The Human Rights Treaty Obligations of Peacekeepers

Do states, through their military forces, have legal obligations under human rights treaties towards the local civilian population during UN-mandated peace operations? It is frequently claimed that it is unrealistic to require compliance with human rights treaties in peace operations, and this has led to an unwillingness to hold states accountable for human rights violations. In this book, Kjetil Larsen criticises this position by addressing the arguments against the applicability of human rights treaties and demonstrating that compliance with the treaties is unrealistic only if one takes an 'all or nothing' approach to them. He outlines a coherent and more flexible approach which distinguishes clearly between positive and negative obligations and makes treaty compliance more realistic. His proposals for the application of human rights treaties would also strengthen the legal framework for human rights protection in peace operations without imposing any unrealistic obligations on the military forces.

KJETIL MUJEZINOVIĆ LARSEN is an associate professor at the Norwegian Centre for Human Rights, University of Oslo, where his research addresses human rights law, international humanitarian law and the responsibility of international organisations.

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The Human Rights Treaty Obligations of Peacekeepers

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CAMBRIDGE
UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107017078

First published 2012
First paperback edition 2014

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication data
Larsen, Kjetil Mujezinović, 1976–
The human rights treaty obligations of peacekeepers / Kjetil Mujezinović Larsen.
pages cm. – (Cambridge studies in international and comparative law; 93)
Includes bibliographical references and index.
ISBN 978-1-107-01707-8 (hardback)
1. United Nations – peacekeeping forces. 2. Human rights monitoring. 3. Treaties.
4. Peacekeeping forces – moral and ethical aspects. 5. Conflict management. I. Title.
KZ6376.L37 2012
341.5′84 – dc23 2012008280

ISBN 978-1-107-01707-8 Hardback
ISBN 978-1-107-41694-9 Paperback

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Foreword

The ancient Chinese curse was: 'May you live in interesting times!' To some extent all 'times' have their interest, and yet to those involved in international law and international relations, the current times are more 'interesting' than usual. A number of tensions seem to be coming to the surface at the same time, and a resolution of one may have unintended consequences in other areas, even exacerbating the tensions there.

The subject matter of this book looks at the tensions in one of those areas, the application of human rights treaties to United Nations peace operations. Yet the author realises that even here, the subject is too vast for one publication. He therefore has to narrow his field to examine the application *as law* of two of the best known treaties, one universal and one regional. In doing so, he accepts that there are other issues raised which cannot be dealt with within the scope of this book. This book is not, therefore, and does not seek to be, the definitive answer to all the issues surrounding United Nations peace operations or the relationship between those operations and international law in general.

The general context in which this book is set is itself complex. The original concept of having forces made available to the United Nations under Article 43 of the Charter never saw the light of day. As a result, command and control of United Nations forces is never straightforward, and has become less so as the nature of United Nations peace operations has changed over the years from 'traditional peacekeeping' in a comparatively benign environment, through 'peace support operations', often in an environment where the consent of all factions could not be taken for granted, to 'peace enforcement', where operations are often conducted in the midst of ongoing hostilities.

At the same time, the legal framework in 'complex emergencies' has also become more confused. The law of armed conflict, or international

humanitarian law as it is often called, applies in 'armed conflict'. Human rights law, originally seen as part of the law of peace, has also now been applied in situations of armed conflict. The European Convention in its derogation article, Article 15, specifically allows for derogation 'in time of war or other public emergency threatening the life of the nation', thus implicitly acknowledging the application of the Convention in time of 'war'. The relationship between human rights law and international humanitarian law in time of armed conflict is itself open to much debate, but the author wisely decides not to go down that particular rabbit hole to any depth. However, it is an issue that cannot be avoided altogether and is perhaps at the heart of the key question with which the author concludes. Whether or not the treaties apply as a matter of law, is their application *suitable* in the context of peace operations?

