The application of humanitarian law by the armed forces of the United Nations Organization

by Yves Sandoz

The events in Lebanon and the despatch of a UN armed force to keep the peace there brings into focus a problem which cannot be ignored, the application of international humanitarian law in armed conflicts. This problem has two aspects:

— What is the nature of the armed forces which the UN commits or can commit at the present time?

— To what extent are these armed forces obliged to apply humanitarian law?

I. The nature of the UN forces

In cases in which the UN decides nowadays to use armed forces to attempt to achieve its main aim, or at least what this aim was originally,[1] that is, to maintain international peace and security (article 1/1 of the Charter of the United Nations), it does so by undertaking what it calls "peace-keeping operations" (PKO).

[1] Certain writers, notably Rölling, think that the first aim of the UN has now become the search for justice, rather than peace-keeping.

The reasons for PKOs

It is necessary to go over briefly the events which led the UN to adopt this method of action, allowing it to break the deadlock it found itself in due to the non-functioning of the collective security system, initially provided for in the Charter. This system was built on three essential pillars: the possibility for the UN to undertake coercive actions; the limitation and reduction of arms (inseparable from the system, even though mentioned only indirectly in article 47/1 of the Charter); and the peaceful settlement of disputes which threaten international peace.

The idea was that the UN — and especially the great Powers which form its core — should be able to *impose*, if necessary, the settlement of any situation endangering world peace. As Kelsen points out: « In the history of international law, the Charter is the first convention aiming at universality instituting a centralised monopoly of force for the benefit of the community of nations".[1]

This idea itself, attractive as it may seem at first, was vulnerable to criticism on many grounds. We will mention particularly Claude who tries to define the conditions necessary to the satisfactory functioning of such a system, and who shows that these conditions are far from being met in the world as it is organised today.[2]

As a result it should be a surprise to no one that it was impossible for the Military Staff Committee, laid down in article 47 of the Charter, to fulfil the mission assigned it, that is, to provide for the setting up of the central force necessary for the functioning of the system and to prepare the agreements which should have been signed in application of article 43; for behind these *technical* disagreements which appeared, there was an important *political* disagreement: certain states feared that a United Nations force might become an instrument in the service of other states or groups of states.

The impossibility of organizing a central force and of concluding the agreements provided for in article 43 of the Charter, certainly entailed, on the part of the states, a loss of confidence in the ability of the Organization to maintain peace, and guarantee international security.

As a result, hope of general disarmament, dependent on such ability, dwindled too. Since then, despite some success in arms limitation, we

[1] Kelsen, H. Théories de droit international public, *Recueil des Cours de l'Académie de droit international*, The Hague, 1953 (III), p. 81.

[2] Claude, I. *Swords into Plowshares*, 4th edition, New York, Random House, 1970; esp. p. 256 et seq.

can see a continual growth of armaments on the planet as a whole, even though the General Assembly has repeated many times that its final aim remains general and total disarmament.

This inability to conclude the special agreements provided for in article 43 and the subsequent failure in the area of disarmament—in other words the collapse of two of the pillars of the original system—could logically give rise to the fear that the third of the pillars, the peaceful settlement of disputes which threaten international peace, could also disintegrate. In fact, however, the UN achieved certain results in this area. As the Secretary-General notes in his Introduction to the Annual Report for 1975, "To have avoided a third world war on a planet bristling with weapons of destruction is no mean achievement either".[1] It can be asked, of course, whether the UN can really claim credit for this. We will not enter into a useless polemic on this point, but the fact remains that the UN has undertaken actions which, if not always permitting the settlement of disputes, have at least had the distinction of contributing to a settlement, by avoiding or interrupting the use of force.

It seems clear in any case that the UN would not have survived a total failure in the area of the peaceful settlement of disputes, that is to say a failure which would have ended in a new conflict on a world scale. The efforts of the Organization, and in particular those of its Secretary-General, were thus concentrated on the consolidation of this third pillar of the original system, the only one left standing and upon which the Organization is perched in precarious equilibrium. Since the task of the UN in regard to the peaceful settlement of disputes was foreseen within the framework of a global system which did not work, it could not be fulfilled exactly as was provided for in the Charter. However, the desire for efficient action (action outside the framework of the Charter, justified by a "constitutionalist" interpretation of it) drew the Organization too far along a path which in itself threatened the break-up of the Organization, since it was not accepted by all states. The PKOs arose from two necessary conditions, both *vital* for the Organization: to take action anyway with a view to the peaceful settlement of disputes, and not to stray beyond the bounds fixed by the Charter.

