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Pieces of the Puzzle: Peace operations, occupation and the use of force

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1. Introduction

In June 2004 a member of Parliament asked the British Secretary of State for Defence what guidance he had given to British forces in Iraq to ensure that they would fully abide by international law enforcement standards. The reply given by the Secretary of State included the statement that there "are no agreed international law enforcement standards applicable to military forces."[2])

This question and answer are telling for a number of reasons. First, they illustrate the fact that military personnel are increasingly called on to carry out police-like tasks. This was the case for the British coalition forces in Iraq that the question above referred to. In June 2004 the UK was an Occupying Power in Iraq. As such it had an obligation under Article 43 of the 1907 Hague Regulations to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety". Police-like tasks are also frequently included in the mandates of peace operations. One example is the Kosovo Force (KFOR) in Kosovo. One of the tasks entrusted to KFOR in Security Council Resolution 1244 was "ensuring public safety and order until the international civil presence can take responsibility for this task."[3])

Secondly, the question and answer demonstrate that an occupation and a peace operation can be closely related at least in time. Only a few weeks after 9 June 2004 the occupation ended. Coalition forces remained in Iraq however on the basis of the authorization in Security Council Resolutions 1511 and 1546.[4]) Finally, the question and answer illustrate that the norms that apply to military forces carrying out public order tasks are open to question. This article will discuss these norms. More in particular, it will focus on the norms that apply to the use of force by peace operations in carrying out public order tasks.[5])

To this end, the article first turns to the question of the application of the law of occupation to peace operations. The occupation paradigm appears on its face to resemble the situation in which many peace operations find themselves. Subsequently, other standards that potentially apply to the use of force by peace operations will be discussed. Finally, the issue of whether a new legal regime is required to address this specific situation is addressed.

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[2]) Hansard 9 June 2004: Column 419 W.

[3]) UN Security Council Resolution 1244 of 10 June 1999, UN Doc. S/RES/1244, para. 9 (d).

[4]) UN Security Council Resolution 1551 of 8 October 2003, UN Doc. S/RES/1511; UN Security Council Resolution 1546 of 8 June 2004, UN Doc. S/RES/1546.

[5]) For the purposes of this article, "peace operation" is broadly defined as including traditional "peacekeeping operations" as well as more robust "peace enforcement operations" whether under the command and control of the United Nations or authorized by the UN but commanded by states or another international organization.

2. Application of the law of occupation

2.1 Occupation law as part of International Humanitarian Law

As was noted, an occupation and a peace operation can be closely related in time. In the case of Iraq, it has been argued that despite the declaration that the occupation ended on 28 June 2004, this does not necessarily mean that the occupation ended on that date. To the extent that the United States and other foreign troops operating in Iraq continue to wield effective control over Iraqis and Iraqi property, it is argued, they are bound by the law of occupation.[6]) This is because this body of law intends to look to the substance of relations, not to their legal characterization as such. This raises the question whether peace operations can be bound by the law of occupation. If the answer is affirmative this has important consequences. For one, the obligation in Article 43 of the Hague Regulations would apply. Standards relating to the use of force contained in the law of occupation would also apply.

Whether the law of occupation can apply to peace operations is part of the larger question of whether International Humanitarian Law (IHL) can apply to peace operations. In this context, a distinction must be made between operations authorized by the UN and operations established and commanded by the UN. In principle there does not appear to be much controversy concerning the possibility of operations authorized by the UN but commanded by states or another international organization being bound by IHL. This possibility is generally accepted. Acceptance also extends to the application of the law of occupation. For example, it was accepted that forces taking part in Operation Desert Storm briefly became Occupying Powers when they moved into Iraq.[7])

With regard to peace operations under the command and control of the UN the situation is different. Whether IHL can apply to such operations was highly controversial for a long time. Today, however, it appears to be widely accepted that IHL can apply to UN peace operations.[8]) An important indication of this was the promulgation in 1999 by the UN Secretary-General of a Bulletin on Observance by UN Forces of IHL.

The increasing acceptance of the application of IHL in general to UN peace operations does not necessarily extend to the law of occupation, however.

2.2 Doctrine on application of the law of occupation

In the legal literature there is some support for the application of the law of occupation to peace operations. This current in doctrine underlines the factual character of an occupation. It points to Article 42 of the Hague Regulations. Article 42 provides that: territory is occupied when it is actually placed under the authority of a hostile army. For there to be an occupation it is important that the occupant exercises effective control without the volition of the sovereign of that territory.[9]) Neither the occupant nor any other party is required to declare that there is an occupation. This factual element was recently underlined by the International Court of Justice in its judgment in the case concerning armed activities by Uganda on the territory of the Congo.[10])

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[6]) E. Benvenisti, The International Law of Occupation, 2nd ed., xv (2004).

