Peace-enforcement actions and humanitarian law: Emerging rules for "interventional armed conflict"

by
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The millennium just past offers a useful historical context for lawyers, soldiers and policy-makers who have to plan and conduct peace-enforcement missions. There has been an unspoken assumption about peace-enforcement operations.[1] They are thought to be so unlike traditional wars that they cannot be accommodated within an easily acquired framework of international humanitarian law. Any differences that may separate peace enforcement from other conflict-related military operations are, however, not profound and should not deny peace enforcers access to rules of international humanitarian law.

States are reluctant to characterize use of force in the peace-enforcement context as equivalent to military operations in other conflict environments. Furthermore, State practice does not encourage the notion that rules of international humanitarian law can

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be applied to peace enforcement in a predictable, systematic manner. Nonetheless, developments at the close of the 20th century point in a positive direction. Events during the Kosovo conflict, and after, demonstrate that rules for interventional armed conflict are beginning to take form.

Is humanitarian intervention compatible with international humanitarian law?

The 20th century witnessed more than a few motivations for war. Some wars were fought to further the interests of ruling élites, some to build empires, some to advance ethnic ambitions, some to serve ideological fervour, some to support nationalistic dreams, some to destroy peoples and civilizations, some to achieve freedom, and some simply to survive in the face of raw aggression. By the closing centuries of the last millennium concrete, treaty-based rules had been set in place to regulate warfare. With the exception of peace operations, we now have a clear consensus that these rules apply, in some form, during every armed conflict. The motives driving any given war are irrelevant to the obligation to apply international humanitarian law.

The use of force under Chapter VII of the UN Charter remains a curious exception to this consensus. In most instances, State policy assumes only piecemeal application of the modern law of armed conflict during peace-enforcement missions. Though the armed forces of the Federal Republic of Germany are instructed that the "rules of international humanitarian law shall also be observed in peace-keeping operations and other military operations of the United Nations",[2] such guidance is atypical. States seem uneasy with the notion that peace-enforcement units should apply all or most of international humanitarian law during their missions as standard operating

1 As used in this article, the term "peace enforcement" refers to military operations conducted under Chapter VII of the UN Charter and to similar operations conducted by intergovernmental organizations at the regional level.

2 *Humanitarian Law in Armed Conflicts — Manual*, Ministry of Defence, Federal Republic of Germany, 1992, para. 208.

procedure. For political leaders, this may reflect unease at the prospect of telling the public that their armed forces are engaged in combat. Whatever its reason, such hesitation generates uncertainty for policy-makers and military planners alike. This was apparent when NATO launched military operations against Yugoslav territory and forces in March 1999.

A journalist posed this question to a senior Cabinet member during the opening days of the campaign: "Javier Solana, when he announced the air strikes, said that this wasn't an unconditional war against Yugoslavia and it wasn't against the Serb people. Would you also make those statements, and what would your message be to liberal Serbs who have been critical of President Milosevic in the past who are now rallying round the flag because they feel their country is under attack?" — The answer was: "This is not a war, it is an operation designed to prevent what everybody recognises is about to be a humanitarian catastrophe: ethnic cleansing, savagery in a physical way, the driving out of people from their own home villages and the likes of the war crimes that we saw at Rajac. That is what we are in there to prevent, that is not war, it is a humanitarian objective very clearly defined as being that."[3]

Nonetheless NATO set out to secure its objective through military means. Perhaps because the military character of this operation was paramount, NATO members never denied that their forces were bound by the rules of international humanitarian law. NATO officials pointedly invoked rules of war during the conflict. However, they did not apply the law of military occupation (a subset of those rules) to follow-up operations in Kosovo. This is but the latest intervention marked by uncertainty, inconsistency and ambivalence in the face of facts that pointed toward armed conflict and the necessity to apply its rules.[4]

3 Secretary of State for Defence, United Kingdom, Briefing of 25 March 1999, www.mod.uk/news/kosovo/brief250399.htm.

4 In this article, the terms "international humanitarian law", "law of war" and "rules of war" are used interchangeably to cover all aspects of the law of The Hague and of Geneva law. There is some disagreement as to whether the term "international humanitarian law" pertains to Geneva law only or whether it covers both.

