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STUDY

THE STATUS OF THE PEACEKEEPING TROOPS IN THE INTERNATIONAL LAW: THE CASE OF THE REPUBLIC OF MOLDOVA.

National Endowment for Democracy
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Study: The status of the peacekeeping troops in the international law: the case of the Republic of Moldova. The role and mission of the Russian peacekeeping troops in the Republic of Moldova – scientific and practical approaches regarding the jurisdictions and responsibility of the peacekeeping forces, in the context of the Ceasefire Agreement of 21.07.1992 between the Republic of Moldova and the Russian Federation.

The Application of Criminal Legislation regarding the Russian soldiers who commit crimes and contraventions on the territory of the Republic of Moldova.

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INTRODUCTION

The process of disintegration of the USSR, which lasted for several years, was accompanied by a series of bloody internal armed conflicts with long-lasting effects - either artificially supported and promoted by the Soviet central authorities to avoid a civilized "divorce," given an enormous state that had been maintained mainly through coercion and false ideology in relation to human values, or based on ethnic hatred that smouldered for decades and that has surfaced like an uncontrollable volcano. Unfortunately, Moldova has not escaped this miserable fate, which has prevented and continues to prevent the Moldovan society from developing and from implementing successfully the European good practices and values.

The outbreak of the "Transnistrian" conflict had tragic effects for the entire Moldovan society because human lives were lost. Unlike other conflicts in the former USSR - Georgia (Abkhazia and South Ossetia), Armenia and Azerbaijan (Nagorno-Karabakh) or Tajikistan the "transnistrian" conflict is purely political and not ethnic, as some commentators try to present it, a fact confirmed by several national and international sources.

The objectives of the study in question are to assess from the point of view of international law what exactly took place in Moldova, how is the Transnistrian conflict characterized and to what extent the involvement of a third State (the Russian Federation) can be regarded as impartial. Equally, it is interesting to observe the opportunity of the Ceasefire Agreement of 21.07.1992 between Moldova and the Russian Federation, which assumed the position of a guarantor of security in the area, while the goals of this agreement were not met and were not wanted to be met and the situation in the area seems to be provocative every time when the Moldovan authorities are trying to promote an independent policy and the interests of their citizens.

Given the conflicts, mentioned earlier, that took place in the former USSR, we should also focus on the format of the peacekeeping forces. The end of the conflict in the Georgian region of South Ossetia was pursuant to the agreement signed on 24 June 1992 between the Russian Federation and Georgia on principles of conflict settlement. Under this agreement, in the region were deployed peacekeeping forces composed of three battalions - Russian, Georgian and Ossetian. We observe similarities with the Republic of Moldova case. The conflict in the Georgian region of Abkhazia largely ended upon the deployment of the Russian contingent of peacekeeping forces as Collective Peacekeeping Forces of the CIS, based on the Moscow agreement on ceasefire signed between Georgia and Abkhazia (as a belligerent party and a subject of international law) under the "aegis of Russia" in 1994. In addition, in August 1993 the United Nations Security Council resolution no. 858 (1993) decided to set up a UN mission to monitor the situation in Georgia, the objective of which was to monitor the previous ceasefire agreement of 27 July 1993. Equally, we draw attention to the fact that the OSCE has been actively involved in monitoring the regulatory process of the last conflict.

Both in case of Moldova and Georgia (South Ossetia) we observe the same trend. The Russian Federation unilaterally assumes the status of a peacekeeper in the absence of competences conferred by the UN, an organization that bears the main responsibility for maintaining the international peace and security. Moreover, in the Dniester conflict the Russian forces stationed in the Republic of Moldova as a result of the collapse of the USSR, had participated directly with the separatists, a fact confirmed by several sources, to which we will refer throughout the study. As confirmation of the above serve the signatory parties to the Ceasefire Agreement - Moldova and the Russian Federation. The third party, the so-called "Transnistria," appears later in the Joint Control Commission, a concept promoted by the Russian Federation, which from the beginning contradicts the intentions of the signatories of the agreement. And the role of a "peace-

keeper" that the Russian Federation had unilaterally assumed (even though Chisinau formally agreed, because it is unknown under what circumstances this occurred) contradicts the concept of peacekeeping forces developed within the UN, to which we will refer later.

Just one example - one of the objectives of the peacekeeping force is implementing the process of disarmament, demobilization and reintegration of former combatants, when the reality in the conflict zone is different - from the introduction of pseudo-customs and border guards, to systematic violations of human rights and fundamental freedoms.

As sources in the development of this study will serve domestic and foreign scientific papers, the practice of the Republic of Moldova, of the Russian Federation, and of other countries, but also the de facto administration of the "Transnistrian" region through statements and documents. In addition, the study will use such sources as the Report "Thawing a Frozen Conflict: Legal Aspects of the separatist crisis in Moldova", developed by the New York City Bar Association and the case examined by the European Court of Human Rights in 2004 Ilașcu and others v. Moldova and Russia.

The events of recent years have raised several questions - to what extent the presence of a military contingent is needed, and why it cannot be replaced by a police contingent of observers, to be mediated not by a State which demonstrated a lack of impartiality and an organization that lacks the necessary resources (we are not talking financial here), but by international bodies that have the corresponding capacity and are enjoying authority in this regard. We are talking about the UN and the European Union.

Another important topic addressed increasingly by the civil society is to what extent the Chisinau authorities can apply its jurisdiction in relation to individuals who commit serious human rights violations or criminal acts that fall under criminal law. We are trying to predict the events that would follow after a possible political settlement of the "Transnistrian" conflict - the implementation of transitional justice mechanisms and institutions, i.e. the reconciliation at the national level of the Moldovan society? Based on the practice gained by transitional justice, beginning with the 70s of the twentieth century till now, we recognize that Truth Commissions, Commissions of Inquiry, Reconciliation Committees and other could be formed. But what about those guilty of crimes that international criminal law considers "war crimes" and "crimes against humanity"? Practice shows that for such "facts" people cannot be waved off responsibility. This is equally true for people who committed such "facts" on both sides involved in the conflict, including Russian citizens in the structures subordinated to the Russian Federation. Here is even a simpler question - to which extent representatives of the armed contingent managed by the Russian Federation or the de-facto administration can be prosecuted for crimes committed while exercising their functions?

With the accession of Romania and Bulgaria to the European Union Moldova's western border became the border with the European Union. This in turn led and inevitably is leading to the "internationalization" of the "Transnistrian" issue. The EU involvement as a direct actor in the negotiation process is a unique opportunity to resolve this "frozen" conflict, the delaying of which is one of the de-facto administration of "Transnistria" and obviously their supporters. We will try to prove in this study that replacing the current format with one directly managed by the EU or the UN, is the solution that needs to be stressed more and more by the Moldovan authorities. The implementation of a police contingent of impartial observers will inevitably lead to the implementation of long term projects, the democratization of the region but also of the Republic of Moldova proper, to minimize the effects of a zone which in the West is accepted as a "grey area".

On the other hand, Croatia's accession to the European Union, a country that went through a bloody conflict and which was able to find the energy to return to democracy and general human values, to restore its society, including through the mechanisms and institutions of transitional justice, allows us to regard with hope the future of Moldova.

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1. THE TYPES OF PEACEKEEPING MISSIONS AND THEIR LEGAL BASIS

The notion of peacekeeping operations (PKO) means operations of military nature, created by the competent body of the UN, as a rule the Security Council based on Chapter VI and / or VII of the UN Charter, under a single command and operational management of the Organization, in the person of the Security Council or the Office of the Secretary General. This category excludes the cases of application of force through a decision of the UN Security Council as a sanction against an aggressor state, where soldiers of the armed forces, acting on behalf of the UN Security Council, acquire the status of combatants.

The Republic of Moldova law defines international peacekeeping operations as "collective security actions, authorized by international organizations, made with the consent of the belligerent parties and meant to ensure respect for a negotiated truce and to help create the prerequisites of supporting diplomatic efforts to establish a lasting peace in the conflict zone and prevent any further international or domestic conflicts as well as ensuring the security of citizens, respect for their rights and assistance to alleviate the consequences of armed conflicts."[1]

The notion of PKO is not expressly stipulated in the UN Charter, which raises the issue of legal grounding and of the determination of its general characteristics. PKO originality lies in the fact that the used military means are applied in a neutral manner. This also served as a basis for the concept created based on a hypothetical "Chapter VI and a half" of the UN Charter, placing them between non-military means of Chapter VI and the coercive actions of Chapter VII, in which the force is represented in the form of sanctions imposed on a state whose behaviour is endangering international peace and security.

In reality, the provisions of Article 40 of the UN Charter on the "interim measures" are situated the closest to the general philosophy of peacekeeping operations.

In general, the UN requires the presence of two preconditions for the deployment of a peacekeeping operation: consent of the parties in conflict and effective compliance with the ceasefire. In reality, only the first condition finds its origins in international law. The principle of sovereign equality of states enforces the respect for their territorial integrity, and protects the states from any irregular intrusion of foreigners into their territories. The principle of non-intervention refers to the tasks arising from the competences of a state in relation with other entities.

Finally, the principle of non-application of force prohibits any unwanted foreign military presence from another state, considering it as a military action that intrudes upon the internal affairs of the given state. Only a decision of the Security Council under Chapter VII of the UN Charter can legislate such action. However, the peacekeeping operations fail to relate strictly to Chapter VII of the UN Charter. Given their non-imperative nature, the peacekeeping operations should automatically secure a prior consent of the State in which these will take place.[2]

The concept of peacekeeping operations arose when the Suez crisis of 1956 broke out. The Security Council was paralyzed by the double veto of France and Great Britain. To justify the new formula of operation, not stipulated in the Chapters VI and VII, the UN Secretary General Dag Hammarskjöld referred to the chapter "VI bis" or "VI and a half". Applying such an operation involves securing the consent of the belligerents. References to the title of Chapter VII allow,

1 Law Nr.1156 of 26.06.2000 regarding the participation of Moldova in international operations of peacekeeping (art.1). Published: 30.11.2000 Official gazette Nr.149.

2 Paye O. Les opérations de mention de la paix et les nouveaux désordres locaux, p. 98, în « A la recherche du nouvel ordre mondial – II. L'ONU: Mutations et défis. Editions complexe, 1993 ».

according to some authors, the forcing of coercive measures upon the parties without their agreement.[3]

The peacekeeping operations allow the establishment of various mechanisms. In this sense Professor P.M. Dupuy differentiates between peacekeeping operations "triggered for the purposes of application of mere recommendations, with the consent of the States interested in a ceasefire" and "national military contingents, having at their origin an agreement negotiated on behalf of the UN by Secretary General with the states to which the military forces belong."[4] As examples we can bring the case of Cambodia in 1991 or Yugoslavia in 1992. Since 1990, when political realities allowed normal operations, the Security Council increased the number of peacekeeping operations, which led to different interpretations of this notion.

The peacekeeping operations of the United Nations experienced an unprecedented development once the "cold war" ended, especially since 1992. In 1992 three operations were launched in Cambodia, the former Yugoslavia and Somalia, and in 1993 another one in Mozambique. During 1992 the number of UN personnel engaged in land operations exceeded 50,000 people, with a total budget of $2.5 billion from the end of 1992.

The United Nations peacekeeping forces are neither armed forces of the Security Council that it may form on the basis of Articles 43 and 47 of the UN Charter nor are those provided by Member States upon an invitation (for example Korea, 1950) or an authorization (in the cases of the Gulf in 1990 and Somalia in 1992) on behalf of the Security Council, the last two being able to use coercive measures to restore international peace and security in the named region.

The peacekeeping forces differ from those cited above, in particular through their mandate which has as a main objective the maintenance of peace.[5] In this area we can distinguish between two types of operations managed by the UN. One involves sending a mission of observers. For example, the United Nations Truce Supervision Organization (UNTSO) in 1948 and the United Nations Military Observer Group in India and Pakistan in 1949 (UNMOGIP). In these cases the mission has only the function of observation, without excluding any possibility to play an active role. In addition, they are not armed. They are not concerned with issues of applicability of international humanitarian law.

Another type of operations is that in which UN forces have a specific mandate of peacekeeping, respecting the truce or ceasefire agreements, which is a prerequisite for the deployment of such forces. Therefore, a peacekeeping operation is an interim agreement, aimed at maintaining peace and security required conditions, including preventing a return to hostilities, to allow the negotiations that would lead to a dispute settlement to take place. The idea consists of the fact that the physical presence of a multinational force, neutral and impartial, would play a dissuasive role with the combatants.

