

Volume 95 Number 891/892 Autumn/Winter 2013

INTERNATIONAL REVIEW

of the Red Cross

Humanitarian debate: Law, policy, action

**Multinational operations
and the law**



ICRC

Aim and scope

Established in 1869, the *International Review of the Red Cross* is a periodical published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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EDITORIAL

MULTINATIONAL OPERATIONS AND THE LAW – GREAT EXPECTATIONS, GREAT RESPONSIBILITIES

Since time immemorial, belligerents have formed alliances to defeat a common enemy, to conquer territory, or to defend it. Alliances between states have sought not only to fulfil an offensive objective, but also to deter attacks and ensure stability and peace in international relations. In addition to the military advantage they may offer, coalitions or alliances may appear to give additional legitimacy to the cause at stake.

In modern times, the various systems of alliance have failed to ensure international peace and security – the two World Wars are a painful testimony to this, with conflicts between two states quickly escalating into global war. In 1945, the United Nations (UN) Charter prohibited the use of force in international relations (without prejudice, however, to the ‘inherent’ right of each state to use force in legitimate self-defence). The Charter also set up a collective security mechanism, whereby each state accepts that the security of one is the concern of all and therefore commits to a collective response to threats to and breaches of the prohibition to use force. This mechanism specifically allows states to use force collectively in situations where international peace and security are threatened. However, this system is certainly not perfect, as it reflects a compromise between collective response and the respect for states’ sovereignty, in addition to embedding a special role for the victorious powers emerging from the Second World War through the possibility of vetoing the UN Security Council’s resolutions.

Whether undertaken under UN command and control or by a regional organisation (such as the North Atlantic Treaty Organisation, NATO) acting with the authorisation of the UN, multinational operations are a common phenomenon today and, in the experience of many states, the *only* type of military operations they have recently conducted.

Today, multinational forces may become involved in hostilities and be called upon to use force against organised armed groups. Sometimes, they receive the explicit mandate to counter the threat emanating from such groups.¹ Given the changing landscape of warfare and of international relations, a number of legal and humanitarian challenges related to the engagement of multinational forces remain to be solved. This issue of the *Review* will expose these new challenges and bring answers to these questions.

What is at stake?

In an ever-changing environment, multinational operations are now deployed with more complex, multidimensional mandates. Before engaging in an operation, states

and their militaries need to know what their legal status will be in the context, and what rules will apply, for example, when they use force against local insurgents. What protection does international law give them? What training needs to be given to troops before their deployment, and how can they be prepared for the growing multiplicity of tasks they will face in the field? According to what standards should they treat people in their power, and when is it lawful to hand such individuals over to local authorities?

The allocation of responsibility between states participating in operations, international organisation(s) and the host state has to be as clear-cut as possible. Even if their capacities do not always match their responsibilities, multinational forces will be exposed to public scrutiny and their troops will be expected to show exemplary conduct. The measures taken by UN peacekeeping missions, in particular, to ensure that the parties to a conflict comply with international humanitarian law (IHL) may also play an essential role in improving the plight of the civilian population.

Leaving aside the study of traditional military alliances, this issue of the *Review* focuses mainly on the following types of multinational operations: first, UN-led peace operations (such as the UN Operation in Côte d'Ivoire, the UN Stabilisation Mission in Haiti, or the UN Interim Administration Mission in Kosovo); second, operations authorised by the UN but carried out by other actors, such as a regional organisation or a coalition of states (such as the African Union Mission in Somalia (AMISOM), or the International Security Assistance Force (ISAF) in Afghanistan); and third, hybrid or co-led operations (such as the African Union–United Nations Operations in Darfur (UNAMID)).² A number of legal and operational challenges remain outstanding across all types of multinational operations.

The evolution of United Nations peacekeeping operations

One cannot discuss the evolution of multinational operations without looking first and foremost at UN peacekeeping operations.

Since 1948, the UN has launched 69 peacekeeping operations,³ whose mandates have varied greatly over time depending on the conditions on the ground and on the global context, as explained by Ronald Hatto in his opening article in this edition of the *Review*. The first formally named 'peacekeeping mission' was the First UN Emergency Force (UNEF I), established in November 1956 between Egypt and Israel during the Suez Crisis. Between then and 1989, the UN launched sixteen peacekeeping operations mostly under this traditional form of 'interposition forces'.

1 See, for instance, SC Res. 2098, 28 March 2013, para. 9, authorising the Force Intervention Brigade in the Democratic Republic of the Congo (DRC) to, *inter alia*, neutralise armed groups and 'reduce the threat posed by armed groups to state authority and civilian security in eastern DRC'.

2 Established by SC Res. 1769, 31 July 2007, UNAMID incorporated former AMIS personnel into its structure.

3 See United Nations Department of Peacekeeping Operations, 'Peacekeeping Fact Sheet', 31 May 2014, available at: www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml. All internet references were last accessed in June 2014.

They consisted of military observers, unarmed or lightly armed, mandated to monitor and report on ceasefires or peace agreements.

The end of the Cold War modified the environment in which peacekeeping forces operated and prompted a move towards more complex, multidimensional missions mandated to lay down the foundations of lasting peace in certain contexts.⁴ In addition to the traditional military and police components, such missions have included increasingly important civilian components (legal experts, deminers, electoral observers, humanitarian workers, economists and so on).

The first four decades of multinational operations saw the UN engage in numerous challenging contexts ‘when there was no peace to keep’⁵ or when peace was extremely fragile, sometimes resulting in terrible failures, as in Somalia, Rwanda and Bosnia. This led to what Ronald Hatto describes in his article as a ‘temporary standby’ in UN peacekeeping operations, or at least a decline in their ambitions until 1999. However, the realisation that the UN was the only organisation able to carry out operations in virtually any area of the world brought UN peacekeeping back to the fore and, since June 1999, the number of multinational operations under UN command and control has steadily increased, with twenty peace operations launched between June 1999 and April 2014.⁶

Today there are sixteen UN peacekeeping operations around the world, to which 122 countries are contributing military, police and civilian personnel. India, Bangladesh and Pakistan are the lead troop-contributing countries. As of March 2014, UN peacekeeping operations were composed of 97,518 uniformed personnel (police and military personnel armed and unarmed) and 16,979 civilian personnel, as well as other additional staff (UN volunteers and so on). Their total annual budget amounts to \$7.9 billion for the period 2013–2014.⁷ All UN peacekeeping operations considered, the UN commands the second-largest number of deployed troops in the world after the United States.

In the opening interview of this issue of the *Review*, General Babacar Gaye, Military Adviser for UN Peacekeeping Operations in New York, brings an operational perspective of the challenges faced by peacekeepers around the world.

Increasingly robust, multidimensional and protection-oriented missions

Multinational operations continue to evolve as a consequence of the complexity of the tasks at hand.

4 These peace-building missions have included the organisation of elections, the disarmament, demobilisation and reintegration of former combatants, and the restoration of the rule of law, to name only a few. See United Nations, ‘Peace and Security’, available at: www.un.org/en/globalissues/peacesecurity/.

5 ‘We tried to keep peace and apply the rules of peacekeeping when there was no peace to keep’: Kofi Annan, Report, November 1999.

6 Five of those were deployed between June 1999 and July 2000, in Kosovo, Sierra Leone, East Timor, the DRC and Ethiopia/Eritrea.

7 See above note 3.

UN peacekeeping missions have evolved from small observer missions to increasingly robust operations, as illustrated most recently by the Force Intervention Brigade set up under the UN Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO). On 28 March 2013, following intense conflicts in the North Kivu region of the Democratic Republic of the Congo (DRC), the UN Security Council adopted Resolution 2098 creating a Force Intervention Brigade tasked ‘with the responsibility of neutralizing armed groups . . . and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities’.⁸ Not only is this the first time the UN has set up a force with a specifically offensive – rather than defensive – mandate, with the aim of improving the protection of civilians, but it also illustrates the development of interactions between the military components of multinational forces and an increasing number of civilian partners, such as experts in the organisation of elections.

The ever more ‘all-encompassing’ mandates under Chapter VII of the UN Charter have included over the years a specific mandate to protect civilians under imminent threat of physical violence.⁹ As Haidi Willmot and Scott Sheeran explain in this issue of the *Review*, the concept of ‘protection of civilians’ has evolved over time and is understood differently by the humanitarian, human rights and peacekeeping communities. These various perspectives have to be reconciled in order to guarantee an efficient fulfilment of this mandate.

The multidimensional aspect of peacekeeping has been reinforced over these last few years, and this has led the UN to progressively realise that it cannot efficiently deal with the increasingly wide range of peace-building activities on its own and that it has to work in close collaboration with the growing number of other, increasingly important, humanitarian actors: the African Union, the European Union (EU), NATO and other regional and sub-regional organisations, as well as private actors and non-governmental organisations. In this issue of the *Review*, Jeremie Labbe and Arthur Boutellis explore what they call ‘peace operations by proxy’, in which UN personnel are supported by or support national, regional or multinational non-UN partners. For instance, UN Security Council Resolution 2100 authorised French troops to intervene in Mali to support MINUSMA when it was placed ‘under imminent and serious threat’. In Somalia, the UN supported AMISOM. Labbe and Boutellis analyse the consequent tension between peacekeeping and humanitarian action; they also examine the legal and policy impacts on humanitarian action of these UN partnerships with non-UN actors, and put forward some solutions to diminish these impacts.

⁸ See above note 1.

⁹ The first UN operation with an explicit protection of civilians mandate was the UN Mission in Sierra Leone (UNAMSIL), established in October 1999. In 2000, the Brahimi Report found that, regardless of the nature of their mandate, ‘all peacekeepers – troops or police – who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, consistent with “the perception and the expectation of protection created by [an operation’s] very presence” (see S/1999/1257, p. 51)’. See United Nations, Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305–S/2000/809, 21 August 2000, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/55/305.

Legal challenges

The above elements highlight the need for the international community to develop a coherent legal framework that embraces the complexity of such operations. When it comes to the law, despite extensive literature on multinational operations, much remains to be clarified. In 2011, the International Committee of the Red Cross (ICRC) ‘submitted that a number of legal questions relating to peace operations remain unsettled and, in light of their importance and consequences, deserve to be closely examined’.¹⁰ The ICRC based this observation on its extensive experience and interaction with various multinational forces on the ground over the years: today, it operates in all contexts where UN peacekeeping forces are deployed.¹¹ It was present in Rwanda during Operation Turquoise, in Kosovo when the NATO mission in Kosovo (KFOR) deployed, in Cote d’Ivoire during Operation Unicorn, and more recently, in Mali when Operation Hydra deployed. It has shared the same operational environment with ISAF forces in Afghanistan, AMISOM forces in Somalia, and the International Force for East Timor (INTERFET), among others.

The legal status of UN peacekeepers

The increasing number of partnerships and of troop-contributing countries enables wide-ranging activities, but it does not come without difficulties. In this issue of the *Review*, Dieter Fleck discusses the particular challenge posed by the determination of the legal status of UN peacekeepers, analysing in detail the shortcomings of the 1994 UN Convention on the Safety of UN and Associated Personnel. This document criminalises attacks against UN peacekeepers who are not ‘engaged as combatants against organized armed forces and to which the law of international armed conflicts applies’ (Art. 2(2)) – a sentence that has triggered intense debate among legal scholars. Dieter Fleck further discusses the ways in which Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs) can help in better defining the status, rights and obligations of UN peacekeepers.

Applicability of international humanitarian law to multinational operations

The applicability of IHL to multinational forces acting under Chapter VII has long been subject to debate. Indeed, in the past, some authors considered that, since these

10 ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, official working document of the 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November–1 December 2011, p. 30, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

11 Today UN peacekeeping missions are deployed in the Central African Republic, Western Sahara, Mali, Haiti, the DRC, Afghanistan, Darfur, Cyprus, Lebanon, Abyei, Kosovo, Liberia, South Sudan, India and Pakistan, Cote d’Ivoire and the Middle East (military observer mission). See United Nations Peacekeeping Operations, ‘Fact Sheet’, 31 May 2014, available at: www.un.org/en/peacekeeping/documents/bnote0514.pdf. The ICRC is currently operational in all of these contexts.

forces were representing the majority of states fighting for a 'just cause', they should not be considered as parties to armed conflicts bound by IHL.

However, as Tristan Ferraro explains in his article, in discussing the applicability of IHL to multinational operations, one must clearly distinguish between *jus ad bellum* (the rules related to the authorisation or prohibition to use armed force under public international law, i.e. the reason for waging a war) and *jus in bello* (the body of law regulating the conduct of hostilities between belligerents and protecting the persons affected by the armed conflict). Whatever the justification of the war or its underlying 'just cause', all belligerents are equally bound to respect certain rules in order to ensure a minimum of humanity in war. Today there seems to be a general consensus that it is *possible* that multinational forces can become parties to an armed conflict. Frederic Naert, Katarina Grenfell and Peter Olson further offer some insights as to the EU, UN and NATO perspectives on the issue of applicability and application of IHL to multinational forces.

Legal classification of situations involving multinational forces

The legal classification of a situation involving a multinational force – that is, whether the legal frame of reference should be that of international armed conflicts, non-international armed conflicts, or domestic law and human rights law – raises complex questions. As the debate between Eric David and Ola Engdahl in this issue illustrates, the views diverge on the implications of the involvement of a multinational force for the classification of a situation. This determination is key to the identification of the legal framework applicable to each and every situation.

Interoperability and multinational operations

'There is only one thing worse than fighting with allies, and that is fighting without them.'¹² This quote by Winston Churchill, speaking about the Anglo-American relationship during the Second World War, reflects the ambivalence of multinational military operations: the advantage of combining forces to overcome an enemy, but also the difficulty of working with foreign troops, who deploy different materiel, come from different cultures, speak different languages, may pursue different political objectives and are bound by different legal obligations.

Indeed, even when the applicability of IHL in a multinational operation is established, and the situation is classified, states will not all be bound by the same international obligations. While the Geneva Conventions have been nearly universally ratified, this is not true for all treaties. States may thus have differing legal obligations under IHL and international human rights law (IHRL) in times of armed conflict, as well as differing interpretations and implementations of such

¹² Viscount Alanbrooke, diary, 1 April 1945, as quoted in Arthur Bryant, *Triumph in the West, 1943–1946*, Grafton Books, London, 1986, p. 445.

obligations. For example, they may have different rules of engagement, chains of command and stances on the extraterritorial applicability of human rights law. The coordination of forces subject to different legal obligations is a crucial challenge for multinational forces. The means to ensure a certain legal interoperability between troops is explored by Marten Zwanenburg in this issue of the *Review*.

Detention by multinational forces

Multinational forces today are recurrently involved in the detention of individuals, but they may also themselves be captured in the course of an operation. Two issues stand out as particular challenges: the procedural safeguards for detention in non-international armed conflicts, and the transfer of detainees to local authorities or to other troop-contributing countries.

States have diverging views as to whether persons deprived of their liberty are protected only by IHL or also by IHRL in times of armed conflict. There is also some disagreement as to the origins of the legal basis for detaining or interning individuals. Moreover, states have diverging interpretations of the principle of *non-refoulement*, which prohibits them from transferring detainees or internees to a partner state that is likely to subject those persons to torture or cruel, inhuman or degrading treatment or punishment. States and international organisations have sought to deal with these challenges in various international processes. In this issue of the *Review*, Bruce Oswald addresses these questions and discusses the intergovernmental project on the 'Handling of Detainees in International Military Operations', also known as the Copenhagen Principles, adopted on 20 October 2012. This initiative is aimed at elaborating a common approach among 22 states to ensure the humane treatment of all persons deprived of their liberty in the context of a multinational operation, and to ensure respect for IHL and IHRL during detention and transfer. The ICRC is currently conducting an extensive consultation process to enhance the protection of persons deprived of liberty in non-international armed conflicts.¹³

Attribution of responsibility for acts committed by multinational forces

Finally, another challenge of multinational operations is the identification of the entity which should bear responsibility for the commission of a wrongful act committed in the course of an operation. Does responsibility lie with the state whose armed forces committed the violation, or the international organisation under whose command and control the troop-contributing state was operating, or both? As Paolo Palchetti explains in this issue of the *Review*, this is particularly difficult given that states usually retain a certain level of control over the troops they lend to

13 See ICRC, 'Strengthening International Humanitarian Law: Protecting Persons Deprived of Their Liberty', synthesis report from regional consultations of government experts, November 2013, available at: www.icrc.org/eng/assets/files/2013/strengthening-protection-detention-consultations-synthesis-2013-icrc.pdf.

an international organisation, complicating the determination of the entity having control over the acts of the troops at any given point in time. Dual responsibility may be the only option for holding an entity responsible.

Humanitarian engagement with multinational operations

The interactions between humanitarian actors operating in armed conflicts and multinational forces are complex, both at the operational and policy levels. On the one hand, the presence of multinational forces may be seen as contributing to the security of humanitarian and other actors, creating a secure environment for them to deliver their services to the people in need, or escorting them when necessary. However, this may have the undesirable consequence of turning humanitarian actors accompanied by military forces into potential collateral damage from attacks targeted against the latter. The distinction between the respective roles of humanitarian actors and multinational forces is therefore crucial. The mere coexistence of humanitarians and multinational forces in the same conflict areas raises the question of coordination and civil–military integration, and the related risks of confusion in the eyes of the population and armed actors between the political, military and humanitarian agendas. It remains important to underline the necessity of preserving the essence of neutral and independent humanitarian action.

As with all parties involved in situations of conflict, the ICRC carries out bilateral dialogue with multinational forces on sensitive issues, such as allegations of violations of IHL. The complexity of this dialogue, due to the sheer multiplicity of actors involved and the global architecture of multinational operations, has prompted the ICRC to reflect on a coherent, comprehensive approach to this type of dialogue.¹⁴

For the ICRC, humanitarian engagement with multinational forces means first and foremost establishing dialogue on their rights and duties, as well as on key issues of humanitarian concern. The ICRC's dialogue with UN peacekeeping operations, for example, focuses on the protection of the civilian population, detention, demining and the conduct of hostilities, among other aspects. The ICRC also offers its services in pre-deployment briefings and dissemination sessions in the areas of deployment to troop-contributing countries. In these briefings, the role, mission and activities of the organisation are explained, and educational material

14 At the institutional level, in New York, the ICRC maintains dialogue with the UN components shaping policy on peace operations (the UN Security Council, General Assembly and Secretariat – including, among others, the Department of Peacekeeping Operations (DPKO), the Department of Department of Field Support (DFS), the Office of Legal Affairs (OLA) and the Office for the Coordination of Humanitarian Affairs (OCHA)) as well as with the troop-contributing countries and the police-contributing countries' representatives in New York. The ICRC also maintains dialogue with UN peacekeeping missions at the operational level, in the contexts where troops are deployed. When the UN works in partnership with regional and sub-regional organisations in peacekeeping missions, the ICRC strives to establish and maintain a humanitarian dialogue with those partner organisations as well.

and IHL expertise are provided to help integrate humanitarian law and human rights norms into training and doctrine.

In light of the urgent humanitarian challenges of today's world and the ever-evolving mandates of multinational forces, and in view of the key role they play in international peace and security, the need to bring clarity to the roles and responsibilities of multinational forces under the law is becoming ever more pressing.

Vincent Bernard
Editor-in-Chief



Interview with Lieutenant General Babacar Gaye

United Nations Military Adviser
for Peacekeeping Operations*

The spectrum of peacekeeping operations has grown increasingly broad and has come to include various – and sometimes simultaneous – dimensions, such as conflict prevention, peacekeeping, peacemaking, peace enforcement and peacebuilding. With the ascendancy of more robust peacekeeping mandates, such as the one assigned by United Nations (UN) Security Council Resolution 2098 to the UN Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO), there is a need to analyse thoroughly the complexity of the contexts in which peacekeepers are deployed today, the rules applicable to their engagement, and the modalities they can introduce to adapt to new realities. In this interview, the Review sought the opinion of a distinguished military commander and strategist on the future evolution of peacekeeping missions.

Lieutenant General Babacar Gaye has been the serving UN Military Adviser for Peacekeeping Operations and Head of the Office of Military Affairs for the past three years. He has exercised command responsibilities at all levels of the military hierarchy and has been among the privileged officers to lead the Senegalese military. Besides his participation in Operation Fode Kaba II in Gambia and the conduct of several campaigns in Casamance, Senegal, General Gaye has taken part in UN operations in Sinai, Lebanon, and Kuwait, where he commanded the Senegalese battalion during Operation Desert Storm. His experience also includes a tour of duty of more than five years in the Democratic Republic of the Congo as MONUC/MONUSCO Force Commander. Prior to that, he served as Ambassador of

* This interview was conducted in New York on 9 April 2013 by Vincent Bernard, Editor-in-Chief of the *International Review of the Red Cross*, and Mariya Nikolova, Editorial Assistant.

the Republic of Senegal to Germany, Austria, and the organs of the UN in Vienna. General Officer of the Armoured Cavalry branch, General Gaye is a graduate of the prestigious Saint-Cyr military academy and the Ecole Supérieure de Guerre of France.

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How do you see the evolution of peacekeeping missions over time, in particular those having a protection mandate? What do you see as the major challenges today for this type of mission in general?

Peacekeeping has evolved around certain landmark events. In the years following 1994 and the Rwanda crisis, there was a certain disaffection with peacekeeping and an increase in the importance of regional organisations, in particular in dealing with crises such as that in Liberia. A second landmark was the publication of the Brahimi Report.¹ This document formed the framework for the development of peacekeeping, resulting in the deployment of a total of 120,000 peacekeeping soldiers around the world by the middle of the first decade of the twenty-first century. So during that period peacekeeping had considerable appeal. Meanwhile, the majority of conflicts were becoming internal, resulting in the development of concepts such as ‘robust’ peacekeeping and the ‘integrated approach’. These tools have the advantage of being applicable to today’s conflicts.

Yet, as it often happens, one has the impression that ways of adapting to changes in conflict situations are always reactive in nature. This is more or less the situation in which we find ourselves today. We have peace missions around the world, but on the one hand most such missions are in Africa – these are by far the most complex ones – and on the other hand, the large majority of them are deployed in French-speaking countries. At the same time, we see that there are two areas in which we have failed to achieve our objectives, namely the number of peacekeeping soldiers who speak the languages of the countries in which they are deployed, and the number of women involved in peacekeeping activities.

Now, what are the challenges ahead? The first is obviously the problem of resources, as we are going through a difficult period in that regard. Wherever they operate, our peace missions must strive to be as effective as possible. However, the resources available to them are close to being seen as minimal. We also face challenges in terms of capacity. There are areas in which we suffer from a lack of capacity: intelligence, aerial mobility, and mastery of local languages. Then there are obviously the challenges specific to each mission: usually political processes, the problem of reforming the armies of the countries where we are deployed, and of course the fact that peacekeeping has to be accompanied by peace consolidation – one being financed by obligatory resources and the other by voluntary resources. This is how I see the situation and the challenges from my perspective as military adviser.

1 Editor’s note: see the Report of the Panel on United Nations Peace Operations (commonly referred to as the ‘Brahimi Report’), UN Doc. A/55/305–S/2000/809, 21 August 2000.

How can peacekeeping missions adapt to the challenges you have just identified?

Every mission takes place in a specific context and reacts in a different way to these challenges, which are a major source of concern for the UN, where practice most often evolves more rapidly than concepts. With respect to resources, although the UN is learning to do more with less, the effort to offset capability deficits is currently centred on the pooling, at regional level, of the resources essential for our missions. Although the details are still being worked out, we have had to bring this inter-mission cooperation into play on several occasions – for example, to respond to security problems on the border between Liberia and Côte d’Ivoire by a transfer of attack helicopters, and to the emergency in Syria by deploying military observers from other missions. As for capabilities arising from new technologies, we continue to appeal to Member States while at the same time exploring possibilities for outsourcing, which will shortly be the object of an experiment in one of our missions.

Turning to the situation in the Democratic Republic of the Congo (DRC), what, in your view, will be the main challenges in implementing Security Council Resolution 2098 providing for deployment of an ‘intervention brigade’ under the command of MONUSCO as a means of adapting to developments in the conflict?²

First of all, I think the merit of Resolution 2098 is that it is extremely proactive. Secondly, it is a resolution resulting partially from the initiative of the countries in the region. It is because those countries wanted to set up a neutral international force (deployed on the border between the DRC and Rwanda) on the basis of contributions from countries in the region, and because they applied to the UN for funds to finance that force, that we favoured this solution. Moreover, it is essentially the countries in the region that will contribute to manning this intervention brigade. Thirdly and finally, it is a realistic resolution because it takes into account the fact that unfortunately the DRC’s armed forces have been unable to gain the upper hand over the armed groups in the region. It remains to be seen whether it will represent a significant development once it is implemented.

What are the opportunities and costs of other UN-mandated missions deployed in support of peacekeeping missions, such as Operation Unicorn in Côte d’Ivoire?

I believe that such an arrangement is first of all imposed on us by the nature of the crises we face today. We are usually deployed in post-conflict situations. When a post-conflict situation is facing a fresh outbreak of hostilities – as was the case in Côte d’Ivoire – the peacekeeping force is no longer entirely adapted to

2 Editor’s note: see UNSC Res. S/RES/2098 (2013), 28 March 2013, para. 9 and ff.

the circumstances. Our force generation process is very lengthy because it is highly political. So to manage the crisis, we have one possibility: to call upon neighbouring missions, or in other words, to pool certain resources at the regional level. However, we also have another possibility: to ask for volunteers to help us in stabilising the situation. This a concept that is gradually gaining ground.

Furthermore, a peacekeeping force is not a standby arrangements system.³ It does not possess an intelligence-seeking capability, nor does it dispose of any specialised means of freeing hostages. It does not dispose of capacities which are generally found in expeditionary forces. In this context, there is a definite advantage in having a parallel force providing us with such support on a permanent basis. So to sum up, such configurations are imposed on us by the realities on the ground. It may be that they are conceptualised after the event, but with hindsight, it is clear that having Operation Unicorn in Côte d'Ivoire was an advantage; the operation undoubtedly helped to deal with the post-electoral problem.

What are the main challenges, in your view, for peacekeeping in Mali at present?

The situation in Mali is obviously a major challenge. Indeed, I believe it is illustrative of various challenges currently facing us. First of all, it is an internal situation which has deteriorated because political decisions were not taken at the right time or in an appropriate manner. This created the breeding ground on which armed groups operating in vast zones have been able to gain the ascendancy that we see today. It is a further reminder that every time a peacekeeping operation is set up, an effort must be made to bolster a political process; otherwise, we are not building on firm ground. Secondly, we are still in a situation in which the means for establishing the authority of the state – in particular the capabilities of the army – have not lived up to expectations. The third factor is that the regional and continental organisations did play their roles but very quickly reached their limits, which were essentially financial in nature.

You will note that a similar situation can be observed in the Central African Republic. The UN is going to find itself faced with high expectations of its peacekeeping soldiers; we are waiting to see how the Security Council is going to draw up the mandate of this future force. We are also waiting to see with what political processes the mission is going to be associated, and finally, how high-intensity operations can be entrusted to UN peacekeeping forces.

I discussed earlier the association between a UN peacekeeping force and a UN-mandated force in support of a peacekeeping force. We have seen this with Operation Unicorn in Côte d'Ivoire as well as with Operation Artemis in the DRC; we have also seen something similar with the operation EUFOR RD Congo.

3 Editor's note: a standby arrangements system combines homogenous groups of military means or capabilities working together towards the same operational objective, thus providing a more effective response to the inter-army nature of military operations.

We have tried to find a remedy for the lack of reserves constantly suffered by the UN in crisis situations by establishing cooperation between missions: for example, the mission in Côte d'Ivoire was able to use attack helicopters belonging to the mission in Liberia. However, this is not always sufficient. What is needed is a force capable of stepping in and providing support to deal with crises. This is likely what will be set up in the mission in Mali.

What is your view of the 'integrated mission' approach, as exemplified by the African-led International Support Mission in Mali (MISMA)?

A mission is described as multidimensional and integrated because it encompasses all the sectors of activity which have to be sorted out before a crisis requiring the deployment of UN troops can be stabilised. These missions encompass sectors as diverse as child protection, civil affairs, electoral assistance, human rights, security, the rule of law, and so on. They are, in my view, an appropriate response to the new patterns of conflict whose complexity is intimately bound up, particularly in Africa, with issues of good governance. However, putting this type of mission in place is only a preliminary to a solution which depends even more on the smooth functioning of this complex array, on the determination of the host country to resolve the crisis, and on the commitment of the international community to seeking a political solution. In other words, a complex problem requires a complex solution.

Could you explain how your office approaches the force generation process? What challenges are involved, and have you defined certain 'good practices' in this process?

The force generation process is usually set in motion by the adoption of a Security Council resolution, the development of a plan of operation and the drafting of various operational documents defining the organisation and capacities of the units concerned and the tasks they will be required to perform. On the administrative and financial level, continuous exchanges of views between the contributing countries and the departments concerned with peacekeeping and with mission support result in agreements on matters such as reconnaissance of the area of deployment, reimbursement, visits prior to deployment, and the deployment itself. Thus, it is a long process which unfortunately has to cope with the challenges of urgency, of generating sufficient resources, and of their coherent deployment.

Here good practice means forward planning and the pooling of available UN resources so as to respond in an appropriate manner to the challenges mentioned. My services establish informal contacts with potential contributing countries long before the adoption of a resolution, on the basis of proposed levels of personnel and the needs in terms of units outlined in the initial planning process. This approach also relies on the UN Stand-by Arrangements System.

How do you view integration of the law in peacekeeping missions, from the stage of force generation to that of accountability in the event of violations? How is training and dissemination of international humanitarian law and other pertinent norms done among peacekeeping forces?

This is a matter that has become vital. For as long as peacekeeping forces were forces of interposition between two conventional armies, there was practically no problem of that sort. But ever since peacekeeping forces have become involved in internal conflicts within states, they have faced new threats. What posture should a peacekeeping force adopt when it is targeted by children? What should be its attitude with respect to violence against women? What should be the attitude of peacekeepers responsible for protecting populations in relation to the rights of displaced persons? These are all relevant questions we ask ourselves today. It is no longer possible to engage in peacekeeping operations without having a clear idea of the body of rules contained in the law of war. Furthermore, the forces concerned must have a sound understanding of those rules. This is provided for in their instruction and training before deployment. Our colleagues in peacekeeping missions who have to deal with all these issues also receive continuous in-service training. It is their duty to ensure that their forces respect the law. Lastly, it is a fact that today, with the use of force, and being mandated to perform tasks implying the use of force, the very status of peacekeeping forces is being called into question. When we are asked to provide the Congolese army with support in disarming armed groups, some consider that we become parties to the conflict. But at some stage, it becomes necessary to be a party to the conflict in order to resolve it. So there is no obstacle to becoming involved in a conflict as long as that involvement is in conformity with the law.

That is why we have put in place a Human Rights Due Diligence Policy in the context of the support provided by the UN to non-UN security forces. This mandatory policy ensures that the non-UN security forces that we support abide by the same principles as the UN, and clearly demonstrates that respect for international law occupies a very important place in peacekeeping activities. Here the very spirit of the UN is at stake. That is why the Secretary-General put in place a ‘Code of Conduct for UN peacekeepers’,⁴ to ensure that the behaviour of civilian, police, and military peacekeeping personnel remains exemplary. Their legitimacy stems from this.

Do you have any means of involving countries that contribute troops in these reflections, and of engaging in discussions with them on the issues you just mentioned?

Absolutely. We launched the debate, and these principles are indeed a condition for accepting a contribution to a peacekeeping mission. Some proposals for contributions have had to be turned down – diplomatically – because they gave rise

4 Editor’s note: for more information, see the United Nations Conduct and Discipline Unit’s website: <http://cdu.unlb.org/UNStandardsofConduct/CodeofConduct.aspx>.

to problems in terms of compliance with the law. The states concerned were involved in legal issues on matters requiring progress on their part. This conditionality therefore serves as an initial filter, attesting to the mentality within the UN which is really conducive to respect for the law.

How do you see the interaction between humanitarian actors and peacekeepers today, especially in contexts where ‘integrated missions’ are deployed?

First of all, I believe that humanitarian agencies are included in most UN peacekeeping resolutions. Several resolutions stipulate that peacekeeping forces have a responsibility to protect UN personnel, but also to provide support for humanitarian actors. In certain resolutions, this support is particularly explicit. Humanitarian workers are therefore taken into account in the context of a peacekeeping mission. And that is the case under formal mechanisms – the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator coordinates all UN agencies, funds, and programmes, and serves as a link with the humanitarian organisations. Thirdly, the heads of missions are in contact with humanitarian agencies.

As for myself, when I was a force commander and travelling in the field, I always held meetings with humanitarian actors. I used to insist: ‘Don’t tell me what’s working well, tell me what isn’t working.’ Similarly, when I would meet with the territorial commander, I would tell him: ‘Don’t tell me what the Blue Helmets have succeeded in doing, tell me what is not going well and what you expect from them.’

Finally, humanitarian workers are extremely familiar with the situation on the ground. Commanders of peacekeeping forces – while maintaining their decision-making autonomy – and local military commanders find a win-win equilibrium whereby each knows what they can expect from the other. This is the ideal situation. Obviously there may be times when this balance is not achieved. I had this experience in the DRC during an operation carried out in the Ruwenzori area in December 2005 against the armed group ADF-NALU,⁵ which resulted in the destruction and burning of all the ADF-NALU camps and the recovery of a large number of weapons. At the same time, the population was displaced without prior warning, and apparently in a period approaching harvest. Humanitarian agencies saw that as a disaster, so we decided that we would meet them to talk about how to proceed in the future, and about the need to consult them before mounting certain operations, while still respecting confidentiality and time frames.

For those responsible for a peacekeeping mission – and more particularly for the military – it is necessary to be familiar with and open to all actors involved, including humanitarian actors. Such sensitivity is all the more necessary as

5 Editor’s note: ADF-NALU is an acronym for the Allied Democratic Forces-National Army for the Liberation of Uganda (*Forces Démocratiques Alliées-Armée Nationale de Libération de l’Ouganda*), an armed group operating in the east of the DRC.

humanitarian agencies also have their own way of doing things. This is particularly apparent when a new Security Council resolution is being drawn up and when the mandate of some peacekeeping mission is being renewed: humanitarian actors try to influence the content of resolutions by means of reports, and often succeed in doing so.

What is your reading of the future evolution of peacekeeping missions? Does the recent Security Council Resolution 2098 reflect a tendency towards a more 'offensive' concept of peacekeeping missions?

I can reply to this question only by sharing with you my personal viewpoint, which does not necessarily reflect the position of the UN. I think we are moving towards situations in which we shall increasingly need forces capable of carrying out robust operations. I believe that we should proceed in two directions. First, as was already done in the DRC, we should rely more heavily on regional forces, even if that means giving them a UN mandate and having them wear blue helmets. Their motivation and their interest in stabilising the crises affecting their countries will probably be greater than those of troops coming from other continents. We must take this into account, while at the same time striving to maintain the universal nature of peacekeeping. Second, there is a need to encourage Northern countries to become involved again, in particular helping peacekeeping missions to be 'systems of force', by supplying them with the capabilities that they lack, such as aerial mobility and intelligence. It is these two aspects that will allow peacekeeping forces, wherever they operate, to maintain moral ascendancy over the various actors present.

A peacekeeping force is not a war machine. From the semantic viewpoint, the expression 'peacekeeping' can give rise to no misunderstanding. Whatever the adjective attached to it – 'friendly', 'robust', etc. – it is still keeping the peace! So if we want to continue to do peacekeeping, in view of the changes in the nature of conflicts, we have to maintain an advantage over the various other actors. This is what avoids slippage towards a war situation. What was done in Somalia was not peacekeeping: Uganda and Burundi – countries which contribute troops – are in a state of war.⁶ What they accepted in terms of human losses cannot be accepted by a peacekeeping force; this is just not possible and the Security Council would never have countenanced it. So the Northern countries will have to return to peacekeeping one way or another. That is my own personal view.

But I also regret that we are moving towards an environment in which the forces are increasingly having to face situations of war. Sadly, we are going through a period in which hotbeds of tension are flaring up. This is the case in West Africa, which has thus far been a rather stable region: I am thinking of Guinea,

6 Editor's note: in 2011, the African Union Mission in Somalia's peacekeeping troops (composed of Ugandan and Burundian forces, among others) reportedly sustained heavy losses in a deadly confrontation against armed militants in Somalia. See Josh Kron and Mohamed Ibrahim, 'African Union peacekeepers killed in Somalia battle', in *New York Times*, 21 October 2011, available at: www.nytimes.com/2011/10/22/world/africa/african-union-takes-casualties-in-somalia-but-numbers-vary.html.

the Central African Republic, Mali. The difficulty of foreseeing the future and of developing appropriate tools is one of the UN's peculiarities. We do not assemble forces, we do not produce equipment; we only take what is there and those who are willing to come forward, whereas states can analyse situations, make projections, develop materiel, form units, and prepare themselves in accordance with their interests. We are merely the users of what is available. That is why we are always rather tardy.

From peacekeeping to peacebuilding: the evolution of the role of the United Nations in peace operations

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Abstract

Multifunctional peace operations have become an integral part of international society to the extent that they are now one of the major regulating institutions of international relations. The United Nations (UN) is the main player in setting up such operations. The UN has seen a major but gradual evolution of its role in maintaining and establishing peace. Having developed peacekeeping as a form of impartial interposition between belligerents during the Suez Crisis in 1956, the UN has continually broadened its sphere of action. These cumbersome and complex operations are demanding and present the UN with a number of challenges.

Keywords: humanitarian interventions, peacekeeping, UN, multifunctional operations, multinational operations.

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Multinational peace operations have become an integral part of the workings of international society to the extent that they are now one of the major regulating institutions of international relations.¹ The media frequently remind us that, in international relations, certain military and civilian actors endeavour to go to the aid of people in distress, such as in Haiti, or are unable to protect the civilian population as, for example, in Syria or in the east of the Democratic Republic of the

Congo (DRC).² Those members of the armed forces and those civilians are part of multinational peacekeeping operations.³ Between 1988 and December 2012, the United Nations (UN) set up fifty-four operations to restore or maintain peace. If account is taken of the fact that in the first forty years of its existence it set up only fifteen such operations, the interest of the academic world and of the general public becomes easy to understand.⁴ On the other hand, media interest in peacekeeping has not been constant.

