

The application of international humanitarian law and human rights law to international organisations

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INTRODUCTION

International humanitarian law and international human rights law have been developed primarily to regulate the behaviour of States. The former has become increasingly detailed in the sphere of international armed conflict. In contrast, the rules relating to internal conflicts, which are equally binding on States and nongovernmental groups, are far more limited, although they have been enriched in recent years through important developments in international criminal law.

This situation was taken for granted as long as the State, as holder of sovereignty and the rights this entails, had exclusive rights over the legitimate use of force. However, this monopoly has gradually been eroded by the emerging power of international organizations on the international scene. Originally conceived as bodies aimed essentially at the coordination of interstate relations, these organizations now tend to claim recognition as fully-fledged actors. They intervene in a range of ways and exercise functions that give them direct power over individuals. On the one hand, this may involve the use of military force, as is the case in peacekeeping and peacemaking operations. On the other hand, international organizations may be given vast powers for the administration of territory, to such an extent that it is no exaggeration to say that they receive veritable "sovereignty rights" or "prerogatives of public power". This is the case whenever an organization is authorized to exercise legislative, executive or legal authority similar to that of a State, through the establishment of an international transitional civil administration (ITCA). In this way, the organization penetrates all (or potentially all) aspects of the day-to-day life of the human community living in the territory concerned by the intervention. ITCAs are most interesting cases for this analysis, because such missions may be given both military and civil powers, or be co-deployed with an autonomous international military presence. The prerogatives exercised by an international organization in such cases may even require the establishment of police forces under the organisation's direct control. In any case, whether the operation is purely military, "governmental", or mixed in nature, it will always raise questions concerning the applicable law and its implementation, particularly from the specific perspective of the protection of individuals.

In particular, the nature of the activities involved raises questions concerning the applicability of international humanitarian law and international human rights norms. In addition, it must be determined whether there is a sufficient basis to assert that these legal regimes, developed to regulate State behaviour, are transposable to international organizations as such. If the answer is positive, it must be determined whether all such norms are tailored to the specific structure of these organizations, or whether some of them need to be adapted or even disregarded.

The importance of this problem is evident. Concluding that these regimes are inapplicable to the activities of international organizations would equate to creating a legal void manifesting itself in the absence of any protection for the population concerned. The consequence would be to subject respect for international humanitarian law and human rights to the goodwill of the international military or civil presence. These general concepts raise a number of specific questions that must receive critical attention.

The complex, articulated nature of situations involving territorial intervention is mirrored by the complexity of the applicable legal regimes. It is not often easy to delimit the framework of an ongoing conflict, which passes from a conflict phase, involving armed action by a number of parties, to a post-conflict peace-building phase, during which State structures must be restored, and sometimes significantly transformed. In the case of long-term crises, it is difficult to precisely distinguish successive phases requiring either the exclusive application of the law of armed conflicts or another legal regime.

Although this study covers this issue in general, it will concentrate more particularly on the abundant practice of the United Nations in this area. Special attention will be given to the events in Kosovo from 1999 to date. Indeed, the chain of events in this region is a particularly rich source of information. Under the impetus and control of various international organizations, Kosovo has lived through a transition from a phase of international armed conflict to a period of international administration. It is thus particularly interesting to analyze the practical implementation of this transition, taking account of transformations in the law governing the situation in response to unfolding events.

In order to reply to all these questions, it is indispensable to analyse the operations of international organizations. The first part of this article identifies the characteristics distinguishing different types of international operation involving the use of armed force, whether effectively ordered and controlled, or simply authorized by the United Nations. It then seeks a better understanding of the relatively new phenomenon of the ITCA.

The next two chapters respectively study international humanitarian law and human rights. Both chapters discuss the issue of the *ratione personae* and *materiae* applicability of these legal regimes to the activities of international organizations. Of course, the analysis of international humanitarian law will cover cases where such organizations use armed force to achieve their aims. The examination of international human rights law turns out to be more relevant to the ITCA framework.

Finally, the last chapter studies the available implementation mechanisms, including those used currently by international law and those that have been, or could be developed at both the global and regional levels.

CHAPTER I

THE MEANS OF INTERVENTION AVAILABLE TO INTERNATIONAL ORGANIZATIONS

International organizations, especially the United Nations, now intervene in a multitude of ways that may, in some cases, involve the use of armed force and/or the civil administration of territory.

A. MILITARY ASPECTS: INTERNATIONAL SECURITY FORCES

Given that the military aspect of this question has been widely covered by scholarly studies, this article simply presents a rapid summary distinguishing the main categories that will provide the backcloth for legal analysis. The use of force by international organizations comes within the more general framework of the system of collective security established by the United Nations Charter. This system provides for reallocation of the power to use force, which tends to be transferred from States *uti singuli* to the world organization. The range of international forces that can be established in this context may be classified according to their command structure.

Forces established under Article 43 of the Charter

Article 43 of the UN Charter is an essential element of the collective security system.¹ It provides for States to place military contingents at the disposal of the United Nations for the purposes of coercive military action. Such contingents must be placed under the commandment of the organization's Military Staff Committee.² The provision of national contingents to the United Nations is not automatic, being subject to the negotiation of special agreements. This obligation thus remains "voluntary".³

In this case, UN control would have total control over the forces in question. However, this mechanism has never been used. Powerful States have always resisted the establishment of such a "UN intervention army", fearing that they would thus abdicate essential sovereign prerogatives relating to control over military force.

Peacekeeping forces

The role of maintaining regional stability in order to avoid the risk of a return to violence has generally been undertaken by international peacekeeping forces (blue helmets).⁴ The classic

¹ See the travaux préparatoires in: *United Nations Conference on International Organization*, vol. XII, p. 572. On this provision, see: (1) older contributions: BOWETT D.W., *United Nations Forces: A Legal Study of United Nations Practice*, London, Stevens and Sons, 1964, pp. 3ss. SEYERSTED F., *United Nations Forces in the Law of Peace and War*, Leyden, Sijthoff, 1966, pp. 29ss., 90ss.; (2) more recent contributions: ROSSMAN J.E., "Article 43: Arming the United Nations Security Council", *New York University Journal of International Law and Policy*, vol. 27, 1994, pp. 227ss; SCHEFFER D. J., "United Nations Peace Operations and Prospects for a Standby Force", *Cornell International Law Journal*, vol. 28, 1995, pp. 649ss; CARLEVARIS A., "Il sistema di 'Standby Agreements' delle Nazioni Unite", *Comunità internazionale*, vol. 54, 1999, pp. 688ss; FROWEIN J.A., KRISCH N., in: *The Charter of the United Nations – A Commentary*, B. Simma (Ed.), pp. 760ss.

² See Art. 47 of the United Nations Charter.

³ See FROWEIN J.A., KRISCH N., in: *The Charter of the United Nations – A Commentary*, B. Simma (Ed.), p. 761.

⁴ For an overview of these operations, see BOTHE M., DOERSCHEL T., *United Nations Peacekeeping – A Documentary Introduction*, The Hague / London / Boston, 1999, and BOTHE M., in: *The Charter of the United*

conception of these operations is based on a number of "constitutional" principles that have crystallized in practice:

- a) These forces are established by the Security Council (or exceptionally by the General Assembly based on the "Uniting for Peace" Resolution)⁵. They are placed under the responsibility of the UN Secretary-General, who conducts action by such forces and reports to the Security Council (or the Assembly). Technically, the force is a subsidiary body of the Council or the Assembly.⁶
- b) The consent of the State on the territory of which the force will be deployed is indispensable. Furthermore, it would not be possible to establish such an operation if a permanent member of the Security Council opposed it. The consent of the territorial sovereign may be revoked at any time, in which case the force must leave.
- c) UN member States, or even non-members, provide military personnel on a voluntary basis. Permanent members of the Security Council do not provide military personnel.
- d) In principle, the forces can only use their arms in self-defence, *i.e.* when they come under attack. Cases of wider use of force were rare before 1990.
- e) The force does not interfere with the internal affairs of the host State. Its mandate is limited to interposition or observation.

The United Nations is responsible for the command and operational control over these forces, exercised through the Secretary-General. The latter may appoint special representatives and specific commanders for each operation, who report to the Secretary-General on their activities in the field. National military forces are placed under UN control in accordance with special agreements concluded between the Organization and contributing States. These States recognize that the forces in question are no longer part of their national forces, coming under exclusive UN control and serving a UN cause (rather than national interests).⁷ However, States retain criminal and disciplinary powers over the members of their contingents, because the United Nations does not have its own penal system. Formally, these forces are a subsidiary body of the Council or the Assembly and their members become personnel of the Organization.⁸

Peace enforcement

The Security Council may also give "peacekeeping" type forces authority to use force, for example, in order to exercise their mandate despite local opposition. Such "robust" operations move towards Chapter VII of the UN Charter compared with classic peacekeeping forces, which are founded on an agreement with the host State, and have no mandate to use force unless they are attacked.

From the legal perspective, "robust peacekeeping" forces remained under the command and control of the United Nations. However, given the complexity of the tasks attributed to such international forces and the insufficient means placed at their disposal, it became increasingly

Nations – A Commentary, B. Simma (Ed.), pp. 664ss. For an overview of the plethora of writings in this area, see *ibidem*, pp. 650-660.

⁵ AGNU Resolution 377 (V), 1950.

⁶ See Articles 22 and 29 of the United Nations Charter.

⁷ See Articles 6-9 of the *Model Agreement between the United Nations and Member States contributing personnel and equipment to the United Nations peace-keeping operations*, UN Doc., A/46/185, 23 May 1991, annex.

⁸ Article 7(2) of the United Nations Charter allows each principal organ to create subsidiary organs as necessary. In this context, see CONDORELLI L., "Le statut des Forces des Nations Unies et le droit international humanitaire", *Les casques bleus : policiers ou combattants*, C. Emanuelli (Ed.), Montréal, Wilson & Lafleur Itéé, 1997, p. 92.

difficult for them to complete their missions. Accordingly, the Security Council was sometimes led to authorize UN Member States and other international organizations (especially NATO) to provide temporary assistance to these UN forces. Furthermore, in practice, some national contingents in the field were not effectively subject to UN command, continuing to seek and receive orders from their national command structure. In such cases, the UN no longer exercised command and control over the international force and responsibility for its operations returned to the contributing States under the principle of effectiveness: the giver of orders is responsible. Nevertheless, joint UN responsibility for not having exercised the required control may still be envisaged.

Forces established in response to wars of aggression (enforcement operations)

Finally, military coercion has generally been achieved by the Security Council through delegation of its power to use force to individual States (or coalitions of States) that are prepared to intervene militarily in a specific region.⁹ This was the case, for example, during the first Western intervention in Iraq, in 1991.

Such delegations of power stand out for two reasons: (1) the transfer of powers; (2) their exercise in the name of the UN. The delegation of power is subject to a series of conditions. The Security Council may only make a delegation: (1) if it possesses the power in question (*nemo dat quod non habet*), whether explicitly or implicitly; (2) if the power in question is open to delegation, which is not the case, for example, concerning the Council's exclusive power to characterize situations under Article 39 of the Charter, which is based on the legitimacy it derives from its specific composition; (3) if certain limits on the delegation itself are respected,¹⁰ such as the Council retaining a power of control over the exercise of delegated authority. In addition, there is a general rule that delegations may not be presumed. In other words, the delegation must be express and it must be interpreted restrictively. In practice, this rule is not always respected.

In every case of delegation, the forces deployed remain under the operational control of the contributing State. The United Nations simply authorises the intervention and, if necessary, verifies respect for its stated aims. It does not exercise any command control over ground forces. Thus, the member States remain fully responsible for the intervention.¹¹

B. CIVIL ASPECTS: INTERNATIONAL TRANSITIONAL CIVIL ADMINISTRATION (ITCA)

In the 1990s, the Security Council began using its powers under Chapter VII of the UN Charter to establish international transitional civil administrations (ITCA). When faced with a humanitarian emergency (where massive, serious breaches of human rights occur in the context of armed conflict, or the failure of state infrastructure), the Security Council generally authorizes the deployment of a peacekeeping or peace enforcement operation.

⁹ On this question, see SAROOSHI, *The United Nations and the Development of Collective Security – The Delegation by the UN Security Council of its Chapter VII Powers*, pp. 3ss. SICILIANOS L.A., "L'autorisation par le Conseil de sécurité de recourir à la force : une tentative d'évaluation", *RGDIP*, vol. 106, 2002, pp. 5ss.

¹⁰ An organ cannot override the limits imposed by its constituent instrument simply by delegating, otherwise these limits would be continually avoided : *res transit cum onere suo*.

¹¹ The question of self-defense, under Article 51 of the Charter, is not covered here, although it is not only an individual or collective right of the attacked State. It may also be taken up by the Security Council which, instead of adopting its own measures, would simply recognise the right of the attacked State to exercise self-defence. In that case, control over the forces deployed remains entirely in the hands of the State in question.

Once peace is re-established, at least formally, the crisis may still require a continuing field presence. In such cases, the UN has established a number of ITCAs, over the last few years, on the territory of countries that had already been the object of an armed intervention. ITCAs are thus "one element among others in the panoply of instruments available to the United Nations in order to maintain peace".¹² They have evolved out of the peacekeeping operations of the preceding decade, the civilian components of which were already involved, to a greater or lesser extent, in activities relating to territorial administration. Among recent examples, two cases merit particular attention: the "United Nations Mission in Kosovo" (UNMIK), established from 10 June 1999¹³; and the "United Nations Transitional Administration in East Timor" (UNTAET), established by the Security Council on 25 October 1999, which was given general responsibility for administration of this region previously under Indonesian administration.¹⁴ This article will concentrate on the first of these two cases.¹⁵

UNMIK within the framework of Chapter VII of the United Nations Charter

ITCAs form part of the general peacekeeping framework, whether in putting an end to conflict or in preventing new or renewed conflict. However, they also depend upon the new international political context, which founds the construction of durable peace on the affirmation and concrete promotion of democracy and the Rule of Law.¹⁶ This goes beyond simply establishing effective administrative structures in a land ravaged by conflict, or slipping towards anarchy. It also requires action to sustain and guarantee the development of a political system and civil society based on the norms of international human rights law.¹⁷

The ITCA mechanism is a particularly relevant response to these objectives¹⁸, which the UN can use to conjugate two aims in a single operation: peacekeeping (or restoration) and "post-conflict peace building". As a response to situations that threaten international peace and security, the most appropriate legal framework is obviously Chapter VII.

As regards Kosovo, the Security Council noted the existence of a threat to peace as early as 1998, due both to the deterioration of the general humanitarian situation in the whole region and

¹² See DAUDET Y., "L'action des Nations Unies en matière d'administration territoriale", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Volumen VI, 2002, pp. 478 [our translation].

¹³ See Resolution 1244 (1999), 10 June 1999. The establishment of UNMIK will be analysed below.

¹⁴ See Resolution 1272 (1999), 25 October 1999. See also the United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES), established by Resolution 1037 (1996), 15 January 1996, para. 1.

¹⁵ For a more detailed examination of the ITCAs planned and/or established until now, see KOLB R., PORRETTO G., VITE S., *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales : Forces de paix et administrations civiles transitoires*, Bruxelles, Bruylant, 2005, 504 pp.

¹⁶ See DAUDET Y., "L'action des Nations Unies en matière d'administration territoriale", pp. 478 et 482. SICILIANOS L-A., *L'ONU et la démocratisation de l'Etat : Système régionaux et ordre juridique universel*, Paris, Pedone, 2000, 321 pp.

¹⁷ See already on this point *An Agenda for Peace*, in which UN Secretary-General B. Boutros-Ghali spoke of the "obvious connection between democratic practices - such as the rule of law and transparency in decision-making - and the achievement of true peace and security in any new and stable political order", *An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping*, UN Doc. A/47/277 - S/24111, 17 June 1992, para. 59. See also the observations by SICILIANOS L-A., *L'ONU et la démocratisation de l'Etat*, loc. cit.

¹⁸ The expression is used by DAUDET Y., "L'action des Nations Unies en matière d'administration territoriale", p. 486.

the imminence of a humanitarian catastrophe, predicted by the Secretary-General.¹⁹ Then, after 24 March 1999, the region was subjected to aerial bombing by NATO as part of "Operation Allied Force". When adopting Resolution 1239, in May 1999, the Council declared itself Deeply concerned "by the enormous influx of Kosovo refugees into Albania, the former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, and other countries, as well as by the increasing numbers of displaced persons within Kosovo, the Republic of Montenegro and other parts of the Federal Republic of Yugoslavia".²⁰

However, this observation does not place sufficient light on the precise legal basis for the means of intervention chosen by the Security Council. On the one hand, the establishment of the ITCA in Kosovo marked the end of a large-scale military operation by multinational forces. On the other hand, it represented the beginning of a more complex strategy based on the simultaneous presence in the territory of international civil and military missions.

A number of authors base the authority for ITCAs on Article 41 of the United Nations Charter.²¹ Indeed, this provision enumerates a wide, non-limitative range of measures not requiring the use of armed force, including both normative measures and measures entailing an operational role for the Organization.²² For example, certain measures involving the establishment of institutional structures, such as *ad hoc* international criminal tribunals, have been linked to Article 41.²³ However, this article cannot cover the military aspects of ITCAs. It would thus seem more judicious to place such military activities within the framework of Article 42, which authorizes the use of force, read in conjunction with Article 48, which provides for the execution of Security Council decisions.

Nevertheless, it would be preferable to adopt a functional reading of Security Council powers as a whole, in light of recent practice, rather than rigidly anchoring them in individual articles of Chapter VII. It thus seems more appropriate to stress the multifunctional nature of UN peacekeeping and enforcement operations, as confirmed by well-established practice. Accordingly, these operations may be based on unwritten rules, drawn from Chapter VII and crystallized in the generally accepted practice of the Security Council. A practical consensus has now formed within the Security Council concerning the resort to interventions that imply extremely penetrating interference in the territory in question. In this respect, the Kosovo and East Timor cases are not isolated precedents, even if they are the most significant.

¹⁹ See the preamble to Resolution 1199 (1998), 23 septembre 1998.

²⁰ See UN Doc. S/RES/1239 (1999), 14 May 1999, preamble.

²¹ See, in particular, BOTHE M., MARAUHN T., "UN Administration of Kosovo and East Timor : Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration", *Kosovo and the International Community, A Legal Assessment*, C. Tomuschat (ed.), p. 232. STAHN, C., "The United Nations Transitional Administrations in Kosovo and East Timor : A First Analysis", *Max Planck Yearbook of United Nations Law*, vol. 5, 2001, p. 139. ZIMMERMANN A., STAHN C., "Yugoslav Territory, United Nations Trusteeship or Sovereign State ? Reflections on the Current and Future Legal Status of Kosovo", p. 438. More generally, on possible measures under Article 41, see FROWEIN J. A., "Article 41", *The Charter of the United Nations – A Commentary*, B. Simma (Ed.), pp. 625s.

²² See *ex multis* CONFORTI B., *Le Nazioni Unite*, Padova, Cedam, 2000, 342 pp.

²³ The UN Secretary-General placed the establishment of the International Criminal Tribunal for the former Yugoslavia under Chapter VII of the Charter. In his commentary on the Statute of the Tribunal (UN Doc., S/25704, 3 May 1993), he considered that this court had been created as a coercive measure designed to force the parties in conflict to respect the preceding resolutions concerning the former Yugoslavia. Thus, Resolution 827 (1993), establishing the Tribunal, makes express reference to Chapter VII when setting the jurisdiction of the body, and when adopting its Statute et defining the obligations of Member States with respect to the court.

The nature of UNMIK in light of its powers and activities

Although peacekeeping, peace enforcement and peace building are the general aims of the ITCA in Kosovo²⁴, its mission goes well beyond that of traditional or "first generation" peace operations. As analysed by C. Stahn, Chapter VII based ITCAs may be defined by no less than five constituent elements.²⁵ Firstly, transfer to the Organization of all administration authority over the territory and, consequently, the (temporary) detachment of the territory from its State of origin. This is accompanied by the grant of vast, exclusive regulatory powers to the Organization. The second element is the specific purpose of such operations, which is to administer the territory in the best interests and for the benefit of the entire local population. The third element is the juxtaposition of legal systems: the internal system of the administered territory and that of the United Nations. In the fourth place, the territory's institutional system is internationalised by the establishment of international or mixed (national/international) executive and legal powers. Finally, limited international personality is conferred on the territory, so that the administering authority can conduct international relations in accordance with the aims of that administration. If this definition is most useful as a guide to the specificities of ITCAs, it is also important to analyse the nature of their activities and powers, in order to verify their basis in the United Nations Charter.

According to a classification proposed by G. Arangio-Ruiz, it is possible to distinguish, on the one hand, the "international activities *stricto sensu*" of international organizations and, on the other hand, the activities of international bodies that "directly penetrate the internal affairs of States and other internationally recognised entities".²⁶ This second category covers the operational activities of the United Nations and a number of specialized agencies that "constitute, in substance, governmental or state activities".²⁷

If this theory is correct, UNMIK's activities must undoubtedly be considered as operational activities exercised by the Organization as if it were a State. Indeed, the activities of UNMIK and the other ITCAs should be seen as "international public services". The UN offers these services to the State and the population of the territory in question in order to further their interests as well, more generally, as those of the international community as a whole. This results implicitly from the logic of peacekeeping, backcloth for the establishment of such operations. Taking total or partial "responsibility" for the administration of a territory requires the Organization to exercise prerogatives of public power over the territory and its population. However, this exercise is never based on a claim to territorial sovereignty, because the UN is not the sovereign

²⁴ Thus BOTHE M., MARAUHN T., "UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration", p. 223.

²⁵ STAHN C., "The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis", p. 181.

²⁶ ARANGIO-RUIZ G., "Le domaine réservé. L'Organisation internationale et le rapport entre droit international et droit interne", *RCADI*, vol. 225, 1990-VI, pp. 402s. According to this author, the first category includes "acts such as decisions, judgements and recommendations issued by international organisations to States or other international bodies, including other international organisations. This category thus includes decisions and recommendations of UN organs and specialised agencies, since the usual destination of such acts are either States or other international bodies, excluding individuals, public servants or sub-State bodies" [our translation].

²⁷ *Ibidem*. The examples provided by the author include, as regards internal State activities, "normative and administrative activities of the EEC Commission, and most of the judicial activity of the Court of Justice of the EEC". As for external State activities ("when the international organ acts in the area of external relations of the concerned State or States"), the author cites "the activity of the Commission relating to the conclusion, on behalf of State Members, of economic, nuclear or other cooperation agreements with third States" (p. 403 – our translation).

power within the territory, but simply an administrator. Moreover, the extent of UN authority may vary from case to case, depending on the context and the aims of the operation.

The reference to "international public service action" appears more relevant than other concepts proposed by legal writers, such as "fiduciary administration", "protectorate", "tutorship", "curatorship" or "trusteeship".²⁸ As for concepts drawn from domestic civil law, it suffices to recall the statement by Sir Arnold McNair in his separate opinion attached to the advisory opinion of the ICJ on the *International status of South West Africa*²⁹, to the effect that private law rules and institutions must not be transposed directly into international law, because they only give "an indication of policy and principle". In other words, these rules and institutions require "much adaptation for the purposes of the new international institution". Accordingly, the application by analogy of concepts specific to domestic legal systems, such as curatorship or trusteeship, to relations between international actors, although suggestive, is not necessarily an appropriate solution. As for the abovementioned international regimes, such as "trusteeship" or "fiduciary administration", doctrine evoking modern forms of fiduciary administration³⁰ is founded on perceived continuity between the mandate system and ITCAs. Nevertheless, a simple reference to chapter XII of the Charter, which establishes the international trusteeship regime, is insufficient. Indeed, the objective conditions for the establishment of this regime³¹ no longer exist. Moreover, Chapter XII does not cover UN interventions in conflict and post-conflict situations.³² Charter based fiduciary administration thus appears to be an outdated model. Current means of intervention are now much closer to peace operations, especially multi-functional missions.

Thus, it is preferable to conclude that the ITCA, as an institution, is a synthesis of several functions and powers of the United Nations as a whole. This includes some express powers set out in the UN Charter (especially Chapters VI, VII, XI and XII), but also implied powers developed through UN peacekeeping practice in the post-cold war period.

From a structural perspective, the Secretary-General plays a fundamental, central role in ITCAs. In the field, a special administrator, also called the Special Representative of the Secretary-General (hereafter SRSG), is named as the mission's senior official. Especially during the start-up phase of the international presence, the SRSG holds extremely wide authority, including the exercise of all legislative, executive and judicial powers. He or she defines the applicable law for the territory, makes any decisions needed to get the administrative system operating again and conducts the external affairs of the territory. This system facilitates the effective implementation of the UN's vast, exclusive authority over the territory. The SRSG gives operational effect to the Secretary-General's structural role as the focal point for the integrated exercise of all relevant UN capacities. In a later phase, administrative authority is gradually transferred to local representative bodies as they are progressively consolidated. The essential aims of the intervention also evolve; from creating the minimal conditions for UN administration of the

²⁸ Thus, MAZIAU N., PECH M., "L'administration internationale de la Bosnie-Herzégovine : un modèle pour le Kosovo", *Civitas Europa*, n° 4, March 2000, pp. 72ss. For these authors, The High Representative in Bosnia and Herzegovina should be seen as a "curator", *i.e.* the person required to assist an adult protected under a "curatorship". For Kosovo, however, they consider it more opportune to speak of "trusteeship" of the international community, due to the wider powers exercised by the SRSG within UNMIK.

²⁹ *International status of South West Africa*, Advisory opinion, ICJ Reports, 1950, pp. 148s.

³⁰ STAHN, C., "The United Nations Transitional Administrations in Kosovo and East Timor : A First Analysis", pp. 140ss.

³¹ See Art. 77 of the Charter.

³² DAUDET Y., "L'action des Nations Unies en matière d'administration territoriale", p. 486.

territory to goals such as facilitating a decision by the local population concerning the future of the territory (East Timor), or establishing democratic home rule over the territory within the framework of a larger state entity, the sovereignty and territorial integrity of which have not been questioned by the Security Council (Kosovo).

The above discussion leads directly to the issue of the applicable law for such international operations. Decisions concerning the options of establishing either a solely military or civilian operation, or a combination of the two in the same operation, ultimately raise questions relating to the *ratione personae* and *ratione materiae* conditions for application of the available legal rules laid down by international humanitarian and human rights law.

CHAPTER II

II. THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO THE ACTIVITIES OF INTERNATIONAL ORGANIZATIONS; IN PARTICULAR THE UNITED NATIONS

At the time the first conventions were adopted on the law of war, only States possessed armed forces and were thus in a position to conduct hostilities. Accordingly, they were the only subjects of the initial customary and conventional development of international humanitarian law. Later, with the adoption of the 1949 Geneva Conventions, rules were adopted for additional actors: all those participating in "armed conflict not of an international character".³³ In more recent times, the intervention of armed forces commanded by international organizations, especially the United Nations, has raised questions concerning the applicability of this legal regime to such cases.

This question raises two issues. Firstly, from a subjective perspective, whether the United Nations and other international organizations are bound by the rights and obligations laid down by the law of armed conflicts. Secondly, from a more objective perspective, the issue is the extent to which such international operations come within the scope of this legal regime.

A. THE *RATIONE PERSONAE* APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO THE ACTIVITIES OF INTERNATIONAL ORGANIZATIONS

The first issue is whether international organizations have the legal capacity to be bound by international humanitarian law norms, which depends on the nature and extent of the international personality of these bodies. The relevant case-law and scholarly writing on this subject have mainly concentrated on the United Nations. However, the reasoning developed concerning the World body is also valid for its regional counterparts.

1. The capacity of international organizations to be bound by international humanitarian law

The case-law regarding the international capacity of the United Nations

In its advisory opinion of 11 April 1949, relating to *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice gave a partial answer to this question. The Court made a preliminary observation that "[the United Nations] has at the same time a large measure of international personality and the capacity to operate upon an international plane".³⁴ It recalled that the UN could not fulfil the intentions of its founders if it was deprived of international personality. When adopting the 1945 Charter, the States intended to give it all the capacity needed to fulfil its purposes and exercise its functions.³⁵ Indeed, the UN has been given wide-ranging tasks that are independent of the powers of its Member States. For

³³ 1949 Geneva Conventions, Art. 3 commun.

³⁴ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, Reports 1949, p. 179.