The contingents that are part of peacekeeping forces are voluntarily granted by the States, upon the UN Secretary General's address. In addition, the government of the territory in which peacekeeping forces will be deployed, and the other party or parties directly involved in the conflict, must give their consent.

The peacekeeping forces are placed under UN command, entrusted to the Secretary General, but under the authority of the Security Council, which is informing him on the deployment of

3 Petit Y. Droit international du maintien de la paix. L.G.D.J. Paris. 2000, p.7.
4 Dupuy P.M. Droit international public. 4-em ed., Dalloz. Paris. 1998, p.504.
5 The legal basis for peacekeeping forces has been disputed, given that they are not mentioned per se in the UN Charter, but in reality, their legality was never contested if they were formed by the UN Security Council.

operations. The field command is exercised by a Force Commander appointed by the Secretary General with the consent of the Security Council.

Characterizing the applicable legal basis of peacekeeping forces, we must explicitly make the distinction between jus ad bellum (the right to use force) and jus in bello (the law applicable in times of armed conflict). The latter evolved over centuries - from the law of war to international humanitarian law, providing the need to respect "the laws and customs of war", which today took the name of "war crimes". However, in the peacekeeping operations what induces directly the applicability of the international humanitarian law is the fact that these forces are armed. It is useful in this case to refer to the following paragraph in the report of the Secretary-General submitted to the Security Council with the goal of establishing on 19 March 1978 the United Nations Interim Force in Lebanon (UNIFIL):

"The Force will hold defensive weapons. It will not need to use the force, except in cases of self-defence. The legitimate self-defence will provide for resistance to any attempt to prevent the force to fulfil the functions of the mandate of the Security Council. The Force assumes that the parties to the conflict shall take all necessary measures to ensure the implementation of the Security Council decisions "(our translation).[6]

The theoretical and practical aspects related to the mission of peacekeeping forces within the limits of the abovementioned principle without violating the international humanitarian law requires a separate study, from the perspective of mandates of these forces in the cases of former Yugoslavia and Cambodia. Suffice it to draw attention to the real risk for peacekeeping forces to be involved in a conflict, as it happened during the Congo operation in July 1960.[7] Therefore, the issue of applicability of international humanitarian law covers two aspects: the respect for international humanitarian law by the peacekeeping forces and the role they can play in contributing to the respect of international humanitarian law. The aspects in question address in their turn the issue of the status of the participants in the peacekeeping operations within the named forces.

It is important to broadly reflect on the essential points of the mandate of the peacekeeping forces (FMP) in the former Yugoslavia (UNPROFOR) and Cambodia (UNTAC), especially on the applicability of the international humanitarian law.

In both cases, the PKF had military, administrative and police components. The task of the military component was to stabilize the situation in terms of security and a climate of confidence for the negotiation of a solution for the Yugoslav crisis and the conduct of elections in Cambodia. To this end, the PKF had to supervise the ceasefire, the withdrawal of all categories of foreign forces from Cambodia and from the demilitarized zones in Yugoslavia, including disarming combatants and protecting people living in the demilitarized zone against any armed attack through the establishment of checkpoints in strategic places. The members of the PKF wore light weapons that they could only use in self-defence, but were also supported by aviation, and by armoured vehicles for transporting troops.

We are facing a vast field of application of international humanitarian law, including applicable conduct during hostilities, especially the set of principles and rules of international humanitarian law in relation to the various categories of protected persons.

6 UN Document S/12611, p.2.

7 Bothe M. Le droit de la guerre et les Nations Unies. Etudes et travaux de l'Institut universitaire de hautes études internationales. No. 5. Genève. 1967, p.143.

Another element of the PKF, the civilian police, although unarmed, was responsible for the supervision of local police to ensure effective and impartial maintenance of public order and full respect for human rights and fundamental freedoms. To this end, the civilian police forces had to accompany members of the local police during patrols and had to have free and immediate access to any place, with the help and under the control of the local police.

Let us consider the following matter - in what manner the PKF could enforce the respect for the international humanitarian law by the armed forces of the parties to the conflict, police forces and population.

One way would be drafting reports on violations of the international humanitarian law in those areas where peacekeeping forces were deployed. Both mandates - the UNPROFOR and APRONUC foresaw that some of its components such as civilian police force in the former Yugoslavia and the one regarding the human rights in Cambodia, were entrusted to investigate cases of human rights violations and the military component - the cases of violation of demilitarized zones. It would need to pertain to the Secretary General to ensure that the PKF do the same in relation to violations of international humanitarian law, some of which belong equally to the human rights. These reports can be communicated to the interested parties and / or the Security Council to cease violations and to impose sanctions against those responsible. In this context, the interested States and the UN could promote the applicability of Article 89 of the Additional Protocol I (1977) to the Geneva Conventions, which describe the role of the International Commission in establishing the facts.

Finally, PKF could equally have a preventive role, in particular by establishing control from the military or paramilitary forces, operating in sectors where the UN forces are deployed.

We can draw some general conclusions:

- The international humanitarian law is in fact applicable to the PKF;
- The UN recognized the applicability not only of the principles but also of the spirit of the rules of international humanitarian law;
- An undertaking by the UN aimed at consolidating the applicability of international humanitarian law by the peacekeeping forces is a great contribution to promoting the applicability and compliance with the international humanitarian law of the States providing contingents, by the states where the operations take place and all parties to the conflict. Such promotion of the international humanitarian law is indeed an objective of the international community, expressed in the UN General Assembly resolutions adopted starting with 1977 on the status of the Additional Protocols I and II to the Geneva Conventions of 1949.

Yet more remains to be done to strengthen the implementation of and compliance with the international humanitarian law by the PKF, especially at a formal level, but also at an operational level, including ongoing and future operations.

Belgian Professor Eride David argues that the international organization can be a full participant in an international armed conflict, as demonstrated both by the Convention on the safety of United Nations and associated personnel in 1994 and by the UN Secretary General's Bulletin of 06.08.1999 on the UN forces compliance with international humanitarian law.[8]

8 Давид Е. Принципы права вооруженных конфликтов: Курс лекций, прочитанных на юридическом факультете Открытого Брюссельского университета. Москва: МККК, 2011, стр.126-127.

Characterizing the bulletin of the Secretary General, Mr. E. David states that it is a synthesis of The Hague and Geneva law and a successful coding of the armed conflicts law applicable to the UN forces. The binding nature of the bulletin for the UN forces is dictated by the fact that the peacekeeping forces are operating under the direct command of the Secretary General (UN Charter, Article 97), who is empowered to establish administrative rules for any structure of the organization, a statute the UN forces benefit throughout the entire time for which the states transfer them to the UN.

Meanwhile, we must acknowledge that the UN is not the only international organization that can be drawn into an armed conflict and thus to be subject to its rules. Military unions and regional organizations alike can become participants in an armed conflict, and as a result to be put before the obligation to respect this law. For example, the foundations were laid in Europe for a European army starting with the advent of the Franco-German Brigade in 1989 and then the European Army Corps (Eurocorps) in 1992 consisting of Franco-German troops, who were later joined by Spain, Belgium, Luxembourg, and Poland.

We believe that in such conditions there are no arguments to make a distinction between the UN and other international organizations since the latter are also obliged to respect the armed conflict law.

2. THE OBJECTIVES AND TASKS OF PEACEKEEPING OPERATIONS AT THE BEGINNING OF THE 21ST CENTURY

The concept of peacekeeping forces has evolved and it has to be interpreted in accordance with the trends of international law, but it also needs to respect the essence of these trends at the time of establishment.

In 2002, was drafted the project *Challenges of Peace Operations: Into the 21st Century, Concluding Report Phase I,* Elanders Gotab, Stockholm, 2002, in which the authors came to the following conclusions:

- exercising the mandates issued by the Security Council, the UN started implementing some very complicated operations, often lacking the necessary resources, including personnel, technical and material;
- given its universal nature, the UN remains the only body in the world responsible for international peace and security, which offers it a unique legitimacy. However, on the one hand, the "coalition of the willing", which has the mandate from the Security Council, can be the perfect implementer of coercive actions, while on the other hand, in complex peace operations, only the UN can benefit from the wide range of possibilities that the international community possesses;
- the sanctions imposed under Chapter VII of the UN Charter to be effective must have clearly defined goals and clear conditions for their removal; the sanctions must be one of the political tools and by no means to replace politics;
- the conditions for successful conduct of PKO are to establish a large enough professional staff that could be assigned missions timely and in an organizational manner;
- an objective for PKO must be to develop global standards that are acceptable and achievable by Member States and international organizations. Clearly, an ideal place for the development of such rules is the United Nations and the procedure must take place through consultations with Member States, while the primary responsibility for preparing the UN peacekeepers assigned to members;
- Since its creation, the UN in the person of the Security Council, is the lead organization and de facto the only that develops the PKO as a mechanism of collective security.[9]

When classifying the PKO, we propose a classification of the functions of such operations:

- *military* – the monitoring of the process of ceasefire, demobilization of troops, identification and destruction of weapons, demining, reorganization and re-profiling of armed forces, the protection of the border, the examination of complaints regarding the presence of foreign armed troops, the ensuring of security during elections and help in rebuilding infrastructure;
- *police* – visits to police offices, the monitoring of the activity of police, the examination of complaints regarding breach of human rights on behalf of domestic police, preparation of new police formations, contribution towards arrest of criminals, and participating in ensuring electoral processes;
- *human rights* – monitoring of respect for human rights; organization of education programs and investigation of human rights breaches;
- *informational* – familiarization with issues of peaceful settlement of cases involving the UN and the possibilities in terms of the future of the country;
- *electoral* – the UN participation can vary from simple participation and verification of elections in a concrete country to organization of elections by UN;

9 Заемский В.Ф. ООН и миротворчество. Курс лекций. Москва: Международные отношения, 2008, стр.16-17.

- *re-establishment* – in many cases the UN contributed towards re-establishment of statehoods through short and long term development processes;
- *repatriation* – the UN organized the coming back and settlement of hundreds of thousands of refugees;
- *administration* – monitoring of actions undertaken by the authorities of the states with PKO. For example, the provisional body in Cambodia, had the mandate to carry out the control of actions in the area of foreign policy, national defence, public security, finance and public information for the purposes of education and maintenance of a neutral political atmosphere prior to elections.[10]

In the context of the above mentioned, we will propose the following six basic conditions imposed to the PKO:

1. the agreement of belligerent parties regarding the intermediary activity of the UN;
2. a unified position regarding the peacekeeping measures within the Security Council, especially amongst the permanent members;
3. the direct and real mandate for peacekeeping;
4. the refusal to apply force on behalf of UN troops, excepting in exceptional situations for self-defence;
5. the capacity of members states of the UN to deliver armed and well prepared contingents;
6. the capacity of the UN to offer adequate funding for the peacekeeping actions.

It has been discussed the importance of interpreting the concept of peacekeeping forces from the perspective of the evolution of the international law, while preserving the essence and spirit of the concept at the time when the arguments are made.

In general terms the peacekeeping activities include "preventive diplomacy", „peace-making"; „peacekeeping"; "peace enforcement"; and "peacebuilding". At the same time, these terms need to be distinguished, given that these terms are not a set of technical terms applicable successively, they can become necessary at any stage of the regulation process, as for example, the elements of „peace-making" and „peacebuilding" are necessary equally at the stage of prevention or at the stage of efforts for the settlement of the conflict.

Lately, the discussions are focused around the name of the term used for the peace-making activity. Objectively, such need is motivated by the fact that the term "operations to maintain peace," which initially corresponded to the nature of the goals of the first generation of FKO – the monitoring of the ceasefire agreements and the separation of conflict parties – already fails to cover the set of new objectives.

As an argument can serve the diversity of the components of field operations. For example the Group of UN military observers in India and Pakistan consists of military observers, while the UNFICYP includes military and police personnel, while the UNMIK and UNMIBH, on the contrary, lack any large military contingents and were mostly made up of civil personnel and civil police. We draw the attention to the fact that in some operations the police contingents represent the main component of the mission.