Attention should nevertheless be drawn to the fact that while such multinational operations are not recent – there were a large number of interposition operations between the two World Wars – they only started to be formalised at the time of the UN operation in Suez in 1956.⁵ It was not until the United Nations Emergency Force (UNEF) was set up between Egypt and Israel in November 1956 that those multinational peace operations became referred to as ‘peacekeeping operations’ (PKOs). As the tasks carried out by the peacekeepers have evolved, the tendency has been to favour the broader term ‘peace operations’ over ‘peacekeeping operations’.⁶ Peacekeeping has now become just one of the aspects of multinational peace operations. The latter can now entail humanitarian assistance, election supervision, the repatriation of refugees, the disarmament, demobilisation and reintegration of former combatants, the restoration of the state’s ability to maintain security out of respect for the rule of law and human rights, or support for the founding of legitimate and effective governance

- 1 These institutions’ function is to enhance the stability of interactions between the different actors in a given society. Peacekeeping operations have become gradually institutionalised to the point where they have become a virtually unavoidable aspect of the management of armed conflicts within international society.
- 2 It should be noted that the UN sent only an observer force to Syria. That force had to be withdrawn following the attacks on it.
- 3 Those taking part in multinational operations are frequently called upon to work with other humanitarian actors that are not under the command or the control of the UN or of the organisations in charge of the missions.
- 4 In the 1990s, some analysts wondered whether peacekeeping had not become a ‘business’. See Larry Minear, ‘The Evolving Humanitarian Enterprise’, in Thomas G. Weiss (ed.), *The United Nations and Civil Wars*, Lynne Rienner, Boulder, CO, 1995, pp. 89–106; Eugene V. Rostow, ‘Is U.N. Peacekeeping a Growth Industry?’, in *Joint Force Quarterly*, No. 4, 1994, pp. 100–105.
- 5 In 1933, during the Leticia crisis between Colombia and Peru, the League of Nations appointed a commission to govern the territory temporarily; it was authorised to command an armed force of its choice. For the first time, the (Colombian) force wore an armband and displayed a League of Nations flag in addition to the Colombian flag. However, that force was not subject to the direct command of the League of Nations. See Norrie MacQueen, *Peacekeeping and the International System*, Routledge, London, 2006, p. 41; Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge University Press, Cambridge, 2008, p. 235.
- 6 The UN continues to use the term ‘peacekeeping’ to describe its operations. In the specialist literature, numerous authors have adopted the broader concept of ‘peace operations’. See Jocelyn Coulon, *Dictionnaire mondial des opérations de paix 1948–2013*, 2nd ed., Athéna Editions, Outremont, 2013; Paul F. Diehl, *Peace Operations*, Polity Press, Cambridge, 2008; Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations*, Princeton University Press, Princeton, NJ, 2006; William J. Durch (ed.), *Twenty First Century Peace Operations*, United States Institute of Peace, Washington, DC, 2006. Thierry Tardy refers to ‘crisis management’ and draws particular attention to the fact that it has become the most visible international governance activity in the field of security: Thierry Tardy, *Gestion de crise, maintien et consolidation de la paix: Acteurs, activités, défis*, De Boeck, Brussels, 2009, p. 9.

institutions.⁷ For the sake of simplicity, however, the generic term ‘peacekeeping operations’ will be used in this article to mean all multinational peace operations. Lastly, the increase in the number of operations and in their complexity since the late 1980s has led to the involvement of a considerable number of entities other than the UN and the Blue Helmets. Civilian staff of the UN and of some of its specialised agencies, non-governmental organisations (NGOs) and regional organisations have now become fully fledged actors of peacekeeping.⁸

The first thing that is noticeable about UN peacekeeping (and multinational peace operations in general) is the absence of a clear definition from the UN of the concept of peacekeeping.⁹ It was not until the 1992 *Agenda for Peace* that the UN defined its concept of peacekeeping more precisely.¹⁰ That belated effort to define its terms can be explained by the improvised nature of the creation of the first peacekeeping operations and by the lack of any reference to peacekeeping in the Charter of the United Nations. While the UN was established in 1945 in order to ‘save succeeding generations from the scourge of war’,¹¹ its Charter was based on the principle of collective security and on cooperation between the permanent members of the Security Council as a means of avoiding armed conflict. However, the tensions of the Cold War from 1947 onwards were to render inoperable a large part of Chapter VII of the Charter, which deals with actions in the event of threats to peace, breaches of the peace and acts of aggression. That explains why the UN fell back on less ambitious measurements than collective security, which was to be replaced by peacekeeping operations.¹² The blocking of the mechanisms

7 United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines*, Department of Peacekeeping Operations, New York, 2008, Chapter 2.

8 As long ago as 1990, Alan James highlighted the fact that peacekeeping was not an activity reserved exclusively for the UN and that civilians also had a role to play. In his view, ‘peacekeeping is by no means a UN preserve’. See Alan James, *Peacekeeping in International Politics*, MacMillan, Basingstoke, 1990, p. 1.

9 The former undersecretary-general for peacekeeping operations, Jean-Marie Guéhenno, recalls this in the opening lines of an article published in 2002: Jean-Marie Guéhenno, ‘On the Challenges and Achievements of Reforming UN Peace Operations’, in *International Peacekeeping*, Vol. 9, No. 2, 2002, pp. 69–80. Not even the basic principles of UN peacekeeping of 2008 include any clear definition of peacekeeping; rather, they list the ‘range of activities undertaken by the United Nations and other international actors to maintain international peace and security throughout the world’. See United Nations, above note 7, p. 17. It should be noted that the specialist literature contains a large number of different definitions.

10 United Nations, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc. A/47/277, S/24111, 17 June 1992 (hereinafter *Agenda for Peace*). The *Agenda for Peace* makes it clear that ‘Peacemaking is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations’: *ibid.*, Chapter 2, p. 5, para. 20.

11 Charter of the United Nations, 26 June 1945 (entered into force 24 October 1945), Preamble.

12 With regard to peacekeeping, under ‘sécurité collective’ (collective security) in the *Dictionnaire de stratégie*, Serge Sur refers to a ‘reduced form of collective security, at least compared with the provisions of the Charter’ (our translation). See Thierry de Montbrial and Jean Klein (ed.), *Dictionnaire de stratégie*, Presses Universitaires de France, Paris, 2000, p. 508. Boutros Boutros-Ghali, in the introduction to the third edition of the UN book *The Blue Helmets*, stresses the fact that the term ‘peacekeeping’ in the sense of ‘non-violent use of military force to preserve peace’ does not appear in the Charter, in which the concept ‘differs fundamentally’ from the enforcement action to preserve international peace and security to which it refers. United Nations, *The Blue Helmets*, 3rd ed., Department of Information, New York, 1996, p. 4. Norrie MacQueen presents a table in which he compares collective security and peacekeeping and which sets out very clearly the differences between the two concepts – and the less ambitious nature of military and political peacekeeping plans: N. MacQueen, above note 5, p. 77.

proposed in Chapter VII of the Charter, caused by the tensions of the Cold War, resulted in successive Secretaries-General finding innovative solutions to enable the UN to play a role in international security.¹³

Since the first formal interposition mission in Suez in 1956, peacekeeping has been used on many occasions to regulate and contain conflicts. Adopting the terminology of realistic theory in international relations, *peacekeeping* has made it possible to replace minimally the *self-help system* of international politics through the provision of selfless and impartial external assistance for the parties to the conflict.¹⁴ On the basis of that observation, a two-tier definition of UN PKOs can be sketched out at the strategic and tactical levels. At the strategic level, peacekeeping aims first and foremost to regulate and stabilise international society.¹⁵ To that end, PKOs have been used to maintain or restore the sovereignty of states facing external threats or internal disintegration.¹⁶ At the tactical level, peacekeeping consists of operations that are set up by the UN, by states, by groups of states (*coalitions of the willing*) or by regional or sub-regional organisations (alone or in cooperation with the UN) and that are based on the deployment of uniformed staff (soldiers and/or police officers), usually with the consent of the parties concerned, with the aim of achieving impartial interposition between the latter in order to prevent, contain, mitigate or put an end to conflicts and possibly to restore peace between the parties. The parties' consent has been one of the three fundamental principles of traditional peacekeeping (observation and interposition) since the report of UN Secretary-General Dag Hammarskjöld on the establishment and functioning of UNEF. He mostly refers to the consent of the 'states parties', which is not without problems in operations which involve non-state groups that may not agree to the presence of military peacekeepers. The operations in the Congo (ONUC) or in Lebanon (UNIFIL) during the Cold War showed that in such cases, if some non-state groups withdraw their consent to the UN presence, the safety of the Blue Helmets may be at risk.¹⁷ Since 1956, the two other fundamental principles of peacekeeping have

13 For a historical overview of the evolution of the role of the UN in international security, see Alex J. Bellamy and Paul D. Williams (with Stuart Griffin), *Understanding Peacekeeping*, 2nd ed., Polity Press, Cambridge, 2010; N. MacQueen, above note 5; David M. Malone and Karin Wermester, 'Boom and Bust? The Changing Nature of UN Peacekeeping', in Abedajo Adekeye and Chandra Lekha Sriram (eds), *Managing Armed Conflicts in the 21st Century*, Frank Cass Publishers, London, 2001, pp. 37–54; T. Tardy, above note 6; Brian E. Urquhart, *A Life in Peace and War*, W. W. Norton, New York, 1987.

14 William J. Durch, 'Building on Sand: UN Peacekeeping in the Western Sahara', in *International Security*, Vol. 17, No. 4, 1993, pp. 152–153. The *self-help* principle is central to a realistic analysis of international relations. It points out that each state is responsible for its own security. In cases of need, given the anarchic nature of the international system, no one will go to the assistance of a state under attack – hence the need to resort to one's own means in order to survive in this dangerous world. The notion of 'international society' is less pessimistic in insisting on the role of international institutions as a means of mitigating the effects of international anarchy.

15 This view of PKOs is based on a 'Westphalian' concept of international order, which holds that, despite the increase in power of many transnational actors and of the concept of human security, states remain the key players in international interactions. For an opposing view, see A. J. Bellamy and P. D. Williams (with S. Griffin), above note 13.

16 N. MacQueen, above note 5, p. 14.

17 United Nations, Summary Study of the Experience derived from the Establishment and Operation of the Force: Report of the Secretary-General, UN Doc. A/3943, 9 October 1958 (hereinafter Report of 9 October 1958).

been impartiality and the non-use of force except in self-defence.¹⁸ We will see that there are major tensions between the strategic and tactical levels and that this tends to lead to inconsistencies in setting up and carrying out PKOs.¹⁹

This article sets out to present the changes that have occurred in multinational peace operations by focusing particularly on UN PKOs.²⁰ While the latter have evolved to the point of becoming an unavoidable institution of international society,²¹ they have remained influenced by the principles drawn up by Secretary-General Hammarskjöld when UNEF was created in November 1956.²² Peacekeeping has therefore continued without too many policy changes since 1956 as a result of *path dependence* while deploying operations that have become increasingly complex.²³ This explains why, despite the evident limitations in terms of conflict resolution and the existence of institutional alternatives,²⁴ UN peacekeeping has remained the preferred tool for the management of international

18 For a more detailed analysis of the three principles and their questioning during some multifunctional operations, see Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', in *Journal of Conflict and Security Law*, Vol. 11, No. 3, 2006, pp. 465–482.

19 These inconsistencies often arise during operations due to a multiplication of Security Council resolutions aiming at transforming the mandate of the force. The two primary examples of that kind of situation are ONUC in the Congo and UNPROFOR in the former Yugoslavia.

20 We stress the role of the UN because, as emphasised by Thierry Tardy, the UN has been in charge of multinational operations, including as from the 1990s, when many other actors have become involved. Even in operations in which the UN does not deploy Blue Helmets, it still participates through its civilian personnel, as in Kosovo or in Afghanistan. That leadership has, moreover, not been without presenting problems for the image of the UN. See Thierry Tardy, 'Le bilan de dix années d'opérations de maintien de la paix', in *Politique Étrangère*, Vol. 65, No. 2, 2000, p. 389; T. Tardy, above note 6, Chapter 3.

21 The concept of 'international society' was spread, in particular, by the representatives of the English School of International Relations. Hedley Bull, Adam Watson and Barry Buzan are some of the most influential theoreticians of that approach. See Barry Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation*, Cambridge University Press, Cambridge, 2004.

22 Nicholas Tsagourias emphasises the fact that the three principles developed by Hammarskjöld following the establishment of UNEF are constantly affirmed and reaffirmed in official UN documents as well as in a large number of university studies. N. Tsagourias, above note 18, p. 465.

23 Andrew Bennett and Colin Elman, 'Complex Causal Relations and Case Study Methods: The Example of Path Dependence', in *Political Analysis*, Vol. 14, 2006, pp. 250–267; James Mahoney, 'Path Dependence in Historical Sociology', in *Theory and Society*, Vol. 29, No. 4, 2000, pp. 507–548. Mahoney's approach is particularly helpful for understanding the birth and evolution of an institution or a public policy. UN peacekeeping has changed little in terms of its policy, its organisation, the implementation of its missions and its political role. While the publication of the *Agenda for Peace* and the creation of the Department of Peacekeeping Operations (DPKO) in 1992 represented a relatively important policy and institutional evolution, the Secretariat is nonetheless still poorly equipped to manage so many police officers and soldiers. Efforts to adjust the Secretariat were made between 2000 and 2010 but are still insufficient. For Tardy, 'the UN is therefore constantly faced with a mismatch between its multidimensional peacekeeping ambitions and the means at its disposal' (our translation). Tardy wonders whether the UN is not condemned to repeatedly have to start from scratch: see T. Tardy, above note 6, p. 88.

24 In the early 1990s, Paul Diehl presented different institutional alternatives to UN peacekeeping by calling on voluntary contributions by the member states. As the *ad hoc* nature of that method was not optimal in terms of rapid deployment and efficiency, two broad types of institutional alternatives were possible according to Diehl: either the development of a permanent UN stand-by force or the outsourcing of the implementation of peacekeeping by delegating those operations to regional organisations or to 'multinational' forces. See Paul F. Diehl, *International Peacekeeping*, Johns Hopkins University Press, Baltimore, MD, 1994, Chapter 5; Paul F. Diehl, 'Institutional Alternatives to Traditional U.N. Peacekeeping: An Assessment of Regional and Multinational Options', in *Armed Forces and Society*, Vol. 19, No. 2, 1993, pp. 209–230.

order since the 1950s.²⁵ This article nevertheless shows that, starting with the 1960s operations (Congo, Western New Guinea and Cyprus), what could be referred to as the Hammarskjöld paradigm of PKOs has been called into question in the field but not in terms of policy.²⁶ Following a return to the basic principles of traditional peacekeeping between 1965 and 1988, the UN – in response to a request made by the members of the Security Council – again began carrying out ambitious operations from 1989 onwards.²⁷

In order to show how PKOs have evolved, this article is divided into three parts. The first deals with the years of the Cold War and the tensions between, on the one hand, the basic principles respectful of the traditional peacekeeping devised by Dag Hammarskjöld in the aftermath of the Suez Crisis, and on the other, the operational and tactical requirements of certain missions such as the United Nations Operation in the Congo (ONUC) between 1960 and 1964. The second part considers the PKOs implemented by the UN and other actors in order to manage the numerous crises of the post-bipolar period. The third and final part presents the present major challenges faced by the UN in the field of peacekeeping.

Peacekeeping during the Cold War: birth and institutionalisation of an improvised practice

UN peacekeeping is an improvisation born of the Cold War and decolonisation. Indeed, it was first and foremost the blocking of the Security Council by the tensions between the United States and the Soviet Union from 1947 onwards that prevented the UN from establishing the system of collective security provided for in its Charter. That explains why the UN fell back on less ambitious methods of collective

- 25 The concept of ‘path dependence’ relates to situations that make a historical choice difficult to change because of the high costs in terms of initial investment (of attention and of political capital), training, coordination and expectation. See Bruno Palier in Laurie Boussaguet, Sophie Jacquot and Pauline Ravinet (eds), *Dictionnaire des politiques publiques*, Presses de Sciences Po, Paris, 2004, p. 319. The actors involved in implementing PKOs are therefore reluctant to make overly radical changes to a long-standing formula. This explains the ‘incremental’ evolution of peacekeeping. Attention should be drawn to the tension that has existed at least since the operation in the Congo in 1960–1964 between the operating principles governing traditional peacekeeping operations (consent of the parties, impartiality and non-use of force) as presented by Dag Hammarskjöld in 1958 and actual practice in the field. The UN has never managed to resolve that tension, as is evident from the problems of protecting civilian populations in some recent missions. See Victoria Holt and Glyn Taylor (with Max Kelly), *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, United Nations, New York, 2009.
- 26 Referring to UNEF, Paul Tavernier emphasises that ‘Dag Hammarskjöld quickly worked out a *sort of policy* for PKOs by systematizing the principles that were to be applied to them’ (our translation and emphasis). See Paul Tavernier, *Les casques bleus*, Presses Universitaires de France, Paris, 1996, p. 31.
- 27 It should be noted that the deployment of the United Nations Interim Force in Lebanon (UNIFIL) in March 1978 is a separate case among the ‘traditional’ operations in the period from 1965 to 1988. That mission had a non-coercitive mandate based on Chapter VI of the Charter, which was similar to other traditional operations, but it was deployed in a very difficult environment over which the Lebanese government had little influence and in which some armed groups did not accept the presence of the Blue Helmets. See Mona Ghali, ‘United Nations Interim Force in Lebanon: 1978–Present’, in William J. Durch (ed.), *The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis*, St. Martin’s Press, New York, 1993, pp. 181–218.

intervention in the late 1940s.²⁸ The other factor that prompted the UN to establish measures intended to keep the peace was decolonisation. The aim of the first two official missions by the UN, the United Nations Truce Supervision Organisation (UNTSO) in Palestine and the United Nations Military Observer Group in India and Pakistan, was indeed to respond to the crises following the withdrawal of the British colonial power from Palestine and India. The Suez Crisis of 1956 gave rise to the first official peacekeeping operation.²⁹

In 1983, in order to identify the functional growth, political maturing and institutionalisation of UN peacekeeping during the Cold War, Canadian politologist Henry Wiseman divided its development process into four stages: the nascent period between 1946 and 1956; the assertive period from 1956 to 1967; the dormant period from 1967 to 1973; and the resurgent period between 1973 and 1978.³⁰ Wiseman could not foresee the rapid increase in the number of operations from the late 1980s onwards, but his four-stage model nonetheless shows that the evolution of multinational operations during the Cold War did not follow a continuous linear pattern. It thus calls into question the relevance of a typology of PKOs in terms of 'generations'.³¹ That kind of typology implies that the evolution of peacekeeping took place sequentially and progressively;³² this was, however, not the case, as Wiseman points out.

Moreover, practice in the field in the 1960s sometimes looked forward to the multifunctional operations that were to become standard from the late 1980s onwards. Several of those missions were carried out in the context of civil war but still respected the three basic principles of traditional peacekeeping – with the exception of ONUC in the Congo, which used force in order to prevent the

28 The establishment of the United Nations Special Committee on the Balkans revealed that tensions had been developing between the two 'blocs' since late 1946.

29 As stressed by Christopher Daase, Dag Hammarskjöld developed his peacekeeping principles not on the basis of any precedent (the League of Nations or UNTSO, for example) but on the basis of a set of rules that he himself defined. That is why peacekeeping as a security institution really did begin with UNEF, the first operation to follow original rules rather than to rely on past examples. Christopher Daase, 'Spontaneous Institutions: Peacekeeping as an International Convention', in Helga Haftendorn, Robert O. Keohane and Celeste A. Wallander (eds), *Imperfect Unions: Security Institutions Over Time and Space*, Oxford University Press, New York, 1999, p. 240.

30 Henry Wiseman, 'United Nations Peacekeeping: An Historical Overview', in Henry Wiseman (ed.), *Peacekeeping: Appraisals and Proposals*, Pergamon Press, New York, 1983, p. 22. Other authors use or refer to the stages of development presented by Wiseman. See A. B. Fetherston, *Towards a Theory of United Nations Peacekeeping*, St. Martin's Press, New York, 1994, pp. 16–19; Ramesh Thakur and Albrecht Schnabel, 'Cascading Generations of Peacekeeping: Across the Mogadishu Line to Kosovo and Timor', in Ramesh Thakur and Albrecht Schnabel (eds), *United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement*, United Nations University Press, Tokyo, 2001, p. 9.

31 There are many studies that use a generation-based typology. The term started to be used in both English and French around 1992. See Georges Abi-Saab, 'La deuxième génération des opérations de maintien de la paix', in *Le Trimestre du monde*, No. 4/1992, pp. 87–95; Victor-Yves Ghébal, 'Le développement des opérations de maintien de la paix de l'ONU depuis la fin de la guerre froide', in *Le Trimestre du monde*, No. 4/1992, pp. 67–85; John Mackinlay and Jarat Chopra, 'Second Generation Multinational Operations', in *Washington Quarterly*, Vol. 15, No. 3, 1992, pp. 113–131. Since then, many authors have used that typology. For a non-exhaustive list, see R. Thakur and A. Schnabel (eds), above note 30; Kai Michael Kenkel, 'Five Generations of Peace Operations: From the "Thin Blue Line" to "Painting a Country Blue"', in *Revista Brasileira de Política Internacional*, Vol. 56, No. 1, 2013, pp. 122–143.

32 A. J. Bellamy and P. D. Williams (with S. Griffin), above note 13, p. 17.

secession of the province of Katanga. The most representative example of those multifunctional operations during the Cold War is the intervention of the UN in Western New Guinea in 1962–1963, which comprised two operations: the United Nations Temporary Executive Authority (UNTEA), which was mandated to replace the Dutch administration, to govern the territory, to maintain public order, to protect the rights of the people living there and to ensure that public services were provided; and the United Nations Security Force (UNSF), which was mandated not only to protect the civilian staff of UNTEA and to maintain public order but also to supervise the setting up of a police force.³³

Macroscopic factors, such as the clash between the United States and the Soviet Union or decolonisation, are just one of the facets that enable the development of that improvised practice to be traced. In order to grasp fully how the UN's multinational operations came into being and evolved, it is necessary to consider the role played by certain individual actors that provided evidence of boldness and creativity in a restrictive international political context. More specifically, it is important to analyse the role of the UN Secretaries-General, and particularly that of Dag Hammarskjöld.³⁴ Hammarskjöld was the first UN Secretary-General to establish a peacekeeping operation based on the deployment of an interposition force. That first operation took place from November 1956 onwards, following the attack on Egypt by British, French and Israeli forces. Hammarskjöld was able to take advantage of the opening that was presented to him when the UN General Assembly – because the Security Council was paralysed by the British and French vetoes – asked him to set up a military force capable of intervening between the warring parties. The General Assembly's request that the Secretary-General present a proposal for an emergency force represented a very substantial delegation of powers, and Hammarskjöld made the most of it. He quickly proposed using certain members of UNTSO to command the new force, which, moreover, was to be composed of soldiers from states that were non-permanent members of the Security Council. That informal principle was to last throughout the Cold War with only two exceptions: the presence of a British contingent in Cyprus from 1964 and of a French contingent in Lebanon in 1978.

It should be pointed out that several military operations had been discussed in Hammarskjöld's circles before deciding on the more lightly armed interposition force. It should also be noted that the Secretary-General was initially very sceptical about the feasibility of an operation of that kind because he could not see where the troops were to come from or how or where they could be deployed in the field. It was the Canadian minister of foreign affairs, Lester Pearson, who managed to convince Hammarskjöld and Henry Cabot Lodge, the American ambassador to the UN, of the feasibility of that option.³⁵ And it was the General Assembly which, by accepting

33 United Nations, above note 12, p. 625.

34 Brian E. Urquhart, *Hammarskjöld*, W.W. Norton, New York, 1994. For a biography of Dag Hammarskjöld, see www.un.org/depts/dhl/dag/index.html. All internet references were accessed in March 2014.

35 See B. E. Urquhart, above note 34, p. 176; B. E. Urquhart, above note 13, p. 133; Michael K. Carroll, *Pearson's Peacekeepers: Canada and the United Nations Emergency Force, 1956–67*, University of British

Hammarskjöld's recommendations and integrating them into Resolution 1000 of 5 November 1956, approved the establishment of UNEF, which was to be the model for establishing the basic principles of peacekeeping as we know it today.³⁶

By establishing an interposition force within a matter of days and with the help of only three or four people, Hammarskjöld succeeded in creating an activity that was to experience major developments, as UNEF was only the first in a long series of PKOs. Moreover, in a report on UNEF dated 9 October 1958, the Secretary-General laid the foundations – the principles – for future UN missions, while at the same time drawing attention to the gaps that the Secretariat would have to overcome in order to manage PKOs effectively.³⁷ The three principles – or the 'holy trinity'³⁸ – on which traditional peacekeeping policy is founded are the consent of the member state party to the conflict,³⁹ impartiality⁴⁰ and the non-use of force except in self-defence.⁴¹ Those principles constituted the policy base of UNEF and, with the exception of ONUC in the Congo between 1960 and 1964, which served to impose a political solution by using force coercively in order to stop the secession of Katanga, peacekeeping operations during the Cold War all complied with the principles established by that first multinational interposition operation.

Following the success of UNEF in Egypt, the UN organised four short-term operations: the United Nations Observation Group in Lebanon from June to December 1958; the UNSF/UNTEA from October 1962 to April 1963; the United Nations Yemen Observation Mission from July 1963 to September 1964; and ONUC from July 1960 to June 1964.

Hammarskjöld was aware of the risks that would be incurred by the UN if it were to find itself involved in managing the crisis in the Congo, which was a typical early 1960s decolonisation crisis. He was also aware of the numerous dangers inherent in the situation in that central African country. After having weighed the

Columbia Press, Vancouver, 2009, p. 30. Pearson was awarded the Nobel Peace Prize in 1957 for his role in establishing UNEF.

36 See Report of 9 October 1958, above note 17.

37 Report of 9 October 1958, above note 17. Paras. 84 to 86 of the document deal with the Secretariat and Chapter VII with the basic principles of traditional peacekeeping. It should be noted that in para. 151 of this report, Hammarskjöld recalled that UNEF had benefited from special conditions (request of the Egyptian government and deployment in accordance with the decision of the General Assembly) and that it could not be reasonably expected for those favourable circumstances to be often reproduced elsewhere. For him, the UNEF experiment was not intended to serve as an inspiration for future UN operations. The mission to the Congo proved him right.

38 For a representation of the traditional peacekeeping principles as a 'trinity', see A. J. Bellamy and P. D. Williams (with S. Griffin), above note 13, p. 96.

39 Report of 9 October 1958, above note 17, paras. 155 and 156.

40 *Ibid.* Para. 160 tackles the question of the composition of the UN forces. In that respect, it states that the UN followed two principles: not to include in the force any military unit from the permanent members of the Security Council or units from any country which, because of its geographical position or for other reasons, might be considered as having a special interest in the situation which has called for the operation. However, it is paras. 166 and 167 that constitute the core of the principle of impartiality as it is applied by traditional PKOs. Para. 166 provides that 'UN personnel cannot be permitted in any sense to be a party to internal conflicts'. Para. 167 adds that 'it was explicitly stated that the Force should not be used to enforce any specific political solution of pending problems or to influence the political balance decisive to such a solution'.

41 *Ibid.*, para. 179.

pros and cons, and aware of the difficulties that lay ahead, the Secretary-General proceeded to set up ONUC. Despite the complexity of the situation, he had to establish ONUC with the help of just one permanent special peacekeeping adviser and without any permanent team to help him in its management of the PKOs. When ONUC was created, in the summer of 1960, the Secretariat still had no management capacities.⁴² Another problem was that the Congo had none of the advantages of the geopolitical environment of UNEF. The latter was operating in the Sinai, a fairly isolated, virtually uninhabited area, and its aim was to separate the forces of two countries at war. ONUC, however, had to try to restore peace to a country that was the size of a subcontinent, was torn by inter-ethnic conflicts and was arousing the interest of foreign powers.

One of the positive points was that the UN intervened at the request of the new Congolese government. Hammarskjöld's objective was to help the new authorities to make the post-colonial transition. As the situation had degenerated into rioting, mutiny and a declaration of independence by the wealthy province of Katanga,⁴³ the ONUC forces were gradually drawn into a *spirale infernale* that led to the use of force against the Katanga secessionists from February 1961 onwards.⁴⁴ After Hammarskjöld's death in an aircraft accident in September 1961,⁴⁵ ONUC's mandate was revised to enable the UN troops to use mass force against the Katanga secessionists and the European mercenaries supporting them.⁴⁶ After four difficult years, the ONUC forces were able to withdraw from the Congo with mixed results since, although the operation enabled the Congo to remain united by stabilising the internal situation, the episodic crises affecting the country between 1965 and 1997 and the return of the Blue Helmets to the DRC in 1999 show that the impact of the operation had only scratched the surface.⁴⁷

42 For an overview of the numerous logistic and organisational difficulties encountered by the UN in the early 1960s, see Edward H. Bowman and James E. Fanning, 'The Logistics Problems of a UN Military Force', in *International Organization*, Vol. 17, No. 2, 1963, pp. 355–376. To gain an idea of the improvised nature of the operation, it should be noted that the Secretary-General had to procure a map of the Congo from a Belgian company located on Wall Street!

43 Proclaimed on 11 July 1960 by Moïse Tschombé.

44 ONUC was established by Resolution 143 (1960) of 14 July 1960. Resolution 161 (1961) of 21 February 1961 explicitly authorised the use of force as a last resort to prevent the outbreak of a civil war following the assassination of Patrice Lumumba.

45 P. Tavernier, above note 26, p. 36. The causes of that accident are still shrouded in mystery. See Bengt Rosio, 'The Ndola Crash and the Death of Dag Hammarskjöld', in *Journal of Modern African Studies*, Vol. 31, No. 4, 1993, pp. 661–671.

46 Dag Hammarskjöld was opposed to the use of force as a means of enforcing peace. After his death, the UN went so far as to use aircraft to bomb the Katangese positions and to put an end to the secession of the province. Walter Dorn, 'The UN's First "Air Force": Peacekeepers in Combat, Congo 1960–64', in *Journal of Military History*, Vol. 77, October 2013, p. 1399. It should also be noted that the UN force deployed in the DRC from 1999 onwards made use of force on numerous occasions by deploying attack helicopters. The Security Council, by virtue of its Resolution 2098 (2013) of 28 March 2013, decided 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping, [to] include an "Intervention Brigade" consisting inter alia of three infantry battalions, one artillery, and one Special force and Reconnaissance company'. That heavily armed 'Intervention Brigade' and the use of observation drones in December 2013 enables UN forces to make use of force in case of need in order to protect the population or to uphold the mandate entrusted to the UN.

47 The causes of the 1990s conflict differ from those of the 1960s, but the country's chronic political instability is one of the causes of the endemic violence.

On the political and strategic level, ONUC made it possible to update one of the paradoxes of peacekeeping operations. On the one hand, the member states asked the UN to intervene in order to avoid the involvement of the major powers in the armed conflicts or to prevent those conflicts from spreading throughout the region. On the other, they were reluctant to delegate too much authority to the UN for fear of seeing it become genuinely influential in international relations. With ONUC, some major powers disapproved of the UN becoming too independent because that might have had a negative impact on their sovereignty.⁴⁸ The use of force was costly for the UN and for the Congolese people, and the so-called risks to the sovereignty of the states caused by heavily armed UN troops had the effect of reducing peacekeeping practice to far less ambitious interposition or observation missions until the late 1980s, when the United Nations Transition Assistance Group (UNTAG) was set up for the transition period in Namibia.

The intervention in the Congo therefore had no lasting impact on peacekeeping 'policy' but, in terms of counter-examples that were not to be imitated, it did affect operational peacekeeping practice during the Cold War and PKO funding. It was the financial problems created by ONUC that forced the UN to review its methods of funding its operations.⁴⁹ ONUC did not favour the development of a stronger form of peacekeeping (quite the opposite) or prompt the UN to intervene in internal state affairs.⁵⁰ After the Congo, the UN deployed its soldiers in Cyprus in March 1964 and sent a few observers to the Dominican Republic, as well as India and Pakistan in 1965, before ending its operations. It took another war between Israel and its neighbours before the UN launched the peacekeeping machinery again with the establishment of the second United Nations Emergency Force (UNEF II) from 1973 to 1979 between Egypt and Israel, the United Nations Disengagement Observer Force from 1974 on the Golan Heights, and the United Nations Interim Force in Lebanon (UNIFIL) from 1978. Those missions all adhered to the Hammarskjöld peacekeeping paradigm as they fully upheld the three basic principles of his approach (consent of the state party, impartiality and the non-usage of force for purposes other than self-defence).⁵¹

48 France and the Soviet Union, in particular. See Pierre Gerbet, Marie-Renée Mouton and Victor-Yves Ghébal, *Le rêve d'un ordre mondial: de la SDN à l'ONU*, Imprimerie Nationale Editions, Paris, 1996, pp. 253–254; P. Tavernier, above note 26, p. 37.

49 The PKO financial crisis started with the deployment of UNEF and, exacerbated by the exorbitant costs of ONUC, led the International Court of Justice (ICJ) to publish an Advisory Opinion on 20 July 1962 to endeavour to determine how to fund the PKOs. See ICJ, *Certain Expenses of the United Nations* (Article 17, para. 2 of the Charter), Advisory Opinion, 20 July 1962. See also Nathaniel L. Nathanson, 'Constitutional Crisis at the United Nations: The Price of Peace-Keeping', in *University of Chicago Law Review*, Vol. 32, No. 4, 1965, pp. 621–658.

50 Except in Cyprus, where UNFICYP was deployed as from March 1964 to separate Greek and Turkish Cypriots.

51 See, however, note 27 on the particular features of UNIFIL.

Multinational operations after the Cold War: between expansion and withdrawal

The late 1980s were a special moment for the UN and its military peacekeepers. First, two new UN observation missions were set up in 1988: the United Nations Good Offices Mission in Afghanistan and Pakistan in May and the United Nations Iran–Iraq Military Observer Group (UNIIMOG) in August. Then, on 29 September 1988, all Blue Helmets who had served between 1948 and December 1988 were awarded the Nobel Peace Prize collectively in Oslo. Finally, in his speech at the 43rd Session of the UN General Assembly on 7 December 1988, Mikhail Gorbachev announced a reduction in the size of the Soviet armed forces and the withdrawal of several military units deployed in Eastern Europe. He also expressed the wish to see the UN playing a more important role in the international regulation of armed conflicts. One year later, the Berlin Wall had fallen.

That series of events gave rise to euphoria with regard to the possibilities of the UN. In 1989, three new missions were organised: the United Nations Angola Verification Mission I in January, the United Nations Transition Assistance Group to cover the transition period in Namibia (UNTAG) in April and the United Nations Observer Group in Central America in November. The operation in Namibia triggered new UN multifunctional missions,⁵² which increased in number from 1991 onwards and became peacebuilding operations. For the first time since the Congo, the UN took up a mission with a complex political mandate, and it met with considerable success. The mission in Namibia is, moreover, considered one of the rare successes of UN operations or as the first such success.⁵³

That success fostered the impression that the UN had the necessary capacities to fulfil the complex missions entrusted to it by the Security Council. Following a lull in 1990, five new missions were created in 1991, four in 1992 and six in 1993. In a period of five years, between 1988 and the end of 1993, the UN mounted twenty peacekeeping operations, whereas it had only set up thirteen between 1948 and 1988. Some of those operations, such as the United Nations Transitional Authority in Cambodia, the United Nations Protection Force (UNPROFOR) in the former Yugoslavia and the United Nations Operations in Somalia (UNOSOM I and II), were to have unequalled scope (even by comparison with ONUC). Those missions extended from simple interposition (as in the case of UNIIMOG in 1988) to enforcement operations mandated by the UN Security

52 Multifunctional missions include, besides stabilising the situation, various tasks such as the repatriation of refugees, organising and monitoring elections, the demobilisation and reintegration of combatants, and ensuring respect for human rights.

53 That success can be attributed to several factors. First, UNTAG had been created on 29 September 1978 by Security Council Resolution 435. The UN personnel had therefore had more than ten years to prepare for the establishment of the mission. Second, with the end of East–West tensions, the parties involved in the conflict between South Africa and its neighbours agreed to disengage gradually. Lastly, South Africa itself accepted the idea of an independent Namibia and worked together with the UN to ensure the success of the mission. See Marrack Goulding, *Peacemonger*, Johns Hopkins University Press, Baltimore, MD, 2002, pp. 139–175; Lise Morjé Howard, *UN Peacekeeping in Civil Wars*, Cambridge University Press, Cambridge, 2008, pp. 52–87.

Council in Resolutions 770 (1992) for the former Yugoslavia and 794 (1992) for Somalia. Those two resolutions authorised UN troops, in support of humanitarian organisations, to use ‘all measures necessary’ to deliver humanitarian aid to the people.⁵⁴ The multifunctional operations of the 2000s, such as those in Liberia, the DRC, Sierra Leone and Timor, were to see a growth in disarmament, demobilisation and reintegration operations⁵⁵ and security sector reform operations targeting, for example, the police and the army.⁵⁶

In the wake of the success of the intervention by the international coalition against Iraq following its invasion of Kuwait in 1991, the US president George H. W. Bush proclaimed the dawning of a new world order.⁵⁷ That concept involved three major principles: (1) the refusal to tolerate aggressive use of military force; (2) the promotion of collective security; and (3) cooperation between the major powers of international society.⁵⁸ What lay behind that US vision of a new world order was the UN, invigorated by the end of the Cold War. This optimism with regard to the UN was to lead to the meeting at the Security Council summit on 31 January 1992, when the members of the Security Council asked the newly appointed Secretary-General, Boutros Boutros-Ghali, to prepare a document making it possible to reinforce the peacekeeping capacities of the UN.⁵⁹ That document, *An Agenda for Peace*, was published on 17 June 1992.

At the conceptual level, two passages in the *Agenda for Peace* broke with the ‘traditional’ concept of peacekeeping as developed by Dag Hammarskjöld. There is first of all the famous ‘hitherto’ concerning the consent of the parties to the deployment of the mission: ‘Peace-keeping is the deployment of a United Nations presence in the field, *hitherto* with the consent of all the parties concerned.’⁶⁰ The *Agenda for Peace* seemed to recognise implicitly that it was now going to be possible to deploy some forces without the consent of the host state. That definition of peacekeeping therefore makes it possible to question the most important principle governing its practice: respect for the sovereignty of states. The second passage from the *Agenda for Peace* which presented an innovation compared to ‘traditional’ peacekeeping is found in paragraphs 43 and 44. The first of those paragraphs held that use of force by the UN was essential to the organisation’s credibility when

54 Mélanie Albaret, Emmanuel Decaux, Nicolas Lemay-Hébert and Delphine Placidi-Frot, *Les grandes résolutions du Conseil de sécurité des Nations Unies*, Dalloz, Paris, 2012, pp. 160–180.

55 Yvan Conoir and Gérard Verna (eds), *DDR: désarmer, démobiliser et réintégrer*, Presses de l’Université Laval, Quebec, 2006.

56 Albrecht Schnabel and Hans-Georg Ehrhart (eds), *Security Sector Reform and Post-Conflict Peacebuilding*, United Nations University Press, Tokyo, 2005.

57 See George H. W. Bush, *Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict*, 6 March 1991, available at: http://bushlibrary.tamu.edu/research/public_papers.php?id=2767&year=1991&month=3.

58 Eric A. Miller and Steve A. Yetiv, ‘The New World Order in Theory and Practice: The Bush Administration’s Worldview in Transition’, in *Presidential Studies Quarterly*, Vol. 31, No. 1, 2001, p. 61.

59 See United Nations, provisional verbatim record of the 3,046th meeting of the Security Council, UN Doc. S/PV. 3046, 31 January 1992, available at: www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/RO%20SPV%203046.pdf.

60 *Agenda for Peace*, above note 10, para. 20.

peaceful means of settlement had failed.⁶¹ That proposal also undermined one of the three fundamental principles of peacekeeping: the non-use of force except in self-defence. Parallel to that willingness to make more frequent use of force, Boutros-Ghali, in paragraph 44, wished to see the establishment of peace enforcement units capable of imposing by force the decisions of the Security Council when the tasks intended to restore or maintain a ceasefire exceeded the capacities of the UN peacekeeping forces.⁶²

In his *Supplement to An Agenda for Peace* published in January 1995, the Secretary-General adopted a very different tone and underscored the particular difficulties for peacekeeping practice posed by internal conflicts and the new tasks that that type of conflict had imposed on the Blue Helmets. In contrast to his position in the first version of *An Agenda for Peace*, in his *Supplement* Boutros-Ghali stressed the importance of upholding the three central principles of peacekeeping in order to ensure the success of the missions. The Secretary-General also clearly emphasised the difference between peacekeeping and peace enforcement and insisted on recalling that force was not to be used to speed up the settlement of conflict. As recalled in the *Supplement*:

Conflicts the United Nations is asked to resolve usually have deep roots and have defied the peacemaking efforts of others. Their resolution requires patient diplomacy and the establishment of a political process that permits, over a period of time, the building of confidence and negotiated solutions to long-standing differences. . . . It is necessary to resist the temptation to use military power to speed them up.⁶³

This turnaround on the part of Boutros Boutros-Ghali is easy to understand. When *An Agenda for Peace* was written in the spring of 1992, the UN had just mounted its heaviest operations since the early 1960s, in Cambodia and in the former Yugoslavia. The Secretary-General therefore lacked the broader view to evaluate the real possibilities open to the UN in the new geopolitical environment. Nearly three years later, with the publication of the *Supplement*, Boutros-Ghali took account of the UN's traumatic experiences in Bosnia, Somalia and Rwanda.

