

ARMED FORCES AND INTERNATIONAL JURISDICTIONS

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Marco ODELLO
Francesco SEATZU
(eds.)



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LIST OF ABBREVIATIONS

| | |
|---------|--|
| API | Additional Protocol 1 to the 1949 Geneva Conventions |
| AP2 | Additional Protocol 2 to the 1949 Geneva Conventions |
| CAVR | East Timorese Commission for Reception, Truth and Reconciliation |
| CEH | <i>Comisión para el Esclarecimiento Histórico</i> (Historical Clarification Commission –Guatemala) |
| CERD | Convention on the Elimination of all forms of Racial Discrimination |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CoE | Council of Europe |
| CUP | Cambridge University Press |
| DRC | Democratic Republic of Congo |
| ECMM | European Communities Monitoring Mission |
| ECOSOC | United Nations Economic and Social Council |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| ECommHR | European Commission of Human Rights |
| FRPI | <i>Force patriotique pour la libération du Congo</i> |
| FYROM | Former Yugoslavian Republic of Macedonia |
| GA | General Assembly |
| GC | Geneva Convention(s) of 1949 |
| HRC | Human Rights Committee |
| IACHR | Inter-American Commission of Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| ICTR | International Criminal Tribunal for Rwanda |
| IHFFC | International Humanitarian Fact-finding Commission |
| IHL | International Humanitarian Law |
| IHRL | International Human Rights Law |
| ILC | International Law Commission |

| | |
|--------|---|
| JNA | Yugoslav People's Army |
| KLA | Kosovo Liberation Army |
| MLC | Movement for the Liberation of the Congo |
| NATO | North Atlantic Treaty Organization |
| NLA | Albanian National Liberation Army |
| OUP | Oxford University Press |
| PCA | Permanent Court of Arbitration |
| PCIJ | Permanent Court of International Justice |
| POW | Prisoner of war |
| R2P | Responsibility to Protect |
| RPF | Rwanda Patriotic Front |
| RUF | Revolutionary United Front |
| SADF | South African Defence Force |
| SC | Security Council |
| SCSL | Special Court for Sierra Leone |
| SLTRC | Sierra Leonean Truth and Reconciliation Commission |
| SFRY | Socialist Federal Republic of Yugoslavia |
| UN | United Nations |
| UNMIK | UN Interim Administration in Kosovo |
| UNTAET | United Nations Transitional Authority in East Timor |
| UPC | <i>Union des patriotes congolais</i> |
| VRS | Bosnian Serb Army |

INTRODUCTION

Marco ODELLO and Francesco SEATZU

There is no doubt that armed forces play a central role in international legal debates, either in the form of collective institutions (State and non-State, regular and irregular armed forces) or in their specific components, with particular attention to the role of individuals who are part of armed forces. However, the increasing interest of the international legal community for the armed forces and their personnel still raises questions concerning the applicable law to their operations and activities, which are the subject of a continuing debate amongst legal scholars. In the last decade these debates have focused on different issues including, most recently, the impact of human rights on armed forces. Nevertheless since yet these debates have only marginally touched the relationship between armed forces and international tribunals, courts and non-judicial bodies. And, surprisingly, this is, even though there is a growing number and jurisprudence of international jurisdictions, especially in the framework of international criminal law, which have addressed the activities of military personnel engaged in different scenarios, and the forms of violation of different rules of international law.¹ It is also important to remember that State organisations and institutions, such as the national armed forces, are official State organs, therefore, general international law, and State obligations would apply to them. In this context, the role of human rights obligations, which are defined at international level, may have some specific consequences in the organisation and functioning of State armed forces.

The central issue which is considered in this volume pertains to the approaches that international jurisdictions such as the International Ad Hoc Criminal Tribunals, Special Courts, and Truth and Reconciliation Commissions, as well as Human Rights Courts and the International Court of Justice have taken in dealing with the conduct of military operations by armed forces and their personnel through the lenses of different rules of international law.