³⁵ *Ibidem*.

example, the United Nations has the power to take action in order to maintain peace, including the establishment of a "UN army" under Article 43 of the Charter. Moreover, it has power to conclude trusteeship agreements and supervise their implementation by the administering authority. In order to fulfil such tasks, the UN must possess a personality distinct from that of its members, which it manifests through its own operational bodies. The Court thus concluded that the Organization has the capacity to be bound by international rights and obligations.³⁶

However, this limited degree of independence and capacity to formulate policy does not amount to granting partial sovereignty to the UN. The Organization's international personality is not plenary. Contrary to States, which are sovereign, the UN only holds the intrinsically limited powers attributed to it, however wide they may be. The legal personality of the United Nations does not cover the whole range of rights and obligations recognized by international law, being limited to those needed to fulfil the purposes and exercise the functions set out in the Organization's constitutive act. However, these purposes and functions may also be deduced implicitly from the constitutive act (implicit powers) or derived from evolving practice.³⁷ Thus, in order to determine the norms of international law applicable to the UN *ratione personae*, one must refer back to its purposes and functions.³⁸

When applied to the specific area of concern for this study, this reasoning supports the argument that the United Nations, as such, can be bound by the norms of international humanitarian law; in other words, the UN has subjective capacity. Given that, in accordance with its purposes (in this case the maintenance of international peace and security),³⁹ and its functions (*i.e.* the power to use military force),⁴⁰ the UN is likely to become involved in confrontations amounting to armed conflict, the necessary conclusion is that the law governing this type of situation is applicable to the Organization.⁴¹ This conclusion is already justified by reference to the powers of the Organization as such, without it being necessary to inquire into the operational exercise of those powers. This means that there is no need for force to be effectively used. The subjective capacity of the Organization must be evaluated in the abstract, *i.e.* it suffices that the UN *may* become

³⁶ *Ibidem*.

³⁷ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, Reports 1949, p. 179. On implied powers, see SCHEMERS H.G., BLOKKER N.M., *International Institutional Law*, 3rd ed., The Hague/Boston/London, 1999, pp. 158ss., and the texts cited.

³⁸ This case-law was later confirmed by the Court. See ICJ, *Legality of the use of nuclear weapons*, Advisory Opinion, 8 July 1996, Reports 1996, para. 25.

³⁹ Art. 1(1). of the United Nations Charter. See LACHS M., "Art. para. 1", *The United Nations Charter*, J-P. Cot et A. Pellet (Ed.), 2^e éd., 1991, pp. 31ss. WOLFRUM R., "Art. 1", *The Charter of the United Nations- A Commentary*, B. Simma (ed.), 1995, pp. 49ss.

⁴⁰ United Nations Charter, Art. 42. See FISCHER G., "Art. 42", *The United Nations Charter*, J-P. Cot et A. Pellet (Ed.), p. 705ss. FROWEIN J. A., "Art. 42", *The Charter of the United Nations- A Commentary*, B. Simma (ed.), p. 628ss. UN practice, based on Chapter VI of the Charter (peaceful settlement of disputes), also allowed the deployment of peacekeeping forces with the agreement of the host State. See BOTHE M., "Peace-Keeping", *The Charter of the United Nations- A Commentary*, B. Simma (ed.), pp. 565ss.

⁴¹ BOTHE M., *Le droit de la guerre et les Nations Unies*, Genève, 1967, pp. 191ss. MEYROWITZ H., *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, Pedone, 1970, p. 190. DAVID E., *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2002, p. 199ss. EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, Montréal, Wilson et Lafleur Itéé, 1997 (2^e tirage), pp. 41ss. GREENWOOD C., "International Humanitarian Law and UN Military Operations", *YIHL* 1998, vol. 1, p. 16. KOLB R., *Droit humanitaire et opérations de paix internationales*, Bâle/Bruxelles, Helbing & Lichtenhahn/ Bruylant, 2002, pp. 27ss.

involved in armed conflict. In others words, the substantive capacity to use armed forces entails the subjective capacity to be bound by international humanitarian law norms.⁴²

The international capacity of other International Organizations

The question of the subjective capacity of other international organizations, especially regional organizations, to be bound by international humanitarian law norms does not raise any fundamentally different concerns. Just like the United Nations, to the extent that these organizations may be required to deploy armed forces in accordance with the purposes and functions set out in their constitutive documents, the applicability of these norms must be recognized.⁴³ Yet again, the corollary of the power to resort to armed force is the *ratione personae* capacity to be bound by the rights and obligations of international humanitarian law. This power may be laid down explicitly in the organization's constitutive documents, or deduced implicitly as long as it is necessary for exercise of functions attributed to the organization or the fulfilment of its purposes.⁴⁴ In others words, to the extent that a universal or regional international organization has the right to contribute to the maintenance of international peace and security by participating in military action, whether by virtue of its constitutive charter or of practice accepted by its Member States, the law of armed conflicts will be applicable.⁴⁵

2. Legal sources of the international humanitarian law applicable to action by international organizations

Once the principle of the subjective applicability of international humanitarian law to international organizations is settled, it is still necessary to identify the specific rules applicable to the armed forces in question. In this respect, legal writers have developed several theories based on either customary or treaty law. Thus, this study must resolve the issue of the sources of the law applicable to the forces of international organization. After having discussed general, theoretical arguments based on the provisions of the United Nations Charter, this chapter develops and completes the study by reference to evolving practice.

2.1. Arguments based on the United Nations Charter

United Nations military operations have not evolved in a legal void, but within the framework of Charter mechanisms. Where these operations are coercive, their legal basis is Chapter VII of the Charter. Alternatively, they may be given a peacekeeping mandate without the right to use force

⁴² *Application des Conventions de Genève par les forces d'urgence des Nations Unies, Résolution XXV de la XXe Conférence internationale de la Croix-Rouge*, Sect. IV, Chap. I, in Manuel du Mouvement internationale de la Croix-Rouge et du Croissant-Rouge, Genève, CICR, 1994 (13^e éd.), p. 768. *L'égalité d'application des règles du droit de la guerre aux parties à un conflit armé*, IDI, Annuaire 1963. *Conditions d'application des règles humanitaires relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*, IDI, Annuaire 1971, tome 54-II, p. 450. *Conditions d'application des règles, autres que les règles humanitaires, relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*, IDI, Annuaire 1975, tome 56, p. 542. *L'application du droit international, notamment humanitaire, dans les conflits armés auxquels prennent part des entités non étatiques*, IDI, Annuaire 1999, tome 68-II, 1999, pp. 386ss. *Conférence internationale pour la protection des victimes de la guerre, Déclaration finale*, para. 1.7, in RICR, no. 803, September-October 1993, p. 402. See also MEYROWITZ H., *Le principe de l'égalité des belligérants devant le droit de la guerre*, pp. 210ss. KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 27.

⁴³ See on this point DAVID E., *Principes de droit des conflits armés*, p. 208.

⁴⁴ ICJ, *Réparation des dommages subis au service des Nations Unies*, Avis consultatif, 11 April 1949, Reports 1949, pp. 178s.

⁴⁵ See on this point International Law Institute, *Annuaire 1999*, tome 68-II, 1999, Art. 2.

except in self-defence. In such cases, their mandate relies on UN practice, the most frequently raised legal basis for which is Chapter VI of the Charter and unwritten law stemming from significant precedents. In principle, these operations are carried out under UN command, although this responsibility may be conferred upon States. They may also be delegated to regional organizations under Chapter VIII of the Charter. In all of these cases, military action by international organizations in conformity with international law comes within the United Nations Charter framework.

This framework goes beyond defining the parameters of the legal use of armed force in international relations, since it also determines the nature of the rules applicable to any hostilities. Indeed, the Charter gives the United Nations a mandate to maintain peace and international security,⁴⁶ while placing it under an obligation to promote and encourage respect for human rights and fundamental freedoms for all.⁴⁷ Yet the specific corpus of norms that establishes a common measure between these two objectives is the law of armed conflict, which contains rules for the protection of the human person that are specially adapted to wartime. There would thus be a violation of the equilibrium intended by the Charter if international peace and security were maintained without also recognizing that the forces carrying out this mission are subject to the law of armed conflicts.

This conclusion applies to forces under the control of both the United Nations and other international organizations. Although regional organizations are not formally part of the UN system, Charter law is the source of their authorization to use military power.⁴⁸ In most cases, their mandate is explicitly based on a Security Council resolution. In any case, Article 53(1) preserves the priority of the UN Security Council by providing that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council". Thus, the rules binding the United Nations apply equally to regional organizations. In other words, to the extent that the latter participate in the global system for the maintenance of international peace and security by providing military resources, they also agree to respect all the rules, including those relating to *jus in bello*.

These considerations, which apply generally to all international organizations with military powers, are strengthened, in the case of the United Nations, by relevant practice.

2.2. The first phase in United Nations practice: reference to the principles and spirit of international humanitarian law

Texts

The United Nations commitment to respect for international humanitarian law has evolved over the course of time.⁴⁹ At first, the Organization noted the general importance of this body of rules by regularly recognizing that troops deployed under UN authority must respect the "*principles and spirit* of general international conventions applicable to the conduct of military personnel".⁵⁰

⁴⁶ Art. 1(1).

⁴⁷ Art. 1(3).

⁴⁸ See VILLANI U., "Les rapports entre l'ONU et les organisations régionales dans le domaine du maintien de la paix", *RCADI*, 2001, tome 290, pp. 324ss.

⁴⁹ For an analysis of the UN position on this question, see GLICK R.D., "LIP Service to the Laws of War: Humanitarian Law and United Nations Forces", *Michigan Journal of International Law*, Vol. 17, 1995, pp. 53-107.

⁵⁰ Our emphasis.

This commitment was included in several sets of UN military rules of engagement,⁵¹ in the Model that serves as the basis for agreements between the United Nations and Member States contributing to peacekeeping operations⁵² and the Model Status-of-Forces Agreement. The latter model defines the relations between the United Nations and the State in which the forces are operating.⁵³ By later agreeing to formalize this commitment in a number of other contexts,⁵⁴ the United Nations have shown that their willingness to respect the principles and spirit of international humanitarian law conventions is founded in henceforth well-established practice.

The content of the principles and spirit of international humanitarian law

The next question is whether this commitment is limited to customary rules of international humanitarian law, as some authors suggest,⁵⁵ or extends to a wider legal corpus. This depends on the meaning attributed to the expression "principles and spirit of general international conventions applicable to the conduct of military personnel" by the United Nations. In this respect, P. Benvenuti recalls that the aim of this general formula was to respond to the specific, practical problems arising within the framework of each operation.⁵⁶ Yet the formula needed to be completed through a concretisation process in order to achieve a sufficiently detailed normative ensemble capable of satisfying practical requirements.

Most scholarly writers consider that this concretisation process must be based on customary rules.⁵⁷ For example, in 1984, D. Schindler already argued strongly that "it is uncontested that the United Nations is bound by the customary rules of IHL when engaged in hostilities".⁵⁸ However, customary law is not the only available source and, in any case, it is not always of great practical use, because of uncertainty as to its specific content. As ICRC studies in this area

⁵¹ See for example, UNEF Regulations, ST/SGB/UNEF/1 (1957), Art. 44, ONUC Regulations, ST/SGB/ONUC/1 (1960), Art. 43, UNFICYP regulations, ST/SGB/UNFICYP/1 (1964), Art. 40, in *Basic Documents on United Nations and Related Peace-Keeping Forces*, R.C.R. Siekmann (ed.), Dordrecht/Boston/London, 1989 (2nd ed.). See on this subject SHRAGA D., ZACKLIN R., "L'applicabilité du droit international humanitaire aux opérations de maintien de la paix des Nations Unies: questions conceptuelles, juridiques et pratiques", *Symposium sur l'action humanitaire et les opérations de maintien de la paix*, U. Palwankar (Ed.), Genève, CICR, 1994, pp. 46.

⁵² *Model Agreement between the United Nations and Member States contributing personnel and equipment to the United Nations peace-keeping operations*, UN Doc. A/46/185, 23 May 1991, annex, para. 28. See SHRAGA D., ZACKLIN R., "L'applicabilité du droit international humanitaire aux opérations de maintien de la paix des Nations Unies: questions conceptuelles, juridiques et pratiques", p. 46. GREENWOOD C., "International Humanitarian Law and UN Military Operations", *YIHL*, 1998, vol. 1, p. 21.

⁵³ *Model Status of Forces Agreement (SOFA) between the United Nations and the State on whose territory United Nations Forces are deployed*, UN Doc. A/45/594, 9 October 1990. See SHRAGA D., ZACKLIN R., "L'applicabilité du droit international humanitaire aux opérations de maintien de la paix des Nations Unies: questions conceptuelles, juridiques et pratiques", pp. 45-47. BENVENUTI P., "The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping", *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Luxembourg, CE, 1995, p. 114. See also the *Agreement on Status of Forces* concluded between the UN and Rwanda, UNTS 1748, Art. 7.

⁵⁴ For more details, see SHRAGA D., "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damages", *AJIL*, Vol. 94, 2000, p. 407.

⁵⁵ SEYERSTED F., *United Nations Forces in the Law of Peace and War*, Leyden, 1966, p. 187, 196.

⁵⁶ BENVENUTI P., "The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping", p. 116. See aussi on this point, GREENWOOD C., "International Humanitarian Law and UN Military Operations", p. 18.

⁵⁷ See in particular SEYERSTED F., *United Nations Forces in the Law of Peace and War*, p. 196. SCHINDLER D., "United Nations Forces and International Humanitarian Law", *Mélanges Pictet*, C. Swinarski (Ed.), Genève/La Haye, CICR/Nijhoff, 1984, p. 527. BENVENUTI P., "The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping", p. 113.

⁵⁸ SCHINDLER D., "United Nations Forces and International Humanitarian Law", p. 526.

have shown, in the absence of conclusive practice, it is often difficult to identify precise norms.⁵⁹ Therefore, it will generally be necessary to turn to treaty-based humanitarian law in order to find rules capable of giving operational content to the "principles and spirit" of IHL that the United Nations have agreed to respect. The Organization itself confirms this approach by specifying that its general commitment covers the four 1949 Geneva Conventions, the 1977 Additional Protocols and the UNESCO Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict.⁶⁰

Clearly, the aim of the expression, "principles and spirit", is not, thus, to limit the applicable law to customary international law. Rather, it serves as a reminder that treaty-based humanitarian law was developed to apply to States and that, consequently, some rules are not adapted to the specific structure of international organizations.⁶¹ The expression does not indicate principled opposition to the applicability of humanitarian law conventions, but simply recalls the need for a discerning approach. A balance is sought between not including too much, given practical capacities, and not excluding those rules by which UN forces should be bound. This is a clear application of the principle that no one is required to do the impossible. This applies as much to the UN as to other subjects of law. The Organization cannot be forced to satisfy those obligations that, as opposed to States, it is physically incapable of applying (due to the lack of any territory, for example). Rather than seeking to list all potentially problematic provisions one by one, a simpler and more convenient solution was found in the simple "principles and spirit" formula. Thus, IHL is applicable to the extent that it gives concrete effect to the "principles and spirit" formula and that the specific provisions of the treaties in question can be materially applied to the forces of an international organization.

This extensive interpretation of the "principles and spirit" of IHL conventions is confirmed by current practice. In particular, several decisive documents examined below have gone beyond this prudent expression to express wider acceptance of international humanitarian law. Accordingly, it is now clear that the sources of the law applicable to international forces are both customary and conventional.

2.3. Recent United Nations Practice

The Convention on the Safety of United Nations and Associated Personnel

The 1994 Convention on the Safety of United Nations and Associated Personnel,⁶² touches on this question in passing. It states that the Convention "shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations ... to which the law of international armed conflict applies".⁶³ In addition, it contains a saving clause to the effect that nothing in the Convention shall affect "[the] applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations

⁵⁹ KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 54.

⁶⁰ *Model Agreement between the United Nations and Member States contributing personnel and equipment to the United Nations peace-keeping operations*, UN Doc. A/46/185, 23 May 1991, annexe, para. 28.

⁶¹ See on this point, DAVID E., *Principes de droit des conflits armés*, p. 203.

⁶² *Convention on the Safety of United Nations and Associated Personnel*, adopted on 9 December 1994, AGNU Resolution 49/59, entry into force: 15 January 1999, *UNTS*, vol. 2051, p. 363.

⁶³ Art. 2(2) (our emphasis).

operations and United Nations and associated personnel *or the responsibility of such personnel to respect such law and standards*".⁶⁴

The Convention seems to indicate that all the relevant rules of international humanitarian law should apply in full to both UN authorized and UN commanded operations. The unqualified references to the law of international armed conflict, read with those to international humanitarian law contained in international instruments, implies that the reference is not limited to customary law.

The Secretary-General's Bulletin of 6 August 1999

The most noteworthy development in this area was the Bulletin entitled "Observance by United Nations forces of international humanitarian law", issued by the UN Secretary-General on 6 August 1999. As its first clause indicates, the bulletin sets out "fundamental principles and rules of international humanitarian law" that are "applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement".⁶⁵ The principles are divided into five categories: protection of the civilian population, means and methods of combat, treatment of civilians and persons *hors de combat*, the treatment of detained persons and the Protection of the wounded, the sick, and medical and relief personnel.⁶⁶

From a legal perspective, this Bulletin is an administrative regulation adopted by the Secretary-General in his capacity as chief of UN operational and strategic command.⁶⁷ The Bulletin is binding on UN forces, since the Secretary-General has the power to prescribe administrative rules for all the organization's personnel.⁶⁸ Indeed, given that they are provided to the UN by their State of origin, the members of these forces become agents of the organization.⁶⁹

The Bulletin's substantive aim is to clarify the exact meaning of the obligation of UN forces to respect international humanitarian law.⁷⁰ Rather than creating new obligations, it provides a coherent, non-exhaustive⁷¹ presentation of those that exist already⁷². The reference to

⁶⁴ Art. 20 (our emphasis).

⁶⁵ *Observance by United Nations forces of international humanitarian law*, United Nations, Secretary-General's Bulletin, ST/SGB/1999/13, 6 August 1999, para. 1.1.

⁶⁶ *Secretary-General's Bulletin*, Art. 5 to 9.

⁶⁷ See SHRAGA D., "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damages", p. 409. CONDORELLI L., "Les progrès du droit international humanitaire et la Circulaire du Secrétaire général des Nations Unies du 6 August 1999", p. 500. ZWANENBURG Marten, "The Secretary General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory", *Revue de droit militaire et de droit de la guerre*, vol. XXXIX, 2000, p. 18. BENVENUTI P., "Le respect du droit international humanitaire par les forces des Nations Unies: La Circulaire du Secrétaire général", *RGDIP*, vol. 105, 2001, p. 359. POZO SERRANO P., "La aplicación del derecho internacional humanitario a las fuerzas de Naciones Unidas: algunos interrogantes", *El derecho internacional humanitario ante los nuevos conflictos armados*, C. Ramón Chornet (ed.), Valencia, Tirant lo Blanch, p. 346.

⁶⁸ Articles 97 and 98 of the United Nations Charter. See BETTATI M., "Art. 97" and SMOUTS M. C., "Art. 98", *The United Nations Charter – Commentaire article par article*, J-P. Cot et A. Pellet (Ed.), pp. 1307ss et 1317ss. FIEDLER W., "Art. 97", "Art. 98", *The Charter of the United Nations – A Commentary*, B. Simma (ed.), pp. 1019ss and pp. 1033ss.

⁶⁹ See DAVID E., *Principes de droit des conflits armés*, p. 205.

⁷⁰ CONDORELLI L., "Les progrès du droit international humanitaire et la Circulaire du Secrétaire général des Nations Unies du 6 August 1999", *Mélanges Abi-Saab*, The Hague (etc.), Nijhoff, p. 500.

⁷¹ *Secretary-General's Bulletin*, ST/SGB/1999/13, 6 August 1999, para. 2.

fundamental principles and rules does not change the basis, nor the scope of the applicable rules. It simply confirms explicitly that, in order to be effective, the law governing the conduct of UN troops cannot be left at the stage of "principles and spirit", needing concrete expression as rules. These rules already exist under customary and treaty law.⁷³

The Bulletin itself confirms that the expression "fundamental principles and rules" must not be interpreted restrictively. For example, Section 4, concerning prosecution, refers to "violations of international humanitarian law" without limitation. This implies that all the sources of this normative system are applicable. In addition, the rules set out in the Bulletin go beyond the current state of customary IHL to include some elements drawn from conventions. In particular, D. Shruga notes that the provisions prohibiting methods of warfare that may cause widespread, long-term and severe damage to the natural environment,⁷⁴ attacks against objects indispensable to the survival of the civilian population⁷⁵ and attacks on installations containing dangerous forces⁷⁶, have been included in the Bulletin despite their purely conventional origin.⁷⁷ In some areas, the Bulletin even goes beyond treaty obligations. For example, it contains a particularly general prohibition of incendiary weapons, whereas treaty law only prohibits some of them.⁷⁸

The Secretary-General's Bulletin does not limit itself to watertight legal categories, but rather aims to adapt international humanitarian law to the Organization's particularities. Yet it does not provide a complete, definitive response to the problem. Section 2 specifies that the Bulletin does not claim to be exhaustive, simply codifying principles that require more detailed development. This process will undoubtedly require even greater recourse to the treaty law rules in force.

UN Security Council Resolution 1327 (2000)

The Secretary-General's contribution has been confirmed by Security Council practice, which uses terms that are drawn directly from the Bulletin.⁷⁹ Thus, Resolution 1327 of 13 November 2000, on the strengthening of UN peacekeeping operations, "[u]rges the parties to prospective peace agreements, *including regional and subregional organizations and arrangements*, to coordinate and cooperate fully with the United Nations from an early stage in negotiations, bearing in mind the need for any provisions for a peacekeeping operation to meet minimum conditions, including ... compliance with the *rules and principles of international law, in particular international humanitarian, human rights and refugee law*".⁸⁰

The Security Council's reference to the "rules and principles of international law, in particular international humanitarian" law is taken directly from the Secretary-General's Bulletin. Thus, the

⁷² BENVENUTI P., "Le respect du droit international humanitaire par les forces des Nations Unies: La Circulaire du Secrétaire général", pp. 357s.

⁷³ See on this point, KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 53.

⁷⁴ *Secretary-General's Bulletin*, Art. 6 para. 3.

⁷⁵ *Secretary-General's Bulletin*, Art. 6 para. 7.

⁷⁶ *Secretary-General's Bulletin*, Art. 6 para. 8.

⁷⁷ See SHRAGA D., "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damages", p. 408.

⁷⁸ See on this point, KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 19. BENVENUTI P., "Le respect du droit international humanitaire par les forces des Nations Unies: La Circulaire du Secrétaire général", p. 366.

⁷⁹ See POZO SERRANO P., "La aplicación del derecho internacional humanitario a las fuerzas de Naciones Unidas: algunos interrogantes", pp. 351s.

⁸⁰ Resolution 1327 (2000), 13 November 2000, Chapter I, para. 3.

above comments relating to the content of the Bulletin also apply to Resolution 1327. This additional step is important, because a principle intergovernmental body has now confirmed principles previously set out in a purely internal administrative document. Therefore, the normative value of these rules and principles is strengthened.

The Security Council goes beyond simple confirmation of the Secretary-General's Bulletin, since the resolution widens the *ratione personae* scope of these rules, specifying that they are binding not only on UN personnel and field agencies, but also on the members of "regional and subregional organizations and arrangements" participating in the operation.

Conclusion

The UN position concerning the applicability of international humanitarian law to international organizations, especially its own forces, is now clear. Recent practice shows that the Organization has resolutely turned away from the original, vague and prudent position under which it only considered itself bound by the principles and spirit of IHL conventions. The current discourse no longer concerns the applicability of international humanitarian law as such, but the adaptation of particular norms to the specific structure of international organizations. This process requires a concretisation process, the first step in which was the Secretary-General's Bulletin. This process should be continued in order to address those problems that remain unresolved.⁸¹

Indeed, some treaty provisions are difficult to apply outside the State structure, such as rules presuming the existence of territory, or specific implementing legislation and mechanisms, especially as regards the repression of breaches.⁸² One example is Article 49 of the IVth 1949 Geneva Convention, which forbids the transfer by an occupying power of its own civilian population onto occupied territory. Another is Article 82 of the Third 1949 Geneva Convention, which provides that prisoners of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power. Similar problems are raised by the common articles to the four 1949 Geneva Conventions requiring the High Contracting Parties to punish persons guilty of grave breaches.⁸³

Thus, in many cases, the application of treaty law to the forces of international organizations will require a preliminary evaluation of the applicable norm. This creates uncertainty as to the content of such norms and therefore legal insecurity for its beneficiaries. P. Benvenuti argues that this difficulty could be overcome through recognition of a "legal presumption according to which all rules of international humanitarian law are applicable, leaving the burden of demonstrating that a specific rule cannot materially work in some cases..."⁸⁴ Following this approach, it would not be up to individuals affected by the military action of an international organization to demonstrate that a rule is applicable to them, but for the organization to prove that it is not. This technique

⁸¹ See KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 20.

⁸² For a more detailed analysis, see BOWETT D.W., *United Nations Forces : A Legal Study of United Nations Practice*, London, Stevens and Sons, 1964, pp. 513ss. SEYERSTED F., *United Nations Forces in the Law of Peace and War*, p. 362ss. EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, pp. 51ss and KOLB R., *Droit humanitaire et opérations de paix internationales*, pp. 60ss. On this question see also SCHINDLER D., "United Nations Forces and International Humanitarian Law", p. 529.

⁸³ *1949 Geneva Conventions*, Common Article 49, 50, 129 and 146.

⁸⁴ *Ibid.*, p. 117.

would have the advantage of increasing the scope of international humanitarian law. However it is too early to state that it has already become part of the law in force.⁸⁵

Finally, the development of UN practice relating to international humanitarian law, paralleling the general evolution of international practice, shows that it is becoming increasingly difficult to clearly distinguish customary and treaty law. The exceptionally rapid development of international humanitarian customary law in recent years, reinforced by the publication of the Secretary-General's Bulletin, is evidence that the merging of customary and conventional law in this sphere is already well advanced. Thus, one can only agree with Luigi Condorelli's statement that "the old idea according to which the United Nations is only bound by customary rules has gradually become obsolete since it has become clear that treaty based humanitarian law (especially the 1949 Geneva Conventions) and customary law are almost exactly the same".⁸⁶

In addition to these developments, legal writers have also postulated the direct application of international humanitarian law conventions to international organizations. Although this approach is beyond the limited scope of this study, it is worth recalling the two mechanisms that have been proposed in this respect: adhesion to existing treaties by international organizations (*de lege lata*),⁸⁷ on the one hand, and the negotiation of a special convention (*de lege ferenda*), on the other.⁸⁸ However, neither of these solutions appears truly satisfactory or even useful. Under the adhesion hypothesis, some conventional rules are simply inapplicable, given the structure of international organizations. Thus, adhesion could only be partial and an adequate end result would require a reworking of all the instruments involved, including the formulation of reserves concerning certain changes. It would then be necessary to submit the results to the other High Contracting Parties, with the risk of long, uncertain negotiations. The hypothesis of a special convention would not be any better. The process of elaborating, negotiating and ratifying such an instrument would probably be long and the results uncertain. Such a process might even weaken currently applicable law, since the opening of a treaty-making process could lead to questions concerning existing norms. This question will be examined in the framework of the applicability of international human rights law.

3. The addressees of the rights and obligations of international humanitarian law

⁸⁵ KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 55.

⁸⁶ CONDORELLI L., "Les progrès du droit international humanitaire et la circulaire du Secrétaire général des Nations Unies du 6 August 1999", p. 502 [our translation]. Other authors consider that most of the conventional rules of international humanitarian law have now acquired customary status. See, for example, SCHINDLER D., "United Nations Forces and International Humanitarian Law", p. 527. EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, p. 48. GREENWOOD C., "International Humanitarian Law and UN Military Operations", p. 16s. KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 53.

⁸⁷ See for example SEYERSTED F., *United Nations Forces in the Law of Peace and War*, p. 344. BOYD S., "The Applicability of International Law to the Occupied Territories", *Israel Yearbook of Human Rights*, vol. 1, 1971, pp. 352s. SCHINDLER D., "United Nations Forces and International Humanitarian Law", p. 529. EMANUELLI C., *Droit humanitaire et opérations de paix internationales*, p. 103s. KELLY M. J., *Peace Operations, Tackling the Military, Legal and Policy Challenges*, Australian Government, Canberra, 1997, para. 444. *Contra* see MURPHY R., "United Nations Military Operations and International Humanitarian Law : What Rules Apply to Peacekeepers ?", *Criminal Law Forum*, Vol. 14, 2003, p. 154.

⁸⁸ BOWETT D.W., *United Nations Forces : A Legal Study of United Nations Practice*, p. 515. EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, p. 70. KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 103.

Given that international organizations use force through troops provided by their member States, it is often difficult to tell whether it is the organization itself, or its members, that are bound by the applicable rights and obligations and must thus assume responsibility in case of illicit acts.