That explains the return to the basic principles of PKOs, the extremely subdued enthusiasm and the relative, temporary withdrawal on the part of the UN. From nearly 69,000 uniformed staff members deployed throughout the world in August 1995, UN forces fell to 12,000 in April 1999.⁶⁴ The *Supplement to An Agenda for Peace* gave the impression that it was sounding the death knell for major

61 *Ibid.*, para. 43.

62 *Ibid.*, para. 44.

63 United Nations, *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60, S/1995/1, 25 January 1995, p. 9, para. 36.

64 See the monthly summary of contributions to PKOs made by the member states between 1995 and 2004, available on the DPKO website at: www.un.org/en/peacekeeping/contributors/documents/Yearly_Summary.pdf.

multifunctional operations by the UN and was temporarily placing the organisation's operations, for the second time, on standby.

What are the key current and future issues for multinational operations?

The UN's withdrawal from conflict management in the second half of the 1990s was to be short-lived, as on 10 June 1999, the Security Council authorised the Secretary-General to establish an international civilian presence in Kosovo in the form of the United Nations Interim Administration Mission in Kosovo, to set up the United Nations Mission in Sierra Leone (UNAMSIL) on 22 October, to deploy the United Nations Transitional Administration in East Timor on 25 October, and to deploy the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) on 30 November. The year 1999 therefore represents a strong comeback to the international scene by the UN and a new period of resurgence for peacekeeping.⁶⁵ That resurgence by the UN showed, on the one hand, that the institutional alternatives (regional organisations, coalitions, unilateral interventions) did not have the same legitimacy as UN operations,⁶⁶ which explains why the latter were involved alongside regional organisations or states intervening in certain conflicts; and, on the other hand, that peacekeeping had become an unavoidable institution in international relations.⁶⁷

65 PKOs have been through various ups and downs but since 2005 the tendency has been to deploy more than 60,000 soldiers and police officers on average in PKOs, a peak having been reached around January 2010 with more than 100,000 uniformed members of staff deployed on four continents. See the chart on the DPKO website, available at: www.un.org/en/peacekeeping/documents/chart.pdf.

66 This point is emphasised by Stephen Kinloch in a text on the strengths and weaknesses of a possible permanent UN force. Kinloch recalls that compared with operations carried out by coalitions of states or by individual states, UN operations are, by virtue of their multinational and genuinely international dimension, less likely to be suspected of partiality or of having hidden objectives. See Stephen P. Kinloch, 'Utopian or Pragmatic? A UN Permanent Military Volunteer Force', in Michael Pugh (ed.), *The UN, Peace and Force*, Frank Cass, London, pp. 170–171. In that passage Kinloch does not refer to regional organisations, but other studies highlight the difficulties encountered by such organisations in respecting the criterion of neutrality. See P. F. Diehl, above note 24, p. 128. The case of the Economic Community of West African States Monitoring Group (ECOMOG) in Liberia in the 1990s is often taken as an example. The ECOMOG regional force comprised a majority of Nigerian soldiers, and some analysts consider that it tended to promote the interests of Nigeria in the region rather than a settlement of the Liberian crisis. Most of the analyses nonetheless admit that the force made it possible to alleviate the suffering of the Liberian people. See Ademola Adeleke, 'The Politics and Diplomacy of Peacekeeping in West Africa: The Ecomog Operation in Liberia', in *Journal of Modern African Studies*, Vol. 33, No. 4, 1995, pp. 569–593; Clément E. Adibe, 'The Liberian Conflict and the ECOWAS–UN Partnership', in *Third World Quarterly*, Vol. 18, No. 3, 1997, pp. 471–488; Herbert Howe, 'Lessons of Liberia: ECOMOG and Regional Peacekeeping', in *International Security*, Vol. 21, No. 3, 1996–1997, pp. 145–176. It should be noted that since the 2000s, the regional organisations, in particular the African Union, have developed their institutional capacities for managing PKOs and the UN has better defined the strengthening of its links with the regional organisations. See SC Res. 1631 (2005) on cooperation with regional organisations.

67 The states make use of PKOs because such operations have become familiar to them as a crisis management mechanism and because the staff in the DPKO at the UN have gradually made PKOs more effective. That efficacy has nonetheless not been sufficient to attract the traditional contributing states back to the UN PKOs.

The new period of PKO resurgence from 1999 onwards nonetheless did not prevent the UN from trying to understand and correct the most serious dysfunctions of previous years. To avoid the recurrence of events such as the genocide in Rwanda or the mass slaughter in Srebrenica, Secretary-General Kofi Annan decided on 7 March 2000 to establish a high-level group mandated to undertake an in-depth study of UN peace and security activities. The group, headed by Lakhdar Brahimi, published its report on 21 August 2000.⁶⁸ One of the objectives of the report was to promote better integration of the missions by delegating their control to Special Representatives.

The objective of that integration was to confer greater coherence on multifunctional missions by improving coordination between the different actors working in the field.⁶⁹ Complex peacebuilding operations generally have three pillars: (1) a diplomatic and political pillar; (2) a military pillar (Blue Helmets); and (3) a humanitarian pillar.⁷⁰ However, only the UN is found in each of the three pillars simultaneously through the Special Representative of the Secretary-General (political pillar), peacekeeping soldiers (military pillar) and specialised agencies such as the Office of the UN High Commissioner for Refugees (UNHCR), the World Food Programme and the United Nations Development Programme (humanitarian pillar). It is therefore important to improve the coordination of relations between the different UN actors and others, which may be NGOs or regional organisations.

Although the situation has evolved (as seen in some African missions in the 2000s), integration continues to present problems, particularly with regard to institutional peculiarities or bureaucratic rivalries between the agencies deployed in peacebuilding missions.⁷¹ As most UN agencies and the Secretariat bodies have a strong tradition of autonomy, they are very attached to their prerogatives and their mandates and are opposed to overly strong 'integration' under the control of the Special Representative of the Secretary-General. Despite the publication of the Brahimi Report, that factor continues to restrict the coherence of operations by integration. Moreover, some NGOs consider that they should not be assimilated into the UN forces as that could affect their image as neutral and

68 United Nations, Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305-S/2000/809, 21 August 2000 (hereinafter the Brahimi Report).

69 These operations, which involve civilian and military actors, as well as regional organisations in some cases, are referred to as 'hybrid operations'. See Bruce Jones with Feryal Cherif, *Evolving Models of Peacekeeping: Policy Implications and Responses*, External Study, Peacekeeping Best Practices Unit, DPKO, September 2003.

70 Xavier Zeebroek, 'La difficile mise en œuvre de l'intégration au sein des missions de paix', in Jocelyn Coulon (ed.), *Guide du maintien de la paix 2006*, Athéna Editions, Outremont, 2005, p. 87.

71 A typical example of successful integration is UNAMSIL. The integration efforts by the various actors made it possible to transform a mission that was about to fail into a success. See Cédric de Coning, *Civil-Military Coordination in United Nations and African Peace Operations*, African Centre for the Constructive Resolution of Disputes, Umhlanga Rocks, 2007, pp. 101–103. The subtitle on page 90 of that work provides a fairly good summary of the problem of integration in complex operations: 'Everybody wants to coordinate but nobody wants to be coordinated.'

impartial actors, an image which is essential to their freedom of action and movement in the field.⁷²

The coherence by integration of the complex multinational peacebuilding missions is not the only important issue that has to be dealt with by the UN. Given the complexity of the tasks carried out in such operations, the soldiers deployed must have been given training that enables them to fulfil their missions appropriately. The second period of resurgence in the history of UN peacekeeping is characterised by a twofold dynamism: the deployment of a record number of uniformed personnel and the long-term disengagement of developed countries from those operations. Thus, developed states, which are still wary of deploying their soldiers in missions that are of no great interest to them, finance the operations without taking part in them directly. That practice is tending to create two types of peacekeeping: one for the 'rich', where developed countries do not hesitate to deploy well-trained troops with substantial resources (the Balkans, Afghanistan after 11 September 2001), and one for the poor, where the UN has to be content with deploying troops that have varying degrees of training and are often badly equipped.⁷³ A comparison between Afghanistan and the DRC is illuminating. In 2010, the North Atlantic Treaty Organisation (NATO) member states had sent more than 100,000 well-trained and well-equipped soldiers to Afghanistan, whereas the UN operation in the DRC had difficulty deploying 20,000 soldiers in a territory three times the size of Afghanistan.⁷⁴ One of the UN's challenges is to attract the traditional donor states (Canada, the Netherlands, Scandinavian countries) back to PKOs.

The problem of sexual abuse in 'robust' peacekeeping operations is another major issue concerning multinational operations in the 2000s, as it is related to the more general problem of the accountability of peacekeeping agencies. The problem was identified back in the early 1990s in Cambodia, the former Yugoslavia, Mozambique and Haiti. Those complex missions prompted the involvement of a very large number of civilian and military personnel, from almost every country in the world. A report published jointly in 2001 by the UNHCR and

72 The arguments put forward by humanitarian actors to avoid being integrated into the organisational chart of peacebuilding operations are legitimate and coherent. The main criticisms made by the humanitarian actors concern the different objectives pursued by peacekeeping forces (particularly the UN) and by humanitarian actors. The latter endeavour to preserve a 'humanitarian space' in which they can provide assistance and protection for civilians affected by conflict; humanitarian organisations thus seek to maintain impartial, non-politicised action. See François Audet, 'L'acteur humanitaire en crise existentielle: les défis du nouvel espace humanitaire', in *Études Internationales*, Vol. 42, No. 4, 2011, pp. 447–472; Jacques Forster, *An ICRC Perspective on Integrated Missions*, Ministry of Foreign Affairs and Norwegian Institute of International Affairs, 31 May 2005, available at: www.icrc.org/eng/resources/documents/misc/6dcgrn.htm.

73 This idea was expressed in the first edition of A. J. Bellamy and P. D. Williams (with S. Griffin), above note 13, p. 275. The authors did not take it up again in the second edition of the work, which was published in 2010. The argument is still valid in the sense that, despite the drastic reduction in the number of soldiers deployed in Afghanistan, developed states no longer take part in peacekeeping operations in Africa, with the exception of France in Mali and in the Central Africa Republic. For a list of contributors to the UN PKOs, see: www.un.org/en/peacekeeping/resources/statistics/contributors.shtml.

74 Fred Tanner, 'Addressing the Perils of Peace Operations: Toward a Global Peacekeeping System', in *Global Governance*, Vol. 16, No. 2, 2010, p. 211.

the NGO Save the Children drew particular attention to the fact that sexual abuse and exploitation were frequent in multinational humanitarian operations and that such abuse was perpetrated both by peacekeepers and by civilian humanitarian workers.⁷⁵

The persistent impunity for sexual abuse committed by members of PKOs is a result, *inter alia*, of the complexity of their composition and of the UN's lack of authority over its member states. Recent multifunctional operations have included as many as five categories of personnel: Blue Helmets (generally in the majority and deployed in contingents), civilian police officers, civilian personnel, UN volunteers and military observers. The policy documents and the codes of conduct drawn up by the UN in the 2000s apply only to some categories of personnel and not to others.⁷⁶

The main problem for the UN in instituting a zero-tolerance policy for sexual abuse and exploitation is that it cannot force the states contributing personnel to punish those of its nationals who engage in practices of that kind. Despite the development of a UN policy arsenal intended to put an end to deviant or criminal sexual behaviour, the UN is still dependent on its member states to provide troops. If some major contributors refuse to take more radical measures against individuals responsible for abuses, there is little that the UN can do. This explains why the problem of sexual abuse and exploitation is now one of the key issues on the UN agenda, and why serious efforts seem to have been made to try to put an end to such practices.⁷⁷ It remains to be seen whether the member states will agree to cooperate with the UN on this subject.

The other important issue for the future of multinational peace operations concerns the conditions governing the use of force. Since the establishment of the first multinational interposition force by the UN in Suez in 1956, the use of force by military peacekeepers has been a focus of concern and a source of controversy. The operations in which UN troops have used force beyond self-defence – in the Congo between 1960 and 1964, in Bosnia between 1992 and 1995, in Somalia between 1993 and 1995, in Sierra Leone in 2001 and in the DRC from 2005 onwards – have all

75 Ray Murphy, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel', in *International Peacekeeping*, Vol. 13, No. 4, 2006, p. 531; UNHCR and Save the Children UK, *Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone*, UNHCR Refugee Report, 2002.

76 R. Murphy, above note 75, p. 533. It should be noted that the 'Zeid Report' clarified the status, the rules of conduct and the disciplinary rules that apply to the different categories of personnel in the service of the UN, and recommended that those same rules be applied to military and civilian personnel. See United Nations, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, UN Doc. A/59/710, 24 March 2005, and particularly the annex beginning on p. 32.

77 For an overview of the measures envisaged by the UN to fight against impunity and the problems that occur along the way, see Carol Allais, 'Sexual Exploitation and Abuse by UN Peacekeepers: The Psychosocial Context of Behaviour Change', in *Scientia Militaria, South African Journal of Military Studies*, Vol. 39, No. 1, 2011, pp. 1–15; Elizabeth F. Defeis, 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity', in *Washington University Global Law Review*, Vol. 7, No. 2, 2008, pp. 185–214; Machiko Kanetake, 'Whose Zero Tolerance Counts? Reassessing a Zero Tolerance Policy against Sexual Exploitation and Abuse by UN Peacekeepers', in *International Peacekeeping*, Vol. 17, No. 2, pp. 200–214.

been traumatic experiences for the UN.⁷⁸ Despite this trauma, the massacres in Rwanda in 1994 and in Srebrenica in 1995 had the effect of prompting the new Secretary-General, Kofi Annan, to adopt a voluntarist stance with regard to humanitarian interventions from 1999 onwards so as to promote the development of a kind of peacekeeping that would use force in order to protect populations at risk rather than for political ends.⁷⁹

At the UN, reactions to the proactive attitude of Kofi Annan were mixed. Many developing countries feared an increase in interference by developed countries in their internal affairs in the name of civilian protection. In August 2000, the panel set up by Kofi Annan and headed by Lakhdar Brahimi published a report in which it was recalled that UN troops must be able to use force to enforce respect for their mandate.⁸⁰ Finally, the Brahimi Report maintained that UN forces should be able to use force to prevent atrocities against civilian populations. While that recommendation in the Brahimi Report enabled a response to be made to the criticisms of the PKOs since the massacres in Rwanda and Bosnia, it nonetheless ran up against two major obstacles: the fears of the developing countries referred to above with regard to interference in their internal affairs, and the lack of willingness among most of the troop-contributing countries to risk the lives of their soldiers deployed in UN operations.⁸¹

More realism would have to be applied with regard to the possibilities for UN operations. The heads of state or governments that deploy soldiers in those multinational operations are primarily influenced by what Max Weber called the 'ethics of responsibility' and which concerns the outcomes of their decisions.⁸² Weber contrasted two types of ethics: the ethics of conviction and the ethics of responsibility. According to Weber, the mature political decision-maker cannot always rely on his moral preferences. In other words, regardless of his convictions concerning people in danger, his function requires him to take account of the lives of his citizens serving as UN soldiers. This explains the reluctance by states providing soldiers for PKOs to see them using force against actors committing atrocities. Is this a narrow, selfish vision based on the defence of nothing more than national interest? It is difficult to give a categorical answer to that question. One thing is certain: the members of the Security Council – who authorise

78 Trevor Findlay, *The Use of Force in UN Peace Operations*, SIPRI/Oxford University Press, Oxford, 2002, p. 1; Eric G. Berman and Melissa T. Labonte, 'Sierra Leone', in *ibid.*, pp. 141–227; Philip Roessler and John Prendergast, 'Democratic Republic of the Congo', in *ibid.*, pp. 229–318.

79 In an interview with *The Economist* on 16 September 1999, Kofi Annan insisted that the Security Council would agree to authorise operations able to defend our common humanity, by force if need be. See *The Economist*, 'Two Concepts of Sovereignty', 16 September 1999, available at: www.economist.com/node/324795.

80 Brahimi Report, above note 68, p. 9, para. 49. For a more recent study of the protection of civilians, see Max Kelly with Alison Giffen, *Military Planning to Protect Civilians: Proposed Guidance for United Nations Peacekeeping Operations*, Henry L. Stimson Center, Washington, DC, 2011.

81 The Brahimi Report, above note 68, addresses this problem in para. 52 (p. 9) by stressing that any state that agrees to contribute troops to a UN mission must be willing to 'accept the risk of casualties on behalf of the mandate'.

82 Max Weber, *Le savant et la politique*, Plon, Paris, 1959, p. 206; Bernard Brodie, *Discord and Collaboration: Essays on International Politics*, Johns Hopkins University Press, Baltimore, MD, 1962, pp. 50–51.

PKOs – should take account of that international reality before deciding to set up new, very ambitious missions. In some cases, other actors (single states, coalitions of states, regional organisations) are better equipped to deal with the demands of complex multinational operations. Regional organisations and single states or coalitions of states have simpler and more effective command capacities and operational structures than UN multinational forces.

Conclusion

Multinational peacekeeping or peacebuilding operations have evolved impressively since they were first established by the UN in 1956. Their evolution was first institutional, with the establishment of the Department of Peacekeeping Operations in 1992 and associated structures for managing operations that set out to respond to the expansion of their functions in the field.⁸³ Since starting out as a simple interposition force in Suez in 1956, the UN missions have become veritable multifunctional operations, as was the case in Namibia in 1989–1990, in Cambodia in 1992–1993 and in Haiti from 1993. Nonetheless, those multinational UN missions are not a panacea. They were developed to counter the impossibility of establishing a system of collective security as provided for in Chapter VII of the Charter. UN peace operations in the 2000s are more complex than those of the Cold War period, but they are still marked by the limitations inherent in their creation.

Without the authorisation of the Security Council, the UN cannot impose peace by force. The Secretariat has neither the legitimacy nor the resources to set up PKOs. The Blue Helmets only manage with difficulty to use force to protect people whom they are supposed to protect.⁸⁴ There are many different reasons for this, but suffice it to say that these troops are usually both few in number and poorly armed compared to the soldiers or militias that they face. Moreover, the governments deploying soldiers in such operations are reluctant to allow them to put their lives at risk for the sake of defending the mandate of the mission. This is why, when the mandate of an operation includes an enforcement facet, the UN and its members need to resort to using actors other than the Blue Helmets. Some states, alliances or regional organisations are generally better equipped to use force. From the 1990s onwards, the UN has also demonstrated its capacity to work in cooperation with alliances or regional organisations. A division of labour was established between the

83 Ronald Hatto, 'L'innovation institutionnelle des Nations-Unies: l'exemple du Département des opérations du maintien de la paix', in Jocelyn Coulon (ed.), *Guide du maintien de la paix 2010*, Editions Athena, Outremont, 2009, pp. 59–75.

84 See Stian Kjeksrud and Jacob Aasland Ravndal, *Protection of Civilians in Practice: Emerging Lessons from the UN Mission in the DR Congo*, Norwegian Defence Research Establishment (FFI), 2010. On p. 36, the authors recall that: 'There is a lack of clear operational guidelines for the military on the protection of civilians and use of force. Again, some claim that protecting civilians under imminent threat is "what peacekeepers do", but this has not often been the case in the DRC.'

UN and NATO in the Balkans and in Afghanistan, and between the African Union and European Union in Africa.

However, despite its shortcomings and its limitations, the UN is still an actor privileged by the international society when peace operations are needed. The example of Mali at the start of 2013 serves as a reminder. That shows that, for the moment, the UN is still the key conflict management organisation in international society. Rather than seeking impossible solutions to its limitations, it would be better to recognise them and come to terms with them. The member states of the UN could thus entrust it with tasks appropriate to it and ask other actors for assistance in cases that exceed its capacities, even if it means deploying Blue Helmets once the situation has stabilised. In that way, the credibility of the UN would cease to be threatened by operations which place it in difficulties.

The protection of civilians mandate in UN peacekeeping operations: reconciling protection concepts and practices

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Abstract

The ‘protection of civilians’ mandate in United Nations (UN) peacekeeping operations fulfils a critical role in realising broader protection objectives, which have in recent years become an important focus of international relations and international law. The concepts of the ‘protection of civilians’ constructed by the humanitarian, human rights and peacekeeping communities have evolved somewhat separately, resulting in disparate understandings of the associated normative bases, substance and responsibilities. If UN peacekeepers are to effectively provide physical

* Haidi Willmot writes in her personal capacity and the views expressed in this article do not necessarily reflect those of the United Nations. The authors have benefited from the helpful comments of others, including Conor Foley and the anonymous peer reviewers.

protection to civilians under threat of violence, it is necessary to untangle this conceptual and normative confusion. The practical expectations of the use of force to protect civilians must be clear, and an overarching framework is needed to facilitate the spectrum of actors working in a complementary way towards the common objectives of the broader protection agenda.

Keywords: protection of civilians, peacekeeping, United Nations, international humanitarian law, international human rights law, responsibility to protect.



The protection of civilians has in recent years become an important focus of international relations and international law, particularly in the context of United Nations (UN) peacekeeping operations. It is often at the heart of international debates on responding to major conflicts, as evidenced in the ongoing discourse on the situations in Syria, Mali and the Central African Republic.¹ Yet despite the international attention being focused on protection issues, the normative bases, content and responsibilities associated with practical implementation remain contested, with disparate usage of the protection lexicon in international law and across humanitarian, human rights and peacekeeping communities. The concept has come to encompass a wide range of rights and obligations under *jus ad bellum*, the UN Charter, international humanitarian law (IHL) and international human rights law (IHRL), as well as a spectrum of activities including the use of force for the physical defence of civilian populations, aspects of humanitarian action and human rights monitoring, reporting and advocacy. The fragmented conceptions and lack of strategic coherence has, at times, negatively impacted the practical implementation of protection mandates, with protection actors sometimes working at cross purposes.

The UN peacekeeping protection of civilians mandate fulfils a critical role in realising overarching objectives of civilian protection, and yet, partly due to the proliferation of competing ‘protection’ concepts, there remains a lack of clarity on the normative framework and practical substance of the mandate. As a result, the peacekeeping mandate is at risk of being diluted, and the potential focus and effectiveness of the use of force to protect civilians undermined.

This article will review the historical development of the protection of civilians mandate in UN peacekeeping operations. It will examine the treatment of civilian protection issues under relevant bodies of international law, and explore the competing concepts constructed by the humanitarian, human rights, and peacekeeping communities. It will then move on to examine some of the practical

1 Security Council Meeting Record S/PV.7019, 19 August 2013; Security Council Meeting Record S/PV.6985, 25 June 2013; Security Council Meeting Record S/PV.7098, 22 January 2014; *Cross-Cutting Report 2013 No. 3: Protection of Civilians*, Security Council Report, 20 December 2013, pp. 11–12, available at: www.securitycouncilreport.org/protection-of-civilians/. All internet references were last visited in February 2014.

challenges manifesting due to the differing concepts of protection. The article proposes reconciling the spectrum of concepts and activities in an overarching framework, and refocusing the protection of civilians peacekeeping mandate on physical protection from imminent violence.

Historical development of the protection of civilians mandate

UN peacekeeping operations were originally conceived as interpositional military forces deployed to carry out observation and ceasefire monitoring.² The end of the Cold War heralded a quantitative and qualitative shift, with many more peacekeeping missions deployed and the range of tasks significantly expanded. Where early peacekeeping missions had sought to freeze a conflict, the next generation of peace operations sought to address the root causes through peacebuilding activities, including electoral assistance, promotion of human rights, disarmament, demobilisation and reintegration of combatants, security sector reform, and other rule of law-related activities.³

Due to growing international concern with the humanitarian situation in several countries, spurred by the ‘CNN effect’,⁴ a number of UN missions were deployed into less permissive environments of ongoing internal conflict with a mandate to use force to ensure a safe and secure environment and to support the delivery of humanitarian assistance.⁵ There were several high-profile failures to protect civilians during the early to mid-1990s, including in Rwanda and the former Yugoslavia.⁶ It was not until 1999 that the first UN peacekeeping mission was specifically mandated to use force ‘to protect civilians’, a mandate that has been provided to almost all UN peacekeeping missions established since.⁷ Yet the origins

2 For example, UN Emergency Force (UNEF I), 1956–1967; UN Observation Group in Lebanon (UNOGIL), 1958; UN Force in Cyprus (UNFICYP), 1964–present; UN Emergency Force II (UNEF II), 1974–1979; UN Disengagement Observer Force (UNDOF), 1974–present; and UN Interim Force in Lebanon (UNIFIL), 1978–present.

3 For example, UN Angola Verification Mission II (UNAVEM II), 1991–1995; UN Mission for the Referendum in Western Sahara (MINURSO), 1991–present; UN Observer Mission in El Salvador (ONUSAL), 1991–1995; UN Transitional Authority in Cambodia (UNTAC), 1992–1993; UN Operation in Mozambique (ONUMOZ), 1992–1994; UN Assistance Mission in Rwanda (UNAMIR), 1993–1996.

4 The ‘CNN effect’ refers to the broadcasting of images of suffering populations, which caused democratic constituencies to put pressure on their governments to ‘do something’. See Piers Robinson, *The CNN Effect: The Myth of News, Foreign Policy and Intervention*, Routledge, London and New York, 2002.

5 Examples include UN operations in Somalia (UNOSOM I and II), the former Yugoslavia (UNPROFOR) and Haiti (UNMIH).

6 See the Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, A/54/549, 15 November 1999, para. 49; and Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, S/1999/1257, 16 December 1999, paras. 50–52.

7 The only UN peacekeeping operation deployed since 1999 without a protection of civilians mandate was the UN Supervision Mission in Syria (UNSMIS), which was established to monitor a cessation of armed violence and to monitor and support the full implementation of the Joint Special Envoy’s six-point plan to end the conflict in Syria: see SC Res. 2043, 14 April 2012, available at: www.un.org/en/peacekeeping/documents/six_point_proposal.pdf.

of the protection of civilians mandate in UN peacekeeping are deeper and richer, reaching back almost to the beginning of UN peacekeeping itself.

UN peacekeeping operations have been involved in the protection of civilians since the deployment of the UN Operation in the Congo (ONUC) in 1960. ONUC Operational Directive No. 8 asserted:

Where feasible, every protection will be afforded to unarmed groups who may be subjected by any armed party to acts of violence likely to lead to loss of life. In such cases, UN troops will interpose themselves, using armed force if necessary, to prevent such loss of life.⁸

However, the ONUC deployment was exceptional. As a result of the escalating conflict, the activities of the UN forces bordered on war-fighting. The resulting political and financial strains placed on the organisation acted against the deployment of similarly expansive and robust operations for some time.⁹

The UN Protection Force established in 1992 and deployed to the former Yugoslavia (UNPROFOR) was the UN's first peacekeeping mission to make a concerted attempt to protect civilians, although it was not mandated or resourced to provide direct physical protection to the civilian population.¹⁰ UNPROFOR proceeded with an indirect civilian protection strategy based on two components: protection through the delivery of humanitarian assistance, and protection through the demilitarisation and defence of territory ('safe areas'). At the height of its mandate, UNPROFOR was authorised to use force in three main situations: to 'deter attacks against the safe areas'; to 'ensure the freedom of movement of UNPROFOR'; and to 'protect humanitarian convoys'.¹¹ There was however no specific 'protection of civilians' mandate, and UNPROFOR's authorisation to use force was presented as *acting in self-defence*.

Following the delivery of reports on the UN peacekeeping failures in Bosnia¹² and Rwanda¹³ in the 1990s, the Security Council embarked upon

8 Operations Directive No. 8 (untitled), February 1961, UN Archives DAG/13/1.6.5.0.0; Operations Directives August 1960–January 1964, Box 3, pp. 2–3; and Trevor Findlay, *The Use of Force in UN Peace Operations*, Oxford University Press, New York, 2002, Appendix 2.

9 See William J. Durch (ed.), *The Evolution of UN Peacekeeping*, St. Martin's Press, New York, 1993, pp. 315–351; Alex J. Bellamy and Paul Williams, *Understanding Peacekeeping*, 2nd ed., Polity Press, Cambridge, 2010, pp. 86–87; and International Court of Justice (ICJ), *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, Advisory Opinion, *ICJ Reports* 1962, p. 151. On peacekeeping and war fighting, see Katarina Månsson, 'Use of force and civilian protection', in *International Peacekeeping*, Vol. 12, No. 4, 2005, pp. 503–504; Derek Bowett, *United Nations Forces*, Stevens & Sons, London, 1964, pp. 196 and 683.

10 See William J. Durch and James A. Schear, 'Faultlines: UN operations in the former Yugoslavia', in W. J. Durch, *UN Peacekeeping, American Policy, and the Uncivil Wars of the 1990s*, St. Martin's Press, New York, 1996, pp. 197–202; and T. Findlay, above note 8, pp. 219–272.

11 SC Res. 743, 21 February 1992; SC Res. 758, 8 June 1992; SC Res. 776, 14 September 1992; SC Res. 836, 4 June 1993; T. Findlay, above note 8, pp. 221–231.

12 Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, A/54/549, 15 November 1999, para. 49; Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, S/1999/1257, 16 December 1999, paras. 50–52.

13 Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, S/1999/1257, 16 December 1999.

a programme of thematic activity,¹⁴ examining civilian protection issues and determining measures to increase UN involvement in their resolution. It also began using UN peacekeeping operations as a tool to address protection concerns. In 1999, the Security Council mandated the UN Mission in Sierra Leone (UNAMSIL) to ‘take the necessary action . . . within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG [the Economic Community of West African States Monitoring Group]’.¹⁵ The language used in the UNAMSIL mandate resolution set a precedent that has been employed in most subsequent UN peacekeeping missions.¹⁶ The meeting records from the Security Council debate preceding the adoption of the protection of civilians mandate for UNAMSIL demonstrate recognition, on the part of the Security Council members, that the mandate represented the advent of a new dimension of UN peacekeeping operations. Security Council members demonstrated *express intent* that UN peacekeepers be mandated to use force to provide direct physical protection to civilians. For example, during the debate, the Argentinean delegation stated:

[T]he protection of civilians under Chapter VII [of the Charter] is a pertinent development in the context of the mandate of a peace operation. This draft resolution is significant in that it introduces a new, fundamental political, legal and moral dimension. This bears on the credibility of the Security Council and shows that the Council has learned from its own experience and that it will not remain indifferent to indiscriminate attacks against the civilian population.¹⁷

Despite the protection of civilians mandate being consistently provided to UN peacekeeping missions from 1999 onward, the clarity of purpose demonstrated in the early Security Council debates dissipated. In the absence of operational guidance for implementation, the mandate became open to the widely varying interpretations

14 The agenda of the UN Security Council encompasses country and regional issues, as well as thematic and general issues. Thematic issues addressed by the Council include ‘Women, Peace and Security’, ‘Children and Armed Conflict’ and ‘Protection of Civilians’.

15 SC Res. 1270, 22 October 1999, operative para. 14.

16 MONUC (Democratic Republic of the Congo) protection of civilians language was added to the mandate in SC Res. 1291, 24 February 2000, operative para. 8; UNMIL (Liberia): SC Res. 1509, 19 September 2003, operative para. 3(j); UNOCI (Côte d’Ivoire): SC Res. 1528, 27 February 2004, operative para. 6(i); MINUSTAH (Haiti): SC Res. 1542, 30 April 2004, operative para. 7(D)(f); ONUB (Burundi): SC Res. 1545, 21 May 2004, operative para. 5; UNMIS (Sudan): SC Res. 1590, 24 March 2005, operative para. 16(i); UNIFIL (Lebanon) protection of civilians language was added to the mandate in SC Res. 1701, 11 August 2006, operative para. 12; UNAMID (Darfur) protection of civilians language was in the original mandate, SC Res. 1769, 31 July 2007, operative para. 15(a)(2); MINURCAT (Chad and Central African Republic) protection of civilians language was added to the mandate in SC Res. 1861, 14 January 2009, operative para. 7(a)(i); MONUSCO (Democratic Republic of the Congo) protection of civilians language was in the original mandate, SC Res. 1925, 28 May 2010, operative paras. 11 and 12(a); UNISFA (Abyei), SC Res. 1990, 27 June 2011, operative para. 3(d); UNMISS (South Sudan): SC Res. 1996, 8 July 2011, operative para. 3(b); MINUMSA (Mali): SC Res. 2100, 25 April 2013, operative para. 16(c)(i). The exceptions are the UN missions in East Timor (UNTAET, UNMISSET, UNMIT), Ethiopia and Eritrea (UNMEE), and Syria (UNSMIS).

17 Security Council Meeting Record S/PV.4054, 22 October 1999, p. 16.

of senior mission leadership on the ground,¹⁸ and many peacekeeping missions that had been provided with the mandate were unable to implement it in any meaningful way. The focus of international debates on the political and security aspects of the protection of civilians were channelled into the overarching normative dilemmas associated with the concept of the 'Responsibility to Protect'.¹⁹

It was not until 2007, following the significant failures of UN peacekeeping missions to protect civilians, particularly in the Democratic Republic of the Congo (DRC),²⁰ that focus returned to the protection of civilians mandate. In response to such failures, the Security Council began to explicitly prioritise protection efforts in several UN peacekeeping missions, such as those deployed to Darfur (UNAMID),²¹ the DRC (MONUC),²² Chad and the Central African Republic (MINURCAT)²³, and more recently, South Sudan (UNMISS)²⁴ and Liberia (UNMIL).²⁵ Highlighting the importance of peacekeeping in furthering the overarching protection agenda, the thematic resolutions on the protection of civilians in armed conflict adopted between 2007 and 2011 focused to a large extent on the implementation of protection mandates in UN peacekeeping operations, stressing that protection activities should be given priority in resource allocation.²⁶

Momentum on the issue also grew in other fora. In the General Assembly, the Special Committee on Peacekeeping Operations (commonly known as the C34) included language on the protection of civilians in the report of its 2009 regular session and every subsequent annual report.²⁷ During this time, the UN Department of Peacekeeping Operations (DPKO) and Department of Field Support (DFS) undertook several major projects to support the effective implementation of the protection of civilians mandate. These included the joint commissioning, with the Office for the Coordination of Humanitarian Affairs, of a comprehensive study

18 Victoria Holt and Glyn Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, independent study jointly commissioned by the Department of Peacekeeping Operations (DPKO) and the Office for the Coordination of Humanitarian Affairs (OCHA), United Nations, 2009, pp. 8 and 160–172.

19 The Responsibility to Protect (RtoP or R2P) is a principle of international security and human rights to address the international community's failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity. See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, IDRC Books, Ottawa, 2001; 2005 World Summit Outcome, GA Res. 60/1, 24 October 2005; and Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, Cambridge, 2011.

20 See e.g. Human Rights Watch, *Killings in Kiwanja: The UN's Inability to Protect Civilians*, 12 December 2008, available at: www.hrw.org/reports/2008/12/12/killings-kiwanja; Human Rights Watch, *Abandoning Abyei: Destruction and Displacement*, 22 July 2008, available at: www.hrw.org/reports/2008/07/21/abandoning-abyei-0; Darfur Consortium, *Putting People First: The Protection Challenge Facing UNAMID in Darfur*, 28 July 2008, available at: www.darfurconsortium.org/darfur_consortium_actions/reports/2008/Putting_People_First_UNAMID_report.pdf.

21 SC Res. 1769, 31 July 2007, operative para. 15(a)(ii); SC Res. 2003, 29 July 2011, operative para. 3(a).

22 SC Res. 1856, 22 December 2008, operative paras. 3 and 6. See also Security Council Meeting Record S/PV.6055, 22 December 2008, pp. 2–3.

23 SC Res. 1778, 25 September 2007.

24 SC Res. 2057, 5 July 2012.

25 SC Res. 2066, 17 September 2012.

26 SC Res. 1894, 11 November 2009.

27 Annual Reports of the Special Committee on Peacekeeping Operations, A/63/19 (2009), A/64/19 (2010), A/65/19 (2011) and A/66/19 (2012).

on mandate implementation,²⁸ the development of an operational concept on the protection of civilians to guide missions' implementation efforts,²⁹ and the development of training materials for military personnel.

In the context of the violent conflict in Libya, in March 2011 the Security Council authorised member states to 'take all necessary measures ... to protect civilians and civilian populated areas under threat of attack'.³⁰ In this instance, the 'protection of civilians' language was used to authorise what was essentially a Responsibility to Protect intervention. This was because the mandate provided for Libya was concerned equally with the broader strategic basis for intervention (for which Libya had not provided its consent) as with the operational-level use of force. In comparison, the protection of civilians mandates in UN peacekeeping are usually focused on the operational-level use of force in the context of the host state's consent to the deployment of the mission (whether genuine or coerced). It had taken time, as well as nuanced and sustained political engagement, to get to the point where the concept and language associated with the protection of civilians peacekeeping mandate had been widely accepted. There was concern that the fallout of the Libya intervention, which was criticised by some as being a vehicle for regime change rather than for protection of civilians,³¹ would jeopardise the ongoing support for and development of the protection of civilians mandate in UN peacekeeping missions. Several commentators have highlighted the impact that the Libya intervention had on the willingness of some Security Council members to support intervention in response to the conflict in Syria.³²

Since the Libya intervention, the Security Council has introduced a new dimension to protection of civilians issues. In March 2013, the Council authorised the deployment of an Intervention Brigade as part of the UN Organisation Stabilisation Mission in the DRC (MONUSCO) to operate alongside the regular UN forces, with the mandate to 'ensure ... effective protection of civilians under imminent threat of physical violence'.³³ The Intervention Brigade was provided the mandate to 'neutralise' rebel armed groups by carrying out targeted offensive operations against them.³⁴ This development could have a significant impact on how the original protection of civilians mandate is understood and, in particular,

28 V. Holt and G. Taylor, above note 18.

29 UN Department of Peacekeeping Operations – Department of Field Support, Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations, 2010, available at: www.peacekeeping.org.uk/wp-content/uploads/2013/02/100129-DPKO-DFS-POC-Operational-Concept.pdf.

30 SC Res. 1973, 17 March 2011, operative para. 4.

31 Alex J. Bellamy, *The Responsibility to Protect and the Problem of Regime Change*, e-International Relations, 27 September 2011, available at: www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change; Alex J. Bellamy and Paul D. Williams, 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect', in *International Affairs*, Vol. 87, No. 4, 2011; John-Mark Iyi, 'The duty of an intervention force to protect civilians: a critical analysis of NATO's intervention in Libya', in *Conflict Trends*, No. 2, ACCORD, 2012.

32 See in particular Security Council, Cross-Cutting Report 2012 No. 2: Protection of Civilians, 31 May 2012, pp. 14–22, available at: www.securitycouncilreport.org/protection-of-civilians/.

33 SC Res. 2098, 28 March 2013, operative para. 11(a)(i).

34 *Ibid.*, operative para. 12(b).

whether it is unable to be conceived as incorporating an inherent authorisation to carry out pre-emptive offensive operations.

Overview of the legal framework for the protection of civilians by UN peacekeepers

IHL and IHRL are most often understood as the normative bases for protection of civilians concepts and activities. While both of these branches of law are indeed relevant to the use of force by UN peacekeepers to protect civilians, a third, more central, normative basis for action arises from *jus ad bellum* and is grounded in the UN Charter. The latter provides greater scope for action by UN peacekeepers, although it sets out a legal *authority* or *right* rather than a positive *obligation* to which these forces may be held accountable. A detailed examination of the legal framework for the protection of civilians is beyond the scope of this work, which will instead focus on outlining the main bases for protection of civilians enshrined in the most relevant bodies of international law.