[7]) United States Department of Defense, Final Report to Congress: Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, at 695 (1992).

[8]) See for a discussion of practice M. Zwanenburg, Accountability of Peace Support Operations (2005), especially at 161 – 179.

[9]) See e.g. G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol. II, The Law of Armed Conflict 324 (1968).

[10]) Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, not yet reported, para 173.

On this basis it has been argued that if a number of factual criteria have been met, even if they are met by a peace operation, an occupation exists. According to Roberts these criteria are the following:

a) there is a military force whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose activities there involve an extensive range of contacts with the host society not adequately covered by the original agreement under which it intervened;
b) the military force has either displaced the territory's ordinary system of public order and government, replacing it with its own command structure, or else has shown the clear physical ability to displace it;
c) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other, with the former not owing any allegiance to the latter;
d) within an overall framework of a breach of important parts of the national or international legal order, administration and the life of society have to continue on some legal basis, and there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants.[11])

There are also other commentators who argue that the law of occupation applies to UN peace operations as soon as certain factual criteria are met.[12])

Opponents of the application of the law of occupation to peace operations underline that consent of the host state is a characteristic of peace operations. Indeed, consent is one of three fundamental characteristics of peacekeeping, together with impartiality and the non-use of force. The Brahimi Panel stated that these are still the bedrock principles of peacekeeping. Consent is normally formalized in an agreement called a Status of Forces Agreement (SOFA) or Status of Mission Agreement (SOMA). Such an agreement, it is argued, replaces the law of occupation as the applicable legal framework. Indeed, consent appears to be a key issue.[13]) There are however peace operations which do not have the consent of the host state. One example is UNOSOM II in Somalia. In that case there was no government in Somalia which was capable of giving its consent. In other cases, such as Kosovo, it has been argued that even though consent has been given, this occurred under duress thus making the consent null and void.[14]) The argument also does not take into account that operations established or authorized by the Security Council under Chapter VII of the UN Charter by definition do not require the consent of the host state. Without the consent of the host state, the deployment of a peace operation would in violation of Article 2, paragraph 7 of the Charter. This article provides that nothing in the Charter authorizes the UN to intervene in matters which are essentially within the domestic jurisdiction of any state. The article also provides that enforcement measures under Chapter VII are an exception to the principle of non-intervention.

Opponents also argue that the rights and obligations of occupying powers flow from the conflict inherent in the relationship between traditional occupying powers and the populati-

[11]) A. Roberts, What is a Military Occupation?, 55 British Yearbook of International Law 249 (1984), at 300 – 301.
[12]) See e.g. M. Kelly, Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework 178 (1999).
[13]) See e.g. S. Vité, L'Applicabilité du Droit International de l' Occupation Militaire aux Activités des Organisations Internationales, 86 International Review of the Red Cross 9 (2004), at 21.
[14]) E. Milano, Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status, 14 European Journal of International Law 999 (2003).

on of occupied territories. These rights and obligations are not relevant to a peace operation because of its altruistic nature, it is argued.[15]) The problem with this argument is that good intentions may be hard to measure. It is not a sound basis for determining the applicability of IHL.[16]) This is why the Preamble to Additional Protocol I states that the obligation to respect the Geneva Conventions and the Protocol does not depend on the causes espoused by or attributed to the arties to a conflict. To hold otherwise would be to introduce a ius ad bellum element into the discussion of whether the ius in bello applies.[17])

It is also argued by opponents of the application of the law of occupation to peace operations that - even in the absence of a SOFA - the rights and duties of a peace operation are derived exclusively from its mandate in a Security Council resolution. This, it is argued, excludes the application of the law of occupation, in particular in case of a resolution under Chapter VII of the Un Charter.[18]) The difficulty with this argument is that Security Council mandates are notoriously vague. They do not establish clear guidance on the relationship between a military force and the local population.[19]) As a consequence of the criticisms by the Brahimi Panel, resolutions mandating peace operations appear to have become somewhat clearer. They are still far from giving the kind of detailed guidelines that are contained in the law of occupation, however. A second difficulty with the argument that the rights and duties of an operation derive exclusively from the mandate is that it does not account for the acceptance that other rules of IHL can apply together with the mandate. Why should the situation be different for the part of IHL dealing with occupation than for the part of IHL dealing with, for example, detainees or the use of weapons?