The effective control criterion

The solution to this problem lies in the criterion of effective control.⁸⁹ The addressee of international humanitarian law rules will be the authority effectively exercising command and control over the forces on the ground. In the case of international organizations, this depends on whether the organization as such, through its operational agencies, exercises sufficiently autonomous powers, as compared with those of its member States, so as to be exercise ultimate direction of military operations. A number of factors are relevant in making this determination, such as the nature of the chain of command, the effective distribution of powers and the application of disciplinary rules.⁹⁰

When the organization exercises effective command and control over the forces in question, it becomes the addressee of the rights and obligations laid down by international humanitarian law and engages its responsibility in case of breach of those norms. At least in principle, this is the case for UN peacekeeping forces. Conversely, when Member States retain these powers, for example, where they individually conduct UN authorized operations, they remain the addressees and retain legal responsibility. This is generally the case for peace-enforcement operations.

However, this distinction is not always clear in practice. Peacekeeping operations are generally conducted under a complex command structure combining both United Nations authority and Member State powers, in which case it cannot be said that the Organization exercises exclusive control. On the contrary, it is appropriate to speak of "dual control" in such situations.⁹¹ Although the United Nations exercises operational and strategic command over the troops in the field, Member States are responsible for the execution of UN orders, administration of their national contingents and disciplinary action, including the adoption of penal and disciplinary measures, if necessary. Accordingly, UN control is shared rather than exclusive. In practice, this distribution of powers is even subtler, since national commanders often influence the strategic choices of the operation, and may even act upon their own initiative.⁹² Therefore, it is useless to seek to show that one or other party holds exclusive control over implementation of the operation, since this does not correspond to the situation in the field. It is more important to determine who has primary responsibility for directing the forces, *i.e.* who ultimately adopts strategic decisions concerning the operation.⁹³

This does not mean that an evaluation of the powers of other participants is irrelevant. Regardless of whether they are part of the organization itself or its Member States, they remain bound by the secondary obligations and responsibilities laid down by international humanitarian

⁸⁹ On this question, see EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, p. 63ss. SHRAGA D., "The UN as an Actor Bound by International Humanitarian Law", p. 328ss. KOLB R., *Droit humanitaire et opérations de paix internationales*, pp. 22ss.

⁹⁰ DE VISSCHER P., *IDI, Annuaire 1971*, tome 54-I, pp. 19-21.

⁹¹ See CONDORELLI L., "Le statut des forces des Nations Unies et le droit international humanitaire", p. 94.

⁹² See MCCOUBREY H., WHITE N. D., *The Blue Helmets : Legal Regulation of United Nations Military Operations*, Aldershot (etc), Dartmouth, 1996, p. 137.

⁹³ CONDORELLI L., "Le statut des forces des Nations Unies et le droit international humanitaire", pp. 94ss. KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 24.

law with respect to their contribution to the operation.⁹⁴ One of the fundamental customary rules under this legal corpus (set out in common Article 1 to the four 1949 Geneva Conventions and the first additional Protocol of 1977) places States under the obligation to respect and ensure respect for international humanitarian law in all circumstances.⁹⁵ Accordingly, States have a duty to adopt any measures likely to promote its respect by the parties to armed conflict.⁹⁶ This obligation is particularly relevant for States providing contingents to an international organization. In such cases, they must verify that decisions adopted by the organization comply with international humanitarian law. At the same time, when an international organization authorizes States, or another international organization, to use armed force, it must ensure that the relevant rules are applied and that adequate implementation measures will be adopted. It is thus clear that the binding force of the rights and obligations of international humanitarian law, as well as the corresponding responsibility, must systematically be understood in its primary and secondary dimensions.⁹⁷

Furthermore, UN experience has shown that a single operation can involve two simultaneous operational systems. When States deploy armed contingents in support of a UN controlled operation, they may decide not to place their forces under UN control. In such cases, determination of the applicable law and the distribution of responsibilities in accordance with the criterion of effective control results in the coexistence of two distinct regimes, specific to the UN forces and the State support troops, respectively. This was the case during the intervention in Somalia in the early 1990s.⁹⁸

Case Study: The addressees of rights and obligations during "Operation Allied Force" (24 March - 9 June 1999)

The NATO bombing campaign against targets in Kosovo and the rest of the former Yugoslavia, from 24 March to 9 June 1999, raises the question whether the Organization or its Member States held primary rights and legal responsibility. Some observers have created a certain

⁹⁴ KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 24.

⁹⁵ See ICJ, *Military and Paramilitary Activities in and against Nicaragua (merits) Nicaragua v. United States of America*, 27 June 1986, Reports 1986, para. 220. The Court held that this rule is a general principle of humanitarian law. Concerning this clause, see *inter alia* *Commentaire de la Convention de Genève I*, J. Pictet (Ed.), Genève, 1952, pp. 25-28. CONDORELLI L., BOISSON DE CHAZOURNES L., "Quelques remarques à propos de l'obligation des États 'de respecter et faire respecter' le droit international humanitaire en toutes circonstances", *Mélanges Pictet*, C. Swinarski (Ed.), Genève-La Haye, CICR-Nijhoff, 1984, pp. 17ss. LEVRAT N., "Les conséquences de l'engagement pris par les Hautes Parties contractantes de 'faire respecter' les Conventions humanitaires", *Mise en œuvre du droit international humanitaire* F. Kalshoven / Y. Sandoz (Ed.), Dordrecht (etc.), Nijhoff, 1989, pp. 263ss. BENVENUTI P., "Ensuring Observance of International Humanitarian Law : Function, Extent and Limits of the Obligations of Third States to Ensure Respect of International Humanitarian Law", *Yearbook of the Institute of Humanitarian Law (San Remo)*, 1992, pp. 27ss. KALSHOVEN F., "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", *Yearbook of International Humanitarian Law*, vol. 2, 1999, pp. 3ss. CICR (Ed.), *Commentaire des Protocoles additionnels du 8 June 1977 aux Conventions de Genève du 12 August 1949*, Y. Sandoz et al. (Ed.), Genève/Dordrecht, CICR/Martinus Nijhoff, 1986, pp. 34ss.

⁹⁶ On this obligation, see *La Convention de Genève pour l'amélioration du sort des blessés et des malades in: les forces armées en campagne : commentaire*, J. Pictet (Ed.), pp. 25-28. CONDORELLI L., BOISSON DE CHAZOURNES L., "Quelques remarques à propos de l'obligation des États 'respecter et faire respecter' le droit international humanitaire en toutes circonstances", pp. 17ss.

⁹⁷ KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 25.

⁹⁸ Successive UN missions (UNOSOM et UNOSOM II) were both supported by military coalitions mandated by the Security Council under State control, *i.e.* the Unified Intervantion Force and the Rapid Intervantion Force. See KOLB R., PORRETTO G., VITE S., *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales : Forces de paix et administrations civiles transitoires*, 504 pp.

ambiguity concerning this question by arguing, in the same analysis, that humanitarian law is applicable both to NATO, without any other details, and to its Member States taken individually.⁹⁹ This uncertainty can only be dissipated by an in-depth examination of the command and control structure used during the intervention.¹⁰⁰

It should first be recalled that the North Atlantic Council (NAC) took operational command of the entire operation.¹⁰¹ The NAC is NATO's supreme political body, founded directly on the North Atlantic Treaty of 4 April 1949.¹⁰² It is composed of permanent representatives of the Member States and meets at least once a week. Foreign affairs ministers, defence ministers and Heads of State or Government may also attend, depending upon the importance and nature of the agenda. The NAC's decisional process is characterized by consensus seeking. All decisions are adopted unanimously and by common agreement.¹⁰³ As regards the case in hand, the participants in "Operation Allied Force" confirmed that the main strategic choices were accepted by the highest political authorities of all the Member States.¹⁰⁴ This was the case, in particular, for the designation of problematical military targets, such as those in the centre of Belgrade or that were likely to cause serious collateral damage.

Decision-making power was delegated to lower hierarchical levels for less importance questions.¹⁰⁵ NATO's Military Committee, the ranking military body within the organization,¹⁰⁶ thus played a decisive role in the direction of day-to-day operations.¹⁰⁷ The Military Committee is a subsidiary body of the NAC comprised of the Armed forces chiefs of staff from each Member State, or their representatives. Even at this level, decisions were taken by consensus.¹⁰⁸ Although there was no longer any question, at this stage, of a power to prevent the execution of a decision adopted at a higher level, each participant had the right not to participate in any action

⁹⁹ See for example *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, <http://www.un.org/icty/pressreal/nato061300.htm>, Independent International Commission on Kosovo, *Kosovo Report*, <http://www.kosovocommission.org/>, HRW, *Civilian Deaths in the NATO Air Campaign*, The Crisis in Kosovo, February 2000. Amnesty International, NATO/FRY, "Collateral Damage" or Unlawful Killings?, AI/Index : EUR 70/18/00, June 2000, 72 p.

¹⁰⁰ PELLET A., "L'imputabilité d'éventuels actes illicites, Responsabilité de l'OTAN ou des Etats membres", *Kosovo and the International Community, A Legal Assessment*, C. Tomuschat (ed.), p. 201.

¹⁰¹ Sur le CAN, see NATO, *NATO Handbook*, pp. 163ss (<http://www.nato.int/docu/handbook/2001/index.htm>).

¹⁰² Art. 9.

¹⁰³ NATO, *NATO Handbook*, p. 164.

¹⁰⁴ Ministère français de la défense, *Les enseignements du Kosovo*, para. I.1.1, <http://www.defense.gouv.fr/actualites/dossier/d36/rubriques0.htm>. United Kingdom Parliament, House of Commons, Committee on Defence, *14th Report*, 23 October 2000, para. 183, <file:///H:/recherche/Documents/UK/HoC D 14th report.htm>.

¹⁰⁵ *Hearings of the Committee on Armed Services of the United States Senate on the situation in Kosovo*, Joint Statement of William S. Cohen, Secretary of Defense, and Gral Henry H. Shelton, Chairman of the Joint Chiefs of Staff, 14 October 1999, p. 9. US Department of Defense, *Kosovo/Operation Allied Force After-Action Report*, report to Congress, 31 January 2000, p. 24. UK Ministry of Defence, *Kosovo : Lessons From the Crisis*, June 2000, par. 5.6 and 5.7.

¹⁰⁶ On the Military Committee, see NATO, *NATO Handbook*, pp. 259ss.

¹⁰⁷ *Hearings of the Committee on Armed Services of the United States Senate on the situation in Kosovo*, Statement of Gral (ret) Klaus Naumann, German Army, former Chairman of NATO's Military Committee, 3 November 1999, p. 1.

¹⁰⁸ NATO, *NATO Handbook*, pp. 259ss.

the legitimacy of which it contested. States thus retained control over the engagement of their own troops during the entire period of "Operation Allied Force".¹⁰⁹

Finally, even at the level of strictly military hierarchy, the States managed to preserve significant decision-making power over the execution of operations. For example, the fourteenth report of the UK House of Commons Committee on Defence explained that most of the British forces deployed during the operation were not subject to the "command" of NATO's Supreme Allied Commander Europe (SACEUR), but only to his "control".¹¹⁰

Under this system, Member States preserved their power of operational command over "Operation Allied Force", because each State had the capacity to abstain from participating in any bombing phases it did not agree with.¹¹¹ The NATO Handbook clearly confirms that "Each nation represented at the Council table or on any of its subordinate committees retains complete sovereignty and responsibility for its own decisions".¹¹² It may be concluded that NATO Member States are the primary addressees of the rights and obligations of international humanitarian law during operations conducted under the auspices of the Organization.¹¹³ Accordingly, they must bear responsibility for breaches of these rules.¹¹⁴ NATO, as such, remains the addressee of secondary obligations, especially those requiring it to "ensure respect" for international humanitarian law by its members in the course of hostilities conducted in its name.

B. THE *RATIONE MATERIAE* APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO ACTION BY INTERNATIONAL ORGANIZATIONS

¹⁰⁹ *Hearings of the Committee on Armed Services of the United States Senate on the situation in Kosovo*, Statement of Gral (ret) Klaus Naumann, German Army, former Chairman of NATO's Military Committee, 3 November 1999, p. 1.

¹¹⁰ United Kingdom Parliament, House of Commons, Committee on Defence, *14th Report*, 23 October 2000, note 461.

¹¹¹ See also on this subject, Amnesty International, *NATO/FRY, "Collateral Damage" or Unlawful Killings?*, AI/Index : EUR 70/18/00, June 2000, p. 16s.

¹¹² NATO, *NATO Handbook*, p. 164, see also pp. 166ss.

¹¹³ En ce sens, WECKEL P., "Le droit des conflits armés et les organisations internationales", *Les organisations internationales et les conflits armés*, M. Benchikh (Ed.), Paris, L'Harmattan, 2001, p. 102. See *contra* PELLET A., "L'imputabilité d'éventuels actes illicites, Responsabilité de l'OTAN ou des Etats membres", p. 199ss. The author argues that "NATO is sole responsible for any violations committed by NATO forces in Kosovo [...]". He presumes, thus, without proving it, that these forces were placed under the Organisation's authority. Although he correctly observes that the attribution of responsibility for any internationally illicit acts committed during the operation can only be characterised on the basis of the facts, he does not undertake such an examination before making his conclusion. As we have seen, if he had done so, he would have found that the States participating in the operation continued to exercise effective control. See also *contra* BUZZI A., *L'intervention armée de l'OTAN en République fédérale de Yougoslavie*, Paris, Pedone, 2001, pp. 165ss. While recognising that the States retained control over the operations during the bombing phase, the author argues that it was for the NATO command to evaluate the "legal legitimacy of the targets, since they gave the orders to the forces" (p. 168). For this author, any other interpretation would lead to a "legal black hole" (Ibid.). As we have seen, the legal evaluation of targets was in fact undertaken at higher hierarchical echelons. Giving the order to attack a specific objective was a question of executing these decisions, not adopting them. This situation does not result in a lack of law, since the States remain fully responsible for their engagements under international humanitarian law.

¹¹⁴ On this point, see KLEIN P., "Les organisations internationales dans les conflits armés : la question de la responsabilité internationale", *Les organisations internationales et les conflits armés*, M. Benchikh (Ed.), Paris, L'Harmattan, 2001, p. 181.

It has been confirmed above that international organizations have the subjective capacity to be bound by the rules of international humanitarian law. Furthermore, the evolution of international practice shows that the source of these rules is both customary and conventional. However, the applicability of international humanitarian law also depends on the circumstances of each case. Accordingly, this study must also take account of substantive considerations. In particular, it must be determined whether the participation of international organizations in armed conflict gives rise to a new category requiring the application of distinct rules, or whether it may be brought within the current *ratione materiae* scope of international humanitarian.

1. The existence of an armed conflict

The notion of armed conflict under international humanitarian law

As a general rule, apart from "the provisions which shall be implemented in peacetime",¹¹⁵ the primary criterion for the application of international humanitarian law is the existence of an "armed conflict".¹¹⁶ The use of this term, which has never been given a precise definition under international law, aims to show that the application of this legal regime depends on a factual situation, rather than the characterisation of that situation by the parties.¹¹⁷ It is an objectively identified question of concrete fact that does not depend on the subjective will of the parties. This applies to international armed conflicts (basically interstate conflicts), regardless of whether there is a declaration of war, as well as internal armed conflicts (basically civil wars), independent to any recognition of belligerence.¹¹⁸

In the international context, the existence of an armed conflict is freely admitted, the threshold level of combat being very low. All that is needed is for one of the situations set out in the 1949 Geneva Conventions to occur, such as the capture of a prisoner "of war", an armed clash between soldiers or the occupation of territory, even if it meets with no resistance. Indeed, the Conventions state that they apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".¹¹⁹ Common Article 2(2) of the Geneva Conventions recognises one exception to the need for an existing conflict, providing that international humanitarian law also applies to the occupation of territory, "even if the said occupation meets with no armed resistance". Clearly, the existence of an armed conflict cannot be a condition for applicability in such cases, since this is not a typical characteristic of military occupation in practice.¹²⁰ Nevertheless, Article 2(2) complies with the logic of paragraph 1, since the same primary criterion is applied: regardless of whether the situation arose through combat or not, the simple fact that territory has been occupied brings the relevant law into application.

¹¹⁵ 1949 Geneva Conventions, Common Art. 2(1).

¹¹⁶ 1949 Geneva Conventions, Common Art. 2(1).

¹¹⁷ See DAVID E., *Principes de droit des conflits armés*, pp. 102ss. KOLB R., *Ius in bello, Le droit international des conflits armés*, pp. 71ss.

¹¹⁸ See KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 30. See aussi EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, pp. 24-26.

¹¹⁹ 1949 Geneva Conventions, Common Art. 2(1) (our emphasis). On this question, see CICR, *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne : commentaire*, Pictet J. (Ed.), Genève, CICR, 1952, p. 34. See aussi SCHINDLER D., "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *RCADI*, tome 63, 1979-II, p. 131. BOTHE M., "Peacekeeping and International Humanitarian Law : Friends or Foes ?", *International Peacekeeping*, vol. 3, 1996, p. 93.

¹²⁰ KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 31.

In the internal context, as confirmed by the International Criminal Tribunal for the former Yugoslavia, "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".¹²¹ Nevertheless, recognition of the existence of an armed conflict in such cases is subject to stricter criteria than international conflict, as the confrontation must cross a threshold level of violence. Under the relevant legal provisions, this type of conflict is defined by two interrelated criteria: the intensity of the confrontation and the level of organization of the opposing parties.¹²²

Armed conflicts in which international organizations participate

When applied to the subject under study, this theoretical framework shows clearly that the forces of international organizations may be confronted, in certain circumstances, with situations coming within the *ratione materiae* scope of humanitarian law. Thus, the relevant rules will apply once those forces come into conflict with a State, or a sufficiently organized armed group, and the conflict crosses the required threshold of intensity.¹²³ In this respect, the characteristics of operations undertaken by international forces do not modify the conditions for applicability of humanitarian law. Of course, as some authors point out, given its legal and moral legitimacy, UN military action does not amount to "war". Its aim is not to defend any particular State interest, but to intervene in the interests of the international community as a whole, in cases of aggression or threats to peace.¹²⁴ Summarising the UN position on this subject in 1995, D. Shraga argued that peacekeeping forces could not be considered parties to a conflict within the meaning of the 1949 Geneva Conventions, because these forces, "which carry with them the stamp of international legitimacy should be, and be seen to be impartial, objective and neutral, their sole interest in the conflict being the restoration and maintenance of international peace and security".¹²⁵

¹²¹ International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case no IT-94-1-AR72, 2 October 1995, para. 70.

¹²² See International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v. Dusko Tadic*, IT-94-1 "Prijedor", Judgement, 7 May 1997, para. 562. See also the conclusions of the ICRC Commission of Experts of 1962, in: *RICR*, vol. 45, 1963, p. 76 ss. SCHINDLER D., "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", p. 147. E. DAVID, *Principes de droit des conflits armés*, pp. 114ss.

¹²³ On the specific question of the application of the law of military occupation to the operations of international organisations, see VITE S., "L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales", *RICR*, n. 853, 2004, pp. 9-35. DINSTEIN Y., "The Dilemmas Relating to the Legislation under Article 43 of the Hague Regulations", *Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law*, Cambridge, June 25-27, 2004, 12 pp. SASSÓLI M., "Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century", *Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law*, Cambridge, June 25-27, 2004, 25 pp.

¹²⁴ The *American Society of International Law* considered that the United Nations could not be bound by the law of law as a whole, since "[t]he purposes for which the laws of war were instituted are not entirely the same as the purposes of regulating the use of force by the United Nations". *Proceedings ASIL*, 1952, p. 220. On this point, see MEYROWITZ H., *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, Pédone, 1970, p. 182ss. OETER S., "Civil War, Humanitarian Law and the United Nations", *Max Planck Yearbook of United Nations Law*, vol. 1, 1997, p. 217ss. On this question, see also BOWETT D.W., *United Nations Forces: A Legal Study of United Nations Practice*, pp. 496ss. EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, p. 30ss.

¹²⁵ SHRAGA D., "The UN as an Actor Bound by International Humanitarian Law", p. 323. See on this point VAN HEGELSOM G.-J., "The Law of Armed Conflict and the UN Peace-Keeping and Peace-Enforcing Operations", *Hague Yearbook of International Law*, vol. 6, 1993, p. 54.

However, these arguments do not take account of the fact that the applicability of international humanitarian law depends on the effective existence of conflict,¹²⁶ not on the legitimacy of an operation or the aims of the parties.¹²⁷ The author thus confuses the motives for the conflict, which relate to *jus ad bellum*, and the reality of hostilities, which are relevant to *jus in bello*. In fact, it is not possible to make an *a priori* decision that peacekeeping operations are not subject to the law of armed conflict. Once the use of armed force is possible and effectively results in a confrontation of sufficient intensity, the substantive conditions for application of international humanitarian law are satisfied. This is confirmed by the UN Secretary-General's Bulletin, which extends to "peacekeeping operations when the use of force is permitted in self-defence".¹²⁸ It is thus irrelevant that the use of force is only allowed in self-defence. Once armed conflict breaks out, the rules enumerated in the Bulletin will apply to UN forces even if they did not initiate the conflict. This reasoning is equally valid in the case of enforcement operations.

It does not follow, as some authors fear, that UN peace-keepers could legitimately be attacked even though they are not participating in the fighting. While it is true that their status as members of armed forces excludes the high level of protection provided to civilians under international humanitarian law, attacks against peacekeeping forces are forbidden under the law relating to the privileges and immunities granted to the agents of international organizations. This principle is outlined in Article 105 of the UN Charter and specified by customary¹²⁹ and conventional rules.¹³⁰ Article 7(1) of the 1994 Convention on the Safety of United Nations and Associated Personnel provides that such persons, "their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate". Such attacks include "[the] intentional commission of (a) a murder, kidnapping or other attack upon the person or liberty" of persons protected by the Convention.¹³¹

2. The nature of armed conflicts involving international organizations

¹²⁶ See in particular IDI, *Annuaire*, vol. 54, 1971, p. 10. EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, p. 25. GREENWOOD C., "International Humanitarian Law and UN Military Operations", p. 11.

¹²⁷ See *Protocol additional I*, Preamble, para. 5.

¹²⁸ *Bulletin*, Art.1.1.

¹²⁹ The UN Security Council had already recalled on a number of occasions that the parties involved in non international armed conflict must "strictly respect the status of the personnel" of peacekeeping operations. See for example Res. 1181, 13 July 1998 establishing the UN Observer Mission in Sierra Leone (UNOMSIL), para. 12. For R. Kolb, "The Blue Helmets benefit from the immunities that customary international law accords to State organs on foreign territory, by analogy.", KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 43 [our translation].

¹³⁰ See in particular the 1946 Convention on the Privileges and Immunities of the United Nations, the 1973 Convention on internationally protected persons, the 1979 International Convention Against the Taking of Hostages, and the 1994 The Convention on the Safety of United Nations and Associated Personnel.

¹³¹ Art. 9. Concerning the links between this convention and international humanitarian law, see BLOOM E.T., "Protecting Peacekeepers : The Convention on the Safety of United Nations and Associated Personnel", *AJIL*, vol. 89, 1995, pp. 621-631, BOURLOYANNIS-VRAILAS M.C., "The Convention on the Safety of the United Nations Nations and Associated Personnel", *ICLQ*, vol. 44, 1995, pp. 560-590. BOUVIER A., "Convention sur la sécurité du personnel des Nations Unies et du personnel associé : Présentation et analyse", *RIICR*, n. 816, 1995, p. 695-725. EMANUELLI C., "La Convention sur la sécurité du personnel des Nations Unies et de personnel associé : des rayons et des ombres", *RGDIP*, vol. 99, 1995, pp. 849-880. MURPHY R., "United Nations Military Operations and International Humanitarian Law : What Rules Apply to Peacekeepers ?", pp. 181ss. KOLB R., PORRETTO G., VITE S., *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales : Forces de paix et administrations civiles transitoires*, 504 pp.

While it is true that hostilities involving international organizations still come within the substantive scope of international humanitarian law, the nature of the armed conflict in question must still be determined. Clearly, the law of international armed conflicts prevails where international forces confront a State army. However, the situation is less clear in cases where such forces are faced with one or more nongovernmental groups.

2.1 The international or internal character of armed conflicts involving international organizations

Theory

For the majority of legal writers,¹³² the best solution is also to apply the law of international armed conflicts in cases involving nongovernmental forces. Given that such operations are conceived, planned and implemented by international organizations which, contrary to States, can only be bound by international law, it is argued that, by nature, their intervention comes within the category of international armed conflicts. In this view, it doesn't matter whether the adversary is a State or a nongovernmental group. This approach posits the existence of a *sui generis* international armed conflict,¹³³ arising out of the specific status of the organization involved.

Yet some authors propose another solution, considering that "there is no reason to think that the involvement of a UN force in a situation of armed conflict will of itself render the conflict 'international' for the purpose of the application of the *ius in bello*".¹³⁴ They suggest that this question be resolved in accordance with the case-law of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.¹³⁵ In a preliminary observation, the Court found that the conflict, and therefore the applicable law, should be fractioned. This effectively meant that the conflict between the contras and the Nicaraguan forces was subject to the law of internal conflicts, whereas United States action against Nicaragua was subject to the rules relating to international conflicts.¹³⁶ This division of legal regimes when one or more foreign powers intervene in internal armed conflicts is undoubtedly the current legal position, despite criticism throughout the 1990s.¹³⁷

Transposed to the case in hand, the preliminary observations of the International Court of Justice and the practice of fractioning in general, would require the application of the law of

¹³² See, in particular, SEYERSTED F., *United Nations Forces in the Law of Peace and War*, p. 209. SHRAGA D., "The UN as an Actor Bound by International Humanitarian Law", p. 333. BENVENUTI P., "The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping", pp. 96s. EMANUELLI C., "Les forces des Nations Unies et le droit international humanitaire", pp. 357ss. PFANNER T., "L'application du droit international humanitaire et les opérations militaires organisées en vertu of the United Nations Charter", p. 58. KOLB R., *Droit humanitaire et opérations de paix internationales*, pp. 56ss. DAVID E., *Principes de droit des conflits armés*, p. 152.

¹³³ EMANUELLI C., "Les forces des Nations Unies et le droit international humanitaire", p. 358.

¹³⁴ MCCOUBREY H., WHITE N. D., *The Blue Helmets : Legal Regulation of United Nations Military Operations*, p. 172.

¹³⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua (merits)* (Nicaragua v. United States of America), 27 June 1986, *Reports 1986*, p. 14. See TITTEMORE B., "Belligerents in Blue Helmets : Applying International Humanitarian Law to United Nations Peace Operations", *Stanford Journal of International Law*, vol. 33, 1997, p. 110.

¹³⁶ ICJ, *Military and Paramilitary Activities in and against Nicaragua (merits)*, para. 219.

¹³⁷ Concerning fractioning: DAVID E., *Principes de droit des conflits armés*, pp. 146ss. SCHINDLER D., "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", pp. 150s.

international armed conflicts when international forces confront those of authorities holding sovereign power over the territory in question. On the contrary, where the opposing forces are nongovernmental groups, the law of non-international armed conflict would prevail. The law applicable to a single conflict would thus vary depending on the adversary in each specific situation.¹³⁸

Practice

The texts specific to the United Nations seem to give precedence to the application of the law of international armed conflicts. The Secretary-General's Bulletin supports this position, since it makes an unlimited declaration that the rules of international humanitarian law apply to both peace enforcement and peacekeeping operations.¹³⁹ The rules referred to in the Bulletin are those relating to international armed conflicts.¹⁴⁰

Moreover, Article 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel seems to adopt the same solution. This provision, which defines the scope of the Convention, provides that the Convention shall not apply to "a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and *to which the law of international armed conflict applies*". P. Kirsch notes that this clause was specifically accepted by the negotiators, for whom "it was widely recognised that it is impossible for the Organization to be involved in an internal armed conflict, because once the UN or associated personnel intervene in a conflict against local forces, by definition, the conflict takes on an 'international' scope".¹⁴¹

Nevertheless, the practice of peacekeeping operations is ambiguous on this point.¹⁴² In the early 1960s, the Security Council decided to establish a UN force to prevent the outbreak, then the spread, of civil war between the Congo and one of its provinces, Katanga, whose authorities had decided to secede.¹⁴³ In accordance with its regulations, this force was required to fully "respect... the principles and spirit of the general international conventions applicable to the conduct of military personnel".¹⁴⁴ Yet it was not specified whether this was limited to the rules of non-international armed conflict, or covered a wider normative sphere. Some authors have argued that the law of international armed conflicts was applicable in this case.¹⁴⁵ As C. Greenwood has pointed out, this choice was without undoubtedly dictated by the participation of contingents from several States.¹⁴⁶

Thirty years later in Somali, however, the United Nations and the United States (which led the Unified Task Force, followed by the rapid intervention force), considered that the law of non-

¹³⁸ See CONDORELLI L., "Le statut des forces des Nations Unies et le droit international humanitaire", p. 110.