While an express Security Council mandate provides the central basis for UN peacekeepers to use force to protect civilians, it is not the sole source of legal authority to use force for such a purpose. Even in the absence of an express mandate by the Security Council, all UN peacekeepers arguably have the authority to use force to protect civilians under imminent threat of physical violence, a view endorsed by the UN itself.³⁵ This may fit under the positivist rule of the expanded concept of 'self-defence' that is part of UN peacekeeping (including self-defence in defence of the mandate), but is best understood as an implied power normatively connected to the UN Charter's purposes and principles.³⁶ The analysis of the legal framework for the protection of civilians mandate also reveals that the mandate's development is the manifestation of progressive interpretation of UN Charter provisions relating to the determination of threats to international peace and security, drawing heavily on humanitarian and human rights ideals, and moving away from the traditional state-centric paradigm.³⁷

35 Report of the Panel on United Nations Peace Operations (the Brahimi Report), 2000, A/55/305 and S/2000/809, para. 62; United Nations Master List of Numbered ROE, Guidelines for the Development of ROE for UNPKO, Provisional Sample ROE, Attachment 1 to FGS/0220.001, United Nations, April 2002, Rule 1.8; see also SC Res. 918, 17 May 1994, which '[r]ecognizes that UNAMIR may be required to take action in self-defence against persons or groups who threaten protected sites and populations, UN and other humanitarian personnel or the means of delivery and distribution of humanitarian relief' (emphasis added).

36 This approach is articulated in Scott Sheeran, 'The use of force in United Nations peacekeeping operations', in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law*, Oxford University Press, Oxford, forthcoming, 2014; Brahimi Report, above note 35, para. 62. For a critical view on the expanded concept of self-defence, see Nigel White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, Manchester University Press, Manchester, 1993, p. 201; T. Findlay, above note 8, p. 356.

37 For example, see Haidi Willmot and Ralph Mamiya in M. Weller (ed.), above note 36; Christine Gray, *International Law and the Use of Force*, Oxford University Press, 2008, 3rd ed., pp. 313–314; Katherine Cox, 'Beyond self-defence: United Nations peacekeeping operations and the use of force', in *Denver Journal of International Law and Policy*, Vol. 27, 1999, pp. 239 and 258.

Foundations of the protection of civilians mandate in IHRL and IHL

While IHRL and IHL may not provide a direct legal basis for the protection of civilians mandate in UN peacekeeping, they are still relevant and normatively connected to this issue. IHRL protects a broad range of rights, but its core is intended to ensure protection against the arbitrary exercise and abuse of power by authorities for all human beings who find themselves within a state's 'effective control' (that is, over territory or otherwise over the individual, for example through detention).³⁸

IHL, by contrast, has two main aims.³⁹ The first is to protect persons who have not taken, or are no longer taking, a direct part in hostilities, including civilians as well as wounded, sick, and captured combatants. The second is to regulate the means and methods of warfare through rules on the conduct of hostilities and the use of weapons.⁴⁰ While the provisions of IHRL apply to all persons at all times within a state's jurisdiction, IHL only applies in times of armed conflict and draws a fundamental distinction between civilians and combatants who are taking a direct part in hostilities.⁴¹

IHL prohibits all attacks against civilians, unless and for such time as they are directly participating in the hostilities.⁴² IHL also specifies that, in international armed conflicts (and arguably non-international armed conflicts), precautions should be taken to try to ensure that civilians are not killed or injured in attacks on military targets.⁴³ While Article 1 of the Geneva Conventions *prima facie* provides a positive obligation to protect (that is, 'to ensure respect' for IHL), in practice this provision is read and implemented more narrowly.⁴⁴ The provisions of IHL

38 International Covenant on Civil and Political Rights (ICCPR), Art. 2(1); UN Human Rights Committee, General Comment No. 31, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004) para. 21; Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, GA Res. 8052, 18 September 1970; European Court of Human Rights, *Loizidou v. Turkey* (Preliminary Objections), Application No. 15318/89, Series A, No. 310, 1995, para. 62; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011.

39 See Geoffrey Best, *War and Law since 1945*, Clarendon Press, Oxford, 1994; Dieter Fleck (ed.), *Handbook of Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008; Christopher Greenwood, *Essays on War in International Law*, Cameron May, London, 2006; ICRC, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, Cambridge, 2005 [hereafter 'ICRC Customary Law Study'], Rules 1–11; SC Res. 1894, 11 November 2009.

40 Sometimes referred to as the Hague law, these rules are mainly contained in the 1907 Hague Regulations respecting the Laws and Customs of War on Land, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1925 Gas Protocol, the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention, and the 1997 Antipersonnel Mine Convention. Francois Bugnion, 'Law of Geneva and Law of The Hague', in *International Review of the Red Cross*, Vol. 83, No. 844, 2001, pp. 901–922.

41 Jean-François Quéguiner, 'Precautions under the law governing the conduct of hostilities', in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 793–821; Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, above note 38.

42 Common Article 3 to the Four Geneva Conventions.

43 Additional Protocol I to the Geneva Conventions, Art. 48; Additional Protocol II to the Geneva Conventions, Art. 13(1).

44 Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions revisited: protecting collective interests', in *International Review of the Red Cross*, Vol. 82, No. 837, 2000,

applicable in non-international armed conflicts are less extensive than those relating to international armed conflicts.⁴⁵

IHRL is potentially of broader relevance for the protection of civilians mandate. This is particularly so when recognising that, while IHL does apply *per se* to UN peacekeepers, such UN forces are generally not considered to be party to an armed conflict.⁴⁶ The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law provides a test which treats UN peacekeepers as more analogous to civilians or non-combatants than to a party to the armed conflict. The Bulletin does this by prescribing that IHL applies to UN forces 'when in situations of armed conflict they are *actively engaged* therein as combatants, *to the extent and for the duration* of their engagement'.⁴⁷ This is however controversial, and the International Committee of the Red Cross (ICRC) adopts a different view of the issue.⁴⁸

The most important rights under IHRL for the protection of civilians in peacekeeping include the right to life, the prohibition against torture and ill-treatment, and the freedom from arbitrary detention.⁴⁹ These are human rights that any host state will have an obligation to respect and *ensure* respect for (that is, a positive obligation), including by non-state actors.⁵⁰ In relation to these human rights, only the freedom from arbitrary detention may be derogated from in a state of emergency.⁵¹ While the applicability of IHRL to UN peacekeeping operations is difficult to contest,⁵² the precise content of these obligations is more unclear than

p. 67; Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: a soap bubble?', in *European Journal of International Law*, Vol. 21, No. 1, 2010, p. 125.

45 See ICRC Customary Law Study above note 39, and US criticisms in John B. Bellinger III and William J. Haynes II, 'A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law', in *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, p. 444.

46 See UN Secretary-General's Bulletin, Observance by UN Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13, section 1.1; Scott Sheeran, 'A constitutional moment? United Nations peacekeeping in the Democratic Republic of Congo', in *International Organizations Law Review*, Vol. 8, 2011, pp. 55 and 113–114; Christopher Greenwood, 'Scope of application of humanitarian law', in D. Fleck, above note 39, pp. 39 and 46; Martin Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 171–174; ICRC, statement of the ICRC to the United Nations General Assembly 50th session, 16 November 1995, Fourth Committee, Agenda Item 86, available at: www.icrc.org/eng/resources/documents/statement/57jmrn.htm.

47 UN Secretary-General's Bulletin, above note 46, section 1.1.

48 The ICRC is critical of this perspective, as are some others: see M. Zwanenburg, above note 46, pp. 171–174.

49 See Universal Declaration of Human Rights, Arts. 3, 5, and 9; ICCPR, Arts. 6(1), 7, and 9(1).

50 See ICCPR, Art. 2(1); General Comment No. 31, above note 38, paras. 3 and 10; Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras* (Preliminary Objections), Serie C, No. 1, Judgement, 26 June 1989, para. 172 (referring to 'the lack of due diligence to prevent the violation or to respond to it as required by the Convention'); Human Rights Committee, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995), paras. 8.2 and 10.

51 ICCPR, Art. 4(2); Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Martinus Nijhoff Publishers, Leiden, 1998; Scott Sheeran, 'Reconceptualising states of emergency under international human rights law: theory, legal doctrine, and politics', in *Michigan Journal of International Law*, Vol. 34, No. 2, 2013, pp. 101–168.

52 See S. Sheeran, above note 46, pp. 112–119; Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?*, Cambridge University Press, Cambridge, 2012; Frederic Megret and Florian

for IHL obligations. The UN is not party to human rights treaties and the greatest difficulty lies in understanding the *scope* and *extent* of obligations for a UN force, which has no sovereignty over a territory and has lesser powers than a state.⁵³ No equivalent of the Secretary-General's Bulletin on IHL exists to guide the application of IHRL to UN peacekeepers.

The 2000 Report of the Panel on United Nations Peace Operations (the Brahimi Report), a landmark UN document on peacekeeping, indicated that:

[P]eacekeepers – troops or police – who witness violence against civilians should be presumed to be authorised to stop it, within their means, in support of basic United Nations principles and . . . consistent with 'the perception and the expectation of protection created by an operation's very presence'.⁵⁴

This statement is connected to a potential UN obligation to ensure respect for IHRL (also known as the 'due diligence' obligation)⁵⁵ by others such as non-state actors, private individuals and even local authorities.⁵⁶ While there is real scope for this argument of *positive* obligation, it is complicated and requires untangling a range of legal issues which are outside the scope of this article, including: the basis and scope of human rights obligations of the UN and its peacekeepers;⁵⁷ the extent to which derogation is possible (as for states of emergency) for any such applicable obligations;⁵⁸ and the UN's legal authority to use force in a peacekeeping operation without an express mandate from the Security Council to do so (which is usually the case for a non-Chapter VII operation).⁵⁹ As a normative guide for UN peacekeepers, IHL may provide less protection to civilians than IHRL and is silent on many issues – particularly concerning active steps to protect – which could be directly relevant to the protection of civilians mandate. This is evident

Hoffman, 'The UN as a human rights violator? Some reflections on the UN's changing human rights responsibilities', in *Human Rights Quarterly*, Vol. 25, No. 2, 2003, pp. 314–334; legal advice dated 1 April 2009 from UN Office of Legal Affairs to the UN Department of Peacekeeping Operations, available at: <http://documents.nytimes.com/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1>; Geoffrey Gettleman, 'U.N. army told not to join Congo army in operation', in *New York Times*, 9 December 2009, available at: www.nytimes.com/2009/12/10/world/africa/10congo.html.

53 *Ibid.*; ICJ, above note 9, pp. 163–164.

54 Brahimi Report, above note 35, para. 62, quoting the report of the Independent Inquiry on Rwanda, S/1999/1257.

55 See the various references to this positive basis of obligation ('due diligence'), below note 60.

56 *Ibid.*

57 S. Sheeran, above note 46, pp. 112–119; F. Megret and F. Hoffman, above note 52; G. Verdirame, above note 52.

58 Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart, Oxford, 2004, pp. 201–202; Scott Sheeran and Catherine Bevilacqua, 'The UN Security Council and international human rights obligations: towards a theory of constraints and derogation', in Scott Sheeran and Sir Nigel Rodley (eds.), *The Routledge Handbook on International Human Rights Law*, Routledge, London, 2013; Michael Wood, 'The UN Security Council and international law', Hersch Lauterpacht Memorial Lectures, Lauterpacht Centre for International Law, University of Cambridge, 8 November 2006, para. 29, available at: www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_2.pdf.

59 T. Findlay, above note 8, pp. 7–14; S. Sheeran, above note 36.

when comparing the positive ('due diligence') obligations of states under IHRL with the more modest obligations of states to ensure respect for IHL.⁶⁰

Foundations of the protection of civilians mandate in the UN Charter

The UN Charter was developed in the aftermath of the failures of the Covenant of the League of Nations, and was seen as a more advanced version of a collective security agreement.⁶¹ Member states relinquished their authority to use force in their relations with other states but maintained the right of self-defence under Article 51 of the Charter. The UN Security Council was given the authority, under Chapter VII of the Charter, to authorise the use of force against member states for the purpose of maintaining or restoring international peace and security.⁶² The trigger for the Security Council's imposition of coercive measures under Chapter VII was provided in Article 39 of the Charter as the identification of a threat to international peace and security.

The development of the legal framework for UN peacekeeping has taken place in the context of the UN Charter's silence on this activity, and where there is arguably no complete theory of sources of international law for the organisation.⁶³ The interpretation of UN law accordingly draws strong parallels to constitutional law rather than the more usual interpretive approach in the Vienna Convention on the Law of Treaties.⁶⁴ As explained by Thomas Franck:

The law of, or about, international organisations is essentially constitutional law ... This is true not only because it is descriptive of the internal rules governing the operation of institutions and societies, but because it is treated by lawyers in a manner different to other law – treated as being capable of organic growth.⁶⁵

It is thus important in the UN context to understand the interpretive approach of *implied* powers under the Charter, which applies to organs (such as the Security Council) and sub-organs (such as UN peacekeeping operations), and is widely accepted in Charter interpretation.⁶⁶

60 See ICCPR, Art. 2(1); General Comment No. 31, above note 38, paras. 3 and 10; *Bautista de Arellana*, above note 50, paras. 8.2 and 10; as compared to Common Article 1 of the Geneva Conventions; L. Boisson de Chazournes and L. Condorelli, above note 44; C. Focarelli, above note 44.

61 Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents*, World Peace Foundation, Boston, 1946, pp. 21 and 59; Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum, 'Introduction', in Lowe *et al.* (eds.), *The United Nations Security Council and War*, Oxford University Press, Oxford, 2008, pp. 11–17.

62 See Arts. 25, 39, 42 and 43 of the UN Charter.

63 See discussion in S. Sheeran, above note 46, p. 118.

64 See the section on interpretation in the Vienna Convention on the Law of Treaties, Arts. 31–33.

65 Thomas Franck, 'Book review of Derek W. Bowett, *The Law of International Institutions* (Stevens, London, 1963)', in *Harvard Law Review*, Vol. 77, 1964, p. 1565; José Alvarez, *International Organizations as Law-Makers*, Oxford University Press, Oxford, 2005, p. 191.

66 José Alvarez, 'Constitutional interpretation in international organizations', in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations*, United Nations University Press, Tokyo, 2001, p. 121; ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949, Advisory Opinion, *ICJ Reports 1949*, p. 174; ICJ, above note 9.

The protection of civilians mandate, which is set out in Security Council resolutions adopted under Chapter VII of the Charter, is central to the protection aspect of UN peacekeeping operations. It represents both the mission's tasking and its explicit legal authority to use force to protect civilians. However, the decisions of the Security Council do not exclusively define the authority to use force, including to protect civilians. The use of force in UN peacekeeping operations has one of two legal bases: (a) it is *expressly* authorised under Chapter VII (such as a protection of civilians mandate); or (b), it is *implied* under the rubric of the right to self-defence (usually under a non-Chapter VII mandate).⁶⁷ In both cases, the mandate is grounded in the broader context of the Charter. A UN peacekeeping operation's legal authority to use force and encroach upon host state sovereignty is greater than that of the visiting forces of other states. This reflects the UN's status as a near universal international organisation of broad purpose and legitimacy, and that peacekeeping operations represent the international community acting through the UN.

While the protection of civilians mandate may be seen as a natural development to fulfil obligations of IHRL and IHL, in fact it rests heavily on the UN Charter and its purposes and principles. As the Brazilian delegation stated in the Security Council in 2011, '[p]rotecting civilians is one of the most important ways in which the Organisation gives expression to its ultimate objectives, as set out in the Charter'.⁶⁸ The mandate represents an important expansion of the *jus ad bellum* manifest in the Security Council authorisation of the use of force. Christine Gray, for example, in her seminal work *International Law and the Use of Force*, refers to the protection of civilians as a 'new legal and moral' dimension to the use of force.⁶⁹ It crystallises a trend suggesting that the most legitimate use of force on behalf of the international community is for the purpose of the protection of civilians.⁷⁰

The development of the protection of civilians mandate is a movement away from the traditional state-centric focus of international peace and security, which was the *raison d'être* of Chapter VII at the time when the Charter was adopted.⁷¹ It has become a practical manifestation of an approach to determining threats to international peace and security that is firmly founded in human rights and humanitarian ideas.⁷² This also reflects a parallel and earlier evolution of the

67 C. Gray, above note 37, pp. 300–304; T. Findlay, above note 8, pp. 14–15; K. Cox, above note 37, p. 249.

68 Security Council Meeting Record S/PV.6531, 10 May 2011, p. 11. See also Security Council Meeting Record S/PV.6650 (9 November 2011), p. 19: France stated 'The protection of civilians is at the heart of the mandate of United Nations peacekeeping operations. In that framework our Organisation, on a daily basis, must fulfil that mission.'

69 C. Gray, above note 37, p. 313.

70 See discussion in H. Willmot and R. Mamiya, above note 37; S. Sheeran, above note 36; K. Cox, above note 37, p. 258; Siobhan Wills, *Protecting Civilians: The Obligations of Peacekeepers*, Oxford University Press, Oxford, 2009; Daphna Shrager and Ralph Zacklin, 'The applicability of international humanitarian law to United Nations peacekeeping operations: conceptual, legal and practical issues', in *Symposium on Humanitarian Action and Peacekeeping Operations*, ICRC, Geneva, 1995, pp. 39 and 43.

71 See L. M. Goodrich and E. Hambro, above note 61, pp. 155–163.

72 See K. Cox, above note 37, p. 258; H. Willmot and R. Mamiya, above note 37.

meaning of Article 39 of the UN Charter – the trigger for the use of Chapter VII powers – from inter-state to intra-state conflicts in which civilians are the main victims and targets.⁷³ In this sense, the broader reading of the Charter also owes a debt to the foundations and growth of IHRL and IHL.

UN peacekeepers' authority to protect in the absence of an express mandate

The development and extensive use of the Security Council's protection of civilians mandate does not mean that similar legal rights and authority may not exist for UN peacekeeping missions without such an explicit mandate. After the Brahimi Report posited the presumed authority to protect civilians, the UN Secretariat revised in 2002 what became known as the UN Master List of Numbered Rules of Engagement.⁷⁴ One of the standard rules from that list, which applied to all UN peacekeeping operations regardless of their mandate, authorised the use of force 'up to, and including deadly force, to defend any civilian person who is in need of protection against a hostile act or hostile intent, when competent local authorities are not in a position to render immediate assistance'.⁷⁵ This reinforces the Brahimi Report suggestion that UN peacekeepers have an inherent or implied authority, in support of basic UN principles, to use force to protect civilians under imminent threat of physical violence, when the state authorities are unable or unwilling to do so.

This legal authority for protection of civilians can perhaps be linked back at the doctrinal level to the right to use force in self-defence *including in defence of the mandate*, which is an established (though controversial) right implied in all UN peacekeeping operations.⁷⁶ The use of force in self-defence is inherent and implied, as it is not usually spelt out in Security Council mandates, status of forces agreements,⁷⁷ or other legal instruments, nor positively expressed in any other way as a legal authorisation. There are valid concerns associated with an overly broad authorisation for UN peacekeepers to use force under the rubric of 'in defence

73 Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford University Press, Oxford, 2002, pp. 724–725.

74 United Nations Master List of Numbered ROE, above note 35 (and other references under that note). Also see discussion of the UN Master List in Victoria Holt and Tobias Berkman, *Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, Henry L. Stimson Centre, Washington, DC, 2006, pp. 83–86; T. Findlay, above note 8, Appendix 3. A UN template for ROE, although without model rules, is provided in the UN Infantry Battalion Manual, 2012, Vol. II, Annex C, model ROE, p. 254, available at: www.un.org/en/peacekeeping/documents/UNIBAM.Vol.II.pdf.

75 *Ibid.*, Rule 1.8.

76 See UN Department of Peacekeeping Operations, General Guidelines for Peacekeeping Operations, UN Doc. UN/210/TC/GG95, October 1995, p. 20, available at: www.un.org/Depts/dpko/training/tes_publications/books/peacekeeping_Training/genguide_en.pdf, which states that the use of force in defence of the mandate 'might be interpreted as entitling United Nations personnel to open fire in a wide variety of situations'.

77 T. Findlay, above note 8, p. 8; C. Gray, above note 37, pp. 300–304: 'Where there is no express reference to the use of force in a resolution then a peacekeeping force will have the right to use force in self-defence and possibly in the implementation of its mission.'

of the mandate'.⁷⁸ As Nigel White observes: 'Allowing a [UN] force to take positive action in defence of its purpose is no different from allowing them to enforce it.'⁷⁹ However, as suggested in other writings, the protection of civilians forms one of the most central, necessary and legitimate aspects of an expanded concept of self-defence for UN peacekeepers.⁸⁰ The UN, by defending civilians in this context, does not act like an intervening state, but rather defends the norms and values of the UN Charter. This is broadly consistent with the rationale for international action that underlies the Responsibility to Protect.⁸¹

This inherent right of UN peacekeepers to use force to protect civilians does not create a *duty* or *obligation* to use force for this purpose. As the right to use force to protect civilians is either based on implied powers or the express authorisation in a Chapter VII resolution, it is quite difficult to articulate it as a positive obligation within *jus ad bellum*. Nevertheless, some commentators have insisted that such a duty to use force to protect civilians exists.⁸²

Conceptualising protection in the humanitarian, human rights and peacekeeping communities

The protection of civilians mandate provided by the Security Council to UN peacekeeping operations is distinct from the related humanitarian and human rights concepts, but is located within and forms a critical part of the broader protection agenda. As the protection of civilians has become increasingly prominent in international relations discourse and humanitarian practice, the existence of conflicting conceptions of 'protection' by various international actors has become starkly evident and has created confusion. This has been particularly so where UN peacekeeping missions have been deployed and peacekeeping, humanitarian and human rights actors have needed to work closely together, including in 'integrated missions'.⁸³

Concepts of 'protection of civilians' in the humanitarian community

The humanitarian community frames its activities within an expansive protection of civilians concept. By the late 1990s, much of the humanitarian community had

78 See T. Findlay, above note 8, pp. 6 and 14; Ray Murphy, 'United Nations peacekeeping in Lebanon and Somalia', in *Journal of Conflict and Security Law*, Vol. 8, 2003, p. 71; D. Bowett, above note 9, p. 196; B. Simma, above note 73, p. 683.

79 N. White, above note 36, pp. 5 and 201. This is acknowledged also by the UN in the 1995 General Guidelines for Peacekeeping Operations, which state that use of force in defence of the mandate 'might be interpreted as entitling United Nations personnel to open fire in a wide variety of situations'. See UN Department of Peacekeeping Operations, above note 76.

80 See e.g. S. Sheeran, above note 36; S. Wills, above note 70.

81 *Ibid.*, pp. 51–52; World Summit Outcome, above note 19; A. Orford, above note 19.

82 K. Månsson, above note 9, pp. 503 and 515; S. Wills, above note 70.

83 See UN Department of Peacekeeping Operations and UN Department of Field Support, United Nations Peacekeeping Operations: Principles and Guidelines (hereinafter Capstone Doctrine), 2008, Chapter 5, available at: http://pbpu.unlb.org/pbps/library/capstone_doctrine_eNg.pdf.

moved away from the relief-only paradigm and instead conceived the spectrum of humanitarian action within a protection of civilians framework.⁸⁴ In 1999, the Inter-Agency Standing Committee (IASC), established by the UN General Assembly to strengthen the coordination of its humanitarian emergency assistance, adopted the definition of ‘protection’ as ‘all efforts aimed at obtaining full respect for the rights of the individual and of the obligations of the authorities/arms bearers in accordance with the letter and the spirit of the relevant bodies of law’.⁸⁵ The Sphere Project, a community of humanitarian response practitioners, subsequently prepared the Charter and Minimum Standards in Humanitarian Response; this attempted to flesh out the IASC definition, articulating a widely recognised set of ‘protection principles’ to guide all humanitarian agencies, even those without a distinct protection mandate or specialist protection capacity. The Sphere Project’s charter focused on the core humanitarian protection concerns of freedom from violence, from coercion of various kinds and from deliberate deprivation of the means of survival. It also advocated the application of the ‘protection principles’ to the three stages of protection activities: (i) preventive – preventing physical threats or rights abuses; (ii) responsive – stopping ongoing violations; and (iii) remedial – providing remedies to victims.⁸⁶ Various humanitarian organisations, including the ICRC, have gone on to develop more detailed concepts of protection, connected to their own mandates.⁸⁷

The humanitarian community’s approach to the protection of civilians concept has not been without criticism. One commentator suggested that the community had manipulated the language of protection, ‘colonised it, and recast even the most mundane of aid activities as protection’.⁸⁸ It has been argued that while humanitarian protection efforts are inherently valuable, they do not in fact provide actual ‘protection’ as they cannot ‘provide directly and forcefully for the safety of people’ and because ‘much of the protection work of humanitarians deals with the post-violence lives of the victims’.⁸⁹

84 Both in conflict situations and in response to natural disasters. See, generally, Sorcha O’Callaghan and Sara Pantullano, *Protective Action: Incorporating Civilian Protection into Humanitarian Response*, Humanitarian Policy Group, London, 2007; *Humanitarian Response Review*, OCHA, 2005; ICRC, *Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence*, 2nd ed., November 2012, available at: www.icrc.org/eng/assets/files/other/icrc-002-0956.pdf.

85 This definition was adopted by the ICRC and the IASC in 1999 following several workshops hosted by the ICRC and attended by representatives of both the human rights and humanitarian communities. See also ‘Protection of civilians in conflict – the ICRC perspective’, address by Angelo Gnaedinger, ICRC Director-General, Humanitarian and Resident Coordinators’ Retreat, Geneva, 9 May 2007, available at: www.icrc.org/eng/resources/documents/statement/children-statement-140507.htm.

86 The Sphere Project, *Charter and Minimum Standards in Humanitarian Response*, 2011 edition, p. 32, available at: www.ifrc.org/PageFiles/95530/The-Sphere-Project-Handbook-20111.pdf

87 For the ICRC definition, see ICRC, above note 84; ICRC, ‘ICRC Protection Policy’, in *International Review of the Red Cross*, Vol. 90, No. 871, September 2008. For Oxfam’s definition, see ‘What is the “Protection of Civilians” principle?’, available at: www.oxfam.org/en/campaigns/conflict/protection-of-civilians.

88 Marc DuBois, ‘Protection: the new humanitarian fig leaf’, *Humanitarian Aid on the Move (Groupe URD Newsletter)*, April 2009, available at: www.urd.org/IMG/pdf/Protection_Fig_Leaf_DuBois.pdf; Marc DuBois, ‘Protection: fig-leaves and other delusions’, in *Humanitarian Exchange Magazine*, No. 46, March 2010, available at: www.odihpn.org/humanitarian-exchange-magazine/issue-46/protection-fig-leaves-and-other-delusions.

89 *Ibid.*

Concepts of ‘protection of civilians’ in the human rights community

The human rights framework, underpinned by the inherent dignity of the human being, provides a platform for the broadest understanding of the fulfilment of civilian protection ideals. It builds on liberal political ideas and legal theory – from Locke, Rousseau, Paine and others – of the relationship between individuals and the organised power of the state. IHRL does at the international level what many constitutions do at the national level: it crystallises the obligations of governments to respect and ensure respect for a range of rights in consideration for individuals giving up other freedoms to the state and organised public power. This, in effect, places the primary responsibility for the protection of civilians on states.

The language of ‘protection of civilians’ is less prevalent in the discourse of the human rights community than in the humanitarian and peacekeeping communities.⁹⁰ In the human rights context, the concept is somewhat superfluous since the entire IHRL framework underwrites a general concept and specific aspects of the protection of individuals through respect for the wide spectrum of human rights. The concept of ‘protection’ held by the Office of the High Commissioner for Human Rights (OHCHR) was espoused in a 2006 publication:

From OHCHR’s point of view human rights protection is a wider concept, including not only civilians but all individuals in time of peace and war. OHCHR emphasises, as well, obligations of promotion, alongside protection. OHCHR’s approach to protection is based on the provisions of international human rights law, international humanitarian law, international criminal law, and international refugee law. Our approach is informed by the full range of internationally agreed human rights standards . . .⁹¹

In practice, protection-related human rights activity usually focuses on human rights monitoring and reporting, advocacy, and efforts to ensure accountability for international human rights violations. However, such effort is more often conceived as the protection and promotion of IHRL rather than as protection of civilians activities *per se*.

Concepts of ‘protection of civilians’ in the peacekeeping community

There are two core security-related aspects of the protection of civilians. The first, encapsulated in the Responsibility to Protect concept, operates at the strategic level

90 See UN Human Rights Council, Protection of the Human Rights of Civilians in Armed Conflict, Res. 9/9, 2008; and see OHCHR focus on accountability in the statement of Ms. Navi Pillay, UN High Commissioner for Human Rights, at the UN Security Council Debate on the Protection of Civilians in Armed Conflict, 25 June 2012, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12288&LangID=E.

91 OHCHR staff, ‘Protection in the field: human rights perspectives’, in Bernard Ramcharan (ed.), *Human Rights Protection in the Field*, Routledge, London, 2006, pp. 119 and 121.

and is an interpretation of *jus ad bellum*.⁹² It conceptualises protection as preventing and halting genocide and widespread war crimes, crimes against humanity, and ethnic cleansing, and identifies the protection responsibilities of states, the UN and the broader international community.⁹³ Nicholas Tsagourias suggests that the concepts of ‘responsibility to protect’ and ‘protection of civilians’ are ‘subsets – indeed interrelated ones – of the same concept and peacekeeping has become the main tool for providing such protection’.⁹⁴

The second aspect, manifest in Security Council protection of civilians mandates, is generally focused on the operational level and solidly grounded in the collective security agreement articulated in the UN Charter.⁹⁵ The language formulation of the mandates,⁹⁶ and the discussion surrounding the first adoption of the protection of civilians mandate, indicate that the Security Council conceived the protection of civilians narrowly in terms of physical protection from the threat of imminent violence.⁹⁷ Influenced by the protection of civilians concepts prevalent in the humanitarian and human rights communities, the mandate was interpreted more broadly in the UN DPKO and DFS Operational Concept on the Protection of Civilians, in which it was conceived as encompassing three ‘tiers’ of activities: (i) protection through political process; (ii) protection from physical violence; and (iii) establishment of a protective environment.⁹⁸ The protection of civilians peacekeeping mandate therefore has somewhat of a dual conception. It is *prima facie* described narrowly as physical protection from imminent violence in Security Council mandates, while implementation of the mandate is conceived to include a broad range of activities undertaken in a peacekeeping operation that contribute to a more general concept of protection. For example, UNAMID’s Mission Directive on the Protection of Civilians in Darfur interprets the mandate as ‘all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law’.⁹⁹ A similar trend was witnessed in respect of the UN Secretary-General’s report on implementing

92 See World Summit Outcome, above note 19, paras. 138–139 (in particular on the idea of the use of force authorised by the Security Council where a state is unwilling or unable to protect its population); A. Orford, above note 19.

93 See e.g. the report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, December 2001, available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. The ICISS report is punctuated with numerous references to ‘human protection’ and also prescribes these grounds for the Responsibility to Protect: see e.g. p. XII, (1)A and B.

94 Nicholas Tsagourias, ‘Self-defence, protection and humanitarian values and the doctrine of impartiality and neutrality in enforcement mandates’, in M. Weller (ed.), above note 36.

95 See L. M. Goodrich and E. Hambro, above note 61, pp. 59–60; Hans Kelsen, ‘Collective security and collective self-defence under the Charter of the United Nations’, in *American Journal of International Law*, Vol. 42, No. 14, October 1948, p. 783.

96 See e.g. UNAMSIL, above note 15, which was mandated under Chapter VII of the UN Charter to ‘take the necessary action . . . to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of [the host country]’; see also the Security Council resolutions and mandates referred to in above note 16.

97 Security Council Meeting Record S/PV.4054, 22 October 1999.

98 UN Department of Peacekeeping Operations – Department of Field Support, above note 29.

99 Cited in V. Holt and G. Taylor, above note 18, p. 181.

the Responsibility to Protect from the 2005 World Summit Outcome document.¹⁰⁰

The language formulation used by the Security Council is explicit, clear, and narrow: the use of force to protect civilians from imminent threat of *physical violence*, which is an aspect of protection that military operations have the unique capacity to fulfil. A broadened interpretation of the mandate risks diluting its power and potential effectiveness. This was recently evidenced by the Security Council's need to mandate an Intervention Brigade in MONUSCO to use offensive force to protect civilians, despite the mission's already strong protection of civilians mandate.¹⁰¹

Practical challenges of reconciling concepts of protection

The lack of clarity on key aspects of the protection of civilians peacekeeping mandate and the proliferation of related concepts within international law and across the humanitarian, human rights and peacekeeping communities raises a number of challenges for coherently advancing the protection of civilians agenda and practically realising civilian protection objectives. Some of the challenges stem from misunderstandings of the mandate and role of various actors, others from the inherent difficulty in reconciling some of the protection activities. As Bernard Ramcharan, former acting UN High Commissioner for Human Rights states, in the UN 'there is no *common, system-wide* . . . understanding of the concept of "protection". This has given rise to problematic inconsistencies in both usage and practice.'¹⁰² A few of the key practical challenges will be briefly touched upon below.

Challenges are often encountered when different actors seek to fulfil their protection mandates through activities that are not always complementary. Balancing the protection activities of the humanitarian and human rights communities with the implementation of the protection of civilians peacekeeping mandate has proved difficult at times. The robust use of force to protect civilians, through which UN peacekeepers may become a *de facto* (if not *de jure*) party to the conflict, raises a number of issues. Prior to the mandating of the African Union forces in Mali, the argument was made by actors in humanitarian and human rights communities that UN-mandated or -authorised military deployments should not be presented as 'protecting civilians' when they are expected to use force in a way that will effectively result in them becoming belligerents. As Brian Urquhart, former Under-Secretary-General for Special Political Affairs in the

100 The Secretary-General's report, Implementing the Responsibility to Protect, UN Doc. A/63/677, 2009, took a much broader perspective than the focus of the World Summit Outcome, above note 19, paras. 138–139.

101 SC Res. 2098, 28 March 2013; see e.g. Bruce 'Ossie' Oswald, 'The Security Council and the Intervention Brigade: some legal issues', in *ASIL Insights*, Vol. 17, No. 15, 6 June 2013, pp. 1–5, available at: www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues; Carina Lamont and Emma Skeppström, *The United Nations at War in the DRC? Legal Aspects of the Intervention Brigade*, Swedish Ministry of Defence, Report No. FOI-R-3761-SE, December 2013.

102 OHCHR staff, above note 91, p. 121 (emphasis in original).

UN and an influential figure in the initial development of peacekeeping, pointed out, '[t]he moment a peacekeeping force starts killing people it becomes a part of the conflict it is supposed to be controlling, and therefore a part of the problem'.¹⁰³ UN peacekeeping forces being viewed as a party to the conflict can undermine the perceived impartiality of other UN actors, and consequently their ability to deliver on their protection mandate. This challenge is compounded when UN peacekeepers use force selectively – against rebel militia groups but not government forces or government-sponsored armed groups, as is the case for the Intervention Brigade in MONUSCO. More broadly, the humanitarian community has raised concerns that the use of force for the protection of civilians can escalate a conflict and exacerbate the humanitarian situation through reprisal attacks, heightening human rights violations and sexual violence, increasing displacement and leaving in its wake a dangerous security vacuum.¹⁰⁴ In this context, several humanitarian and human rights actors expressed concern at the mandating of the MONUSCO Intervention Brigade.¹⁰⁵

Host state consent for the deployment of a peacekeeping operation is one of the traditional 'guiding principles' of UN peacekeeping.¹⁰⁶ The withdrawal of consent, whether formal or effective, can have a significantly negative impact on the ability of the mission to fulfil its mandate. In order to establish a presence and to move freely to provide physical protection to civilian populations, a UN peacekeeping operation needs to retain the political consent and cooperation of the host government and authorities. The maintenance of such consent can be jeopardised by human rights monitoring and reporting on issues that identify governmental elements as committing gross violations. Such challenges have been faced by the UN, including in South Sudan.¹⁰⁷ A reverse dynamic exists in respect of humanitarian activity, whereby the use of force by a peacekeeping mission to protect civilians against government forces, or even government-sponsored armed groups, may result in retaliatory restriction of humanitarian access. However, even though the protection of civilians peacekeeping mandate authorises the use of force including against host state actors,¹⁰⁸ force has rarely – if at all – been used in such a manner.

103 Brian Urquhart, *A Life in Peace and War*, Harper and Row, New York, 1987, pp. 178–179.

104 Reliefweb, 'UN's new solution for Congo not without risk', 28 March 2013, available at: <http://reliefweb.int/report/democratic-republic-congo/un%E2%80%99s-new-solution-congo-not-without-risk>.

105 See for example What's in Blue, 'Adoption of a resolution on the Democratic Republic of Congo', 27 March 2013, available at: www.whatsinblue.org/2013/03/adoption-of-a-resolution-on-democratic-republic-of-congo.php; 'U.N. approves new combat force to "neutralize" Congo rebels', Reuters, 28 March 2013, available at: www.reuters.com/article/2013/03/28/us-congo-democratic-un-idUSBRE92R0X820130328; and FIDH, 'DRC: an intervention brigade within MONUSCO would require further human rights protection mechanisms', 27 March 2013, available at: www.fidh.org/DRC-An-intervention-brigade-within-MONUSCO-would-require-further-human-13106.

106 The traditional 'guiding principles' of UN peacekeeping are: Impartiality, Consent, and Non-Use of Force except in Self Defence and Defence of the Mandate. See Capstone Doctrine, above note 83.

107 'South Sudan expels a U.N. rights officer', in *New York Times*, 5 November 2012, available at: www.nytimes.com/2012/11/06/world/africa/south-sudan-expels-un-rights-officer.html?_r=0.

108 See e.g. the statement of the Permanent Representative of Costa Rica during the 2008 MONUSCO mandate renewal, Security Council Meeting Record S/PV.6055, 22 December 2008, p. 5; and the resulting

The dilution of the protection of civilians peacekeeping mandate has deflected focus away from the use of force for physical protection, resulting in unclear expectations on UN peacekeepers and consequent difficulty in holding them accountable for their failure to act. If the implementation of the mandate more clearly focused on physical protection from imminent violence, the expectations to use force, obligations to carry out enabling military activity and accompanying resource requirements would be more transparent. The lack of clarity associated with the mandate has also resulted in concerns regarding overlap of mandates, including in respect of the militarisation of humanitarian aid and resulting implications for humanitarian access.¹⁰⁹

The lack of clarity regarding the legal framework governing the establishment and implementation of the protection of civilians mandate has significant practical implications. The misconception that the peacekeeping mandate derives from IHL and IHRL, rather than from an independent normative basis, has resulted in confusion regarding the appropriateness of using force to implement protection obligations articulated in those branches of law. The lack of appreciation of the *inherent* normative basis for UN peacekeepers to protect civilians irrespective of an express mandate has resulted in the failure to recognise that UN peacekeepers will always have the authority to intervene in order to protect civilians under imminent threat of violence where the host state cannot act. Furthermore, a failure to intervene may also violate IHRL obligations owed by UN peacekeepers to the host state's population. Questions remain about the authority and obligation to use pre-emptive force and the scope of military activities that might cover. With these issues insufficiently addressed in the missions' Concepts of Operations or Rules of Engagement, and absent from the Memoranda of Understanding between the UN and troop contributing countries, the expectations of UN peacekeepers to use force to protect civilians remain unclear, undermining the potential role that the use of force can play in realising protection ideals.

Conclusion

The protection of civilians framework can be broadly conceived as comprising legal authority and obligations of protection, and activities undertaken to realise those legal protections. As demonstrated by the foregoing analysis, the humanitarian, human rights and peacekeeping communities have each constructed discrete understandings of what 'protection of civilians' means, drawing on various bodies of law and building a concept of protection to frame their own narrative and practical activities.

SC Res. 1856, 22 December 2008, operative para. 3(a), and SC Res. 1925, 28 May 2010, operative para. 12(a).

109 Pierre Krähenbühl, *The Militarization of Aid and its Perils*, ICRC Resource Centre, 22 February 2011, available at: www.icrc.org/eng/resources/documents/article/editorial/humanitarians-danger-article-2011-02-01.htm.

