

Peacekeeping talk – Conference 23 May 2019

Legal framework regarding the participation in armed conflict:

- Legal basis for peacekeeping operation's presence in the host state is the UNSC Resolution in combination with host state consent. The mandate however does not determine whether the troops are involved or will be involved in an armed conflict. This is always determined based on the facts on the ground.
- An IAC is often defined as the resort to armed force between two or more states. A non-international armed conflict (NIAC) has been identified as 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.
- If the peacekeeping force becomes involved in fighting with non-state actors or governmental forces, this may indicate that the troops become a party to the conflict. There is considerable debate about 1) whether the UN as an organisation would be involved in the conflict or whether it is the TCC that becomes a party to the conflict and 2) whether this would have to be classified as a non-international armed conflict or an IAC
- Regarding the first point, whether the organisation or the TCC becomes involved, it is argued that whoever exercises operational control over the troops is considered to be the party to the conflict. Although many commentators still are of the opinion that an international organisation cannot be a party to an armed conflict and will state that it is by definition the TCC that becomes involved, the debate has shifted towards accepting that this could also be the UN.
- Regarding the second point, whether this would be defined as an international or non-international armed conflict, it is clear-cut that a conflict between the host state and either the UN or the TCC is by definition an international armed conflict, even though it may not necessarily fulfil the exact definition of an IAC as that refers to a conflict between two or more states. One of the arguments provided is that it concerns distinct legal personalities which makes it international in nature, but also the idea that the UN is a higher moral authority and therefore should follow the highest standards applicable to armed conflict, being the rules of IAC, has been referred to. A relatively large group of experts then argues that a confrontation between the UN/TCC and a NSA is by definition a NIAC, as it does not involve more than one state. I position myself on the other side of the debate, and consider this an IAC, as it involves two entities of entirely different nationalities with the NSA representing the state it belongs to. In any case, it is not an internal and thus not a non-international armed conflict.
- The distinction between IAC and NIAC is relevant for PK troops, since this affects the protected status of the forces differently. In IAC, peacekeepers lose their protected status as they obtain the status of combatants, whereas in NIAC the Safety Convention continues to apply and the troops thus continue to be protected, despite being a party to the NIAC.

- The fact that peacekeepers lose their protected status as part of an IAC also means that they are legal or legitimate targets, which makes TCCs hesitant in acknowledging their involvement in an IAC. In particular in missions that have a counter-terrorism character and where the groups involved in the conflict may have members in the TCC, classifying it as international may result in a scenario where the TCC is attacked on its own territory, for example if opposing forces target a military base in the TCC and in doing so follow the rules and principles of IHL.
- If this prospect does not decrease the willingness of states to contribute troops, it will at the very least make states impose caveats on their commitment to the mission.

Norms of peacekeeping and IHL:

- Another issue in relation to peacekeeping troops being involved in an armed conflict is the fact that it complicates the notion of Protection of Civilians which continues to be an important objective and task in PKOs. There is however a notable difference between protection under IHL, which applies in a situation of armed conflict, and the norm of positive protection often incorporated in the mandate and the rules of conduct applicable to peacekeeping operations. My concern is that if peacekeepers are considered a party to a conflict, we expect them to combine these two notions of protection. So, on the one hand the obligation to offer so-called negative protection to civilians as laid down in IHL, which means that they should minimise harm to civilians in their combat activities, and the expectation or perhaps even obligation under the mandate to offer positive protection to civilians, meaning that they should protect civilians from being harmed by others. The fundamental principles of humanity and military necessity will guide the peacekeepers, but this still justifies collateral damage up to the point where this is proportional. How do we reflect on that relationship in a combat situation? Which norm prevails? Or do we ignore the normative framework applicable to peacekeeping as soon as the forces are considered part of the conflict? The fact that the Safety convention would continue to apply in situations of NIAC indicates that peacekeepers continue to fulfil their peacekeeping role.

Nature of peacekeeping and counter-insurgency missions:

- Kaldor coined the term 'cosmopolitan law enforcement' to label the envisioned role of PKOs in the context of what Kaldor considers to be 'new wars', which are mainly wars similar to what we now see in Mali, CAR and South Sudan. However, rather than proposing a forceful approach to solving the cycles of violence characterising the countries, cosmopolitan law enforcement places the protection of people at the centre of its activities, which includes law enforcement tasks such as the arrest of alleged war criminals or monitoring human rights situations. The term cosmopolitan refers to 'the existence of a human community with certain shared rights and obligations', which ultimately represents an approach in which the international community and local populations together rebuild the country. To some extent, this

is visible in current PKO mandates, but one can question whether the forceful approach actually contributes to peacebuilding in these contexts.

- There is at this point no clear indication of whether peacekeeping troops are successful in contribution to CT activities. What do they achieve on the local level? It is more likely that the liberal peace of international troops interfering in domestic matters strengthens anti-western sentiments that are often the basis for sympathizing with terrorist organisations.
- Plus, the use of language in mandates like that of MINUSMA in Mali also reflects CT terminology and is particularly risky of jeopardizing the mission's impartiality if it points at specific religious groups in society and links them to terrorism. The issue of peacekeepers carrying out CT activities is that it requires the identification of an enemy, which is in complete contrast to what peacekeeping stands for.
- The difficulty here lies with the fact that CT activities are easily connected to the strategic goal of creating an environment that allows for sustainable peacebuilding, and the idea that in order to allow/support the government to gain its power back, so-called spoilers need to be removed. The question one may ask is whether this is something that we want peacekeepers to be involved in or whether this should be done by regional organisations or ad hoc coalitions operating alongside the UN mission but not under the UN umbrella.
- This is closely related to the next point that I would like to address, which again refers to Mary Kaldor's **new war theory**. Part of her more recent argumentation is the idea that the parties to conflicts involving fundamentalist rebel groups among others also depend heavily on the **war economy** and thus have no interest in ending the war as it is their main source of income. There are then two arguments one could make:
 - the role and influence of spoilers can be tackled best by means of the use of force. Fight them with the same means, which is in part what the UN seems to do.
 - there are however also good examples of how the role of spoilers and potential spoilers are tackled on a local level by community projects, where especially young people are encouraged to hand over their weapons in exchange for participation in community projects or training focused on agriculture in order to allow them to make a living without having to resort to force. The CAR is a good example thereof. This also respects the traditional principle of peacekeeping by discouraging potential spoilers from engaging in the conflict by using peaceful means. The mission maintains its impartiality and increases legitimacy due to its focus on local needs and building local capacity. This of course more in line with Kaldor's concept of cosmopolitan law enforcement.
- **In contemporary conflicts that are more complex, in particular in the goals, actors and means that characterise them, one can see the paradox the UN finds itself in:**

on the one hand stressing the importance of human security, sustainable peace and civilian protection, while on the other hand resorting to militarized approaches. In particular, the HIPPO report in 2015 on the one stressed the need to act in protection of civilians: '[w]hen a protection crisis occurs, UN personnel cannot stand by as civilians are threatened or killed. They must use every tool available to them to protect civilians under imminent threat'. The same report however also reaffirmed the 'primacy of politics' in United Nations (UN) peacekeeping missions, since '[l]asting peace is achieved not through military and technical engagements, but through political solutions'. The Cruz report was more in favour of militarized peacekeeping than against it, so we may at some point question what position the UN takes or what its vision is for future deployments.

My personal take on this is that peacekeeping should focus on the protection of civilians as its main aim, while at the same time strengthening local capacity to deal with the root causes of conflict.