¹³⁹ Art. 1.

¹⁴⁰ See KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 58.

¹⁴¹ KIRSCH P., "La Convention sur la sécurité du personnel des Nations Unies et du personnel associé", *Les casques bleus: policiers ou combattants ?*, C. Emanuelli (éd), p. 56 [our translation].

¹⁴² EMANUELLI C., *Les actions militaires de l'ONU et le droit international humanitaire*, p. 36. GREENWOOD C., "International Humanitarian Law and UN Military Operations", p. 26.

¹⁴³ See, in particular, Security Council Resolutions 146, 9 August 1960 ; 161, 21 février 1961 ; 169, 24 November 1961.

¹⁴⁴ UN Doc., ST/SGB/ONUC/1, 15 July 1963, Art. 43.

¹⁴⁵ BOWETT D.W., *United Nations Forces : A Legal Study of United Nations Practice*, pp. 509s.

¹⁴⁶ See GREENWOOD C., "International Humanitarian Law and UN Military Operations", p. 26.

international armed conflict should apply. Adopting any other solution would have been difficult in practice, given that the Somali National Alliance (SNA) opposing the international forces, was not sufficiently organized to be treated as a party to an international armed conflict. In addition, there were political considerations underlying the reliance on this objective element in order to limit the legal framework to that of civil wars. The United States would not have been able to implement its will to prosecute the members of the SNA for acts of war that did not amount to serious breaches of the Geneva Conventions if they had been entitled to prisoner of war status under the law of international conflicts. Despite these ulterior motives it remains true that the war in Somalia opposed international forces and non-State actors.

Conclusions

In light of this analysis, it is difficult to give a definitive answer to this question. Theoretical writings, supported by two relatively recent documents relating specifically to the UN, seem to favour applying the law of international armed conflicts. Yet the situation is less clear in practice.

One may be excused for doubting whether the law of international armed conflicts will automatically be relevant in all cases. For example, in cases where international forces are confronted by unstructured armed groups, it would appear difficult to require the parties to respect the Third 1949 Geneva Convention. In that case, H. McCoubrey and N. White have suggested that it would be possible to apply the law of non-international armed conflict, while promoting the conclusion of special agreements between the parties in order to widen the circle of applicable norms, as appropriate.¹⁴⁷ This solution would lead to a normative system better adapted to the reality of the conflicts opposing international forces and nongovernmental troops. Moreover, it would still be possible to preserve the fundamental rules for the protection of non-combatants, without requiring systematic internationalisation of this kind of conflict, by relying on the increasing convergence between the law of international and internal conflict in this respect, regardless of the parties involved. The application of the law of non-international armed conflicts in such circumstances would have the added advantage of preserving the coherence of the legal regime, since nongovernmental movements would be bound by identical rules in situations that do not differ fundamentally, *i.e.* whether they are opposing an international organization or State forces.

Another alternative would be to conclude that the law of international armed conflicts is applicable in principle, but only partially, not as a block or in its entirety. Indeed, it would appear inappropriate to exempt the United Nations from the obligation to respect all the rules relating to the conduct of hostilities set out in the law of international armed conflicts, thus allowing them to take advantage of the serious failings in codification of the law of non-international armed conflict. Moreover, it is not certain that the United Nations would be forced to accord prisoner of war status to every captive that a State itself would be allowed to treat as a rebel or criminal.

In any event, the decision to apply the international humanitarian law relating to internal or international armed conflicts will not necessarily have serious practical consequences as long as the parties are prepared to modulate the obligations set out in each "packet" of rules, either by completing the law of non-international armed conflict by rules relating to the conduct of hostilities, or by moderating the law of international armed conflicts in order to limit some forms

¹⁴⁷ MCCOUBREY H., WHITE N. D., *The Blue Helmets : Legal Regulation of United Nations Military Operations*, pp. 172s.

of protection, especially as regards prisoner of war status. In the end, it might even be possible to achieve identical regimes, regardless of the initial normative corpus.

2.2. Maintaining order and security: the threshold between armed conflicts and international police operations

In the strictly internal context, below a certain level of violence and organization of one of the opponents, a confrontation can no longer legally be characterized as an armed conflict, and the application of international humanitarian law can no longer be justified. Such situations are referred to as cases of internal disturbances and tensions.¹⁴⁸ Thus, it is important to understand the nature of this change in circumstances, onto which the choice of legal regime is grafted. In the case in hand, it must be determined whether the action by an international organization within a State qualifies as a military operation or as the use of coercive powers by a civil administration. In both cases, the use of armed force is authorized, but in the first case it amounts to armed conflict, whereas in the second it simply involves international police action.

In the context of territorial administration, the primary aim of the civilian police is to ensure respect for the law in force through the prosecution of offenders. Its activities are thus part of a legal process, and consist of gathering the necessary evidence.¹⁴⁹ This may lead to confrontation with individuals, or even mafia groups. On the contrary, military forces are not generally judicial personnel, as their main aim is to keep, or even impose peace. They are not required to conduct investigations. Only controlling the territory counts. In this capacity, they may come into conflict with organized groups claiming control over a region for political purposes. Of course, there is no strict separation of roles in practice. In particular, the military often participates in police action as required by the circumstances.¹⁵⁰ Therefore, it is not the nature of the contingent involved that determines the applicable law in each case, but the nature and objectives of the action undertaken.

In the same way, it is not possible to adopt an *a priori* decision that certain operations conducted by international organizations will automatically be characterized as police intervention, by nature. Nevertheless, some writers have attempted to predetermine the applicable law based on

¹⁴⁸ *Protocol II*, Art. 1(2) and *Statute of the International Criminal Court*, Art. 8(2)(f). Concerning the concept of troubles and internal tensions, see *inter alia Commentaire de la Convention I de Genève*, J. PICTET (Ed.), pp. 52 ss, JUNOD S., *Commentaire des Protocoles additionnels du 8 June 1977 aux Conventions de Genève du 12 August 1949*, pp. 1378-80, EIDE A., "Troubles et tensions intérieurs", *Les dimensions internationales du droit humanitaire*, UNESCO (Ed.), Paris/Genève, 1986, pp. 279ss, MOMTAZ D., "Les règles humanitaires minimales applicables en période de troubles et de tensions internes", *RICR*, vol. 80, 1998, pp. 487ss, MOMTAZ D., "Le droit international humanitaire applicable aux conflits armés non internationaux", *RCADI*, tome 292, 2001, pp. 47ss, MOIR L., *The Law of Internal Conflict*, Cambridge, Cambridge University Press, 2002, 306 pp.

¹⁴⁹ For more details on civilian police functions in UN operations, see MCFARLANE J., MALEY W., "Civilian Police in United Nations Peace Operations", Australian Defence Studies Centre, April 2001, 27 pp. See aussi MARTÍNEZ GUILLEM R., "La participación de fuerzas policiales en las Operaciones de Mantenimiento de la Paz", *El derecho internacional humanitario ante los nuevos conflictos armados*, C. Ramón Chornet (ed.), Valencia, Tirant lo Blanch, pp. 159-197. The latter author distinguishes two main police functions: security police, to prevent offences, and judicial police, to punish the authors of offences (pp. 175s).

¹⁵⁰ Ramón Martínez Guillem thus recalls that public international law describes the police domain by reference to its functions rather than the institution which implements them. See MARTÍNEZ GUILLEM R., "La participación de fuerzas policiales en las Operaciones de Mantenimiento de la Paz", p. 167. See also HOLLAND J.C., "Blue Helmets: Policemen or Combatants: comments", *Les casques bleus : policiers ou combattants ?*, C. Emanuelli (Ed.), Montréal, Wilson et Lafleur, 1997, pp. 115-120. The author considers that the status of peacekeeping forces is of a mixed nature, since they exercise both police and combat functions, depending on practical needs (pp. 199ss).

the characterization and mandate of operations. G.-J. Van Hegelsom argues, for example, that the circumstances in which peacekeeping forces resort to force (*i.e.* in self-defence, to protect UN personnel and property and the conduct of humanitarian operations), never cross the threshold for application of international humanitarian law.¹⁵¹

The insufficiency of these arguments becomes clear, however, when it is recalled that the application of IHL depends neither on the motivations of the parties nor the legality of the use of force. As already shown, the applicability of international humanitarian law depends on the effective existence of an armed conflict, not on questions of *jus ad bellum*. Thus, any attempt to determine what distinguishes police action from armed conflict must be based on a list of factual criteria, whilst remembering that the two cases may well arise in the course of a single operation.

In this respect, a useful indicator for the legal characterisation of any confrontation is the specific mission of the forces in each case. When the mission is part of a judicial function, the use of force will generally be seen as part of the normal police work of maintaining law and order. When its aim is to keep or enforce peace, one may speak of armed conflict. In the latter case, the mandate given to the military also constitutes an indication of the concrete probability that hostilities will occur, and thus, whether international humanitarian law will apply.¹⁵² In the case of peacekeeping troops, whose right to use force is limited to self-defence, the outbreak of armed conflict will essentially depend on the attitude of the other armed parties involved. Such a possibility is not, therefore, inherent in the mission, but may arise in some circumstances. On the contrary, where the operation is mandated to restore peace, thus implying coercive powers, the possibility of armed conflict may be seen as an integral part of the mission. In such cases, there is a much greater chance that international humanitarian law will apply.

When the conditions for application of international humanitarian law are not satisfied, alternative regimes will serve as the legal framework in cases of confrontation. The law relating to privileges and immunities, especially as laid down in the 1994 Convention, will be of particular relevance, but also "international police law", international human rights law and the internal law of the organization itself. In addition, some rules of international humanitarian law remain applicable.¹⁵³ Indeed, as the International Court of Justice pointed out in the *Corfu Channel* case, States are bound at all times by "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war".¹⁵⁴ In 1986, the Court further specified that these rules include, in particular, common Article 3 to the 1949 Geneva Conventions, which constitutes a humanitarian "minimum" to be respected in all circumstances and during all forms of conflict.¹⁵⁵

¹⁵¹ VAN HEGELSOM G.-J., "The Law of Armed Conflict and the UN Peace-Keeping and Peace-Enforcing Operations", p. 57.

¹⁵² BOWETT D.W., *United Nations Forces : A Legal Study of United Nations Practice*, pp. 501ss. KOLB R., *Droit humanitaire et opérations de paix internationales*, p. 40.

¹⁵³ See *contra* DAVID E., *Principes de droit des conflits armés*, p. 169.

¹⁵⁴ ICJ, *Corfu Channel case (merits)*, United Kingdom v. Albania, 9 April 1949, *Reports* 1949, p. 22 (our emphasis).

¹⁵⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua (merits)*, Nicaragua v. USA, 27 June 1986, *Reports* 1986, para. 218.

CHAPTER III

THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW TO THE ACTIVITIES OF INTERNATIONAL ORGANIZATIONS, ESPECIALLY THE UNITED NATIONS

The aim of this chapter is to determine whether, and to what extent, international law norms relating to human rights apply to certain operational activities of international organizations, especially integrated missions during which organizations take the place of the (former) local authorities in exercising the prerogatives of public power within the country. Attention will also be given to military action undertaken in this context, whether conducted by a single organization or by several coordinated organizations.

A. THE RATIONE PERSONAE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW TO THE ACTIVITIES OF INTERNATIONAL ORGANIZATIONS

As established above, international organizations possess a distinct legal personality from that of their Member States. They can thus be the addressees of international rights and obligations. However, this international personality is not absolute, being limited by the scope of the organization's powers. Must one conclude, however, that it is impossible for international organizations to be bound by international human rights norms, which are typically addressed to States? A negative response appears necessary. When an international organization establishes an international transitional civil administration ("ITCA"), it exercises prerogatives of public authority affecting the livelihood and legal status of physical and legal persons. The organization acts through specially established bodies and administrative structures; it adopts norms and makes decisions regulating all aspects of daily life within the territory; it gives itself the means to ensure execution of its rules and decisions by the population; it exercises judicial functions to varying extents. Accordingly, the organization, as a subject of international law, becomes the addressee of international human rights norms due to its territorial authority and "control" over the population. Consequently, in addition to any obligations of its Member States or States contributing to the operation, the organization becomes an addressee of the rights and obligations deriving from international human rights norms.

As for activities carried out in a country by armed forces under the command and control of an international organization (or more generally within the framework of such an organization), consideration must be given to the varying situations in which the members of such armed forces may exercise prerogatives of public authority over the population, without the involvement of local civilian authorities (whether *international* or *national*, as the latter are progressively re-established). These activities include maintaining public order and security, including judicial policing.

1. Treaty-based human rights law

In order to examine the applicability of international human rights law to the operational activities of international organizations, the subjective scope of the relevant treaties must be defined. This leads to questions regarding the capacity of organizations to participate in these treaties.

1.1. The subjective scope of human rights conventions and international organizations

It is well known that international organizations are not currently parties to international instruments for the protection of human rights, despite the fact that they often play a fundamental role in the promotion, drafting and conclusion of such treaties. Multilateral treaties in this area are only open for signature by States.¹⁵⁶ Does this mean that the application of these treaties to international organizations must be excluded?

There is no definitive answer to this question. Historical arguments hold some weight. The signature clauses in these conventions only mention States. However, at the time they were drafted, the phenomenon of international organizations exercising "state" functions had not yet been envisaged. Thus, there was no reason to deal with the question. This is confirmed by the work on codification of the law of treaties concluded by international organizations, undertaken by the International Law Commission (ILC) in the 1970s.¹⁵⁷ Throughout its work (1970-1985), the ILC never examined this specific question. It is not surprising, thus, that conventions are silent on the point.

At present, however, the extent of the subjective scope of these treaties may be seen in a different light, due to the evolution of international practice. Human rights instruments are conceived of and drafted with the aim to establish a universal corpus of rules, or at least capable of general acceptance in a regional context. As regards civil and political rights, the 1966 UN Covenant, the 1950 European Convention and the 1969 American Convention codify international standards accepted by States. The 1966 UN Covenant on economic and social rights and the European Social Charter are the counterparts of these instruments in the social and economic domain. They contain a series of written, binding¹⁵⁸ rights and fundamental freedoms.

The working hypothesis for this chapter is that once international organizations, especially the United Nations, start exercising State functions relating to territorial administration, their adherence to human rights instruments appears logical, and even desirable. It may be argued that this point, dictated by changing international practice, should take precedence over more formalistic considerations. In other words, the absence of any express rule authorizing organizations to adhere to certain conventions should not exclude all possibility of their participation.

Beyond direct participation by organizations in international human rights conventions, it must be recalled that many Member States of such organizations are parties to these instruments. It may thus be envisaged that treaty-based human rights norms may be applied to the operational activities of an organization through the commitments of Member States participating in its operations.

1.2. The options open to international organizations for participation in human rights conventions

¹⁵⁶ See *Statute of the Council of Europe*, signed in London on 5 May 1949, Article 4. The *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Rome on 4 November 1950, under Article 59, is "open to the signature of the members of the Council of Europe". See the identical provisions in Article 26(1) and (3), of the Covenant on economic, social and cultural rights (*UNTS*, vol. 993, p. 3) and Article 48(1) and (3), of the Covenant on civil and political rights (*UNTS*, vol. 999, p. 71).

¹⁵⁷ On this question, reference may be made *inter alia* to R. SOCINI LEYENDECKER, "A propos de la codification du droit des traités des organisations internationales", *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago*, vol. II, Milan, Giuffrè, 1987, pp. 413 et ss. See also *Annuaire de la Commission du droit international*, 1970, vol. II, 2^{ème} partie, p. 115.

¹⁵⁸ Except, of course, the European Social Charter.

When an organization adopts territorial authority and establishes governmental bodies similar to those of States, it exercises authority over the territory and its population that clearly involves "personal" powers devolving from territorial jurisdiction.¹⁵⁹ This raises the primary question whether the *de facto* assimilation of the international organization to a State, through exercise of the typical functions of the state apparatus, can translate into *de jure* assimilation as regards the organization's adherence to human rights treaties.

Given the "functional" nature of the personality of organizations, and the absence of any international rule recognizing the general capacity of all organizations to conclude any treaty, it does not appear possible to formulate a general rule concerning the capacity of organizations to be bound by conventional human rights norms. The answer must be sought in the "rules of the organization", that is the "internal law" of each organization.¹⁶⁰ In so doing, account must be taken not only of its constitutive act but also its activities; the organization's "effective" status is as important as its normative rules. This conclusion appears to comply with the letter and spirit of the 1986 Vienna Convention,¹⁶¹ as well as the case-law of the International Court of Justice. Consideration must thus be given to the organization's "constitutional" treaty, "derived law" and ulterior practice. A global examination of all these elements is needed in order to verify, on a case-by-case basis, whether the organization can become a party to international human rights treaties.

As P. Klein states clearly, when organizations hesitate about adhering to major multilateral treaties, the obstacles appear, "in reality, more political (or even psychological!) than truly legal".¹⁶² This is particularly true for the treaties under study. It is certainly not any limitation on their contractual capacity which prevents organizations from participating in normative processes on an equal footing with States.¹⁶³ Indeed, any organization whose internal rules and effective powers allow it to conclude these instruments should have the right to become a party to them.

The real question is whether the organization has the indispensable physical and legal means to implement the obligations set out in the relevant conventions. It suffices to observe, in this respect, that the law of treaties provides the means to surmount certain obstacles that may arise. In particular, an organization could always make reservations to a human rights treaty at the time of adherence, by reason of its limited material capacity to fulfil certain obligations.¹⁶⁴

One possible solution allowing international organizations to participate fully in human rights conventions would be to modify the instruments themselves. The aim of such modification would be to widen the list of potential parties beyond States. This is a politically viable possibility and would be relatively simple from a technical viewpoint. The adherence of an

¹⁵⁹ NGUYEN QUOC DINH, DAILLIER, P., PELLET, A., *Droit international public*, 6^e éd., Paris, LGDJ, p. 605.

¹⁶⁰ We use both expressions interchangeably, despite the fact that the International Law Commission, during its work on treaties concluded by organisations, preferred "rules of the organisation". *Annuaire de la Commission du droit international*, 1982, vol. II, 2^{ème} partie, p. 21. We consider, conversely, that use of the expression "internal law" is also unequivocal.

¹⁶¹ Under Article 2(1)(j) of the Convention: "rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

¹⁶² KLEIN P., *La responsabilité des organisations internationales*, Bruxelles, Bruylant, 1998, p. 318.

¹⁶³ See *ibidem*.

¹⁶⁴ Of course, under Article 20 of the 1986 Vienna Convention, such reserves must be compatible with the object and aims of the treaty in question.

international organization to a multilateral convention would have great symbolic importance. It would be the clearest solution, allowing the organization to express an explicit commitment to human rights, as a distinct entity from with its Member States.

An alternative to such adhesion would be for international organizations to participate in one or more treaties through *ad hoc* adhesion in the framework of a particular operation or ITCA. This would allow the organization to make a commitment to respect and implement conventional obligations in relation with the activities of a specific operation.

It goes without saying that any human rights convention could be modified to make express provision for the adhesion of international organizations. However, it may also be possible to achieve such a conventional amendment within the *lex lata*, by virtue of a non-conventional norm or objective procedure. As international organizations have not yet attempted to become parties to these Conventions, it is difficult to evoke generally accepted subsequent practice, to the extent the concept of "subsequent practice" amending a treaty requires evidence of actual practice. If, on the contrary, the example is taken of certain doctrinal tendencies concerning customary law (of which "subsequent practice" is but one form), it may be possible, in the context of human rights and humanitarian law, for *opinio juris* to play a more eminent role than effective practice, in order to argue that, due to wide acceptance by international opinion, these Conventions must now be regarded as open to adhesion by international organizations.

The principle of effectiveness also supports this argument. It has already been shown that, in the domain of humanitarian law and human rights, this principle determines the scope of applicability. Humanitarian law applies whenever there is an effective armed conflict and human rights rules apply whenever there is effective exercise of public authority, regardless of the precise legal basis for these situations. It could thus be argued that the operation of this fundamental principle requires a widened reading of the adhesion clauses of human rights treaties, to the extent that international organizations actually exercise prerogatives of public power in a country. Such an evolutionary interpretation could open these treaties to non-State parties.

An alternative to direct participation in such treaties is foreseeable: an *ad hoc* declaration committing the organization to respect and implement at least some conventional obligations. This would overcome any objections to the formal adhesion of organizations to the underlying treaties on an equal footing with State Parties.

Finally, it might be possible to set up from scratch an organization-specific system of protection for fundamental rights. However, this would undoubtedly be a very complicated process, leading to futile duplication of law that has already been codified for decades.

1.3 The applicability of human rights treaties to the military activities of an international organization in the absence of formal adhesion by the organization

Even in the absence of formal adhesion to existing treaties by international organizations, their application to an organization's operational activities is not excluded. This can also be achieved via the conventional engagements of its Member States.

At the outset, it must be recalled that the personnel of an international organization are independent of their respective governments, as well as any other Member State of the

organization. The concept of "international personnel" is rather wide, as it includes not only international officials *stricto sensu*, but also, for example, members of national armed forces placed at the disposal of the organization by States, as well as consultants and experts on missions.¹⁶⁵ Such personnel are recruited by the organization and exercise their duties in the name of the organization. Their status is thus governed by the organization's "internal law", which guarantees their independence from government influence. If the organization conducts an operation, its internal law will generally apply to implementing action. This is a consequence of the internationally established principle of autonomy.¹⁶⁶

However, there is an important distinction. On the one hand, civilian personnel, generally recruited by contract, are subject to the organization's staff rules and regulations¹⁶⁷, any related instruments (resolutions, declarations, reports, communiqués, etc...) and *ad hoc* agreements governing specific missions. For example, in UN missions, the status of civilian staff is based on: the UN Charter and Staff Rules; the UN Convention on privileges and immunities;¹⁶⁸ the relevant resolutions of the Security Council and any reports prepared for the Council by the Secretary-General; any agreement made by the Organization and domestic authorities (to the extent such authorities still exist); and any other instruments adopted by the operational bodies of the mission itself.¹⁶⁹ Accordingly, international civilian officers are only bound to observe international human rights treaty norms within the framework of their relations with the organization, to the extent that it is bound by those norms.

Military personnel, on the other hand, continues to be linked to their home States in some respects. As explained above, operations involving peacekeeping peace forces are subject to "dual control". Operational and strategic command is exercised by the organization's unified chain of command, whereas each contributing State (whether or not it is a member) is responsible for the execution of orders and the administration of each contingent (or individual, in the case of military observers). As a result, the application of human rights treaties to military personnel depends on the organic relationship between the soldiers and both the contributing

¹⁶⁵ According to the definition laid down by the ICJ in 1949, an international agent is "any person who, whether a paid official or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions –in short, any person through whom it acts." (ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, Reports 1949, p. 177). Also included, under Article VI, section 22, of the 1946 Convention on the Privileges and Immunities of the United Nations, are "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations". See on this point, the Advisory opinion of the Court on the *Applicability of article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Reports 1989, p. 194 ; and the advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Reports 1999, p. 62. On this point see, *inter alia*, KLEIN P., *La responsabilité des organisations internationales*, pp. 376ss. CONDORELLI L., "Le statut des forces des Nations Unies et le droit international humanitaire", *Les casques bleus : policiers ou combattants*, C. Emanuelli (Ed.), pp. 89ss., 91ss.

¹⁶⁶ See, *inter alia*, MONACO R., "Les principes régissant la structure et le fonctionnement des organisations internationales", *RCADI*, tome 156, 1977-III, pp. 121s.

¹⁶⁷ The increasing number of international public servants in the last few decades has led organisations to draft uniform rules applicable to all their personnel. These rules are based on the regulatory powers of the organisation. On this point, reference may be made, *ex multis*, to: WEIL P., "La nature du lien de fonction publique dans les organisations internationales", *RGDIP*, vol. 67, 1963, pp. 273ss. RUZIE D., "La condition juridique des fonctionnaires internationaux", *JDI*, vol. 105, 1978, pp. 868ss. BETTATI M., "Recrutement et carrière des fonctionnaires internationaux", *RCADI*, tome 204, 1987-IV, pp. 171ss.

¹⁶⁸ "UN Convention on the Privileges and Immunities", approved by the UNGA on 13 February 1946, *UNTS*, vol. I, No. 4, pp. 15ss.

¹⁶⁹ For example, the SRSF for the UN Mission in Kosovo (UNMIK), who can adopt regulations and administrative orders.

State and the organization. Therefore, it is possible to envisage the application of human rights treaty norms to the activities of these forces independently of the applicability of such instruments to the organization itself.

Clearly, this conclusion has a number of consequences for the law applicable to particular operations. Indeed, the application of treaty norms will depend on the nationality of the personnel in question and whether or not their home State is a party to the relevant instruments. The question then arises whether the application of treaties based on the organic relationship between the military personnel and their Member State simply entails the application of substantive treaty rules or also the procedural controls over State implementation of these rules (judicial and non-judicial mechanisms).

2. International organizations and the vesting of general international human rights norms

The next question concerns the *ratione personae* applicability of general international human rights norms to ITCAs and peacekeeping operations. These norms bind all the subjects of a legal system, whether or not they have individually consented to them.¹⁷⁰ It hardly needs recalling that the considerable development of international human rights protection after 1945 occurred through advances in both treaty and general law. Nevertheless, as J.-F. Flauss observes, "the conditions under which this protection was introduced into general international law through the instrumental mechanism created by Article 38 (1b and c) of the ICJ Statute, have undoubtedly raised more questions they have resolved".¹⁷¹ However, it is not possible to study these questions within the limited framework of this article.

General human rights norms are binding on international organizations to the extent that they are applicable to the activities of each organization, due to their functional legal personality. Therefore, the existence of the subjective conditions for the application of these norms to organizations must be established; as well as the substantive conditions for such application.

The International Court of Justice has held that, "international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under [among others] general rules of international law".¹⁷² Correspondingly, an organization conducting activities relating *ratione materiae* to the sphere of application of customary human rights rules cannot avoid observing them. This is true, of course, when the activities in question are conducted by the organization itself. The more flexible, or even rudimentary, nature of general rules as compared with treaty norms allows this position to be established with ease. Indeed, in the case of general rules, there is no formal adhesion procedure. Widening the sphere of subjective application does not, thus, require any predetermined revision procedure, occurring with infinitely more suppleness.

Just as for the analysis of treaty law, it does not appear feasible to adopt a single, definitive position concerning the applicability of general international law. It is more appropriate to take a

¹⁷⁰ See, *ex multis*, BUZZINI G., "La théorie des sources face au droit international général", *RGDIP*, vol. 106, 2002, p. 582.

¹⁷¹ Thus, FLAUSS J.-F., "La protection des droits de l'homme et les sources du droit international", *La protection des droits de l'homme et l'évolution du droit international* (Colloque de Strasbourg de la Société française de droit international), Paris, Pedone, 1998, p. 49 [our translation].

¹⁷² ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory opinion, 20 December, Reports 1980, p. 89 and sub.

pragmatic approach, based on a case-by-case examination of existing situations. In particular, it is interesting to study UN practice in this area.

The case of the United Nations

The main questions concerning the applicability of customary international human rights law to the United Nations have arisen because of UN involvement in peacekeeping operations and the civil administration of territories. This area is a good example of the way in which an organization's practice can develop and give more precise meaning to its "internal rules".

Legal writers have applied the case-law of the International Court of Justice, especially the *Reparations, interpretation of the agreement between the WHO and Egypt* and *Legality of the use of nuclear weapons* cases¹⁷³ to human rights norms, in order to conclude that the United Nations is bound by general international law rules in this area. A number of arguments have been based specifically on the "internal law" of the Organization. In particular, it has been argued that the United Nations is bound to respect such norms simply because the promotion of human rights is included in the Charter: Article 1(3) specifies, among the purposes of the Organization, the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Of course, it may be objected that this is a pure programme provision, since its aim is simply to achieve international cooperation in solving social and economic problems as well as the promotion and encouragement of certain human rights and procedures for their protection.¹⁷⁴ Article 55(c), of the Charter,¹⁷⁵ which requires the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms", is also quite generic, as it does nothing to specify the substance of this commitment.¹⁷⁶ The verb to promote ("*favoriser*" in the French version) is not particularly constraining, which is also the case for the other verbs used in the Charter to define the Organization's mission with respect to human rights: "to encourage", or "to assist".¹⁷⁷ Clearly, an obligation to promote the respect and realization of human rights is not comparable to an obligation "to safeguard" or "to protect".

