

Contents

	Foreword	page xvi
	Preface	XX
	Table of cases	xxiii
	List of abbreviations	xli
Part I	Background and context	
1	Introduction and overview	3
	The main research question	4
	Scope of analysis	6
	Treaty law as the relevant basis of human rights	
	obligations	6
	UN-mandated peace operations: some terminology	7
	Preparing the stage	11
	Whose obligations towards whom?	11
	The obligations of states	11
	Military forces as the relevant state agents	13
	Civilians as the relevant rights-holders	13
	A selection of substantive norms: the protection of	
	an individual's physical integrity	14
	Human rights treaties in context: the legal	
	framework of peace operations	16
	The immunities and privileges of the	
	United Nations	20
	Clarifications concerning method	21
	Principles of interpretation: human rights treaties	21

vii



viii CONTENTS

	Judicial activism vs. judicial self-restraint in human rights bodies The interpretation of UN Security Council	25
	resolutions	27
	The interpretation of other instruments	32
	The relevance of international customary law Outline of the book	34 36
2	The context	42
_	The emerging relevance of human rights law in	12
	UN-mandated peace operations	42
	The increased complexity of peace operations	43
	Globalism vs. regionalism	45
	The mainstreaming of human rights in the	
	United Nations	48
	Two trends in peace operations: the protection of	
	civilians and the protection of human rights	49
	The protection of civilians	49
	The protection of human rights	53
	The failure of peace operations to respect or protect	
	human rights	55
	The 'humanisation' and the 'human-rightism' of	
	international law	57
	The other side of the coin: the alleged	
	inappropriateness of applying human rights treaties	60
	The two approaches of the European Court of	
	Human Rights and the United Nations Human	
	Rights Committee: an example of the	
	fragmentation of international law?	61
	The fundamental policy consideration: peace and	
	security vs. human rights	64
	Peace and human rights	65
	(National) security and human rights	66
	The relevance for UN-mandated peace operations	70
	Conflicting values in peace operations: the	
	effectiveness of peace operations and the	
	effectiveness of human rights	71
	The 'square peg, round hole' argument	76



	CONTENTS	ix
Part II	Two fundamental arguments for non-applicability of human rights treaties	
3	The argument of non-applicability ratione personae	85
	Overview of the chapter	85
	The capacity of actors in peace operations to bear	
	responsibility under international human rights law	87
	Troop contributing states	87
	The human rights obligations of international	
	organisations	87
	The relevance of international legal personality	88
	The international legal personality of the United	
	Nations and NATO	91
	Objective and subjective personality	98
	Attribution of conduct during UN-mandated peace	
	operations	99
	The context	99
	The responsibility of states and of international	
	organisations	99
	Are the general principles of international	
	responsibility relevant for human rights law? The	
	notion of 'self-contained regimes'	102
	The relevance of the issue for the present book	105
	Overview of the further analysis	107
	Attribution of conduct of military forces during	
	peace operations: rules and principles of general	
	international law	108
	Relevant provisions in the Articles on State	
	Responsibility	108
	Relevant provisions in the Draft Articles on	
	Responsibility of International Organizations	111
	The legal status of peace operations	112
	Application of the general rules and principles in	
	UN-mandated peace operations	113
	Attribution of conduct under human rights law: a	
	lower threshold?	121
	Direct responsibility	121
	'Indirect responsibility': the concept of positive	
	obligations	125
	The Behrami/Saramati case	129



