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APPLICABILITY OF THE RULES OF INTERNATIONAL HUMANITARIAN LAW TO PEACEKEEPING OPERATIONS IN REGIONAL CRISES

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SUMMARY

Reading the International Humanitarian Law, point of view of the status of subjects of Public International Law of the parties ist the only issue that involved in military conflicts matters so that they can be qualified as international or non-international, which depends directly on the volume of legal rules to be enforced and complied by the warring parties.

Thus, members of peacekeeping operations conducted under the auspices of the UN, or with the participation of regional structures must strictly comply with the provisions of the rules of war throughout their actions in situations that may qualify as armed conflicts. Mechanisms and instruments for ensuring compliance with the rules of International Humanitarian Law by members of peacekeeping contingents shall be the subject of research in this article.

Key-words: *Public International Law, International Humanitarian Law, peacekeeping operations, regional organizations, armed conflicts.*

APLICABILITATEA NORMELOR DREPTULUI INTERNAȚIONAL UMANITAR ASUPRA OPERAȚIUNILOR DE MENȚINERE A PĂCII ÎN CADRUL CRIZELOR REGIONALE

SUMAR

Din punct de vedere al dreptului internațional umanitar, contează doar statutul de subiecte de drept internațional public al părților implicate în cadrul conflictelor militare pentru ca acestea să poată fi calificate drept internaționale sau fără caracter internațional, fapt de care depinde direct volumul de norme juridice care urmează să fie aplicare și respectate de către părțile beligerante.

Astfel, membrii operațiunilor de menținere a păcii realizate sub egida ONU sau cu participarea structurilor regionale trebuie să respecte cu strictețe prevederile regulilor de ducere a războiului pe întreaga durată a acțiunilor sale în situațiile care pot fi calificate drept conflicte armate. Mecanismele și instrumentele de asigurare a respectării normelor dreptului internațional umanitar de către membrii contingentelor forțelor de menținere a păcii constituie obiectul de cercetare al prezentului articol.

Cuvinte-cheie: *drept internațional public, drept internațional umanitar, operațiuni de menținere a păcii, organizații regionale, conflicte armate.*

Essence, necessity and importance of peacekeeping operations

Peacekeeping Operations (PKO) – are actions taken by the United Nations with armed forces in regions where military conflicts have erupted with the mission of placing itself as a buffer between the warring parties and thus promoting the peaceful settlement of the dispute. Unlike the military actions planned to be undertaken by the Security Council for the repression of acts of aggression (according to Chapter VII of the Charter of the United Nations), these operations are not provided by the Charter, constituting an *ad hoc* creation, demanded by the need for intervention by the United Nations even if the Council did not find that it was an aggression [21, p. 195].

Since the early 1990s, the UN has organized more peacekeeping operations than during the first 40 years of its existence. In fact, the Nobel Committee awarded the Nobel Peace Prize to Blue Helmets. Today, classical peacekeeping operations give way to so-called *Peace Making* (missions empowered to maintaining peace), in which United Nations forces monitor the ceasefire between belligerents, dismantle military structures, etc., as was the case in Namibia in 1989 and 1990, then went to an additional stage, with missions called *Peace Building* (UN missions empowered to „*build*" peace), during which the Blue Helmets must restore the very foundations of peace, becoming peacekeepers, administrators, diplomats, teachers [21, p. 196].

In this context, PKO members, especially those in the *peace building* format, are directly involved in the hostilities. Whether or not these forces are party to the armed conflict and their reason to militate is a matter of study of Public International Law in general and international security law, as a branch in the process of formation, in particular. Thus, the participants or members of the Peacekeeping Forces are equipped with:

- distinctive element, i.e. military form;
- the person responsible for their actions, i.e. the Head Commander of the Mission;
- carry the weapon openly, i.e. they are equipped with weapons.

According to the Third Geneva Convention, they may be assigned combatant status provided that the provisions of International Humanitarian Law are complied with [13, art. 4 (2) (a-d)].

In these operations, members of the Peacekeeping Forces participate directly in hostilities, which generates a complex problem of qualifying their status in terms of combatant status and a controversial polemics between UN opinion representatives and representatives of the position of the International Committee of the Red Cross, what we are going to elucidate in the text of the present research.