Some background to the application of international humanitarian law

State practice seems to be founded on the idea that armed forces acting under Chapter VII are not bound by the Geneva Conventions or other treaty-based international humanitarian law, as they act for the United Nations rather than as State actors bound by those rules. At most, they would assert, such missions are regulated by customary rules of international humanitarian law. Sometimes, State practice also seems linked to an assumption that peace-enforcement missions are something new in warfare and cannot be held to the same rules that apply in other armed conflicts.

Chapter VII of the UN Charter empowers the UN Security Council to authorize "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations." Nothing in this language inherently argues against full application of international humanitarian law, but States have accorded a special status to Chapter VII operations. As they are conducted at the behest of the Security Council, they seem to have been endowed with unique political as well as legal character and are treated as something different from inter-State conflict.

Intervention under Chapter VII in the Korean War was marked by application of the Geneva Convention relative to the Treatment of Prisoners of War, and during the Gulf War all forces were governed by the rules of international armed conflict. These precedents did not, however, pave the way for continued expansion of that practice. Chapter VII forces operating in Somalia and Haiti sometimes applied international humanitarian law, as witnessed by their cooperation with ICRC protection delegates who visited detainees. But the decision to apply those rules was developed ad hoc, without benefit of a policy assuring clarity and consistency in meeting these challenges.

In December 1994 the UN Security Council adopted the Convention on the Safety of United Nations and Associated Personnel. On the face of it, this treaty provides for the protection of

UN staff on mission and punishment for those who attack them within a peacetime, law enforcement-oriented context. Article 2 specifies that the treaty does not apply to situations in which "the law of international armed conflict applies". Unfortunately, this language only increased the uncertainty surrounding Chapter VII deployments, for the treaty was adopted in response to attacks on UN personnel during peace-*enforcement* missions. This left the inference that States considered the law of international armed conflict inapplicable to peace enforcement. However, that interpretation would run contrary to military realities in the field. This contradiction between theory and reality only compounds the challenge involved in merging international humanitarian law with Chapter VII operations.

Operational realities quickly overcame NATO's initial reluctance to characterize military operations in Kosovo (conducted without Chapter VII authorization) as being a "war". However, follow-on military activities in Kosovo by NATO members remain shrouded in legal ambiguity, as they have not adopted the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War to regulate their activities. Their presence in Kosovo is sanctioned by a Chapter VII resolution,[5] but this is not enough to close a serious gap in their legal authority. The resolution authorizes the Secretary-General "with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo."[6]

This mandate was achieved through the use of armed force. The agreement for the withdrawal of Yugoslav forces provides that "the bombing campaign will terminate on complete withdrawal

5 UN Security Council Resolution 1244, of 10 June 1999.

6 *Ibid.*, para. 10.

of FRY [Federal Republic of Yugoslavia] forces ...".[7] It also stipulates: "The international security force (KFOR) shall have the right: (a) to monitor and ensure compliance with this agreement and to respond promptly to any violations and restore compliance, using military force if required. This includes necessary actions to: (1) enforce withdrawals of Federal Republic of Yugoslavia forces; ..."[8]

Though international humanitarian law does not furnish precise guidance on what constitutes military occupation, Kosovo has plainly come under foreign military control through the use of force. The international military contingent in Kosovo reasonably qualifies as an occupation force. Nothing found in the UN Charter, or elsewhere in international law, grants the United Nations any authority to administer the territory of a sovereign State. The only available authority for such action is found in that part of international humanitarian law regulating the powers and duties of occupation forces.

The law of military occupation has not been invoked to justify or support KFOR or the UN Interim Administration Mission in Kosovo (UNMIK). This adds yet another precedent for the employment of Chapter VII-sanctioned force without complementary obligations under the rules of international humanitarian law. Fortunately, that unfavourable momentum is slowed by important countervailing events.

International humanitarian law and intervention operations: the Kosovo precedent

NATO's military operations during the Kosovo conflict were not authorized under Chapter VII, and KFOR and UNMIK operate there without reference to the law of military occupation. Nonetheless, NATO has established an important precedent for the application of international humanitarian law to intervention

7 Letter from the Secretary-General to the President of the Security Council, S/1999/682, of 15 June 1999. See the appended Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, Art. II(e).

8 *Ibid.*, Appendix B(4).

operations. From the viewpoint of NATO member States, their operations were conducted in response to an international humanitarian threat, rather than for the pursuit of State interests. Ultimately, NATO members sought and received Chapter VII authority to move into Kosovo. Under those circumstances, NATO's commitment to follow rules of war during the conflict provides a compelling precedent for their use where relevant in all Chapter VII operations.