While each of the concepts is legitimate and useful within the respective communities, the proliferation of concepts has created a high level of confusion regarding the nature of the protection of civilians, in particular its normative basis, content and associated responsibilities. Each of the strands of protection essentially comes from the same place – a recognition of civilians as individuals with inherent dignity to whom obligations of protection are owed, including from violence. They also aspire to reach a similar destination – the fulfilment of protection obligations deriving from international law. In order to improve the implementation of protection activities, there is a need to articulate an overarching framework in which the various concepts of ‘protection of civilians’ are coherently conceived, and can interact in a complementary and mutually reinforcing manner.

A range of activities contributes to realising the legal obligations of protection drawn from the UN Charter, IHL and IHRL, including human rights monitoring, reporting and advocacy; the use of force to provide physical protection to civilians; the provision of humanitarian assistance to sustain civilians; and rights-based programmatic activity contributing to building a protective environment. Concurrently undertaking the range of activities in the absence of a coherent overarching framework raises many practical challenges. Although protection concepts and activities may not always be easily reconcilable, there is a need for a more nuanced approach that recognises shared objectives, clarifies responsibilities, and promotes complementary and mutually supportive activities in the field. In the UN peacekeeping context, this should lead to a reorientation towards the Security Council mandate language, which is focused heavily on the protection of civilians from imminent physical violence. There is also a need for an explicit recognition of the full legal framework in which the peacekeeping mandate exists, including the rights and obligations of peacekeepers arising from international law governing the use of force and the UN Charter’s purposes and principles. The broader interpretation of the peacekeeping mandate, which is currently prevalent, risks undermining the core and original intent of the Security Council, and renders unclear expectations of the use of force by UN peacekeepers.

If the most immediate and pressing needs of physical protection – from murder, rape and other attacks – are to be met by UN peacekeepers, it is necessary to untangle this conceptual and normative confusion. The core of the protection of civilians peacekeeping mandate, as well as its part in the broader protection agenda, needs to be understood to ensure that it is as clear as possible when force is expected to be used by UN peacekeepers to protect civilians.

Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces

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Abstract

Mandates of United Nations (UN) peacekeeping missions increasingly include stabilisation and peace enforcement components, which imply a proactive use of force often carried out by national, regional or multinational non-UN partners, operating either in support of or with the support of the UN, acting as ‘proxies’. This article analyses the legal, policy and perception/security implications of different types of ‘peace operations by proxy’ and the additional challenges that such operations create for humanitarian action. It suggests some mitigating measures, including opportunities offered by the UN Human Rights Due Diligence Policy, for a more coherent approach to the protection of civilians, but also acknowledges some of the limitations to an independent UN-led humanitarian action.

Keywords: United Nations, peacekeeping, peace enforcement, stabilisation, humanitarian action, humanitarian principles, Human Rights Due Diligence Policy for UN support to non-UN security forces, protection of civilians.



Introduction

On 25 April 2013, the United Nations (UN) Security Council unanimously adopted Resolution 2100 establishing a 12,600-strong UN Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA) and authorising in parallel French troops to intervene in support of the mission. The complexity of the task ahead was illustrated by the declaration of the foreign minister of Mali, who welcomed the peacekeeping mission as ‘an important step in a process to stem the activities of terrorist and rebel groups’. He added, ‘this mission . . . will be concentrated, amongst other things, on stabilising the main urban centres in the North, restoring the authority of the state . . . the protection of civilians, the promotion and protection of human rights as well as humanitarian assistance’.¹

This UN peacekeeping mission epitomises many of the challenges faced by the conflict management tool that is peacekeeping, which has grown in size and complexity in response to the changing nature of conflicts. UN peacekeeping evolved from mostly small unarmed military observer missions on a ceasefire line between two states to what are now ‘multidimensional peacekeeping’ and ‘stabilisation’ operations. These include large military, police and civilian components and are now often given all-encompassing mandates – including, among other things, the protection of civilians under imminent threat and the provision of security for the delivery of humanitarian aid. Mandates of UN peacekeeping missions have also increasingly included strong stabilisation and peace enforcement components. These imply a more robust and proactive use of force under Chapter VII of the UN Charter, carried out by national, regional or multinational non-UN partners, operating either in support of or with the support of the UN mission. Modern UN-mandated peace operations are resolutely more robust than those of the past, with an increased resort to partners acting as ‘proxies’ in delivering the offensive part of the mandate.

The tension between peacekeeping and humanitarian action is not new, and the benefits and risks of UN integration for humanitarian space have been debated for years.² However, the growing number of UN peacekeeping operations with stabilisation mandates and the increasing tendency of UN peacekeepers

1 ‘UN Security Council approves creation of Mali peacekeeping force’, in *Reuters*, 25 April 2013, available at: www.reuters.com/article/2013/04/25/us-mali-crisis-un-idUSBRE93O0R420130425. All internet references were last accessed in January 2014.

2 See Espen Barth Eide, Anja Therese Kaspersen, Randolph Kent and Karen von Hippel, *Report on Integrated Missions: Practical Perspectives and Recommendations – Independent Study for the Expanded UN ECHA Core Group*, May 2005; and more recently Victoria Metcalfe, Alison Giffen and Samir

to work in partnerships with non-UN security forces call for the revisiting of this complex relationship.

The first part of the article offers a typology of the different types of ‘peace operations by proxy’ that have emerged in recent years, and the context in which they have developed. These partnerships take the form of UN engagement alongside, or in support of, non-UN regional forces, and in support of the national security forces of the host state. In the second part, we analyse the legal, policy and perception/security implications of these different partnerships and the additional challenges they create for humanitarian action. The third part of the paper explores ways to mitigate some of the tensions that these peacekeeping evolutions create for humanitarian action. It focuses on the Human Rights Due Diligence Policy on UN support to non-UN security forces made public in March 2013, which could become the basis for a more coherent UN approach to the protection of civilians (PoC), but it also acknowledges some of the limitations to an independent UN-led humanitarian action due to the eminently political nature of the world body.

Typology of increased UN peacekeeping engagement by proxy

Principles and evolving practice of the use of force in UN peacekeeping

Although peacekeeping is not mentioned as such in the UN Charter, it has become one of the most essential conflict resolution tools in the UN toolbox. What distinguishes UN peacekeeping from other bilateral or multilateral peace operations – beyond the universal membership of the organisation – are three prescribed basic principles: (1) the consent of the parties – host government and/or parties to the conflict; (2) impartiality; and (3) non-use of force except in self-defence and defence of the mandate.³ Another unique feature of UN peacekeeping is its multidimensional approach – bringing together military and civilians, with increasingly complex mandates combining political, security, protection, rule of law and human rights efforts.⁴

But while these basic principles are largely seen as the basis for the legitimacy, credibility and security of UN peacekeepers and the overall success of the operation, they have also been challenged by the evolving practice. UN peacekeepers have been deployed in increasingly complex and dangerous theatres where the consent of the parties to the conflict is tenuous at best and easily reversed, and where they may be expected to carry out robust action against

Elhawary, *UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group*, Overseas Development Institute, December 2011.

3 UN Department of Peacekeeping Operations and Department of Field Support (DPKO/DFS), *UN Peacekeeping Operations: Principles and Guidelines (Capstone Doctrine)*, 2008.

4 This multidimensional approach to peacekeeping was formally endorsed by the Security Council in Resolution 2086 of 21 January 2013, which lists ten broad tasks that peacekeeping missions can be mandated with and ‘calls upon the Secretary-General to take all measures deemed necessary to strengthen UN field security arrangements and improve the safety and security of all military contingents, police officers, military observers and, especially, unarmed personnel’.

‘spoilers’ – broadly defined as illegal armed elements that have stayed out of (or left) a peace process and represent a threat to the state and/or civilian population⁵ – or to protect civilians under imminent threat. Although the concept of ‘robust peacekeeping’ that emerged after the peacekeeping failures of the 1990s is not a new one and was first mentioned in the Brahimi Report,⁶ it was brought back to the forefront in 2008–2010.⁷ The term ‘effective’ peacekeeping is now generally preferred by troop-contributing countries – many of whom have generally been reluctant to embrace robustness, as it is more likely to result in the loss of peacekeepers’ lives⁸ – but the fundamental tension between the use of force and respect for UN peacekeeping principles remains.

The Security Council opened a new chapter in this debate when it authorised, in March 2013, the deployment of a UN Intervention Brigade in the eastern Democratic Republic of the Congo (DRC). This unit was allowed to use offensive combat operations to ‘neutralise and disarm’ Congolese rebel groups,⁹ in particular the M23 rebels who had temporarily taken over the city of Goma in November 2012 in spite of the presence of about 1,500 UN peacekeepers.¹⁰ The Intervention Brigade is composed of about 3,000 troops from Tanzania, South Africa and Malawi, deployed for one year within the existing UN Stabilisation Mission in the DRC (MONUSCO). But many in the UN Secretariat and among member states are still reluctant to go that route. This was illustrated by the fact that Resolution 2098 was agreed upon ‘on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping’. In the same vein, the subsequent Resolution 2100 establishing the MINUSMA clearly restated in its preamble the above-mentioned basic principles of peacekeeping, including the prohibition to use force except in self-defence or defence of the mandate.¹¹ This was done with the intention of clearly distinguishing UN peacekeeping – even when called a ‘stabilisation mission’ – from peace enforcement and offensive military action that others may be more willing and better suited to undertake, be they national, regional or multinational forces.

5 For example, the International Conference on the Great Lakes Region (ICGLR), a sub-regional organisation, has termed the armed groups FDLR and M23 as ‘negative forces’ in part to justify coordinated military efforts against these armed groups operating in the eastern Democratic Republic of the Congo. See ICGLR, ‘Press release on the 4th ICGLR extraordinary summit on DRC to take place in Kampala’, available at: www.icglr.org/index.php/en/press-releases/98-media-center/press-releases/231-4th-icglr-extraordinary-summit-on-drc-to-take-place-in-kampala.

6 Report of the Panel on United Nations Peace Operations (Brahimi Report), UN Doc. A/55/305-S/2000/809, 21 August 2000.

7 See Bruce Jones *et al.*, *Robust Peacekeeping: The Politics of Force*, Center on International Cooperation, 2010.

8 These reluctant states have generally been the traditional troop-contributing countries – such as Pakistan and Guatemala, who initially opposed the creation of the Intervention Brigade within MONUSCO – but also include Western troop-contributing countries that have robust capacities but are wary of public reaction to the loss of troops serving within peacekeeping operations.

9 SC Res. 2098, 29 March 2013.

10 See Arthur Boutellis, ‘Will MONUSCO fall with Goma?’, in *Global Observatory*, 3 December 2012, available at: <http://theglobalobservatory.org/analysis/394-will-monusco-fall-with-goma.html>.

11 SC Res. 2100, 25 April 2013.

Indeed, the Intervention Brigade remains an exception to the trend and UN peacekeepers remain unlikely to engage in offensive military operations and peace enforcement. Instead, and because of the complex and dangerous environments in which it operates, but also because of pressures from host governments (to keep rebel forces at bay, for example), the UN has found itself increasingly engaging in what could be called ‘peace operations by proxy’ – that is, UN peacekeepers partnering with national or regional non-UN security forces that are themselves involved in offensive military operations. These partnerships can be broken down into two broad categories, which are not mutually exclusive: (1) non-UN forces operating in support of UN forces; and (2) UN peacekeepers providing support to non-UN forces.

Non-UN forces operating in support of UN peacekeepers

This first type of peacekeeping partnership involves non-UN forces operating in support of UN forces, in a more or less formalised manner. For example, Resolution 2100 states that it:

Authorises French troops, within the limits of their capacities and areas of deployment, to use all necessary means, from the commencement of the activities of MINUSMA until the end of MINUSMA’s mandate as authorised in this resolution, to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General.¹²

While many welcomed the presence of 1,000 French troops alongside the UN mission given the security threat posed by terrorists and affiliated groups, some have expressed concerns about the risks of being too closely associated with a counter-insurgency-type military operation, fearing that it would expose UN staff, including staff from humanitarian agencies, to reprisals. Yet this reflects a more general trend towards these so-called ‘parallel’ deployments of UN and (robust) national or regional non-UN forces – such as from the European Union (EU) – from the DRC to Chad and Côte d’Ivoire.¹³

While the North Atlantic Treaty Organisation (NATO) deployed larger peace operations in the Balkans and Afghanistan – the latter now drawing down – that were also authorised by the UN Security Council with an expectation of ‘cooperation, coordination and mutual support’ between both organisations,¹⁴

12 *Ibid.*, para. 18.

13 The French *Licorne* military forces deployed alongside the UN Operation in Côte d’Ivoire (UNOCI) played a critical role in the final days of the post-election crisis in April 2011. Before that, in the DRC, the UN called on a French-led EU Interim Emergency Multinational Force (IEMF) – ‘Operation Artemis’ – to restore security in Bunia and its surrounding areas in June 2003 (authorised under Resolution 1484). The IEMF was authorised for three months to open the way for the deployment of a larger and more robust UN ‘Ituri brigade’ equipped with attack helicopters and armoured personnel carriers. Although generally seen as a ‘bridging mission’, the authorisation of the European Union Force (EUFOR) for one year in support of the initial UN multidimensional Mission in the Central African Republic and Chad (MINURCAT) could also be considered a case of parallel deployment (SC Res. 1778, 25 September 2007).

14 SC Res. 2096, 19 March 2013.

the above-mentioned ‘parallel’ forces differ by their smaller size and the fact that they do not carry out large-scale combat operations. Although the presence of such troops may be the result of a bilateral agreement with the host government, they are also expected to coordinate and provide some support (mostly related to security) to the UN mission on the ground and to report on such activities.¹⁵ These ‘parallel’ forces differ, however, from hybrid operations such as the Africa Union–UN Hybrid Operation in Darfur (UNAMID), in that the former retain their own chains of command and rules of engagement (that is, they do not respond to the UN force commander) in order to ‘maintain the highest degree of operational autonomy possible, even where they are cooperating extremely closely’.¹⁶

While the UN has got better at developing joint assessments and planning processes as well as more effective coordination mechanisms and interoperability with non-UN organisations such as the EU, having multiple organisations running parallel operations on the ground with different chains of command and rules of engagement continues to create immense challenges. Furthermore, such ‘parallel’ deployments between UN and non-UN forces often do not guarantee the impartiality that the UN strives for, particularly when these forces carry out joint patrols and are ‘collocated’ in some of the same locations. This becomes even more of an issue when the UN is providing support to these regional or national non-UN forces engaged in combat operations, as is increasingly the case in practice.

UN providing support to non-UN forces

The post-Cold War international context has seen two main evolutions with major implications for UN peacekeeping that help to explain its growing tendency to engage in ‘peace operations by proxy’. First, the bulk of UN peacekeeping has shifted from mostly small missions monitoring ceasefires in inter-state conflicts in the Middle East to a large number of multidimensional missions dealing with intra-state conflicts and civil wars in Africa. Second, after a short-lived attempt at autonomous regional peace enforcement in Africa by the Economic Community of West African States (ECOWAS) in the 1990s in Liberia and Sierra Leone, regional African peacekeeping has re-emerged after the creation of the African Union (AU) in 2003.¹⁷

15 See, for instance, the initial UNOCI mandate under Resolution 1528 (2004), which authorises the French *Licorne* forces stationed in Côte d’Ivoire ‘to use all necessary means in order to support UNOCI in accordance with the agreement to be reached between UNOCI and the French authorities, and in particular to: – Contribute to the general security of the area of activity of the international forces, – Intervene at the request of UNOCI in support of its elements whose security may be threatened, – Intervene against belligerent actions, if the security conditions so require, outside the areas directly controlled by UNOCI, – Help to protect civilians, in the deployment areas of their units; – Requests France to continue to report to it periodically on all aspects of its mandate in Côte d’Ivoire’.

16 Richard Gowan and Jake Sherman, *Peace Operations Partnerships: Complex but Necessary Cooperation*, ZIF (Center for International Peace Operations), March 2012, p. 2

17 The AU has deployed three major peacekeeping missions to date, in Burundi (AMIB, 2003), Sudan/Darfur (AMIS, 2004), and Somalia (AMISOM, 2007), as well as other smaller electoral observation and support missions.

The first shift is responsible for about 80% of UN peacekeepers currently being deployed in Africa, but it has also resulted in an increased focus of UN missions on state- and institution-building as part of (early) peacebuilding and stabilisation efforts.¹⁸ The ‘extension of state authority’ has become a core function of peacekeeping.¹⁹ Such mandates generally imply the development and reform of the national security forces – army and police – of the host country, to enable peacekeepers to hand over security responsibilities as a key benchmark for the withdrawal of the UN mission. In a few cases, the UN has provided assistance to domestic military operations by the national army of the host country: the UN mission in the DRC (MONUC/MONUSCO)²⁰ providing fuel, food rations, transport, and tactical support to units from the Congolese army conducting operations against rebel groups, for example, or the UN mission in South Sudan (UNMISS) airlifting South Sudanese army soldiers and providing fuel to Sudan People’s Liberation Army’s helicopters.²¹ This presents a dual challenge, however, as these national forces may commit human rights violations, but also because it may more generally affect the perception of UN peacekeepers’ impartiality, as we shall see later in this article. Yet the UN mission, which is mandated to support the development of national institutions and whose continued presence depends on the host country’s consent, may find itself in a difficult position when asked by national authorities – which hold the primary responsibility to protect their own populations but often lack the means to do so – for such support.

The second shift and the emergence of the AU as a major peacekeeping actor on the continent are the result of a recognition that no single actor can effectively address the entire peacekeeping burden in Africa, but also that the AU has some comparative advantages over the UN in certain African contexts. On the one side, the AU and African troops can add political legitimacy and leverage to a peace operation, particularly when the host government may not welcome a UN presence. For instance, Khartoum initially opposed a UN deployment in Darfur, which eventually led to the deployment of the hybrid AU–UN mission UNAMID instead. On the other side, the AU has shown greater willingness to undertake peace enforcement missions that the UN and its troop-contributing countries would be reluctant to undertake based on the UN peacekeeping basic principles. There is also

18 The 2009 UN DPKO/DFS non-paper *A New Partnership Agenda* (New Horizon) first made reference to peacekeepers as ‘early peace builders’. Later in June 2011, the DPKO/DFS produced an ‘Early Peacebuilding Strategy’ that is meant to provide guidance to UN peacekeepers on prioritising, sequencing and planning critical early peacebuilding tasks (broadly defined as ‘those that advance the peace process or political objectives of a mission, ensure security and/or lay the foundation for longer-term institution-building’).

19 Jake Sherman, ‘Peacekeeping and Support for State Sovereignty’, in *Annual Review of Global Peace Operations 2012*, Center on International Cooperation, p. 12.

20 MONUSCO was created by UN Security Council Resolution 1925 of 28 May 2010 and is the successor to MONUC, with an expanded ‘stabilisation’ mandate.

21 Jort Hemmer, ‘We are laying the groundwork for our own failure: the UN Mission in South Sudan and its civilian protection strategy – an early assessment’, CRU Policy Brief No. 25, Clingendael Institute, January 2013.

a sense that the UN and its troop-contributing countries could not politically sustain the kind of casualties that AU troops have sustained in Somalia.²² However, because of the limited financial and logistical means of the AU, the UN and other partners have provided increasingly comprehensive logistical and financial support packages to some AU-led peace operations. The most extensive such support package has been provided to the AU Mission in Somalia (AMISOM), which has since late 2009 been supported under the UN peacekeeping budget covering most logistical and equipment costs (while the EU has continued paying for AU troop allowances).²³

To sum up, the recent tendency of UN peacekeeping to take on stabilisation mandates has resulted in the three concomitant evolutions described above: (1) UN peacekeepers themselves engaging in more robust peacekeeping (such as the Intervention Brigade in the DRC), which remains the exception; (2) non-UN forces operating in support of UN peacekeepers (such as in Mali); and (3) the UN providing support to non-UN forces (Somalia, the DRC). While all three call into question the principle of impartiality of peacekeeping missions, they also have very different implications depending on the context, the nature of the partnerships (the UN acting in support of a non-UN force or vice versa), and the regional and national security forces at stake.

Implications of UN support to non-UN security forces for humanitarian action

The evolution of UN peacekeeping in the last two decades has coincided with a growing involvement of UN entities in humanitarian action – including in key roles of leadership and coordination²⁴ – and with peacekeeping mandates that increasingly include the protection of civilians, under the impulsion of the Security Council. The present section will examine the implications for humanitarian action of ‘peace operations by proxy’ in terms of legal responsibility and policy coherence as well as perception and security.

22 UN Deputy Secretary-General Jan Eliasson suggested in a 2013 press conference that as many as 3,000 AU peacekeepers have been killed in Somalia in recent years. See Louis Charbonneau, ‘Up to 3,000 African peacekeepers killed in Somalia since 2007’, in *Reuters*, 9 May 2013, available at: www.reuters.com/article/2013/05/09/us-somalia-peacekeepers-deaths-idUSBRE94812020130509. Conversely, only a dozen casualties in a UN peacekeeping context would likely trigger an investigation and lead to a reassessment of the mission.

23 See Arthur Boutellis and Paul Williams, *Peace Operations, the Africa Union, and the United Nations: Towards More Effective Partnerships*, International Peace Institute, April 2013.

24 UN General Assembly Resolution 46/182 of 1991 entrusted the world body with the task of improving the coherence and coordination of humanitarian action, through the creation of a Department of Humanitarian Affairs (that became OCHA in 1998) and the position of Emergency Relief Coordinator. This leadership and coordination role of the UN was further consolidated in 2005 with the ‘humanitarian reform’ that created the ‘cluster’ system to improve coordination by sector and that strengthened the role of UN Humanitarian Coordinators.

Legal implications

While the International Committee of the Red Cross (ICRC) has long contended that international humanitarian law (IHL) is applicable to multinational forces involved in peace operations,²⁵ whether under UN auspices or under UN command and control,²⁶ this position was disregarded for a long time. Opponents to the applicability of IHL to multinational forces argued that the latter could not be considered as a 'party' to a conflict in the sense of the 1949 Geneva Conventions. It was indeed claimed that, given the impartial and objective nature of the mandate received from the international community and aimed at restoring international peace and security, multinational forces could not be deemed a 'belligerent' as understood in IHL. However, the unprecedented involvement of peacekeepers in 'robust' combat operations during the 1990s truly opened the debate and led to the adoption of the Secretary-General's Bulletin on the Observance by UN Forces of International Humanitarian Law in 1999.²⁷ In the words of the former principal legal officer of the UN's Office of Legal Affairs, the bulletin 'concluded the debate over the principle of applicability of international humanitarian law to UN peacekeeping operations'.²⁸ Although there are still disagreements as to the threshold triggering the applicability of IHL and its scope of application,²⁹ it is broadly recognised today that UN peacekeepers become a party to the conflict – and thus bound by IHL as such – when they directly participate in hostilities.³⁰ This applied, for instance, when MONUSCO's helicopter attacks targeted M23 rebels in 2012, in support to the Congolese armed forces.³¹

But what does it tell us about the legal responsibility of the UN for a specific violation of IHL committed by non-UN security forces when a peacekeeping mission provides administrative, logistical, or even tactical support, but does not commit the specific violation itself? First, Article 1(3) of the UN Charter states that one of the purposes of the world body is 'to achieve international co-operation . . . in

25 Jakob Kellenberger, former president of the ICRC, clearly stated that: 'It has always been the ICRC's view that peace forces must observe [IHL] when conditions for its applicability are met.' See Jakob Kellenberger, 'Keynote address at the 31st round table on current issues of international humanitarian law', International Institute of Humanitarian Law, San Remo, 4 September 2008, available at: www.icrc.org/eng/resources/documents/statement/peace-operations-statement-040908.htm.

26 Forces under UN command and control are usually referred to as 'blue helmets' and operate in the framework of a UN peacekeeping or peace enforcement operation, as opposed to multinational operations 'under UN auspices' which are mandated by a Security Council resolution but are under national or regional command. Examples of the latter include the French-led Operation Serval in Mali, mandated by SC Res. 2100 of 25 April 2013, and the NATO-led International Security Assistance Force in Afghanistan, mandated by SC Res. 1386 of 20 December 2001.

27 Secretary-General Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, 6 August 1999.

28 Daphna Shrager, 'The Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law: a decade later', in *Israel Yearbook on Human Rights*, Vol. 39, 2009, p. 357.

29 An issue addressed at length in other articles in the present issue of the *Review*.

30 D. Shrager, above note 28, recognises this assertion in her discussion of the threshold and scope of application of IHL.

31 Reuters, 'U.N. helicopters strike rebel posts in Congo', in *New York Times*, 18 November 2012, p. 8.

promoting and encouraging respect for human rights and for fundamental freedoms for all'. Support to national or regional forces committing IHL or human rights violations would be in contradiction with this very purpose. Second, such support could arguably render the UN complicit in violating international law and could engage the international responsibility of the organisation. The International Law Commission indeed considers that an international organisation is internationally responsible when it aids or assists a state or another international organisation – including regional bodies like the AU or NATO – in the commission of a wrongful act if '(a) the organisation does so with the knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organisation'.³² As for the latter condition, it is generally agreed today that a violation of IHL – by which UN peacekeepers are bound, as discussed above, when they directly participate in hostilities – could be considered an internationally wrongful act triggering the responsibility of the international organisation.³³ The former condition, however, requires that the international organisation must have had the knowledge of the circumstances of the international wrongful act, an element that is inherently circumstantial and that depends on the nature of the relationship between the UN and the non-UN security force. Notwithstanding the high threshold established by the International Law Commission, it is worth noting that the UN itself – in its commentaries on an earlier version of the Draft Articles on the Responsibility of International Organisations – referred to the support provided by its mission in the DRC (then MONUC) to this country's armed forces as a potential case of aiding and assisting in the commission of a wrongful act.³⁴ Therefore, while it is debatable that the UN would be held responsible for a wrongful act committed by French forces in Mali – where they conduct military operations largely autonomously from MINUSMA, despite being mandated to support it – it is not unreasonable to argue the UN could be held responsible for wrongful acts committed by forces it directly supports, such as AMISOM in Somalia.

Although it is arguable that UN support to non-UN security forces could engage the international legal responsibility of the organisation in certain circumstances, this debate remains largely theoretical due to the lack of enforcement mechanisms and judicial remedies. Indeed, in practice the policy implications and the impact in terms of perception and security of such association to non-UN security forces have played a much greater role in shaping new UN policies in that respect.

32 See Art. 14 of the Draft Articles on the Responsibility of International Organisations, adopted by the International Law Commission at its 63rd session in 2011 and submitted to the UN General Assembly as a part of the Commission's report covering the work of that session (A/66/10), available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf.

33 A situation covered by Art. 7 of the Draft Articles on the Responsibility of International Organisations, above note 32. This article covers 'Conduct of organs of a State or organs or agents of an international organisation placed at the disposal of another international organisation', which requires that the latter organisation exercise effective control over the conduct in question.

34 See UN Comments to the Draft Articles on the Responsibility of International Organisations, UN Doc. A/CN.4/637/Add.1, 17 February 2011, Comments to Draft Article 13, p. 18.

Policy implications

On the policy front, the increased tendency of the UN to rely on and support non-UN security forces in the implementation of its peace operation activities has implications in relation to the protection of civilians and to humanitarian action in general, based on the principles of impartiality, independence and neutrality.

Concerning the protection of civilians – a component increasingly included in the mandate of UN peacekeeping missions since 1999³⁵ – contradictions between the stated mandate of a UN mission and its implementation are quite obvious when the UN supports security forces directly responsible for widespread abuses against civilians. This was the case in 2009 when MONUC provided support to and engaged in joint operations with the Congolese armed forces (FARDC)³⁶ and, to a lesser extent, in Somalia when the UN-supported AMISOM forces retaliated to attacks by indiscriminately shelling urban areas and substantially endangering civilians.³⁷

Beyond the consequences linked to the immediate behaviour of non-UN security forces, there are more subtle policy implications related to the overarching objectives of UN support to non-UN forces. As previously discussed, this growing trend is concomitant with the increasing involvement of the UN in ‘stabilisation’ operations. Proponents of this approach argue that the objectives of stabilisation are, both in the short and long term, to protect civilians through immediate physical protection and by building an environment conducive to the respect of civilians through better governance, rule of law and sustainable peace. This is made explicit in the PoC strategy of MONUSCO, an entire pillar of which is based on the UN stabilisation strategy for the eastern DRC and aims to extend state authority in that volatile part of the country, including by providing support to the government’s security forces.³⁸ Yet, when it comes to protecting civilians, it presupposes that said security forces, which engage in combat operations, will strictly abide by IHL and take the utmost care to protect civilians in their conduct of hostilities. MONUSCO’s PoC strategy had identified this risk by warning that the mission ‘may need to modulate its support to the FARDC based on the latter’s behaviour and respect of IHL and human rights law’.³⁹

More fundamentally, this type of approach that aims to extend the state’s authority through support to its security forces both to bring stability and protect civilians introduces an element of partiality in apparent contradiction with the

35 The Security Council first recognised the connection between the protection of civilians in armed conflict and its mandate to maintain international peace and security in a Presidential Statement adopted on 12 February 1999 (S/PRST/1999/6) that was followed by its first thematic resolution on the protection of civilians (SC Res. 1265, 17 September 1999). For more information on the role of the Security Council in the protection of civilians, see Security Council Report, *Cross-Cutting Report on the Protection of Civilians in Armed Conflict*, 31 May 2012, available at: www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/XCutting%20POC%202012.pdf.

36 Human Rights Watch, *You Will Be Punished: Attacks on Civilians in Eastern Congo*, December 2009.

37 Human Rights Watch, *You Don’t Know Who to Blame: War Crimes in Somalia*, August 2011, pp. 16–18.

38 MONUSCO, UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of Congo, January 2010, para. 13 (on file with the authors).

39 *Ibid.*, para. 21.

impartiality required from humanitarian actors as per the widely respected Professional Standards for Protection Work developed by the ICRC.⁴⁰ From the DRC to Somalia and from Afghanistan to Mali, some authors have observed that ‘the UN openly relinquished any pretence of neutrality or impartiality, even though it lacks the requisite resources and structures to play a comprehensive or clearly strategic stabilisation role’.⁴¹ In other words, stabilisation mandates result in the UN giving up the impartiality expected from a protection actor while it usually fails to achieve the positive outcomes that successful stabilisation efforts are expected to have on civilian protection, for lack of the required resources and structures.

The lack of neutrality and impartiality of UN missions mandated to support non-UN security forces engaged in conflict also has obvious policy implications for broader humanitarian action. More often than not, this support is a modality of stabilisation efforts that tend to subsume humanitarian action into broader political objectives. In the context of a UN integrated mission – which brings all the different spheres of activities of the UN under the political leadership of the Special Representative of the Secretary-General (SRSG) and has been the norm in conflict and post-conflict settings since the UN Secretary-General’s Decision No. 2008/24⁴² – it can result in humanitarian preoccupations being sacrificed on the altar of political expediency. This was the case in the DRC in 2009, for instance, when the ‘protection cluster’, gathering a number of humanitarian agencies engaged in protection activities, officially complained to the SRSG, Alan Doss, that the latest report of the Secretary-General to the Security Council on MONUC represented an ‘inaccurate picture of the humanitarian situation’ in the country.⁴³ Similar concerns were reported around the same time in Somalia, where the SRSG, Ahmedou Ould-Abdallah, wanted humanitarian aid to be channelled through the Transitional Federal Government in order to legitimise it,⁴⁴ and could very well resurface in Mali in the context of the UN integrated stabilisation mission. As illustrated in these examples, a complex relationship exists between humanitarian action and political imperatives. Humanitarian action can at times serve broader political objectives, as in the Somalia case, by demonstrating the tangible and quick impact of a peace operation. Conversely, it can also contradict the dominant political narrative that wants to present the context in which a peace operation is deployed under a favourable light, as in the DRC case. In either instance, submitting humanitarian action to political objectives risks distracting

40 Standard 19 of the ICRC’s *Professional Standards for Protection Work* states: ‘A protection actor must be consistent and impartial when making reference to, or urging respect for the letter or spirit of relevant law, as applied to various parties to an armed conflict.’ ICRC, *Professional Standards for Protection Work*, October 2009, p. 39.

41 Sarah Collinson, Samir Elhawary and Robert Muggah, ‘States of fragility: stabilisation and its implications for humanitarian action’, in *Disasters*, Vol. 34, Supplement 3, October 2010, p. 290.

42 UN Secretary-General, Decision No. 2008/24 – Integration, 26 June 2008.

43 Human Rights Watch, above note 36, p. 153.

44 Ken Menkhaus, ‘Stabilisation and humanitarian access in a collapsed state: the Somali case’, in *Disasters*, Vol. 34, Supplement 3, October 2010, p. 334, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-7717.2010.01204.x/pdf>; Mark Bradbury, *State-Building, Counterterrorism, and Licensing of Humanitarianism in Somalia*, Feinstein International Center, Briefing Paper, September 2010, pp. 11–12, available at: www.humanitarianforum.co.uk/data/files/statebuilding_somalia.pdf.

from the humanitarian imperative to save lives and alleviate suffering based on an objective assessment of needs. Beyond the immediate impact this can have on operational decisions and policies, the submission of humanitarian aid to broader political objectives in the context of UN integrated missions can also have very serious implications in terms of perception of humanitarian actors – both UN and non-UN agencies, as we shall see below – by the population and other stakeholders, and therefore on the security of humanitarian personnel.

Perception and security implications

It is widely accepted that UN peacekeepers and humanitarian actors alike must be impartial⁴⁵ – and perceived to be so – in order for the UN mission to retain the ability to play good offices and mediator functions, and for humanitarian actors to access populations in need wherever they are, including in areas controlled by non-state armed groups. In turn, perception by a party to a conflict that UN peacekeepers or particular humanitarian organisations are partial and one-sided risks undermining their ability to achieve their respective mission and, in addition, might jeopardise the safety of their respective personnel. Yet it is argued here that perception of partiality of UN peacekeepers by armed groups does endanger not only the staff – military or civilian – of the peacekeeping mission itself but also the staff of humanitarian organisations, whether directly affiliated or not to the UN.

In the DRC, for example, the M23 rebels, who had in the past used PoC language as an integral part of their communication strategy⁴⁶ and alleged that civilians had been killed by UN helicopter attacks, threatened in April 2013 to ‘fight back’ in the event of an attack by the new MONUSCO Intervention Brigade.⁴⁷ This clearly illustrates the kind of security implications that the use of force by UN peacekeepers – and their real or perceived lack of impartiality – can have. During discussions at the UN Security Council on the creation of the Intervention Brigade, some troop-contributing countries expressed concerns that such a brigade might threaten the safety of the entire peacekeeping force. Yet others have argued that this is not really new, as MONUSCO was already authorised to conduct offensive operations under its Chapter VII mandate (and it did), where the rules of engagement authorise the use of force beyond self-defence.⁴⁸

45 Impartiality is understood here as even-handedness, as not favouring one party over another. However, for humanitarian actors, impartiality more specifically means that aid must be delivered on the basis of needs only and without discrimination. It is complemented by the principle of neutrality that requires not taking a side in hostilities and not engaging in controversies of a political, racial, religious or ideological nature.

46 Arthur Boutellis, ‘In the DRC communications war, rebels learn PoC language’, in *Global Observatory*, 12 July 2012, available at: <http://theglobalobservatory.org/analysis/324-in-the-drc-communications-war-rebels-learn-poc-language.html>.

47 Associated Press, ‘Congo’s M23 rebels threaten new UN brigade’, 30 April 2013, available at: <http://news.yahoo.com/congos-m23-rebels-threaten-un-brigade-115736055.html>.

48 Patrick Cammaert and Fiona Blyth, *The UN Intervention Brigade in the Democratic Republic of the Congo*, International Peace Institute, Issue Brief, July 2013, available at: www.ipinst.org/media/pdf/publications/ipi_e_pub_un_intervention_brigade_rev.pdf.

While this offensive mandate has perception and security implications for peacekeepers – uniformed and civilians – it is also likely to affect both UN-affiliated and non-UN humanitarian actors.⁴⁹ As noted in a study commissioned by the UN Integration Steering Group, ‘it is evident that how UN humanitarian actors are perceived is influenced by the manner in which the UN political or peacekeeping component is perceived’.⁵⁰ In the current UN-led humanitarian coordination system, this assertion arguably applies not only to UN humanitarian actors but also, more broadly, to all humanitarian aid agencies that are affiliated with the existing ‘cluster’ system under the overall leadership of a UN Humanitarian Coordinator.⁵¹ How humanitarian agencies are perceived by local communities, national and local authorities, and the parties to a conflict is crucial for humanitarian access and to ensure the security of aid personnel. A 2011 study commissioned by the UN Office for the Coordination of Humanitarian Affairs (OCHA) concluded that the most successful humanitarian agencies in highly insecure environments are those that prioritise acceptance by all relevant stakeholders, including the population, through sustained humanitarian dialogue and strict respect of the humanitarian principles of impartiality, independence, and neutrality.⁵²

Just like when UN peacekeepers engage directly in fighting, the UN’s partnerships with non-UN security forces that are parties to a conflict undoubtedly have an impact on how the UN political and peacekeeping component is perceived and, consequently, how humanitarian actors are seen. This was made explicit by the UN Secretary-General in late 2012 during discussions on the modalities of the creation of an African-led International Support Mission to Mali (AFISMA). In his November 2012 report, the Secretary-General, drawing on previous experience with AMISOM in Somalia, cautioned that the AU’s ‘request to the Security Council to authorise a UN support package for an offensive military operation raises serious questions’, adding that ‘the impact on the image of the UN . . . in addition to the implications for the safety and security of UN personnel in the region, must be weighed carefully’.⁵³ The Security Council ultimately authorised AFISMA in December 2012, but subsequently denied it the same kind of logistical and financial UN support package as AMISOM, instead opting for voluntary member state

49 Aurélie Ponthieu, Christoph Vogel and Katharine Derderian, ‘Without precedent or prejudice? UNSC Resolution 2098 and its potential implications for humanitarian space in Eastern Congo and beyond’, in *Journal of Humanitarian Assistance*, 21 January 2014, available at: <http://sites.tufts.edu/jha/archives/2032>.

50 V. Metcalfe, A. Giffen, and S. Elhawary, above note 2, p. 32.

51 The ‘cluster’ system was created as part of the 2005 UN-led ‘humanitarian reform’, with a view to strengthening humanitarian response capacity and effectiveness by ‘improving strategic field-level coordination and prioritisation in specific sectors/areas [‘clusters’] of response by placing responsibility for leadership and coordination of these issues with the competent operational agency’. In effect, at field level, these ‘clusters’ are coordination fora between aid agencies in different sectors of activities, such as protection, food security, health or logistics. ‘Clusters’ are usually placed under the leadership of a UN agency. See Reliefweb, *Glossary of Humanitarian Terms*, August 2008, p. 14, available at: http://reliefweb.int/sites/reliefweb.int/files/resources/4F99A3C28EC37D0EC12574A4002E89B4-reliefweb_aug2008.pdf.

52 Jan Egeland, Adele Harmer and Abby Stoddard, *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, UN Office for the Coordination of Humanitarian Affairs, 2011.

53 Report of the Secretary-General on the Situation in Mali, UN Doc. S/2012/894, 29 November 2012, para. 91.

contributions to a trust fund, echoing among other considerations the Secretary-General's concerns.⁵⁴

To be fair, one should recognise that, theoretically at least, UN support to national or regional security forces does not necessarily cast a negative image on the world body and, conversely, merely operating 'in parallel' may not be sufficient to disassociate the UN from a non-UN combat force – at least in the eyes of some parties to the conflict, as in Afghanistan.⁵⁵ If support is granted to security forces that are widely seen as legitimate and benefiting from the support of large swaths of the population, it is likely to shed a positive light on the organisation, provided it meets at least some expectations in terms of security. But even in this ideal scenario, from a strictly humanitarian perspective, such support is necessarily granted to one side and against one or several other parties to a conflict, most of the time non-state armed groups. This stands in contrast with the requirement of impartiality and neutrality of humanitarian actors highlighted above. Therefore, even in a best-case scenario where UN support is given to widely accepted and legitimate forces, it is likely to impact the perception by opposition armed groups and their supporters that UN humanitarian agencies and non-governmental organisations (NGOs) associated with them are partial and against them, endangering those organisations' staff and jeopardising access.