The United Nations Peacekeeping Forces (PKF) do not belong to the armed forces that could be constituted by the Security Council under Articles 43 and 47 of the Charter of the United Nations, nor those created by Member States at the invitation of the Security Council (as in Korea, 1950) or authorization (the 1990 Gulf War and Somalia, in 1992), these forces are empowered to use coercive measures to restore international peace and security (or appropriate security conditions) in the region.

Therefore, the question of the applicability of International Humanitarian Law to PKF includes two aspects:

a) the observance by the contingent of these forces of the International Humanitarian Law through the prism of the combatant status and
b) the contribution of these forces to the application of International Humanitarian Law.

Both the International Committee of the Red Cross and the International Conference of the Red Cross and Red Crescent have on many occasions expressed their opinion on the applicability of the International Humanitarian Law to Peacekeeping Forces. Several examples of these affirmations, made at various times and in different forms, could be cited.

Place and role of regional organizations and structures in the process of ensuring international peace and security

In respect of the provisions of the article 52 paragraphs (2) and (3) of the UN Charter, the agreements and the regional organizations have a priority role in the process of settling the regional conflicts. Thus, the states members have to analyze the possibility of settling the local disputes [3, p. 262] within the regional organizations they are part before notifying the Security Council, allowing to conclude that the agreements and the international regional organizations have the priority in the process of settling the disputes on the territories of states members.

In this sense, it is important to analyze the legal instruments the regional organizations may apply in order to put into practice the task of preventing or settling the local disputes on the territory of states parties.

The content of these peaceful measures remain vague as they are not regulated expressly in the text of the Charter. Beside „coercive mea-

sures" which are object of the chapter VII and the article 53 of the Charter, it seems that the organizations truly enjoy of „a considerable margin of discretion" [25, p. 193] in the efforts they undertake in order to calm the conflict relations appeared between the states parties.

The non-exhaustive list of other methods of peacefully settling the disputes provided by the article 33 (negotiations, investigation, conciliation, arbitration and juridical regulation) establishes a large range of possibilities to settle available for the regional organizations, as there is not a special reason so the states not be assisted by the regional organizations in using these other means [25, p. 194].

The majority of these fundamental actions of the regional organizations do not give additional explanations as for the legal means provided to these structures in order to accomplish the task established by the article 52 and do no limit to the reaffirmation of these provisions [7, art. 20; 9, art. 4; 19, art. 1; 23, art. 4 (e); 24, art. 2]. Contrary to these incoherent trends, some regional treaties may provide clarifications as for the place an organization may occupy in this framework.

An example in this sense might be:

a) The American Treaty on Pacific Settlement (Pact of Bogota) [4] accompanying the provisions of the constitutive act of the American States Organization;
b) The South African Development Community (SADC) that has a cooperation body for the matters of policy, defense and security, especially created to allow the realizations of attempts to settle the disputes between the states members;
c) The Economic Community of West African States (ECOWAS), created in respect of the article 17 of the Protocol on the mechanism of prevention, management and settlement of conflicts, peacekeeping and security, whose members play the role of mediators, counselors and facilitators in preventing the possible disorders, together with the Mediation and Security Council [25, p. 194].

The capacity of the regional organizations to accomplish efficiently the role in settling peacefully the disputes is not easy to appreciate, as it is submitted to the political dynamic of organization, the identity of concerned parties and the nature of dispute and the wider context in which they developed [18, p. 19-20].

Following the analysis, we may ascertain the presence of regional organizations that, from different reasons, showed a predisposition to settle peacefully the emerging local tensions, from the less active to the most efficient in certain specific situations, as the actions to facilitate the agreements of peace undertaken by OUA in Ethiopia and Eritrea (2000), those of AU in Kenya (2008), of the Intergovernmental Authority for development in the progressive secession of South Sudan, the behavior of OAS in relation to the disputes appeared in Guatemala, Belize (2005), El Salvador and Honduras (2006) or even EU in its efforts of mediating after the former of former Yugoslavia.

There are regional structures that appealed to the exclusive anti-militarism, *i.e.* they would use only peaceful solutions in all crises that may appear in their zone of intervention. For example, the Association of Southeast Asian Nations (ASEAN) is, in this sense, a contrasting example as it develops a certain philosophy in settling the conflicts that may appear between its members, based on the principles of discussion and consensus.

