

THE SPACE BETWEEN PROMISES AND RESULTS: THOUGHTS ON REGULATING USE OF FORCE BY THE UN

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Abstract - United Nations forces are today deployed into settings that cover almost all the factual signposts on the spectrum between peace and conflict. In spite of the increased tensions they encounter and ever-expanding mission objectives, the fundamental purposes of UN deployment, namely maintaining international peace and security and advancing human rights, remain unchanged. This was underlined by the March 2018 UN Secretary-General's Report on Peace building and sustaining peace.¹ This paper assesses the importance played by the use of force by United Nations forces in achieving these objectives and argues that existing gaps between mission objectives and results can be reduced or closed by adopting a regulatory framework that is more sensitive to the nature, character and purposes of United Nations deployment. I submit in this regard that human rights law has a greater role to play in the realm of regulation than is acknowledged at present, suggest a conceptual criterion through which this could be achieved and in conclusion, assess the utility of such an approach with reference to practical examples.

I. INTRODUCTION

Early international law thinking viewed the right to use force as a corollary of the state. War was thus an attribute of statehood and conquest conferred legitimate title to territory.² The questions of when and by whom force could legitimately be used would gain continued significance throughout the 18th, 19th and 20th centuries, culminating in the adoption of the Charter of the United Nations (the 'Charter')³. Its twin objectives of restricting the use of force except in self-defense and promoting international peace and security through collective self-defense confers

on the United Nations ('UN') a monopoly on the use of force⁴, in exchange for the promise of international peace and security. This paper deals with an integral aspect of the use of force by the UN; the legal standards applicable to its regulation. I venture to analyse why and how these standards could improve mission efficiency by eliminating or reducing, existing gaps between their desired and actual outputs.

Part II of this paper will analyse the purposes for which the UN is authorized to use force and trace its evolution with reference to specific mission mandates as well as the content of related principles such as Protection of Civilians (PoC) and Responsibility to Protect (R2P). Part III will consider the phenomenon of conflict of laws, assess its operational dynamics and how conflict of laws issues mediate between the two regulatory candidates, International Human Rights Law (IHRL) and International Humanitarian Law (IHL); in view of their concurrent applicability to armed conflict⁵. I submit in conclusion that any regulatory regime that seeks to regulate UN troop conduct must take cognisance of the peculiarities inherent in UN uses of force. It is only then that the reforms proposed in 2018 by the UN Secretary-General to restructure the peace and security pillar in line with the human rights and development pillar of the UN,⁶ as well as the proposals contained in the Santa Cruz report on peacekeeper fatalities⁷ will become a reality.

¹ibid, Art.s2(4), 29 and 51.

²Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ Rep 226, para 25 and Case Concerning Armed Activities on the Territory of the Congo: Democratic Republic of the Congo v Uganda(2005) ICJ Rep, 178,179.

³Peace building report (n 1).

⁴General Santos de Cruz. Improving the Security of UN Peacekeepers (DeCruz Report), December 2017. Available at https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf

¹ UN Secretary-General. Peacebuilding and sustaining peace. 2018. Available at <https://www.un.org/peacebuilding/>

²Ian Brownlie, 'International law and the use of force by states revisited' (2000) 21 Australian Yearbook of International Law 21, 22.

³Charter of the United Nations, signed 26 June 1945, I UNTS XVI (entered into force 24 October 1945).

II. THE USE OF FORCE BY UN FORCES, A CONCEPT IN FLUX?

A. *The UN Charter framework for the use of force*

Human history is often characterized by watershed moments. These watersheds take numerous shapes and forms, from the European colonization of Africa and Asia to the French revolution to the two World Wars; the last directly shaping the background relevant to the issues discussed here. The destruction and loss of life that resulted from the World Wars were unprecedented in history and shook the collective conscience of the international community to such an extent, that it was forced to call for and implement extraordinary measures. The First World War thus created the League of Nations⁸ while the Second created the UN.⁹

Mindful of the events preceding it, the Charter of the UN adopts an extremely cautious approach to the use of force; the applicable framework comprising of Articles 2(4), 42 and 51. The context in which force is used by the UN is also informed by Article 1(1) of the Charter which provides that one of the purposes of the UN, is to 'maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace'. Humanitarian disasters and gross human rights violations within states have consistently been taken to represent such threats.¹⁰ These collective provisions effectively proscribe the aggressive use of force and require member states to surrender to the Security Council ('UNSC') their right to use force except in situations covered by Article 51. Notwithstanding doubts that have been expressed regarding the current utility of the 'imminence' criteria¹¹, the Right of collective or individual self-defense can only be exercised until the UNSC takes appropriate measures under the Charter. Thus when peaceful means of settlement fail, the UN is authorized to take measures such as 'demonstrations, blockade and other operations by air, sea or land forces of the members of the United Nations' as may be necessary to maintain or restore international peace and security.¹² UN operations operations, regardless of their characterization, are and

have been one of the principle mechanisms so used for the maintenance of international peace.

