

The Leuven Manual on Peace Operations

Peace Operations Manual Project : ISMLLW

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Outline of Presentation

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- Evolution of Peace Operations;
- Legal Bases for Peace Operations: The Mandate and Host State Consent;
- Guiding Principles in Consensual Peace Operations;
- The Applicable Legal Regimes: LOAC, IHRL, Sending State and Host State Law;
- Command Arrangements and Implications for International Responsibility
- Some Questions and Controversies in Relation to Peace Operations and Some Recent Developments;
- Concluding remarks

Definition of Peace Operations

- Peace Operations are instruments of the United Nations and of regional organizations and arrangements acting in conformity with the Charter in the maintenance and restoration of international peace and security.
- As such they are an integral part of the UN Collective Security System which is set out in the UN Charter.
- They include tasks and elements relating to peacekeeping, peace building and on occasion include elements of peace enforcement, but unlike enforcement action under Chapter VII of the Charter are predicated upon Host State consent.

The Place of Peace Operations within the UN Collective Security System

- The UN Charter has as its primary purpose the maintenance and restoration of international peace and security
- The Charter sets this objective out in Articles 1:1, 24, 25, 27, 29 and in Chapters VI, VII and VIII.
- Peace Operations are instruments within the UN Collective Security System to fulfil this objective and derive their authority from the general powers of the UNSC and UNGA and are predicated upon a number of guiding principles.

Evolution of Peace Operations

- The first operations conducted by the UN of a peacekeeping character were in response to the Suez crisis in 1956 and the unstable situation in the Congo following its independence in 1960.
- These led to a crisis within the UN and the setting out of the legal and diplomatic framework for such operations *inter alia* through the advisory opinion of the ICJ on *Certain Expenses*.
- The role of the UNSC as mandating authority was reaffirmed and three bedrock principles for peacekeeping operations were laid down by then UNSG Hammarskjöld.
- After the end of the Cold War, the UN entered a new period of proactive peace operations which sometimes included elements of peace enforcement and peace building and a wider definition of peacekeeping.
- Following the failures in Rwanda and Srebrenica, the Brahimi report was issued in August 2000 containing recommendations for improving the effectiveness of peace operations, most of which have been adopted and put into practice.
- The adoption of the Capstone doctrine by the UN in 2008 has further contributed to setting out the legal and operational parameters in which peace operations are conducted.

Legal Bases for Peace Operations

- The Charter makes no specific reference to Peace Operations as such.
- However, in view of the wide powers bestowed upon the UNSC under the Charter, there can be no doubt that these include the legal authority to conduct or authorize peace operations as one of the means at its disposal to maintain international peace and security.
- This is not only evident from the scope of these powers and the object and purpose of the Charter, but also from consistent practice stretching over 60 years.
- As all consensually based Peace Operations are predicated upon the consent of the Host State, this serves as an additional legal base, alongside the mandate for the operation.

Guiding Principles in the Conduct of Peace Operations 1

- As stated above, Peace Operations are predicated upon consent of the Host State. Lawful consent provides not only a legal base for the operation under general international law, it also forms one of the bedrock principles underlying Peace Operations. To the extent feasible, it includes the consent of all interested parties as a matter of operational performance.
- A second guiding principle is that of impartiality. This should not be confused with neutrality. Impartiality is not passive as neutrality is, but provides that a Peace Operation will, in principle, not take sides in an ongoing conflict and will (attempt to) conduct its operations in an even-handed manner.

Guiding Principles 2: Use of Force in Peace Operations

- Peace Operations are additionally predicated upon the limited use of force. In contrast to traditional military operations (including enforcement action under the Charter) in which force is an instrument to impose one's will on an adversary party, Peace Operations will only use force in self-defence.
- Self-defence includes not only reacting to attacks upon (members of) the Peace Force, but has also come to mean in the context of UN conducted operations, the right to respond to forcible attempts by "spoilers" to frustrate the execution of the mandate.
- Peace operations are normally authorised to defend mission associated personnel, vital equipment and installations, to maintain freedom of movement and protect civilians from imminent threat to the extent feasible. These tasks are often set out separately in the mandate.

Blurring the Distinctions between Enforcement Action and Peacekeeping

- Contemporary Peace Operations often operate in unstable environments and have a multidimensional character. The consent of the Host Government no longer automatically implies consent of all parties and actors. Mandates often include specific language authorizing the protection of civilians and the promotion of a stable environment.
- This poses legal and practical challenges to keeping within the bounds of the abovementioned guiding principles. Nevertheless, this conceptual base still governs Peace Operations and sets them apart from (Peace) Enforcement Operations, which are authorized to proactively impose a peace upon a State or organized armed groups by the use of force.

Applicable Legal Regimes 1: LOAC

- As Peace Operations are governed by the abovementioned principles of consent, impartiality and limited use of force, the point of departure is that they will not be parties to an armed conflict.
- However, to the extent a Peace Force engages in acts which cross the threshold of armed conflict (normally of a non-international character), it will become a party and will be *de jure* bound by LOAC.
- The 1999 SG Bulletin on the Application of Fundamental Principles of IHL acknowledges this possibility. It is an internal UN administrative directive for operations conducted by UN DPKO, but does not replace the material thresholds for becoming party to an armed conflict under conventional and customary LOAC. These are set out in the well known Tadić decision of the ICTY and are generally viewed as customary international law binding States, international organizations and armed groups.