However, the fact that the Charter only requires the United Nations to supervise respect for human rights by other international subjects, especially States, does nothing to diminish the value and meaning of the norms referred to in Articles 1 and 55. Their inclusion in the Charter was the first recognition of human rights at the international level, despite the abovementioned imperfection and weakness. The responsibility and powers thus conferred on the organization have allowed human rights to be gradually withdrawn from the State's reserved domain, to

¹⁷³ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, Reports 1949, p. 4. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory opinion, 20 December 1980, Reports 1980, pp. 89. *Legality of the use of nuclear weapons*, Advisory Opinion, 8 July 1996, Reports 1996, p. 226.

¹⁷⁴ AINSI BEDJAOU M., commentary on Article 1, *The United Nations Charter* (sous la dir. de J-P. COT et A. PELLET), Paris, Economica, 1985, p. 26. In other words, this aim could be expressed by a shortcut for "development".

¹⁷⁵ The Article is part of Chapter IX, relating to international economic and social cooperation.

¹⁷⁶ Article 55 has nevertheless been interpreted as the basis for concrete obligations and not as a purely "programme" provision: see ROLIN H., "Les principes du droit international public", *RCADI*, tome 77, 1980-II, p. 411ss. WOLFRUM R., "Article 55 (a) and (b)" and PARTSCH K.-J., "Article 55 (c)", *The Charter of the United Nations – A Commentary*, B. Simma (ed.), pp. 759ss.

¹⁷⁷ See MEGRET, F., HOFFMANN, F., "The United Nations as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", *Human Rights Quarterly*, vol. 25, 2003, p. 319.

become a subject of "international interest".¹⁷⁸ According to the logic adopted by the founders of the Charter, the responsibility for respect and implementation of human rights lies exclusively with States. Nevertheless, it is hard to imagine that the World body, one of the declared purposes of which is to promote progress in human rights, and the constitutive Charter of which specifies that this is one of the essential conditions for sustainable peace, might use convoluted arguments to deny any responsibility for the respect of human rights as regards its own action. It would, indeed, be strange for the Organization to ask States to respect human rights while preserving almost total liberty for its own action. The progressive development of human rights since 1945 also weighs in favour of this position. Finally, UN practice shows that the Organization aims to ensure that its staff benefit from fundamental guarantees similar to those set out in State human rights protection. This practice obtained strong support from the International Court of Justice in its Judgement on the effects of the UNAT.¹⁷⁹ Accordingly, on balance, the most appropriate conclusion appears to be that the Organization has a double responsibility with respect to international human rights. On the one hand, the Organization must conduct and promote positive, concrete action in favour of the respect and enjoyment of human rights. On the other hand, the organisation itself must protect, implement and safeguard these rights when it exercises public authority, as it is directly bound by international obligations in such cases.

In conclusion, the Charter-based human rights norms and the considerable efforts since 1945 for to elaborate the major universal texts in this area, were the humus on which a UN obligation to safeguard and protect human rights within the framework of its operational activities has gradually developed. The Organization's practice confirms this. From an early stage, the international administrations planned or implemented for the Free Territory of Trieste (FTT), the City of Jerusalem and West Irian (UNTEA), leaned in favour of the Organization's obligation to respect certain fundamental human rights when exercising government powers. With the exception of the Statute of the FTT, a more or less detailed *ad hoc* "list" of rights was established. Although the normative parameters of these "lists" were not the same, the basic aim in each case was to ensure respect for a "core" of rights and fundamental freedoms. Yet it is the UNMIK operation in Kosovo that provides the best source of information.

The applicability of international human rights law to operational activities of the United Nations: ITCAs and peacekeeping forces – UNMIK

The obligation for ITCAs to respect international human rights law now seems to go without saying. Indeed, Security Council Resolution 1244, establishing UNMIK, gave it the task *inter alia* of "protecting and promoting human rights" [para. 11(j)]. The Secretary-General's first report on the Mission specified that it "will be guided by internationally recognized standards of human rights as the basis for the exercise of its authority in Kosovo", "will embed a culture of human rights in all areas of activity, and will adopt human rights policies in respect of its administrative functions".¹⁸⁰ In practice, the role of human rights was first raised when defining the applicable law for Kosovo during the international presence.

¹⁷⁸ Si Although the Charter does not list human rights, nor define any measures or mechanisms for their implementation and respect, this task was later accomplished by the General Assembly and the Economic and Social Council.

¹⁷⁹ ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, Reports 1954, p. 57.

¹⁸⁰ *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* (UN Doc. S/1999/779, 12 July 1999), para. 42.

The definition of the applicable law by UNMIK

The absolute priority for the original regulations adopted by the Special Representative of the UN Secretary-General (SRSG) in Pristina, was to define the legal regime for the activities of the international civilian mission, in order to allow it to commence execution of the Security Council mandate.¹⁸¹ UNMIK Regulation No. 1999/1 (25 July 1999), decreed that the applicable law would be the law in force in the territory on 10 June 1999, the date of establishment of the Mission (including laws of the FRY, the Republic of Serbia and the Province of the Kosovo), subject to their compatibility with three sources: (1) internationally recognized human rights standards; (2) UNMIK's mandate; and (3) any regulations later adopted by the SRSG.¹⁸² It was thus decided to combine existing "local" law with legislation adopted by the international civil mission through the SRSG. The legal backcloth was thus made up of the Mission's mandate and international human rights standards.

Maintaining the law in force in the territory at the date of establishing the Mission was essentially dictated by practical reasons. However, this choice created a number of problems that it is not possible to study in this article, which concentrates on problems relating to the application of international human rights norms.

The incorporation of international human rights standards by UNMIK

Under the heading, "*Observance of internationally recognized standards*", Article 2 of Regulation 1999/1 requires all persons undertaking public duties in Kosovo: a) to observe "internationally recognized human rights standards"; and b) to respect a classic non-discrimination clause, derived from international conventions on the subject. It was only later that Regulation 1999/24 specified that these internationally recognized standards are "as reflected in particular in":

1. the Universal Declaration of Human Rights;
2. the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto;
3. the International Covenant on Civil and Political Rights
4. the International Covenant on Economic, Social and Cultural Rights;
5. the Convention on the Elimination of All Forms of Racial Discrimination;
6. the Convention on the Elimination of All Forms of Discrimination against Women;
7. the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;
8. the International Convention on the Rights of the Child.¹⁸³

¹⁸¹ In Kosovo, for example, the first two weeks of UNMIK activities were governed by two emergency decrees: see BRAND M., "Effective Human Rights Protection When the UN 'Becomes the State': Lessons From UNMIK", *document distributed during the Conference on "The United Nations and Human Rights Protection in Post-Conflict Situations"*, University of Nottingham (UK), Human Rights Law Centre, Septembre 2002, p. 10.

¹⁸² Under Section 3 of the Regulation (UNMIK/REG/1999/1 "On the authority of the Interim Administration in Kosovo", dated 25 July 1999, *Official Gazette of the United Nations Interim Administration Mission in Kosovo*, Volume 1, 1999, p. 1): "The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply insofar as they do not conflict with standards referred to in section 2, the fulfilment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK".

¹⁸³ See Article 1.3 of the Regulation.

This framework was later confirmed in Regulation 2000/59. It may be questioned whether this was a satisfactory solution from the viewpoint of effective application of international human rights standards. It postulates the immediate, direct application of international law without any "national" approval procedure. These international human rights norms were not included in a constitutional document and no classic executive or legislative procedure was used to introduce them into national law.¹⁸⁴ Thus the treaty law was not formally ratified and incorporated into national law. Despite the absence of formal reception, these norms are nevertheless considered to be an integral part of the applicable law in Kosovo. One might speak of imposed "monism", obviating the need for either ratification or incorporation into national law.

The effective penetration of international human rights norms within the UNMIK legal regime depends on two interrelated elements: *a*) direct application of the norms, *i.e.* whether they are "self-executing" or not; *b*) their hierarchical position within the national legal system. Yet the UNMIK regulations do not classify the international norms according to their direct applicability. The chosen formula ("international... standards... as reflected in particular") is a catchall phrase. Furthermore, the relevant regulations provide no clear indication concerning the possible supremacy of international standards over other sources of law.¹⁸⁵ This creates a relatively "diffuse" system for the application of international human rights norms, even though the determination and interpretation of the applicable law is reserved to the SRSG as a last resort. It may be concluded that, if necessary, public officials should apply international standards in their individual decisions, even in the presence of incompatible national norms (including regulations adopted by the SRSG).¹⁸⁶

Practice relating to this point remains uncertain, however. The supremacy of international norms has had to be asserted by various authorities on several occasions, in order to ensure satisfactory implementation of the regulations. This question has arisen most acutely in relation to the application of these norms by criminal justice bodies. In this area, uncertainty concerning the applicable law was grafted onto other essentially material difficulties.¹⁸⁷ At an early stage, the mission's work in various areas encountered serious practical difficulties, exacerbated by inconsistent application of existing laws. In fact, many judges and lawyers were unfamiliar with the content and application of human rights conventions.¹⁸⁸

The functioning of the UNMIK emergency judicial system provides many examples of clear breaches of the principles of legality and predictability of criminal law and punishment. Since

¹⁸⁴ It may be recalled that legislative and executive powers are in any case concentrated in the hands of the SRSG.

¹⁸⁵ See KOLB R., PORRETTO G., VITE S., *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales : Forces de paix et administrations civiles transitoires*, 504 pp.

¹⁸⁶ See LAGRANGE E., "La mission intérimaire des Nations Unies au Kosovo, nouvel essai d'une administration directe d'un territoire", *AFDI*, vol. 45, 1999, p. 364.

¹⁸⁷ Indeed, the recruitment of lawyers to all the postes left vacant in all the branches of the administration represented the primary difficulty for the civil mission during the first months. The Albanian Kosovars had only played a limited role in the legal system during the 1990s. When the ACIT was established, it was very difficult to find qualified persons within the ethnic Albanian population (interview with Annamariam Roccatello, UNMIK Ministry of Justice, 15 May 2003). In the context of the establishment of an Emergency Judicial System, a certain number of judges and prosecutors were identified and named by a Joint Advisory Council on Provisional Judicial Appointment, or *JAC*, so as to allow the prosecution of persons arrested by KFOR immediately after the end of the NATO bombings. However, no Serbian candidates came forward when the official nomination was organised, or they resigned immediately afterwards (see *Department of Human Rights and Rule of Law : Kosovo, A Review of the Criminal Justice System, February–July 2000*, pp. 11ss). This situation was confirmed by Annamariam Roccatello.

¹⁸⁸ OSCE Mission in Kosovo, *Department of Human Rights and Rule of Law : Kosovo, A Review of the Criminal Justice System*, p. 16

the judges were acting as officials recruited by UNMIK, it may be said that the Mission, in the exercise of its legal powers, failed to respect certain international human rights standards, despite being expressly bound by these rules under the relevant regulations. In particular, the pre-eminence of international norms with respect to the UNMIK regulations does not appear to have been clearly established. The UN Secretary-General has noted that "there was a lack of clarity among local judges as to whether international human rights standards were supreme law in Kosovo" and that there was "evidence of bias on the part of the local judiciary against minorities".¹⁸⁹ In a letter to the President of the Belgrade Bar, dated 14 June 2000,¹⁹⁰ the SRSG was obliged to reiterate that under Article 1.3 of Regulation 2000/59, judges were not supposed to apply national norms that were incompatible with international human rights standards.¹⁹¹

The Ombudsperson for Kosovo expressed an extremely critical opinion on this question in a report on UNMIK Regulation 2000/59. After having noted the absence of any control over the human rights compatibility of the rules in force before March 1999, the report concludes: "*It is an inherent principle of international human rights law that the standards presumptively apply on a uniform basis to all laws in force*".¹⁹² Moreover, it explicitly stated that the Regulations neither incorporated nor otherwise rendered directly applicable the relevant human rights instruments: "*In the event that the drafters of UNMIK Regulation 2000/59 intended for Section 1.3 to incorporate or apply international human rights instruments directly in Kosovo, this purpose has not been achieved by the actual wording of that Section*".¹⁹³

The Ombudsperson also noted the difficulty in establishing whether the list of treaties set out in the regulations was exhaustive or not, in order to know whether it would be possible to invoke other norms or standards contained in relevant international instruments as part of Kosovo's legal system.¹⁹⁴ In this respect, it should be said that the "Constitutional framework" (adopted several months after the Ombudsperson's report) added the European Charter for Regional or Minority Languages and the Council of Europe Framework Convention for the Protection of National Minorities to the list of conventions included in previous regulations. Yet this regulation left unmodified the method used to incorporate international human rights norms into the national system, reiterating the concept of direct application in Kosovo of the provisions of these instruments relating to rights and freedoms "*as part of this Constitutional Framework*".

In conclusion, it should be noted that a complete, systematic revision of the applicable law in Kosovo was not undertaken for a long time. The system established by UNMIK may be seen, in many respects, as a "diffuse" application of international human rights norms. Accordingly, review of the compatibility of existing legislation with international standards was normally

¹⁸⁹ UN Doc. S/2000/1196, 15 December 2000, para. 44. The SG's position seems fully justified in light of the Declaration made to the OSCE Mission in Kosovo by the President of the Mitrovica District Court. He stated that international standards were not considered as part of the applicable law and thus were not applied by the Judges at the tribunal (see OSCE Mission in Kosovo, *Department of Human Rights and Rule of Law : Kosovo, A Review of the Criminal Justice System, 1 September 2000 – 28 February 2001*, p. 31).

¹⁹⁰ Quoted in the first report of the *Department of Human Rights and Rule of Law* of the OSCE Mission in Kosovo, *Review of the Criminal Justice System, February-July 2000*, p. 15.

¹⁹¹ On the basis of this letter, it would be possible to posit the existence of a principle of the primacy of international standards in this area over any inconsistent domestic law. Nevertheless, the SRSG apparently sees this as an indication or programme rather than the enunciation of a binding norm within the Kosovo legal system.

¹⁹² *Ombudsperson Institution in Kosovo, Special Report No. 2 on Certain Aspects of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (27 October 2000)*, para. 10.

¹⁹³ *Ibidem*, para. 12.

¹⁹⁴ *Ombudsperson Institution in Kosovo, Special Report No. 2 on Certain Aspects of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (27 October 2000)*, para. 10

delegated to each legal actor *uti singuli*, in the exercise of his or her specific jurisdiction. This control was not always exercised harmoniously, *a priori*, using specific proceedings. On the contrary, public officials applying the law, whether in the civil, administrative or penal areas, were required to give priority to international standards in their individual decisions, in cases where *ad hoc* decisions had not been adopted by the SRSG. This may explain the flawed, inconsistent character of the application of international human rights law in Kosovo.

KFOR and human rights standards

The fact that all the components of UNMIK are required to respect human rights results not only from the Secretary-General's report presenting the Mission plan¹⁹⁵ and Security Council Resolution 1244 (1999), but also from Regulation 2000/38 establishing the "Ombudsperson".¹⁹⁶ Besides, UNMIK has never claimed that it is not bound by these norms.¹⁹⁷

The situation is more controversial as regards KFOR. Indeed, none of the Security Council resolutions or Secretary-General's reports on the mission place the Force under an express obligation to exercise its mandate in compliance with internationally recognized human rights norms. In addition, the only relevant practice is a declaration by the SRSG for Kosovo, in July 1999, which stated unequivocally that KFOR, in assuming responsibilities under the Security Council mandate, would be subject to the obligations deriving from relevant international standards.¹⁹⁸ However, one may question the legal value of this declaration, since the SRSG has no hierarchical authority over the military component of the international mission. In addition, the members of KFOR do not come within the *ratione personae* scope of the regulations requiring "all persons undertaking public duties" in Kosovo to respect internationally recognized standards.

It must be recalled, in this respect, that KFOR is an international security mission established in accordance with the Petersberg Declaration and the Military Technical Agreement,¹⁹⁹ with Security Council authorization. It is deployed under unified command and control, with substantial NATO participation (nearly half the contributing States are not members of the Organization). The field contingents are organized into five multinational brigades, each responsible for a particular zone of operations, yet subject to a single chain of command, under the authority of the Commander of KFOR (COMKFOR).²⁰⁰ Given that the COMKFOR is clearly a NATO institution, it is important to establish its exact powers within the overall operation, especially over the operational command structure of the Force in the field.

Along the same lines as the conclusion concerning "Operation Allied Force", it would appear that in the case of KFOR, NATO only plays a coordinating role, since decisions taken by its bodies cannot override the autonomous decision-making power of each Member State with

¹⁹⁵ UN Doc. S/1999/779, 12 July 1999, para. 42.

¹⁹⁶ Under Article 3 of the Regulation, "*The Ombudsperson shall have jurisdiction to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution*".

¹⁹⁷ See the OSCE Report, *Review of the Criminal Justice System, February – July 2000*, p. 19.

¹⁹⁸ See the document entitled "Statement on the Right of KFOR to Apprehend and Detain", UNMIK Press Release, UNMIK/PR/7, 4 July 1999: <http://www.unmikonline.org/press/press/pr7.html>. The SRSG during the first phase of the Mission was Sergio Vieira de Mello.

¹⁹⁹ For the Petersberg Declaration, see: <http://www.weu.int/documents/920619peten.pdf>; for the Military Technical Agreement, see: <http://www.nato.int/kosovo/docu/a990609a.htm>.

²⁰⁰ See <http://www.nato.int/kfor/kfor/about.htm>.

respect to its own forces. The COMKFOR thus appears as a coordinating body for the action of several national contingents and the Organization simply heads a multinational operation. In particular, although the eighteen non-member States of NATO have agreed to place their contingents under unified command, it does not follow that they have accepted to subject them to all the international obligations of the Organization as such. Accordingly, NATO simply provides a connecting structure for military action by a number of States acting with the authorization and subject to a mandate established by the UN Security Council. The question of the application of international human rights norms during field operations must, therefore, be examined for each State providing troops to the operation, rather than in the name of the Organization. Of course, the situation would be different should Member States decide to redefine the structure of the Organization and the mechanisms for its operational activities, for example by setting up veritable peacekeeping operations placing the contingents deployed under the effective command and control of the Organization.

In conclusion, it appears that KFOR Member States may be bound in two respects. Firstly, whether they are NATO members or not, they are bound to respect conventional commitments that continue in force within the territory in question, and which apply as *erga omnes* obligations to all subjects exercising the prerogatives of public authority in the territory. Secondly, international human rights norms apply to KFOR contingents through the conventional engagements of the States participating in military operations. This conclusion is a consequence of the fact that, beyond the coordinating role played by the COMKFOR, effective command and control over the deployed forces continues to be exercised by their home States. Thus, these forces are still under the authority of their respective States.

B. THE *RATIONE MATERIAE* APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS NORMS TO THE ACTIVITIES OF INTERNATIONAL ORGANIZATIONS

1. The coexistence of civil administration and military activities

The ITCA in Kosovo was deployed immediately after an armed conflict involving serious violence and the collapse of local institutions. During the following, post-conflict period, the priority was to maintain the newly re-established peace and pass on to the reconstruction of State structures. It is not often possible to trace clear temporal frontiers between phases requiring the exclusive application of international humanitarian law or another legal regime. In other words, the complex, articulated nature of the situation on the ground generally translates to legal complexity and articulation of the potentially applicable legal regimes. Such ambiguous situations cannot always be forced into the dichotomous framework opposing a state of armed conflict to a state of peace. The dividing line between applicable legal regimes is also unclear. Therefore, the applicable law for the civil administration phase, including the reconstruction of governmental and administrative structures, cannot be examined without taking account of the legal framework and "legacy" of preceding phases, during which the logic of military intervention prevailed.

International humanitarian law can only be applied to the extent that the operations in question reach the threshold of armed conflict. While it is true that the first phase of establishment of an ITCA is characterized by a pre-eminent role for the military contingent, this does not necessarily mean that armed confrontations will occur between these forces and organized groups or nongovernmental movements. On the contrary, these actions generally take the form of public

order missions, to which the law of armed conflict is not applicable.²⁰¹ Human rights must thus take over so as to guarantee the protection of the civilian population. The analysis of the law applicable *ratione materiae* by international organizations in such complex situations, which often cover long time periods, creates problems with respect to the interaction between differing legal regimes.

2. The applicable law for operations aimed at maintaining public safety and order

The Kosovo case perfectly illustrates the problems relating to the *ratione materiae* applicability of international human rights law in missions where an international civil component is accompanied by an international military force.

It may be observed, by way of introduction, that the Security Council did not bother to clearly define the powers of the international civil presence regarding public safety, simply requesting UNMIK to protect and promote human rights.²⁰² The same comment may be made concerning KFOR's mandate, since the Council gave it power, *inter alia*, to "ensure public safety and order",²⁰³ without further defining this task. It is clear, however, that the military forces deployed at the same time as the international civil presence was established, were also prepared to conduct armed operations.²⁰⁴ Indeed, the KFOR mission in Kosovo was part of a complex mandate for peace *restoration*, based on Chapter VII of the Charter. Yet, the division of powers was not always clear between operations aimed at restoring peace and police operations, aimed at ensuring order in the streets. Moreover, jurisdiction over public order was transferred from KFOR to UNMIK, especially its civilian police component (UNCIVPOL), in progressive stages.²⁰⁵ Security Council Resolution 1244 determined that KFOR would be responsible for these tasks "until the international civil presence can take responsibility..."²⁰⁶

The attribution to KFOR of powers that would normally fall under the jurisdiction of civil authorities resulted from the needs of a mission intended to put an end to a constantly evolving emergency situation.²⁰⁷ The force's mandate must be interpreted extensively, at least during the initial phase of operations, which was carried out in particularly difficult circumstances.²⁰⁸ Indeed, the military presence acted in the absence of either a local police force or a functioning legal system.²⁰⁹ Its tasks thus included both administrative police and judicial police functions. Yet the flexibility of the terms of Security Council Resolution 1244 do not make it easy to identify with precision the legal framework for operations of the international presence in Kosovo, especially KFOR's activities. Following are some concrete illustrations of the problems

²⁰¹ On this point, see FORTEAU M., "La situation juridique des contingents militaires français chargés d'assurer le maintien de l'ordre public sur le territoire d'un Etat étranger", *RGDIP*, vol. 105, 2003, p.651.

²⁰² See Resolution 1244 (1999), para. 11(i) and (j).

²⁰³ *Ibidem*, para. 9(d).

²⁰⁴ GUILLAUME M., MARHIC G., ETIENNE G., "Le cadre juridique de l'action de la KFOR au Kosovo", *AFDI*, vol. 45, 1999, p. 329.

²⁰⁵ See *ibidem*.

²⁰⁶ Para. 9 of Resolution 1244.

²⁰⁷ GUILLAUME M., MARHIC G., ETIENNE G., "Le cadre juridique de l'action de la KFOR au Kosovo", p. 323, who argues that this mandate cannot be limited to "the classic trilogy of security–tranquility–salubrity" (our translation).

²⁰⁸ *Ibidem*.

²⁰⁹ JOHNSON M. S. argues that "[t]he absences of civil police and court system were two of the more daunting problems. Military authorities normally eschew undertaking civil police roles, but there was no alternative" ("Headquarters KFOR", *The Handbook of The Law of Visiting Forces*, D. Fleck (ed.), Oxford, Oxford University Press, 2001, p. 342).

that have arisen, essentially concerning police and security activities (especially arrest and detention powers).

The administrative and judicial police in Kosovo

Administrative police activities involve maintaining public safety and the execution of police measures ordered by the judicial and administrative authorities.²¹⁰ These tasks were aimed at "ensuring public safety and order until the international civil presence can take responsibility for this task", according to the terms of Resolution 1244. The KFOR command referred to them as "security", "interposition" or "crowd control" services.²¹¹ The forces deployed in this context were not authorized to forcibly disperse crowds unless there was a threat to the security service itself.²¹² During early operations, the UNMIK police forces (generally gendarmes) relied on support from the armed forces. When confronted with aggressive opposition, some KFOR units had to fire warning shots to keep control of situations bordering on direct confrontation.²¹³

Judicial police activities consist of "taking note of offences, gathering evidence and seeking those responsible in order to hand them over for prosecution and trial by the competent authorities".²¹⁴ These tasks continue during the prosecution phase, including cooperation with the investigating bodies and execution of their orders.²¹⁵

Given the division of powers between KFOR and the UNMIK police during the early period, jurisdiction over judicial police remained solely within the ambit of the military forces.²¹⁶ Yet, as a rule, military forces are not trained in conducting judicial police investigations. The only exceptions in KFOR were the French *gendarmes* and Italian *carabinieri* units.²¹⁷ Later, the gradual transfer of authority from KFOR to UNMIK provided for in Resolution 1244 led to cooperation between military forces and the UNMIK police for the purposes of disarmament operations and ensuring public security. Coordination with the judicial police officers was necessary in order to commence prosecutions following offences.²¹⁸ Judicial police forces, especially *gendarmes* units, were included in coordinated operations.²¹⁹

²¹⁰ See PIQUERREZ G., *Procédure pénale suisse*, Zurich, Schulthess, 2000, p. 223.

²¹¹ GUILLAUME M., MARHIC G., ETIENNE G., "Le cadre juridique de l'action de la KFOR au Kosovo", p. 329.

²¹² *Ibidem*, pp. 329ss.

²¹³ *Ibidem*. One example was the renewed violence in the Northern multinationale brigade's zone of responsibility (under French command), involving violent demonstrations and repeated attempted attacks between communities. Consequently, action was taken to restore law and order and introduce a curfew, with UNMIK and KFOR participation (see *ibidem*).

²¹⁴ PIQUERREZ G., *Procédure pénale suisse*, p. 224 [our translation].

²¹⁵ GUILLAUME M., MARHIC G., ETIENNE G., "Le cadre juridique de l'action de la KFOR au Kosovo", p. 329.

²¹⁶ See *supra*, Chapter II, section B, Case study. For example, in the Northern multinationale brigade's zone of responsibility (French KFOR contingent), the agreement on transfer of competence between KFOR and the UNMIK police was only concluded on 22 October 1999, four months after deployment of both international presences in Kosovo.

²¹⁷ See *supra*, Chapter II, section B, para. 2.2.

²¹⁸ GUILLAUME M., MARHIC G., ETIENNE G., "Le cadre juridique de l'action de la KFOR au Kosovo", p. 327.

²¹⁹ *Ibidem*. For example, under the rules of engagement of certain preventive security operations in Mitrovica, KFOR soldiers were given the power to stop and search anyone, whereas the UNMIK police dealt exclusively with judicial police tasks (arrest and interrogation). Before the UNMIK police was established, administrative and judicial police missions were undertaken by special KFOR units, called "*Military Special Units*" (MSU). The progressive transfer of powers from KFOR to UNMIK has not yet been completed. As a general rule, KFOR uses the gendarmerie in situations where the discovery of offences requires the establishment of police reports or the launching of administrative or criminal proceedings.

The question, then, is the place of international human rights norms in the law applicable *ratione materiae* to these operations. The contingents deployed in the early days of the Mission acted in a fairly uncertain legal framework. Resolution 1244 was silent on this point. The above-mentioned authors indicate unequivocally that strictly military arms search and seizure operations "[were not] necessarily conducted within the framework of judicial proceedings and did not have to be conducted by judicial police officers".²²⁰ They were based on operational orders from military force commands, which specified the procedure to be followed by all battalions in case of verified criminal offences. However, operational orders are confidential documents. Thus, it is impossible to know whether they followed the logic of international humanitarian law or other rules. The same applies for KFOR's "Rules of Engagement", *i.e.* all the rules covering the action by this force, which give operational and legal effect to the political orientation provided by the military leaders.²²¹ In particular, these rules of engagement set limits on the use of force. In addition, they include rules on the detention and surveillance of prisoners, body searching and the disarmament of hostile persons.²²² They undoubtedly authorized the use of armed force, since the recrudescence of violent attacks called for a wide mandate.²²³ Yet the legal basis for the adoption of operational orders is not very clear. In this respect, KFOR has always invoked its powers under Resolution 1244. In other words, these operations were characterized as urgent measures taken in order to establish a "secure environment in Kosovo". This position calls for some consideration.

In order to ensure respect for international human rights norms, operational orders and rules of engagement must be read in a way that is adapted to real situations. The authorization to use force must be modulated on the basis of necessity and proportionality. Armed ripostes must therefore be moderated in situations of simple public disorder. The recourse to strong arm interventions must be strictly justified, applying the so-called "increasing force" operational rule, now well known to the police forces of most States having a liberal constitutional regime: the use of force must be proportional to the escalation of violence.²²⁴

International instruments now codify standards concerning the recourse to force and the use of firearms. Particular mention should be made of the *Code of conduct for Law enforcement Officials*, adopted by the UN General Assembly on 17 December 1979,²²⁵ and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.²²⁶ These instruments do not lay down compulsory rules. The "Principles on the Use of Force" open with a reminder that it is for public authorities and the police to adopt and apply relevant regulations. However, a distinction may be made between the legal value of these instruments for States and for the United Nations itself or another international organization. For the former, they are nothing more than a recommendation. For the United Nations, on the contrary, they express the

²²⁰ GUILLAUME M., MARHIC G., ETIENNE G., "Le cadre juridique de l'action de la KFOR au Kosovo", p. 327 [our translation].

