Conclusions of the San Remo Round Table

by Dr. Philip Spoerri

Mr. President,
Your Excellencies,
Ladies and Gentlemen,

It is an honor for me, this year again, to fulfill the difficult task that consists in proposing to this distinguished audience some conclusions of this 31st Round Table. Indeed, the difficulty is all the more enhanced by the variety of subject matters addressed during the Round Table, all raising very interesting legal issues and triggering fruitful discussions. Let me just submit to you the salient points discussed during these three days.

- Thursday Session 1: Peace operations, an operational and a legal concept

In the first session, speakers have described the evolution of the operational and legal framework under which peace operations have developed recently. They have notably highlighted the variety (DPKO's operations over the past 10 years have increased in a staggering manner to 19 operations with 110'00 people now serving on missions), but also the increased complexity of the tasks now assigned to peace operations. We have also been rendered aware that the classical dichotomy between operations conducted under Chapter VI of the Charter and those implemented under Chapter VII tend to progressively disappear – or have certainly become more and more blurred - since many peace operations actually contain Chapter VI and Chapter VII UN Charter components in their mandates. These operations have even been defined as an *"objet juridique non identifié"* whose legal framework of reference may also include IHL. One speaker called it a still lacking legal framework for robust peace operations.

- Thursday Session 2: The applicability of IHL to peace operations: a settled issue?

In this session, speakers have clearly indicated that challenging the applicability of IHL to peace operations – whether conducted under UN command and control or not - is now an issue of the past. As of today, only a minority still seems to argue that troops engaged in a peace operations can not become party to an armed conflict and would thus not bound by IHL.

There appeared here to be wide agreement that peace forces, including UN forces, may indeed become party and thus bound by IHL in an armed conflict situation when the criteria set by IHL are met. In fact, it was compellingly argued that full respect for IHL by peace forces can be an important element in reinforcing the legitimacy of their mission.

One shall note that speakers have almost unanimously underscored the necessity to assess IHL applicability exclusively on the basis of the facts of ground – hence irrespective of the mandate assigned to peace forces.

On the question of IHL's material field of application, discussions have highlighted two different doctrines:

One consists in the systematic application of IHL governing international armed conflict as soon as an international organisation becomes party to the conflict. The other looks into each bilateral belligerent relationship. Under this doctrine, if the peace forces are fighting a State's forces, the rules governing international armed conflict will apply. If they are opposed to a non-state armed group, the rules of non-international armed conflict will be applicable. In this

respect, while it seems undisputed that the law of international armed conflict applies if peace forces fight against a State's armed forces, controversy however persists as to which part of IHL is applicable when multinational forces are engaged against non state actors. This issue raises important legal issues, notably in relation with the status of captured fighters.

The question of the status of peace forces not involved in an armed conflict also appeared to be controversial – yet it seems more in legal theory than in *de lege lata*. Those who were in the plenary will easily recall Professor Sassoli's example: his son serving as a military border guard in peace time on the Swiss border (…). The issue at hand concerns the reluctance –or call it counter intuitive - to grant civilian status to "staff in military uniform" even if they are peacekeeping forces. However, and this is why the issue must be described a theoretical, the 1998 Rome State, but the ICRC customary law study has confirmed the civilian status of peacekeepers.

- Friday Introductory session: Interaction of the legal regimes in peace operations:

In the framework of this session, we have been reminded that international jurisprudence has recognized the parallel application of human rights law and IHL in situation of armed conflict, including occupation. However, it seems that the content of human rights applicable in times of armed conflict still needs to be fleshed out.

Something that was very much highlighted in the presentations related to the fact that being deployed in a situation of armed conflict does of course not necessarily mean that peace forces are a party to that conflict. If they are not party to the conflict, they will not be bound by IHL norms but by others bodies of law, in particular human rights law.

In this respect, a crucial consequence of the evolution of peace operations has been the increasing breadth of their impact - positive or negative - on the enjoyment of human rights in territories in which they operate. This has of course raised numerous questions on the applicability of human rights to peace operations. As mentioned during the discussions, peace operations should not create circumstances beyond the reach of human rights obligations and this despite the debates surrounding their extraterritorial scope of application.

In this session, also the issue of the legal protections afforded to peace operations' personnel was addressed. We were explained that protection of peace forces' personnel was ensured by a combination of legal instruments including SOFAs, IHL, the 1994 UN Convention (so called Safety Convention) as well as the host state's domestic law. The efficiency of the protection sought after relies not on one instrument alone, but on the interplay between these instruments, in particular between IHL and the 1994 UN Convention. In this respect, emphasis was put upon article 2 (2) of the 1994 Convention, interpreted as a "switch clause". However, it should be pointed out that this clause does not make the two legal regimes mutually exclusive in situation of non-international armed conflict, consequently rendering unlawful under the 1994 Convention's regime actions otherwise not prohibited under IHL.

- Friday Session 1: The law of occupation: a corpus juris relevant for peace operations

The question of occupation law's applicability still raises points of contention but it seems that some of the arguments aimed at denying occupation law applicability may be overcome in particular by the fact that they find their basis in *jus ad bellum* and not in *jus in bello*.