The centrality of the role played by 'peace' in the conceptual context within which UN operations are created and deployed is thus undeniable. As pointed out in the Agenda for Peace¹³, there is 'a need to address the deepest causes of conflict: economic despair, social injustice and political oppression'¹⁴ and 'to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well - being among people.'¹⁵ UN missions therefore pursue a broader concept of peace, which is sometimes also referred to as a 'liberal peace'.¹⁶

'Peace' also impacts and is impacted by, human rights. Mention of the close relationship that exists between these notions can be found for instance, in the Universal Declaration of *Human Rights* (UDHR) which provides in its preamble that the 'inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.¹⁷ This is echoed in the Friendly Relations Declaration which emphasizes 'the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights...'¹⁸ Similar references are made in the UN Charter¹⁹ and the International Covenant for Civil and Political Rights (ICCPR)²⁰. Peace and human rights thus exist in a symbiotic relationship, each respectively benefitting or suffering from, the presence or absence of the other.²¹

This paper will not venture on a detailed discussion regarding the classification of UN missions²² because

⁸Covenant of the League of Nations, 28 April 1919, available at: <http://www.refworld.org/docid/3dd8b9854.html> (accessed 21 February 2018).

⁹The Charter (n.3).

¹⁰Refer for example UNSC Res. 1894, UN Doc. S/RES/1894 (11 November 2009), UNSC Res. 1911, UN Doc. S/RES/1911 (28 January 2010).

¹¹John C. Yoo, 'Force rules: UN reform and intervention'(2006) 6 *Chicago Journal of International Law* 641. Refer also Tim Bakken, 'Nations' use of force outside self-defense'(2010) *Georgetown Journal of Law and Public Policy* 451.

¹²The Charter (n.3) Art.42.

¹³An Agenda for Peace: Preventive diplomacy and related matters, UN Doc A/ RES/47/120 (18 December 1992).

¹⁴*ibid*, para. 15.

¹⁵An Agenda for Peace (n.13) para 16.

¹⁶Refer for doubts expressed on the desirability of enforcing on societies, such foreign notions of peace; Alexander Bellamy and Paul Williams, 'Introduction: Thinking anew about peace operations' (2004)11 *International Peacekeeping* 1,2 and Michael Pugh, 'Peacekeeping and critical theory' (2004) 11 *International Peacekeeping* 39, 41.

¹⁷Universal Declaration of Human Rights, UNGA Res 217, UN Doc A/RES/217 (10 December 1948), Preamble.

¹⁸Declaration On Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, UNGA Res 2625, UN Doc. A/RES/25/2625 (24 October 1970).

¹⁹The Charter, n. 3.

²⁰International Covenant on Civil and Political Rights, signed 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²¹See further William A. Schabas, *Freedom from Fear and the Human Right to Peace, in The Challenge of Human Rights: Past, Present and Future* 36-51 (David Keane & Yvonne McDermott, eds., 2012).

²²Refer United Nations Peace keeping Operations: Principles and Guidelines (UN Department of Peacekeeping Operations and Field Support 2008) 19 available at www.effectivepeacekeeping.org/events/70th-ungeneral-assembly-us-priorities-un-peacekeeping-summit and Ulrich Schneekener, 'Freiden Machen: Peacebuilding and peacebuilders' (2005) 80 *Die Friedenswarte* 17 for classification of UN missions.

its focus will be on the regulation of force used by them, regardless of the type of operation concerned. I am, however, mindful of the different levels of force that may be utilized by specific types of operations (and the divergence of objectives ascribed to them).²³ These differences are reflected in the wording adopted by enabling resolutions in addition to how force has in fact been used on the ground.²⁴