Mitigation measures and the way forward for humanitarian action

Aware of some of the implications and risks associated with the different partnerships with non-UN forces highlighted above, the UN has adopted policies that, although initially conceived to absolve the organisation of any legal liability, have the potential to address the need for coherence in the UN's approach to the protection of civilians, if implemented system-wide and consistently. In parallel, OCHA has adopted policies that are aimed at mitigating some of the implications of the perception of increased UN engagement by proxy, but which stop short of addressing the main challenge to principled humanitarian action: the deeply political nature of the world body.

From 'conditionality' to 'due diligence'

Real concerns about the potential legal responsibility of the UN for wrongful acts committed by the security forces that it supports first emerged in the DRC during the above-mentioned 2009 military operation by the FARDC to dismantle rebel

54 Security Council Report, 'Mali briefing and consultations on funding options and developments', in *What's in Blue*, 21 January 2013, available at: www.whatsinblue.org/2013/01/mali-briefing-consultations-on-funding-options-and-developments.php.

55 Antonio Donini, 'Between a rock and a hard place: integration or independence of humanitarian action?', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 141–157.

groups, which was supported by MONUC.⁵⁶ Rather than improving the security situation for civilians, this operation led to the deterioration of humanitarian conditions and widespread human rights violations committed by both the rebels and the FARDC.⁵⁷ Concerns about the legal risks of UN peacekeepers being complicit in crimes committed by Congolese soldiers quickly surfaced and were formalised in a series of legal advices from the UN Office of Legal Affairs. In one such note, the legal office stated that ‘if the FARDC violate international humanitarian, human rights or refugee law in the course of the operation, MONUC must immediately intercede with the FARDC . . . with a view to dissuading the units concerned from continuing in such violations.’⁵⁸ It added that, should widespread and serious violations continue despite these efforts, ‘MONUC must cease its participation in the operation as a whole’.⁵⁹ In June 2009, the legal advice was endorsed by the UN Secretary-General’s Policy Committee, which prompted MONUC officials to develop a policy conditioning UN support to the FARDC to respect for international law. The ‘conditionality policy’, as it would later be known, was finally endorsed by the Security Council in its Resolution 1906, which further called on the Secretary-General to ‘establish an appropriate mechanism to regularly assess the implementation of this Policy’.⁶⁰

This adjunction by the Security Council resulted in a review mission dispatched from UN headquarters in spring 2010 that, according to senior UN officials, included wide consultations with other humanitarian and human rights actors present in the country.⁶¹ Although this policy was criticised by some observers as a convenient fig leaf to continued acts of violence by the FARDC,⁶² these consultations convinced the UN to extend the ‘conditionality policy’ to other UN missions; this was compounded by growing concerns about how AMISOM was conducting hostilities in Somalia. The policy should further bind not only peacekeeping missions but all UN entities in their dealings with non-UN security forces. In late 2010, the UN Policy Committee decided that the conditionality policy should apply globally and system-wide, and launched an internal inter-agency process led by the Department of Peacekeeping Operations and the Office of the

56 See Human Rights Watch, above note 36.

57 Philip Alston, former UN Special Rapporteur on Extrajudicial Executions, publicly stated in October 2009, after a ten-day mission to the DRC, that the MONUC-supported Kimia II operation ‘produced catastrophic results’ from a human rights perspective. See Press Statement dated 15 October 2009, available at: www2.ohchr.org/english/issues/executions/docs/PressStatement_SumEx_DRC.pdf.

58 Confidential note, leaked by the *New York Times*, from the UN Office of Legal Affairs to Mr. Le Roy, Head of the Department of Peacekeeping Operations, 1 April 2009, para. 10, available at: <http://documents.nytimes.com/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1>.

59 *Ibid.*

60 SC Res. 1906, 23 December 2009, para. 23.

61 Interviews with senior UN officials, New York, March 2013.

62 In July 2010, an expert on the DRC observed that ‘[t]he imperfect policy finally agreed on, far from significantly reducing the occurrence of FARDC crimes, serves the more limited purpose of shielding the UN mission from accusations of complicity in war crimes’. See Thierry Vircoulon, ‘After MONUC, should MONUSCO continue to support Congolese military campaigns?’, *Blog of the International Crisis Group*, 19 July 2010, available at: <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/vircoulon-after-MONUC-should-MONUSCO-continue-to-support-congolese-military-campaigns.aspx>.

High Commissioner for Human Rights to work on the development of a new policy. In July 2011, the Human Rights Due Diligence Policy on UN support to non-UN security forces (HRDDP) was officially adopted as an internal policy applicable to all UN missions, offices, agencies, funds and programmes;⁶³ it was officially made public in March 2013.⁶⁴

Upgrading the ‘protection toolbox’: due diligence and engagement with non-UN security forces

The purpose of the HRDDP is to ensure that mistakes from the past, where UN missions provided support to security forces responsible for grave violations of human rights or IHL, do not happen again. It establishes a framework of due diligence, applying to all UN entities providing support to non-UN security forces, that includes three key elements: (1) a risk assessment of the likelihood that the concerned security forces will violate international law, to inform both the decision to give support and the drafting of mandates;⁶⁵ (2) transparent communication with the concerned authorities at the earliest possible stage, including by the highest in-country UN leadership;⁶⁶ and (3) an effective implementation framework laying down procedures and mechanisms to monitor, report and intervene with the relevant authorities when required.⁶⁷

A literal reading of the HRDDP gives the impression that, in line with the conditionality policy, its main purpose is to shield the UN from any legal responsibility incurred by the behaviour of the security forces that it supports. It refers to the importance of ‘maintain[ing] the legitimacy, credibility and public image of the UN’⁶⁸ and justifies withdrawing support ‘where continued support would implicate the Organisation in grave violations of international humanitarian, human rights or refugee law’.⁶⁹ But beyond the ‘defensive’ character of the policy, what makes it truly remarkable is the opportunity it creates for proactive and constructive engagement with UN-supported security forces to protect civilians. In that respect, if applied consistently, the HRDDP will add a tool to the UN’s ‘protection toolbox’ by providing a framework for systematic engagement with non-UN security forces on the protection of civilians in their conduct of hostilities, including in the context of stabilisation missions. Early risk assessments might also allow the Security Council to better take into account the risks inherent to such partnerships at the drafting stages of peacekeeping mandates, mitigating policy contradictions between stabilisation and PoC objectives. Interestingly, Security

63 UN Secretary-General, Decision No. 2011/18, 13 July 2011.

64 Identical letters dated 25 February 2013 from the Secretary-General addressed to the president of the General Assembly and to the president of the Security Council, UN Doc. A/67/775-S/2013/110, 5 March 2013.

65 UN Secretary-General, Decision No. 2011/18, annexed to UN Doc. A/67/775-S/2013/110, paras. 14–17 and 23.

66 *Ibid.*, paras. 18–19.

67 *Ibid.*, paras. 20–22.

68 *Ibid.*, para. 3.

69 *Ibid.*, para. 28.

Council Resolution 2100 of May 2013, creating the MINUSMA, did just that by requesting that:

MINUSMA take fully into account the need to protect civilians and mitigate risk to civilians, including, in particular, women, children and displaced persons and civilian objects in the performance of its mandate ... where undertaken jointly with the Malian Defence and Security Forces, in strict compliance with the Human Rights Due Diligence Policy.⁷⁰

Despite the relatively conservative language used in the text of the due diligence policy itself, it is increasingly seen and presented within the UN system as a proactive tool for engagement on human rights and humanitarian law issues. According to UN officials closely involved in the implementation of the HRDDP, the end purpose of the policy as such is not suspension of support – this would rather be considered as a failure – but to influence positively the behaviour of security forces towards compliance with international law, including greater respect for civilians.⁷¹

In the case of AMISOM in Somalia, the AU reacted to criticisms about its forces' bad record on human rights by reaffirming its commitment to IHL and establishing a Working Group on PoC within the AU Commission in February 2011 (prior to the adoption of the HRDDP). It also issued a new 'Indirect Fire Policy' included in the revised AMISOM rules of engagement in mid-2012, which 'formalised a stricter chain of command for the use of mortar and artillery fire and the establishment of "no-fire zones" where civilians were known to be present'.⁷² Although these positive policy developments cannot be directly credited to the HRDDP, this is certainly the kind of improvement that can be expected if it is applied consistently.

This framework for more consistent engagement with non-UN security forces on protection of civilians might alleviate some of the tensions described earlier between peacekeepers and humanitarian agencies, if it leads to improvements in the record of non-UN security forces protecting civilians while conducting combat operations. It requires, however, that peacekeepers themselves lead by example and are given the ability and the means to monitor these operations effectively. It remains true that the HRDDP will not address the more deeply entrenched contradictions highlighted above related to the loss of impartiality of UN peacekeepers when associated with broader peace enforcement or stabilisation efforts.

Thinking outside the integration box

UN peacekeepers' partnerships with national or regional security forces aimed at stabilising an area inevitably give the impression that the UN is not impartial and

70 SC Res. 2100, 25 April 2013, para. 26.

71 Interviews with senior UN officials, New York, March 2013.

72 Walter Lotze and Yvonne Kasumba, 'AMISOM and the protection of civilians in Somalia', in *Conflict Trends*, No. 2, 2012, p. 22.

may even become a party to the conflict, as in the case of the DRC.⁷³ Against this backdrop, most humanitarian actors are very concerned by the unstoppable trend toward increasingly integrated UN missions, which they see as subsuming humanitarian action to broader political objectives.⁷⁴ They are all the more worried when the UN mission is *de facto* supporting a party to the conflict, as illustrated by the strong reaction of the NGO community to the creation of a UN integrated mission in Somalia in March 2013.⁷⁵ The association of humanitarian agencies with political actors 'is particularly problematic in high-risk environments, where the UN mission is implementing a political mandate that is opposed or contested by one or more of the conflict parties',⁷⁶ as is necessarily the case when the UN supports the security forces of a party to the conflict, as in the DRC, Somalia, or Mali.

Aware of the tensions between integrated UN missions and a humanitarian coordination system led by the UN, OCHA has developed a policy proposing different degrees of integration of the UN humanitarian leadership and coordination within the structure of UN missions on the ground.⁷⁷ This policy aims to mitigate the effects of integration on the neutrality and independence of humanitarian action, and devises three modalities of structural integration depending on the context: (1) complete physical separation of OCHA and the Humanitarian Coordinator from the structure of the UN peacekeeping or political mission ('two feet out'); (2) complete structural integration ('two feet in'); and (3) a default option with a separate OCHA presence but integration of the Humanitarian Coordinator within the UN mission ('one foot in, one foot out').⁷⁸

However, it remains questionable whether these different arrangements would really make a difference when a UN mission is associated with a party to the conflict. First, it is unclear to what extent OCHA, itself part of the UN Secretariat, can impose the degree of structural integration it favours on UN leadership. For that matter, the tendency might go towards greater mingling of UN legislative bodies in deciding the structural arrangements within a mission. This is illustrated by Security Council Resolution 2093 on Somalia, which took the unprecedented

73 Philip Alston, former UN Special Rapporteur on Extrajudicial Executions, was the first senior UN official to publicly acknowledge that MONUC had become a party to the conflict in 2009. See Press Statement, above note 57.

74 See Marit Glad, *A Partnership at Risk? The UN-NGO Relationship in Light of UN Integration*, Norwegian Refugee Council, 2012, available at: <http://www.nrc.no/?did=9608295>.

75 Three NGO consortia (Interaction, ICVA and VOICE), representing more than 330 humanitarian and development NGOs, published a statement on 11 March 2013 expressing their dismay at SC Res. 2093, 6 March 2013, which integrated all UN functions under one UN umbrella in Somalia, *de facto* subsuming UN humanitarian coordination to the political mandate of the UN mission. Statement available at: www.ngovoice.org/index.php?page=2858. See also 'In Somalia, humanitarian NGOs against integration with United Nations', interview with Joel Charny, vice-president of Interaction, in *Global Observatory*, 26 April 2013, available at: www.theglobalobservatory.org/interviews/488-in-somalia-humanitarian-ngos-resist-integration-with-un-interview-with-joel-charny.html.

76 V. Metcalfe, A. Giffen and S. Elhawary, above note 2, p. 2.

77 UN OCHA Policy Instruction, 'OCHA's structural relationships within an integrated UN presence', 1 May 2009, available at: <http://afgarchive.humanitarianresponse.info/sites/default/files/OCHA%E2%80%99s%20Structural%20Relationships%20Within%20An%20Integrated%20UN%20Presence.pdf>.

78 *Ibid.*, pp. 6–7.

step of instructing the structural integration of the Humanitarian Coordinator within the political mission, leaving little leverage for OCHA to separate the humanitarian arm of the UN from the broader mission.⁷⁹ Secondly, it is questionable whether such subtle cosmetic structural arrangements really impact how UN actors as a whole are perceived by the population and opposition armed groups. Some relatively sophisticated armed groups might be willing to distinguish between the 'blue UN' logos of humanitarian and development agency vehicles and the 'black UN' of peacekeeping and political missions, as was reportedly the case in Afghanistan.⁸⁰ However, it remains doubtful that these different types of arrangements can dissipate the fundamental ambiguities created by multiple, and sometimes conflicting, UN mandates – ambiguities compounded by the drive towards greater UN integration. This is particularly true if an armed group wishes, for strategic or tactical reasons, to target the UN, in which case it may decide to aim at 'soft' UN targets rather than peacekeepers. This is arguably the reasoning that led Al-Shabaab to target the so-called 'UNDP compound' used by UN humanitarian agencies in Mogadishu in June 2013, rather than the heavily fortified airport area sheltering the UN political mission and AMISOM.⁸¹

In contexts where the UN develops a partnership with or directly supports a party to the conflict and consequently loses its impartiality, the likelihood is high that it will affect humanitarian actors inasmuch as they are associated with the UN mission on the ground. Dilemmas over humanitarian principles will become more acute as the UN remains on a dual course of increasingly integrated missions aimed at enforcing peace by proxy while still aspiring to lead operational coordination of humanitarian action. In these specific contexts, it seems legitimate to argue that, in some cases at least, 'the existing UN-led coordination system might have to consider disengaging from the operational theatre and privilege coordination and information-sharing at the strategic level',⁸² as opposed to operational coordination.

The increasing diversity of the humanitarian sector and the emergence on the global stage of relief actors that are not part of the mainstream UN-led humanitarian system, especially Muslim donor countries and Islamic charities, and that have different *modus operandi*, present new opportunities in that regard. During the famine that affected Somalia in 2011, tens of Arab or Muslim aid agencies operated in areas where traditional – mostly Western – humanitarian actors could not operate due to security reasons. The Organisation of Islamic Cooperation established a coordination office bringing together twenty-seven organisations that operated mostly in parallel to the UN-led coordination system, reportedly 'to fill the gaps left by the UN with regard to inaccessibility of aid

79 SC Res. 2093, 6 March 2013, para. 21.

80 Ashley Jackson and Antonio Giustozzi, *Talking to the Other Side: Humanitarian Engagement with the Taliban in Afghanistan*, Overseas Development Institute, HPG Working Paper, December 2012, p. 4, available at: www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7968.pdf.

81 Abdi Sheikh, 'Somali Islamist rebels attack U.N. base, 22 dead', in *Reuters*, 19 June 2013, available at: www.reuters.com/article/2013/06/19/us-somalia-blast-idUSBRE95I0AJ20130619.

82 Jérémie Labbé, *Rethinking Humanitarianism: Adapting to 21st Century Challenges*, International Peace Institute, November 2012, p. 23.

to certain areas of Somalia that are off-limits to international UN staff.⁸³ While these tectonic shifts in the international humanitarian system make the response more fragmented and create a number of challenges – for instance, in terms of uneven operational standards and increased risks of competition and duplication – they may also open new opportunities for humanitarian action where the UN’s involvement in ‘peace operations by proxy’ compromises the impartiality, neutrality and independence of its humanitarian arm.

Conclusion

UN peacekeeping engagement by proxy is fraught with many risks, since the UN abandons its impartiality to stand by one side in a given conflict, which creates additional challenges for the already complicated relationship between peacekeeping and humanitarian action. However, such UN partnerships with national and regional non-UN security forces engaged in combat operations represent a growing trend that is likely to continue. They are the result of the evolutions and limitations of the peacekeeping tool, of the changing nature of conflicts and threats to international peace and security, and of the increasing importance in peacekeeping mandates of stabilisation and of the protection of civilians in support of the host state.

The questions and challenges that these developments raise are not merely rhetorical. One must therefore acknowledge these evolutions and the legal, policy, perception and security implications that they have for peacekeepers themselves and for humanitarian action. The tension between eminently political peacekeeping missions and humanitarian principles has always existed, but the increasing tendency of peacekeeping engagement by proxy dictates a pragmatic rather than rigid approach by humanitarian actors.

In some cases the risks can be mitigated, and the UN HRDDP presents a real opportunity for the UN to proactively engage with these non-UN partners and bring greater coherence to the UN’s approach to the protection of civilians, in which the UN-led humanitarian coordination system has a role to play. Increasingly, however, the need to access all vulnerable populations pushes humanitarian actors to keep their distance from peacekeepers and, in extreme cases, from the UN-led humanitarian coordination system itself. While some actors can afford that – such as the ICRC or Médecins sans Frontières (Doctors without Borders), which decided to stay outside of the UN coordination system – not all actors can or are willing to, not least since existing humanitarian funding streams are intimately linked to this coordination architecture. These changes may require that the UN think outside of the integration box, and even contemplate disengaging from operational coordination when its impartiality is compromised.

83 Integrated Regional Information Network, ‘Arab and Muslim aid and the West – “two china elephants”’, 19 October 2011, available at: www.irinnews.org/Report/94010/Analysis-Arab-and-Muslim-aid-and-the-West-two-china-elephants.

The applicability and application of international humanitarian law to multinational forces

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Abstract

The multifaceted nature of peace operations today and the increasingly violent environments in which their personnel operate increase the likelihood of their being called upon to use force. It thus becomes all the more important to understand when and how international humanitarian law (IHL) applies to their action. This article attempts to clarify the conditions for IHL applicability to multinational forces, the extent to which this body of law applies to peace operations, the determination of the parties to a conflict involving a multinational peace operation and the classification of such conflict. Finally, it tackles the important question of the personal, temporal and geographical scope of IHL in peace operations.

Keywords: multinational operations, multinational forces, international humanitarian law, IHL, applicability of IHL.

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Over the years, the responsibilities and tasks assigned to multinational forces have transcended their traditional duties of monitoring ceasefires and observation of fragile peace settlements. Indeed, the spectrum of operations in which multinational

* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

forces participate (hereinafter ‘peace operations’ or ‘multinational operations’)¹, be they conducted under United Nations (UN) auspices or under UN command and control, has steadily widened to embrace such diverse aspects as conflict prevention, peacekeeping, peacemaking, peace enforcement and peacebuilding. The mission of the multinational forces in Afghanistan, the Democratic Republic of the Congo (DRC), Somalia, Libya or Mali are no longer confined to ensuring ceasefires or monitoring buffer zones but are characterised by their involvement in military operations aimed at eradicating threats from various quarters, especially from non-state armed groups engaged in a non-international armed conflict (NIAC).

Today, the multifaceted nature of these peace missions and the increasingly difficult and violent environments in which their personnel operate make it all the more necessary to develop a coherent framework, including a legal dimension, that takes account of their complexity. Since these new aspects of multinational forces’ operations increase the likelihood of their being called upon to use force, the question of when and how international humanitarian law (IHL) applies to their action becomes all the more relevant. Although, at first sight, it might seem that everything that could be said on this issue has been said, a number of unresolved legal questions pertaining to peace operations warrant close examination owing to their significance and potential consequences.

After drawing attention to the essential distinction between *jus ad bellum* and *jus in bello*, this article attempts to clarify the conditions under which IHL becomes applicable to multinational forces and to identify the extent to which this body of law will apply to peace operations. It then addresses the thorny issue of determining which of the international organisations and/or states participating in a peace operation should be regarded as parties to an armed conflict. It also discusses the classification of conflicts involving multinational forces and identifies the pertinent parts of IHL that apply in such situations. Lastly, it tackles the important question of the personal, temporal and geographical scope of IHL in peace operations.

1 There is no clear-cut definition of peace operations in public international law. The terms ‘peace operations’, ‘peace-support operations’, ‘peacekeeping operations’ or ‘peace-enforcement operations’ do not appear in the UN Charter. They may be interpreted in various ways (see, for example, *United Nations Peacekeeping Operations: Principles and Guidelines*, United Nations, New York, 2008) and are sometimes used interchangeably. For a comprehensive analysis of the definition of peace operations, see Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, 2005, pp. 11–50.

For the purposes of this article, the term ‘peace operations’ covers both peacekeeping and peace-enforcement operations conducted by international organisations, regional organisations or coalitions of states acting on behalf of the international community in pursuance of a UN Security Council resolution adopted under Chapters VI, VII or VIII of the UN Charter. Although the majority of multinational peace operations take place under the command and control of either the UN or the North Atlantic Treaty Organisation (NATO), this article also bears in mind the growing role played by other international organisations such as the African Union (AU) or the European Union (EU). The expression ‘peace forces’ and ‘multinational forces’ will be used interchangeably in this document.

The relevance of the distinction between *jus in bello* and *jus ad bellum* to peace operations

Rationale and legal basis of the distinction

Whether multinational forces can be engaged in armed conflict is a matter of much debate. In the past, states and international organisations engaged in peace operations have often been reluctant to consider IHL applicable to their action.

In many peace operations (past and present), it has been argued that multinational forces cannot be a party to an armed conflict and consequently cannot be bound by IHL. This position is based on the premise that peace forces generally operate on behalf of the international community as a whole, thus precluding them from being qualified as either a 'party' to an armed conflict or a 'power' within the meaning of the Geneva Conventions of 1949 and, hence, from being termed a belligerent under IHL. It has been claimed that, for the sake of their international legitimacy, multinational forces have to be impartial, objective, neutral and concerned only with the restoration and preservation of international peace and security.² This position was adopted for instance by some troop-contributing countries (TCCs) participating in NATO operations in Afghanistan³ and Libya.⁴ The UN Secretary-General seemed to have expressed a similar view with regard to the UN forces' action in Côte d'Ivoire in 2011.⁵

- 2 Daphna Shrager and Ralph Zacklin, 'The Applicability of International Humanitarian Law to United Nations Peacekeeping Operations: Conceptual, Legal and Practical Issues', *Report to the Symposium on Humanitarian Action and Peacekeeping Operations*, 22–24 June 1994, ICRC, Geneva, 2004, pp. 39–48; Daphna Shrager, 'The Applicability of International Humanitarian Law to Peace Operations, from Rejection to Acceptance', paper submitted to the 31st Round Table on Current Problems of International Humanitarian Law, International Humanitarian Law, Human Rights and Peace Operations, 4–6 September 2008, International Institute of Humanitarian Law, San Remo, 2009, pp. 82–89.
- 3 See, for example, the position expressed in 2008 by French Minister of Foreign Affairs Bernard Kouchner before a parliamentary commission. In his opinion, France was not engaged in armed conflict in Afghanistan, because its troops were operating under a UN Security Council resolution with a view to restoring international peace and security in accordance with the UN Charter. See *Assemblée Nationale, XIII^e Législature, Compte rendu n°46, Commission de la Défense Nationale et des Forces Armées, mardi 28 août 2008*, p. 16.
- 4 Ola Engdahl, 'Multinational Peace Operations Forces Involved in Armed Conflict: Who are the Parties?', in Kjetil Mujezinović Larsen Camilla Gundahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge, 2012, p. 259. The author refers to a statement by the Norwegian prime minister to the effect that Norwegian soldiers could not be considered legitimate targets while participating in NATO operations in Libya, because they were on a UN mission.
- 5 On 4 April 2011, Reuters quoted UN Secretary-General Ban Ki-moon as saying 'let me emphasise that the ONUCI is not party to the conflict. In line with its Security Council mandate, the mission has taken this action in self-defence and to protect civilians'. A military court in Canada also adopted this position in 1996: see Court Martial Appeal Court of Canada, *Her Majesty the Queen v. Private DJ Brocklebank*, Court File No. CMAAC-383, 2 April 1996, 106, Canadian Criminal Cases, 134 DLR (4th) 377. In this case, the Court did not consider a UN peacekeeping mission to be a party to an armed conflict. However, the Court used a very abstract, old-fashioned interpretation of the term 'peacekeeping mission' in order to find that Chapter VI missions can never become a party to an armed conflict. The Court disregarded the fact that the blurring of the distinction between peacekeeping and peace enforcement in contemporary missions means that in some circumstances forces deployed under a Chapter VI mandate can perfectly well be drawn into hostilities.

Recent peace operations have also been accompanied by the development of legal constructs suggesting that the conditions triggering IHL applicability might differ when armed forces intervene on the behalf the international community.⁶ According to these theories, IHL would not apply, would apply differently, or would apply only as policy, to certain peace operations conducted by TCCs and/or international organisations.

Regardless of these arguments, however, no IHL provisions preclude multinational forces from becoming a party to an armed conflict if the conditions for IHL applicability are met.⁷ The argument that IHL cannot apply to multinational forces' military operations must be rejected, as it erases the long-standing distinction established in public international law between *jus in bello* and

6 Paul Berman, 'When Does Violence Cross the Armed Conflict Threshold? Current Dilemmas', *Proceedings of the 13th Bruges Colloquium, Scope of Application of International Humanitarian Law*, 18–19 October 2012, Collegium No. 43, Autumn 2013, College of Europe–ICRC, p. 41.

7 The argument that multinational forces may not be deemed a party to an armed conflict (and are therefore not bound by this body of law) does not rest on any firm basis. Indeed, an analysis of various military manuals shows that some of them expressly qualify peace forces as a party to an armed conflict (United States, *FM 27-10, Department of the Army Field Manual, The Law of Land Warfare*, July 1956, Appendix A-3s, section 8. A; Nigeria, Directorate of Legal Services of the Nigerian Army, *International Humanitarian Law (IHL)*, pp. 26–27; Peru, Ministry of Defence, *Manual para las Fuerzas Armadas*, May 2010, p. 242; Spain, General Staff of the Armed Forces, *Orientaciones. El Derecho de los Conflictos Armados*, March 1996, Vol. I, sections 1–7 and 1–8) while others, without specifically referring to multinational forces as a party to an armed conflict, nonetheless recognise that IHL might be applicable to their military operations under certain circumstances (see, for example, Argentina, Ministry of Defence, *Manual de Derecho Internacional de los Conflictos Armados*, 2010, pp. 79–85; Australia, Royal Australian Air Force, *Operations Law for RAAF Commanders*, 2nd edition, 2004, p. 37; Germany, Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, August 1992, p. 24; New Zealand, New Zealand Defence Force, *Interim Law of Armed Conflict Manual*, 1992, pp. 19–3, para. 1902.2; The Netherlands, *Humanitair Oorlogsrecht, Handleiding*, 2005, p. 207). In this respect, the UK *Joint Service Manual of the Law of Armed Conflict* is probably one of the most significant: '14. 3. The extent to which PSO (peace support operations) forces are subject to the law of armed conflict depends upon whether they are party to an armed conflict with the armed forces of a state or an entity which, for these purposes, is treated as a state. ...

14.5. A PSO force can become party to an armed conflict, and thus subject to the law of armed conflict:

a. where it was mandated from the outset to engage in hostilities with opposing armed forces as part of its mission ...; b. where its personnel, though not originally charged with such a task, become involved in hostilities as combatants ... to such a degree that an armed conflict comes into being between the PSO force and the opposing forces. The latter situation may arise in any type of PSO. ...

14.7 It is not always easy to determine whether a PSO force has become a party to an armed conflict or to fix the precise moment at which that event has occurred ...'. British Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, 2004, pp. 378–379.

A similar position was already expressed by the EU in 2002 on the occasion of the Salamanca Presidency Declaration according to which 'respect [for IHL] is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party': see *The Outcome of the International Humanitarian Law Seminar of 22–24 April 2002 in Salamanca*, doc. DIH/Rev.01.Corr.1. In this issue of the *Review*, Frederik Naert expresses the opinion that 'in the case of a military mission in a theatre where an armed conflict is ongoing, a robust mandate may lead to the EU forces becoming engaged in combat and becoming a party to the conflict, even if this is not intended.' In her contribution, Katarina Grenfell states that: 'In accordance with general principles of IHL, the writer understands that the principles and rules of IHL as set out in the Secretary-General's Bulletin apply in respect of a UN peacekeeping operation whenever it engages in such level of hostilities with a state or sufficiently organised non-state armed group as would render it a "party to a conflict".' Lastly, it must be noted that the Institute of International Law adopted resolutions in 1971, 1975 and 1999 expressly recognising that UN forces can be engaged in armed conflict.

jus ad bellum. Indeed, by virtue of this distinction, the applicability of IHL to multinational forces, as to any other actors, depends exclusively on the circumstances prevailing in the field, irrespective of the international mandate assigned to these forces by the Security Council, or of the term used for their potential opponents. This determination will depend on the fulfilment of certain legal conditions stemming from the relevant norms of IHL, in particular Common Articles 2 and 3 of the Geneva Conventions of 1949. The mandate and legitimacy of the mission entrusted to a multinational force are issues which fall within the province of *jus ad bellum* and they have no bearing on the applicability of IHL to peace operations. The legitimacy, or illegitimacy, of the use of force cannot absolve any of the parties, including multinational forces, of their obligations under IHL, or deprive anyone of the protection afforded by this body of law. States or international organisations engaged in peace operations cannot simply decide that they are not participating in an armed conflict if an objective assessment of the situation proves otherwise.

The new features of peace operations tend to call into question the previous dichotomy between peacekeeping operations conducted under Chapter VI of the UN Charter and peace-enforcement operations carried out under Chapter VII thereof. Consequently, the mandate assigned to multinational forces by the Security Council shall not be regarded as a condition determining IHL applicability, but must be seen as one indicator among others.⁸ While it is true that peace forces deployed under Chapter VII are more likely to resort to force than those acting under Chapter VI, this is not necessarily always the case; a Chapter VII resolution does not *per se* turn the multinational forces in question into a party to an armed conflict.⁹ Similarly, over time, multinational forces initially operating under Chapter VI may well be drawn into the hostilities and may become bound by IHL as the result of these new circumstances, of hybrid mandates including action under both Chapter VI and Chapter VII, or of ‘mission-creep’ that transforms a ‘purely’ peacekeeping operation into one of peace enforcement.

The volatile environment in which multinational forces are more frequently operating means that less emphasis must be placed on the label given to the mission and that, in line with IHL, rather than focusing on whether the nature of the mission comes under Chapter VI or Chapter VII, an analysis must be made of the actual circumstances prevailing on the ground.

The very object and purpose of IHL, i.e. to protect those who are not, or no longer, taking part in hostilities in an armed conflict, would be defeated were the

8 The nature of the mandate assigned by the Security Council has a bearing only on the possibility that multinational forces might have to resort to force and thus become party to an armed conflict. For a contrary opinion, see E. T. Bloom, ‘Protecting Peacekeepers: the Convention on the Safety of United Nations and Associated Personnel’, in *American Journal of International Law*, Vol. 89, 1995, p. 626.

9 One example was the deployment of EU forces in the DRC in 2003. Although acting under Resolution 1484 adopted under Chapter VII, the European troops were not drawn into hostilities and never had to apply IHL while in action; Frederik Naert, ‘The Application of International Humanitarian Law and Human Rights Law in CSDP Operations’, in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union*, Martinus Nijhoff Publishers, Leiden, 2011, pp. 189–212., especially p. 193

application of IHL to be made dependent on the lawfulness of the use of force triggering the armed conflict, or on the subjective perception of the legitimacy of the cause pursued by a belligerent. To conclude that IHL does not apply, or applies differently, to a belligerent waging an armed conflict that it deems 'just' would arbitrarily deprive the victims of such a conflict of the protection to which they are entitled under IHL. It would also make it possible for parties to armed conflicts to deny their legal obligations under IHL, either by branding the enemy's use of force as unlawful, or by underscoring the international legitimacy of their own action. Finally, the position according to which IHL would not govern military operations conducted by multinational forces would also create a legal vacuum: if IHL does not apply to such a situation, then which body of law does?

The strict separation between *jus in bello* and *jus ad bellum* is firmly anchored in treaty law, as well as in domestic law and international case law.

While it has been argued that references in treaty law to this distinction are surprisingly scant, implicit or soft,¹⁰ this differentiation is indisputably reflected in the wording of Article 1 common to the four 1949 Geneva Conventions, according to which 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*' (emphasis added).¹¹

Similarly, in the context of international armed conflicts, Common Article 2 of the Geneva Conventions specifies that IHL 'shall apply to all cases of declared war or of any other armed conflict'. This shows that neither the applicability nor the application of IHL may be made subject to an assessment of the legality or legitimacy of multinational forces' military operations.

The distinction between *jus in bello* and *jus ad bellum* has also been explicitly confirmed by the preamble to the 1977 First Additional Protocol:¹²

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

10 Rotem Giladi, 'The *Jus Ad Bellum/Jus In Bello* Distinction and the Law of Occupation', in *Israel Law Review*, Vol. 41, 2008, p. 251.

11 In this regard, the Commentary to Common Article 1 of the Geneva Conventions of 1949 explains that 'the words "in all circumstances" mean that as soon as one of the conditions of application for which Article 2 provides is present, no Contracting Party can offer any valid pretext, legal or otherwise, for not respecting the Convention in its entirety. The words in question also mean that the application of the Convention does not depend on the character of the conflict. Whether a war is "just" or "unjust", whether it is a war of aggression or of resistance to aggression, whether the intention is merely to occupy territory or to annex it, in no way affects the treatment protected persons should receive': Jean Pictet (ed.), *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, pp. 16–17.

12 Since Article 31 of the 1969 Vienna Convention on the Law of Treaties indicates that the preamble to a legal instrument forms an integral part of the context in which the rules of that treaty must be interpreted, it is clear that any discussion of IHL applicability certainly cannot ignore the terms of the preamble to the Additional Protocol. These terms form the basis of an objective evaluation of the applicability of IHL, which is impervious to any political considerations and unaffected by the criteria of *jus ad bellum*.

The application of these provisions in the context of peace operations means that multinational forces operating under a mandate assigned by the UN Security Council cannot plead their specific status in order to argue that IHL does not apply, or applies differently, to them.

In addition to treaty law, international and domestic courts, numerous academic writers and many military manuals confirm the validity and relevance not only of the strict separation between *jus in bello* and *jus ad bellum*, but also of its corollary, the principle of equality between belligerents before IHL.

In particular, the *Hostage* case at the US Military Tribunal at Nuremberg forms a landmark decision with regard to the strict separation between *jus ad bellum* and *jus in bello*.¹³ Other judgments related to war crimes in the Second World War have also followed the same approach and confirmed the importance of maintaining this separation.¹⁴ Following the precedents set by this consistent case law, academic writers have likewise been overwhelmingly supportive of it and have confirmed that the legal status of belligerents under *jus ad bellum* does not affect the applicability or application of IHL.¹⁵

- 13 US Military Tribunal at Nuremberg, *Trial of Wilhelm List and others (The Hostages Trial)*, 1949, Law Reports of Trials of War Criminals Vol. VIII, United Nations War Crimes Commission, London, 1949, p. 59.
- 14 See Keiichiro Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello*, Hart Publishing, 2011, p. 17; Alexander Orakhelashvili, 'Overlap and Convergence: the Interaction Between *Jus ad Bellum* and *Jus in Bello*', in *Journal of Conflict and Security Law*, Vol. 12, 2007, pp. 167–170.
- 15 See, for example, Charles Rousseau, *Le droit des conflits armés*, Pédone, Paris, 1983, pp. 24–26; Myres McDougal and Florentino Feliciano, *The International Law of War*, New Haven Press, 1994, pp. 530–542; Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed., Cambridge University Press, 2004, pp. 156–163; Leslie Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Manchester University Press, 2000, pp. 18–19; Christopher Greenwood, 'International Humanitarian Law', in Frits Kalshoven (ed.), *The Centennial of the First International Peace Conference – Reports and Conclusions*, Kluwer, Boston, 2000, pp. 173–192; François Bugnion, 'Guerre juste, guerre d'agression, et droit international humanitaire', in *International Review of the Red Cross*, Vol. 84, No. 847, September 2002, pp. 523–546; K. Okimoto, above note 14; Marco Sassòli, 'Ius ad Bellum and Ius in Bello, the Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?', in *International Law and Armed Conflict: Exploring the Fault Lines, Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, 2007, pp. 241–264; Christopher Greenwood, 'The Relationship between *Jus ad Bellum* and *Jus in Bello*', in *Review of International Studies*, Vol. 9, 1983, pp. 221–234; Ryan Goodman, 'Controlling the Recourse to War by Modifying Jus in Bello', in *Yearbook of International Humanitarian Law*, Vol. 12, 2009, pp. 53–84; Jasmine Moussa, 'Can "Jus ad Bellum" Override "Jus in Bello"? Reaffirming the Separation of the Two Bodies of Law', in *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, pp. 963–990. These writers generally endorse what was so aptly said by Hersch Lauterpacht in 1940 when he wrote in *Oppenheim's International Law*, 6th ed., 1940, pp. 174–175, that 'whatever may be the cause of a war that has broken out, and whether or not the cause may be a so-called just cause, the same rules of international law are valid as to what must not be done, and what must be done by the belligerents themselves in making war with each other . . . This is so even if the declaration of war is ipso facto a violation of international law, as when a belligerent declares war upon a neutral State for refusing passage to its troops or when a State goes to war in patent violation of its obligation under the Covenant of the League or of the General Treaty for the Renunciation of War . . . The rules of international law apply to war from whatever cause it originates.' This legal construct is unimpeachably modern; it can be transposed to peace operations in order to affirm forcefully that IHL applies whenever multinational forces are involved in either an international or a non-international armed conflict.

The distinction drawn between *jus in bello* and *jus ad bellum* is also expressly reflected in some military manuals.¹⁶

All this is evidence that the operation of *jus in bello* does not depend upon *jus ad bellum* and that neither law nor practice justify making an exception for multinational forces. The distinction between *jus ad bellum* and *jus in bello* must be maintained¹⁷ – even when multinational forces are involved – in order to preserve the integrity of IHL and the humanitarian objectives pursued by this body of law.¹⁸

The consequence of the strict separation: the application of principle of equality between belligerents to peace operations

Equality between belligerents relates specifically to peace operations, as in the past international organisations and states have tried to apply IHL selectively to such operations, particularly when UN forces are concerned, since their objective is to restore and preserve international peace and security. Some writers have gone so far as to argue that, even if drawn into hostilities, multinational forces operating under Chapters VI or VII of the UN Charter should have a general immunity from attack, thus challenging the basic premises upon which IHL is built.¹⁹

16 See, for example, *The Interim Law of Armed Conflict Manual*, DM 112, Directorate of Legal Services, New Zealand Defence Force, Wellington, New Zealand, 1992, p. 19, para. 1902; *The Joint Service Manual* . . . , above note 7, section 3.12 entitled 'Universal Application of the Law of Armed Conflict'.