Before dealing with the PKOs themselves, we must now briefly touch upon the attempt, mentioned earlier, to allow the UN to fulfil its original peace-keeping role, *despite* the initial disagreements, and thus *in a different way* from that laid down in the Charter.

---

[1] Introduction to the Report of the Secretary-General on the Work of the Organization, August 1975, UN Doc. A/10 001, Add. 1.

The central idea on which this attempt rests is that the Charter should be interpreted like the constitution of a state, of which none of the fundamental principles can be broken. These principles take precedence over organizational provisions and the division of functions among the various organs. Hence, if one organ is prevented from carrying out a task necessary for the respect of a fundamental principle, another organ is entitled to fill the gap. Thus, for the maintenance of peace, the Security Council is mainly responsible, but if it remains inactive when peace is broken or even threatened, the General Assembly is entitled to act in its place. It can *recommend* actions (this is the only difference with the Security Council's authority since the Security Council can *impose* them) and even, when peace is broken or an aggressive act takes place, recommend coercive measures which imply the use of armed force. An example was the famous General Assembly Resolution 377 (V), called "Uniting for Peace", during the Korea crisis.

This thesis is based on a series of very questionable legal options. Some of them are derived from what Flory calls a "dynamic" interpretation of the Charter.[1] They are based on the existing executive arrangements, interpreted in a very broad way. But some of them, based purely on the fundamental principles of the Charter, go much further, to justify actions which are *opposed* to the existing executive arrangements. In this latter case we can really talk of a "constitutionalist" interpretation of the Charter.

The unease which was felt even before the end of the Korean operation, led progressively to a modification of the untenable position of the pure "constitutionalists". The UN *had* to start out again on a new basis, and it was from this generally accepted necessity that a new form of UN action, the PKO was born. Since that time Resolution 377 (V) has never been *fully* applied, and it is doubtful if it ever will be again.

The name PKO, which appeared in 1956 with the UN intervention after the Suez Canal affair, includes a number of UN actions differing in aims and characteristics, and having a very controversial legal basis, but whose leading principles have become clear with time.

Before examining these principles, we should note that, even though each PKO is different from all others, we can nevertheless distinguish two main types of operation: those which have a purely observational function with no active role, and those which have a surveillance mission, implying a larger physical presence which should have a clearly

[1] Flory, M. L'organisation des Nations Unies et les opérations de maintien de la paix. *Annuaire français de droit international*, 1965, p. 449 et seq.

deterrent effect on the belligerents. It is especially during these latter operations that the UN forces may be required to apply humanitarian law.

Guiding principles of PKOs

The guiding principles for these operations, such as we can distinguish them after more than 20 years of practice, were recalled by the Secretary-General of the UN in the report he was asked to make with a view to establishing a UN interim force in Lebanon (UNIFIL), on 19 March 1978.[1] It seems to us useful to mention them, with brief comments on some.

> "(A) The Force will be under the command of the United Nations, vested in the Secretary-General, under the authority of the Security Council. The command in the field will be exercised by a Force Commander appointed by the Secretary-General with the consent of the Security Council. The Commander will be responsible to the General-Secretary. The Secretary-General shall keep the Security Council fully informed of developments relating to the functioning of the Force. All matters which may affect the nature or the continued effective functioning of the Force will be referred to the Council for its decision."

Two elements are worthy of note in this first principle:

Firstly, we saw earlier that it had previously been permissible for the General Assembly to decide on the sending of UN forces in certain circumstances. This idea has now been abandoned. It is true that the controversy which had developed around the legal basis of PKOs has not been fully resolved. Some see this basis in Chapter VI of the Charter, which would allow the General Assembly subsidiary power to order PKOs: others see it in chapter VII, which would tend to confirm the sole power of the Security Council: and others, finally, would like to see it in a new chapter VI(bis) of the Charter. However, the basis for the controversy has practically disappeared. No one today questions the exclusive authority of the Security Council to order PKOs, even though we must admit that this is for reasons which are as much political as legal.

[1] UN Doc. S/12611, p. 2.

Secondly, the command of the force is the direct responsibility of the Secretary-General, but his authority is very restricted, since every new problem must be submitted to the Security Council for decision. This development has been very marked, especially since the end of the Congo operation, during which the Secretary-General took certain initiatives which were severely criticised by certain members of the Security Council. It must be noted, however, in the then Secretary-General's defence, that the mandate he had been given was extremely vague. It was thus this experience in particular which led the Security Council to give the Secretary-General only very precise terms of reference which were also limited in time.

> "(B) The Force must enjoy the freedom of movement and communication and other facilities that are necessary for the performance of its tasks. The Force and its personnel should be granted all relevant privileges and immunities provided for by the Convention on the Privileges and Immunities of the United Nations."