The author accepts as a basic premise that an international organisation cannot itself become a party to the relevant human rights treaties. It follows that the obligations, such as they may be, must fall on the troop-contributing states. But what are those obligations, to whom are they owed and what is the position of military forces as state agents in light of the command arrangements applicable in United Nations operations? Even here, it is necessary to narrow down the issues by looking at the human rights of the civilian population in the area of deployment of the peace operation. In addition, it is only possible to look at selected human rights, the right to life, the freedom from torture and inhuman or degrading treatment, and the right not to be subjected to arbitrary detention.

It is accepted that there are a number of obstacles that lie in the way of application of human rights treaties to UN operations, and these are examined in the light of the jurisprudence, particularly that of the European Court of Human Rights. However, this is not an uncritical examination. As many would agree, the jurisprudence from the *Banković* case to *Behrami and Saramati* is confused, and seems to lack the normal legal logic. It is here that the author takes his boldest step. He argues that the underlying issue is that of the suitability of application, and his conclusion is that the European Court of Human Rights has failed to face up to this basic question. Because this is not a legal question as such, the Court has sought to circumvent the issue by seeking to avoid having to provide a direct answer to the question. The conclusion reached is that some of the obstacles to application, apparent in the jurisprudence, are not inherent in the law itself but are *invented* in particular contexts to avoid having to reach an 'undesirable conclusion'. Indeed, it is arguable – and is argued

here – that the European Court of Human Rights 'does not wish or does not consider itself competent, to review acts during' UN-mandated peace operations. If this is right, *quis custodiet ipsos custodes?*

UN-mandated peace operations straddle the boundary between peace and war. Rarely is it envisaged that such operations will involve the UN forces themselves as parties to an armed conflict. It follows that, whatever is going on around them, their own actions will be governed more often by human rights law than by the law of armed conflict. This can be seen in the allegations of sexual exploitation made against UN personnel in the Democratic Republic of Congo. However, it is exactly here that the weaknesses of the current legal system appear. The UN has no criminal enforcement powers; those are the prerogative of states. If human rights courts are reluctant to exercise jurisdiction over states in relation to human rights abuses by military forces of such states operating as part of a UN force, then there would appear to be a 'black hole' in the enforcement mechanisms.

How can this hole be filled? The first, and most necessary, step is to admit its existence. The European Court has indeed sought to draw back somewhat from its decision in *Bankovic* and to widen the scope of extraterritorial jurisdiction. *Behrami and Saramati* has also been considered to be a decision on its own facts. But is this enough? It could be argued that the Court needs to rethink its attitude in relation to such cases so as to come up with a more coherent fundamental position. The two conflicting options seem to be either to hold that the Convention does not apply to such activities at all, because the nature of participation is so fundamentally different from other state activities, or that the Convention does apply in principle with such modifications as may be necessary to make it suitable for such operations. Neither course will be easy. The first would confirm the 'black hole' and require a reconsideration of enforcement mechanisms in general. The second would require the European Court in particular to show a much greater degree of flexibility than it appears to have shown so far, particularly in relation to international humanitarian law, that branch of public international law that is designed specifically for military operations in armed conflict. How that would work in practice is a huge question, one beyond the scope of this book at least. However, by asking the question, the author has opened up an avenue of debate.

If the Chinese curse is indeed upon us and it is our fate to live in 'interesting times', then, if the rule of law is to carry weight, we need to maintain a degree of legal certainty. This is often most difficult in the case of international law, which is so dependent on the will of states

themselves. It has been argued that we are entering a post-Westphalian era where the significance of state sovereignty is being challenged, not least by the growing emphasis on the rights of the individual against the State. Change requires innovative thinking. The existing law appears to be under stress. However, that is no reason to abandon the structures that have been so carefully assembled. What may be required is some reinterpretation of existing legal theory to fit the new context in which the law is operating. We should take advantage of that flexibility, which is built into the international legal system and which, whilst some would argue is its greatest weakness, is also its greatest strength, enabling it to adapt to changing circumstances.