The first recognized UN mission - the United Nations Emergency Force (UNEF) - for example, was only authorized to use force in self-defense and was prohibited from using initiative.²⁵ The United Nations Operation in Somalia II (UNOSOM II) on the other hand, was authorized 'to use all necessary means to establish a secure environment for the delivery of assistance'²⁶ thereby limiting its engagement (including the use of force) to the protection of humanitarian assistance missions.²⁷ Meanwhile in Sierra Leone, the United Nations Mission in Sierra Leone (UNAMSIL) was authorized to 'take necessary action to ensure safety of personnel, and within its capabilities, to afford protection to civilians under imminent threat of physical violence'²⁸, thus enabling it to act in self-defense as well as defense of others. While in Cote d' Ivoire UN forces were authorised to use force 'in support of or in parallel with government actors'²⁹ in a 'preventative and pre-emptive posture',³⁰ in Darfur, they can use 'sufficient military powers to defeat spoilers'.³¹ Compare these mandates with that of Mission De L' Organisation des Nation Unies Pour La Stabilization En Rd Congo (MONUSCO) and particularly of the Force Intervention Brigade (FIB) in the Democratic Republic of Congo. While MONUSCO was authorized to take all necessary measures for the protection of civilians³², the authorization for the FIB breaks new ground³³ by permitting it to support the FARDC in operations against the Lords Resistance Army (LRA) and more significantly, to carry out targeted offensive operations.³⁵

The breadth of the foregoing mandates is put in context when one recalls the original peacekeeping principles of consent, impartiality and non-use of force except in self-defense and defense of mandate³⁶. The fact that mission mandates were recognized as 'straining' these principles³⁷ as far back as 1999 should therefore not come as a surprise.³⁸ The use of force by UN forces is today recognised as a well - established exception to the aforementioned principles which, according to the Ramos - Horta report, 'should never be used as an excuse for failure to protect civilians'.³⁹ The resultant normative, qualitative and quantitative transformation has thus appropriately been coined a 'triple transformation' of peace operations.⁴⁰

B. Detailing the Charter framework

The evolution of mission mandates I describe above was radically affected by how the exigencies posed by conflicts outpaced the development of peacekeeping doctrine by the early 1990's, often at unacceptable cost. The events that unfolded in Rwanda from April to July 1994 and Srebrenica in July 1995 provide poignant and compelling examples. In the face of extensive criticism for inaction⁴¹, the need for a change was efficiently summarized by the Brahimi Report.⁴² These developments contributed to increased weight being placed on two notions that are central to the contemporary understanding of UN deployment; Protection of Civilians (PoC) and the Responsibility to Protect (R2P).

PoC, in the context of UN missions, acknowledges that such missions are duty bound to provide a basic level of security to local civilians by virtue of the mere decision to intervene in a given situation.⁴³ Protection of civilians

²³Ibid, United Nations Peace keeping Operations: Principles and Guidelines, 19.

²⁴For a detailed discussion on the evolution of mission mandates refer Trevor Findlay, *The use of force in UN peace operations* (Oxford University Press 1996).

²⁵Summary study of the experience derived from the establishment and operation of the force, Report of the Secretary General, UN Doc. A/3943 (09 October 1958) 139.

²⁶UNSC Res 794, UN Doc. S/RES/794 (03 December 1992) para 10.

²⁷Refer for a general analysis of UNOSOM Rules of Engagement F.M. Lorenz, 'Rules of Engagement in Somalia: were they effective?' (1995)42*Naval Law* 62, 65.

²⁸UNSC Res 1270, UN Doc. S/RES/1270 (22 October 1999) para. 14.

²⁹UNSC Res 2112, UN Doc. S/RES/2112 (30 July 2013) para. 6(a), UNSC Res 2216, UN Doc. S/RES/2216 (25 June 2015) paras 19 (a) and (c).

³⁰UNSC Res 2162, UN Doc. S/RES/2162 (25 June 2014) para. 19(a).

³¹UNSC Res 1706, UN Doc. S/RES/1706 (31 August 2006) Preambular para. 11.

³²UNSC Res 1856, UN Doc. S/RES/1856 (22 December 2008) para.s 3, 5.

³³For an analysis of how, in view of its functions, the FIB should be classified for the purposes of IHL refer L. Muller, 'The Force Intervention Brigade - United Nations Forces Beyond the Fine Line Between Peacekeeping and Peace Enforcement' 2015 (20) 3 *Journal of conflict and Security Law* 359, 372.