> "(C) The Force will be composed of a number of contingents to be provided by selected countries, upon the request of the Secretary-General. The contingents will be selected in consultation with the Security Council and with the parties concerned, bearing in mind the accepted principle of equitable geographic representation."

Two remarks on this subject:

Firstly, we must point out that one can find certain evidence of opinions favourable to not including in the PKO forces contingents from the countries of the permanent members of the Security Council [1]. This was no doubt due in part to the circumstances in which the first UN emergency force was set up, since it was necessary to avoid the inclusion of members from Britain and France, who had recently intervened in Suez. The presence of French forces in the UNIFIL seems to indicate that these ideas have not finally prevailed. It remains to be seen whether the absence of forces from the two super-powers in the PKOs should be seen as being the result of chance circumstances or of a general rule. It seems to us, in any case, that this is a judicious practice, avoiding as it does any risk of confrontation between these great Powers.

[1] See especially the report of the Secretary-General and the Chairman of the General Assembly of 31.5.1965 (UN Doc. A/AC. 121/4), p. 22.

Secondly, the principle of fair geographic representation has not always held good. But the idea that all the large groups of states represented in the UN may be represented in the PKOs has made some progress and is now very generally accepted. We find it expressed in the Appendix to the Comprehensive Review of the Whole Question of Peace-Keeping Operations in all their Aspects, presented in the Report of the Special Committee on Peace-Keeping Operations of 31 October 1974,[1] and elsewhere.

There are, however, practical obstacles to compliance with this principle, owing to the necessity of having contingents of a certain technical level, and to the expenses incurred by the countries providing the contingents. Today, therefore, it should be considered a *right* for the different groups of states to be represented equitably in the UN forces, and not an *obligation* for them to take part.

> "(D) The Force will be provided with weapons of a defensive character. It shall not use force except in self-defence. Self-defence would include resistance to attemps by forceful means to prevent it from discharging its duties under the mandate of the Security Council. The Force will proceed on the assumption that the parties to the conflict will take all the necessary steps for compliance with the decisions of the Security Council."

Since this principle is particularly important as far as the application of humanitarian law by UN forces is concerned, we will come back to it in the second part of this article.

> "(E) In performing its functions, the Force will act with complete impartiality."

> "(F) The supporting personnel of the Force will be provided as a rule by the Secretary-General from among existing United Nations staff. Those personnel will, of course, follow the rules and regulations of the United Nations Secretariat."

These principles do not, however, cover all aspects of PKOs. In particular, the financial aspect, which was the cause of an important crisis, now overcome, is not touched upon. Another aspect not touched

[1] UN Doc. A/9827, p. 7.

upon seems to us to be particularly worthy of mention within the framework of our subject: the consensual aspect of the PKOs.

The consensual character of the PKOs

PKOs cannot be undertaken without the agreement of all the interested parties, that is, the government on whose territory the PKO takes place, the other party or parties directly involved in the conflict, and the permanent members of the Security Council, who may exercise their right of veto in regard to a PKO. Finally, the states who provide contingents to the PKO do so on a voluntary basis.

It is clear that various problems can nonetheless arise, the most serious being that of withdrawal of consent. Can a government which accepts a PKO on its territory, or a member of the Security Council who accepts (or at least does not refuse) the setting up of a PKO, withdraw their consent at any moment, thus threatening to distort completely the result of a PKO which has already begun? The problem has occurred in the past, particularly during the Congo operation. The present solution is to engage PKOs for very short periods of time. At the moment, UNIFIL is engaged in the Lebanon for four months; in Cyprus the UN force to keep the peace is engaged for six months, while in the Near East the UN force responsible for observing the disengagement, and the UN Emergency Force are engaged for a year. So we can say that the undertaking entered into at the beginning of these periods, which must be renewed each time in order to prolong a PKO, is today more than a simple "si voluero" undertaking. It would probably not be questioned during the agreed periods, unless there were an important change in the circumstances.

II. Application of humanitarian law

Having examined these characteristic of PKOs, we now ask whether humanitarian law can and should be applied by UN forces engaged in such operations.

Two aspects mentioned above should first of all be recalled: the PKOs are subject to the agreement of the parties to the conflict and the UN forces cannot therefore constitute an added military force for one of them, especially since they are bound to act "with complete impartiality". Further, the UN forces receive arms only of a defensive nature, and may use force only in self-defence.