Despite the diversity of the component, all the missions have the mandate of the Security Council of UN, which recommends the implementation of a series of tasks within the post-conflict regulation, in this sense being larger than classical FKO.

10 Idem, p.19-20.

As a results of these changes a new term was proposed – “operations for peace” which for the first time was argued in the report of the UN High Group for operations for peace (Brahmi report) and is currently used in the documents of the FKO department.

The refusal to use the modern term by the developing states, can be explained through the lack of will to accept a larger interpretation of peace-making efforts. These states have the fear that the language of “operations for peace” would mean, specifically, force actions based on Chapter VII of the UN Charter.

Taking into account the current trends in the development of the concept of the operations for peace, but also stemming from the need of a corresponding interpretation of this practice, we can find that the constitution and implementation of FKO is founded on the following fundamental principles:

1. The consent of the parties – is the basic principles that determines in broad terms the form of the operation. According to this, the international forces are deployed only after the signature between the body that institutes the operation and the conflict parties of the respective agreement, or the latter present clear guarantees regarding their agreement on deployment to the zone of conflict of international pacifying forces. International forces, as a rule, lack the means to exercise forcefully the mandate and have the obligation to cooperate in this sense with the conflict parties. The introduction of the military contingent needs to take place after the stabilization of the conflict with the condition that the parties have reached a wilful desire to solve the conflict through political means. At the same time, it seems obvious that the principle of the agreement of parties is applicable in case of operations of imposing the peace.
2. Impartiality – of the international forces is reflected in the principle of parties’ agreement to use these forces. Impartiality means the refusal to carry out actions that could bring prejudice to the rights, status and wishes of the conflict parties, as well as any other actions that could be interpreted as granting priority to any of the parties.
   At the same time, the impartiality excludes the refusal to apply force in cases of legitimate self-defence, as well as the cases when conflict parties prevent the mission to exercise the mandate of the peacekeeping forces. In addition, these parties do not need to possess a decisive vote for determining the impartial nature of some or other actions on behalf of the UN forces.
3. Another principle is the general management from the institution body, in other words the UN Security Council, which according to the UN Charter bears the main responsibility for maintaining the peace and international security.
4. The command and control over the international peace-making forces is another principle. The forces act under the direction of the UN Security Council, but are under the command of the Secretary General who acts on behalf of UN and has the political agreement of the Security Council.

Regarding the composition of the forces, these are completed from the capacities made available by the participating member states, based on the agreements between the governments of these states and the Secretary General, on behalf of the UN. It is very important that in the future the UN forces are formed as a result of consultations between the governments of member states and with the consent of the Security Council and of the interested parties respecting the principle of equitable geographical representation and political needs. The UN practice, according to which it is recommended to avoid the participation in the PKO of contingents of states that are neighbours with the conflict state or states, today is faced with the reality according to which it remains rational but falls short of being a dogma.

The use of force is accepted only in the capacity of legitimate self-defence. At the same time, the term of legitimate self-defence includes resisting military attempts to prevent the exercise of the mandate of international forces.

The listed principles, together with the conditions mentioned earlier, represent the quintessence of the world practice, fixed in the Statement of the Chairman of the UN Security Council on 22 January 1995. We admit that the key provisions can be considered universal.

We referred to the conduct of peacekeeping operations which must take place in strict accordance with the principles and purposes of the UN Charter. Let us now refer to the regional structures, in our case the CIS. The Russian doctrine argues that Russia's participation at PKO in the CIS territories stems primarily from its own security considerations and the special responsibility it has agreed with its neighbours for stability and protection of human rights in this region. The size and format of such participation is determined strictly on the basis of agreements, considering the resources needed to carry out PKOs.

The legal basis for the involvement of Russia in PKO on the territory of CIS stems from the calls received from other states to contribute to the conflicts settlement.

The PKO actions of the CSI take place solely with the direct consent of the conflict parties, while the contingents are sent based on the respective international agreements. The responsibility for the conduct of such PKOs lies with the parties that have instituted the operation, which in their turn are bound through their obligations to respect the UN Charter, as well as a series of other principles and goals of the OSCE (CSCE). Both the statements of the states, and their practice, allows us to find that the principles that govern the PKOs in the CSI are the same as those in case of UN. Amongst these are also listed the mandatory notification of the UN Security Council and of OSCE about the conduct of the operation, including about the evolutions of the political process. These in their turn would allow us to find that the principles that govern the PKO, regardless of which organization bears the aegis, including regional, are recognized as customary rules of the international law, which attributes an imperative nature to these when conducting PKOs.

The legal basis for the conduct of PKOs in the CIS is the Agreement on groups of military observers and collective peacekeeping forces in the CIS, signed in Kiev on 20.03.1992 by the heads of states, including the head of the Republic of Moldova. We should only mention that when this document was drafted the provisions of the UN Charter were taken into account and those standards and procedures established under the UN for the conduct of PKOs.

Another important actor in the settlement of the Transnistrian conflict is the OSCE, which in principle has the potential to carry out the peacekeeping, but unfortunately so far we notice its passivity. We note that the basic doctrinal and organizational arsenal of the CSCE / OSCE was formed gradually. The Paris Charter adopted in November 1990 was an important step in shifting from the Advisory role to expressly preparing joint actions of Member States. Thus, in Prague was created the OSCE Conflict Prevention Centre, which was later involved in organizing OSCE missions in conflict regions. Since its inception, the OSCE Conflict Prevention Centre evolved rather in the direction of monitoring conflict situations and information, than in the direction of a centre for the development of operations and OSCE mission in conflict resolution.

Concluding the information on the OSCE role in conflict settlement, including the Transnistrian conflict we find that OSCE activities in the field of conflict resolution are limited exclusively to preventive diplomacy, and the prospect of carrying out the PKOs on their own, even with the mandate of the UN Security Council, seems to be unlikely, including from a financial standpoint. Given the OSCE practice, we can assume that this is due to the fact that the OSCE is not positioned as a competitor to the UN peacekeeping policy.

3. ASSIGNING THE RESPONSIBILITY OF THE STATE - A LEGAL ARGUMENT WHICH DIRECTLY INFLUENCES THE IMPARTIALITY OF ONE OF THE MEDIATORS

From the very beginning a question may arise - to what extent the actions of Tiraspol administration can be attributed to the Russian Federation. One would have to prove the link between the actions of the Tiraspol administration and their level of coordination with the authorities in Moscow.

To answer this question we will bring some examples that support Russia's contribution to the strengthening of the Tiraspol regime. We refer to the New York City Bar Association report "Thawing a Frozen Conflict: Legal Aspects of separatist crisis in Moldova", presented in 2006.

3.1. The evolution of the "transnistrian" conflict

At the beginning of 1992, while the pressure between a group of separatists and the constitutional government of Moldova was under way, the separatist leader Igor Smirnov started a harassment campaign to force the police officers to leave the east of the country.[11] The illegal separatist forces were amassed in the spring of 1992 upon the arrival of the Cossacks and other mercenaries and volunteers from other parts of the Soviet Union.[12] According to the data presented in the Report, "the Cossacks and other volunteers were paid by the state, receiving 3000 rubles per month",[13] which can be considered a direct involvement in internal matters of another country.

According to the information presented during hearings at ECHR on 3 December 1991 the 14th Army occupied the cities of Grigoriopol, Dubăsari, Slobozia, Tiraspol and Rîbniţa, all in the transnistrian region.[14] Thusly, we face an armed occupation, in the conditions that on 27 August 1991 the Republic of Moldova became a subject of international law. In these conditions, in case when the constitutional authorities of Moldova would have introduced its forces in the region, there was a danger of an armed conflict of international nature. We note that the provocations continued, especially we refer to the events of 2 March 1992, when Moldova becomes part of UN. Here we should remind about the numerous provocations, including bloody ones, which took place against both police officers and civilians, which took place during 1990-1991.

Later, immediately after signing on 01 April 1992 by the President of the Russian Federation of the decree No. 320, according to which the unites of the 14th army from the territory of Moldova were declared part of Russian forces under the name of „Operation Group of Russian Forces (OGRV) in the transnistrian region of the Republic of Moldova", the commander of this operational group, on 2 April 1992, submitted to Moldovan authorities an ultimatum, asking the retrieval of Moldovan forces from the vicinity of Tighina/Bender, stating at the same time that the units of OGRV are ready to resist in case the requests are not met. And on 5 April 1992, in Tiraspol made his appearance the Vice President of the Russian Federation who openly stated "the sovereignty and independence of transnistrian people".

11 The report of New York Bar association „ Thawing a Frozen Conflict: Legal Aspects of separatist criss in Moldova", p.14.

12 ECHR. Ilaşcu and others v. Moldova and Russia, 2004, par. 66.

13 Bar association report, idem.

14 Ilaşcu, par. 53

We only referred to the representatives of the executive, leaving aside many Russian politicians and parliamentarians who constantly visit the "Transnistrian" region without coordinating these visits with officials from Chisinau, encouraging the Tiraspol leaders and promising them full support. We did this intentionally, given that it is exactly the executive that represents the state on the international level and the statements made by the executive heads are regarded as expressing the official position of the state. Although we cannot support that these statements expressly form the behaviour of the state but these statements may be part of those practices that could confirm the involvement of a state directly in the internal affairs of another state.

Gradually the tensions escalated until a real conflict started in the summer of 1992, when the death toll rose to 1,000 people. The 14th Army intervened on the side of the illegal paramilitary forces, and largely due to the intervention and position of the 14th Army, the constitutional structures of Moldova failed to take control of Bender and Dubasari.[15] By accepting the armistice on 21 July 1992, the Republic of Moldova signed with the Russian Federation the "Agreement on principles of peaceful settlement of the armed conflict in the Transnistrian region of Moldova." The negative effects of this conflict were mentioned by various experts, including under the aspect of legal norm.[16]

3.2. International practice regarding the responsibility of a state for the international illicit actions

We propose a brief analysis of the position of international law regarding this issue. We start from the fact that State practice constitutes the state's actions and documents produced by the state. This is recognized by international bodies of international law and by the states themselves. The International Court of Justice examined the official statements, in the capacity of state practice, in a series of cases, amongst which we can bring as an example the case of *Nicaragua*,[17] to which we will refer throughout the report, and the case of the Project *Gabčikovo-Nagymaros*.[18]

In the first case, the Court concluded that the principle of prohibition of force application, as it is formulated in Article 2 (4) of the UN Charter, finds confirmation as a customary humanitarian norm, in that the representatives of states were often referring to this principle in their statements not only as an ordinary principle of customary international law, but as a fundamental principle of customary international law.

In the second case, the Court held that the term "state of necessity" has a character of customary law, which removes the illegality of the fact that fails to correspond to international law. The Court reached this conclusion based on various materials, including numerous official statements used by the UN International Law Commission (ILC) in developing the corresponding Article of the Draft Articles on State responsibility. Among the acts ILC relied on, to support the presence of a customary international law, are: international agreements, decisions of national and international courts, domestic law, diplomatic correspondence, opinions of legal counsels from different countries and the practice of international organizations.[19]

15 Bar association report, idem.

16 Ковриг Андрей. Лица, пропавшие без вести, и их семьи. Кишинев. 2009 г., стр.27-55.

17 ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, Judgement, 27 June 1986. ICJ Reports 1986, § 190.

18 ICJ, Case concerning the Gabčikovo-Nagymaros Project (*Hungary v. Slovakia*), Judgement, 25 September 1997, ICJ Reports 1997, § 49-58.

19 Project of articles regarding the responsibility of states for illicit international facts and commentary, developed by the UN Commission on international law, approved by the UN General Assembly through resolution 56/83 of 12.12.2001.

The International Criminal Tribunal for the former Yugoslavia established in the Tadic case (to which we will return), that in analysing the creation of customary rules of international humanitarian law it “should be based primarily on such elements as official pronouncements of States, internal military statutes and judicial decisions “.[20]

The International Law Association supports the view that “verbal acts, not only the actions of states, are considered practice of States”, warning that “the practice of international tribunals offers rich examples of verbal acts, considered as an example of practice. And the states are systematically examining such acts in a similar manner”.[21]

We note that international tribunals and courts sometimes conclude, that the rule of customary international law exists, if this rule is welcome to preserving peace and security or to protect the personality, provided that there is no contrary *opinio juris*. As an example can serve the decisions of the International military tribunal from Nurnberg, which found that the Hague Conventions of 1907 became customary law[22] and the decision of the International Court of Justice in the case of *Nicaragua* (1986), which established that the norm on non-interference in the domestic and foreign policy matters of another state, is part of the international customary law.[23]

The basic principle for the verbal acts or examined actions to be recognized as state practice – is that the practice to be official. Now let us imagine that a commander of an operational military group acts on his own and is later sanctioned for this by the supreme commander of the state? It is obvious that such things are impossible! While the vice president of the Russian Federation who was in Tiraspol and made the respective statements – could have been on a private visit, spending his vacation? This too sounds utopian.