X CONTENTS

	Introduction to the case	129
	The content of the 'ultimate authority and	
	control' test	132
	Developments 'post-Behrami/Saramati'	136
	The European Court of Human Rights: cases	
	applying the 'ultimate authority and control' test	136
	Domestic case law: the Al-Jedda case	138
	The European Court of Human Rights tries again:	
	the Al-Jedda case	141
	Domestic case law: the Dutch cases concerning	
	Srebrenica	142
	Domestic case law: the Belgian Mukeshimana-	
	Ngulinzira case	144
	Reactions from the UN and states	144
	The (lack of an) approach of the UN Human	
	Rights Committee	146
	A normative assessment of the 'ultimate authority	
	and control' test	146
	The incompleteness of the Behrami/Saramati	
	decision: two unexplored avenues to holding	
	contracting states responsible when conduct is	
	(also) attributable to the United Nations	151
	Dual and multiple attribution	151
	The responsibility of member states for acts of	
	the organisation	156
	Conclusions	164
4	The argument of non-applicability ratione loci	165
-	Territory and jurisdiction	165
	The extraterritorial application of the ECHR: general	100
	starting points	167
	The settled issue: the ECHR can apply	10,
	extraterritorially	167
	'Jurisdiction' defined as the exercise of authority	10,
	and control	169
	The contentious issues: an overview of the further	
	analysis	173
	A basis for comparison: the position under the ICCPR	177
	The ICCPR can also apply extraterritorially	177
	The similar definition of 'jurisdiction'	180



	CONTENTS	X
	The application of the ICCPR in UN-mandated peace	
	operations	181
	The exercise of extraterritorial jurisdiction in peace	
	operations: four categories	185
	Exercise of authority or control over a territory	185
	The general principles	185
	Transitional administration	190
	'Safe areas', 'security zones', and other places of	
	protection	194
	Buffer zones	198
	Combat operations	202
	Exercise of authority or control over individuals	204
	Arrest	204
	Detention	207
	An individual is killed by a state agent	211
	Extraterritorial effects of territorial or	
	extraterritorial conduct	215
	Extradition and expulsion	215
	Cross-border incidents	217
	The requirement of a close connection between	
	the conduct and the injury	217
	Effects of a foreign state's conduct	218
	The Manoilescu/Dobrescu and Treska cases: the birth of a	
	'due diligence' doctrine, or a slip of the tongue?	220
	The discussion of an 'espace juridique' limitation	224
	A sidestep: the universality of human rights	224
	The possible relevance of the 'espace juridique'	227
	The relationship between the host state and the peace	
	operation	233
	Competing 'jurisdictions'	233
	Conflicting international obligations	236
	Conclusions	237
Part	III Circumstances that may exclude or modify the	
	application of the treaties	
5	The applicability of human rights law during	
	armed conflicts	243
	The settled issue: human rights law applies, in	
	principle, during armed conflicts	243



The contentious issue: the relationship between IHL

xii CONTENTS

	and human rights law	247
	Overview	247
	The relevance of the issue for the present book	248
	The applicability of IHL to troop contributing	
	states in UN-mandated peace operations	248
	The applicability of the law of belligerent	
	occupation	250
	The right to life	252
	The right to liberty and security	255
	Prohibition against torture	255
	The lex specialis theory	256
	The complementarity theory	259
	The 'most favourable protection of victims' theory	260
	The human rights-based theory	261
	The practice under the ECHR and the ICCPR	263
	The jurisdiction of the European Court of	
	Human Rights and the UN Human Rights	
	Committee to apply IHL	263
	Methodological and practical challenges	268
	The case law of the European Court of	
	Human Rights	272
	The views of the UN Human Rights Committee	282
	The Committee's General Comments	282
	The Committee's country-specific practice:	
	Concluding Observations to Periodic	
	State Reports	285
	The Committee's country-specific practice:	
	jurisprudence	289
	Advantages and disadvantages of the application of	
	IHL by human rights tribunals	290
	Can a general theory be identified?	293
	Implications for the application of the ECHR and the	
	ICCPR when peace operations are involved in armed	
	conflicts	296
6	Derogations	298
U	The legal basis for derogations	298
	Derogation from human rights treaties in peace	290
	operations	299
	operations	499