This is not to say that the Security Council cannot deviate from the law of occupation. It clearly can, in accordance with the overriding framework of the law of the Charter expressed in Article 25 and 103 of the Charter.[20]) The only exception may be norms of ius cogens. The International Court of Justice suggested in its Advisory Opinion on the Wall that certain rules of the law of occupation are of a ius cogens nature.[21]) An important question that remains is what the legal situation is if the Council does not expressly derogate from the law of occupation.[22])

2.3 State practice

Turning from literature to state practice, there is very little support for the application of the law of occupation to peace operations. There appears to be only one case in which a state accepted the application of the law of occupation to a peace operation. This is the case of Australia, which applied the law of occupation to its contingent in Operation Restore Hope

[15]) D. Shraga, the United Nations as an Actor Bound by International Humanitarian Law, in L. Condorelli, A.M. La Rosa & S. Scherrer (Eds.), Les Nations Unies et le Droit International Humanitaire 317 (1996).
[16]) M. Sassoli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, 16 European Journal of International Law 661 (2005), at 688.
[17]) Id.
[18]) D. Shraga, intervention in L. Condorelli, A.-M. La Rosa & S. Scherrer (Eds), Les Nations Unies et de Droit International Humanitaire 433 (1996).
[19]) M. Kelly, Restoring and Maintaining Order in Complex Peace Operations 70 (1999).
[20]) E. de Wet, The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law, 8 Max Planck Yearbook of United Nations Law 291 (2004), at 237.
[21]) See M. Zwanenburg, Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation, 86 International Review of the Red Cross 745 (2004), at 762.
[22]) T. Irmscher, The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation, 44 German Yearbook of International Law 353 (2001), at 384.

in Somalia.[23]) All other states in all other peace operations appear to have considered that the law of occupation did not apply. This is also the case for case law on this question. For example, the Brussels Military Tribunal held in a judgment in 1997 that the UN in Somalia was not an Occupying Power.[24]) It is also notable that the Secretary-General's Bulletin on the Observance by UN Forces of IHL does not mention the law of occupation.

In sum, there are plausible arguments in the legal literature for applying the law of occupation to peace operations in certain situations.[25]) There is little or no support however in state practice for such application.

3. Standards for the use of force

3.1 Different potential sources of standards

The underlying question that this article addresses is which standards apply to peace operations when they try to preserve law and order. It has become clear that the law of occupation is not considered applicable in practice and therefore cannot provide applicable standards. This raises the question in which other source standards can be found. A number of legal regimes may be relevant in this respect. These are discussed below.

3.2 The mandate

The use of force by peace operations is governed first by their mandate.[26]) The mandate is usually set out in a Security Council resolution. Mandates of traditional peace operations did not refer to the use of force at all. This was not surprising, because one of the fundamental principles of peacekeeping doctrine was the non-use of force. The only exception to this principle was considered to be the right of peacekeepers to self defence. The right to self defence is a general principle of law found in most if not all domestic legal systems. It is considered to be an inherent right that cannot be limited. In the unique context of UN peace operations "self defence" has developed into a broadly defined concept. It is considered to include not only action taken in defence of the peacekeeper himself but also resistance to attempts by forceful means to prevent the operation from discharging its duties under the mandate of the Security Council.[27])

In the case of peace operations with enforcement powers under Chapter VII of the UN Charter operations typically have the authority to "use all necessary means" or "take all necessary measures" to fulfill the mandate. It is generally recognized that these means or measures include the use of force.

Both the right to self defence and the authorization to use all necessary means or measures principally provides a legal basis for the use of force. They do not provide meaningful guidelines on the *level* and *means* of force that may be used.[28])

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[23]) Australian Government Statement for the meeting of states parties to the Fourth Geneva Convention, Geneva, 27 – 29 October 1998, reproduced in 2 Yearbook of International Humanitarian Law 451 (1999).

[24]) Belgian Military Court of Appeal (Militair Gerechtshof), Prosecutor v. C.K. and B.C., Judgment of 17 December 1997, reported in Journal des Tribunaux 1998, 286 – 289.

[25]) See also S. Ratner, Foreign Occupation and International Territorial Administration: The Challenges of Convergence, 16 European Journal of International Law 695 (2005).

[26]) T. Findlay, The Use of Force in Peace Operations 7 (2002).