Before referring to the case of Ilascu and others vs. Moldova and Russia, examined by the ECHR, we should analyse what would reflect the international practice in this area. It is a case examined by the International Court of Justice in 1986, regarding “military and paramilitary formations on the territory of Nicaragua” (*Nicaragua v. SUA*) and the case of Dusco Tadic examined by the International Criminal tribunal for the Former Yugoslavia in 1999.

At the beginning of this report we mentioned that the international law distinguishes between the principles of *jus ad bellum* and *jus in bello*, the application of the latter not being conditioned by the legal or illegal nature of the use of force. As we said, we will refer to two cases – one from the practice of the International Court of Justice of UN, and one from the practice of the International Criminal Tribunal for the former Yugoslavia.

In the case of the International Court of Justice, Nicaragua sought the recognition of guilt of the USA, which according to the former “prepared, financed and supported” paramilitary structures that were fighting against legal authorities accusing the United States of involving in the internal affairs of another state - *jus cogens* norm in the international law. In the examination of the present case, the Court found that the only US participation “despite the fact that it was crucial in organizing, financing, training, supplying and arming the Contras, determining goals and planning ... all operations - this is not enough. .. for acts committed by the contras during military operations in Nicaragua to be attributed to USA... for these facts to lead to legal liability

20 ICTY, Tadic case, Case № IT-94-AR72, § 99.

21 ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Principle 4 and commentary (a) thereto, p.725-726.

22 International Military Tribunal at Nurenberg, Case of the Major War Criminals, Judgment, 1 October 1946, Official Documents, Vol.I, pp.253-254, art.119.

23 ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, Judgment, 27 June 1986. ICJ Reports 1986, § 202-209.

of the United States, it must be shown that there is effective control on behalf of the US on the process of conducting military or other similar operations."[24] This criterion is similar to that proposed by the authors of the ICRC Commentary on the Geneva Conventions, which believes that when acts were committed not by the occupying state, but local authorities "there is a need to establish the location where the decision was made that resulted in illegal actions, as well as the location where the intention was formulated and the order given."[25] Therefore, the Court concluded that responsibility can be attributed to another state only if there is evidence confirming that it has effective control over the actions of the authorities of the uncontrolled region (in our case the left bank) by the constitutional authorities of the State (in our case Moldova).

In the second case - Dusco Tadic, examined by the International Criminal Tribunal for the former Yugoslavia, the application of international humanitarian law and more specifically the 1949 Geneva Conventions governing the protection of various categories of persons in time of armed conflict, were subject to recognition of acts committed by Bosnian Serbs as war crimes committed in an international armed conflict.

To verify this position the Tribunal was forced to establish the facts but also to determine the legal criterion based on which the support from abroad could impose the application of the international armed conflict law[26] regarding the rebels. The first court found that the International Court of Justice established this criterion in the case of *Nicaragua v. SUA*, which we referred to earlier.

We have to mention that the concept of responsibility of state and of the natural person differ, so that we assume that the International Court of Justice, in the case of *Nicaragua v. SUA* lacked as a goal the examining of the problem of applying the law of international armed conflicts or those non-international, for the simple reason it considers the interdictions provided for in article 3 as minimal criteria for both types of conflict.

In principle, before establishing the responsibility of a state or of the individual in each case, must be determined the norms that the state or the person followed. Referring to the case of *Nicaragua v. SUA*, we mention that the law of international conflicts could be applied only in the case that the actions of *contras* on the territory of Nicaragua would have been attributed to the United States. Similarly we find that this right could have been applied to the facts committed by the Bosnian Serb Dusko Tadic against Bosnian Muslims during the conflict with the Bosnian government, only if these facts were attributed to another state – Serbia and Montenegro (the new Yugoslavia).

Recognizing that in both cases are applied the same criteria, the Appeal Chamber of the Tribunal found that in the case of *Nicaragua v. USA* the application by the Court is not convincing, including when determining the responsibility of state, because they contradict the logics of the law on international responsibility, as well as the international practice.[27] In the view of the Chamber, when the responsibility for the actions of a military formation is concerned, the general control over the activity being exercised by another state, this could be sufficient to find the state responsible for the actions of the mentioned formation, as well as for the application of the law of international armed conflicts.[28]

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24 ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, Judgement, 27 June 1986. ICJ Reports 1986.

25 Pictet Jean S. Convention de Gèneve relative a la protection des personnes civiles en temps de guerre. Commentaire du Comité International de la Croix-Ruge. Genève, 1958, p.212.

26 The terms „law of armed conflicts" and „international humanitarian law" are identical, the application of one or another reflects the terminology used in each case

27 Judgment, *The Prosecutor v. Dusko Tadic*, Case №IT-94-1-A, ICTY Appeals Chamber, 15 July 1999, paras. 115-145.

28 *The Prosecutor v. Zejnil Delalic et al.*, (*the Celebici case*), Judgment, ICTY Trial Chamber, Case № IT-96-21-T, 16 November 1998, paras. 233-234.

The main factor was, probably, the effective control over the territory. Another case brought as an example by the Chamber was that of the occupied territory, examined by the European Court of Human Rights,[29] when forces of occupation are present. In such situations the Geneva Conventions provide directly for the fact that protected persons cannot be deprived of their rights as a result of amendments to legislation applicable in that territory are introduced.[30] There could be various opinions regarding the application of these precedents in case of Tadic in situation where the local armed formation was created from what were armed forces of the former centralized state, possibly by the central government on the territory of the state in the process of dissolution.

Applying the criterion of general control in case of Bosnian Serbs the Chamber of Appeals finds that they were under such general control from Serbia and Montenegro,[31] bringing indirect evidence that would demonstrate the presence of such control.

We warn that such arguments were brought where the state was in the process of dissolution, while the armed forces of the former centralized state had multiple links with the former central administration, which, under the new conditions, became Foreign Forces. In the specific case of Tadic, the Chamber of Appeals brings as an argument the fact that Serbia and Montenegro signed a peace agreement in Daton on behalf of Bosnian Serbs. Referring to the situation of the Republic of Moldova, we mention that the parties to the Convention regarding the peaceful settlement of the armed conflict in the Dniester zone of Republic of Moldova of 21 July 1992 were the Republic of Moldova and the Russian Federation and in no way the so called MRT (Moldovan republic of transnistria), from which we can conclude that even at that stage there was an effective control on behalf of Moscow over the actions committed by the Tiraspol authorities.

3.3. The role of OSCE in creating the negotiating format regarding the solution of the “transnistrian” conflict

The mission of any peace-making operation is to create conditions that would lead to minimizing the tensions in the region, through putting into practice and favouring a process of demilitarization and democratization of the region. In this sense it is interesting to find the effects produced by the negotiation format installed in the conflict zone in the Republic of Moldova. Referring to the Russian Federation we mentioned and will continue to mention that it took an overt position favouring Tiraspol, a fact found directly and indirectly by various documents, including the report of the American Bar Association, the case of Ilascu examined by the ECHR through the examples brought regarding the economic, humanitarian, and military aid. Another mediator, the OSCE, had to contribute towards putting into application the process of withdrawing of armed forces of the Russian Federation from the territory of the Republic of Moldova. Despite the fact that this organization is not a subject of international law,[32] its authority allows it to be an active actor in the process of ensuring security on the European continent. On 13 No-

29 Cazul *Loizidou c. Turkey* din 18.12.96. Европейский Суд по правам человека. Избранные решения. Том 2. Издательство НОРМА. Москва, 2001, стр.362-390.

30 Convenţia IV de la Geneva (1949) privind protecţia persoanelor civile în timp de război, art.47.

31 Judgment, *The Prosecutor v. Dusko Tadic*, Case №IT-94-1-A, ICTY Appeals Chamber, 15 July 1999, paras. 146-162. Anterior TPII şi-a expus aceeaşi poziţie în cazurile: *The Prosecutor v. Dragan Nicolic*, Case № IT-94-2-I, ICTY Trial Chamber, 20 October 1995, para. 30; *The Prosecutor v. Zejnil Delalic et al.*, (*the Celebici case*), Judgment, ICTY Trial Chamber, Case № IT-96-21-T, 16 November 1998, paras. 233-234; *The Prosecutor v. Ivica Rajic*, Case № IT-95-12-R61, ICTY Trial Chamber, 13 September 1996, para. 25 (regarding the participation of Croatia in the Bosnia and Herzegovina conflict).

32 The capacity of subject of international law for an international organization is conditioned by the presence in its foundation of a founding international treaty. The Final Helsinki Act of 1975 which formed the basis of CSCE is not an international treaty in the strict sense of the term, having a political nature. That is why the commitments within this organization bear a political character and not an international law one.

vember 1993 the CSCE mission to Moldova formulated in its report No. 13, the first proposals, directly linked to the status of the rayons from the left bank of Nistru. As a starting point for the definition of the special status were proposed the respect of three criteria: establishing a single economic, social and legal space on the territory of the Republic of Moldova; ensuring the rule of complementarity with regional and local authorities to extend the terms on areas that do not require the involvement of credentials of the Centre; the promotion of mutual trust among the two banks. Based on this document it was proposed the division of state powers into three categories: exclusive competences of central ruling bodies; exclusive competencies for the regional administration and mixed competences.

In our opinion the most important event which clarified and regulated a series of important circumstances, implanted intentionally into the transnistrian theory, as well as determined the strategic and successful line in the negotiation process became the results of the OSCE Summit from Istanbul in 1999. At this Summit the Russian Federation assumed, at the highest level and at the most representative organization responsible for security, the commitment to withdraw completely the troops and weapons from the territory of Moldova, by the end of 2002. In the opinion of several experts this commitment, demonstrated first of all the artificial nature of the interdependency of Russian troops presence in the transnistrian region of Moldova with the process of conflict settlement, and practically broke this interdependence. Despite the fact that the obligations assumed by the Russian Federation at the Istanbul Summit are obligations of political nature, we draw attention that they need to be viewed as gentlemen`s agreement, which the states adhere to when dealing with international relations.

3.4. The applicability of the jurisdiction in the area of human rights as a criterion for the culpability of a state internationally

In the ECHR judgment in the case of Ilaşcu and Others v. Moldova and Russia, one of the judges of the Court (Judge Covler) in his separate opinion, comparing the situation to that in the case of Loizidou v. Turkey, said: “there was no military invasion from outside the territory in order to establish such control: the Russian troops, which only ceased to be Soviet troops (2/3 of them natives of the region), were caught in the events where they stationed for many years without interfering with the administrative leadership. These military men did not exercises any active mission” except securing the warehouses of weapons and equipment planned to be moved. We see a different treatment in the two situations and in principle the difference is logical, however the jurisdiction of the two courts differ as well.

How is then argued in this case the reference to the judicial practice of the two courts with different competencies. In our opinion this is because the respect for human rights and fundamental freedoms became the order of the day, and compliance with “core” human rights becomes obligation erga omnes for the international community.