³⁴UNSC Res 1925, UN Doc. S/RES/1925 (28 May 2010)para. 12 H.

³⁵UNSC Res 2098, UN Doc. S/RES/2098 (18 March 2013)para. 12 B.

³⁶Refer R. Siekmann, *National Contingents in United Nations Peace Keeping Forces* (1991). Refer also Findlay (n 20) for a detailed analysis of the practical execution of UN mission mandates.

³⁷Swedish Government, 'Comprehensive report on lessons-learned from United Nations Operation in Somalia April 1992- March 1995' (1995)24.

³⁸Katherine Cox, 'Beyond self-defence: United Nations peacekeeping operations & (and) the use of force' (1999) 27 *Denver Journal of International Law and Policy* 239.

³⁹Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Respects', UN Doc. A/70/95 - S/2015/446, Para. 122

⁴⁰Alex Bellamy, Stuart Griffin and Paul Williams, *Understanding Peacekeeping* (Cambridge Polity 2004) 75.

⁴¹Report of the Secretary - General pursuant to General Assembly Resolution 53/55: 'The Fall of Srebrenica', UN Doc. 54/549 (15 November 1999), Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257 (15 December 1999).

⁴²Report of the Panel on UN Peace Operations, UN Doc. A/44/305 - S/2000/809 (21 August 2000)11.

⁴³Hugh Breakey, 'The protection of civilians in armed conflict: four concepts' in Angus Francis and others (eds), *Norms of Protection: Responsibility to Protect, Protection of Civilians and their interaction* (United Nations University Press 2012) 40.

under threat of physical violence is today, an established justification for the use of force by the UN.⁴⁴ PoC finds a convenient home in the Human Security Doctrine⁴⁵ and these levels of security are in turn informed by three considerations; the protective

body fulfilling its mission mandate, the natural expectations entertained by agents on what appropriate standards of protection are and the content of the applicable IHL and IHRL rules which establish the relevant legal standards.⁴⁶ This last consideration holds particular significance as the said standards also confer legal authority on the non - legal concept of PoC.

R2P on the other hand, consists of three pillars; the recognition that it is the responsibility of all states to protect individuals within their jurisdiction from the crimes of genocide, crimes against humanity, war crimes and ethnic cleansing ('R2P crimes'), the international community's commitment to assist states to fulfill this responsibility and the power of the UNSC to authorize the collective use of force in favour of those (at the risk of) being subjected to the said crimes.⁴⁷ Action under pillar 3 will however be taken only when peaceful means are inadequate and national authorities are manifestly failing to protect their populations from the four R2P crimes.⁴⁸

But, by their very nature, crimes against humanity⁴⁹ and genocide⁵⁰ can be committed in the absence of a temporal or geographic nexus to armed conflict. So long as the applicability of R2P to the said crimes (when committed beyond the temporal and/or geographic scope of an armed conflict) is concerned, legal authority cannot thus emanate from IHL, but from IHRL. In the case of R2P

as applicable to war crimes (which by definition require a nexus to armed conflict)⁵¹ the said authority emanates either from the standards prescribed by IHL per se, or in combination with those prescribed by IHRL. Moreover, both these concepts give prominence to the need to protect civilians from dangers emanating from third party conduct as well, thus resonating with the idea underlying the IHRL principle of due diligence⁵². A correlation to due diligence is not found in IHL⁵³ which with its focus on duties, is normatively ill-equipped to accommodate such a dimension.

It is also worth noting that, although these notions have not attained the status of jus cogens norms, they are relevant to UN missions in two very significant respects. First, they flesh out the content of mission mandates by adding detail into what is expected as well as required of a particular mission and second, they link the applicable legal structure with the content of the respective mandate, in effect connecting political statements with legal standards. The emphasis so placed by the conceptual framework underpinning UN missions on the protection of human rights and maintenance of international peace may be compared with the use of force by states or non-state actors, which is seldom defined by the preservation of peace or protection of human rights. For Kelsen, these latter forms of force constituted one method of international sanction, namely war (the other being reprisals), which was aimed at the opponent's 'complete submission or total annihilation'.⁵⁴ The armed conflict paradigm so represented is primarily characterised by the belligerents' ability to use offensive lethal force provided the standards set out by IHL are satisfied. The other end of this spectrum is occupied by what is referred to as the 'law enforcement' paradigm. Depending on the context and the amount of force used, UN missions therefore can fall anywhere between these two extremes. It must however be borne in mind that even in cases that involve elevated levels of force by the UN, the ultimate objective continues to be the maintenance of international peace and security (as informed by required emphasis on human rights), and is not the annihilation of those parties that are violating or have violated the said notions.⁵⁵