²²¹ *Ibidem*, p. 324.

²²² *Ibidem*, p. 325.

²²³ *Ibidem*.

²²⁴ Interview with Christian Pédrón, member of the UNMIK "Special Police Unit", 14 May 2003.

²²⁵ See UNGA RES/34/169, in particular Article 3 : "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty". Respect for and protection of fundamental freedoms for all is recognized in Article 2 of the Code of conduct.

²²⁶ This document was adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1, at 112.

will of its primary body, the General Assembly. It is unthinkable that a UN body, or a mission set-up by the Organization, might take the same liberties with regard to these norms as a Member State, acting outside the Organization. It is regrettable, therefore, that these principles were not incorporated in Security Council Resolution 1244. Moreover, no reference was made to more recent documents drafted by the United Nations on the subject, despite the fact that one of them is specifically aimed at the civilian police components of peacekeeping operations.²²⁷

As might be expected, each contingent fell back, by "professional reflex" to its own domestic law,²²⁸ especially the criminal law and procedure with which its members were familiar. This is exactly what the French gendarmes did, for example, during the original emergency, while waiting for the applicable law of the territory to be determined.²²⁹ Recourse to the domestic norms of the State of origin is an appropriate way to provide a legal framework for the early phases of establishing international forces. It fills the gaps created by uncertainty as to the applicable law. Indeed, it was only a month after the arrival of the first contingents that the SRSG adopted rules relating to the applicable law for Kosovo.

In addition, some problems were not fully resolved, even after the adoption of these rules. The first was the continuing difficulty in obtaining French or English language copies of the relevant local laws. Secondly, this method was sometimes of little use for the implementation of international human rights norms, given that there was no attempt at systematic revision and completion of the former law in light of those standards. Consequently, it was foreseeable that some laws in breach of international human rights norms would survive and continue to be applied by certain officials. Added difficulties were caused by the collapse of the pre-existing local legal system.

As the Brahimi panel observed with reference to the ITCAs in Kosovo and East Timor, "[t]hese missions' tasks would have been much easier if a common United Nations justice package had allowed them to apply an interim legal code to which mission personnel could have been pre-trained while the final answer to the 'applicable law' question was being worked out".²³⁰ In a short-term perspective, this solution is clearly the most preferable. Indeed, the elaboration of a new system of applicable law for the territory and the restoration of the local legal system from scratch can only be envisaged in the long term. Nevertheless, the temporary model codes called for by the Brahimi panel do not yet exist. The need to provide a satisfactory solution to these problems during the emergency phase remains open. This brings us back to the need to apply pre-existing local law in the absence of any alternative. Despite the difficulties already raised,²³¹ local law has the important advantage of being better known not only to the local population but also to local legal personnel (who will be called upon in any case to aid in the reconstruction of a temporary legal system).

²²⁷ We mainly refer to "*United Nations Criminal Justice Standards for Peace-Keeping Police*", a handbook drawn up in February 1994 by the UN Crime Prevention and Criminal Justice Branch of the UN Office in Vienna and the *Code of Conduct for Law Enforcement Officials*, adopted by the UN General Assembly in 1979. During a visit to Kosovo, it became clear that these publications were unknown to both the UNMIK civil police and the KFOR forces.

²²⁸ GUILLAUME M., MARHIC G., ETIENNE G., "Le cadre juridique de l'action de la KFOR au Kosovo", p. 333.

²²⁹ *Ibidem*.

²³⁰ *Report of the Panel on United Nations Peace Operations*, UN Doc. A/55/305-S/2000/809, 21 August 2000, paras. 79-80.

²³¹ See *supra*, section A, para. 4.1.

Whatever the results obtained by the working group set up following the recommendations of the Brahimi panel,²³² it may be concluded that, by respect for the principle of legal security and the predictability of applicable law, the need for uniform laws and procedure throughout the territory arises from the very beginning of the international operation. The Security Council should, on the basis of the report generally submitted by the Secretary-General before the establishment of any operation, clearly determine the law to be applied by the personnel of the military and civil missions from day one of deployment. In the absence of such a decision, the application of the domestic law of the States providing personnel may be appropriate, but should be strictly limited to cases where it is truly necessary and must rapidly give way to the entry into force of a uniform system of law and procedure.

In practice, problems relating to respect for international human rights standards in Kosovo were most clearly brought to light in the area of security measures, including extrajudicial detention.²³³

²³² See *Report of the Secretary-General on the implementation of the report of the Panel on United Nations peace operations*, UN Doc. A/55/502, 20 October 2000 ; *Resource requirements for implementation of the report of the Panel on United Nations Peace Operations*, UN Doc. A/55/507, 20 October 2000 ; *Implementation of the recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations*, UN Doc. A/55/977, 1 June 2001. *Implementation of the recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations*, UN Doc. A/56/732, 21 December 2001.

²³³ UNMIK/REG/1999/2, 12 August 1999. For a detailed examination of these questions, see *Ombusperson Institution in Kosovo, Special Report No. 3 on The Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards*, adressé au RSSG le 29 July 2001, GUILLAUME M., MARHIC G., ETIENNE G., "Le cadre juridique de l'action de la KFOR au Kosovo". See KOLB R., PORRETTO G., VITE S., *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales : Forces de paix et administrations civiles transitoires*, 504 pp.

CHAPTER IV
IMPLEMENTATION OF THE LAW APPLICABLE TO THE ACTIVITIES OF INTERNATIONAL ORGANIZATIONS

A. MECHANISMS ESTABLISHED UNDER INTERNATIONAL HUMANITARIAN LAW

We have established that international organizations involved in armed conflicts are bound by international humanitarian law as a whole, to the extent that these norms are materially adapted to their specific structure. The following section covers the role that the control mechanisms established within this legal framework can play in armed conflicts involving international organizations.

1. Protecting Powers and their Delegates

The concept of Protecting Powers is at the heart of the system for implementation of the law of international conflicts.²³⁴ The idea behind this mechanism is that a State that is not involved in the conflict takes responsibility for safeguarding the interests of one of the belligerents with respect to one or more adversaries. Article 8/8/8/9 common to the four 1949 Geneva Conventions provides that the Conventions shall be applied "with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interest of the Parties to the conflict".²³⁵ If a Protecting Power is not designated, alternative solutions are proposed. In some cases, a neutral State or even a humanitarian body may replace it.²³⁶

In the context of this study, resort may be had to Protecting Powers in the search for an adequate solution to the need to control the behaviour of the belligerents. From a strictly legal viewpoint, this solution could be based directly on treaty law, if the international organization in question made the still hypothetical choice, as we know, to sign the relevant international humanitarian law instruments, or ratify a new treaty specially addressing the problem. As regards the current situation, under which international organizations are bound by the "principles and rules" of international humanitarian law, the Protecting Power could be designated directly by the parties to the conflict on the basis on an *ad hoc* agreement.

In both cases, the procedure for establishing the mechanism would not be fundamentally different, since it will always be necessary to reach an agreement between the organization and the State concerned at the time of the conflict. Indeed, although common Article 8 seems to create a pre-established, compulsory mechanism, since it provides that each Convention "shall be applied" with the cooperation and under the scrutiny of the Protecting Powers, it adds that the

²³⁴ ABI-SAAB G., "Les mécanismes de mise en œuvre du droit humanitaire", *RGDIP*, vol. 82, 1978, pp. 2 s. See in general, CICR, *Commentaire des Conventions de Genève du 12 August 1949*, Vol. 1, pp. 93-113 and 123-138. DOMINICE C., PATRNOGIC J., "Les Protocoles additionnels aux Conventions de Genève et le système des puissances protectrices", *Annales de droit international médical*, Vol. 28, 1979, pp. 24-50. SANDOZ Y., "Mise en œuvre du droit international", *Les dimensions internationales du droit humanitaire*, Paris, UNESCO, 1986, pp. 308-319. COULIBALY H., "Le rôle des Puissances protectrices au regard du droit diplomatique, du droit de Genève et du droit de La Haye", *Mise en œuvre du droit international humanitaire*, F. Kalshoven et Y. Sandoz (Ed.), Dordrecht/Boston (etc.), Nijhoff, 1989, pp. 69-78. BUGNION F., *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, Genève, CICR, 1994, pp. 989-1002.

²³⁵ The 1949 Geneva Conventions, Common Art. 8/8/8/9.

²³⁶ For the history of this mechanism, see VITE S., *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Bruxelles, Bruylant, 1999, p. 34ss and 96ss.

latter's delegates are subject to acceptance by the party with whom they will work. This effectively requires belligerents to conclude an *ad hoc* implementation agreement.

Although Protecting Powers may legally participate in the implementation of international humanitarian law during wars involving international organizations, the chances of this actually occurring are unlikely for political and practical reasons. Experience shows that the Protecting Powers mechanism has almost never worked since the entry into force of the Geneva Conventions in 1949. Indeed, it has only been applied on five occasions²³⁷, and was always unsatisfactory.²³⁸ Although there are many reasons for this failure,²³⁹ the overriding cause is simply that States always seek to avoid, to the extent possible, any form of international control over conflicts in which they are involved. The designation of a Protecting Power is all the more improbable, in this respect, as it requires the conclusion of an agreement during the hostilities.

There are also difficulties due to the extent of the activities required of Protecting Powers, creating a burden that States may refuse to shoulder.²⁴⁰ The Geneva Conventions considerably increase the functions generally attributed to Protecting Powers, thus discouraging many governments from assuming these duties. The political cost of this type of activity may also be heavy.

It may thus be observed that this mechanism is not adapted to the need for scrutiny in current armed conflicts. The practical experience of the interstate wars of the last fifty years is undoubtedly also true for those that are likely to oppose States and international organizations in the future.

2. Enquiry Procedures

Where it is alleged that international humanitarian law has been breached, common Articles 52/53/132/149 to the 1949 Geneva Conventions provide that an enquiry shall be instituted at the request of a party to the international armed conflict. The "interested parties" must then decide on the appropriate mechanism. In case of any disagreement, they should designate an umpire to choose the appropriate procedure.

This mechanism offers a further possibility, based on international humanitarian law, to establish a form of control over international armed conflicts involving international organizations. Assuming that the belligerents decide to use this sort of procedure, there is no legal obstacle to its application in this context. In practice however, as with the Protecting Powers system, one

²³⁷ For more details concerning these examples, see BUGNION F., *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, pp. 1009ss. FORSYTHE D.P., "Who Guards the Guardians: Third Parties and the Law of Armed Conflict", *AJIL*, vol. 70, 1976, pp. 41-61. ROBERTS A., "The Laws of War: Problems of Implementation in Contemporary Conflicts", *Duke J. Comp. & Int'l L.*, vol. 6, Fall 1995, p. 32. VITE S., *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, p. 37.

²³⁸ ABI-SAAB G., "Les mécanismes de mise en oeuvre du droit humanitaire", p. 7.

²³⁹ See *Respect for Human Rights in Armed Conflicts*, Report of the Secretary General, UN Doc. A/7720 (1969), para. 213, ABI-SAAB G., "Les mécanismes de mise en oeuvre du droit humanitaire", p. 8. BUGNION F., *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, p. 1011.

²⁴⁰ COULIBALY H., "Le rôle des Puissances protectrices au regard du droit diplomatique, du droit de Genève et du droit de La Haye", *Mise en oeuvre du droit international humanitaire*, F. Kalshoven et Y. Sandoz (Ed.), Dordrecht/Boston (etc.), Nijhoff, 1989, pp. 75 s. CONDORELLI L., "L'inchiesta ed il rispetto degli obblighi di diritto internazionale umanitario", *Scritti degli allievi in memoria di Giuseppe Barile*, Padova, CEDAM, p. 242.

should not be overly optimistic as to the usefulness of this mechanism. The investigation procedure has basically remained ineffective despite being updated in 1949.²⁴¹

The main reason for this failure is the fact that each belligerent retains control over the establishment of an enquiry, since a request by one of them is not enough, of itself, to open an investigation. Indeed, the parties involved must seek a compromise concerning either the implementation of the enquiry or the choice of an umpire. Although the terms of this provision seem to indicate that the principle of an enquiry is a right that must be satisfied upon the request of a single party, its practical effects are deceptive. This is true for both interstate war and conflicts involving international forces.

In conclusion, the usefulness of enforcement mechanisms that can only be instituted under an agreement between the belligerents is limited. In most cases, the binding provisions establishing their legal basis remain unapplied. Thus, they do not provide a sufficiently reliable basis for guaranteeing satisfactory control over international forces in the field. One way of overcoming this obstacle would be to rely on the authority of the Security Council. As the UN Secretary-General suggested in his 1999 report on the protection of civilians in armed conflict,²⁴² the Council could establish *ad hoc* fact-finding commissions to enquire into allegations involving the members of international forces. This could take inspiration from its experience in the former Yugoslavia and Rwanda.²⁴³ Depending on the facts of each case, these commissions could rely on either international humanitarian law or the relevant human rights instruments.²⁴⁴ Another solution would be to rely on mechanisms that can be set in motion automatically. In the 1970s, this idea led to the establishment of what was to become the International Fact-Finding Commission.

3. The International Fact-Finding Commission (IFFC)

Article 90 of Additional Protocol I of 8 June 1977 provides for the creation of a permanent body, called the International Fact-Finding Commission (hereafter "IFFC"),²⁴⁵ with an enquiry and good offices role with respect to international humanitarian law.²⁴⁶ The Commission does not

²⁴¹ For practice in this area, see BUGNION F., *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, pp. 1099s. On the historical evolution of enquiry procedures under international humanitarian law, see VITE S., *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, pp. 30ss.

²⁴² *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc. S/1999/957, 8 September 1999.

²⁴³ Resolution 780 (1992), 6 October 1992, Resolution 935 (1994), 1 July 1994.

²⁴⁴ *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc. S/1999/957, 8 September 1999, para. 61.

²⁴⁵ See <http://www.ihffc.org/>. In order to clarify the nature of its competence, the Commission decided to modify its name under Protocol I. The title of its internal rules thus refers to the International *Humanitarian* Fact-Finding Commission.

²⁴⁶ *Protocol additional I*, Art. 90(2)(c). Generally on the IFFC, see: <http://www.ihffc.org/fr/aboutus.html>. BRETTON Ph., "La mise en œuvre des protocoles de Genève de 1977", *RDPS*, Tome 95, 1979, pp. 395-403. TAKEMOTO M., "The Enquiry Procedure Under International Law", *Kansai University R. of Law and Politics* no 1, 1980, pp. 21-46. KUSSBACH E., "Commission internationale d'établissement des faits en droit international humanitaire", *RDPM*, XX-1-2, 1981, pp. 91-116. BOTHE M., PARTSCH K.J., SOLF W.A., *New Rules for Victims of Armed Conflicts*, The Hague/Boston (etc.), Nijhoff, 1982, pp. 525-546. SANDOZ Y. et al. (Ed.), *Commentaire des Protocoles additionnels du 8 June 1977 aux Conventions de Genève du 12 August 1949*, Genève, CICR et Nijhoff, 1986, pp. 1061-1077. SCHAEFER O., "Der Art. 90 des I. Zusatzprotokolls-Ein Mittel zu Beachtung des humanitären Völkerrechts", *IDRK*, Heft.1, Oktober 1988, pp. 38-39. KRILL F., "La Commission Internationale d'Etablissement des Faits - Rôle du CICR", *RICR*, n° 788, 1991, pp. 204-221. ROACH J.A., "La Commission Internationale d'Etablissement des Faits-

have compulsory jurisdiction over all High Contracting Parties. During the negotiations, most of them refused to accept any abstract jurisdiction, applicable to all future conflicts in which they might become involved. For this to occur, the Parties must express a double consent: first, by ratifying or adhering to Protocol I and then by declaring "that they recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission".²⁴⁷ Even in such cases, the competence of the Commission is limited, since its powers of enquiry are limited to a "grave breach ... or other serious violation" of the Conventions or the Protocol.²⁴⁸

In order for the compulsory competence of the IFFC to be applicable to the activities of international forces, the organization in question would have to sign Protocol I and make the required declaration of acceptance. This would be a useful way of conferring part of the implementation of international humanitarian law on an existing, independent body benefiting from the authority of Protocol I. This possibility would be a desirable alternative to the internal control proceedings of the organizations in question. Indeed, it may be doubted whether an injured party would be satisfied by any steps undertaken by the very organization against which it has filed a complaint.

Another possibility, clearly less procedurally complicated, would be to apply the mechanism established for other non-state actors (national liberation movements, as defined in Article 1(4) of Protocol I), to international organizations, by analogy. Under Article 96(3) of the Protocol, such movements may make a unilateral declaration to the depositary that they will apply the Conventions and Protocol. Such declarations confer the same humanitarian rights and obligations on the movement in question as those accepted by the High Contracting Parties. This includes, in particular, the right to recognize the compulsory competence of the IFFC.²⁴⁹ Similarly, an international organization in conflict with a State could also agree to be bound in this way by making declarations under both Article 96(3) and Article 90(2)(a).

Even where the High Contracting Parties are not prepared to recognize the compulsory competence of the IFFC, they may still submit a case to it during an ongoing conflict, but only with the consent of all the "interested parties".²⁵⁰ In such cases, requests to the Commission would remain optional for all belligerents, bringing the situation back to the logic of compromise.

This double source of abstract or concrete competence was adopted in the hope that Article 90 would satisfy the diverse requirements of States, thus facilitating establishment of the IFFC. This hope remains unsatisfied, however, since the Commission has never had the opportunity to put the expertise of its members into practice after more than twelve years of existence. The chances of one day seeing the IFFC enquire into allegations of breaches of international humanitarian law

L'article 90 du Protocole I additionnel aux Conventions de Genève de 1949", *RICR*, n° 788, 1991, pp. 178-203. CONDORELLI L., "L'inchiesta ed il rispetto degli obblighi di diritto internazionale umanitario", pp. 225-308. VITE S., *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, pp. 43ss, 99ss, 146ss, 211ss.

²⁴⁷ *Protocol additional I of 1977*, Art. 90(2)(a).

²⁴⁸ *Protocol additional I of 1977*, Art. 90(2)(c).

²⁴⁹ See on this point CONDORELLI L., "L'inchiesta ed il rispetto degli obblighi di diritto internazionale umanitario", p. 262. *Contra*, see BOTHE M., PARTSCH K.J., SOLF W.A., *New rules for victims of armed conflicts*, p. 543. SANDOZ Y. (Ed.), *Commentaire des Protocoles additionnels du 8 June 1977 aux Conventions de Genève du 12 August 1949*, p. 1069. DAVID E., *Principes de droit des conflits armés*, pp. 516s.

²⁵⁰ *Protocol additional I of 1977*, Art. 90(2)(d).

involving international organizations, is thus limited. Furthermore, it must be said that the effective impact of the procedure remains weak, since the conclusions of the enquiry are only published if all the parties to the conflict request it.²⁵¹ Any change in behaviour would depend solely on the hypothetical willingness of the guilty party. By reason of the confidential nature of the enquiry, any recourse to pressure from international opinion would be impossible in such cases.²⁵²

In sum, strict respect for the implementation procedures established by international humanitarian law generally leads to failure. In fact, the results of the Protecting Powers, the enquiry procedure and the IFFC is almost nil. In practice, it has thus been necessary to eschew strict application of the law in favour of a more pragmatic approach, with the ICRC assuming the bulk of the work.

4. The International Committee of the Red Cross (ICRC)

Legal sources of ICRC competence

As the primary organization responsible for the implementation of humanitarian law, and more particularly for the protection of military and civilian victims of war, the ICRC²⁵³ must naturally carry out control activities in fulfilling its mission. In the exercise of its tasks, the ICRC makes field visits which, in cases where humanitarian law has been breached, lead it to make confidential contact with the responsible authorities.

Legally, the ICRC has competence to carry on such activities for several reasons. During international armed conflicts, in addition to those cases where the Geneva Conventions give it express control duties,²⁵⁴ the ICRC can also be designated as a substitute for the Protecting Powers under common Article 10(1) and (2) [Fourth Convention, Art. 11].²⁵⁵ Even where the Geneva Conventions do not expressly designate the ICRC, as such, legal writers have long recognized that this provision applies to the Geneva based body.²⁵⁶ This competence is therefore solidly based from a theoretical viewpoint. However, it has never been formally exercised in practice.²⁵⁷

The ICRC still manages to play a quasi-substitute role by spontaneously proposing its services to the parties at war. This right to take the initiative is clearly recognized within the Protecting Powers framework.²⁵⁸ In such cases, the ICRC acts as a quasi-substitute and the authorities it approaches are obliged to accept its proposals, unless they have requested the services of another

²⁵¹ *Protocol additional I of 1977*, Art. 90(5)(c).

²⁵² On the questions of confidentiality and the role international opinion, see VITE S., *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, pp. 385ss et 410ss.

²⁵³ <http://www.icrc.org/eng>.

²⁵⁴ See *IIIrd 1949 Geneva Convention*, Art. 126(4), *IVth 1949 Geneva Convention*, Art. 143(5).

²⁵⁵ See BUGNION F., *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, pp. 1012-1061.

²⁵⁶ See, in particular, SANDOZ Y., "Mise en œuvre du droit international", *Les dimensions internationales du droit humanitaire*, Paris, UNESCO, 1986, p. 318.

²⁵⁷ See BUGNION F., *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, pp. 1041-1050.

²⁵⁸ *1949 Geneva Conventions*, common Art. 10/10/10/11 para. 3.

humanitarian organization.²⁵⁹ If international organizations were to adhere to the 1949 Geneva Conventions, the ICRC would thus have a right of scrutiny over the behaviour of international forces in the field. However, due to this element of constraint, the ICRC hesitates to base its action on this competence in practice, generally preferring persuasion rather than pressure.

To this end, the ICRC has been granted the right freely and at all times to propose its services to any State or armed group involved in an armed conflict.²⁶⁰ The right to take the initiative is subject, nevertheless, to the agreement of the belligerents. The offer of services is free of any obligation, and may always be refused. Although the parties to the conflict have a duty to take the offer into consideration and not reject it arbitrarily, this basis for ICRC action remains fragile.

ICRC practice with respect to international organizations

On the basis of this freedom to propose its services, the ICRC has already been given some occasion to scrutinize the behaviour of international organizations in the field. Given its mandate, this practice has essentially developed in the area of detention. In 1961, for example, it was given the right to make regular visits to combatants held by the forces of the UN operation in the Congo (ONUC).²⁶¹ This was also the case in 1999 for persons held by KFOR and UNMIK,²⁶² and those persons detained by UNTAET in East Timor.²⁶³

Practice thus confirms the implications of the law, since the ICRC has the power to exercise limited control over the activities of international forces. Nevertheless, this practice is based on humanitarian diplomacy rather than the recognition of any binding obligation of the organizations in question. The mandate of the ICRC in the abovementioned cases resulted from agreements concluded on a case-by-case basis.

The ICRC is thus the sole implementation mechanism provided for in international humanitarian law treaties that actually functions in the situations raised by this study. Although ICRC action is necessary, it is not sufficient. ICRC policy gives priority to gaining access to the victims of hostilities. However, it does not seek to determine the responsibilities of the belligerents.²⁶⁴ It gives precedence to negotiation rather than denunciation. For these reasons its scrutiny is confidential, in principle, and it is extremely circumspect when asked to comment on alleged breaches of humanitarian law. In responding to a complaint, it could upset the authorities in question and compromise its main activities. Therefore, it is indispensable to envisage other

²⁵⁹ PICTET J. (ED.), *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne : commentaire*, Genève, CICR, p. 135.

²⁶⁰ Under the law of international armed conflict : Art. 9/9/9/10 common to the 1949 Geneva Conventions, Art. 81(1) of the Protocol additional I of 1977. Under the law of non international armed conflict : Common Art. 3(2). The right of initiative is also set out in Art. 5(2)(d) and (3) of the Statutes of the International Red Cross and Red Crescent Movement. For a detailed analysis of this question, see BUGNION F., *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, pp. 457-530. See aussi CONDORELLI L., "L'inchiesta ed il rispetto degli obblighi di diritto internazionale umanitario", p. 245.

²⁶¹ CICR, *Activity Report 1961*, pp. 10-11.

²⁶² CICR, News 02/02, *Yugoslavia / Kosovo: Summary of ICRC work last year to help detainees in Yugoslavia*, 18 January 2002.

<http://www.cicr.org/Web/Eng/siteeng0.nsf/iwpList74/05D87BCEC6FB7592C1256B660060E81E>

²⁶³ ANTOULAS Syméon, Deputy Head of operations for South-East Asia and Pacific, Interview, 17 January 2003.

²⁶⁴ PFANNER T., "Le rôle du Comité international de la Croix-Rouge dans la mise en œuvre du droit international humanitaire", *Le droit face aux crises humanitaires*, vol. 1, Luxembourg, Communautés européennes, 1995, p. 218.

bodies with complementary activities to those of the Geneva based organization.²⁶⁵ In this respect, the mechanisms developed within the United Nations framework should make better use of their competence.

B. MECHANISMS WITHIN THE UNITED NATIONS SYSTEM

The implementation of international humanitarian law now extends beyond the strict framework of the mechanisms developed through the Geneva Conventions and Protocol I.²⁶⁶ A number of international, intergovernmental and nongovernmental organizations are becoming more and more deeply involved in this area, which had previously remained essentially in the hands of the ICRC. Most of these organizations work for the respect of human rights in general, with the UN playing the lead role.²⁶⁷ One major aspect of this contribution which deserves to be particularly stressed is that, for the time first, international humanitarian law may be implemented through mechanisms that continue to function even in the absence of agreement of the parties concerned. Accordingly, each of these mechanisms facilitates scrutiny of international forces.

1. Special Procedures before the Commission on Human Rights

In order to satisfy its mandate, the UN Commission on Human Rights has established a complex system of mechanisms over the years, responsible for collecting relevant information and reporting to it annually.²⁶⁸ Some of these, whether they be experts, representatives or rapporteurs, have been given a geographical mandate, to examine the human rights situation in a particular region or country.²⁶⁹ Others are responsible for thematic mechanisms that study respect for a specific right throughout the world.²⁷⁰

²⁶⁵ ROBERTS A., "The Laws of War: Problems of Implementation in Contemporary Conflicts", *Duke Journal of Comparative & International Law*, vol. 6, 1995, p. 72.

²⁶⁶ See, in particular, CERNA M.C., "Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies", *Mise en oeuvre du droit international humanitaire*, F. Kalshoven et Y. Sandoz (Ed.), Dordrecht/Boston (etc.), Nijhoff, 1989, pp. 32-67. DOSWALD-BECK L., VITE S., "Le droit international humanitaire et le droit des droits de l'homme", *RICR*, n° 800, 1993, pp. 99-128.

²⁶⁷ For a detailed study of UN participation in the implementation of international humanitarian law, see VITE S., *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, pp. 55ss.

²⁶⁸ On the functions of the Commission and their progressive development, see BOSSUYT M.J., "The Development of Special Procedures of the United Nations Commission on Human Rights", *HRLJ*, vol. 6, 1985, pp. 179-210. PASTOR RIDRUEJO J.A., "Les procédures publiques spéciales de la Commission des droits de l'homme des Nations Unies", *RCADI*, III, tome 228, 1991-III, pp. 197-200. ALSTON Ph., "The Commission on Human Rights", *The United Nations and Human Rights*, Ph. Alston (ed.), Oxford, Clarendon, 1992, pp. 126-210. FARER T.J., GAER F., "The UN and Human Rights: At the End of the Beginning", *United Nations, Divided World*, A. Roberts and B. Kingsbury (ed.), Oxford, Clarendon, 1993 (2d ed.), pp. 257-288. ROBERTSON A.H., MERRILLS J.G., *Human rights in the World*, Manchester/New York, Manchester University, 1996 (4th ed.), pp. 77-95.

²⁶⁹ On these procedures, see PASTOR RIDRUEJO J.A., "Les procédures publiques spéciales de la Commission des droits de l'homme des Nations Unies", pp. 216-221. RODLEY N.S., "United Nations Non-Treaty Procedures for Dealing With Human Rights Violations", *Guide to International Human Rights Practice*, H. Hannum (ed.), Philadelphia, University of Pennsylvania press, 1992 (2d ed.), pp. 61 ss. ALSTON Ph., "The Commission on Human Rights", pp. 173-181.

²⁷⁰ For a more complete list of these procedures, see the website of the UN High Commissioner for Human Rights: <http://www.unhcr.ch/>. See in general, PASTOR RIDRUEJO J.A., "Les procédures publiques spéciales de la Commission des droits de l'homme des Nations Unies", pp. 221-224. RODLEY N.S., "United Nations Non-Treaty Procedures for Dealing With Human Rights Violations", pp. 70 ss.