One speaker coined the topic very well under the title question "tool or tabu?"

The presentations showed that that occupation law could be applicable to peace operation, including those under UN command and control – hence it should not be a tabu. However, in

the presentations we were urged not to overemphasize the focus on occupation law insofar as this body of law will not apply in most of the peace operations. One speaker indeed went as far as to say that these cases may be imaginable, but very unlikely to occur.

However, the substantive relevance of occupation law was then presented in detail. In this respect, it has shown that occupation law may be a useful tool for peace forces, in particular as it brings opportunities such as the possibility to take security measures. For instance, occupation law could prove useful in the field of detention, authorizing internment where as detention in peace operations is often controversial. In addition, it has been underlined that peace operations necessitate a clear legal framework and accountability. In this respect, it has been underscored that occupation law may contribute to the first but not to the second.

- Friday Session 2: IHL and the administration of territories by the UN

Generally, occupation by states and administration by international organizations have been regarded as distinct legal and political phenomena. However, this distinction did not appear to uphold and emphasis was made on their common traits and challenges. Despite the similarities, IHL and occupation law were identified only as default regimes, as providing "good ideas", *de facto* solutions as opposed to a *de jure* application. It was once again stressed that their relevance should not be exaggerated and that human rights law remains the main legal framework of reference for internationally administered territories.

On this issue, the point that was made – and this also in comparison to the former trusteeship regimes - that international administrations should not be above the law and that a system of accountability is necessary with in order to ensure the preservation of the rights of individuals.

- Friday : Working groups (and here I will be very brief)

WG 1: Peace operations and the protection of civilians:
In this WG, speakers analyzed the concept of R2P and examined its relevance in the context of peace operations. If peace operations may be a course of action for the enforcement of R2P, it has been stressed that the use of force should be made at last resort, notably once other means have been exhausted. In that perspective, it has been argued that when R2P involves the use of force, this concept could impact the application of certain IHL rules, in particular those governing the conduct of hostilities (for instance the notion of military objective or the principle of proportionality) or those related to relief operations. Potential advantages but also risks of such impact were discussed.

WG 2: Peace operations and detention:
Today, peace forces are increasingly involved in the detention of individuals. Discussions led to a general agreement that detention in peace operations must not be unlawful and arbitrary. Detention in peace operations raises a number of legal issues such as their legal basis, the procedural safeguards afforded to detainees or the legal regime of transfers of detainees. Discussions in this WG also highlighted that the challenges raised by detention in peace operations should be addressed without undermining existing law. Participants finally showed great interest in the Copenhagen process aimed at defining a common platform to deal with the challenges raised by detention in peace operations.

WG3: Peace operations and the repression of IHL violations:
In this WG, speakers explained the difficulties encountered by international tribunals in gaining the active support of peace forces to arrest indicted persons. The importance of

having an explicit mandate of the Security Council assigned to peace forces in this respect was particularly underlined since national contingents would otherwise see themselves as not being obligated to carry out arrest warrants delivered by international tribunals. In order to overcome the absence of SC resolution in this area, ad hoc solution between the ICC, troops contributing states and the state hosting peace operation have been devised. Participants also underlined the complementary role between international tribunals and peace operations in bringing stabilization and ultimately peace in the region.

WG 4: Responsibility and compensations for damages caused during peace operations:
This WG permitted to better understand the complexity of peace operations' structures. In this respect, distinction was made between different forms of command including operational, organic and political command. The legal consequences of such structure on the question of international responsibility of troops contributing states, international organizations using those troops or responsibility of both were also discussed, notably in light of the Behrami and Saramati cases rendered by the European Court on HR in May 2007. Discussions also showed how important it is that violations of IHL committed during peace operations be effectively repressed, in particular at the level of the troops contributing countries.

- Friday session 3: relations between humanitarian organizations and peace forces

In this WG, we did learn how much the environment has changed for humanitarian organizations in terms of security and diversity of the actors involved. In the presentations and discussions, emphasis was put on the impact of the integrated approached on the neutrality and consequently on the security of humanitarian actors.

Strong accent was made in clearly distinguishing between the different types of humanitarian actors on the ground: notably the uniformed actors, the UN, the Red Cross Movement and the multiform NGO world.

A strong reminder was made by two speakers that in situation of armed conflicts the ICRC and Red Cross/Red Crescent National Societies enjoy a special role and status under IHL, where others NGOs benefit from lesser facilities. In this respect, "privileged" humanitarian actors such as the ICRC and NS were encouraged to be more proactive in promoting their special status under IHL. The example of the operational surface and scope of activities of the Somali Red Crescent showed why in most conflict situations the National Societies and of course the ICRC continue to play a central role in the protection and assistance of the populations affected by such situations.

Besides the changing landscape for NGOs, discussions showed the past decade was also characterized by the challenges posed by the evolution of the medias and others means of information such as internet, blogs, in particular upon the perception and ultimately the capabilities of humanitarian agencies to carry out their activities.