⁴⁴Consider mandates of UNAMSIL, MONUSCO, United Nations Operation in Cote d'Ivoire (UNOCI), United Nations Interim Force in Lebanon (UNIFIL), United Nations Interim Security Force for Abyei (UNISFA), United Nations Multi-dimensional Integration Stabilization Mission in Mali (MINUSMA), United Nations Mission in Liberia (UNMIL) and United Nations Operation in Burundi (ONUB).

⁴⁵United Nations Development Programme, Human Development Report (OUP, 1994) 23,30.

⁴⁶ibid, 48.

⁴⁷Refer for the development of R2P doctrine, A more secure world: Our shared responsibility, Report of the High Level UN Panel on Threats, Challenges and Change, UN Doc. A/59/565 (December 2004), In larger freedom: Towards development, security and human rights for all, Report of the Secretary General, UN Doc. A/59/2005 (21 March 2005) and Protection of civilians in armed conflict, UNSC Res 1674, UN Doc S/RES/1674 (28 April 2006). Refer also Susan Harris - Rimmer, 'The Rwanda Paradigm: The Responsibility to Protect Displaced Persons' in Cecilia Jacob and Alistair D.B. Cook (eds) Civilian Protection in the Twenty-First Century, 79.

⁴⁸Ibid, Breakey, 182.

⁴⁹Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force on 01 July 2002), Arts 7(1) and (2). Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by UNSC Res 827, UN Doc S/RES/827 (25 May 1993) as amended by other Resolutions, Art. 5.

⁵⁰Ibid, Rome Statute Art.6, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art.4.

⁵¹Rome Statute (n 49) Art.8, Statute of the International Criminal Tribunal for the Former Yugoslavia (n 49) Art.3.

⁵²For a discussion of the concept refer Riccardo PisilloMazzeschi 'Due Diligence' E responsabilità internazionale degli Stati (Giuffrè 1989) 41-55.

⁵³Durham and Wynn - Pope (n 28).

⁵⁴Hans Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems (Stevens and Sons, 1950) 707.

⁵⁵Consider Harry Aitken, 'The Security Council and International Law Enforcement: A Kelsenian Perspective on Civilian Protection Peacekeeping Mandates' 2017 (22) 3 Journal of Conflict and Security Law 396, 403 for an analysis of how enforcement action qualifies as a form of international law enforcement.

Any regulatory regime dealing with UN use of force must therefore be capable of taking cognisance of these distinctions and it is only then, that serious hopes of achieving consistency between what is promised and what in fact happens, could to be entertained. The succeeding portions of this paper will explain why such an extended role is not only desirable, but also, necessary. It will utilize as a general guideline in this regard, 'the efficiency criteria' which requires that the regulatory framework allow and compel, to the greatest extent possible, the realization of the objectives of deployment. Part III will lay the foundation for this analysis by assessing the difficulties that will be encountered in drawing up a regulatory scheme, focusing on the nature and content of the relevant conflict of laws issue comprised of the IHL – IHRL interplay, as applicable to the UN use of force. Part IV will analyze how this conflict could and should be resolved by reference to the *lex specialis* principle in view of the inherent peculiarities of UN use of force, while Part V will deal with the practical applications of the resultant normative basis to the case of use of force by UN missions.

III. THE BASES OF A NORMATIVE FRAMEWORK FOR REGULATING UN USE OF FORCE

A. *The conflict difficulty*

Advancements made in various spheres create areas of functional specialization and the development of these areas create normative silos which shadow the relevant area of specialization. This 'siloining' creates distinct regulatory norms that take cognisance of and cater to the specific objectives and exigencies relevant to the particular silo and which then become crystallized into branches of law.⁵⁶ This phenomenon, ultimately results in what are termed 'self-contained regimes'.⁵⁷

