

Peacekeeping Forces and Human Rights Law

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The experience from a number of peacekeeping operations around the world suggests that, whatever the peaceable intentions behind the mission, on occasion individual components of peacekeeping units may themselves become a threat to the human rights of those they are sent to protect. In those situations what legal redress is there?

Some notable events from the past involving abuses by peacekeepers (for example, by Canadian forces in Somalia) have been dealt with by military discipline—trial by court martial. Commonly, the Status of Forces and Co-Operation Agreements under which peacekeepers operate will reserve jurisdiction over their personnel to the sending state according to its law and give immunity from prosecution in the courts of the receiving state. However, military justice suffers from two drawbacks: in some states it is not a regular system of criminal justice and, moreover, it is in the hands of the state whose representatives are accused of the abuse. This may not appear to be sufficiently impartial to satisfy victims and international opinion.

As a possible alternative I am concerned in this brief note with the question of how international law applies to peacekeeping forces, and whether it applies to international forces or to individual states. I will concentrate on the possible application of international human rights law, after some brief remarks concerning the Law of Armed Conflict and International Humanitarian Law.

¹ I gratefully acknowledge the advice of my colleague Ms. S. Williams in preparing this note.

Difficulties arise over applying the Laws of Armed Conflict for two reasons. Firstly, many peace-keeping situations are below the necessary threshold level of violence. Secondly, the country or organisation sending peacekeeping forces is not strictly in conflict. At most the Rules of Engagement are likely to allow the use of force in self-defence or defence of the civilian population.

International Humanitarian Law, contained in the Geneva Conventions and protocols, is likely to have greater relevance. It, however, has certain limitations. While states taking part in peacekeeping forces will be bound, International Humanitarian Law does not apply to international organisations, and so unified forces will not be bound as a matter of law. Moreover, enforcement is via the traditional means of international law -by a claim brought by another state rather than by individual petition. A claim would need to be brought before the ICJ, which would have to assume jurisdiction, since there is no other standing forum. Nevertheless, International Humanitarian Law contains specific duties with regard to prisoners of war and civilians of considerable relevance to peacekeeping operations.

International Human Rights Law, similarly, only applies to states and not to international organizations, which are not signatory to the major human rights treaties, such as the International Covenant on Civil and Political Rights 1966 (ICCPR) or the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR).

So far as states are concerned, not all CIS members are signatories to the European Convention on Human Rights. However, Armenia, Azerbaijan, Georgia, Moldova, the Russian Federation, and the Ukraine are, and in their case the possibility of liability under the Convention for the actions of their peacekeepers could arise.

A state is normally responsible under human rights law for violations of human rights occurring within its jurisdiction. For example, Article 1 of the European Convention on Human Rights states:

Obligation to respect human rights. The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention. (Italics added)

Jurisdiction in this sense obviously includes the territory of the state. However, less obviously, it can apply extra-territorially and this is where it is of possible relevance to peacekeeping operations.

In *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, at paragraph 62 the European Court of Human Rights stated:

"Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."

In that case the Court determined, applying this test, that Turkey was in control of Northern Cyprus and so had human rights obligations under Article 1 of the European Convention for the actions of its officials within it.

Broadly similar arguments have been put forward by a leading international lawyer with regard to the ICCPR: Professor Buergenthal argues that the Covenant can apply where to a state which is in actual control of all or part of the territory of another state.²

Extra-territorial effect has also been given to the Convention where a member state takes decisions that have a real risk of leading to violation of a person's rights, even if this will take place in another territory or by a state which is not sig-

² T. Buergenthal, "To Respect and Ensure: State Obligations and Permissible Derogations", in L. Henkin (ed.), *The International Bill of Rights*, (1981), 73-77.

natory to the Convention. In *Soering v UK* (1989) 11 EHRR 439 this applied where extradition of a fugitive could lead, if he was convicted, to imposition of the death penalty in the United States.

Either of these routes might possibly lead to the imposition of liability upon a member state under the Convention for the actions of its peacekeepers while they are outside the sending state's territory.

Arguments of this type these were raised (albeit unsuccessfully on the facts) in a challenge brought by the survivors and relatives of victims of the NATO bombing of Radio-Television of Serbia on April 23, 1999, as part of Operation Allied Force: *Bankovic and others v Belgium and 16 Other Contracting States*, European Court of Human Rights, Application No. 52207/99, Decision of December 12, 2001³.

The applicants alleged breaches of Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy) arising from the attack, in which 16 of the broadcaster's employees were killed and a further 16 injured. They argued that since NATO forces were in effective control of the airspace they were responsible under Article 1 of the ECHR to people within their 'jurisdiction'. In addition they claimed that since the injuries arose from decisions planned and taken within the territory of the states concerned, this brought them within 'jurisdiction' for the purpose of Article 1.

The European Court rejected this broad approach to state responsibility and distinguished the facts here from the degree of control in a case like mentioned case of *Soering*. Nevertheless, it affirmed that in exceptional circumstances states could be considered to have jurisdiction over events beyond their territorial limits; the question was whether the State had 'effective control' of the territory, and so could exercise governmental powers. Clearly, then, the door remains open for extra-territorial liability under the European Convention for states sending peacekeeping forces, depending on the situation on the ground.

³ See S. Williams and S. Shah, [2002] European Human Rights Law Review 775).

Even if the effective control test is satisfied, however, liability would depend on the make-up and terms of operation of the particular peacekeeping force. Where the force is under United Nations or CIS unified command, since neither body is party to the ECHR there could be no liability even if the force is exercising control within the receiving state. It is arguably different, however, where national contingents exercise control over specific areas of territory, under the overall control of a unified command (as in Kosovo under KFOR). Here sending states should be alert to their potential liability in international human rights law.

Thought might then be given to the possibility of derogating from human rights obligations for peacekeeping forces. It is worth noting that the European Convention applies even in wartime, although some rights are derogable in war or public emergencies under Article 15 «Derogation in time of emergency»

- 1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
- 3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Consequently, some fundamental rights (notably, the right to life under Article 2 and Article 3 protection from torture, inhuman and degrading treatment) are non-derogable and procedural requirements for the registration of a state of emer-

gency exist under Article 15. The European Court of Human Rights will be able to review the legality of the state of emergency in order to check that the necessary pre-conditions are met⁴.

States taking part in peacekeeping missions have not generally thought to enter human rights derogations in respect of the territory they control. Perhaps they should. More generally, it seems they may also have some legal obligations, especially for non-derogable human rights in territories over which they exercise control.

⁴ See, for example, *Ireland v UK* (1978) 2 EHRR 25; *Lawless v Ireland* (1961) 1 EHRR 15; *Aksoy v Turkey* (1996) 23 EHRR 553).