The ultimate legal basis for the Commission's special procedures is the United Nations Charter itself. Contrary to the system of committees responsible for the implementation of UN human rights, their existence is not rooted in a specific treaty. Their *ratione personae* competence is not dependent on increasing ratifications, but on the renewal of their respective mandates by the Commission every year. As mentioned above, these mandates are based on either thematic or geographical criteria. However, their *ratione personae* competence is not defined strictly. Although these procedures originally concentrated their activities on State behaviour, their practice has evolved in recent years to include others actors in the scope of their interventions. In Resolution 1990/75, for example, the Commission requested all Special Rapporteurs and working groups to give particular attention to action by irregular armed groups.²⁷¹ More recently, a number of specific cases have shown that the system set up by the Commission on Human Rights is also prepared to investigate the activities of international organizations, especially those of the United Nations.

1.1. Country mandates

The United Nations independent expert for Somalia

The first step in this evolution occurred in the context of the intervention in Somalia by the UN and a number of States. In Resolution 1997/47, dated 11 April 1997, the Commission on Human Rights requested the UN independent expert for Somalia "to report on the human rights situation" in this country.²⁷² The following year, on the basis of this very general mandate, the expert presented an analysis of the behaviour of all the parties involved in the Somali conflict, including both the local factions, and the national contingents of the "Unified Task Force" and UNOSOM II.²⁷³ In particular, the expert reported serious breaches of international humanitarian law perpetrated by members of the Belgian, Canadian and Italian contingents.²⁷⁴

However, she remained prudent concerning any UN responsibility for these acts, preferring to avoid the question entirely in order to concentrate solely on the responsibility of the home States of the guilty soldiers. The introduction to her chapter on international forces specified as follows: "Regardless of the debate on the applicability of international humanitarian law to the forces deployed by the United Nations, it should be here stated that if States Members of the United Nations are authorized by the Security Council to undertake military activities but are not acting under the direct command and control of the United Nations, then the individual participating State is at least responsible for the action of its soldiers". This choice is regrettable since some of the cases presented, involved members of UNOSOM II, *i.e.* soldiers placed under direct UN command and control. Although the secondary responsibility of home States also deserved to be raised in these cases, there should nevertheless have been a preliminary examination of the primary responsibility of the Organization itself.

²⁷¹ *Report of the Commission on Human Rights*, 1990, supplement No. 2, pp. 150-151.

²⁷² *Assistance to Somalia in the field of human rights*, Commission on Human Rights Resolution 1997/47, 11 April 1997, para. 6 : "The Commission on Human Rights, [...] 6. Requests the independent expert to report on the human rights situation in Somalia to the Commission at its fifty-fourth session, in particular on the basis of a detailed assessment of the means necessary to establish a programme of advisory services and technical cooperation through, inter alia, the contribution of agencies and programmes of the United Nations in the field, as well as of the non-governmental sector".

²⁷³ For an overview of this operation, see *The United Nations and Somalia, 1992-1996*, New York, United Nations, 1996, 535 p.

²⁷⁴ *Report of the Independent expert on the situation of human rights in Somalia*, Ms Mona Rishmawi, presented under Resolution 1997/47 of the Commission on Human Rights, E/CN.4/1998/96, 16 January 1998, paras. 96-124.

The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia

It wasn't until the outbreak of the Kosovo crisis that the Commission on Human Rights system became a fully-fledged instrument for scrutiny of international organizations. This evolution originated in the preceding practice of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. In August and October 2000, on the basis of an equally broad mandate,²⁷⁵ the Special Rapporteur presented a precise analysis of the situation of human rights in the context of UNMIK and KFOR activities.²⁷⁶ The Rapporteur expressed concern for respect of the Rule of Law and judicial guarantees. In particular, he deplored the adoption of UNMIK Regulation 1999/26, which provided for the prolongation of pre-trial detention for up to a year. He stressed that the criteria for ordering such prolongation were not specified in the regulations and that no appeal was available to contest its validity. Moreover, there was no procedure for reviewing the legality of any other form of detention. Therefore, the Special Rapporteur recommended that "UNMIK review this regulation urgently and bring it into conformity with international standards".²⁷⁷ In so doing, the Rapporteur presumed not only that UNMIK was bound by international human rights norms, but also that it was subject to scrutiny under the Commission's special procedures. When the Commission received the Special Rapporteur's report, it confirmed the competence of its subsidiary bodies to scrutinize the activities of international organizations.

This practice, established in the context of the international presence in Kosovo, should henceforth be adopted by the Commission's other bodies. Whether special procedures are established for specific countries or themes, they should now systematically examine the activities of international organizations. This evolution would not involve any radical change in the system, since the mandates of the bodies in question are all formulated in a sufficiently wide manner as to include the supervision of non-State actors.

1.2. Thematic procedures

The Special Rapporteur on Torture

The Special Rapporteur on torture considers that his *ratione personae* mandate is not limited to States, but also includes "entities other than official de jure authorities".²⁷⁸ Although this reference was probably aimed at armed opposition groups when it was originally formulated,²⁷⁹ a wide interpretation extending to other non-State authorities is still legitimate. Firstly, international organizations are also "entities other than official de jure authorities" as defined by

²⁷⁵ In 2000, the General Assembly asked the Special Rapporteur to "to continue to monitor closely the situation of human rights in Kosovo", AGNU Doc. A/RES/54/183, 29 février 2000, para. 24. See also Commission on Human Rights Resolution, UN Doc. E/CN.4/2000/26, 18 April 2000, para. 8.

²⁷⁶ *Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia - Report of the Special Rapporteur*, UN Doc. A/55/282-S/2000/788, 9 August 2000, para. 101ss, and note by the Special Rapporteur, A/55/282, 20 October 2000, para. 106ss.

²⁷⁷ *Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia - Report of the Special Rapporteur*, UN Doc. A/55/282, 20 October 2000, para. 106-108 and 129-132.

²⁷⁸ *Report of the Special Rapporteur on the question of torture submitted pursuant to Commission resolution 2002/38*, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 9.

²⁷⁹ See *Ibid.*

the Special Rapporteur, since their field of action is based on public international law, whether through bilateral agreements with the State in question or a Security Council resolution. Secondly, even if it is considered that the official authorities in a given territory are the only holders of sovereignty, international organizations may still be subject to scrutiny by the Special Rapporteur under the heading of "other entities" holding *de facto* power to commit acts of torture, without being States in the legal sense of the term. Thirdly, in the more specific context of armed conflicts, the Rapporteur has confirmed this approach by stating that his work must focus on all the involved parties, given that they are bound to apply the humanitarian law norms prohibiting violence to life and person at any time and in any place whatsoever.²⁸⁰ As indicated above, when international organizations participate in armed conflict, they are bound by international humanitarian law.

The Special Rapporteur has confirmed this interpretation in practice, by intervening directly with the authorities of international organizations in recent years, in the exercise of his mandate, as was the case for UNMIK.²⁸¹

The other special procedures of the Commission on Human Rights

In this respect, the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mme Asma Jahangir, seems to be more limited than that of the rapporteur on torture. Indeed, she admits that her mandate "only allows her to intervene when the perpetrators are believed to be government agents or have a direct or indirect link with the State".²⁸² Nevertheless, practical needs have led Mme Jahangir to interpret her mission extensively and this has not aroused any opposition from the member of the Commission. Like her colleague dealing with torture, she has also intervened with UNMIK authorities.²⁸³ Without clarifying the legal basis for such intervention, she has thus indicated that her mandate must include the acts of non-State authorities.

On the basis of this evolving practice, it may be argued that the other special mechanisms of the Commission on Human Rights also have the right to take action, when necessary, concerning cases involving respect for human rights and international humanitarian law by international organizations. For example, the Working Group on arbitrary detention should have questioned the powers of administrative detention granted to the UN SRSG for Kosovo and KFOR, during establishment of the transitional civil administration in that region. The legality of these powers and their practical application has, in fact, been questioned by other human rights implementation bodies.²⁸⁴

²⁸⁰ *Ibid.*

²⁸¹ See *Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur*, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, Addendum, UN Doc. E/CN.4/2002/76/Add.1, du 14 mars, para. 1819s. *Report of the Special Rapporteur on the question of torture*, Theo van Boven, submitted pursuant to Commission resolution 2002/38, Addendum, UN Doc. E/CN.4/2003/68/Add.1, 27 February 2003, para. 2014-16.

²⁸² *Extrajudicial, summary or arbitrary executions - Report of the Special Rapporteur*, Ms Asma Jahangir, submitted pursuant to Commission Resolution 2000/31, UN Doc. E/CN.4/2001/9, 11 January 2001, para. 53.

²⁸³ *Civil and Political Rights, Including Questions of Disappearances and Summary Executions, Report of the Special Rapporteur*, Ms. Asma Jahangir, submitted pursuant to Commission resolution 2001/45, Addendum, UN Doc. E/CN.4/2002/74/Add.2, 8 May 2002, para. 384.

²⁸⁴ See, in particular, Ombudsperson Institution in Kosovo, *Special Report No. 3 on The Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards*, 29 July 2001. Gil-Robles Alvaro,

It is also regrettable that neither the Special Rapporteur on the sale of children, child prostitution and child pornography, nor the Special Rapporteur on violence against women, its causes and consequences have reported on cases of child abuse and sexual exploitation by the employees of international and nongovernmental organizations in refugee camps, especially in West Africa and Nepal.²⁸⁵

The interest of this evolution is all the greater since, in the last few years, the Commission on Human Rights system is no longer limited to the implementation of human rights *stricto sensu*, but also covers international humanitarian law norms whenever necessary.²⁸⁶ This system is thus an important control mechanism for scrutiny of the behaviour of international organizations, not only when they exercise powers involving the administration of territories, but also when they use force in the context of armed conflict.

2. Treaty Supervision Bodies

Competence

Certain international human rights conventions concluded under the UN aegis provide for the creation of dedicated mechanisms to verify respect for their provisions: the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women.²⁸⁷

Among their functions, these organs examine reports presented to them at regular intervals by the State Parties to the relevant treaties. These reports cover State implementation of the rights recognized in each treaty.²⁸⁸ The reports are discussed by the Committee and State representatives in public sessions, then the Committee publishes its conclusions and recommendations concerning the situation. Some supervisory bodies have also been granted the right to examine complaints lodged by individuals claiming to have been the victim of a breach of the treaty in question. For the complaint to be admissible, the State concerned must have expressly accepted the right of individual petition. Depending on the treaty, this may be done by simple declaration of recognition,²⁸⁹ or by ratifying a special protocol.²⁹⁰ Finally, some of these

European Commissioner for Human Rights, *Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes*, CommDH (2002)11, Strasbourg, 16 October 2002.

²⁸⁵ See on this subject, *Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa*, UN Doc. A/57/465, 11 October 2002. *UN-backed officials said involved in sex harassment in Nepal*, AFP, 19 November 2002.

²⁸⁶ For details of this practice, see VITE S., *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, pp. 66ss.

²⁸⁷ See <http://www.ohchr.org/english/bodies/treaty/index.htm>

²⁸⁸ See *International Covenant on Civil and Political Rights*, UNGA Resolution 2200 A (XXI), 16 December 1966, Art. 40, *International Covenant on Economic, Social and Cultural Rights*, AGNU Resolution 2200 A (XXI), 16 December 1966, Art 16, *Convention on the Rights of the Child*, AGNU Resolution 44/25, 20 November 1989, Art. 44, *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, AGNU Resolution 39/46, 10 December 1984, Art. 19, *Convention on the Elimination of All Forms of Racial Discrimination*, AGNU Resolution 2106 A(XX), 21 December 1965, Art. 9, *Convention on the Elimination of All Forms of Discrimination against Women*, AGNU Resolution 34/180, 18 December 1979, Art. 18.

²⁸⁹ *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Art. 22, *Convention on the Elimination of All Forms of Racial Discrimination*, Art. 14.

committees may also receive complaints by one State Party against another State Party.²⁹¹ However, this procedure has never been used.

None of these committees has ever dealt with questions relating to the respect for human rights by an international organization. Given that an international treaty defines their competence, they only cover the States that have ratified that instrument. Moreover, until now, only States have had the right to become parties. A *ratione personae* extension of their competence to other subjects of international law could, however, be envisaged through various means, depending on the situation, including unilateral declarations of acceptance, agreements concluded on a case-by-case basis, or even a resolution of the Security Council.

The practice in the Kosovo case

When studying the Kosovo case, it should be recalled that Serbia and Montenegro is a party to the two United Nations Covenants. Moreover, it has ratified the additional Protocol to the ICCPR authorizing the Human Rights Committee to receive individual petitions concerning breaches of the civil and political rights. The question then arises to what extent this State is under any obligations with respect to a region over which it has *de jure* sovereignty, but in which effective power is exercised by international institutions.

During its July 2004 session, the Human Rights Committee was forced to make a finding on this question, when it examined the first periodic report presented by Serbia and Montenegro under Article 40 of the ICCPR. This report covers the whole territory of the State, including Kosovo. In particular, the government makes a precise, critical analysis of the legal system set up by the international administration for the region.²⁹²

The Committee was thus confronted with two alternatives. On the one hand, it could choose to limit itself to *ratione personae* considerations, and refuse to make any findings concerning UN and NATO action in Kosovo. Indeed, Article 40 of the Covenant authorizes it to study the reports submitted to it in order to evaluate the measures adopted and progress made by *State Parties*. No mention is made of the role of other actors. On the other hand, the Committee could give priority to its *ratione loci* competence. Article 2 of the Pact stipulates that each State Party is obliged to respect and guarantee rights "to all individuals *within its territory*".²⁹³ Accordingly, when international institutions, acting as a "substitute for the State", exercise the main prerogatives of public power over the territory of a State Party, it should be recognized that the competence of the Committee covers their activities.

The decision adopted during the Committee's July 2004 session supports the second solution, since it recognized that "Covenant continues to remain applicable in Kosovo" and considers itself

²⁹⁰ See *Optional Protocol to the International Covenant on Civil and Political Rights*, AGNU Resolution 2200 A (XXI), 16 December 1966. *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, AGNU Resolution A/RES/54/4, 6 October 1999.

²⁹¹ *International Covenant on Civil and Political Rights*, Art. 41, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 21, *Convention on the Elimination of All Forms of Racial Discrimination*, Art. 11.

²⁹² *Consideration of reports submitted by States Parties under Article 40 of the Covenant, Initial Report, Serbia and Montenegro*, CCPR/C/SEMO/2003/1, 24 July 2003. See, in particular, *Annex : Consideration of the Criminal Legal System and the Situation of Human Rights in Kosovo and Metohija Since the Arrival of the United Nations International Forces (1999-2002)*, p. 198.

²⁹³ Our emphasis.

competent to evaluate the situation of human rights in that region.²⁹⁴ Given the unusual status of Kosovo, however, it refused to make findings on the sole basis of information presented by Serbia and Montenegro, and postponed its decision concerning the zone under international administration until its following session. To this end, it "encourages UNMIK, in cooperation with the Provisional Institutions of Self-Government (PISG), to provide, without prejudice to the legal status of Kosovo, a report on the situation of human rights in Kosovo since June 1999".²⁹⁵ Thus the international administration is not bound, as such, by the implementation mechanism of the Covenant. It is "encouraged" to make a report, which implies that it is not legally obliged to do so.

In this case, then, Serbia and Montenegro's obligations formed the basis for the Committee's competence, even though that State was no longer in a position to exercise the prerogatives of public power in Kosovo. The non-State nature of the political institutions established in the region is not an obstacle to implementation of this competence, since power is still being exercised there, as Security Council Resolution 1244 confirms, within the sovereign framework of Serbia and Montenegro. Although autonomous, this power is exercised in substitution for a State having ratified the Covenant, which is a sufficient basis for the Committee's right of scrutiny. The opposite conclusion would be all the more doubtful that it would prevent a UN body from being subject to a procedure that the organization itself helped set up in accordance with its mandate.

The Committee's decision opens new perspectives for international control. It implies, in particular, that other UN Committees, especially the Committee on Economic, Social and Cultural Rights, could examine reports covering Kosovo.²⁹⁶

These procedures would thus create a useful complement to the examination of reports presented to the Security Council by the Secretary-General under paragraph 20 of Resolution 1244. Indeed, whereas examination by the Security Council involves a general evaluation of the UNMIK operation, giving priority to the maintenance of regional peace and security, supervision by the two Covenant bodies would concentrate specifically on the implementation of human rights. Moreover, contrary to the Security Council, UN committees are bodies made up of independent experts, that are, better equipped to adopt decisions unbiased by any political considerations. The bodies established under the two Covenants would thus be able to partly resolve observed defects in the implementation of human rights under the international transitional administration of Kosovo.

Further questions would arise were petitions to be lodged against the United Nations or NATO by individuals under the additional Protocol to the ICCPR, ratified by Serbia and Montenegro on 6 December 2001. As for the dilemma concerning the reports procedure, the answer would vary according to whether priority was placed on *ratione personae* or *ratione loci* competence. In the first case, the complaint might be declared inadmissible, since these two organizations are not parties to the additional Protocol. In the second case, it could be argued that these organizations are bound to the extent that their powers are derived from the sovereignty of Serbia and Montenegro, the geographical limits of which include Kosovo. Even in the absence of

²⁹⁴ *Concluding Observations of the Human Rights Committee : Serbia and Montenegro*, CCPR/CO/81/SEMO, 12 August 2004, para. 3 .

²⁹⁵ *Ibid.*

²⁹⁶ Serbia and Montenegro succeeded to the former Yugoslavia as a party to the Covenant on Economic, Social and Cultural Rights on 12 March 2001.

ratification of the Protocol, one might then consider that the Committee's *ratione personae* competence over the UN and NATO is established by ricochet. The Committee's competence would thus spread beyond State Parties to cover bodies exercising exclusive sovereign competence over the territory of those States in accordance with international law.

This second solution would have the advantage of conformity with the position adopted by the Committee in its final observations adopted in July 2004. It would, however, be necessary to overcome some practical difficulties. A petition lodged against Serbia and Montenegro for acts attributable to UNMIK would lead to a legal fiction. While the State would formally be the defendant, in reality, the organization would be required to reply to the allegations. This impracticable situation pleads in favour of recognizing the direct competence of international control mechanisms over international administrations.

For example, it would have been both desirable and possible for the Security Council, when establishing the international transitional administration in Kosovo in Resolution 1244, to create the conditions for human rights implementation in this context by requesting the new international authorities to recognize the competence of the relevant UN Committees. Another possibility would have been the conclusion of a bilateral agreement between UNMIK and each of these bodies. Given that UNMIK has recognized that it is bound by the six treaties establishing such bodies,²⁹⁷ it is indispensable that this recognition should go beyond substantive norms to include the acceptance of the corollary control mechanisms. However, the political acceptability of this solution is uncertain.

C. THE MECHANISMS OF REGIONAL ORGANIZATIONS: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The most important European Convention on Human Rights (ECHR) implementation mechanism for the purposes of this study is that of individual applications²⁹⁸ under Section II of the Convention, as amended by Protocol 11. Article 34 provides that the European Court of Human Rights "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto".

Serbia and Montenegro signed the ECHR on 3 April 2003, but has not yet ratified it. Assuming it does not formulate territorial reserves with respect to Kosovo, this territory will come within the Court's jurisdiction, in principle. Accordingly, the question is whether, after ratification, this State will also be bound by conventional obligations with regard to the territory of Kosovo. It may be objected that, at the present time, the Serbian government does not exercise effective governmental authority in Kosovo and that UNMIK is required to "protect and promote human rights" in the exercise of its mandate under the terms of Resolution 1244. In particular, the SRSG is responsible for the prerogatives of public power that have the most effect on enjoyment of the fundamental rights and freedoms of the population of Kosovo (including police and justice, for example, but also property rights). However, KFOR also has a mandate entailing (less now than in the early stages of the mission) the exercise of some prerogatives of public power.

²⁹⁷ UNMIK/REG/2000/59, 27 October 2000.

²⁹⁸ Interstate affairs governed by CEDH Article 33 are thus not treated herein, nor advisory opinions (Article 47).

The aim of this part of the study is to analyse whether, and if so under what conditions, the system of individual applications under the ECHR can be used to guarantee the implementation of human rights in the context of the UNMIK and KFOR operations in Kosovo.

1. The extent of State jurisdiction under the European Convention: the notion of "effective control"

Under Article 1 of the ECHR, State Parties agree to secure the rights and freedoms defined in Section I of the Convention "to everyone within their jurisdiction". National borders do not limit the definition of the persons coming within the jurisdiction of a Member State. In fact, under Article 56, a State may declare that the Convention will extend to all or any of the territories for the international relations of which it is responsible. A State may also declare that it accepts the jurisdiction of the Court to hear applications under Article 34 with respect to such territories.²⁹⁹ In addition, the case-law of the Strasbourg control mechanisms indicates that the scope of application of the Convention can even extend beyond the sovereign territory of Member States, provided that their jurisdictional connection with another territory justifies such an extension. This effectively allows extraterritorial application of the European Convention on Human Rights.

The European Commission on Human Rights has accepted extraterritorial application of the Convention for a long time. The jurisdictional connecting factors with other territories that have been accepted are the nationality of the applicants³⁰⁰ and the imputation of the acts in question to the consular and diplomatic agents or the armed forces of a State Party.³⁰¹ As regards the State military services, of interest for this study, the Commission has found that when they act *jure imperii*, they bring all those subjected to this manifestation of public power within the jurisdiction of their home State.³⁰² This refers to specific situations in which "customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State".³⁰³ The European Court has also concluded on a number of occasions that State jurisdiction is not limited to its national borders.

The most important extraterritorial connecting factor for this study is the *effective control* exercised by a State over a zone situated outside its national territory. The definition of this concept is to be found in the case-law of the Court. In the first place, *effective control* may exist irrespective of any formal element. The key factor is the concrete power of a State to affect the enjoyment of the rights of individuals residing in a particular territory. In addition, it would seem that the Court also requires *exclusive control*, that is the absence of any other public authorities, or at most a purely formal or subordinate presence. Finally, the control must manifest a certain temporal *stability*.

The leading precedent for this case-law is the *Loizidou* judgement (preliminary objections), in which the Court held that "[b]earing in mind the object and purpose of the Convention, the

²⁹⁹ Article 56(4).

³⁰⁰ *Application No. 1611/62, X. v. Federal Republic of Germany*, Decision of 25 September 1965, *Yearbook of the European Convention on Human Rights*, vol. 8, 1965, p. 169, *Applications No. 6780/74 and 6950/75, Cyprus v. Turkey*, Decision of 26 May 1975, *Yearbook of the European Convention on Human Rights*, vol. 18, 1975, p. 119.

³⁰¹ *Application No. 1611/62, X. v. Federal Republic of Germany*, Decision of 25 September 1965, *cit.*, p. 169.

³⁰² See also *Applications No. 6780/74 and 6950/75, Cyprus v. Turkey*, Decision of 26 May 1975, para.119.

³⁰³ Grand Chamber of the European Court, decision on admissibility in the *Bankovic* case, 12 December 2001 (see *infra*, note 183), para. 73.

responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration".³⁰⁴ On the merits of that case, the Court held that the large number of Turkish soldiers participating in active missions in the North of Cyprus proved that the Turkish army "exercises effective overall control over that part of the island". It concluded, accordingly, that persons affected by the policy and action of the "Turkish Republic of Northern Cyprus" came within Turkish "jurisdiction" within the meaning of Article 1 of the Convention. Thus, the State's obligation to secure the rights and freedoms defined in the Convention extended to an applicant from the northern part of Cyprus.³⁰⁵

In a more recent judgement (*Cyprus v. Turkey*), the Court held that, through its exercise of control over the territory in question, Turkey engaged its responsibility not only for the acts of its own agents, but also for the acts of the local administration implanted with its support. Thus, Turkey was required to ensure respect for all of the substantive rights recognized by the Convention, due to the "jurisdiction" it exercised in the northern part of Cyprus within the meaning of Article 1.³⁰⁶

The Court dealt with this question again in the *Bankovic* case.³⁰⁷ The applicants, who were all FRY nationals, lodged their complaint in their own names and/or in the name of family members who died during the bombing of the Serbian Radio-Television during "Operation Allied Force".³⁰⁸ They claimed that this bombing "by the respondent States constitute[d] yet a further example of an extra-territorial act which can be accommodated by the notion of "jurisdiction" in Article 1 of the Convention". Therefore, they requested the Court to conclude that there had been an extraterritorial exercise of jurisdiction by the defendant States.³⁰⁹ As for admissibility, the applicants argued that alleged acts, carried out in the FRY (or on the territory of the defendant States but producing effects in the FRY), brought them and their deceased family members within the scope of these States' jurisdiction. They also claimed that the defendant States were jointly responsible for the bombings, notwithstanding the fact that they had been carried out by NATO forces. Finally, no effective internal remedies were available in this case.

The Grand Chamber declared the application inadmissible. It specified that the Court's "recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".³¹⁰ In other words, the Court concluded

³⁰⁴ *Loizidou v. Turkey*, (preliminary objections), 23 March 1995, series A n° 310, para. 62. The Court cited the precedent in *Drozdz and Janousek v. France and Spain*, 26 June 1992 (*ibidem*).

³⁰⁵ *Loizidou v. Turkey*, 18 December 1996 (merits), *Reports* 1996–VI, para. 56.

³⁰⁶ *Cyprus v. Turkey* [GC], n° 25781/94, CEDH 2001-IV, para. 77.

³⁰⁷ *Bankovic and others v. Belgium and others* (Dec.) [GC], n° 52207/99, CEDH 2001-XII. In particular, the application was made against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom.

³⁰⁸ On the nature of "Operation Allied Force", see *supra*, Chapter II, para. 4, Case Study.

³⁰⁹ These were the applicant's allegations, as recapitulated by the Court (para. 74).

³¹⁰ *Bankovic and others v. Belgium and others*, para. 71 (our emphasis).

that extraterritorial jurisdiction is only recognized under the Convention as an exception to an essentially territorial concept of jurisdiction.³¹¹

The applicants proposed an extension of the term "jurisdiction" under Article 1 of the Convention in order to include bombings as extraterritorial acts, even where they do not entail full control over the territory. However, the Court refused to admit that the positive obligation of States to secure the rights and freedoms recognized in the Convention (Article 1) might be fractioned and adapted in proportion to the degree of control exercised in a particular extraterritorial situation.³¹²

The *Bankovic* case thus seems to mark a change of direction in the case-law of the Court. Yet the *Loizidou* judgement dealt, in reality, with a somewhat different problem, referred to by E. Decaux as "internal extraterritorial jurisdiction". This problem arises in cases where there is a conflict between the territorial jurisdiction of one State Party and the personal jurisdiction of another State Party.³¹³ The *Bankovic* case, on the other hand, involved a situation of "external extraterritorial jurisdiction" with respect to territory covered by the Convention: in this case there is no conflict of jurisdiction between two State Parties.³¹⁴ Nevertheless, it cannot be denied that the alleged breaches raised by the applicants were attributable to the military forces of the defendant States. Extraterritorial jurisdiction could thus have been established without reference to the control criterion, in direct application of the earlier case-law. The concept of "jurisdiction" retained by the Court in earlier cases was not necessarily subordinated to a territorial connection. At the same time, it did not extend to all and any activity by any State. Thus, *prima facie*, the *Bankovic* decision establishes a stricter limitation of the common legal space, beyond which the ECHR system no longer has any effect.³¹⁵

Would the Court's decision have been any different if the operations had involved ground forces and not bombings? Perhaps the Court would have concluded that in such circumstances there was a sufficient degree of control to speak of jurisdiction? In any case, simple aerial mastery proved insufficient. It is likely that the decision was essentially determined by judicial policy considerations, the Court not wanting to set itself up, for the future, as the "default" body for all complaints relating to peacekeeping operations involving State Parties to the ECHR. This risk was underlined by the UK government in a memorandum submitted to the Court in this case.³¹⁶ The Court could still declare itself competent in future, in situations involving terrestrial military operations led by a force physically deployed in the territory. This type of operation entails the exercise of full control over the territory. The importance of the *Bankovic* case-law would thus be limited.

³¹¹ *Ibidem*, para. 59ss et para. 67ss.

³¹² *Ibidem*, para. 75.

³¹³ Alternatively a conflict between two extraterritorial jurisdictions (DECAUX E., "Le territoire des droits de l'homme", *Liber amicorum Marc-André Eissen*, Bruxelles/Paris, Bruylant/L.G.D.J., 1995, pp. 69ss.). As the Court found in the *Bankovic* decision: "the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention." (*Bankovic and others c. Belgium and others*, para. 80).

³¹⁴ *Ibidem*, p. 73.

³¹⁵ "[T]he Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States." (*ibidem*, para. 80).