So, lately we are witnessing a new phenomenon - when the body takes some competences the main function of which is not related to the sanctions for violations of the international humanitarian law.[33] In the face of inefficient traditional sanctioning mechanisms, the victims are seeking new ways to obtain justice before a judicial body. Many states are members of international organizations for protection of human rights and, in this respect have integrated into their legal orders some appeal mechanisms enabling its nationals to notify a supranational judge in case of

33 Xavier Philippe. Les sanctions des violations du droit international humanitaire : problématique de la répartition des compétences entre autorités nationales et entre autorités nationales et internationales. Revue internationale de la Croix-Rouge. No 870, p.360.

dispute. European Court of Human Rights has repeatedly sought to punish violations of human rights, which also constitute violations of international humanitarian law.[34]

However, we must draw attention to the specific position of the High Court - punishing behaviours that constitute serious violations of international humanitarian law, it prefers to refer only to violations of the European Convention of Human Rights.[35] The issue of reference to the applicable law can be considered secondary when exercising the search for diversification of its competence. The choice of the reference norm - the international humanitarian law and international human rights law - remains subject to internal and external factors that we will not analyse in the study in question. One should find that a genuine complementarity is emerging between various organs empowered to sanction the violations of international humanitarian law. This competence developed accidentally may even generate some consequences in relation to the effectiveness of the sanctions themselves. We should mention that the tribunals of the international law of human rights were not designed to answer the challenge of violations of international humanitarian law. If some appreciable results have been obtained, their interest must be considered from the point of view of time. And here we come with some conclusions regarding the issue addressed.[36]

1. The exercise of this competence by the regional jurisdictions for human rights has an occasional nature and is integrated into a larger dimension of international protection of fundamental rights. As a consequence it is difficult to qualify a situation of a true competition between jurisdictions, instead it is rather a mechanism of substitution that demonstrates, in our vision, the incapacity of national systems to take measures of effective sanction.
2. The reference to the humanitarian law in order to analyse the breach of fundamental rights cannot be made in terms in which the interpretation of normative or conventional rules is made regarding the foundation of the sanction. In the specific case mentioned earlier, the ECHR referred directly to acts that are grave violations of the humanitarian law – means and methods of warfare used; massive use of non-discriminatory weapons – without specifically qualifying them as such, but referring to the articles of the Convention.[37] The analysis of the rationale of the jurisdictions is in principle difficult, given that we need to take into account different problems. We can mention here that the competences of these jurisdictions, in the matter of sanctions for violations of international humanitarian law, are not put in the same terms as those met in the national or international jurisdictions. The jurisdictions assigned to find the violations of human rights are not criminal jurisdictions. They are condemning the states and not the authors of the deeds. Substitution, then, has its limitations.
3. The *ratione materiae* competence of these jurisdictions fails to suggest them to approach the issue of grave violations and their sanctioning in a repressive or vengeful light, but rather in terms of conformity of behaviours in relation to the international commitments of the states (the Convention for Human Rights and Fundamental Freedoms). The role of the judge is to determine what is the conventional obligation that was taken into account in a concrete case in relation to the elements put forward by the parties. As a consequence, the sanction pronounced by the jurisdictional bodies for protection of human rights can-

34 Hélène Tigroudja. La Cour européenne des droits de l'homme face au conflit en Tchéchénie. Revue trimistrielle des droits de l'homme. 2006, p.128.

35 See: Affaire Khasiyev et Akayeva c . Russie (requêtes n°s 57942/00 et 57945/00). Arrêts du 24 fèvrier 2005.

36 The study was presented by professor Xavier Phillipe together with the author of the current report within „The first regional seminar on implementing the international humanitarian law in the CIS countries" in Sankt-Petersburg, 17-19 June 2008. The presentation of the opinions herein was coordinated with professor Xavier Phillipe, for which we thank him sincerely.

37 Articles 2, 3, 5, 13 of the European Convention on Human Rights.

not be considered but a satisfaction to see the defendant state in treating it as a party that breaches international humanitarian law, with a possible pronouncement of a financial compensation that would represent, according to the established terms, "a due satisfaction". Apropos, we might wonder whether in exercising a competence in the matter of international humanitarian law these jurisdictions can influence, in one form or another, the behaviour of those who bear the weapons?

4. These jurisdictions cannot be substituted to the general deficiencies of the system. They surely can support, encourage certain ways, but they are conceived for individual requests and cannot thus absorb the mass of violations of international humanitarian law, when these were committed. The regret formulated by some observers and commentators about the absence of a direct reference to the international humanitarian law can be understood: which jurisdiction can take the risk to leave its area of competence, under the pretext that it could get inspiration and apply just as well the rules of the international humanitarian law? The protection of the substance of the rules is more important for a jurisdiction when compared to looking for a larger base. Hence we cannot talk about a transfer of competence, only about a marginal competence where the resources are limited.[38] To expect a substitution of competence would be an error.
5. It is impossible to ignore the political share of these cases and the obligation the jurisdictions would assume to remain flawless from the legal point of view. The approximate criterion cannot be placed into this hypothesis, often present in the media, which intervenes in the contexts which are not as a rule peace-making. This political share of the legal rationale influences clearly the perception of the material competence by the jurisdictions: the selection of norms of reference cannot be made with ease, ensuring the exercise of style that could embrace all the existent texts and protecting those rights.
6. From the beginning a question should be asked regarding the absorption capacity of the jurisdictional bodies for the protection of human rights and the process of treating the grave violations of the international humanitarian law, as well as applying the sanctions. We are talking about a material external limit which pertains to the capacities of the jurisdictions to accept a larger number of complaints. In case when these would have to deal with a larger flux of complaints, the redirected risks would increase and the chances to see a pronouncement of justice in good conditions would be minimized.

38 Xavier Phillipe, op. cit., p.366.

4. THE OCCUPATION LAW AND ITS APPLICABILITY IN THE CASE OF THE “TRANSNISTRIAN” CONFLICT

The dictionary of the international public law defines “military occupation” (in Latin ocupatio bellica) as a situation of a territory found under the power of an enemy army, which is exercising in an effective way a temporary authority.[39] The Oxford manual “Law of land warfare” provides in art.41 that „a territory is considered occupied, as a result of an invasion of an enemy army, the state owning the territory stops exercising in fact a regulated authority over that territory and when the invading state is the only one capable of maintaining the order”.[40] We mention that this language is given by the International Law Institute on 09.09.1880.

As an international legal norm this norm found its first use in the Regulation annex to the two Conventions – the second of Hague from 1899; and the IV of 1907 regarding the laws and customs of land warfare, being later developed and provided for in the IV Geneva Convention of 12 August 1949 regarding the protection of the civil population during a war, section III, entitled “Occupied territories”, articles 47-78; in the Bylaw of the Hague Convention of 14 May 1954 regarding the protection of cultural assets in case of armed conflict and the Protocol I from Geneva of 8 June 1977.

At the obvious questions regarding the legal basis for the applicability of these international treaties to the case of the Dniester conflict, in the conditions that this conflict had an international nature, we will refer to the position of the Military Tribunal from Nurnberg of 1945, which in one of the adopted sentences examining the responsibility of Germans for the inhuman treatment of Soviet prisoners of war, found that the Hague Law at the moment of beginning of second world war was part of the international customary law. The Tribunal had to pronounce given that the German part sustained that it lacked obligation to apply the requirements of the Geneva Convention of 1929 in relation to the treatment of prisoners of war given that USSR was not part of that convention. Please note that the Hague Law, also called the law of war included the Geneva Convention of 1929.

The Hague Convention of 1907 regarding the laws and customs of land warfare provides for the occupation as being a situation when the territory is under effective control of occupying forces. The occupation is referred only to the territories where the administration of occupation forces is able to exercise effective control and impose a certain behaviour. While the IV Geneva Convention of 1949 in article 2 mentions that the convention will be applied in all cases of occupation of a part or entirety of a territory if such occupation lacked resistance from the population.

The definition of occupation is underscoring the characteristics specific that differentiate it from other forms of intervention of armed forces on a foreign territory. We distinguish three basic categories of occupation:[41]

1. The effective nature of occupation and possession of territory.
2. The non-transitive nature of sovereignty.
3. The temporary nature triggers a limited substitution of competences.
    1) Not each possession of territory can be considered military occupation (ocupatio bellica). „A territory is considered occupied – specifies article 42 of the Hague Regulation – when it is in fact under the authority of an enemy army.” Thus, the essential element

39 Ionel Cloşcă, Ion Suceavă. International humanitarian law. „Şansa” SRL, Bucureşti, 1992, p.160.
40 Idem, p.160-161.
41 When characterizing the fundamental nature of occupation we refer to „International humanitarian law” (1992), I. Cloşcă and I. Suceavă and on the materials and practice accumulated by the author of the report over years in his activity as an expert of the International Committee of the Red Cross, Regional delegation Moskow.

of occupation is that of effective possession. In the interpretation of the International Law Association: "A territory cannot be considered occupied by the enemy apart from cases when it is freed of an adversary army, is in actual and effective power of armed forces of the enemy and will remain so for a long time"[42] Another treatment of the term of effective possession can be found in the internal regulations of armed forces of many states. These prescribe that there is effective possession when a party of the conflict has a real possibility to exercise power and impose a behaviour on an occupied enemy territory, to be able to fulfil all the obligation of the Law of Occupation. Such treatment allows the occupying force to be waived off responsibility for non-respecting the Law of Occupation reasoning that they lacked real control of the occupied territory.

The interpretation of this problem offered by the Commentary to the IV Geneva Convention of 1949, carried out by CICR in 1958, is closer to the essence and protective goal of the occupation law on behalf of persons who voluntarily or involuntarily are involved in military actions. The CICR Commentary supposes a larger interpretation than the one offered by article 42 of the Regulation of the Hague Convention of 18 October 1907 regarding the rules and customs of land warfare. The interpretation offered by the CICR based on article 2 and 6 of the IV Geneva Convention, stipulates that the relations that appear between the civil population and military occupying forces that are advancing on a territory, independent of whether there is an armed opposition or not, will be "governed by the stipulations of the Convention".[43] Moreover, there will be no intermediary period between invasion, inauguration and recognition by the occupation power of a stable and effective regime of possession of the occupied territory. The CICR commentary is of the opinion that in case of patrol that enters the enemy territory without the goal of remaining there it needs to respect the provisions of the international humanitarian law of occupation in relation to the civil population, an obligation in this sense being the interdiction to seize civilians upon leaving the territory by the patrol. Seizing of civilians by the patrol can be qualified as a violation under article 49 of the IV Convention (this article being a conventional norm of the international humanitarian law of occupation). This provision refers to any person that is not a conational of the occupying force and that reside on the land or water recognized as territory that is under the jurisdiction of the occupied state.

2) The fundamental principle, consecrated in the pertinent instruments of international humanitarian law, is that military occupation fails to stimulate any transfer of territorial sovereignty over the occupying force. The territorial sovereign continues to conserve the sovereign rights, with the difference that the exertion in fact of some competences of administrative and jurisdictional nature passes, within the limits of the international humanitarian law, to the attribution of the occupant. This exertion of competence is limited to three objectives:
   a) to maintain public order on the occupied territory;
   b) to protect the civilian population;
   c) to ensure the security of the occupation administration and army.

Apart from these competences exercised by the occupant, the state whose territory is being occupied conserves the prerogatives resulting from its sovereignty. This idea responds not only to the logical rationale but also to a legal behaviour. From the moment

42 Project regarding the rules of war in occupied territories (art.1), adopted by International Law Association at the 35th session, Warsaw, 1935.
43 Uhler Oscar., Henri Coursier Commentary on the Geneva Conventions of 12 August 1949. Volume IV. ICRC, Geneva, 1958, p.61.

when the occupation has, according to the norms of international law, a temporary nature, it cannot have as an effect the suppression of the national sovereignty, but simply creating for the occupant the quality of an administrator. This situation stems from the principle of continuity of social life and public order.

The military occupation is a state of fact and not a state of law, as it is hit by the vice of violence, through which the occupant enters into the possession of the territory. As it is, the territory continues, in principle, to be governed by the laws of the sovereign state. This rule is consecrated both in article 43 of the Hague Regulation of 1907 and article 64 of the IV Geneva Convention of 1949. The occupant fails to exercise the power in the name of a legal government, implicitly the occupant lacks the right: to annex, proclaim independence or unilaterally create state bodies to invest it with sovereignty.

This principle was reconfirmed by the UN Security Council linked to the territories occupied by Israel,[44] in the case of the Iran Iraq conflict, and in case of the Kuwait war.[45]

3) The principal effect of the military occupation is the limited and provisional substitution of competences regarding the administration of the occupied territory. The substitution of competence is motivated, on the one hand, by the necessity to continue with the social life and public order, while on the other hand by the military needs of the occupant. This need was recognized by the decisions of the Permanent Arbitrage Court on 9 June 1931 in Chevreau case.

The domestic jurisprudence, as well as the international one, reaffirmed constantly the non transitive nature of the military occupation. In exchange, many controversies ensued both in the practice and philosophy, regarding the exertion by the occupant of the legislative, administrative and jurisdictional competences.