According to the International Law Commission report titled 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law'⁵⁸, such regimes can take three principle forms i.e. a narrow form where the relevant regimes only contain secondary rules⁵⁹, a broader form where

they contain primary as well as secondary rules⁶⁰ and a broadest form in which special rules of administration are also developed by the regime.⁶¹ IHL and IHRL are classic examples of such regimes, with at least IHRL falling within the third category. These regimes are not however, completely self-contained. Even though they may well be capable of regulating issues falling within their purview on their own, they draw from and are impacted by, rules beyond them in their creation as well as failure⁶². They necessarily interact with the general law at some level⁶³ and 'self-contentedness' is therefore, nothing more than the specialty of the regime. Put simply then, conflict arises when different rules apply to the same subject matter, between the same parties leading to inconsistent results.⁶⁴

Even though conflict may be summarized in the foregoing terms, to conclude that rules apply to the same 'subject matter' is somewhat inaccurate. This is because a given rule may only apply to certain aspects of the 'subject matter' and not to others. Lindroos exemplifies this by referring to the case of a vessel sailing into the Exclusive Economic Zone of a country, in which case rules pertaining to the freedom of navigation and to environmental protection regulate distinct components of the issue.⁶⁵ Another example (which is directly relevant to this paper) is provided by the use of force in armed conflict, which can be regulated by rules that prescribe behavioural standards as well as those that create Rights. *Prima facie*, IHL applies to the conduct regulation aspect of the situation with its duty - focus while IHRL applies to the rights - protection aspect (even though, the respective Rights and Duties these branches expressly confer create implied and correlative Rights and Duties).⁶⁶ The factual dynamic is further complicated, by the extensive but unclear relationship that exists between these aspects, each influencing and being influenced by the other. It is perhaps better in these circumstances, to understand conflict as emanating from the ability of these factual contact-points to attract particular branches, instead of particular branches applying to them.

How such conflicts are characterized also merits attention and informs the issues considered herein. Characterization can be carried out on a multiplicity of levels and bases,

⁵⁶International Law Commission, Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, UN Doc. A/CN.4/L.682, para 15.

⁵⁷Michael Bothe, 'The historical evolution of international humanitarian law', international human rights law, refugee law and international criminal law' in Fischer and others (eds), Crisis Management and Humanitarian Protection (2004)37.

⁵⁸Fragmentation Report (n.56).

⁵⁹Case Concerning the United States Diplomatic Consular Staff in Tehran (United States of America v Iran) I.C.J. Rep 1980, 41 [86].

⁶⁰Exchange of Greek and Turkish Populations, P.C.I.J. Series B, No.10 (1925) [20].

⁶¹Fragmentation Report (n 56) para 172.

⁶²Report of the International Law Commission, General Assembly Official Records, 59th session, Supp. No. 10 (A/59.10).

⁶³Fragmentation Report (n.56) para 172.

⁶⁴Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS 54/, WT/DS 55/R, WT/DS 59/R, WT/DS 64/R (2 July 1998) [4.20], Sir G. Fitzmaurice, 'The law and procedure of the International Court of Justice 1951 – 4: Treaty Interpretation and other Treaty Points', (1957) XXXIII British Yearbook of International Law, 236, 237.

⁶⁵Anja Lindroos, 'Addressing norm conflicts in a fragmented legal system: The doctrine of *Lex Specialis*' (2005) 74 Nordic Journal of International Law 27, 48.

⁶⁶The implied dimension of this issue will be discussed hereunder.

but the division between ‘apparent’ and ‘genuine’ conflicts⁶⁷ is most relevant for present purposes. Apparent conflicts arise when the content of one rule is prima facie inconsistent with that of a second, but in fact acts as an application of the latter. What this actually means is that the consequences that result from the application of the narrower rule, can be accommodated within the ambit of the consequences potentially returned by an application of the broader one. The former set of consequences is in effect, a sub category of the latter.⁶⁸

These dynamics may be compared with that of ‘genuine’ conflicts in which one rule necessarily has to set aside another, as they return inconsistent results when applied individually. The respective consequences cannot be reconciled as the consequences returned by the application of one rule will be unacceptable under the other. A classic application of this phenomenon is found in the Nuclear Weapons Opinion.⁶⁹

