

# Contents

<i>Foreword</i>	<i>page</i> xvi
<i>Preface</i>	xx
<i>Table of cases</i>	xxiii
<i>List of abbreviations</i>	xli

## Part I Background and context

1	<b>Introduction and overview</b>	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

Judicial activism vs. judicial self-restraint in human rights bodies	25
The interpretation of UN Security Council resolutions	27
The interpretation of other instruments	32
The relevance of international customary law	34
Outline of the book	36
<b>2 The context</b>	<b>42</b>
The emerging relevance of human rights law in 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

## Part II Two fundamental arguments for non-applicability of human rights treaties

3	The argument of non-applicability <i>ratione personae</i>	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 <i>Behrami/Saramati</i> case	129

Introduction to the case	129
The content of the ‘ultimate authority and control’ test	132
Developments ‘post-Behrani/Saramati’	136
The European Court of Human Rights: cases applying the ‘ultimate authority and control’ test	136
Domestic case law: the <i>Al-Jedda</i> case	138
The European Court of Human Rights tries again: the <i>Al-Jedda</i> case	141
Domestic case law: the Dutch cases concerning Srebrenica	142
Domestic case law: the Belgian <i>Mukeshimana-Ngulinzira</i> 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 <i>Behrani/Saramati</i> 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
<b>4 The argument of non-applicability <i>ratione loci</i></b>	<b>165</b>
Territory and jurisdiction	165
The extraterritorial application of the ECHR: general starting points	167
The settled issue: the ECHR can apply extraterritorially	167
‘Jurisdiction’ defined as the exercise of authority 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

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
<i>The Manoilescu/Dobrescu and Treska cases: the birth of a ‘due diligence’ doctrine, or a slip of the tongue?</i>	220
The discussion of an ‘ <i>espace juridique</i> ’ limitation	224
A sidestep: the universality of human rights	224
The possible relevance of the ‘ <i>espace juridique</i> ’	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 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 <i>lex specialis</i> 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
<b>6 Derogations</b>	298
The legal basis for derogations	298
Derogation from human rights treaties in peace operations	299

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 <i>affected parts</i> 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
<b>7 Norm conflicts between UN Security Council mandates and human rights treaties</b>	<b>314</b>
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 <i>Behrami</i> and <i>Saramati</i> cases	333
The UN Human Rights Committee: the <i>Sayadi</i> and <i>Vinck</i> case	335
The European Court of Justice and the Court of First Instance: the <i>Kadi</i> and <i>Al-Barakaat</i> case	338
The UK House of Lords: the <i>Al-Jedda</i> case	344
The European Court on Human Rights tries again: the <i>Al-Jedda</i> case	346

	Norm conflicts between authorisations under the UN Charter and rights under the European Convention on Human Rights: the (uncertain) <i>lex lata</i> solution	347
	Attempts to reconcile the cases	347
	An explanation of the view of the European Court of Human Rights	349
	Norm conflict in practice in peace operations: the interpretation of resolutions authorising ‘all 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
	<b>Part IV Application <i>in concretu</i>: the right to life, to freedom from torture, and to liberty and security</b>	
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

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 <i>non-refoulement</i>	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

## 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