The applicability of the law of occupation in the current conditions was reconfirmed by the International Court of Justice in its Consultative Observation of 09.07.2004 „regarding the legal effects of the construction of a wall on the occupied Palestinian territories"[46]

In relation to the laws and customs of warfare, the Court determined that the norms of the Regulation annex to the Hague Convention regarding the laws and customs of land warfare of 1907 (Convention IV) that has as a goal the revision of the general laws and customs of war, became customary norms of international law. Hence, although Israel is not part of this Convention, the norms of the Regulation are applicable to it as well. In relation with the Western Bank are currently applicable only part III of the Regulation – art.43, 46 and 52.[47]

Regarding Protection of civilian population during occupation the Court stated that the customary norms of international law regarding the good will interpretation of the international treaties (art.31 and 32 of the Vienna Convention on the law of international treaties of 1969) means that the authors of the IV Geneva Convention tended to ensure the protection of civilians during war, regardless of the status of the occupied territory, as it is seen from the provisions of article 47 of the Convention and the materials prepared for it.[48] The states, parties to Convention IV of Geneva, have also confirmed during the conference of 15.07.1999 that the convention needs to be applied in the occupied Palestinian territories. The same opinion is shared by the

44 Security Resolution 242, of 22 November 1967, on The situation in the Middle East; Security Resolution 267, of 3 March 1969, on The situation in the Middle East.

45 Security Resolution 662, of 9 August 1990, on Iraq-Kuwait.

46 Consultative note of the International Court of Justice of 09.07.2004 „Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé".

47 Idem.

48 Idem.

International Committee of the Red Cross, the General Assembly and the Security Council. And finally, the Supreme Court of Israel has also sustained this position in its decision of 30.05.2004. That is why the Court reached the conclusions that Convention IV of Geneva needs to apply on the entire territory of Palestine occupied by Israel, because at the moment of the beginning of the conflict between Israel and Jordan in 1967 this territory was to the east of the "green line", while latter it was occupied by Israel. Because the military operations on the left bank ended long time ago, only those provisions of the Convention IV of Geneva are applicable which are prescribed in part 3 art.6; art.1-12; 27, 29-34; 47; 49; 51-53; 59; 61-77 and 143.

The report of the American Bar Association also contains references to the law of occupation but at some points it is maintained that this law is applicable to the "transnistrian" part, which we cannot agree with. The report maintains that "in this case, as long as Moldova is recognized as controlling *de jure* Transnistria, the MRT became an effective occupant of the region, the de facto regime. Although there is no armed conflict between the Moldovan Government and MRT, there is still a state of occupation."[49] Having an effective control over a part of a territory obliges the respective authorities to ensure the rule of law in the region, but in our case it is a regime created artificially and supported from abroad. In these conditions we cannot talk about direct applicability of the law of occupation in relation with the Russian Federation, but we submit that we are faced with an effective control on behalf of Russia over the authorities in Tiraspol which can be accepted as a lack of impartiality from one of the parties to the existing format of negotiations.

As ECHR concluded in its decision on the Ilascu case: "Given all the circumstances the Court considers that the responsibility of the Russian Federation is underlined in relation with the illegal acts committed by the transnistrian separatists, given the military and political support offered to the establishment of the separatist regime and the participation of Russian military personnel in combat. Proceeding thusly, the Russian Federation authorities contributed both militarily and politically to the creation of a separatist regime in the Transnistrian region, which is part of the Moldova territory. The Court finds further that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to offer military, political and economic support to the separatist regime, (see para 111 and 161 earlier), allowing it to survive through self-consolidation and through obtaining a high degree of autonomy from Moldova".[50]

As it has been mentioned in the American Bar Association Report, the de facto influence can lead to de jure responsibility, especially when it is found that the state has surpassed the acceptable limits and used an undue influence. Regardless whether we are convinced that the actions and statements of Russia give birth to such accusations of state responsibility according to international law, these actions can be understood fully in the context of a more general model of behaviour that perpetuates the transnistrian conflict.[51]

49 Report of Bar Association, p.49.
50 Ilaşcu, para. 382.
51 Bar association report, p.69.

5. THE JURISDICTION APPLICABLE REGARDING THE ARMED FORCES OF A STATE, STATIONED ON THE TERRITORY OF ANOTHER STATE

The issue of applicable jurisprudence in relation with persons who committed illegal acts is of relevance to the international public law. If there is a competition of jurisdiction between two or more states, it offers neither a philosophical nor a practical solution. Given that the principle of sovereign equality of states is one of the fundamental principles of the international public law, every state reserves the right to exercise its jurisdiction in relation with persons and assets found on its territory or abroad.[52] In such conditions a universal solution cannot exist. Such situations are regulated by international agreements, both bilateral and multilateral. Such agreements can prescribe the application of the jurisdiction of a state in certain conditions, conditions of surrender and extradition of persons, institution of certain Committees of investigation or conciliation, aimed at solving conflicts, etc.

The issue of applicability of jurisdiction over the personnel of military contingents, including of members of peacekeeping forces under UN management, is one that needs a separate approach, given its specifics, a fact confirmed not only by the theory of the international law but also by the practice of states and international organizations.

5.1. Theoretical aspects

One of the criteria that characterize the state as a subject of international law is the exercise of its jurisdiction in relation to people and assets. The fact is that the state organization of a society is only possible if the population is divided on the territorial criterion. The territorial supremacy means the empowerment of the state in exercising a full and exclusive power within the limits of its territory. Although the notions of supremacy and jurisdiction differ, they are still closely connected. It is obvious that in absence of territorial supremacy one cannot talk about jurisdiction over the territory in question.

One of the elements of territorial supremacy is the application of the extraterritorial jurisdiction, when the jurisdiction of a state over its citizens extends into international spaces. The extraterritorial jurisdiction includes the personal principle, which results from the state supremacy over its people. Based on these principles the effects of some laws of the state apply also onto the people without citizenship residing permanently in that state, while they are abroad. This refers even to the coercive branches of law.

Another principle of extraterritorial jurisdiction, quite common these days, is the principle of defence. Based on it, the state has the right to bring to criminal justice people who are not its citizens for committing crimes on its territory, but which are directed against the interest of the state or its citizens. The criminal extraterritorial jurisdiction can be exercised based on the principle of universality. Based on it, any state has the right to bring before criminal justice the person who committed outside its territory a crime described by the international law.

The complete jurisdiction can be exercised only if there is territorial supremacy. Functional jurisdiction can take place both in exercising territorial supremacy and, to a lesser extent, beyond it. The territorial supremacy of the state is exercised within the limits of prescription jurisdiction on behalf of people who enjoy diplomatic immunity. These persons are obliged to respect

52 Gamurari V., Osmochescu N. Sovereignty and international law: *theoretical problems and practice*. Chișinău: CEP USM. 2007. 258 p.

the laws of the state of residence, but enjoy immunity from the criminal and administrative jurisdiction. Prescription jurisdiction can apply to citizens who are abroad based on the personal supremacy of the state. The jurisdiction of forced execution can be exercised only on the territory of the state.

5.2. The case of the personnel of the contingent of Russian Federation stationed in the conflict zone of the Republic of Moldova

This brief analysis of forms of exertion of jurisdiction by states allows us to find that in some cases can surface a competition of jurisdictions. This is the case of the military man of the Russian Federation armed forces contingent, stationed in the conflict zone, involved in the incident that took place on 1 January 2012 on the bridge in the vicinity of Vadul lui Voda town. The Russian Federation has the right to apply personal jurisdiction over this person, given the Russian citizenship, while the Republic of Moldova has the right of territorial jurisdiction, given that the incident took place on the territory of Moldova. But Moldova could apply its jurisdiction only if it had access to that person, either being detained by the Moldovan authorities or extradited at the request of Moldova from the territory of a state with which we have such an agreement. Regarding the Russian Federation, it will not extradite its citizen given the constitutional law that provides for non-admission of such situations. This principle is universal and does not need a detailed description. In this case the solution would be an address by the Moldovan authorities to the competent structure of the Russian Federation regarding a forming of a working group that would examine the case through presenting the evidence. If the committed fact meets the elements of crime instituted by the legislation of both states (double incrimination) than this person will be tried by the Russian authorities. This is the ideal solution but, regretfully, in practice the things stand differently.

The impossibility of applying a jurisdiction of the state over members of the military of other states is not conditioned by the legality of station of such military. In a situation of an armed occupation the occupational law is applied which we referred to earlier and it is obvious that in relation to the respective military men is applied the jurisdiction of their state. While when foreign troops are stations based on an agreement, usually the conventional provisions establish firmly the fact that the members of the armed forces fall under the incidence of their state jurisdiction. In case of Republic of Moldova we cannot speak about the applicability of a classical regime of occupation, given that the Russian forces from the very beginning presented the effects of the dissolution of former USSR, while later no legal document was signed (that would produce legal international effects) between Moldova and Russian Federation, which would stipulate the withdrawal of Russian army from the territory of Moldova, including the terms of such withdrawal. Further we will analyse the situation in which the armed contingents of a state are stationed on the territory of another state. Regretfully, members of the armed forces fall into the category of persons who commit most often crimes, including grave ones.

Given that the Republic of Moldova de facto does not exercise its jurisdiction in relation to the members of the military contingent of the Russian Federation, as well as in relation to persons who commit crimes on the left bank of Nistru, the territory placed outside of the jurisdiction of Chisinau, a logical question arises what would be the respective solution. Let us try to answer briefly both questions.

Regarding the persons who commit crimes on the territory left of Nistru, the solution would be to initiate criminal cases and to issue international warrants, limiting their space of circulation. In addition, we mentioned that some categories of crimes are outside the prescription

term – war crimes, crimes against humanity, genocide. We alluded to the possibility of applying this principle over the cases of torture, but this is an issue that does not fall directly under the international criminal law.

Regarding the exertion of jurisdiction over the member of the military contingent of the Russian Federation, we need to find that the legal solution would be the cooperation of the competent bodies of the two states case by case, with the condition of double incrimination – the starting of a criminal case and issuance of an international warrant.

5.3. International practice

The problem of immunity can become one of the most frequent when applying the international criminal law. In relation with the war crimes during armed international conflicts, lack of immunity *ratione materiae* stems from the treaties that regulate armed conflicts. The argument of the Lords Chamber regarding the Convention against torture is applicable to the law of Geneva. For example art.146 of the IV Geneva Convention of 1949 states: „Each High Contracting Party is obliged to search for persons charged with committing or ordering a grave crime, regardless of citizenship, to defer them to justice".[53]

Because the military men (at least in international conflicts) appear as representatives of the state, the obligation to search for and try the person charged with crimes of war would be impossible in case of application of immunity *ratione materiae* in relation to the crimes of war. Thusly, we find that the Geneva law annulled the *ratione materiae* immunity in relation to the crimes of war. Regarding the crimes against humanity, the rule described earlier, regarding the refusal of immunity *ratione materiae* in case of grave crimes, is applicable in relation with military men, because they also represent state officials.

The foreign armed forces that are station on the territory of a state lacking the agreement of the said state, according to the traditional philosophy of international law, enjoy immunity and exterritoriality.[54] In case of military occupation these forces are not subject to the jurisdiction of the occupied state, they fall under the jurisdiction of the occupant state, which has to apply the provisions of the Hague Convention regarding the laws and customs of land warfare.[55] In other situations the military men of the enemy armed forces, in principle, enjoy immunity in relation to the committed acts of official capacity. Yet, the area of application of this immunity is very limited, because the majority of crimes committed by the foreign military men are considered war crimes, which are lacking this immunity. The murder of civilian population of the adversary part, destruction and plunder of their goods, are considered crimes, under the IV Geneva Convention. The immunity for such crimes exists only in cases when the foreign military men steals the good that belongs to another foreign military man. Obviously, that such a special status cannot lack influence over the international law and the *ratione materiae* immunity of the state in relation to war crimes, crimes against humanity and genocide. It transpires that the state which possesses foreign armed forces lacks any tangencies with the criminal investigation exercised by the International Criminal Court.