	CONTENTS	xiii
	The emergency requirement: the problem of	
	extraterritorial derogations	299
	A threat to the 'life of the <i>entire</i> nation' or to the	
	'life of affected parts of the nation'?	302
	A similar test for extraterritorial derogations?	306
	Consistency with other obligations under	
	international law	311
	A way to avoid the 'absurdity' argument	312
7	Norm conflicts between UN Security Council	
	mandates and human rights treaties	314
	The UN Charter Article 103	314
	Introduction to the problem	314
	A necessary background: constitutionalism vs.	
	legal pluralism	315
	Charter obligations and Charter body decisions	318
	Obligations and authorisations	319
	The general prevailing effect of Article 103	322
	Norm conflicts between Charter obligations and	
	human rights	323
	The special situation of human rights	323
	Human rights norms as a substantive limitation	
	of the competence of the UN Security Council	323
	The right to life, freedom from torture, and the	
	right to liberty and security, as a substantive	
	limitation of the competence of the UN Security	
	Council	328
	Is there a presumption of human rights	
	compliance?	332
	A review of relevant case law	333
	The European Court of Human Rights: the	
	Behrami and Saramati cases	333
	The UN Human Rights Committee: the Sayadi and	
	Vinck case	335
	The European Court of Justice and the Court of	
	First Instance: the Kadi and Al-Barakaat case	338
	The UK House of Lords: the Al-Jedda case	344
	The European Court on Human Rights tries	
	again: the Al-Jedda case	346



X1V	CONTENTS

	Norm conflicts between authorisations under the UN Charter and rights under the European	
	Convention on Human Rights: the (uncertain) lex	0.45
	lata solution	347
	Attempts to reconcile the cases	347
	An explanation of the view of the European Court	2.40
	of Human Rights	349
	Norm conflict in practice in peace operations: the	
	interpretation of resolutions authorising 'all	251
	necessary means'	351
8	Legal challenges relating to the interrelationship	
	between troop contributing states	353
	Regional differences	353
	Interoperability from a human rights perspective	355
	The mutual dependence between states	357
	Indispensable third parties – the 'Monetary Gold'	
	principle	360
Part IV	Application <i>in concretu:</i> the right to life, to freedom from torture, and to liberty and security	
9	Selected issues relating to the application of	
	substantive provisions	367
	The distinction between positive and negative	
	obligations	367
	Overview	367
	The starting point: the indivisibility of	
	human rights	367
	Are human rights 'divisible' in peace operations?	
	Building a case for separating negative and	
	positive obligations	368
	The right to life	374
	The relevant treaty provisions	374
	Use of lethal force	375
	Introduction to the authority to use lethal	
	force in peace operations	375
	Personal self-defence	378
	Defence of the mission	379
	Chapter VII authorisation: the situation during	
	combat operations	381



Cambridge University Press & Assessment 978-1-107-01707-8 — The Human Rights Treaty Obligations of Peacekeepers Kjetil Mujezinović Larsen Table of Contents **More Information**

	CONTENTS	XV
	Positive obligations under Article 2	386
	General content: relevance for peace operations	386
	Mandates concerning the protection of civilians	
	under 'imminent threat of physical attack', and	
	similar limitations	391
	The right to liberty and security	393
	Detention	393
	The prohibition against arbitrary arrest	
	and detention	393
	The right to be brought promptly before a judge	397
	The right to judicial review	399
	Positive obligations under Article 5	400
	Transfer of detainees: the principle of	
	non-refoulement	401
	The application of the ECHR and the ICCPR on the	
	transfer of detainees	401
	Bilateral detainee transfer agreements: ISAF	404
	Bilateral detainee transfer agreements: the	
	Coalition Provisional Authority	406
	The impact of the agreements: the question of	
	diplomatic assurances	408
	The prohibition against torture	418
	The obligation not to subject anyone to torture	418
	The scope of the prohibition	419
	Positive obligations under Article 3	423
	Final reflections: is it 'absurd' to require compliance	
	with the ECHR?	427
D 4 77		
Part v	Conclusions	
10	Conclusions	433
	Many obstacles to the applicability of human rights	
	treaties	433
	Inherent or invented obstacles?	434
	The better approach: transparent adaptations to the	
	ordinary application of the treaties	436
	Sources and materials	439
	Selected UN documents	439
	Books, articles and other literature	439
	Index	461