17 See K. Grenfell's contribution in this issue of the *Review*.

18 Given that recent peace operations show that multinational forces are more likely to become embroiled in non-international than in international armed conflicts, the question is whether the strict separation between *jus ad bellum* and *jus in bello* may be invoked in such situations and whether the corollary principle of the equality between belligerents remains equally valid. Indeed, it might be argued that the strict separation is invalid in a non-international armed conflict as international law does not prohibit such conflicts and recognises that every state has the right to use force in order to preserve its territorial integrity and quell an insurgency. However, at the domestic level, almost all states have passed legislation prohibiting citizens from taking arms against the government. It is therefore essential to examine the relationship between this kind of domestic law and IHL. Does the fact that one of the parties to the non-international armed conflict has violated domestic law by resorting to force against the government preclude the application of IHL and its underlying principles? It is submitted here that the IHL applicable to a non-international armed conflict has to be the same for both parties, regardless of the fact that one belligerent is fighting in breach of internal law. See for example, François Bugnion, 'Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts', in *Yearbook of International Humanitarian Law*, Vol. 6, 2003, pp. 167–198; Marco Sassòli, 'Collective Security Operations and International Humanitarian Law', in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors*, 25–26 October 2002, Collegium No. 27, Spring 2003, pp. 84–85. In other words, the unequal legal status of the belligerents under domestic law does not affect the fact that IHL applies equally to all parties involved in a non-international armed conflict, including multinational forces. Furthermore, in accordance with Article 27 of the 1969 Vienna Convention on the Law of Treaties which stipulates that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty', the domestic law of the state in the territory of which the peace operation takes place and the internal law of the TCCs cannot be used as grounds for disregarding the IHL applicable to a non-international armed conflict. In this regard, the wording of the first paragraph of Common Article 3 of the Geneva Conventions may be interpreted as ruling out any subordination of *jus in bello* to *jus ad bellum* in a non-international armed conflict.

19 Walter Gary Sharp, 'Protecting the Avatars of International Peace and Security', in *Duke Journal of International and Comparative Law*, Vol. 7, 1996, pp. 93–183. From the same author, see also 'Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal', in *Maryland Journal of International Law*, Vol. 22, 1998, pp. 3–78.

However, in practice, neither the Security Council nor TCCs have tried as a matter of general principle to apply IHL unequally in recent peace operations. Although some have disputed the fact that conditions for IHL applicability were met, once these criteria were deemed to be fulfilled, no state argued that IHL would apply differently owing to the multinational forces' specific nature and mandate. For instance, during the NATO operation in Libya in 2011, legal adviser to the US Department of State Harold Koh stated that:

For purposes of international law, U.S. and NATO forces are engaged in an armed conflict in Libya. We are committed to complying with the laws of armed conflict, and we hold other belligerents in the conflict, including the Qaddafi regime, to the same standards.²⁰

This position is also reflected in the military manual of New Zealand's armed forces, which expressly recognises the application of the principle of equality between belligerents under IHL, even when one of the belligerents is a peace force engaged in armed conflict in pursuance of a UN Security Council resolution.²¹ An analysis of the military manuals of other states which have recently participated in peace operations reveals that none of them exclude the application of the principle of equality between belligerents when peace forces are involved in international or non-international armed conflicts. There is therefore a general assumption that multinational forces are bound by IHL rules in the same manner as their adversaries and that the principle of equality between belligerents remains valid in the armed conflicts in which they are engaged.²²

Abandoning the principle of equality between belligerents, or nuancing it, would have adverse effects on parties' respect for IHL, since non-state armed groups would have little incentive to comply with IHL if all attacks on peace forces were

20 Questions for the Record Submitted to Legal Adviser Harold Hongju Koh by Senator Richard G. Lugar, Hearing before the Committee on Foreign Relations, US Senate, June 28, 2011, p. 54, available at www.fas.org/irp/congress/2011_hr/libya.pdf (all internet references were accessed in March 2014).

21 *Interim Law of Armed Conflict Manual, DM 112*, Directorate of Legal Services, New Zealand Defence Force, Wellington, New Zealand, 1992, p. 19, para. 1902: 'Military operations by or on behalf of the United Nations will only be taken against a State regarded as an aggressor, or otherwise in breach of its obligations under international law. To the extent that the law of armed conflict applies to such operations, it does so on the basis of complete equality. That is to say, the fact that one side is acting as a law enforcer against another party which is a law breaker does not invalidate the operation of [IHL].'

22 Adam Roberts, 'The Equal Application of the Laws of War: a Principle Under Pressure', in *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, pp. 952–956. It is also worth noting that, in 1963, the Institute of International Law explored the question of whether the principle of equality between belligerents would apply in the event of UN forces becoming implicated in an armed conflict (see *Annuaire Français de Droit International*, Vol. 9, 1963, pp. 1248–1949). This subject was again examined by the Institute in 1971. In a resolution adopted that year, it concluded that all the humanitarian rules of the law of armed conflict should be observed by UN forces (Institute of International Law, Zagreb Session, 3 September 1971, resolution on 'Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged', in particular Art. 2). In 1975, the Institute decided that, in general, other 'non-humanitarian' rules of armed conflict should be respected in hostilities in which UN forces were engaged and it reaffirmed that UN forces should not be exempted from the application of the principle of equality between belligerents (Institute of International Law, Wiesbaden Session, 13 August 1975, resolution on 'Conditions of Application of Rules, other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces may be Engaged').

deemed unlawful. Failure to apply the principle of equality might also be detrimental to the protection of peace operations' personnel, in that it might disincline their opponents to comply with IHL. Why should non-state actors respect IHL rules on the conduct of hostilities if any attack against multinational forces would be deemed illegal even though, under IHL, when such forces are engaged in an armed conflict they are legitimate military targets? Why should non-state armed groups make an effort to capture opponents if they are required immediately to release them under the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter the 1994 Safety Convention)? The principle of equality between belligerents must therefore be upheld, as it is the strongest practical basis that exists for maintaining certain elements of moderation in the conduct of armed conflict.

Despite the practical necessity of the principle of equality between belligerents, the 1994 Safety Convention raises a problem in relation to the application of the principle when forces under UN command and control are involved in a NIAC. This instrument, which is not strictly speaking an IHL document, provides that UN personnel (in particular UN military personnel) on certain UN operations have immunity from attack and thus criminalises attacks on them.

The 1994 Safety Convention would not conflict with IHL if it were applicable only in situations where UN forces were not a party to an armed conflict, in which case it would simply reaffirm one of the main objectives of IHL, namely the protection of civilians from the effects of hostilities. As long as UN forces are not engaged in an armed conflict, they are considered civilians for the purposes of IHL²³ and benefit from the protection inherent to this status.

Unfortunately, the terms of the 1994 Safety Convention are not as clear as they might seem at first sight. Indeed, the negotiating history of this instrument shows that another narrative emerged indicating that, in the words of Adam Roberts, 'in all the treaties with a bearing on the conduct of war, [the 1994 Safety Convention] is the one which might seem to come closest to privileging one particular group of soldiers over others'.²⁴

It would appear from the (unclear) terms of this instrument (in particular Article 2(2) governing its relationship with IHL, the so-called 'switch clause')²⁵ that,

23 ICRC, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005, Rule 33 and its commentaries, Vol. I, pp. 112–114.

24 A. Roberts, above note 22, p. 955.

25 Article 2(2) of the 1994 Safety Convention reads as follows: 'This Convention shall not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organised armed forces and to which the law of international armed conflict applies'. This clause has been referred to as a 'switch clause' stipulating conditions where the Convention no longer applies. This provision is a result of a compromise between those favouring mutual exclusion (i.e., the Convention would not apply when IHL covers UN forces irrespective of the nature of the armed conflict in which they are engaged) and those willing to create an overlap between the Convention and IHL in the event of a non-international armed conflict. Consequently, Article 2(2) is open to various interpretations and has been criticised for having rendered the applicability of IHL and the 1994 Safety Convention unclear. See for instance Ola Engdahl, *Protection of Personnel in Peace Operations: the Role of the 'Safety Convention' against the*

in the event of NIACs, the application of the 1994 Safety Convention and that of the relevant IHL provisions is unfortunately not mutually exclusive.²⁶ In this regard, some experts have argued – on the basis of the ordinary meaning to be given to the terms of the 1994 Safety Convention – that the protection afforded by the 1994 Safety Convention to UN forces and associated personnel continues to apply when these troops are engaged in NIACs. This would parallel the relationship already existing between domestic criminal law and IHL rules in the sphere of NIACs.²⁷ Consequently, the 1994 Safety Convention would criminalise acts against UN forces and other peace forces (who may be qualified as ‘associated personnel’ under the Convention if they provide some form of support to the UN mission)²⁸ that would otherwise be lawful under IHL.

The simultaneous application of the 1994 Safety Convention and IHL seems at first sight to erode the strict separation between *jus ad bellum* and *jus in bello*. It also undermines the principle of equality between belligerents, in that it leads to a lack of balance in the treatment of UN forces and other peace forces qualifying as ‘associated personnel’ on the one hand and non-state armed groups on the other.

A stark contrast therefore exists between the 1994 Safety Convention and IHL. However, the former’s influence on the legal framework governing peace operations should not be overestimated. First, the Convention’s impact is mitigated by the fact that it does not apply to any peace operations, since no state in the territory of which peace operations have been or are being carried out has yet become a party to it.²⁹ Secondly, the interplay between the ‘switch clause’ contained in Article 2(2) of the 1994 Safety Convention and the saving clause set forth in Article 20 thereof³⁰ is significant. If the purpose of this saving clause is

Background of General International Law, Martinus Nijhoff Publishers, 2007, pp. 233–241; Ola Engdahl, ‘The Status of Peace Operation Personnel under International Humanitarian Law’, in *Yearbook of International Humanitarian Law*, Vol. 11, 2008, pp. 121–129.

26 O. Engdahl, *Protection of Personnel in Peace Operations*, above note 25; Mahnoush H. Arsanjani, ‘Defending the Blue Helmets: Protection of United Nations personnel’, in Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer (eds), *The United Nations and International Humanitarian Law, Actes du colloque international à l’occasion du cinquantième anniversaire de l’ONU*, Pédone, Geneva, 1995, pp. 143–144. For a contrary view, see Keiichiro Okimoto, ‘Violations of International Humanitarian Law by United Nations Forces and Their Legal Consequences’, in *Yearbook of International Humanitarian Law*, Vol. 8, 2003, p. 214; Richard D. Glick, ‘Lip Service to the Laws of War: Humanitarian Law and the United Nations Armed Forces’, in *Michigan Journal of International Law*, 1995, pp. 82–83; Vaios Koutroulis, ‘Problèmes de symétrie: des brèches du mur de Berlin aux brèches au principe de l’égalité des belligérants?’, paper presented at the 4th Biennial Conference of the European Society of international Law in Cambridge, available at: www.esil-en.law.cam.ac.uk/Media/Draft_Papers/Agora/Koutroulis.pdf.

27 *Ibid.*

28 For the conditions under which non-UN peace forces would qualify as ‘associated personnel’ under the 1994 Safety Convention, see O. Engdahl, *Protection of Personnel in Peace Operations*, above note 25, pp. 218–224.

29 See Dieter Fleck’s article in this edition of the *Review*.

30 Article 20 of the Convention reads as follows:

Nothing in this Convention shall affect:

(a) The applicability of international humanitarian law and universally recognised standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards;

effectively to preserve the integrity of IHL,³¹ this should include the underlying principles of this body of law, in particular the separation between *jus ad bellum* and *jus in bello* and its corollary, the principle of equality between belligerents.

Lastly, Article 8 of the Rome Statute of the International Criminal Court (ICC) considerably limits the application of the 1994 Safety Convention's rationale in situations of NIAC. Indeed, this provision stipulates that attacks intentionally directed against peacekeeping missions constitute a special category of war crimes in both international and non-international armed conflicts but only 'as long as [their personnel, installations, material, units or vehicles] are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'. In other words, while an intentional attack against UN forces (and other associated personnel) that have become party to a NIAC is a crime under the 1994 Safety Convention and under domestic law, it is not considered a crime under the Rome Statute (Article 8(2)(e)(iii)) or under IHL, since once these forces participate in a NIAC, they do not enjoy the protection afforded to civilians under IHL.³² The 1994 Safety Convention's ambiguity should not have any bearing on the applicability and application of IHL to multinational forces when the latter are party to an armed conflict, be it international or non-international in nature.

(b) The rights and obligations of States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories;

(c) The obligation of United Nations and associated personnel to act in accordance with the terms of the mandate of a United Nations operation;

(d) The right of States which voluntarily contribute personnel to a United Nations operation to withdraw their personnel from participation in such operation; or

(e) The entitlement to appropriate compensation payable in the event of death, disability, injury or illness attributable to peace-keeping service by persons voluntarily contributed by States to United Nations operations'.

31 Antoine Bouvier, 'Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis', in *International Review of the Red Cross*, No. 309, pp. 638–666; M.-Christiane Bourloyannis-Vrailas, 'The Convention on the Safety of United Nations and Associated Personnel', in *International and Comparative Law Quarterly*, Vol. 44, 1995, pp. 583–584.

32 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 452–457. In 2000, the UN Secretary-General stressed that it should not be the nature or character of the conflict that determined whether the Convention or IHL applied but whether 'in any type of conflict, members of the United Nations peacekeeping operations are actively engaged therein as combatants, or are otherwise entitled to the protection given to civilians under the international law of armed conflict': Report of the Secretary-General on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated personnel, UN Doc. A/55/637 (2000), footnote 3, p. 9. Furthermore, the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1993/13, 6 August 1999 (hereinafter the Secretary-General's Bulletin or the Bulletin), confirms the position adopted by states in the Rome Statute, as the Bulletin specifies in section 1.2 that 'the promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, *as long as they are entitled to the protection given to civilians under international law of armed conflict*' (emphasis added).

The conditions determining IHL applicability to multinational forces

A question of facts

Whether or not multinational forces are engaged in an armed conflict must be determined solely on the basis of the prevailing facts. This view, besides being widely held by academic writers,³³ is also reflected in recent international judicial bodies' decisions and in certain military manuals.

Numerous international tribunal decisions confirm the applicability of IHL on the basis of the prevailing facts. For instance, the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations International Criminal Tribunal for Rwanda (ICTR) have handed down many decisions in which they have stressed that IHL applicability should be determined according to the prevailing circumstances³⁴ and not to the subjective views of the parties to the armed conflict. For instance, the Trial Chamber of the ICTY stated in *Boškovski* that 'the question of whether there was an armed conflict at the relevant time is a factual determination to be made by the Trial Chamber upon hearing and reviewing the evidence admitted at trial'.³⁵ In a similar vein, the ICTY underlined in

33 For instance Eric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Bruxelles, 2012, p. 120; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2008, pp. 75–76; Dieter Fleck (ed.) and Michael Bothe, *The Handbook of International Humanitarian Law*, Oxford University Press, 2008, pp. 47–48; Geoffrey S. Corn et al., *The Law of Armed Conflict: An Operational Approach*, Wolters Kluwer Law & Business, New York, 2012, pp. 72 and 80; Gabriele Porretto and Sylvain Vité, 'The Application of International Humanitarian Law and Human Rights to International Organisations', in *Research Papers Series No. 1*, Centre Universitaire de Droit International Humanitaire, 2006, p. 32; D. Shraga, 'The Applicability of International Humanitarian Law to Peace Operations', above note 2, p. 94; International Law Association, report on use of force, The Hague Conference, 2010, p. 33: 'The *de jure* state or situation of armed conflict depends on the presence of actual and observable facts, in other words, objective criteria.'

34 See, for example, ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (Trial Chamber I), 6 December 1999, para. 92: 'the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of common Article 3, is to be decided upon on a case-by-case basis'; ICTY, *The Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, para. 90: 'the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis'; Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137, *Juan Carlos Abella v. Argentina*, 18 November 1997, para. 153: 'The line separating an especially violent situation of internal disturbances from the "lowest" level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.' As far as the International Criminal Court is concerned, in *Lubanga* and *Bemba*, the Trial and Pre-Trial Chambers each looked at the test established by the ICTY in *Tadić* in order to determine the existence of an armed conflict and then applied this test to the facts in the case. The ICC therefore implicitly accepts that the existence of an armed conflict has to be determined on the basis of the facts at the time. See ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Judgment (Trial Chamber), 14 March 2012, paras 533 ff.; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Art. 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor (Pre-Trial Chamber), 15 June 2009, paras 220 ff.

35 ICTY, *The Prosecutor v. Boškovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 174. In para. 176, the Trial Chamber also indicated that 'Trial Chambers have assessed the existence

Milutinović that ‘the existence of an armed conflict does not depend upon the views of the parties to the conflict’.³⁶

Some military manuals also make it clear that the existence of an armed conflict depends on the circumstances of the particular case. In this regard, the 2006 *Australian Law of Armed Conflict Manual* stresses that ‘whether any particular fact situation meets the threshold so as to become an armed conflict will depend on all circumstances surrounding a particular event’.³⁷

The legal classification of a situation involving multinational forces therefore depends on the facts on the ground and on the fulfilment of criteria stemming from the relevant provisions of IHL, in particular Common Article 2 of the Geneva Conventions in the case of international armed conflicts and Common Article 3 in the case of NIACs.

The conditions for IHL applicability to multinational forces

Nowadays, as multinational forces are frequently deployed in conflict zones during peace operations, the likelihood of their involvement in hostilities has increased. For this reason, it has become essential to determine the conditions under which these situations constitute an armed conflict within the meaning of IHL, especially as it is still hard to fix the precise moment at which multinational forces become a party to an armed conflict.³⁸

This is all the more important given attempts to up the threshold of IHL applicability.³⁹

of armed conflict by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group or groups involved depending on the facts of each case.’

36 ICTY, *The Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Judgment (Trial Chamber), 26 February 2009, para. 125. See also ICTR, *The Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment (Trial Chamber I), 2 September 1998, para. 603: ‘If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimised by the parties thereto.’

37 *Executive Series, Australian Defence Doctrine Publication 06.4*, 11 May 2006, chapter 3.5. Along the same lines, the United Kingdom’s *Joint Service Manual*, above note 7, provides in its section 3.3.1 that ‘whether any particular intervention crosses the threshold of armed conflict will depend on all the surrounding circumstances’.

38 British Ministry of Defence, *The Joint Service Manual*. . . , above note 7, section 14.7, p. 379.

39 In 2004, an ICRC report summing up the discussions that took place on the occasion of an expert meeting on IHL and multinational peace operations underlined the fact that the participants ‘could not reach an agreement on the threshold that triggers applicability of IHL [to multinational forces]’; Alexandre Faite and Jérémie Labbé Grenier, *Report to the Expert meeting on Multinational Peace Operations, Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, ICRC, Geneva, 2004, p. 10. Christopher Greenwood has underlined the fact that the use of force by peace operations is sometimes judged on a different scale allowing a higher level of force than is the case for other armed forces before IHL applies: see Christopher Greenwood, ‘International Humanitarian Law and United Nations Military Operations’, in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 24.

The application of the classic conditions in order to determine when multinational forces become a party to an armed conflict

The limited scope of this contribution does not permit a lengthy analysis of the classic conditions triggering IHL applicability. These have been discussed in an earlier ICRC publication⁴⁰ and they form the subject of some fairly detailed academic work.⁴¹ However, it is important to recall briefly the essential aspects of this issue, since the vague definition of armed conflict in IHL also affects peace operations.

First, deployment in a conflict zone does not necessarily mean that multinational forces become a party to the armed conflict affecting the area in question.⁴² Multinational forces will not become a party to an armed conflict of either an international or a non-international character and will not be bound by the applicable IHL norms in the course of their operations unless the following conditions for IHL applicability are met.⁴³

According to Common Article 2 of the 1949 Geneva Conventions, an international armed conflict exists whenever there is recourse to armed force between two or more states. An evolving interpretation of the law could be employed to contend that an international armed conflict exists whenever two or more entities possessing international legal personality resort to armed force in relations between them. Such an interpretation would make it possible to bring within the scope of IHL military action undertaken by international organisations, provided it reaches the threshold for the application of that body of law.⁴⁴

The threshold for determining the existence of an international armed conflict is very low, and factors such as duration and intensity do not enter into the

40 ICRC Opinion Paper, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', March 2008, available at: www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf; 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Report of the 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November–1 December 2011, pp. 7–13, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

41 See for example Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 2004, pp. 39–49; Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 3rd ed., 2011, pp. 21–22; Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, pp. 149–156; Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012; Daniel Bethlehem, Sandesh Sivakumaran, Noam Lubell and Philip Leach, *Conflict Classification: the Way Forward*, International Law Meeting Summary, Chatham House, London, 2012, available at: www.chathamhouse.org/sites/default/files/public/Research/International%20Law/011012summary.pdf; Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, pp. 69–94.

42 British Ministry of Defence, *The Joint Service Manual* . . . , above note 7, section 14.6, p. 379.

43 Tristan Ferraro, 'The Issue of International Humanitarian Law Applicability to Recent UN, NATO and African Union Peace Operations (Libya, Somalia, Democratic Republic of Congo, Ivory Coast. . .)', in Stanislas Horvat and Marco Benatar (eds), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments*, Proceedings of the 19th International Congress (Québec City, 1–5 May 2012), International Society for Military Law and the Law of War, Brussels, 2013, pp. 315–323.

44 It may be argued that a customary rule has crystallised, making it possible to extend the scope *rationae personae* of international armed conflicts to international organisations: see Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed.), above note 41, pp. 32–79.

equation; the mere capture of a soldier, or minor skirmishes between the forces of two or more states, or with the forces of an international organisation, may spark off an international armed conflict and lead to the applicability of IHL, insofar as such acts evidence a genuine belligerent intent.

Belligerent intent may be deemed to exist when it can be objectively observed that international organisations and/or TCCs are effectively involved in military operations or any other hostile action aimed at neutralising the enemy's military personnel and resources, hampering its military operations, subduing it or inducing it to change its course of action. Belligerent intent must therefore be deduced from the facts. Existence of such belligerent intent is very important since it permits to rule out the possibility of including in the scope of application of IHL situations that arise as a result of a mistake or of individual acts not endorsed by the TCCs or the international organisation involved in the peace operation.⁴⁵

Even if NATO's action in Libya in 2011 is a prime example of international organisations' and/or TCCs' involvement in an international armed conflict, the reality of contemporary peace operations is that, in most cases, the usual question is whether the international organisations and/or TCCs involved in these operations have actually become parties to a NIAC.

The classification of a NIAC under IHL can be a more complex issue.

Despite the absence of a clear definition of a NIAC in the Geneva Conventions, it is widely accepted that two conditions must be fulfilled before it can be said that, for the purpose of IHL, such a conflict exists:

- The fighting must oppose two or more parties demonstrating a certain level of organisation;
- The armed opposition must have reached a certain threshold of intensity.

In this regard, various probative factors which might be of relevance have been identified in order to assess whether these criteria are met.

To evaluate 'intensity', the following elements, *inter alia*, can be taken into account: the number, duration and intensity of individual confrontations; the types of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces participating in the fighting; the number of casualties; the extent of material destruction; the number of civilians fleeing combat zones; and whether the fighting is widespread.⁴⁶

Four groups of factors have been identified as criteria for assessing the level of organisation of non-state armed groups: the existence of a command structure; the ability of the armed group to conduct coordinated military operations; evidence

45 It must be made clear that the notion of belligerent intent, which is crucial for determining whether an international armed conflict exists, must not be confused with the notion of *animus belligerendi* which is intrinsic to the legal concept of war. While *animus belligerendi* is regarded as a prerequisite for the existence of a state of war, as an indicium of the subjective dimension of a declared war, the reference to the notion of belligerent intent has only evidentiary value and can in no way be interpreted as challenging the objective dimension inherent to the concept of international armed conflict.

46 ICTY, *The Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras. 177–193.

of a certain level of logistics; and, lastly, the ability of the group to respect and ensure respect for IHL.⁴⁷

In order to ascertain whether a NIAC exists, one must look at the organisation of each party, in particular that of non-state armed groups, and the intensity of the armed violence. Given the structure of multinational forces, they inherently fulfil the first requirement. However, it will be essential to verify whether the armed groups opposing them have the requisite level of organisation.⁴⁸

The frequent deployment of multinational forces in NIACs has also raised the question of the use of force for self-defence purposes and its impact on the applicability of IHL to peace operations. In recent peace operations, non-state armed groups have sometimes attacked multinational forces, even when the multinational forces were not initially parties to the pre-existing NIAC in the territory in which they were deployed. What legal framework governing the use of force would apply in such situations? Is IHL applicable to the sporadic use of force by multinational forces for the purpose of self-defence? What if the resort to force in self-defence becomes more and more frequent?

The issue of the legal framework governing the use of force in self-defence by multinational forces was raised in particular on the occasion of the entry into force of the UN Secretary-General's 1999 Bulletin entitled 'Observance by United Nations Forces of International Humanitarian Law' (hereinafter the Secretary-General's Bulletin or the Bulletin).⁴⁹ This document specifies in its section 1.1 that

47 See, in particular, ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, paras. 561–568; ICTY, *The Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, paras. 94–170; ICTY, *The Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, paras. 50–60; ICTY, *The Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras. 194–206.

48 A more restrictive definition of non-international armed conflicts was adopted in Additional Protocol II to the Geneva Conventions. Article 1(1) of this instrument specifies that it applies to armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.' This definition of non-international armed conflicts is narrower than the one derived from Common Article 3 of the Geneva Conventions. Indeed, it introduces a territorial requirement by providing that the non-state actor opposing government forces must exert such territorial control 'as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol.' In addition, contrary to Common Article 3, the Protocol excludes armed confrontation between non-state armed groups from its field of application. It is submitted here that since the definition of non-international armed conflicts set forth in this Protocol is narrower, it is relevant to the application of the Protocol alone, but not to the law of non-international armed conflicts in general. Indeed, as Article 1(1) of this instrument plainly states, it 'develops and supplements' Common Article 3 'without modifying its existing conditions of application'.

49 The ICRC was involved at the drafting stage, but it had no say on the final version of the Bulletin which is, strictly speaking, a UN document. ICRC participation in the drafting process does not mean that this document has been endorsed by the ICRC. As it stands, some elements of the Bulletin, in particular its field of application, call for clarification and do not necessarily reflect IHL provisions, in particular those laying down the conditions for determining IHL applicability to a *de facto* situation. See Anne Ryniker, 'Respect du droit international humanitaire par les forces des Nations Unies, quelques commentaires à propos de la Circulaire du Secrétaire Général des Nations Unies du 6 août 1999', in *International Review of the Red Cross*, Vol. 81, No. 836, December 1999, pp. 795–805; Marten Zwanenburg, 'The Secretary General's Bulletin on Observance by UN Forces of IHL: a Pyrrhic Victory?', in *Revue Militaire et de Droit de la Guerre*, 2000, p. 17.

IHL is applicable ‘in peacekeeping operations when the use of force is permitted in self-defence’. A strict interpretation of the Bulletin’s wording might result in the application of IHL as soon as UN forces use force in self-defence, irrespective of the fulfilment of the abovementioned criteria of applicability. However, the use of force in self-defence during peace operations does not always give rise to the applicability of IHL. The use of force in self-defence during peace operations will not be governed by IHL when the conditions for this body of law’s applicability are not met by the multinational forces. For this reason, the inference in section 1.1 of the Secretary-General’s Bulletin that IHL applies whenever force is used in self-defence is misleading as it could be interpreted as triggering IHL application as soon as force is used in self-defence.⁵⁰ Such an interpretation is not reflected in the practice of TCCs.⁵¹ Self-defence is a notion that falls within the province of law enforcement and, with a different meaning, of *ius ad bellum*, and does not *per se* influence the conditions for the applicability of IHL.

Nevertheless, it is possible that, in certain specific situations, the use of force in self-defence during peace operations might give rise to the application of IHL, in which case it implies multinational forces’ involvement in a NIAC.

In this context, a distinction must be drawn between two situations.

First, it is clear that the use of force in self-defence by multinational forces will have no impact on the applicability of IHL when these forces are already party to a NIAC, since IHL already applies and governs any use of force against military objectives, members of non-state organised armed groups performing continuous combat functions or civilians directly participating in the hostilities. Consequently, in this situation, any use of armed force by multinational forces *in connection with hostilities occurring during the armed conflict* will be subject to IHL requirements, whether these forces act in self-defence or otherwise.

Second, the repeated use of force in self-defence by multinational forces (who were not initially party to the armed conflict) may at some point reach the threshold required by IHL for them to be considered a party to a NIAC. Indeed, in cases where the multinational forces are regularly attacked by non-state organised armed groups, counterattacks carried out in self-defence may over time rise above the threshold of intensity required by IHL, thus making it possible to assert that the multinational forces are party to the NIAC.⁵² Such a position is bolstered by the interpretation of the notion of ‘protracted armed violence’ referred to in the ICTY’s

50 On the contrary, the phrase referring to self-defence contained in section 1.1 of the Bulletin should be construed so that the use of force by UN forces in self-defence may trigger IHL application *only* once such use of force meets the conditions for IHL applicability.

51 ‘Answers to the Questionnaire, Part II: Applicability of IHL in Peacekeeping Operations’, in *Report Presented to the 18th Congress on Practice and Customary Law in Military Operations including Peace Support Operations*, International Society for Military Law and the Law of War, La Marsa, 5–9 May 2009, p. 26, available at: www.ismllw.org/congres/General%20Report%20Congress.pdf.

52 O. Engdahl, ‘The Status of Peace Operation Personnel...’, above note 25, p. 117: ‘Even if military force is utilised for the purposes of self-defence, such force must also be judged against the objective criterion of the level of force applied (intensity of the conflict) and the level of organisation of the opposing forces. The argument of self-defence cannot be relied upon indefinitely in order to escape the application of IHL.’

Tadić decision.⁵³ Indeed, this notion has been construed as covering acts of violence repeated over time, but which are nevertheless not continuous.⁵⁴ It is therefore submitted that repeated but not necessarily continuous military operations conducted in self-defence may potentially lead to the involvement of multinational forces in a NIAC (if the classic criteria for this type of conflict are met) even though they are only retaliating against attacks.⁵⁵

- 53 ICTY, *The Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 69.
- 54 See Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 205 ff.; Andreas Zimmermann, 'War Crimes Committed in an Armed Conflict not of an International Character', in Otto Triffterer (ed.), *Commentary on the Statute of the International Criminal Court*, Verlagsgesellschaft, Baden-Baden, 1999, p. 285; Sonja Boelaert-Suominen, 'Commentary: the Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Conflicts', in *Leiden Journal of International Law*, 2000, p. 634; Bahia Thahzib-lie and Olivia Swaak-Goldman, 'Determining the Threshold for the Application of International Humanitarian Law', in Liesbeth Lijnzaad, Johanna Van Sambeek and Bahia Thahzib-lie (eds), *Making the Voice of Humanity Heard*, Martinus Nijhoff Publishers, Leiden/Boston, 2004, p. 248.
- 55 Robert Kolb for instance argues that the use of force by multinational peace forces in self-defence against sporadic attacks would not turn these troops into parties to the pre-existing armed conflict. However, he adds that 'if the attacks degenerate into a general pattern and the forces start conducting military operations on their own so as to respond to the acts of war of the other side, we would find ourselves in the context of an armed conflict': Robert Kolb, 'Background Document 1: Applicability of International Humanitarian Law to Forces under the Command of an International Organisation', in A. Faite and J. Labbé Grenier, above note 39, p. 68. However, this position was not shared by the Trial Chamber of the Special Court for Sierra Leone, which stated that 'as with all civilians [the peacekeepers'] protection would not cease if the personnel use armed force only in exercising their right to individual self-defence. Likewise, the Chamber opines that the use of force by peacekeepers in self-defence in the discharge of their mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers': Special Court for Sierra Leone, *The Prosecutor v. Sesay, Kallon and Gbao (RUF case)*, Judgment (Trial Chamber), 2 March 2009, SCSL-04-15-T, para. 233. An identical position was taken by the ICC Pre-Trial Chamber, on 8 February 2010, in *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ICC-02/05-02/09, para. 83. However, the Court could be challenged when it argues that multinational forces acting in self-defence can never be deemed to be involved in armed conflict. Such a position means in practice that multinational forces could be considered party to an armed conflict only when they initiate the fighting. If one takes the position of the Special Court for Sierra Leone a step further, no military action undertaken by non-state organised armed groups against multinational forces could ever reach the threshold of armed conflict within the meaning of IHL if the multinational forces' response cannot be used in the classification process. Furthermore the risk would also be that attacks against the latter, when they are connected with the armed conflict, would be qualified as a war crime, which is at odds with the IHL principle of equality between belligerents. The position taken by the Trial Chamber is not therefore consistent with IHL, as it disregards the possibility under IHL that the use of force in self-defence by multinational forces might well trigger the application of IHL and turn these forces into a party to a non-international armed conflict. In this regard, it is worth noting that the UK military manual on the law of armed conflict acknowledges this possibility and stresses that 'a PSO force can become party to an armed conflict and thus subject to the law of armed conflict ... where its personnel, though not originally charged with such a task, become involved in hostilities as combatants (whether as the result of their own initiative or because they are attacked by other forces) to such a degree that an armed conflict comes into being between the PSO force and the opposing forces. The latter situation may arise in any type of PSO.' British Ministry of Defence, *The Joint Service Manual...*, above note 7, section 14.5, pp. 378–379.

Are the conditions for determining the existence of an armed conflict different when multinational forces participate therein?

Some scholars argue that when multinational forces are involved, a higher degree of intensity should be needed for the situation to constitute an armed conflict for the purposes of IHL. In this regard Christopher Greenwood has underlined that ‘there is a tendency to treat the threshold for determining whether a force has become a party to an armed conflict as being somewhat higher in the case of United Nations and associated forces engaged in a mission which has a primarily peace-keeping or humanitarian character than in a normal case of conflicts between states’.⁵⁶ These arguments have been essentially made in relation to UN forces and this tendency has been reinforced by the adoption of the 1994 Safety Convention.⁵⁷

In the light of Article 2(2) of this instrument, which clarifies its relationship with IHL,⁵⁸ and given the risk that the 1994 Safety Convention might have ceased to apply by the time the UN forces have become a belligerent, there might be a temptation to raise the threshold of armed conflict required by IHL before recognising that they have become involved therein.⁵⁹

A decision by a Belgian Military Court in 1997 reflects this tendency to apply a higher threshold of armed conflict when UN forces are involved. This judicial body held that UN forces can be qualified as a party to an armed conflict only once they are involved in combat operations of a *permanent, widespread and structured character* against organised armed groups.⁶⁰

In addition, the Secretary-General’s Bulletin appears to be quite vague about the conditions for the applicability of IHL to UN forces. Section 1.1 describing the Bulletin’s field of application might also be interpreted as upping the threshold of IHL applicability. It establishes that the fundamental principles and rules of IHL would apply to UN forces ‘when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of

56 *Ibid.*, pp. 24 and 34.

57 See above.

58 As discussed above, Article 2(2) of the 1994 Safety Convention indicates that the latter does not apply when UN forces are involved in an international armed conflict.

59 See *Final Report on the Meaning of Armed Conflict in International Law*, International Law Association, Committee on the Use of Force, The Hague, 2010, p. 17: ‘If a low threshold of hostilities is adopted for the application of the [1994 Safety] Convention, this will have the effect of rendering virtually non-existent the protections offered by the Convention.’

60 Cour Militaire, *Ministère Public et Centre pour l’égalité des chances et la lutte contre le racisme v. C. . . and B. . .*, 17 December 1997, *Journal des Tribunaux*, 4 April 1998, pp. 288–289: ‘Attendu qu’avant tout, il faut relever qu’il n’y a pas eu de situation de conflit et, a fortiori, pas de situation de conflit armé, qui soit survenue entre la République démocratique de Somalie et les Nations Unies ; Que, comme il a été dit plus haut, les troupes des Nations Unies ne sont pas entrées en jeu dans le cadre des articles 43 et suivants de la Charte, mais bien comme une force de paix dotée de compétences coercitives pour l’exécution de missions bien définies ; . . . Que la cour n’a pas connaissance d’autres données, d’où il résulterait que les forces de l’ONU se seraient livrées de facto, sur le territoire de la Somalie – en contravention à leur mission légale – à des opérations de combat (1) permanentes, (2) généralisées et (3) structurées contre une ou plusieurs bandes armées rivales ; Que c’est seulement dans cette hypothèse que la force de paix serait devenue une partie au conflit. . .’

their engagement. They are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.’

Although the Bulletin is important and useful (notably because it reaffirms the fact that UN forces are bound by IHL even though the UN cannot ratify IHL treaties as it is not a state), its field of application is not entirely clear. It would have been useful if it had specified the criteria for deciding when UN forces are ‘actively engaged in armed conflict as combatants’. The wording of the phrase leaves a number of unanswered questions. In particular, how does this phrase mesh with the classic conditions under IHL derived from Common Articles 2 and 3 of the Geneva Conventions? How should the adverb ‘actively’ be interpreted in relation to the notion of intensity for the purposes of determining the existence of an armed conflict under IHL?

The terms of the Bulletin do not answer these questions. However, the legal literature on the Bulletin is a bit more explicit. Daphna Shruga, a former senior legal adviser at the UN Office of Legal Affairs who was involved in drafting the Bulletin, has interpreted section 1.1 as introducing what she has referred to as a ‘double key’ test. According to her, ‘two cumulative conditions – a so-called “double key” test – must therefore be met for international humanitarian law to apply to UN forces in the theatre of war: (i) the existence of an armed conflict in the area and time of their deployment, and (ii) the engagement of members of the Force in the conflict as combatants – whether in a Chapter VII enforcement action or in a Chapter VI operation in self-defence’.⁶¹

While the second condition, which is not contained in the Geneva Conventions or their Protocols, provides no further guidance to section 1.1 of the Bulletin,⁶² the first condition spells out in more explicit terms what appeared to be implicit in the Bulletin: the necessity for the UN forces to be involved in ‘a conflict within the conflict’ in order for IHL rules to apply. This additional requirement cannot be interpreted otherwise than as raising the threshold of armed conflict for determining the applicability of IHL to UN forces, since it adds a new condition for deciding whether they have become a party to an armed conflict, namely that the conflict had to be ongoing prior to their deployment.⁶³ This would not permit the application of IHL rules to a potential armed confrontation between UN forces and a state’s armed forces or non-state armed groups, even if the classic criteria for an armed conflict were met, if prior to this confrontation the situation in which the UN

61 Daphna Shruga, ‘The Secretary General’s Bulletin on the Observance by UN Forces of International Humanitarian Law: a Decade Later’, in *Israel Yearbook on Human Rights*, Vol. 39, 2009, p. 359; D. Shruga, ‘The Applicability of International Humanitarian Law to Peace Operations. . .’, above note 2, pp. 94–95.

62 In her article Daphna Shruga illustrates the ‘double key’ test with examples of military operations triggering the applicability of IHL to UN forces. These examples seem to demonstrate that a substantial threshold of intensity needs to be met in order to meet the second condition of the ‘double key’ test. They thus reflect the tendency to apply a higher threshold of intensity for determining the existence of an armed conflict – international or not – when multinational peace forces are involved and whether they should be considered parties to it within the meaning of IHL.

63 M. Zwanenburg, above note 49, p. 21: ‘The Bulletin follows the view that armed violence has to reach a certain level of intensity before IHL applies [to UN forces].’

forces were deployed did not amount to an armed conflict for the purposes of IHL. This theory therefore introduces a condition foreign to the relevant IHL norms.⁶⁴

Nothing under IHL provides that conditions for IHL applicability differ when UN and other peace forces are involved in armed conflict. Under *lex lata*, the criteria used to establish the existence of an armed conflict involving multinational forces do not differ from those applicable to more 'classic' forms of armed conflicts. Any other position would lack a legal basis under IHL as the 'higher threshold approach' does not rest on general practice, nor is it confirmed by any *opinio juris*. The criterion for determining whether multinational forces are involved in armed conflict is strictly identical to that applying to any other armed conflict situation.⁶⁵

In this regard, some states' legal advisers attending the 2009 Congress of the International Society for Military Law and the Law of War (ISMLLW) embraced the classic IHL conditions for conflict determination, even when UN forces are involved. The Congress report summarising the responses of some states to a questionnaire relating to the UN Secretary-General's 1999 Bulletin indicated that 'responding states do not necessarily consent with the 1999 UN Secretary General's Bulletin because they consider themselves bound by IHL only *if there exists a situation of armed conflict in the sense of either common Article 2 or of common Article 3 of the 1949 Geneva Conventions*' (emphasis added).⁶⁶ The last part of this quotation shows that the some advisers clearly rejected the conditions set forth in section 1.1 of the Bulletin and reaffirmed that the classic conditions for determining the existence of an armed conflict (derived from the relevant IHL provisions) remained the legal benchmark against which the participation of multinational forces, including UN forces, in an armed conflict must be analysed.