Let us refer to the practice of the NATO member states, but we suppose that such provisions are included also in the agreements between other states, who have their military contingents on

53 Convention on protection of civilians during war (IV), Geneva 12 August 1949.
54 Daillier P., Pellet A. Droit international public. 7-e edition. L.G.D.J. Paris, 2002, p.975.
55 Международная конвенция о законах и обычаях сухопутной войны (1910 г.). Международное право. Ведение военных действий. Сборник Гаагских конвенций и иных соглашений. Международный Комитет Красного Креста. Москва. 1999 г.

the territory of other states – Russia in Ukraine, Armenia, Tajikistan. When foreign forces are stationed on a territory of a state with its agreement, their status, as a rule, is provided by the SOFA agreements, of the type entered into by NATO and exclude immunity in the strict sense of the word, but establish a parallel jurisdiction, which offers the state sending armed forces or the host state, the priority right to exercise jurisdiction, for example, in cases where the alleged crime is committed during exercise of functional obligations. In other words, even if the state who sends armed forced possesses a priority jurisdiction, the host country has the right to exercise jurisdiction, in case the sending state fails to start criminal prosecution against a person suspected of committing the crime. So the appearance of problems of immunity are less likely in situations when the SOFA agreements are applied, similar to those used in the NATO practice.

We face another situation in case of agreements on the status of forces entered into by the USA based on exchange of papers.[56] The personnel is offered a "status equivalent with that of the administrative and technical staff of the US Embassy according to the Vienna Convention on diplomatic relations". Because such status means full immunity *ratione personae* at least from any criminal prosecution,[57] the starting of a criminal case in relation to grave crimes would be impossible.

But the offering of full immunity in relation with grave crimes would have breached several international treaties. Both the Convention against torture and the Geneva law ask the states to exercise criminal investigation based on universal jurisdiction, which would be impossible from a practical standpoint in case of *ratione materiae* immunity regarding torture and war crimes. What is characteristic to the agreements in the area of human rights is the one regulation the *erga omnes partes* obligations, meaning they can be respected or breached only in relation to the other participants in those agreements. And on the contrary, a customs multilateral agreement can be respected by one party and breached by the other party.[58] The obligation to prosecute the persons who commit crimes or apply torture cannot be rejected based on a bilateral agreement between participatory states to the Convention against torture and the Geneva Conventions. At the same time, in relation to the obligations prescribed by the customs agreement some deviations are admitted from both parties. This is why the agreements regarding the status of armed forces that establish immunities inexistent previously in relation to torture and war crimes, breach the obligations of participants to such agreements, according to the mentioned conventions.

The stated are applicable in relation to the Convention on genocide. The Convention itself, at the first glance, fails to prescribe the obligation to prosecute for genocide based on universal jurisdiction. But article IV of the Convention prescribes that people who commit genocide must be prosecuted, regardless of the occupied function. The area of application of the precedence in question cannot be limited by a simple annulment of immunity in relation to genocide, but needs to include the interdiction of such immunity. This results if not directly from the language of the Convention on genocide, then from the principle of due interpretation of the treaties.[59] Thusly, the agreements on armed forces, that provide immunity in relation to genocide, would breach the obligation of parties in this agreement according to the Convention on genocide.

56 Agreement Redarding the Status of Military Personnel and Civilian Employees of the US Departement of Defense who may be Present in the Republic of South Africa in Connection with Mutually Agreed Exercices and Activities (1999), State Dept. № 99-84.
57 Vienna Convention of 1961 on diplomatic relations, art.37 (2).
58 Vienna Convention on treaties law 23 May1969, art.41 (1) (b).
59 Ibidem, art.31.

We have to recognize that it is not only the Republic of Moldova who faces such problems. The practice of the states demonstrates that the majority of cases (it doesn't pertain only to totalitarian states, this happens in states with high degree of democracy such us USA, UK, France, Canada, etc) of persons who commit grave crimes during armed conflicts or peacekeeping operations, the punishment is applied only formally. In some cases are ignored the rules of recognized *jus cogens* norm, such as the "core" of the international humanitarian law.[60] The problem is that such situations are often solved given the political considerations; that is why the level of applicability of norms of law depends largely on the political factor.

60 Just an example– detention of Taliban at Guantanamo by US authorities infringing the III Geneva Convention of 1949 regarding the treatment of war prisonsers.

6. THE HUMANITARIAN CRITERION IN THE ACTIVITY OF THE PEACEKEEPING OPERATION

We started the last segment of the report in question specifically with the humanitarian aspect of the peacekeeping operations, because the "humanitarian" criterion was the main one during the entire duration of the conflict, including on behalf of the Russian Federation. Each effort undertaken by the Chisinau authorities to impose civilized rules that would minimize the effects of smuggling, which is the main source of income for the authorities of Tiraspol, a fact recognized by domestic and international experts, Russia responded with humanitarian arguments that led to supporting the Tiraspol regime through various economic ways.

The last years are characterized by a new practice of the PKO, dictated by the changes in international relations. On the one hand, the need to supply energy and increasing resources to the preventive diplomacy. On the other hand, we are witnesses of a transition to a new generation of PKO, which in addition to traditional tasks include a set of measures that aim at solving the problems that caused crisis in the societies in question: fighting against mass infringement of human rights; preventing humanitarian catastrophes, contribution to democratic reforms; organization of elections; contribution to re-establishing the governmental and social structures' reorganizing the bodies of law enforcement and armed forces; managing local administration; offering support in demining operations; the rebuilding of infrastructure, etc.

Such general objectives mean the need of diverse and decisive measures for the exercise of the mandate issued by the Security Council. In certain situations the deployment of operations can be applied as measures of coercion, such as: actions to realize sanctions, blockade, interdiction to use or design certain weapons, territorial or geographical limitations regarding use of force, etc.

The humanitarian organizations are involved in the political and military activities that aim at reducing the parameters of the conflict and re-establishing the peace, especially after the perpetuation of humanitarian military interventions. As examples we can bring Cambodia, Bosnia, Kosovo, Afghanistan and Iraq.

„The humanitarian imperative", which represents the ethical essence of the majority of humanitarian organizations, confirms that there are obligations to offer help outside of any conditions, always and in all circumstances, when such need appears. However, in the opinion of some experts, the main responsibility for the security and welfare of citizens lies with their governments, while the "humanitarian help is needed only in cases when governments or combatants lack desire or capacity to fulfil their obligations"[61]

If we apply the criterion of discourses that take place today in the area of armed humanitarian interventions, we can wonder – would they be possible in the absence of such an organization as UN – ready to contribute towards reestablishment of order, destroyed by military operations?

The humanitarian organizations found that it is not so easy each time to invoke exclusively the moral responsibility of governments. Ethical dilemmas of the humanitarian activity were brought to light, for example, in case of armed conflicts of 1994, which had as a goal the help of Rwanda refugees, placed in camps on the territory of Zaire, many of whom took part directly in the Rwanda genocide. These camps served as bases and centres for recruitment for the ethnic groups of Hutus, who continued to commit murder and plunder on the territory of Rwanda. It is

61 Швайцер Б. Моральные дилеммы гуманитарной деятельности в эпоху «гуманитарных» военных интервенций. Международный Журнал Красного Креста. Сборник статей. 2004 г., стр.115.

obvious that the obligation to get involved and ensure at least the demilitarization of the camps lied mainly with the government of Zaire and possibly UN, a fact invoked on several occasion by the international humanitarian organizations. On the other hand, in absence of international humanitarian assistance the existence of such camps would be impossible, that is why some of the humanitarian organizations felt a moral responsibility. Eventually, the armed forces of Rwanda attacked these camps in October 1996, which increased the number of victims.[62]

Very often, the process of humanitarian assistance is accused of the fact that it subsidizes the politics of war, leading to a prolonged duration of the conflict, the humanitarian aid ending up directly or indirectly in the hands of combatants. As examples, the conflicts in Somalia, Liberia and Angola are often brought.

One of the characteristic elements of the modern world is that if previously the concept of humanitarian activity had clear limits, having the goals of alleviating the effects of war, in the 90' of the 20th century it became a principle of international relations dictated by the West. After the hard lessons of Bosnia, Somalia, Rwanda a series of experiments were conducted, especially by the USA and the EU, aiming at integrating the humanitarian help into the political measure adopted on the conflicts in question. The attempts to use the humanitarian help as a political measure were made, especially in Serbia, Sudan (Darfur region), Afghanistan, and North Korea.[63]

Despite the fact that in latest years a lot has been said on a possible lessening of the role of UN in the process of managing PKOs, this position is not unanimous. The Secretary General of the UN, K. Annan (1997-2006) considered that the fact of using coalition forces can be argued exclusively through the practical considerations as a first step of extraordinary reaction to a situation of crisis, given that it allows time for the preparation of operations under the aegis of UN.

The realities of the day dictate the need to adjust the new requests to the peace-making process. Here are several ideas and basic criteria that the UN Secretariat follows in its daily activity, although they are not included into formal instructions:

1. PKOs need to have the possibility to change in a visible manner the life of people from the territory of the mission from the first stages of deployment. The head of the mission should have the right to use a small part of mission funds for projects that would have short term effects, whose objectives are to raise the quality of life in real terms, contributing to trust towards the new mission.
2. Free and fair elections need to be seen as a part of a larger effort aimed at consolidating institutions of power. The elections should be supported by a larger process of democratization and founding of a civil society, which includes effective civil governance and a culture of respect towards the fundamental human rights, to avoid creating the impression that the elections are only a means to confirm the tyranny of the majority and that their results could not be annulled by force after the end of the peacekeeping mission.
3. Observers from the civilian police of the UN cannot be considered pacifiers when their presence is only aimed at avoiding illegal actions from the officers of local police or when they simply record such actions. Today the objectives that are put before a pacifying mission dictate that the civilian police to have goals such as: reforming, perfecting local police services in conformity with the standards of democratic police activity and human rights, in addition the civilian police should possess a potential of effective response to sporadic manifestations, as well as means of legitimate self-defence.

62 Ibidem, p.116.
63 Ibidem, p.121.

4. The component of human rights which is part of PKO, in reality, is one that is very important for the process of re-establishing effective peace. The UN workers for human rights can have an important role, for example, in contributing towards a general program of national reconciliation.
5. Disarming, demobilization and reintegration of former combatants is one of the main means of consolidating the post-conflict stability, including minimizing the threat of the restart of the conflict. Thanks to this fact, the process of re-establishing the peace brings direct contribution to ensuring social security and rule of law. However, the main goal of disarming, demobilization and reintegration cannot be attained if these three elements are not put into practice all at the same time. The demobilized combatants will do everything possible to return to the path of violence, in case they would not find subsistence means, in other words if they are not reintegrated into the local economy. At the same time, the reintegration element of demobilization and reintegration is funded on a voluntary basis that is why the financial means in this respect are almost never enough.
6. The way to the complete normalization of life in the society that went through a conflict goes clearly through the application of measures for national reconciliation that needs to embrace all the participants in the conflict.[64]

Disarming, demobilization, and reintegration constituted the main element of over 15 PKOs in the last 15 years. More than ten of the institutions and programs of the UN, as well as other international organizations governmental and non-government, fund these programs. An impression is formed that specifically due to this fact – a large number of actors involved in planning and supporting the process of disarming, demobilizing and reintegrating – this program lacks a single coordination element in the UN system.

On the threshold between the millennia, the international community reached the conclusion that an effective process of re-establishing the peace needs a centre for coordination of various and diverse forms of activity pertaining to the consolidation of peace. The community of donors should regard the UN as such coordination. Such an effective process is a *de facto* hybrid of political activity and activity in the area of development that aims at eliminating the sources of conflicts. It needs the active involvement of parties, and such involvement should be multidimensional in its nature.

64 Заемский В.Ф. ООН и миротворчество. Курс лекций. Москва: Международные отношения, 2008, стр.169-171.

7. ASPECTS REGARDING PUTTING INTO PRACTICE THE TRANSITIONAL JUSTICE

When finding an applicable jurisdiction in the conditions of a present frozen conflict we will bring arguments to support the application of transitional justice. The fact is that the current situation cannot continue indefinitely, and the application of deferring to justice of persons who committed acts of torture, war crimes and crimes against humanity, is considered as an imperative necessity in the modern international law, including the conventional and customary law.