Applicable Legal Regimes 2 IHRL

- The applicability of IHRL to Peace Operations has been acknowledged by the UN. As a subject of international law, it is bound by customary international human rights law. The same would apply to other international organizations possessing legal personality.
- The application of IHRL to military operations, including Peace Operations, has likewise been acknowledged by the UN Human Rights Committee and in the jurisprudence of regional human rights bodies, including the ECtHR
- While opinions diverge on the conditions for applicability, most States and the majority of academic opinion accept the applicability of IHRL to military operations as a matter of principle.

Interplay of LOAC and IHRL

- In situations below the threshold of armed conflict LOAC will not apply as a matter of law (although it may be applied as a matter of policy w/o prejudice to obligations under IHRL).
- IHRL is generally recognized as applicable whenever State agents (including the military) exercise control over individuals or exercise control over (a segment of) territory. This includes, but is not limited to situations where 'public powers' (e.g. transitional authority) are exercised.
- In case of simultaneous applicability, the general principles of legal methodology, including the *lex specialis* principle will determine how to resolve conflicts between norms when these arise.

Applicable Legal Regimes 3: Sending State Law

- Military forces deployed abroad remain subject to the law of the Sending State. This includes not only LOAC and IHRL obligations of the sending State, but also the (military) criminal and disciplinary law of the Sending State. The Organization conducting the operation will enter into SOFA arrangements with the Host State. These can provide for exclusive or complementary jurisdiction. State agents possess functional immunity for official acts when deployed consensually as a matter of customary international law.
- In UN Peace Operations, the practice is that the Peace Force remains subject to the exclusive jurisdiction of the Sending State. In operations conducted by other organizations, either the organization in question, or individual TCC's conclude SOFA arrangements providing for either exclusive or in some cases complementary jurisdiction. The former is, however, prevalent.

Applicable Legal Regimes 4: Host State Law

- Forces consensually deployed on another State's territory are bound "to respect" Host State law. Subject to any applicable SOFA arrangements, this means at the least that foreign forces are bound to take Host State law into account and give all due respect to the legal order of the Host State that is compatible with other legal obligations and with the mandate.
- Questions such as entry, freedom of movement, import of mission related equipment, transfer of persons detained etc. will be worked out in the SOFA and in other arrangements (MOU's, MTA's) whereby applicable legal obligations are 'operationalized'. In the absence of formal agreement, the UN Model SOFA and customary international law will govern these questions.

Detention in Peace Operations

- The abovementioned legal regimes in conjunction with the mandate will set out the conditions for operationally related detention
- Where possible, the mandate should provide specific authority for particular purposes where necessary; such authority can provide a legal basis for detention in the relevant circumstances
- IHL and where applicable LOAC will additionally provide grounds and set out conditions for detention
- In addition, Host State law will often be relevant and whenever possible, agreements should be concluded with the Host State providing for authority to detain, transfer and monitoring of detainees and periodic independent review.

C2 Arrangements and Accountability and Responsibility

- In UN Peace Operations, TOA agreements will normally place troop contributions under the OPCON of the UN. The latter exercises control through the UNSG & DPKO which appoints a Head of Mission (SRSG) who exercises overall control over the mission. The UN DPKO will also appoint a Force Commander and in some missions also/or a Police Commander who has OPCON over units subject to the direction of the SRSG.
- In NATO and EU missions, C2 will be exercised through the organization's chain of command.
- To the extent a particular act is performed under the 'effective control' of an IO or a TCC, it will be attributable to it. Both the UN and most IO's conducting Peace Operations have set up claims procedures to deal with damage or injury arising from the performance of the mission. Oftentimes these will provide *ex gratia* compensation even when an act may not be attributable or constitute a breach of obligation.

Some Recent Developments & Controversies in Peace Operations

- In recent years, the challenges to the performance of Peace Operations have increased. These include organized attacks upon Force personnel, the challenges associated with protecting civilians (POC), allegations of widespread (sexual) abuse of the civilian population by mission personnel, and adequate procedures for investigation of alleged abuses. Many of these have been addressed in Peace Operations doctrine and the literature, but room for considerable improvement continues to exist.
- At a more strategic level, there is a degree of innate tension between the bedrock principles governing PO's and the need for effective responses, including the need to protect civilians within mission capabilities.

Concluding Remarks

- Peace Operations have become an indispensable tool in the maintenance of international peace and security
- They have garnered general support and have booked notable successes over the years, notwithstanding some marked failures.
- They are governed by guiding principles of consent, impartiality and limited use of force, alongside their mandates and by the applicable legal regimes under international and national law
- They are faced by significant challenges to their successful implementation. Some of these have resulted in notable improvements (e.g. DPKO is a much more professional organization than 20 years ago), but significant room for improvement remains.
- The Manual aims to provide authoritative legal guidance in meeting (some of) these challenges. To the extent it succeeds, it will have served a useful purpose.

Questions & Comments

- We welcome your questions and comments and would like to thank our host and audience for this opportunity to present this project and for their kind attention.