Charles Garraway

Preface

This book is a revised version of my Ph.D. dissertation, which was defended at the University of Oslo in October 2010 before an evaluation committee consisting of Judge Christopher Greenwood (International Court of Justice), Professor Inger Österdahl (Uppsala University), and Professor Geir Ulfstein (University of Oslo). The dissertation was researched and written while I was Research Fellow at the Norwegian Centre for Human Rights, the University of Oslo, from August 2006 to May 2010. During this period, I benefited greatly from the supervision of Gro Nystuen and Charles Garraway. Gro, I am grateful for your quick and constructive feedback to all my drafts and questions, and for your ability to give me confidence and a sense of accomplishment even if you tore my arguments utterly apart. Charles, I am proud to have had you as my supervisor. Your feedback has truly been invaluable, in particular with regard to making sure that my arguments are realistic and relevant for the real life in international peace operations.

While the writing of a Ph.D. dissertation ultimately is a rather lonely enterprise, the unique environment at the Norwegian Centre for Human Rights ensured that any occurrence of loneliness was my own choice, rather than a necessity. I am grateful to all my colleagues at the Centre, both for their academic contributions and for making my stay there both pleasant and inspiring. A particular gratitude should be offered to my Ph.D. colleagues at the Centre: Cecilie Hellestveit, R. Hustad, Rose van der Hilst, Malcolm Langford, Hadi Lile, Lena Larsen and Girmachew Aneme – you were all a great help and inspiration. I am also particularly grateful to the two research directors at the Centre, Andreas Føllesdal and Jan Helgesen – both of you have the ability to make a Ph.D. student feel appreciated and respected. Further, I benefited greatly from discussions and conversations with other academic staff at the Centre and elsewhere

at the Faculty of Law – Mads Andenæs, Ragnar Nordeide, Cecilia Bailliet and Geir Ulfstein deserve particular mention, along with all the members of the Faculty's Research Group on International Relations. Still further, a researcher would be quite lost if he did not have a competent administration around him; as a Ph.D. candidate at the Centre, one is blessed with an excellent administration both at the Centre and at the Faculty. Maria Sommardahl, Guro Frostestad, Daniel Kjelling, Jasna Jozelić, Gørill Arnesen and Louise Bjerva have always guided me skilfully through the maze of formal requirements, and I am truly grateful to you for making my life so much easier. The staff at the library of the Centre is also always friendly and helpful; Betty Jean Haugen and Marta Herkenhoff, thank you for your invaluable assistance.

I was fortunate enough to be accepted as a Visiting Fellow at the Lauterpacht Centre for International Law at the University of Cambridge in 2009, and I benefited greatly from my stay there. I am truly grateful to the distinguished scholars who met with me during my stay; although our meetings may perhaps have seen inconsequential to you, they were of great help to me.

I am most grateful to Cambridge University Press's two anonymous reviewers, who provided constructive and very valuable comments, to the Norwegian Ministry of Defence, which generously funded a two-week stay for me in the USA, and to the Norwegian Red Cross, who equally generously funded a two-week stay for me in Italy. The Faculty of Law has also been generous in its funding, which allowed me to visit Brussels, the Hague, Oxford, Copenhagen, and the Saaremaa island in Estonia, for conferences and courses during my research.

However, the biggest gratitude goes to my family. First of all to my wonderful wife Selma – I love you for ever and always. I know that living with a Ph.D. candidate is sometimes challenging, and I admire your patience with me through these years. Further, to my lovely and dear children, Eira and Emir, who through every smile and hug remind me of what is most important in life. Then, to my father Reidar and my brother Thomas, who have always supported me and believed in me. And finally, to my parents-in-law, Valida and Sead, and to my brother-in-law, Mirza, who all have been astonishingly helpful in making my daily schedule work in a hectic period.

But I cannot write this foreword without extending a final word of gratitude and of love to my mother Ragnhild. You were so proud to hear that I would pursue a Ph.D., and you were so immensely happy to hear that you would become a grandmother. But sadly, you died quickly and

unexpectedly soon before you could experience either, three months before Eira was born. In one of those moments where nature shows that it has a strange sense of irony, you were admitted to hospital on the same day as my first article was accepted to be published in an international journal, making sure that your demise and my academic accomplishments will always be connected. Dear mum, I am sorry that you are not here to share this moment with me, but I hope that this book would have made you proud.

Oslo, September 2011,
Kjetil Mujezinović Larsen

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