Thus, even though Art.51(2) of Additional Protocol I (AP I) proscribes the civilian population or individual civilians being made the objects of attack, IHL leaves room for ‘collateral damage’ by barring only attacks ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’⁷⁰. By comparison, IHRL permits only the non - arbitrary use of lethal force i.e. ‘when there is an imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives...’⁷¹ and imposes a duty not to use lethal force in other circumstances. The content of the consequential duty so imposed does not align with that of the corresponding IHL duty which makes a clear allowance for civilian casualties even when such civilians (for the purposes of this paper) do not pose an ‘imminent threat’. Civilian

casualties⁷² satisfying the Art.51(2) threshold cannot by definition, also include individuals who would have posed a threat to the life of the person using force or to another, and would thus be classified as arbitrary deprivations by IHRL. The results so returned by the application of IHL and IHRL cannot therefore be reconciled, one set of results cannot fall within the remit of the other and necessarily falls beyond it. As noted by Milanovic,⁷³ what takes place in such situations is a partial displacement of one law by the other, a displacement sufficient to accommodate the application of that particular rule.

B. Conflict between the candidate regimes:

IHL and IHRL

I shall next consider the conflict issue as applicable to IHL and IHRL. How conflict is created between these two branches and how this manifests is central to understanding its normative character. Rules on the conduct of hostilities date almost as far back as hostilities themselves. They are found in varying forms and in numerous temporal and geographic contexts, ranging from the middle ages⁷⁴ to the ancient practices of the Pacific islands.⁷⁵ References to rules of war in codified form are also found in early treaties such as the Treaty of Amity and Commerce between the United States and Prussia of 1785.⁷⁶ Today’s IHL finds its roots in the Geneva Conventions of 1949 and their Additional Protocols and its content emanates from the principle of ‘inter arma caritas’ which is based on respect for opposing troops; reciprocity thus being central to its functioning.⁷⁷ IHL rules thus balance military necessity and humanity and are designed not to undermine an

⁶⁷Fragmentation Report (n 56) para 88.

⁶⁸Fragmentation Report (n 56) para 99.

⁶⁹Nuclear Weapons (n.5) 240.

⁷⁰Nuclear Weapons (n.5).

⁷¹Arts 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September 1990, Report prepared by the Secretariat (United Nations publication Sale no. E.91.IV.2), Chap.I, Sec.B.2.annex. Also, while the IHL Principle of Distinction is used in order to avoid killing civilians not participating in hostilities, the Right to Life has been interpreted with a view to avoiding the use of lethal force per se, refer *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) para. 202-213 (1995), *Jordan v. United Kingdom*, App. No. 24726/94 (ECtHR May 4, 2001), at paras. 103-104.

⁷²Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the victims of international armed conflicts, Art. 50(1). The said Article defines civilians as persons not belonging to the categories referred to in Arts 4(A)1,2,3 and 6 of Geneva Convention III or Art.43 of Additional Protocol I which are, members of the armed forces of a party to the conflict and of militias or other volunteer corps forming part of such forces, members of other militias and volunteer corps (provided they satisfy certain attributes), members of regular armed forces who profess allegiance to an authority not recognized by the detaining power and inhabitants of a territory who spontaneously take up arms on the approach of the enemy (levee en masse).

⁷³Marko Milanovic, ‘The lost origins of Ius specialis: rethinking the relationship between human rights and international humanitarian law’ in Ohlin, Jens David (ed), *Theoretical boundaries of armed conflict and human rights* (Cambridge University Press 2016) 78.

⁷⁴M. Keen, *The Laws of War in the Late Middle Ages* (Routledge & Keagan Paul 1965).

⁷⁵Helen Durham, ‘The Laws of War and Traditional Cultures: A Case Study of the Pacific Region’ (2008) 34(4) *Commonwealth Law Bulletin* 833. Compare with Marcus Cicero’s quote in his *Pro Milone*: ‘Silent enim leges inter arma’ (‘for among [times of] arms, the laws fall mute’).

⁷⁶A. Roberts and R. Guelff, *Documents on the Laws of War* (Oxford University Press 2005).

⁷⁷Louise Doswald – Beck and Sylvain Vite, ‘International Humanitarian Law and Human Rights Law’ (1993) 293 *International Law Review of the Red Cross* 94.

army's ability to win the war.⁷⁸ It is primarily worded in the language of Duties, a feature that is explained by how and the conditions under which, it was created.