³¹⁶ See *Observations of the United Kingdom regarding the admissibility of the application*, 2 May 2001.

The decision on admissibility handed down by the Court in the *Issa* case seems to support this approach, since the Court accepted an application concerning alleged breaches by members of the Turkish army against Iraqis in Iraq.³¹⁷ The question of Turkey's jurisdiction over Iraqi territory was not raised by the defendant government, nor examined by the Court. The application was declared admissible due to the absence of any practicable, effective remedies in Iraq.³¹⁸ The Court seems therefore to have relied upon the principle of effective protection of conventional rights and the need to prevent any failings in the system of State responsibility for breaches of these rights. We argue that the same logic should have guided the judges of the Grand Chamber when dealing with applications by FRY citizens, a State that is not yet a party to the Convention.

It is to be hoped that the Court will return to a less strict interpretation of the concept of "jurisdiction" within the meaning of the Convention. Rightly, the applicants in the *Bankovic* case stressed the pre-eminence of the right to life, as well as the role of the ECHR as an instrument of the "European public order", in order to hold its Member States responsible for breaches committed under their authority, even outside their national territory.

The following section examines the exercise of control by the Strasbourg Court over the operations of Member States in cases where they act within the framework of missions by international organizations.

2. State jurisdiction under the ECHR in the context of missions by international organizations: the possibility for *de lege lata*

In the *Bankovic* case, the Court concentrated on the jurisdiction of ECHR Member States concerning action by their armed forces taking place outside "Convention territory". Having declared the application inadmissible, the Court did not deal with the most important aspect for this study: the question whether such action should to be attributed to States separately or to NATO, as an organization.

The only precedent concerning the jurisdiction of States acting within the framework of an international mission is the 1975 decision of the European Commission in *Ilse Hess v. United Kingdom*.³¹⁹ This case involved the military, but not during a strictly military mission. The applicant was the wife of Rudolf Hess, sentenced by the Nuremberg International Military Tribunal and imprisoned in an allied military prison in Berlin-Spandau,³²⁰ administered by British forces. Ilse Hess claimed a prolonged breach of Articles 3 and 8 of the European Convention by the United Kingdom, due to its responsibility for the detention of her husband. The defendant government argued that, under the terms of Article 1 of the Convention, the question did not come within its jurisdiction.

³¹⁷ ECHR., *Decision as to the admissibility of Application no. 31821/96 by Halima Musa Issa, Beebin ahmad Omer, Safia Shawan Ibrahim, Fatime Darwish Murty Khan, Fahima Salim Muran and Basna Rashid Omer against Turkey*, 30 May 2000.

³¹⁸ *Ibidem*, pp. 7s.

³¹⁹ *Application No. 6231/73, Ilse Hess v. United Kingdom*, Final Decision, 28 May 1975, *Yearbook of the European Convention on Human Rights*, vol. 18, 1975, pp. 147 ss.

³²⁰ Rudolf Hess had been acquitted on the charges war crimes and crimes against humanity, but found guilty of conspiracy to wage a war of aggression crimes against peace. Hess was thus condemned to life imprisonment and transferred to Berlin-Spandau Prison.

The Commission declared the application inadmissible, recalling that Spandau prison had been established by the allied Kommandatura of Berlin under a directive from the Control Council, and that its direction had been conferred on this institution common to the four powers exercising supreme authority in Germany since 1945. All decisions had to be made unanimously by this body. The Commission concluded that this joint authority could not be fractioned into four distinct jurisdictions. Correspondingly, UK participation in the exercise of this authority did not make notice concerned persons of the court of this country to individual title, as required by Article 1 of the Convention.³²¹

The *Hess* case is the only one in which a Strasbourg body has made a finding with respect to the jurisdiction of a State over foreign territory "controlled" within the framework of action by an international mission. The question is whether the same *ratio decidendi* can be applied to the current day missions of international organizations.

i) It would appear that the Commission's finding that the Kommandatura was an international body responsible for common action by the victor States, is *a fortiori* valid for current ITCAs, which have far more complex, evolved structures. As mentioned above, their action is based on decision-making mechanisms that are entirely autonomous from the Member States of the organization that establish them. It would therefore be impossible to invoke any organic relation between States and the personnel of an ITCA in order to conclude that residents of the territory in question come within the jurisdiction of these States within the meaning of the ECHR.

ii) As regards the military operations of peacekeeping forces, the role of international organizations varies, especially as a function of the composition of the force and the way in which it implements its mandate. In some cases, the organization simply coordinates individual action by each State participating in the mission and its may thus be limited to an essentially political role. In other cases, the organization substitutes itself completely for States by exercising command and control over the operation. It then undertakes operational tasks through its own bodies, generally using an *ad hoc* set up, even though States provide the troops. The appropriate criterion for analysing military operations is the effective exercise of command and control powers over the operations in question. The degree of involvement of an organization, as well as the mandate and structure of the force itself, are elements to be taken into account when making a determination. The complexity of the command structure normally leads to the observation of "dual control". Rather than rigid schemas, practical reality presents a continuum of models, allowing a number of possibilities for coordinated roles exercised jointly by the organization and participating States.

NATO operation "Allied Force" in the former Yugoslavia is a good example of an operation where States clearly retain control over the commitment of their respective troops. KFOR is another example. In these conditions, whether or not NATO itself is the addressee of conventional human rights obligations, it appears evident that the soldiers involved are bound to respect these norms to the extent that their home States are bound. It is therefore on the basis of an organic link with provider States that the jurisdiction of the ECHR is established. It is open to argue that, in the *Hess* case, the Commission would probably have held that the United Kingdom had jurisdiction if it had found that it exercised effective, autonomous power over Spandau prison. Direct State control over its own troops in the context of a collective military operation equates to the exercise of jurisdiction over the territory covering the theatre of operations, and over its resident population. Therefore, this State is the addressee of the obligations derived from

³²¹ *Application No. 6231/73, Ilse Hess v. United Kingdom*, Final Decision, 28 May 1975.

the Convention, with respect to all persons coming under its jurisdiction, even where the acts are extraterritorial.

What of a military or civil mission under the command and effective control of an international organization (the United Nations, NATO, the OSCE)? In such cases, it is difficult to speak of any effective, autonomous exercise of powers by each participating State. Yet if the formation of a common design within an international organization excluded the jurisdiction, under the Convention, of both States taken individually and the organization as a whole, through lack of participation in the Convention, the effective protection of human rights would be seriously flawed.³²² How could the implementation of the rights guarantee by the Convention be ensured in such circumstances?

An answer may have been given in two recent judgements handed down by the Grand Chamber on 18 February 1999 in *Matthews v. United Kingdom* and *Waite and Kennedy v. Germany*. A passage from the *Waite* judgement deserves to be quoted *in extenso*:

"The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial".³²³ Similarly, in the *Matthews* case, the Court held that "The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer".³²⁴

Since this principle was relied upon in both a case concerning the European Space Agency's immunity from jurisdiction and a case on the exclusion of voting rights for elections to the European Parliament, it would seem to be of general application within the ECHR system. However, it must be questioned to what extent it is transposable to the situation of concern for this study. Some months after the *Matthews* and *Waite and Kennedy* judgements, when the Grand Chamber handed down its decision in the *Bankovic* case, examined above, it did not discuss this question. Among the defending parties, the French government postulated that the bombing in question was attributable to NATO, an organization with distinct international legal personality from that of its members, rather than to the defendant States taken individually.³²⁵ France argued, accordingly, that the responsibility of NATO Member States cannot be raised solely by reason of a violation of the Convention resulting from an act exclusively attributable to

³²² This is a paraphrase of the *Loizidou* judgement. The case referred to in the text correspond to what Decaux calls "external extraterritorial jurisdiction". Under this hypothesis, "the connection with the Convention system [...] would be one-dimensional, in the absence of any conflict of "jurisdiction" between State Parties". In *Loizidou* type case, on the contrary, the author speaks of "internal extraterritorial jurisdiction" (DECAUX E., "Le territoire des droits de l'homme", *Liber amicorum Marc-André Eissen*, pp. 69ss.).

³²³ *Waite and Kennedy v. Germany* [GC], n° 26083/94, CEDH 1999-I, para. 67.

³²⁴ *Matthews v. United Kingdom* [GC] n° 24833/94, CEDH 1999-I, para. 32.

³²⁵ *République française, Ministère des affaires étrangères, Direction des affaires juridiques, Observations additionnelles à insérer après les § 35 et 36 du mémoire du Royaume-Uni dans l'affaire Bankovic et autres c. Belgium et autres.*

NATO, whereas no link to the exercise of State jurisdiction is possible, because Member States have not accomplished any act in exercise of their "jurisdiction" either in preparation for or execution of the bombing in question. It followed, for France, that in cases of shared authority it is not possible to establish the Member State's jurisdiction for the purposes of the ECHR.

Any recognition of this argument by the Court would be out of step with the principle stated in the *Matthews* and *Waite and Kennedy* cases. In any case, this position would not ensure the implementation of ECHR obligations in missions conducted by international organizations. Other solutions must thus be preferred.

3. *De lege ferenda* solutions for the international civil and military presence in Kosovo

The *Hess* case, examined above, dealt with a case of generalized exercise of government powers through a four-power authority in territory where the State no longer exercised any sovereignty following the German defeat. Conversely, in the Kosovo case, Security Council Resolution 1244 reaffirmed the sovereignty and territorial integrity of the FRY, now Serbia and Montenegro. Moreover, this State signed the ECHR on 3 April 2003, even though it has not yet ratified the Convention. Thus, unless Serbia and Montenegro formulates territorial reserves with regard to Kosovo, this territory will, in principle, come within the jurisdiction of the Court. The question is whether, after ratification, the State will be bound by the Convention as regards the territory of Kosovo. In this respect, it has been established that the Serbian government does not exercise effective governmental powers over Kosovo and that, on the contrary, UNMIK is required "to protect and promote human rights" in the exercise of its mandate under Resolution 1244. The extent of the powers given to the international civil and military presence thus requires an appropriate international mechanism for punishing any violations, since the domestic legal system does not (yet) offer any effective, efficient remedies.

Several solutions are foreseeable in this respect:³²⁶

a) The UN Security Council could adopt a resolution instructing UNMIK (as well as KFOR) to accept the conventional obligations of Serbia and Montenegro. UNMIK's human rights obligations would thus be clarified. Nevertheless, unless otherwise indicated, Serbia and Montenegro would be responsible before the European Court of Human Rights for any acts of UNMIK (and KFOR) in violation of these obligations.

b) An agreement could be concluded between UNMIK and the Serbian government, by virtue of which the former would accept the conventional obligations of Serbia and Montenegro. This solution seems politically more viable than the first. The agreement would provide implicit acceptance by UNMIK of Belgrade's conventional obligations within the territory of Kosovo. This commitment would come to an end once a final decision is made concerning the international status of Kosovo. As for its detailed content, UNMIK would have to agree to be bound by the decisions of the European Court of Human Rights and to enforce them in Kosovo.³²⁷ The agreement would also establish that the remedies offered by the Courts of Serbia

³²⁶ These solutions were proposed by Ronald Hooghiemstra, public international lawyer for the OSCE Mission in Kosovo; he discussed them with the authors during a meeting in Pristina, on 14 May 2003.

³²⁷ As we know, scrutiny of the execution of the Court's decisions is exercised by the Committee of Ministers of the Council of Europe, of which UNMIK cannot become a member. A solution must thus be found to this problem, by giving UNMIK observer status or by creating an obligation for Serbia and Montenegro to represent the interests of UNMIK within the Committee.

and Montenegro would not be taken into account when determining, as a preliminary condition for applications to the Court, whether all domestic remedies have been exhausted. A fundamental question this would raise is modification of the system of immunities for UNMIK personnel. As for the more delicate problem of the immunity of KFOR soldiers, it would be necessary to change the current protection system, at least for acts committed in the exercise of civil tasks, without touching on powers exercised in the framework of the peacekeeping mandate. The content of such an UNMIK/Serbia and Montenegro agreement would then have to be included in a declaration by the State at the time of ratifying the European Convention.

c) A third solution would be to retain the *status quo* unmodified and simply wait for applications to be made to the European Court against Serbia and Montenegro for breaches committed by UNMIK or KFOR in Kosovo. The Court would then have to decide whether it has jurisdiction in such cases.

CONCLUSION

The principle of the applicability of international humanitarian law to international Organizations

This study has shown that it is an established principle that international humanitarian law is applicable to international organizations. Insofar as such an organization is entitled, in accordance with its goals and functions, to conduct military operations, it has the subjective capacity to be bound by the rights and obligations of this branch of the law. Humanitarian law therefore applies *ratione personae*. What is more, the organization's intervention as such does not confer any particular legal status on the operations concerned. The nature of any clashes occurring in the context must be assessed in the light of the criteria established by international humanitarian law to define its thresholds of applicability. If one of those thresholds is objectively crossed in the course of an international operation, the relevant rules will apply. In this case, international humanitarian law is applicable *ratione materiae*. In the main, the assessment depends on the intensity of the fighting and the degree of organization of the parties involved. The fact that the international organization benefits from a particular form of legitimacy - its intervention has in principle been requested by the Security Council - is not relevant when it comes to determining the applicable law.

This does not mean, however, that the soldiers involved in international operations can legitimately be attacked when they do not take part in the fighting. While it is true that their status as members of the armed forces does not grant them the same protection as civilians under international humanitarian law, attacks against peacekeeping forces are nonetheless prohibited under another branch of the law, namely the privileges and immunities accorded to the agents of international organizations. In this respect, it is worth clarifying the conditions of application of the 1994 Convention on the Safety of United Nations and Associated Personnel as opposed to those of international humanitarian law.

The sources of the norms applicable to international organizations involved in armed conflicts

The recognition in principle that international humanitarian law is applicable to international organizations does not, however, answer all the questions that arise in connection with this issue. First, the sources of the rules applicable to international organizations involved in armed conflicts must be more accurately identified. Traditionally, it has been widely accepted, on the basis of consistent practice, that international customary law must be taken into account. Recent United Nations practice, however, as codified in particular in the Secretary General's 1999 Bulletin, shows that the law has changed on this point. Although custom remains relevant in terms of the operational needs of international forces engaged in the field, recent practice confirms that it is sometimes indispensable, and legally justified, to draw on other normative sources, in particular treaty-based law, to find appropriate solutions.

The norms applicable to international organizations involved in armed conflicts

In fact, what truly impedes the application of international humanitarian law to international organizations is therefore not the sources of the law but the norms the law contains. Some

provisions, which presuppose a State structure, are not adapted to the specific characteristics of international organizations. The existing rules must therefore be sorted with a view to determining which are applicable to international organizations as they stand, which call for material adaptation and which can simply not be applied at all. This task implies that an effort must be made by each of the organizations concerned to give a more precise interpretation of existing rules. This process, which started at the United Nations with the 1999 Bulletin, is worth pursuing in order to obtain as complete a description as possible of the law applicable to the forces of the organization engaged in the fighting. Indeed, the Bulletin covers in the main only fundamental principles and is in no way exhaustive. Ultimately, any doubts that persist in practice are not about the applicability of international humanitarian law but rather about how to gauge the material relevance of each of the rules concerned.

Pending future developments in this respect, the doubts arising from the interpretation of the existing rules and the consequent legal uncertainty could be reduced if there were official recognition that there exists a “presumption of law” that all the norms of international humanitarian law, whether customary or treaty-based, were applicable in the situations considered here. That presumption could be overturned by the organization concerned if it showed, in a given case, that a norm was materially inappropriate.

International Organizations as addressees of the rights and obligations of international humanitarian law

The application of international humanitarian law to the forces of international organizations requires consideration *in concreto* of who has authority over them. Given that the international organizations use force via troops made available by the Member States, it is often difficult to say in what entity, the organization or its members, the applicable rights and obligations are vested and what entity must therefore take responsibility for unlawful acts. By virtue of the principle of effectiveness, compliance with the rules is incumbent on the authority that has practical command and control of the forces engaged in the field.

Peacekeeping operations usually have a complex command structure combining both the authority of the United Nations and the power of the Member States, and there is therefore “dual control” in such situations. What would be the point, then, in trying to show that one of the parties has exclusive control over the conduct of the operation, since that does not correspond to reality on the ground? Rather, it must be established which party has primary responsibility for leading the forces, i.e. which party in the last resort makes the operation’s strategic decisions. The question of which entity is vested with the rights and obligations of international humanitarian law and the corollary responsibility must therefore systematically be answered at the principal and at the secondary level.

A player in which primary responsibility is not vested is not thereby relieved of all obligations. When that player is a participating State, it must verify that the decisions adopted by the organization conducting the operation are in accordance with international humanitarian law. Conversely, when an international organization authorizes States or another international organization to use armed force, it must ensure that the relevant rules are applied and adequate implementation measures taken. These obligations arise from the customary and treaty-based rule that both the States and the international organizations are bound to respect and ensure respect for international humanitarian law in all circumstances.

Our analysis of how NATO functioned during Operation Allied Force showed, for example, that it was the Member States that exercised operational command during the operation, in that each Member State retained the capacity to withhold its approval of sorties it did not agree with. It was therefore in the Member States that the rights and obligations of international humanitarian law were vested at the principal level. NATO, for its part, had no independent decision-making authority, but confined itself to coordinating the decision making process.

Law of international armed conflicts and law of non-international armed conflicts

Another point of uncertainty is the scope of the law applicable to international forces in a combat situation. Is it the law of international or the law of internal armed conflicts that is applicable? Although legal scholars, backed in this respect by two relatively recent texts, would appear to be leaning towards the application of the law of international armed conflicts, it is not clear that this solution is the best adapted to practical needs. Some rules conceived for conflicts between States are not appropriate in cases where international forces are confronted with armed groups that are poorly structured or do not control a territory of their own.

In this case, it could be held that the law of internal armed conflicts was applicable and consideration given to concluding special agreements between the parties with a view to expanding the range of norms applicable as needs arose. This solution would result in a normative outcome that was better adapted to the reality of conflicts opposing international forces and non-governmental troops. It would also have the advantage of preserving the coherence of the legal system, because identical conclusions would be drawn for situations that do not differ fundamentally, namely those in which a non-governmental movement is opposed by turns to an international organization and a State. Another possibility would be to consider that the law of international armed conflicts is in principle applicable, not in its entirety but in part only. It would then be possible to modulate certain provisions, in particular those relating to prisoner-of-war status, in keeping with the circumstances of each specific case.

No matter what the point of departure, the result would be similar: in the first instance, the law of non-international armed conflicts would be supplemented with rules on the conduct of hostilities; in the second, the scope of the law of international armed conflicts would be reduced by limiting certain forms of protection. In any event, the discussion may appear purely academic, given the fact that at present the normative customary content of both bodies of the law of armed conflicts are drawing substantially closer together.

The applicability of international human rights law to civil international transitional administrations

In accordance with the theory that international organizations have functional legal personality, the organization establishing the transitional administration, as a subject of international law, is vested with the human rights norms because of the operational activities it conducts on the territory. Indeed, the transitional administration exercises the prerogatives of the public authorities as concerns the life and status of physical persons and bodies corporate on the territory concerned.

It nevertheless remains to determine which legal sources are relevant. Given that, as the law now stands, international organizations are not party to human rights treaties, those sources must be sought in general international law. In practice, this has given rise to several problems. Although

the principle of the applicability of the “internationally recognized human rights rules” to transitional administrations has been accepted, its implementation has been rather disappointing. In particular, the question of the direct applicability of certain rules and their position in the transitional administration’s hierarchy of rules has not been settled. Furthermore, it must not be forgotten that the content of general international human rights law has not been clearly defined. It would therefore seem preferable for the international organizations establishing transitional administrations to adhere to the relevant international treaties. For that purpose, there are several possibilities.

The text of the treaties could be amended with a view to including clauses authorizing the adherence of international organizations. The latter could thus explicitly demonstrate, as subjects distinct from the Member States, their commitment to the protection of human rights. Another option is the *ad hoc* acceptance of the relevant treaties during a specific operation or transitional administration, as was the case in Kosovo and East Timor. Yet another option would be the adoption of an *ex ante facto* declaration whereby the organization pledged generally to respect and implement at least some treaty-based obligations. This solution would serve to overcome all the objections contesting the organization’s participation in a treaty on an equal formal footing with the States parties. In the case of the United Nations, the declaration could take the form of a bulletin from the Secretary General, as was the case for the law of armed conflicts.

If the international organizations do not take part in the existing treaties, the treaties’ application to operational activities remains possible via the treaty undertakings of the Member States. This possibility only exists, however, for *military personnel*, which are subordinate to their respective sending States. It does not exist for *civilian agents*, who answer only to the international organization and are therefore bound only by the norms applicable to that organization. In other words, this method of applying human rights law is only useful for the activities of peace forces, not for the activities of the civilian components of transitional administrations.

The norms of international human rights law applicable to transitional administrations

When it comes to the applicable norms of human rights, it must first be remembered that the establishment of the transitional administrations in Kosovo marked the end of far-reaching military operations and the beginning of a more complex phase. The United Nations found itself intervening in a situation where, at least during the initial phase, peace existed only on paper. It was only later that the context in which the missions were working gradually returned to normal. The applicable law must therefore adapt to changes on the ground.

At first, the lion’s share of authority is attributed to the military component, given the absence of local police forces and a legal system. The military component is therefore in charge not only of maintaining public order but also of taking on the roles of the police and the courts. Unfortunately, it is difficult in practice to evaluate how those functions are performed, since military forces do not make their operation orders and rules of engagement public. It is therefore no easy matter, at least during the operation’s initial phase, when the first military contingents are deployed on a territory ravaged by conflict, to determine to whom the law applies *ratione materiae*.

No matter what the situation, the forces engaged must first and foremost, no matter what the objective of their mission, respect the international rules relating to the use of armed force. When the operation reaches the intensity of an armed conflict, the relevant rules are, of course, those of

international humanitarian law. When the operation is tantamount to an international police operation, the terms and conditions for the use of force are governed by the relevant human rights texts. In particular, the international forces should comply with the provisions of the *Code of Conduct for Law Enforcement Officials* and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*. In both cases, force is to be used in accordance with the principles of distinction and proportionality. Moreover, authority to maintain public order and to fulfil the function of the police must be transferred as soon as possible to the organs of the transitional administration. Lastly, recourse by each national contingent to its own national norms must be strictly limited to those cases where there is no other option. The requirement that one set of laws and procedures should be applied uniformly throughout the territory covered by the operation is, in our opinion, imperative when considered from the angle of respect for the principle of legal security and the predictability of the applicable law.

The implementing mechanisms provided for in international humanitarian law

The practice we have examined shows that the implementing mechanisms provided for in international humanitarian law are of little help when it comes to evaluating the conduct of international forces in the field. Even though, from the point of view of the law, there is nothing to preclude the application of those mechanisms in such situations, only the ICRC has been able to function. In this respect, the ICRC's competence should be strengthened, meaning it should be officially recognized by the international organizations concerned, in particular the United Nations. It is vital that the ICRC's right to intervene, in particular its right to obtain access to those being held by international forces, be generally established. The *ad hoc* agreements concluded on a case-by-case basis would therefore serve, not to authorize the ICRC to conduct its activities in a specific context, but rather merely to spell out the terms and conditions of a right that has already been accepted as such.

The ICRC's activities, although necessary, are not sufficient. As a humanitarian institution, the ICRC's priority is to have access to the victims of armed conflicts. Its main role is not to determine the responsibilities of the belligerents. It prefers to negotiate rather than to denounce. For this reason, its observations are in principle confidential and it is extremely prudent when asked about alleged violations of humanitarian law. It is therefore vital to develop new mechanisms that will strengthen the implementation of humanitarian law in international operations by supplementing the work done by the ICRC.

In this regard, consideration must be given to the potential role of the International Fact-Finding Commission provided for in Article 90 of 1977 Additional Protocol I. In the event of grave breaches and other serious violations of international humanitarian law, Article 90 provides for a mechanism of inquiry and good offices to which the international organizations should have recourse. Given that the members of the Commission have been appointed and the procedure established, there should be no difficulty in opening inquiries. Suffice it for the parties to the conflict to reach an *ad hoc* agreement requesting the Commission to act. The Commission could also intervene in a given case on the order of the Security Council, acting by virtue of its competence under Chapter VII of the United Nations Charter. Lastly, the Commission's conclusions and recommendations would probably be more readily accepted by the parties, given that the Commission is an independent body.

The universal mechanisms for the implementation of human rights

Given the poor implementation of international humanitarian law, attention must also be turned to expanding the scope of human rights implementing mechanisms. Those mechanisms must, as indeed they have in the past several years, systematically refer to international humanitarian law, not only to human rights. They must also, through their activities, expand their jurisdiction *ratione personae* to international organizations.

In this respect, the practice gradually evolved by the Special Rapporteur on the former Yugoslavia appointed by the Commission on Human Rights in the context of the international presence in Kosovo should be picked up by other Commission organs. Special procedures, whether established for countries or on themes, should be used systematically to examine the activities of international organizations. This would not bring about a radical change in the system, since the respective mandates of the organs concerned are sufficiently broadly worded to encompass the oversight of actors other than States.

And what about the potential role of United Nations treaty-based mechanisms? In the case of UNMIK, for example, when the Security Council adopted resolution 1244 laying the groundwork for the transitional administration, it could have set the conditions for the implementation of human rights in the context by requiring, for instance, the new authorities in Kosovo to submit regular reports to the United Nations Committee on Economic, Social and Cultural Rights and to the Committee on Civil and Political Rights. The jurisdiction of those committees could also have been grounded in bilateral agreements between UNMIK and each of the organs concerned. The latter would thus have been able to overcome at least some of the shortcomings observed in the implementation of human rights in the context of the transitional administration in Kosovo.

Beyond the recent case-law of the Human Rights Committee, the scrutiny powers of the treaty-based control bodies would undoubtedly be based, in the meantime, on ratification of the relevant treaties by the State on the territory of which the mission is deployed. In the case of Kosovo, the Committee held that it was competent to examine UNMIK activities, because the International Covenant on Civil and Political Rights remains applicable in that region due to its ratification by Serbia and Montenegro.³²⁸

Regional human rights implementing mechanisms

Our consideration of regional human rights implementing mechanisms focused on the European Court of Human Rights, which can, *de lege lata*, play a crucial role in the implementation of the rights and guarantees set forth in the ECHR in the course of international organization operations in which military contingents from the States parties take part. Given that the States retain operational control over the conduct of their respective troops, the Court can declare itself competent to consider action against the States by the victims of violations of treaty-based norms. Indeed, it has done so on several occasions, having interpreted the notion of the “jurisdiction” of the States members through the prism of “effective control” over the territory and its inhabitants. The very recent *Bankovic* judgment would seem, unfortunately, to mark a reversal in this jurisprudence, although different indications are emerging from the *Issa* case, which also concerns violations committed outside the Convention’s territory. It is therefore difficult to predict how the Court’s jurisprudence will evolve on this point. In our opinion the

³²⁸ *Concluding Observations of the Human Rights Committee: Serbia and Montenegro*, 12 August 2004, CCPR/CO/81/SEMO.

Court's competence *ratione loci* should not be assessed too restrictively. The need to implement the Convention everywhere where the States parties exercise the prerogatives of the public authorities should carry the day. That is the case, for example, of Kosovo, where the violations committed by KFOR can certainly not be laid at the door of Serbia-and-Montenegro.

On this point the current situation is nevertheless not satisfactory and requires further work. In the case of Kosovo, the Court's jurisdiction does not extend to either UNMIK or KFOR members whose States of origin are not parties to the ECHR. What is more, the internal legal order in Kosovo does not (yet) afford effective and efficient remedies. Other means must therefore be found, *de lege ferenda*, of ensuring the Court has jurisdiction over the international mission in Kosovo.

To start with, an agreement could be concluded between UNMIK and Serbia-and-Montenegro. The agreement should explicitly indicate that the parties accept the Court's jurisdiction over the territory of Kosovo. That undertaking would be subordinate to a termination clause, for it would come to an end when a final decision is reached on the region's international status. As to the agreement's specific content, UNMIK should agree to be bound by the judgments of the European Court of Human Rights and should undertake to execute those judgments on the territory of Kosovo. Concerning the obligation to exhaust all internal remedies as a pre-condition for referring a case to the Court, the agreement should also specify that the remedies provided by Serbia-Montenegro would not be taken into account. The question of the immunities granted UNMIK and KFOR personnel should also be clearly dealt with.

Alternatively, another solution would be not to modify the *status quo*, pending the presentation to the European Court of cases against Serbia-Montenegro for violations committed by UNMIK and KFOR on the territory of Kosovo and the Court's decision on whether it is competent to hear those cases. This solution could be the most likely, because cases were recently presented by individuals living in Kosovo against the military and civilian staff of the international presence in the region.