The case in which UN forces may be required to apply international humanitarian law applicable in armed conflicts are therefore rather rare. Self-defence is, however, defined in a very broad sense, since it includes resistance to any attempt to impede it by force from carrying out the functions assigned it by the Security Council. Even though it is very unlikely that direct engagements on such a scale as those in the Congo will occur, the use of arms by UN forces cannot be excluded. Let us look in particular at the situation today in the Lebanese conflict, in which the UN forces became involved following the Israeli occupation. There are a number of factions and isolated armed units which are not really under any political authority. The risk of armed confrontations with the UN forces is, under such circumstances, not negligible.

So it is possible that the members of the UN forces may find themselves in a situation in which they must use arms, and anyone faced with such a situation should know the principles of international humanitarian law applicable in armed conflicts. As soon as a weapon is used during a conflict, even in self-defence, certain rules, of which the simplest examples would be humane treatment for the wounded who cease fighting and for prisoners who may be taken following a confrontation, must be observed.

But if UN forces may have to apply humanitarian law directly when they are involved in armed confrontations, they can also have an important role to play by collaborating with those whose particular responsibility it is to see that this law is applied. We could cite for example the responsibilites given by the Fourth Convention to the Protecting Power or its substitute in occupied territories. UN forces may, for example, facilitate the movements of, and, as far as possible, protect delegates of the Protecting Power or, where there is no Protecting Power, of the ICRC whose task it is, under the Fourth Convention, to bring help to civilians isolated by the conflict.

It is important, therefore, for humanitarian reasons, that all officers and other ranks of UN forces engaged in PKOs should be trained, to a degree varying with rank, in humanitarian law. Besides, there is no doubt that the non-respect of the principles of humanitarian law, which is nowadays practically universally accepted, would have an extremely detrimental effect on the image of the UN forces and hence of the UN itself.

It remains for us to examine whether the UN, or more exactly the Security Council, under whose authority the PKOs are placed, and the Secretary-General, who is in command of the forces, are obliged to see that humanitarian law applicable in armed conflicts is applied by the UN forces.

The UN itself, as an organization, is, of course, not a party to the Geneva Conventions and does not possess forces of its own. It is therefore primarily up to the states who provide the contingents to instruct their troops beforehand, as they should in fact do with all their armed forces. It is the states who are responsible for any breaches of international humanitarian law which the soldiers they provide commit, and they are equally responsible for the punishment and suppression of such breaches. However, the Secretary-General and, especially, the military commander at the head of the troops, have a considerable role to play in the co-ordination and practical observation of these directives, and the maintenance of discipline.

The obligation on the UN forces to observe the fundamental principles of the Geneva Conventions can hardly be questioned today, since they are in force in nearly every state. What is more debatable, however, is the question of the Protocols additional to those Conventions, adopted on 10 June 1977 but not yet in force.[1]

It would seem in any case that the UN forces should take account of the principles which inspired the Protocols, worked out and adopted by consensus by the representatives of the great majority of the international community.

A problem could arise if some states instructed their contingents according to the Protocols and others refused to do so. This problem remains theoretical, inasmuch as the UN forces may be called upon to apply the generally accepted fundamental principles. It could possibly, however, arise at the command level, in which case it should be resolved by the PKO with the agreement of all the parties concerned.

Position of the Red Cross

The ICRC has not remained indifferent to the question of the application of humanitarian law applicable in armed conflicts by UN forces engaged in PKOs.

It has brought the problem to the attention of the Secretary-general through representation made in 1956, 1961, 1964 and, most recently, during the PKO in Lebanon, by letter on 10 April 1978. These representations have been favourably received and the obligation on UN forces to observe the principles of humanitarian law was recognised.

In addition, the ICRC, in a memorandum of 10 November 1961, reminded the governments of States Parties to the Geneva Conventions

[1] Up to now, Protocol I has been signed by 52 states, Protocol II by 49; both have been ratified by Ghana and Libya and will thus come into force on 7 December 1978.

and members of the UN of their responsibilities concerning the application of these Conventions when they provide a contingent to the UN.

Finally we would mention that the Twentieth International Red Cross Conference in Vienna, in 1965, adopted a resolution (No. XXV) entitled: "Application of the Geneva Conventions by the United Nations Emergency Forces", in which it makes three recommendations. They are still very much up to date and will serve as our conclusions:

The XXth International Conference of the Red Cross recommends:

1. *that appropriate arrangements be made to ensure that armed forces placed at the disposal of the United Nations observe the provisions of the Geneva Conventions and be protected by them;*
2. *that the Governments of countries making contingents available to the United Nations give their troops—in view of the paramount importance of the question—adequate instruction in the Geneva Conventions before they leave their country of origin as well as orders to comply with these Conventions;*
3. *that the authorities responsible for the contingents agree to take all the necessary measures to prevent and suppress any breaches of the said Conventions.*

Yves SANDOZ