[27]) See K. Cox, Beyond Self-defense: United Nations Peacekeeping Operations & the Use of Force, 27 Denver Journal of International Law & Policy 239 (1999).

[28]) M. Forteau, La Situation Juridique des Contingents Militaires Français Chargés d'Assurer le Maintien de l'Ordre Public sur le Territoire d'un Etat Etranger, 107 Revue Générale de Droit International Public 635 (2003), at 661.

3.3 De facto application of the law of occupation

It became clear above that there is little support in state practice for the applicability of the law of occupation to peace operations. The formal applicability of this field of law however can be distinguished from its application *de facto.* It has been argued that even if the law of occupation is not formally applicable, it provides useful guidelines that should be followed.[29])

This appears to be the case for many issues with which peace operations may be confronted, including the treatment of detainees, interaction with local authorities and treatment of property. The law of occupation however appears to be less useful in providing clear guidelines on the use of force. Article 43 of the Hague Regulations imposes an obligation on the Occupying Power to restore and ensure public order and safety, but it does not state specific standards to be applied in doing so. Since an occupation triggers the application of the full panoply of IHL rights and obligations, the general rules of IHL apply. Combatants may be attacked taking into account such rules as the prohibition of the use of weapons of a nature to cause unnecessary suffering. Civilians may not be attacked. They lose this protection when they take an active part in hostilities, however. The persons against which a peace operation takes action to preserve public order will in most cases not have lost their civilian status. IHL contains no rules on use of force against these persons, other than that they may not be attacked.

3.4 Human rights law

Human rights law has much more to offer in this respect. There are many questions however concerning the applicability of human rights to peace operations. One of these is whether human rights obligations apply extraterritorially and if so, under what circumstances.

It is outside the scope of this article to discuss this question in depth. For present purposes it may be noted that case law of human rights monitoring bodies does not exclude the application of human rights to military forces abroad. It appears that for this to be the case they must have effective control over an area or control over a person.[30]) The Al Skeini case decided by the British Court of Appeal is illustrative.[31]) In this case the Court held that a person who died in a British detention facility in Iraq was within the jurisdiction of the United Kingdom thus making the European Convention on Human Rights applicable. Five other Iraqis who were shot by British troops patrolling the streets of Basrah City were considered not to fall within British jurisdiction, however. When a peace operation takes action for to preserve public order it will often be in circumstances similar to the ones in which these five found themselves.

In a situation in which human rights law does apply, it provides standards that apply to the use of force in preserving law and order. A rich body of principles has been developed in this respect, in the case law of human rights monitoring bodies and in hard and soft law instruments. Some of the more relevant instruments are of a soft law nature. These include the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials .

The environment in which peace operations function is not always the environment for which such principles were developed, however. In case of an attack with firearms and Rocket Propelled Grenades (RPGs) against a peace operation, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials do not appear as an appropriate

[29]) S. Vite, supra note 12, at 29; Sassoli, supra note 15, at 691 – 693.
[30]) See e.g. R. Lawson, Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights, in F. Coomans & M. Kamminga (Eds.), Extraterritorial Application of Human Rights Treaties 83 (2004).
[31]) The Queen (On the application of Mazin Mumaa Galteh Al-Skeini and Others) v. the Secretary of State for Defence, 21 December 2005, [2005] EWCA Civ. 1609.

legal framework. This would not be a problem if a clear distinction could be made between the situation where a peace operation is confronted with an attack and where it is confronted with a law enforcement-type situation. But such a distinction is often difficult to make in practice.[32]) Is a car that fails to stop at a checkpoint a car bomb, or is it trying to avoid detection of smuggled cigarettes?

3.5 The law of the host state

The law of the host state is provides another possible source of standards. Status of forces agreements usually contain a provision stating that the personnel of the operation will respect the laws of the host state. In practice however it appears that little more than lip service is paid to this provision. In addition, the provision appears more straightforward than it may be. It may for example not be clear what the applicable law in the host state is. The applicable law may also raise concerns because of its discriminatory nature or fall short of meeting universally recognized human rights standards.[33]) Despite these concerns, this potential source of standards appears to deserve more attention than it currently receives.