The article 33 provides that: „The parties in any dispute whose prolongation may jeopardize the peacekeeping and the international security has to find the solution, above everything, by … relying on regional organizations or agreements" [6, art. 33].

In the same order of ideas, the article 52 establishes at paragraph 1: „No provision of this Charter precludes the existence of agreements or regional organizations aimed at settling the matters related to the peacekeeping and international security…"; the text of paragraph 2 highlights: „the UN members that conclude such agreements or create such bodies have to undertake all efforts to settle peacefully the local disputes through such regional agreements or organizations before submitting them to the Security Council"; and the paragraph 3 states: „the Security Council will encourage the peaceful settlement of the local disputes through these regional agreements or organizations" [6, art. 52] are arguments in the favor of the fact that the role of the regional organizations takes precedence over the Security Council when is possible a peaceful settlement of the conflicts between the states members.

It considers that these provisions may be valuable also for the conflict situation between a state member and a third state. The argument that regional organizations would be responsible only of the conflicts between the states members, is nothing more than a simple incidence of an equivocal formulation. The information of preparing works of the Charter's text would not uphold in any way this restrictive theory. If the Charter's authors truly wanted to delimit the conflicts in which the regional organizations may or may not intervene, a more specified term would be used as the „coercive measures" of the article 53(1) establishing the

conditions under which the regional organizations may intervene, if necessary [1, p. 40].

There are not exceptions from centralizing the collective security system around the Security Council. This thing applies to other UN bodies as the General Assembly, and the regional organizations.

However, the regional organizations may intervene in the peacekeeping and international security, notwithstanding their actions be placed under the control of the Security Council, which is responsible firstly for the peacekeeping. The integration of the regional organizations in the peacekeeping and regional security may be possible only in respect of the principle of subordination toward the general framework defined by the UN Charter. Consequently, the actions of preventing the conflicts initiated by the regional organization should not face, *a priori*, formal difficulties under this aspect, especially if it implicates non-coercive measures.

Any military action initiated by a regional organization needs, consequently, in respect of the article 53 of the United Nations Organization's Charter, the approval of the Security Council. Nevertheless, it should be specified that the subordination does not limit only to the actions initiated by a regional organization. The first link of subordination consists, in fact, in applying by the regional organizations of the measures adopted by the Security Council itself.

Given the articles 24 and 51 of the United Nations Organization's Charter, it may be ascertained the intention to ensure the efficiency of adopted measures, determining the Security Council to delegate its competences to certain regional organizations.

This mechanism of delegation preserves the responsibility for using the force between the exclusive competences ring of the Security Council, although it may divide this competence with the regional organizations.

The professor Leurdijk said that the article 53 grants to the Security Council the competence „to use" the regional organizations for actions of executing under its authority. In legal terms, this competence of the Security Council is submitted to certain conditions:

a) A previous precise authorization issued following the appeal of the states members and/or regional organizations for military execution;
b) Identification by the Security Council of a precise task; and
c) The respect by the regional organizations of the reporting obligation [16, p. 68].

There are many practical cases implicating a cumulative reference to the Security Council and certain regional organizations that had taken place between 1950 and 1960 as: Lebanese conflict and Arab League, Guatemala and OSA, Morocco, Algeria, Somalia, Ethiopia, Congo and OAU. They demonstrate that the mandates granted to regional organizations by the Security Council on the basis of Article 52 have not been respected. According to G. Lind, since then cooperation seems to have been mainly „based on the advantages of cooperation between the United Nations and regional organizations, thus generating the complementarity of efforts" [17, p. 30].

The controversy over jurisdictional conflicts disappears in the post-Cold War period when the proliferation of regional organizations, combined with the emergence of local conflicts, is an indefinite priority in favor of the UN, when it comes to regional conflicts. In this regard, regional structures, despite everything, they may be able to achieve to ensure peace and security in the region, fulfill their „primary responsibility" [25, p. 193] and therefore take on the mission that could be added to an already existing agenda [1, p. 33-34].

All these elements together show that the preemption matter of regional organizations would ultimately arise more in terms of the capacity of the organizations concerned than a strict legal hierarchy.