When characterizing the transitional justice, we start from the fact that the ordinary justice has its limits, while the creativity of states with *common law* system gave birth and developed in the 90s of the 20th century transitional justice. This concept is welcome and allows re-establishing in a fundamental manner the notion of justice in a post-conflict society, determining the boundaries and cementing the certainties. But the tasks that stand before transitional justice are colossal, firstly because it needs to avoid the institution of a spiral that could lead to a possible vengeance, allowing meanwhile time for the possibility for cohabitation of victims and former torturers. In addition, it is involved in the pursuit of truth and justice to reintegrate the victim and their dignity, to propose reparations, finding meanwhile ways of alternative or judiciary punishment for those responsible, eliminating impunity.

As it can be seen from the present study, the process of transitional justice in a post-conflict society is governed by the principle of justice. Criminal justice for victims and against criminals, reparatory justice for the entire society, thus the coherence and interaction must be re-established.

In principle, transitional justice allows putting into application a number of repressive and preventive mechanisms in the area of law and security of state and persons. Repressions, reparations and reconciliation represent key words in this sense. The consolidation of the normative framework and its revision means a certain number of reforms in the state apparatus.

Good political and economic governance is the basis of development for countries in transition, providing an alternative to the violence as means of expression, of political victory and accumulation of wealth. The involvement of local actors in adopting and applying the development policies, the completion of public accounts and fight against corruption contributes to the balance in the state.

At the same time, we accept that traditional justice has a complementary role, fight against impunity, while the prevention of international crimes and guarantees for the respect for rule of law and human rights fails to be its exclusive competence.

A post conflict society risks returning to the state of crisis. In this sense we need to mention that almost 45% of post-conflict countries return to violence within 5 years of conflict termination. The causes for such effects need to be looked at in the period immediately before and after the conflict.

The key in managing the problems of a post-conflict situation resides in the analysis of the situation of stability that preceded the conflict. The knowledge that the states in war were fragile before the conflict and will so be after it, finding in the post-conflict societies the signs of fragility will allow prevention and reduction of risks of transforming a possible crisis into an armed conflict.

It is important to acknowledge that without truth there is no justice and without justice impunity leads to vengeance. That is why the concept of transitional justice is key to ensuring sustainable peace, preventing the past to come back in a violent form.

Equating from the point of view of effects the grave violations of human right, including torture, with the international crimes, such as war crimes, crimes against humanity and genocide, allows us to suppose that in relation with acts of torture the prescription term can be lifted all the same. The principal argument is that the acts of torture can be committed over a long period of time, especially referring to situations of conflict or totalitarian regimes, while the real possibility to start the prosecution of those culpable can appear only after tens of years. In this sense the objectives of transitional justice can remain unfulfilled, which cannot be considered beneficial for the society in transition. In some cases the state can monitor the situation in a certain territory, which is either under the control of a belligerent party, or is under occupation. As an example we can bring the case of Cyprus, divided into Greek Cyprus and Turkish unrecognized, or the unrecognized transnistrian region of Moldova. When the constitutional structure of Moldova lack control over the territory, it can only monitor the cases of torture that are committed over the last 20 years in that territory. What is important is that if that territory was recognized as being occupied by foreign forces, a de facto situation, Moldova would not be condemned by ECHR for the cases of breach of human rights in the region, a responsibility of the state which de facto controls the region, as provided by the international humanitarian law. We refer here to the case of Ilascu. While once the conflict is settled completely the law enforcement, including those that will be active in the respective region, will have to prosecute the people responsible for the cases of torture. These refer equally to the persons subordinated to Chisinau that committed torture against citizens from the transnistrian region. Transitional justice comes to re-establish the truth for all parties involved in the conflict and does not come, as mentioned, to provide vengeance on the representatives of the opposition. Thusly the chances for a post conflict reconciliation of society are limited. Let us hope that the Moldova authorities in the nearest future will show political maturity, so that the practice of our young state can be used by other societies in transition. In this way, we will demonstrate that we are ready to be part of the states with a high degree of democracy, which have as a priority the rule of law and unconditional respect for human rights.

CLOSING REMARKS

As it was mentioned amongst the attempts made by OSCE to convince the Russian Federation to fulfil the obligations regarding withdrawal of armed forces from the territory of Moldova, we can mention the following – in 1999, OSCE issued a document at the Istanbul Summit that reminds about the decisions of the Budapest and Lisbon summits and reiterated the expectations of the organization regarding an urgent and complete withdrawal of Russian Federation troops from Moldova. At the time the OSCE was ready to extend the term of the mission in Moldova to ensure the security of withdrawal. The results are well known.

Referring to the future status of an observer contingent, including military, we would need to start from the interpretation of the current concept of peace-making policies, which is still managed by the UN. Even though such a mission would be managed on a regional level, this policy needs to be based on the objectives and principles promoted by the UN Charter. Here are some ideas and criteria that the UN Secretariat follows in its activity in promoting the peace-making policy. Even though these are not fixed in a document, the importance of these is still high:

1. The mission needs to have the capacity to improve the living conditions of the population from the conflict region, including through promotion of programs that would involve representatives of all parties to the conflict.
2. One of the objectives of the mission needs to be the organization of free and fair elections. At the same time the elections need to be supported by a larger process of democratization and consolidation of civil society, which includes the ensuring of a good civil governance and promotion of a culture of respect for the fundamental human rights, which will lead to ensuring the legitimacy of the future electoral process.
3. Modern missions also include the objective, especially in the cases of observers from police missions, to reform and engage the police services in conformity with international standards of police activity and human rights, including to ensure that the civilian police has the potential to react effectively to cases of mass disorders.
4. An ever increasing role is assigned to that of ensuring human rights. The representatives of the mission can have a major role in such processes, for example putting into practice of a national program of reconciliation.
5. Amongst mandatory programs of peacekeeping missions after the end of cold war is the so called DDR – disarming, demobilizing, and reintegrating the former combatants, which contributes to the stabilization of the post conflict situation and leads to minimizing the threat of reigniting the conflict.
6. We warn that amongst the conditions that ensure the normalization of life in a post conflict society, an important role is played by the national reconciliation, which needs to include all parties to the conflict.

The low level of efficiency of the current format of negotiation in the transnistrian conflict settlement is obvious. It is one of the few cases in the history of PKOs, if not the only one, when a party directly involved in the conflict, supporting clearly the actor on the other side of the conflict, takes the role of a mediator in the settlement of the conflict. In this manner one cannot speak about respect for the principles of peace-making policy, regardless of the level of deployment – either direct control of UN or managed by another international regional organization, but governed by the principles of the UN Charter.

The reality is that the EU is increasingly involved in the Moldova situation. In the current conditions when the principle of impartiality is not respected by one of the actors in negotiation process, the need to change the negotiation format becomes obvious. As mentioned in the report

the Russian Federation lost the moral right to be the main important player in the solution of the transnistrian conflict, firstly because it has systemically breached the principle of impartiality.

Amongst the argument brought here, we firstly mention that over the last 22 years the situation lacked positive change, on the contrary – the parties were put in positions of inequality. We do not refer to the case of international law – as mentioned in the current report, Moldova is the only subject of international law that represents this territory, while the arguments brought by the transnistrian party in supporting their right for separation are unfounded, lacking any basis in international law. At the same time, the reality is that instead of applying the DDR practice the forces from the left bank of Nistru were armed unjustifiably, both from the quantitative and qualitative standpoint, while the Tiraspol authorities continue promoting an aggressive policy against Chisinau lacking an adequate response from the main mediator.

In its capacity of party to the ceasefire agreement of 1992, Russia systemically breached the provisions of this legal document that it signed. We are talking about several factors, including political, social and economic, humanitarian. Here are only a couple of them.

Firstly, despite the fact that parties to the agreement are Moldova and Russia, the efforts of the latter were to include the so called transnistrian side.

Secondly, during all these years the introduction of pseudo-customs and border checkpoints by the transnistrian side was supported by the Russian Federation, breaching the 1992 agreement principle (article 5) – free circulation of people, assets and services.

Thirdly, it is systemically infringed the concept of humanitarian assistance offered by a state or international organization. The international practice is based on the fact that such assistance is awarded to the state or a concrete region only with the agreement of the central administration. Normally, Moldova and Russia need to regulate the mechanism of award and distribution of humanitarian help based on the document negotiated by the parties and applied in a transparent and equitable manner.

The fourth argument is the differentiated nature of economic relations between Moldova and Russia, on the one side, and Russia and the transnistrian region on the other which again proves the breach of international commitment of Russia towards Moldova. The principle of *pacta sunt servanda* remains one of the fundamental principles of international law, recognized as a *jus cogens* norm.

The fifth point is that the political influence that the Russian Federation exercises in the transnistrian region allows the Tiraspol administration to have a non-constructive attitude in the dialogue with the Chisinau authorities in the settlement of the transnistrian conflict. As an argument can be brought the jurisprudence of the ECHR in case of Ilascu and others versus Moldova and Russia (2004) and Catan and others vs. Moldova and Russia (2010), which can be considered as evidence of effective control by Russia over the transnistrian region.

We remind that the concepts of effective control and general control were described in this report, argued through the judicial practice of the International Court of Justice and the Criminal International Tribunal for former Yugoslavia.

The sixth point, is that despite the fact that the armed forces of the Russian Federation cannot be considered occupation forces in the strict sense of the term as it is interpreted in the international public law, certain criteria allows us to find that the presence of Russian armed forces on the territory of Moldova exceeded any legal arguments, let alone moral side of the question. The examples were – the report of the American bar association of 2005, the case of Ilascu examined

by ECHR, allow us to find that Russia is directly involved in this conflict, which is also confirmed by the ceasefire agreement between Russia and Moldova of 21 July 1992.

In turn, ensuring the security of the administrative border with the transnistrian region can take place through effective checkpoints which, in turn, need supplementary argumentation, including from the point of view of international law either being under occupation region, or under the control of insurgents.

In such conditions, the revision of the Agreement can be argued through the philosophy of *rebus sic stantibus*, which supports the refuse from any treaty can take place as a result of essential change in conditions. The state of affairs over the last 22 years, including the effects of presence of armed forces of Russia and critical situation in Ukraine, especially with the military intervention of Russia in this state (having two states parties to the process of settlement of the transnistrian crisis in a de facto of war), make such philosophy quite relevant. Even though this philosophy is not part of the codification document of international treaties law—the Vienna Convention of 1969 – it is recognized the fact that this norm has a customary nature. At least this philosophy can be an argument to support the position of Moldova regarding the need to change the format of peacekeeping to a civilian observer format that would involve a very active involvement of the EU in the definitive settlement of the transnistrian conflict.

CONCLUSIONS AND RECOMMENDATIONS

As a result of this study we found the following:

1. The inefficiency of the negotiation format became obvious, given that over the years it was confirmed that Moldova de facto found itself in total isolation, lacking support apart from formal on behalf of OSCE and a declarative one on behalf of Russian Federation.
2. Equally, Ukraine, in its capacity as mediator, all these years was a de facto supporter of the transnistrian region, given the large number of ethnics and citizens of Ukraine in the region.
3. Given that the interest of Russia and Ukraine stems from large number of ethnics and citizens residing in the region, it is logical the request to have a more active involvement of the EU in the dialogue, given that on the territory of Moldova including the transnistrian region reside a large number of Romanian citizens, member of the EU.
4. The annexation of Crimea demonstrated to the entire world that even in the existence of international commitments that guarantee the territorial integrity and inviolability of state boundaries (Budapest Memorandum of 1994) of permanent members of the UN Security Council, one of the guarantors allowed itself to overtly infringe its international commitments.
5. In these conditions, we consider necessary to replace the current format of peacekeeping forces with a contingent of civilian and police observers based on the principles that establish the modern concept of pacifying policies promoted by the UN, listed earlier.
6. It is necessary to intensify the diplomatic dialogue with the EU institutions to ensure the most active involvement in the process of conflict settlement, including through attributing a decisive role in the future format.
7. At the same time, we cannot deny the importance of participation in a new format of negotiations of the states already present in the process– Ukraine and Russian Federation– with the condition that the latter lacks an imaginable and claimed right for veto.
8. Regarding another important issue – attribution of responsibility towards persons that commit illegal actions in the territory of Moldova that is not controlled by the Chisinau constitutional authorities, we consider that:
   - Prosecution of people who committed international crimes, including war crimes, crimes against humanity and genocide, is possible based on the principles of universal jurisdiction;
   - Prosecution of persons who committed crimes under the general law can and should take place based on cooperation with Interpol, Europol and equally based on bilateral agreements with other states and some multilateral agreements entered into within some international organizations that Moldova is part to.