¹ Accordingly, see G. Bartolini, *Armed Forces and the International Court of Justice: The Relevance of International Humanitarian Law and Human Rights Law to the Conduct of Military Operations* in this volume, who also stresses that the proliferation of international tribunals and other bodies, as commissions of inquiry, increased the chances for analysis on the relationship between international human rights and international humanitarian law.

Since a variety of international legal conditions are relevant to the evaluation of the relationship between armed forces and international jurisdictions, it is appropriate that the contributors come from a variety of international legal backgrounds, including international human rights, criminal and humanitarian law. The international human rights and criminal law scholars are notably sophisticated about politics as well as about moral philosophy, and by no means restrict themselves to explicating the law.

The editors have sought to make this work an integrated volume rather than merely a set of essays. In achieving this aim, they have circulated drafts of relevant papers to contributors when appropriate, during the process of revision, in order to facilitate cross-references and discussions of disputed points.

The volume is divided into seven chapters plus a short conclusion, that focus on the pertinent case-law developed by a single court or sometimes by homogeneous international jurisdictions. However, we are aware that this is not the only possible option, as other ways of organising the volume would have been equally feasible.

Chapter 1, by Peter Rowe, a world-renowned expert on military law who is also the author of *The Impact of Human Rights Law on Armed Forces*, offers a general survey of the multifaceted debate on the role of armed forces both in the national and international legal orders. The starting point of his work in the volume is the statement that: “the armed forces are unlike any other organs of a State since their role within a State goes to the very heart of the obligations of the government, namely, to defend the State itself”. Starting from this right premise, Rowe critically explores the relationship between armed forces and international jurisdictions, distinguishing two broad situations – namely the international obligations which are placed on the State, acting through its armed forces, to protect or prevent harm to others; and the obligations imposed on the State in relation to members of the armed forces themselves. His discussion focuses, in turn, on the liability of individual members of the armed forces and the liability of the State itself. Rowe goes on to relate these issues to current debates on command responsibility. He concludes the chapter by observing that: “those States which, for one reason or another, do not find their armed forces or its individual members subject to international jurisdictions lose the opportunity for constructive criticism of the operation of their armed forces or of the manner in which its individual members are treated”

Marco Odello, in Chapter 2, also discusses the legal regimes that may apply to armed forces in general international law, focusing principally on the relationship between international humanitarian and international human rights law. He neatly distinguishes the trend in favour of an attention to human rights breaches by some international jurisdictions, particularly in the context of military activities and operations which may not be very clearly defined in international law, in particular when referring only to the use of international

humanitarian law in the context of several international jurisdictions. Odello's emphasis on the legal debate related to legal rules applicable to armed forces complements Rowe's examination in general terms of the relationship between armed forces and international jurisdictions, and deepens the discussion, began by Rowe, on the international jurisdictions' efforts to ensure that armed forces act within the legal framework of international law.

In Chapter 3, the first of the two chapters in the volume that deal with the treatment of armed forces in the jurisprudence of the International Court of Justice (ICJ), Giulio Bartolini focuses on the relevance of international humanitarian law and human rights law to the conduct of military operations in the case-law of the ICJ, building on some of the themes that shall be further developed in Francesco Seatzu's chapter. Bartolini agrees that human rights treaties should apply in cases of armed conflicts, but he also argues (as mentioned in the chapter by Marco Odello) that some important issues such as the extraterritorial application of human rights treaties and the relationship between norms of international humanitarian law and human rights law remain to be clarified in order to determine the effective applicability of such rules in different circumstances.

Constantine Antonopoulos, in Chapter 4, provides the most sustained discussion in the book of the regular armed forces in the contexts of passage through the territory of another State without its consent, UN peacekeeping operations and the use of force, especially in the context of the right to resort to force ('jus ad bellum') and of passage of armed forces through foreign territory in time of peace. She discusses not only the pronouncements of the ICJ on issues of the use of force by States and, in particular, the justiciability of disputes involving the use of force, the nature and extent of the prohibition of the use of force, the concept of threat to use force, the support to armed bands as a violation of the prohibition of the use of force, etc. but also the opinion of this Court on the matter of the establishment and financing of peacekeeping operations.