The qualification of a regional organization within the meaning of Chapter VIII provides the necessary legal basis for the peaceful settlement of disputes between member states, even if this function has not been included in the text of its constitutive act. However, this relatively „robust" [15, p. 649] role given to regional organizations is very narrow. The consensual nature of this framework prevents the expected outcome from effectively disabling security [25, p. 195] threats, so tougher action can sometimes be considered involving this type of organization.

Ensuring the applicability of international humanitarian law in peacekeeping operations under UN

At the official level, we should mention the Memorandum entitled „Application and dissemination of the Geneva Conventions" of 10 November 1961, addressed to the States party to the Geneva Conventions and Members of the UN, in which the International Committee of the Red Cross draws the attention of the United Nations Secretary-General to the necessity for ensuring application of the Conventions by the forces placed at the disposal of the UN. Since the UN,

as such, is not party to the Conventions, the ICRC considers that each Member State remains individually responsible for the application of these treaties whenever it provides a contingent for the United Nations, and, in consequence, the State should do what is necessary, especially by issuing to the troops appropriate instructions related to the application and observance of the basic provisions of International Humanitarian Law before they are posted abroad.

The Memorandum also stressed that by virtue of Article I common to the four Conventions, which also requires the High Contracting Parties to ensure respect for the Conventions, the Member States providing contingents „…should each, where necessary, use their influence to ensure that the provisions of humanitarian law are applied in all circumstances" [11, 12, 13, 14, art. 1].

Resolution XXV entitled „Application of the Geneva Conventions by the United Nations Emergency Force", adopted by the 20th International Conference of the Red Cross (Vienna, 1965), made three recommendations:

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 of 12 August 1949;
2. That appropriate arrangements be made to ensure that the Peacekeeping Forces are to benefit from the protection guaranteed by the provisions of International Humanitarian Law;
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 [20, p. 250].

In the absence of a definition of peacekeeping forces in the texts of international documents relating to International Humanitarian Law, their members could be classified as combatants, based on the arguments cited above, provided that they comply with the provisions of International Humanitarian Law. It must also be determined whether or not the UN can be considered a „power" (full party) to accede to the conventions.

A difficult problem arises when the PKF contingent consists of both members of the armed forces of the Member States to Additional Protocol I and those of States which have not ratified this Protocol. In such cases, it would be appropriate for the members of the PKF, nationals of States which have not ratified Additional Protocol I, to be instructed in its content before proceeding directly with their duties, and the sanctions for violation of its provisions to be applied by abstracting from the aforementioned criterion, which is to be expressly provided for in the text of the mandate to enable PKF actions.

In the light of the views expressed by UN representatives, the current rules of International Humanitarian Law are not sufficient to guarantee effective protection of the contingent of peacekeeping forces in the context of contemporary armed conflicts [5, p. 697].

Thus, the elaboration, adoption and application of an international convention is absolutely necessary in order to create a special system for the protection of members of the UN military forces during such asymmetric situations. However, exponents of the ICRC's official position have repeatedly stated that International Humanitarian Law cannot provide for a differentiated and consequently discriminatory treatment for UN forces in relation to their potential adversaries, based on the fact that the rules of international law are directly applicable to all Parties to the conflict without exception [5, p. 698].

In interpreting the provisions of the Convention [8], we can state that in some cases and *mutatis mutandis* the International Humanitarian Law is fully applicable to actions of the Peacekeeping Forces and not only within the limits of its principles and spirit. This would argue the qualification of the Peacekeeping Forces as a party to the conflict.

Subsequent developments have taken place since 1992, which have materialized through the involvement of the UN directly responsible for enforcing the provisions of International Humanitarian Law by members of the peacekeeping forces. A similar clause has been inserted in the text of the „Model Status of Forces Agreement", to later be an integral part of several such agreements [22, p. 47].

Such a development of events at the UN is a welcome one, although in most cases the initiative and the need to apply International Humanitarian Law in peacekeeping operations comes from the International Committee of the Red Cross and a large number of exegetes in the field.

The formal provisions of International Humanitarian Law, and in particular those of customary origin, are applicable to this situation from the moment of the effective application and use of force by the Peacekeeping Forces under the UN mandate. Even if the status and structure of the United Nations does not allow the implementation and observance of all the provisions of International Humanitarian Law, then it would be sufficient for them to be observed selectively according to the Latin adage *mutatis mutandis*, *i.e.* in peace-building or peace-making operations, situation practically identical to the international armed conflict.