From the first days of the conflict, NATO statements demonstrated an intent to follow the law of war rules on targeting. While discussing military operations at a press conference in the early days of the conflict, a NATO spokesman said that "the targets were exclusively military — every effort was made to avoid collateral damage — planes only fire at targets when we are confident that we can strike accurately — some aircraft in the first operation returned without dropping ordinance. Targets are carefully selected and continuously assessed to avoid collateral damage."[9]

Two months later, a like message was delivered at a US Department of Defense press briefing. When a journalist asked: "To what extent are targets like power plants and other utilities designed to have a psychological impact on Milosevic, based on the fact that those are the ones that greatly inconvenience his people?", he received the following reply: "Once again, the targets are not directed whatsoever at the Serbian people. These are directed at his ability to coordinate his military forces in the field, his ability to attack innocent civilians, the IDPs and refugees, and his ability to command and control his fielded forces. Anything that contributes to that in a military fashion will be attacked, but we certainly have no intention of causing any problem for the Serbian population. That's not a military target. But once again, you need to go back. Milosevic knows exactly what his targets are and what things he needs to maintain a military force, and those will be attacked."[10]

9 NATO Press Conference, 26 March 1999, www.nato.int/kosovo/press/p990326a.htm.

10 Defense Link, US Department of Defense News Briefing, 22 May 1999, www.defenselink.mil/news/May1999/t05221999_t0522asd.html.

Likewise, NATO invoked the rules of war on treatment of captured enemy forces. A spokesman for the US Department of Defense made the following point at a press briefing after three US service members were captured: "... We, of course, are of the mind that these individuals should not have been abducted in the first place, that they should be released immediately. We believe, of course, that they should not be used as any kind of bargaining chip, since this is contrary to the Geneva Convention ..."[11]

At another press conference a little over a month later, another statement was made on the application of the Third Geneva Convention relative to the Treatment of Prisoners of War: "Let me start and give you a few details about the release of the two EPWs, former EPWs (enemy prisoners of war) today at the border between Hungary and Yugoslavia. There wasn't press coverage of this because, as some of you may know, Article 13 of the Third Geneva Convention says: 'Prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity'. So there was no press coverage for the turnover."[12]

In conclusion, NATO had declared that it was implementing Geneva rules for treatment of prisoners of war, and following rigorous targeting practices. NATO took the initiative to point out its application of rules of war in a conflict where a Security Council resolution was ultimately obtained in support of its follow-on military presence in Kosovo. This leaves little room for the view that Chapter VII operations are exempt from rules of international humanitarian law.

Emerging rules for interventional armed conflict

On 6 August 1999 UN Secretary-General Kofi Annan issued to United Nations forces their first standing guidance on the application of international humanitarian law.[13] The guidance he gives

11 *Ibid.*, 7 April 1999, www.defenselink.mil/news/April 1999/to4071999_to407asd.html.

12 *Ibid.*, 18 May 1999, www.defenselink.mil/news/May1999/to5181999_to518asd.html.

13 *Observance by United Nations forces of international humanitarian law*, Secretary-General's Bulletin, ST/SGB/1999/13, of 6 August 1999. Reprinted in *IRRC*, No. 836, December 1999, pp. 812-817.

them is based on the premise that peace-enforcement operations cannot be categorized as traditional armed conflict. For example, Section 8 of the Bulletin begins with the instruction that: "The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention." In contrast, the Third Geneva Convention relative to the Treatment of Prisoners of War plainly identifies such detainees as "Prisoners of War." Article 12 of the Convention begins "Prisoners of war (...) in the hands of the enemy Power (...)".

Unlike the Geneva Conventions of 1949, the Secretary-General's Bulletin does not address the application of international humanitarian law within the context of inter-State armed conflict. However, as one reads on, the next sentence stipulates regarding such detainees that: "Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949 (...)" The Bulletin, then, expressly extends the practice of applying international humanitarian law in UN operations, without waiting for a solution to all legal questions. The Secretary-General's Bulletin contains detailed guidance on Geneva law issues relative to treatment and protection of civilians, detainees, and wounded and sick combatants. It contains detailed guidance on Hague law issues relative to means and methods of combat.