IHRL on the other hand, is based on the 'inherent dignity of the human person'⁷⁹. It is the result of a long and sometimes uneasy relationship between the State and the individual and personifies a check on the powers of the State. IHRL is thus codified in terms of Rights which stem from the mere fact of being human while the corresponding responsibility to respect them emanates from the effective control of territory.⁸⁰ (Human rights originally being conceived of as a matter between the State and the individual; the ability of the State to interfere with Rights emanating from the exercise of effective control). They are therefore inalienable and capable of being enforced by the holder against whoever exercises effective control over the given territory, regardless of how such control came about.

The fact that IHRL continues to apply through armed conflict (the onset of which triggers the application of IHL) is no longer doubted.⁸¹ According to the Wall Opinion, this application results from the nature of human rights;

'106. More generally, the Court considers that the protections offered by human rights conventions does not cease in the case of armed conflict save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.'⁸²

While this undoubtedly justifies application from a rights perspective, it leaves two important issues unanswered. First, how does a regime that was designed to regulate relations between the individual and the state (which had as a *sine qua non*, the exercise of governmental authority resembled through effective control) apply to situations that may not possess such authority or control? Second, in

view of this concurrent application, how does *lexspecialis* identify the applicable normative standards between IHL and IHRL in the case of use of force by the UN (for the purposes of this paper)?

The first of the abovementioned issues can be resolved by reference to the nature of human rights which in their omnipresent nature, human rights survive through conflict and may thus be interfered with by actors who do not wield effective control through governmental authority. From this impact based perspective, regardless of the surrounding circumstances (and especially in conflict situations), any one that is capable of interfering with human rights exercises 'effective control' over the subject. This in turn, obliges them to respect the said Rights.⁸³

It is against this backdrop that the second of the aforementioned issues i.e. how *lexspecialis* identifies the applicable normative standards between IHL and IHRL should be considered.

IV. CONCLUSION

Even though contemporary international life has been spared of large scale human-induced catastrophes such as World Wars, it is plagued and unsettled by a large number of regional as well as domestic conflicts that have more than enough potential to jeopardize international peace. UN missions, regardless of how they are characterized, play an integral role in the containment and elimination of such threats. It must not be forgotten however, that between the FIB (which to date enjoys the most aggressive mandate) and the most conventional, non-intrusive operation, force is used by UN forces at a number of levels. The objectives of the use of force by the UN are substantially different from those informing the use of force by states in traditional wars, such as winning the conflict and neutralizing enemies. Regulation of the conduct of UN forces has to be governed by a combination of IHL and IHRL whose content can only be identified by analyzing how conflict between these branches arises and can be resolved. It is imperative in this connection to note that each conflict is comprised of endemic factors that influence and are influenced by the factual dynamics of the situation. These dynamics play a crucial role in choosing the regime by which the relevant fact situation should primarily be regulated, that regime necessarily being

⁷⁸Anthony E. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and the fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623.

⁷⁹ICCPR (n 20) Preamble.

⁸⁰Armed Activities (n 5). The principle has been applied by the European Court of Human Rights in *Loizidou v Turkey* (Merits) App no (ECtHR 18 December 1996) and *Cyprus v Turkey* App no 25781/94 (ECtHR 10 May 2001) and by the Inter-American Commission on Human Rights in *Coard et Al v United States*, Report No 109/99, Case 10.951(29 September 1999) and *Alejandro and Others v Cuba*, Report No 86/89, Case 11.589 (29 September 1999).

⁸¹Nuclear Weapons and Armed Activities (n 5).

⁸²Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (2004) ICJ Rep 136 [106]. Also refer J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press 2005) 299–305

⁸³F.Mergret, F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', (2003) 25 *Human Rights Quarterly* 314, 323.

capable of allocating appropriate degrees of weight to the relative importance of these various factual components. This can be done by breaking the operational dynamics of *lexspecialis* down to a value based contact point theory which explains how particular laws are attracted by fact situations. In this backdrop, even though a detailed analysis of the relevant conflict resolution mechanism applicable to this case falls beyond this paper, both the objectives of deployment as well as the overall context within which the UN uses force, dictate that IHRL function as the

lexspecialis in the regulation of UN use of force. This is primarily driven by a recognition of unique objectives of UN deployment which are better accommodated by the overall protective accent of IHRL, which emphasizes a greater role for and survival of rights along with its unique tools such as due diligence, demands a greater role in the applicable regulatory framework. A framework so dictated by an IHRL influence promises improved levels of protection on a number of fronts ranging from targeting to preventing third party atrocities, in effect bringing results of deployment into greater harmony with its objectives.

PROOF