Such an interpretation is in the spirit of the principle of the distinction between *jus ad bellum* and *jus in bello* – the basic principle of International Humanitarian Law, from which it follows that the warring parties are equal as regards the obligation to apply its rules. By virtue of this principle, the rules of International Humanitarian Law are to be applied by the regular forces of the Parties to the conflict, regardless of the nature or origin of the conflict, the legality of the use of force or the root cause of the conflict [2].

A related issue lies in determining the category of rules applicable to situations in which the UN Peacekeeping Forces are involved: either the rules applicable in an international armed conflict or in a non-international armed conflict.

At present, the position of the majority of exegetes in the field is in favor of assessing the situations related to the direct involvement of the Peacekeeping Forces in conflict situations, with the effective use of military force to achieve the provisions of UN Resolutions establishing their mandate in equal measure for all Parties involved in the conflict, as situations practically similar if not identical to those of international armed conflict [10, p. 24-41].

In view of all the above observations, we could analyze the UN decision to send PKF to the former Yugoslavia and Cambodia. The idea is to identify gaps and challenges (existing or foreseeable) both in general (ICRC – UN – Member States supplying troops) and in operational terms, namely: the implementation and observance of the provisions of International Humanitarian Law by PKF, the role of these forces in the process of implementing the rules of the International Humanitarian Law in the territories where they are deployed and of the cooperation between PKF and ICRC in order to achieve the above-mentioned goals.

In general, it can be seen that the deployment of the PKF to the former Yugoslavia and Cambodia was not preceded by official United Nations procedures designed to recall the role and importance of International Humanitarian Law, as achieved through the above forms. This represents a gap to be filled, especially for other operations that were initiated later (Somalia, Mozambique).

Conclusions

It should be noted that the primary responsibility at the operational level for ensuring the implementation of the rules of International Humanitarian Law by the PKF lies with the United Nations. The ICRC has had the opportunity to recall its willingness to assist and contribute to the dissemination of International Humanitarian Law in the ranks of the PKF to the best of its ability, including by providing an instructive framework plan in International Humanitarian Law that could be tailored to the specific requirements of each PKF. In particular, the ICRC may undertake various dissemination activities in cooperation with supplier States and the United Nations.

An important aspect would be the training of the contingent before departure, in particular by the ICRC's regional offices.

It would also be useful to consider the information provided by the ICRC delegation in New York to the contingent of commanders during their visit to UN headquarters.

Finally, it is of the utmost importance to disseminate information on the need for and importance of respecting International Humanitarian Law in the country where PKF troops are deployed by specialists who could be delegated by the ICRC. Emphasis could be placed on the fact that the applicability and observance of International Humanitarian Law is in the interests of PKF members because, in specific situations, they could be involved in military operations due to the intensity of an armed conflict and fall into the captivity of the opposing warring Party, and compliance with the rules of International Humanitarian Law would allow them to enjoy combatant status and, consequently, that of a prisoner of war, which would allow them to take advantage of a wide range of guarantees stipulated in the Geneva Conventions of August 12, 1949 and of the Additional Protocols of July 8, 1977.

An effective way to do this would be to find violations in areas where PKF operate. Thus, both FORPRONU and APRONUC mandates foresee that some of their components (civilian police forces in the former Yugoslavia, the human rights component in Cambodia) have the task of investigating allegations of human rights violations, and the military (in the case of the former Yugoslavia) on alleged violations in the demilitarized zone segment. The UN Secretary-General is responsible for monitoring violations of International Humanitarian Law, some of which include human rights violations committed in the segment nominated in the PKF mandate, and the reports prepared in this regard should be communicated to the parties involved in the conflict and/or to the Security Council to put an end to the wrongdoing and to sanction as appropriate the persons responsible for committing them. In this context, both the States involved and the UN could effectively contribute to the application of art. 89 of Additional Protocol I and to promoting the role of the International Humanitarian Fact-Finding Commission [1, art. 89].

It should be noted that any appeal to the services of the International Humanitarian Fact-Finding Commission is not automatically generated by an international conflict because, at the constituent meeting of 12 and 13 March 1992 in Bern, the Commission expressed its initiative to activate even in the event of a civil war if the parties so request.

Finally, the FMP could play a preventive role, in particular in establishing control over military or paramilitary forces operating in their surveillance sector.

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