3.6 The law of the troop contributing state

The law of the troop contributing state may also provide guidance. In many states the (criminal) law of the troop contributing state applies to military personnel wherever they are.[34]) In case military personnel are brought before their own courts the criminal law of the sending state will be applied. The law of that state may also be applied in case a civil claim is brought against peacekeepers in their own country. A recent example is the case of Mohamet and Skender Bici v. the British Ministry of Defence.[35]) This case concerned the shooting by British KFOR personnel of two Kosovars in what was essentially an operation to preserve public order. The Court measured the use of force by British personnel against some of the same standards that would apply to military personnel assisting law enforcement authorities in the United Kingdom itself. Using the standards of troop contributing states has its disadvantages. One of these is that it lacks legal certainty. The applicable standards will vary from troop contributor to troop contributor. The local population is confronted with different standards each time it comes into contact with another national contingent.

3.7 Rules of engagement

Rules of Engagement (ROE) are a final potential source of standards for the use of force in preserving public order. They seem a particularly appropriate instrument for present purposes, to judge by their definition: "Directives issued by competent military authority which specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered".[36]) They are not a legal instrument themselves, however. Rather, they are an instrument for the commander.[37]) ROE are based on legal, political and ope-

[32]) See e.g. K. Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 American Journal of International Law 1 (2004), at 28.
[33]) C. Stahn, Justice Under Transitional Administration: Contours and Critique of a Paradigm, 27 Houston Journal of International Law 311 (2005), at 318.
[34]) See e.g. Art. 4 of the Military Criminal Code of the Netherlands.
[35]) Mohamet Bici and Skender Bici v. Ministry of Defence, 2004 EWHC 786 (QB).
[36]) NATO Glossary of Terms and Definitions, AAP-6 (2006).
[37]) M.S. Martins, Rules of Engagement for Land Forces: A Matter of Training, not Lawyering, 143 Military Law review 1 (1994).

rational considerations.[38]) The applicable legal standards are an important element in drafting ROE. This implies that the source of such legal standards lie outside the ROE themselves.

4. A new regime?

This overview of potential sources of standards for the use of force by peace operations in preserving order suggests that existing legal regimes all present difficulties. If current regimes are unsatisfactory, could a new regime be developed that specifically addresses this particular situation?

Proposals for developing a separate legal regime for post-conflict situations have been made by commentators. At an expert meeting on multinational peace operations organized by the International Committee of the Red Cross in December 2003 a number of ideas were put forward.[39]) One of these was a proposal to draw up 15 to 20 rules that would direct military forces in their efforts to restore and maintain public order and security. Another proposal was the drafting of document similar in form to the Secretary-General's Bulletin to regulate situations such as the ones encountered in Kosovo and east Timor.[40]) Such proposals raise the question whether the environments in which different peace operations operate are similar enough to be covered by one single instrument. The fact that no concrete, fully elaborated, proposals have been put on the table yet could indicate that this is not the case.

5 Conclusion

Peace operations developed largely as an ad hoc solution to ad hoc problems. It appears that in many respects the legal framework for peace operations has followed suit. It resembles a puzzle. This has become particularly clear with the advent of "multifunctional" or "third generation" peace operations. These operations are frequently given or forced in practice to shoulder law and order tasks. There appears to be a need for developing doctrine on the use of force by peacekeepers in law and order functions. The absence of doctrine to which peacekeepers undertaking such tasks can be held accountable also impacts on the capacity to prepare adequate standard operating procedures, mission-specific rules of engagement and force commanders directives, and training regimes. Developing doctrine is in the clear interest of peacekeeping personnel. Their actions must be guided by sufficiently detailed principles and standards so that they and the local population are clear about the parameters within which peacekeepers will undertake law and order functions and tasks.[41]) Developing a new doctrine does not necessarily mean developing an entirely new legal regime. Many of the pieces of the puzzle seem to be available. The challenge now is to put them together.

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[38]) See G.R. Phillips, Rules of Engagement: A Primer, Army Lawyer 4 (1993), at 7-9. See generally J.F.R. Boddens Hosang, Rules of Engagement: het politiek juridische struikelblok voor de militaire commandant, 96 Militair Rechtelijk Tijdschrift 354 (2003).

[39]) A. Faite & J.L. Grenier (Eds.), Report, Expert Meeting on Multinational Peace Operations 17 (2004).

[40]) See also B. Oswald, Addressing the Institutional Law and Order Vacuum: Key Issues and Dilemmas for Peacekeeping Operations, available at http://www.peacekeepingbestpractices.unlb.org/pbpu/library/Bruce%20Oswald%20DPKO%20final%20draft%2028%20Sept%202005.pdf, at 10 (last visited 3 June 2006).

[41]) Id.