In the subsequent chapter, Andrea Carcano makes a point also developed by Giulio Bartolini and Marco Odello that 'international courts and tribunals (including hybrid tribunals) participate – to a wider or lesser extent – in a general process of enforcement, clarification, and development of norms and general principles of international humanitarian law'. Good evidence is found in supporting the idea that international courts and tribunals are particularly useful in filling the gaps that arise in the daily application of general principles and provisions of international humanitarian law to the specific circumstances of each case.

Chapter 6, by Francesco Seatzu, turns to explicitly human rights issues, critically assessing the potential application of the European Convention on Human Rights (ECHR) and Inter-American Convention on Human Rights (ACHR) to armed forces personnel in the light of the case-law of the European

Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (ACtHR). A special attention is given to the standards of protection expected by military bodies and government authorities with respect to armed forces who are under their control and direction. Moreover, whether restrictions to some fundamental rights and freedoms of this heterogeneous category of subjects which includes many sub-categories, e.g., conscripted service personnel, volunteer service personnel, members of the different branches of the armed forces (navy, air force, army, military police, and special units), as well as the various ranks from private to general are legitimate under the normative frameworks of the ECHR and ACHR is also discussed in a comparative manner.

In chapter 8, Alison Bisset, who is also the author of *Truth Commissions and Criminal Courts*, focuses on the complex relationship between truth commissions, armed forces and breaches of international legal obligations. Of particular interest, in this context, is the analysis of the difficulties posed by the contemporaneous pursuit of criminal prosecution and the potential for armed forces' participation in transitional contexts. Hence, Bisset persuasively argues for more vigorous involvement of armed forces personnel in national truth proceedings that is currently threatened by the pursuit of criminal trials. The rationale behind this assertion is clear and straightforward. It is based on the role of the armed forces in human rights violations which has historically formed a considerable component of truth commissions' investigations and, subsequently, of their findings.

One strand of thinking in this volume could be described as that of the contribution of the international tribunals, courts and non-judicial bodies to the strengthening of the status of armed forces in international human rights, criminal and humanitarian law. It emphasizes the contribution to the clarification and development of international legal rules made by those jurisdictions through the reiteration of the same principle in relation to particular issues.² This line of argument runs from Rowe in chapter 1 to Odello, Seatzu and Bisset in chapters 2, 6 and 7.

It is also relevant to underline that international jurisdictions should interact with national military jurisdictions establishing a more efficient co-operation among them. This requires, in particular, that domestic courts and tribunals be well attuned to the dangers of lack of cooperation between them and international jurisdictions to avoid the possible dangers of abuse.³

² See Andrea Carcano, chapter 5 in this book.

³ See also, on this topic Michael R. Gibson, 'International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity' (2008) 4(1) *Journal of International Law and International Relations*, 2 ff. focussing on the debate regarding the struggle against military jurisdictions in which several states are currently engaged.

However, these issues are beyond the scope and limits of the present work which focuses mainly on the law applicable to armed forces within the framework of international legal rules.

As editors of this book we have tried to contribute to the debate and clarification of several interrelated issues that may affect the application of international law to armed forces. We hope that the results will live up to the expectations of our many well-wishers, and will be a step in the directions of better understanding the complex relationships between armed forces and international jurisdictions, judicial courts and quasi-judicial bodies.

We also thank individual authors who have been eager to contribute to this effort and for their patience in dealing with our joint work. The debate on the different roles that armed forces may have both at national and international level, which is not always appreciated in the right way due to abuses that sometimes occur in the context of military structures and in their daily activities, should not forget that the rules of international law, in particular human rights, humanitarian law, and both national and international criminal law should be properly understood and applied to all bodies of states, including the armed forces and their individual components. It is up to individual governments to make sure that these rules are properly disseminated and applied by their armed forces, and that individuals are aware of the relevant rules that may apply to them in different circumstances. It is also important that members of armed forces, either regular or irregular, are aware of those rules, particularly when they involve possible breaches of national and international law, as they may have clear consequences on them and on the people affected by the activities in the field.

We have tried to state the law at May 2013. As usual, any errors contained in this work are the authors' responsibility. We would be grateful for any comments and, in particular, any references to cases and reports that have been overlooked.