The legal status of this Bulletin is open to debate. Can the Secretary-General issue rules and regulations for the conduct of State-deployed forces on UN missions? Some of the guidance relies on treaties that have not been ratified by all States participating in Chapter VII operations, and for the forces involved this poses serious questions about their capacity to work together. Nonetheless, the Bulletin offers a way forward.

In the past, Chapter VII operations have been saddled with unnecessary legal ambiguity about the application of rules of war. The Bulletin provides a foundation for legal advisors, commanders and civil authorities tasked to implement peace-enforcement operations. In the future, they can ask *which* rules of international humanitarian law apply. In the past, the question was whether *any* of those rules applied.

It is appropriate here to recall the Martens Clause: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[14]

Surely, the dictates of the public conscience would require the fullest possible application of international humanitarian law where UN-sponsored forces (or those sponsored by a regional organization) are engaged in combat or military occupation. The Secretary-General's Bulletin provides the first step. A workable legal context would furnish the second.

As with other, less destructive human activities, the characteristics of armed conflict are susceptible to change in their specifics. That such operations may have distinctive legal, political or operational characteristics setting them apart from other military operations is not extraordinary. It should no longer keep us from moving to develop and implement clear, usable standards of international humanitarian law.

The Geneva Conventions of 1949 formalized customary law on the categorization of armed conflicts. In accordance with customary practice, armed conflicts were categorized as international or internal in character. These categories are open to further development or addition as the humanitarian imperative demands.

Intervention is an integral part of peace enforcement. Units so deployed cannot be classified as parties to internal armed conflict. Chapter VII forces applied rules of international armed conflict during the Gulf War, but there is likewise still no constituency pressing to apply such rules on the basis that peace-enforcers are parties to international armed conflict. The rules of internal armed conflict do not provide a

14 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, preambular para.

realistic framework for their operations. Nor can we routinely look toward the rules for international armed conflict if we reject the notion that peace-enforcers are also belligerents, participating within the established legal framework for international armed conflict.

Peace enforcers are interveners. Their operations are intervention operations. We need not lose further time in developing rules for them simply because we cannot place them within existing legal constructs for war. Armed conflict that involves peace enforcers is interventional conflict. Along with internal and international armed conflict, interventional armed conflict is also a reality of modern war. International humanitarian law can best move forward if we take that into account. When the Geneva Conventions of 1949 were adopted, it required something of a conceptual breakthrough to accept and adopt rules for internal armed conflict. Historically, States had been willing to consider treaty-based rules for international conflict only. We have no such challenge here. The debate is over what rules to apply to peace-enforcement operations, not whether established rules apply at all.

The concept of interventional armed conflict provides a practical, descriptive framework within which to focus and refine rules for peace operations. We now have experience with application (albeit uncertain and inconsistent) of international humanitarian law in a wide range of peace operations. Finally, we have a concrete framework in rules proffered by the Secretary-General of the United Nations.

Peace-enforcement operations represent a shift in the nature of armed conflict — they do not fall within the framework of internal armed conflicts, and many do not regard them as falling within the framework of international armed conflict. However, armed conflict they remain. Such shifts in the nature of warfare may not be frequent, but they have taken place over the centuries. From a humanitarian viewpoint we should be prepared to deal with them. We can develop realistic, practical rules for peace enforcement within the framework of interventional armed conflict. Our predecessors of the late 19th to mid-20th centuries adopted a workable framework to implement international humanitarian law in the context of their times. We need to match their spirit of innovation in our own.

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Résumé

Mesures d'imposition de la paix et droit humanitaire : nouvelles règles pour les interventions armées

par MICHAEL H. HOFFMAN

Au cours des dernières années, le Conseil de sécurité a autorisé, à plusieurs reprises, le recours à la force en vertu du chapitre VII de la Charte des Nations Unies. D'autres actions militaires collectives contre un État ont eu lieu en dehors du cadre fixé par la Charte (par exemple, l'intervention de l'OTAN au Kosovo). Les questions de savoir si le droit international humanitaire est applicable et quelle en est la justification ont suscité de longue date des débats, sans qu'une réponse acceptée par tous y soit donnée. En examinant la pratique des États, l'auteur arrive à la conclusion que, faute d'une codification explicite du droit international applicable à ces actions, les normes du droit international humanitaire sont tout de même invoquées par les forces qui participent à de telles opérations militaires. Les règles, publiées récemment par le secrétaire général des Nations Unies sous le titre « Respect du droit international humanitaire par les forces des Nations Unies », semblent confirmer ce constat.