Lastly, it has been argued that IHL should be applied to multinational forces *mutatis mutandis*, taking into consideration the special legal status of the international organisation under whose auspices they operate.⁶⁷ It is submitted here that the *mutatis mutandis* argument can in no way justify a pick-and-choose approach to the application of IHL to multinational forces. The argument simply means that the limited juridical, administrative and operational capacities of international organisations should be taken into account in order to identify exactly which IHL norms apply, or do not apply, to them.⁶⁸ Indeed, some IHL norms require means that can be deployed only by states parties to the

64 One should note that, in this issue of the *Review*, when Katarina Grenfell, legal adviser at the UN Office of Legal Affairs, discusses the conditions under which IHL applies to UN forces, she does not refer to the above-mentioned 'double key test'.

65 Garth J. Cartledge, 'Legal Restraints on Military Personnel Deployed on Peacekeeping Operations', in Helen Durham and Timothy L. H. McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, Martinus Nijhoff Publishers, The Hague, 1999, pp. 125–130. See also O. Engdahl, 'The Status of Peace Operation Personnel...', above note 25, p. 118: 'There would not seem to be support in law for a special threshold for applying IHL to peace operations forces. The point of departure must be that the same criteria for determining when such forces become involved in armed conflict apply as for other armed forces.'

66 'Answers to the Questionnaire. . .', above note 51.

67 D. Shraga and R. Zacklin, above note 2, p. 48.

68 *Ibid.*

Geneva Conventions. For example, the obligation to provide effective penal sanctions for persons who have committed war crimes and other grave breaches can be enforced only by states. This obligation cannot be discharged by international organisations, as they generally do not have their own judicial systems. Other IHL obligations can be respected only by states (for example, Article 49(6) of the Fourth Geneva Convention requires an occupying power not to transfer parts of its own population into territory it occupies), and while international organisations can be an occupying power for the purposes of IHL, they do not have their own population. The *mutatis mutandis* argument is useful only for distinguishing the vast majority of IHL rules that can be applied by international organisations from the few that cannot be applied by them because of their intrinsic characteristics. The *mutatis mutandis* argument cannot be used in relation to IHL norms establishing the conditions under which an armed conflict may be said to exist.

The relevance of a complementary approach when multinational forces intervene in a pre-existing NIAC: the 'support-based approach'

The new features of peace operations are such that multinational forces often intervene in a pre-existing NIAC by providing support for the armed forces of the state in the territory of which the conflict occurs. This support for government armed forces fighting against non-state organised armed groups is sometimes expressly requested by Security Council resolutions. This was the case with the UN forces deployed in the Democratic Republic of the Congo⁶⁹ and the NATO troops in Afghanistan.⁷⁰

In recent peace operations, multinational forces' involvement in pre-existing NIACs has often taken the form not of kinetic operations against a clearly identified enemy, but of logistical support, intelligence activities for the benefit of the territorial state, or participation in the planning and coordination of military operations carried out by the armed forces of the territorial state.

Such circumstances give rise to some difficult questions. What is the legal status under IHL of multinational forces not engaged in 'front-line' operations, but which still play what is sometimes a fundamental role in military operations alongside the host state's armed forces? Is the multinational forces' action covered by IHL in this situation? These questions are especially difficult to answer, because often the support given by the multinational forces to the armed forces of the host state does not by itself meet the threshold of intensity required for a NIAC.

This situation has led to an examination of whether the classic criteria for defining the existence of a NIAC involving multinational forces should be complemented by an approach taking account of this support in order to ascertain whether IHL should apply to multinational forces intervening in a pre-existing NIAC (hereinafter the 'support-based approach').

69 SC Res. 1906, 23 December 2009, paras. 21–23; SC Res. 1925, 28 May 2010, para. 12(h); SC Res. 2098, 28 March 2013, para. 12(b).

70 SC Res. 1386, 20 December 2001, para.1; SC Res.1510, 13 October 2003, para.1.

It is important to underline that such an approach complements, but does not replace, the determination of IHL applicability on the basis of the classic criteria discussed above. It simply establishes a link between IHL and certain types of action undertaken by multinational forces in support of a party to a pre-existing NIAC, and it draws the legal consequences of this connection in terms of IHL applicability. This approach also makes it possible to avoid an illogical situation where multinational forces making an effective and significant contribution to military operations and participating in the collective conduct of hostilities in a pre-existing NIAC would not be considered belligerents and could still claim protection against direct attacks. This support-based approach is therefore consistent with IHL logic and in line with the imperative of not blurring the distinction between combatants (in the technical meaning of the term) and civilians not directly participating in hostilities.

Accordingly, even if multinational forces' involvement does not *per se* meet the criterion of intensity deriving from Common Article 3 of the Geneva Conventions, the nature of their engagement in the pre-existing NIAC could turn them into a party to it. The *rationale* of this support-based approach is to link to IHL multinational forces' actions that form an integral part of that pre-existing conflict. Multinational forces' support should not be interpreted as a constitutive element of a potential new and independent NIAC. Therefore, because of the nexus with the pre-existing NIAC, the support provided by multinational forces must be distinguished from what is required to establish that they are party to a distinct NIAC. In grafting their military action onto a pre-existing NIAC, multinational forces in fact act as a co-belligerent assisting one of the parties to that armed conflict. In such cases, they must be considered a party to the pre-existing NIAC.

In such a situation, it is not necessary to assess whether multinational forces *per se* fulfil the classic criteria for determining the existence of a NIAC, since they have already been fulfilled during the pre-existing one. The support functions performed by multinational forces in the pre-existing conflict determine whether IHL governs their operations in this specific situation.

Under the support-based approach, it is submitted that IHL applies to multinational forces when the following conditions are met:

- There is a pre-existing NIAC ongoing in the territory where multinational forces intervene;
- Actions related to the conduct of hostilities are undertaken by multinational forces in the context of that pre-existing conflict;
- The multinational forces' military operations are carried out in support of a party to that pre-existing conflict;
- The action in question is undertaken pursuant to an official decision by the TCC or international organisation in question to support a party involved in that pre-existing conflict.

All four conditions must be fulfilled in order to render IHL applicable to the multinational forces' action in the context of a pre-existing NIAC.

The first condition is self-explanatory. If it is not met, the only way in which multinational forces could become a party to a NIAC would be to fulfil the classic

criteria derived from Common Article 3 of the Geneva Conventions. The support-based approach is therefore irrelevant in the absence of a pre-existing NIAC. The territorial reference included in the first condition reflects the fact that, in most cases, the multinational forces' intervention takes place in the territory where the conflict originated. However, it does not restrict the geographical scope of the application of IHL to that territory. IHL would continue to regulate the multinational forces' action related to the armed conflict but carried out, for example, in international airspace or on the high seas. Similarly, IHL could also apply to multinational forces' action undertaken when the pre-existing conflict spills over into neighbouring states.⁷¹

The second criterion is of great importance. For IHL to become applicable to multinational forces in the context of a pre-existing NIAC, these forces must perform action of a nature that would make them qualify as a party to that conflict.

For the purposes of the support-based approach, the decisive element is the contribution made by this action to the collective conduct of hostilities. A general contribution to the war effort would not be sufficient, as it amounts to no more than loose, indirect involvement in the pre-existing armed conflict. War-sustaining activities such as financial support, or the delivery of weapons/ammunition to a party to the conflict, should be regarded as a form of indirect involvement in hostilities that has no effect on the multinational forces' status under IHL.⁷² A distinction must therefore be drawn between the provision of support that would have a direct impact on the opposing party's ability to conduct hostilities and more indirect forms of support which would allow the beneficiary only to build up its military capabilities.

In this regard, multinational forces' military operations which directly damage the party opposing the armed forces whom they support, or which are designed to directly undermine its military capabilities, are definitely included in the type of action covered by the second criterion. However, it is not necessary for the action carried out by the multinational forces *per se* to cause direct harm to the opposing party. Direct support also encompasses action that has an impact on the enemy *only in conjunction with* other acts undertaken by the supported party. In that case, the multinational forces' action should be considered an integral part of specific, coordinated military operations carried out by the supported party which directly inflict harm on the enemy.

In other words, there must be a close link between the action undertaken by multinational forces and the harm caused to one of the belligerents by specific military operations undertaken by the opponent. For example, transporting the supported state's armed forces to the front line or providing planes for refuelling jet fighters involved in aerial operations carried out by the supported state do implicate

71 This position is without prejudice to *ius ad bellum* issues that might considerably limit the geographical spread of the conflict. Consent of the territorial state particularly matters in such circumstances. For further details on the geographical scope of application of IHL, see below.

72 When these weapons/ammunition are not immediately used by the supported party against its adversary, the causal relationship between their delivery and the harm inflicted by the supported party while using them is too indirect for such support to be deemed an integral part of the collective conduct of hostilities.

multinational forces in the collective conduct of hostilities⁷³ and make them a party to the pre-existing NIAC.

With regard to the second condition, it is still a moot question whether there should always be evidence of recurrent action before multinational forces may be considered a party to a pre-existing NIAC on the basis of their support to the territorial state's armed forces. Recent peace operations have shown that, to a large extent, the support provided by multinational forces within the framework of a pre-existing NIAC was not limited to one or two acts, but was generally made up of multiple actions conducted on a regular basis over a significant period of time. Although the all-important factor in the support-based approach is generally whether action in support of a party to a pre-existing NIAC is repeated, in some circumstances a single act could turn the multinational forces into a party to the armed conflict. This would be the case, for example, when the act in question plays a fundamental role in the supported party's capability to carry out military operations with the view to eradicating the threat posed by the enemy.⁷⁴

The third criterion refers to the nexus between the action undertaken by multinational forces and the pre-existing NIAC. This requirement is met when the multinational forces' action is undertaken *in support* of a party to the pre-existing conflict.

If some action might appear at first sight to pursue the same goal (e.g. to suppress a threat from a non-state organised armed group), this may not necessarily mean that the multinational forces' operations are carried out in support of one of the parties to the pre-existing NIAC. *A fortiori*, shared political views are not sufficient grounds for concluding that multinational forces' action is conducted on behalf the territorial state.

For this reason, determining the existence of such a nexus might prove difficult. The key issue will be that of identifying whether the action carried out by multinational forces in the prevailing circumstances can reasonably be interpreted as action designed to support a party to the pre-existing NIAC, in that it directly affects the adversary's military capabilities or hampers its military operations. In other words, it must be evident from the action undertaken by multinational forces

73 The term 'hostilities' cannot be restricted to actual fighting, to the neutralisation of a given object or the killing/capture of a certain person. It also encompasses certain logistical, intelligence or preparatory activities and, taken together, the belligerent's activities aimed at inflicting damage on the enemy. 'Hostilities' for the purposes of IHL would thus constitute the sum of hostile actions or all acts harmful to the adversary. The conduct in question has to be directed at the enemy or, at least, has to be closely related to action against the enemy. The concept of hostilities within the meaning of IHL is therefore broader than the mere use of force and includes all violent and non-violent measures which constitute an integral part of the same military operation aimed at destroying the enemy's military capacity or at hampering its military operations. In other words, the term 'hostilities' can be equated with the traditional term 'acts of war' which by their nature or purpose, and sometimes in conjunction with other action, are likely to cause harm to the personnel or equipment of the enemy armed forces. Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, pp. 325–334.

74 It is, however, questionable whether one should err on the side of caution when applying the support-based approach, because of its legal and practical implications for the legal status of the multinational forces. A cautious attitude would entail waiting until multiple acts had taken place before it might be said that this second condition had been fulfilled.

that two or more states or international organisations are pooling or marshalling military resources in order to fight a common enemy. This cooperation or coordination among the participants in hostilities would be sufficient proof of the collective nature of operations that is required by the support-based approach.

This condition therefore implies an objective analysis of the purpose of the action carried out by the multinational forces in the context of the pre-existing NIAC. Setting up *ad hoc* joint military mechanisms or signing an agreement designed to enhance cooperation between the multinational forces and the armed forces of the territorial state in respect of the pre-existing conflict would certainly tend to suggest some form of support and therefore the existence of the required nexus. If there is any doubt, the multinational forces should not be regarded as belligerents and they would not be bound by IHL.⁷⁵

However, support does not need to be the prime objective of the multinational forces. What is important under the third condition is that it is plain from the situation that the multinational forces are not acting solely for their own interests or benefit. Support for the armed forces of the territorial state is expressly listed among the tasks assigned to multinational forces in an increasing number of Security Council resolutions providing the legal basis of multinational forces' intervention. This makes it easier to determine the existence of this nexus.

Lastly, the support-based approach demands that the provision of support to the territorial state's armed forces has been decided by the appropriate authorities of the TCC or organs of the international organisation. This criterion is important insofar as it evidences the willingness of the TCCs and international organisation to intervene on behalf of the supported party and avoids including acts that are the result of a mistake or that appear to be *ultra vires*.⁷⁶

When fulfilled, these criteria testify beyond reasonable doubt to the existence of belligerent intent on the part of the multinational forces, since the situation is objective evidence of their effective involvement in military operations, or in other hostile action, aimed at neutralising the enemy's military personnel and assets and/or hampering its military operations.

On the basis of this approach, multinational forces are considered to be a party to a pre-existing NIAC. Since modern armed conflicts are increasingly being fought through coalitions and alliances of several states and/or international organisations whose involvement in the hostilities may vary, this approach is particularly relevant, as it would make it possible to ascertain when these stakeholders are bound by IHL.

75 This would be the case, for instance, when the multinational forces' action is so tenuously associated with the action of a party to the pre-existing conflict that it raises some doubts as to whether the action concerned can really be regarded as part of the collective conduct of hostilities.

76 In this regard, *ultra vires* action might well trigger the international responsibility of the TCC or international organisation in question, but would not be sufficient *per se* to turn it into a party to the pre-existing non-international armed conflict owing to a lack of any belligerent intent on the part of the entity to which the impugned act can be attributed.

Who should be considered a party to an armed conflict when multinational forces are involved?

Once it has been determined that multinational forces have become a party to an armed conflict in accordance with the conditions set out above, several important questions still have to be answered. Who among the participants in a peace operation should be considered a party to an armed conflict? Should it be held that only TCCs are a party to it? What about the international organisation⁷⁷ under whose command and control the multinational forces operate? Could the international organisation and the TCCs be jointly regarded as parties to the armed conflict?

Little attention seems to have been paid to these questions so far.⁷⁸ Nonetheless, the issues are important in light of their legal consequences and need to be examined in more depth.

International organisations involved in peace operations all share one characteristic: they do not have armed forces of their own. In order to carry out peace operations, an international organisation must rely on its member states to place armed forces at its disposal. When they put troops at an international organisation's disposal for peace operations, the TCCs never transfer full authority over them to the organisation. TCCs always retain some form of authority and control over the armed forces they lend to the international organisation so that, even when they are operating on behalf the organisation, these troops still continue to act simultaneously as organs of their respective states. This dual status of the armed forces involved in peace operations conducted under international organisations' control, as organs of both TCCs and international organisations, considerably complicates the determination of who should be considered a party to

77 In addressing this question, it is assumed that the international organisations involved in peace operations have the legal capacity to be bound by IHL. This capacity depends on the existence of the international organisations' international legal personality. This article will proceed on the assumption that that the material capacity of an international organisation to be engaged in military operations entails its subjective capacity to be bound by IHL. In other words, if the constitutive document of an international organisation explicitly or implicitly provides for the possibility of deploying armed forces in a foreign country and allows it to contribute to the maintenance of international peace and security through military action, IHL may potentially be a legal frame of reference once these forces are involved in military operations reaching the level of an armed conflict. Hence an international organisation could perfectly well become a belligerent and be considered *per se* a party to an armed conflict, be it international or non-international in nature. As international organisations *per se* cannot be formally a party to any IHL treaties, only IHL customary rules will apply to international organisations engaged in armed conflicts. See Robert Kolb, Gabriele Porretto and Sylvain Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales, forces de paix et administrations civiles transitoires*, Bruylant, Bruxelles, 2005, pp. 121–128; Tristan Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *Proceedings of the 12th Bruges Colloquium, International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility*, 20–21 October 2011, Collegium No. 42, Autumn 2012, College of Europe–ICRC, pp. 15–22.

78 Marten Zwanenburg, 'International Organisations vs. Troop Contributing Countries: Which Should Be Considered as the Party to an Armed Conflict during Peace Operations?', *Proceedings of the 12th Bruges Colloquium, International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility*, 20–21 October 2011, Collegium No. 42, Autumn 2012, College of Europe–ICRC, pp. 23–28; O. Engdahl, above note 4, pp. 233–271.

an armed conflict in the context of a peace operation conducted under the auspices of an international organisation.

In order to answer this complex question, one has to address the command and control ('C2' in military parlance) arrangements in force in peace operations.⁷⁹ A grasp of the C2 structure and corresponding levels of authority are essential in order to understand how peace operations function and accurately identify who has control over the military operations and, *in fine*, which of the peace operation's partners should be considered a party to the armed conflict.

There is no 'one size fits all' approach to C2 in the context of peace operations. The C2 structure varies from one operation to another and from one international organisation to another. This is not the place to conduct a thorough analysis of the C2 arrangements in the context of each peace operation past and present.⁸⁰ However, there is no disputing the fact that TCCs never delegate 'full command'⁸¹ to the international organisations involved in peace operations but generally transfer only 'operational command'⁸² or 'operational control' to them.⁸³ However, what do these notions mean in legal terms?

By identifying where control lies during peace operations, one can in turn determine to which entity – the international organisation and/or TCCs – the

79 C2 refers to the authority vested in certain individuals or bodies to direct the action of and exercise authority over the armed forces. Most states and international organisations such as the UN and NATO have developed sophisticated, complex C2 structures and doctrines in order to achieve specific objectives and ensure that the armed forces put at their disposal operate within designated legal and policy guidelines. See Terry Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations', in *Netherlands Yearbook of International Law*, Vol. 42, December 2011, p. 45. In other words, the C2 structure provides the framework within which military resources drawn from states and international organisations can operate together effectively to accomplish a common mission generally assigned by the UN Security Council.

80 For a more detailed analysis of these issues, see Blaise Cathcart, 'Command and Control in Military Operations', in Terry Gill and Dieter Fleck (eds), *The Handbook of International Law of Military Operations*, Oxford, 2010, pp. 235–244; T. Gill, above note 79, pp. 37–68.

81 'Full command' is defined by NATO as 'the military authority and responsibility of a commander to issue orders to subordinates. It covers every aspect of military operations and administration and exists only within national services.' The term 'command' as used internationally implies a lesser degree of authority than when it is used in a purely national sense. No NATO or coalition commander has full command over the forces assigned to him since, when assigning forces to NATO, states will delegate only operational command or operational control. See NATO Standardisation Agency (NSA), *NATO Glossary of Terms and Definitions (English and French)* (hereinafter NATO Glossary), AAP-06, 2013, p. 2-F-7, available at: <http://nsa.nato.int/nsa/zPublic/ap/aap6/AAP-6.pdf>.

82 NATO has defined 'operational command' as 'the authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control as the commander deems necessary.' NATO Glossary, above note 81, p. 2-O-3.

83 NATO has described 'operational control' as 'the authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control.' NATO Glossary, above note 81, p. 2-O-3. While military forces generally use the same terminology, terms such as 'full command', 'operational command' and 'operational control' may have different meanings from one state to another or from one international organisation to another. The UN has a definition of 'operational control' which would be tantamount to 'operational command' within NATO's meaning. UN, Department of Peacekeeping Operations and Department of Field Support, *Authority, Command and Control in UN Peacekeeping Operations*, 15 February 2008, Ref. 2008.4, p. 4.

military operations undertaken by multinational forces should be attributed.⁸⁴ In other words, determining the parties to an armed conflict in the context of multinational operations comes down to the question of the level of control or authority exerted by the international organisation over the troops put at its disposal.

In order to answer this question, it is first necessary to ascertain whether the multinational forces' military operations are to be considered those of the international organisation, the TCCs or both. To that end, one has to establish a link between the conduct of the multinational forces and a holder of international obligations, be it the international organisation and/or the TCCs. In this regard, the notion of attribution⁸⁵ will play a central role, as it can be employed to establish whether multinational forces' action is that of the international organisation and/or the TCCs. Indeed, in order to determine the parties to an armed conflict among participants in a peace operation, one has to identify to which entity – the international organisation and/or the TCCs – all the acts of war accomplished by multinational forces during the operations can be attributed.

IHL is silent on the issue of attribution. It does not contain any specific criteria making it possible to ascertain that action carried out by multinational forces can be attributed to a particular holder of international obligations. In the absence of specific criteria in IHL, one has to rely on the general rules of public international law for determining under which conditions multinational forces' action can be attributed to international organisations and/or TCCs.

International law concerning the responsibility of international organisations for internationally wrongful acts and its provisions regarding attribution offer a solution that can be used in the case at hand. As rightly observed by Marten Zwanenburg, determining who is a party to an armed conflict during peace operations is similar to determining to which entity conduct must be attributed for the purposes of international responsibility:

in both cases what is at issue is linking the conduct of physical persons to a holder of international obligations . . . if we consider international law as one system, it is logical to answer similar questions in a similar way . . . If this logic is accepted, this would mean that the test to determine who [among participants

84 The issue is further complicated by the lack of consistency in state practice when attributing conduct within the framework of peace operations and by states' different positions regarding who can qualify as a party to an armed conflict, for example during NATO operations. See Giorgio Gaja, Second Report on the Responsibility of International Organisations, International Law Commission, 56th session, UN Doc. A/CN.4/541, p. 4. See also O. Engdahl, above note 4.

85 Attribution is an operation that consists in establishing a link between an act and a person or an entity considered to be its author. This operation is particularly delicate for collective entities such as states or international organisations which necessarily act through physical persons. The operation consists of two stages: the first stage makes it possible to connect an act (or several acts) to an individual, and the second stage determines whether the individual or group of individuals concerned performs a function within this collective entity with the result that the acts of these individuals can be interpreted as being those of the entity itself. See Hervé Ascensio, 'La responsabilité selon la Cour Internationale de Justice dans l'affaire du génocide bosniaque', in *Revue Générale de Droit International Public*, 2007/2, p. 288.

of a peace operation] is a party to the conflict is the same as the test for determining to which entity conduct must be attributed.⁸⁶

The work carried out by the International Law Commission in this field of the law has made it possible to establish a direct connection between the notions of control and attribution. The question of whether or not multinational forces' action can be attributed to the international organisation and/or the TCCs therefore becomes a question of how one defines the notion of control.

Article 7 of the draft articles on the responsibility of international organisations, which was drafted with peace operations in mind, uses the test of 'effective control' in order to attribute the conduct of multinational forces to an international organisation.⁸⁷ Unfortunately, the International Law Commission does not define the notion of 'effective control'. This provides an opportunity for further refining the test. As Paolo Palchetti holds:

The application of such a test would significantly complicate attribution, as in many cases it would be extremely difficult to prove the existence of an 'effective control' of this kind. However, it does not seem that Article 7 requires such a high level of control for the purposes of attribution of acts of lent organs. As the Commentary to this provision makes clear, the notion of 'effective control' within the context of the responsibility of international organisations does not play the same role as in the context of the law on state responsibility.

Palchetti adds that:

Article 7 is to be applied in a more flexible way than for the attribution to a state of a conduct performed by *de facto* organs. In particular, attribution – to the organisation or to the sending state – does not necessarily depend on whether it is demonstrated that the conduct was taken as a result of a specific instruction.⁸⁸

Therefore, the issue of attribution in the context of peace operations leaves room for interpretation.⁸⁹ One question which might be asked is whether the notion of

86 M. Zwanenburg, above note 78, p. 26.

87 Article 7 of the Draft Articles on the Responsibility of International Organisations (DARIO), adopted by the International Law Commission at its 63rd session, in 2011, and submitted to the UN General Assembly as a part of the Commission's report covering the work of that session (A/66/10): Conduct of organs of a State or organs or agents of an international organisation placed at the disposal of another international organisation. 'The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.'

88 See the article by Paolo Palchetti in this issue of the *Review*. See also Paolo Palchetti, 'How Can Member States Be Held Responsible for Wrongful Actions Committed during Peace Operations Conducted by International Organisations?', *Proceedings of the 12th Bruges Colloquium, International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility*, 20–21 October 2011, Collegium No. 42, Autumn 2012, College of Europe–ICRC, p. 100.

89 For a discussion of the test used to determine the attribution of action undertaken by non-state armed groups, see D. Akande, above note 44, pp. 57 ff.; Marina Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia', in *Journal of International Criminal Justice*, Vol. 5, 2007, pp. 829–838; Marco Milanovic, 'State Responsibility for Genocide', in *European Journal of International Law*, Vol. 17, No. 3, 2006, pp. 553–604; Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', in *European Journal of International Law*, Vol. 18, No. 4, 2007,

‘effective control’ within the meaning of the law governing international organisations’ international responsibility and its apparent flexibility might in fact square with the interpretation of the ‘overall control’ test developed by the ICTY in the *Tadić* case,⁹⁰ in particular when the notion of control is used to determine the parties to an armed conflict in the context of peace operations.

Indeed, the International Court of Justice (ICJ) recognised in the *Genocide* case that the notion of control, when used for the classification of a situation under IHL, could be less rigorous than the one used for the purposes of establishing responsibility for a violation of international law.⁹¹ Determining who is a party to an armed conflict during peace operations is inherently bound up with the question of the classification of armed conflict and would therefore justify a less strict interpretation of the notion of control based on the ‘overall control’ test.⁹² This test might also prove particularly useful in the context of peace operations as it would be more likely to lead to the attribution of a sum of actions to an entity (as opposed to the attribution of one specific act), an operation which is consonant with the rationale of classification under IHL, which presupposes an objective analysis of the whole gamut of military action undertaken by those involved in armed violence.

However, in light of recent peace operations, such as those conducted by the UN in the DRC, by the African Union in Somalia and Mali and by NATO in Afghanistan and Libya, in fact the application of the ‘overall control’ or ‘effective control’ test would not have changed the determination of who among the participants in the peace operations ought to be considered a party to the armed conflict.

Indeed, a careful examination of the C2 structure of peace operations under UN command and control shows that the TCCs generally transfer a substantial part of their authority over the troops they put at the UN’s disposal. An analysis of the UN doctrine on C2 issue⁹³ combined with a review of its practical application in a context such as the DRC clearly demonstrate that, despite the multiplicity of caveats put in place by TCCs⁹⁴ and the potential for TCCs’ (limited) interference, the UN

pp. 649–668; Jörn Griebel and Milan Plücker, ‘New Developments Regarding the Rules of Attribution? The ICJ’s decision in *Bosnia v. Serbia*’, in *Leiden Journal of International Law*, 2008, pp. 601–622.

90 ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 131. This approach has also been endorsed by the ICC in *The Prosecutor v. Lubanga Dyilo*, Case No. ICC 01/04-01/06, Decision on the Confirmation of Charges (Preliminary Chamber), 29 January 2007, para. 211.

91 ICJ, *Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, *ICJ Reports 2007*, para. 404: ‘Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable.’

92 Application of the ‘overall control’ test to determine the parties to an armed conflict when multinational forces are drawn into hostilities has been proposed by O. Engdahl, above note 4.

93 UN, Department of Peacekeeping Operations and Department of Field Support, *Authority, Command and Control in UN Peacekeeping Operations*, 15 February 2008, Ref. 2008.4, p. 24.

94 A caveat is a limitation, restriction or constraint placed by a nation on its military forces or civilian elements under international organisation command and control, or otherwise available to the international organisation, that does not permit the mission force commander to deploy or employ them fully in line with the approved plan of the operations.

generally exerts 'operational control'. Legally speaking this means that it has 'effective control' (and *a fortiori* 'overall control') over military operations conducted by the troops lent by the TCCs.⁹⁵

In view of the above considerations, it is submitted that in the case of peace operations under UN command and control, there is a presumption that only the UN mission, and not the TCCs (and still less the member states of the UN), should be considered a party to the armed conflict when UN forces are drawn into hostilities reaching the threshold of armed conflict.⁹⁶ In other words, the formal authority vested in the organisation combined with the C2 structure effectively in force generate a presumption that only the UN mission, as a subsidiary organ of the UN, should be deemed party to the armed conflict.⁹⁷ The situation would be identical, for example, for the African Union (AU) insofar as its C2 structure appears to be similar to that of UN-run peace operations. Hence, if AU peace forces became involved in armed violence reaching the level of an armed conflict, only the AU mission, as a subsidiary organ of the AU, should be deemed party to the armed conflict.⁹⁸

The situation as regards peace operations conducted by NATO is more complex and differs from that of UN operations. Owing to the very intricate, specific nature of the C2 architecture of NATO operations (in particular the role played by TCCs within the C2 structure), it is submitted that, in principle, when NATO troops are engaged in peace operations reaching the threshold of armed conflict, it is not only the organisation which is a party thereto. Indeed, a close look at NATO C2 doctrine and its implementation in recent peace operations in Libya and Afghanistan reveals that the TCCs' representation at the strategic, operational and tactical level is such that these states clearly have the power to influence and the capacity to intervene at all levels and stages of NATO military operations. TCCs are so closely associated in the NATO C2 structure that it is almost impossible to discern whether it is NATO itself, or the TCCs, which

95 This has been recognised explicitly by the UN, which even went further by stating that 'it has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are "transformed" into a United Nations subsidiary organ and, as such, entail the responsibility of the organisation just like any other subsidiary organ, regardless of whether control exercised over all aspects of the operation was in fact "effective."' International Law Commission, Responsibility of International Organisations: Comments and Observations Received by International Organisations, 63rd session, 2011, UN Doc. A/CN.4/637/Add. 1, p. 13.

96 R. D. Glick, above note 26, p. 98: 'As a consequence of its command and control, the United Nations is deemed a party to armed conflict and thereby subject to the obligations of IHL. In contrast, as a consequence of their lack of control, troop contributing states are neither parties to the armed conflict nor directly responsible for the actions of the UN armed forces.'

97 Obviously, this presumption may be rebutted if it is demonstrated that the TCCs recurrently interfere in the chain of command to such an extent that the UN cannot be considered to have command and control over the operations. In these circumstances, under IHL only the TCCs and not the UN as such may be considered to be a party to the armed conflict. It is important to note that isolated, sporadic or limited instances of interference should not be sufficient to divest the international organisation in question of belligerent status but, in this case, even if the international organisation remains a party to the armed conflict, the violations of international law resulting from the TCCs' interference should be attributed only to the TCCs since they have exerted effective control over the specific impugned act.

98 What was said in the preceding footnote also applies to AU peace operations.

have effective or overall control over the armed forces operating during a NATO-run peace operation. In light of this situation, NATO operations should be attributed simultaneously to the international organisation and the TCCs.⁹⁹ The logical legal consequence in terms of IHL is that both NATO and the TCCs (but not all NATO member states) should be considered parties to the armed conflict.¹⁰⁰

Indeed, despite the fact that the NATO C2 doctrine provides that TCCs transfer ‘operational control’ to the NATO Force Commander,¹⁰¹ Peter Olson, former legal adviser to the NATO Secretary-General, recognises in this issue of the *Review* that ‘actions taken by NATO in conducting military operations are, with only a few exceptions for assets owned by the Alliance collectively, carried out by contingents provided by and under the command of, the participating individual Allies or NATO operational partners – and over which those states retain ultimate, and *often substantial daily*, control’ (emphasis added).

The difficulty of distinguishing between TCCs and NATO itself for the purposes of determining which should qualify as a party to the armed conflict also arises in respect of the allocation of operational activities. A NATO Force Commander has no authority whatsoever over detention during NATO operations, since it is a purely national issue determined by each TCC and over which NATO has no say.¹⁰² On the contrary, when it comes to kinetic operations, in particular air operations, the identification of targets and the military planning of air operations fall within the remit of the NATO Force Commander and NATO multinational staff, while the strikes themselves are carried out by units under national command within the overall NATO operational context.¹⁰³ However, the detention and killing of enemy fighters are both activities that are normally carried out by the parties to an armed conflict. Therefore, the fact that detention activities remain under the exclusive authority of the TCCs, while the conduct of kinetic operations is the responsibility of the NATO Force Commander, further demonstrates the dual nature of NATO-run operations and buttresses the conclusion that both NATO and

99 The notion of dual attribution – i.e., the possibility that the same act could be simultaneously attributed to a state and to an international organisation – has been expressly recognised by the International Law Commission. Dual attribution might well be admitted in cases where it is not clear whether the peace forces are acting under the authority of the TCCs or the international organisation. Such situations may occur when both entities are formally entitled to exert their authority over the troops and when actions are undertaken by mutual agreement. See P. Palchetti, ‘How Can Member States...’, above note 88, pp. 102–103; Christopher Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangement and the Attribution of Conduct’, in *Melbourne Journal of International Law*, Vol. 10, 2009, pp. 12 ff.

100 This determination is based on a case-by-case approach taking into account the characteristics of each peace operation.

101 NATO, *Allied Joint Doctrine*, AJP-01 (D), December 2010, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/33694/AJP01D.pdf. See also, NATO *Allied Joint Doctrine for the Conduct of Operations*, AJP-3 (B), March 2011, available at: www.cicde.defense.gouv.fr/IMG/pdf/20110316_np_otan_ajp-3b.pdf.

102 *Ibid.*

103 *Ibid.*

TCCs must be considered parties to an armed conflict in the context of a NATO-run peace operation.¹⁰⁴

In order to avoid being considered parties to an armed conflict during NATO operations, some TCCs may be tempted to make use of sophisticated legal constructs and to argue that they could be militarily involved in NATO operations reaching the threshold of armed conflict without being a party to the latter within the meaning of IHL.¹⁰⁵ However, in practice and in law it is difficult to draw distinctions in the legal status under IHL of the states participating in such operations. Carrying out some military activities within the framework of such NATO operations, in particular if they form an integral part of the collective conduct of hostilities, would confer the status of belligerent on those TCCs. Such involvement would be clear evidence of a belligerent intent on the part of the TCCs involved. In these circumstances, a presumption, albeit a rebuttable one, exists that states participating in a NATO operation reaching the threshold of armed conflict have the status of a party to the armed conflict. As Ola Engdahl has rightly held with regard to NATO operations in Afghanistan, 'ISAF [i.e. the NATO forces operating in Afghanistan] is a multinational force under unified command and it may in fact not be possible to compartmentalise such a force into participating and non-participating forces.'¹⁰⁶ The opposing party will certainly not make such a distinction and will consider all the TCCs as belligerents and therefore as military objectives that can be lawfully attacked under IHL.

104 However, a so-called 'either-or approach' has been put forward as a means of determining the parties to an armed conflict in the context of peace operations. According to this approach, the party can be either the international organisation, under whose auspices the peace operation is undertaken, or the TCCs, but not both simultaneously. Els Debuf, *Captured in War: Lawful Internment in Armed Conflict*, Pédone, 2013, p. 135. Debuf argues that armed forces can be under the effective control of either their national state or the international organisation. While she acknowledges the possibility of joint responsibility, she discards the potential existence of a 'combined effective control'. However, she ignores the possible existence of the dual attribution in the context of peace operations, to which the International Law Commission refers. The International Law Commission has recognised the possibility that the same conduct could be simultaneously attributed to a state and to an international organisation (International Law Commission, UN Doc. A/CN.4/637/Add. 1, p. 18). This 'either-or approach' is also favoured by M. Zwanenburg, above note 78, p. 27, who underlines the fact that considering both the international organisation and the TCCs as parties to the armed conflict would lead to unreasonable results. Indeed, according to Zwanenburg, such a situation would mean applying two different regimes of IHL (international humanitarian treaty law and customary IHL) to the same military unit. However, the argument loses some relevance when one takes into account the fact that, during NATO operations, detention activities are generally carried out exclusively by TCCs and not by NATO itself. The point made by Zwanenburg is pertinent in the event of combined activities such as air operations but it is tempered by the consideration that many of the treaty-based rules governing the conduct of hostilities are generally also accepted as norms of customary law.

105 Under this option, one would distinguish between members of the NATO mission on the basis of their participation in the hostilities, with those not drawn into hostilities retaining their so-called 'protected status'.

106 O. Engdahl, above note 4.

IHL application to multinational forces: the material scope

It has sometimes been argued that the mere involvement of multinational forces in an armed conflict is sufficient to make it an international armed conflict and to trigger the application of the law governing international armed conflicts irrespective of the legal status of the belligerents (i.e. states, international organisations or non-state armed groups).¹⁰⁷ However, this view is far from widely accepted.¹⁰⁸

The question of whether the legal framework of reference should be the law governing international armed conflicts or that applicable to NIACs is still debated. While in practice there is probably no difference in the rules regulating the conduct of hostilities, because most treaty-based rules applicable in international armed conflict are also generally applicable in NIAC as customary law, the issue is important for example when it comes to the status of persons deprived of liberty, the legal basis for ICRC activities or the geographical scope of application of IHL.

In order to answer questions pertaining to the classification of situations, the ICRC has followed a fragmented approach to the relationship between belligerents, similar to that adopted by the ICJ in the decision which it rendered on 27 June 1986 in the case *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*.¹⁰⁹ This approach is shared by the ICTY¹¹⁰ and the ICC.¹¹¹ It involves examining and defining every bilateral relationship between belligerents in terms of IHL: if the multinational forces are fighting against the forces of a state, it is the rules governing international armed conflict which will apply, since the conflict is between two entities endowed with international legal personality (multinational forces being considered here as a subsidiary organ of the international organisation or states to which they answer). On the other hand, if the multinational forces are combating a non-state organised

107 See, in particular, Daphna Shruga, 'The United Nations as an Actor Bound by International Humanitarian Law', in L. Condorelli *et al.* (eds), above note 26, p. 333; Paolo Benvenuti, 'The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping', in *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Office for the Official Publications of the European Communities, Luxembourg, 1995, pp. 96 ff.; Claude Emanuelli, 'Les forces des Nations Unies et le droit international humanitaire' in L. Condorelli *et al.* (eds), above note 26, pp. 357 ff.; Robert Kolb, *Droit humanitaire et opérations de paix internationales*, Bruylant, Brussels, 2006, pp. 57 ff.; Marco Sassòli, 'International Humanitarian Law and Peace Operations, Scope of Application *rationae materiae*', paper submitted to the 31st Round Table on Current Problems of International Humanitarian Law, above note 2, pp. 93–94; Eric David and Jean Salmon, *Droit international public*, Vol. 3, Presses Universitaires de Bruxelles, 2012, 26th edition, pp. 728 ff.

108 See, for example, ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', above note 40, p. 10; S. Vité, above note 41, pp. 87–88.

109 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports* 1986, para. 219.

110 ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 77.

111 ICC, *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, para. 209. See also ICC, *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (Trial Chamber I), 14 March 2012, paras. 536 and 565.

armed group, it is the rules governing NIAC which will apply. They will also apply when, in the context of a pre-existing NIAC, multinational forces intervene in support of the armed forces of a state against non-state armed group(s). This situation has been referred to as a 'multinational NIAC'. The latter is defined as an armed conflict in which multinational armed forces are fighting alongside the armed forces of a 'host' state, in its territory, against one or more organised armed groups. As the armed conflict is not between two or more opposing states, i.e. as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant.¹¹²

It is submitted here that the fragmented approach is equally relevant for situations involving multinational forces. The fact that multinational forces are involved in an armed conflict and generally operate under an international mandate or authorisation can in no way affect the operation of the fragmented approach. This remains the most appropriate rule for determining the material scope of application of IHL.

As mentioned above, the ICRC's current position is not shared by some academic writers.¹¹³ Indeed, the latter favour the option of the internationalisation of a conflict by the mere presence of international forces. From this viewpoint, whenever international forces are involved in an armed conflict the latter necessarily becomes international and therefore calls for the application of IHL in its entirety. This position is attractive in terms of protection, since it means that victims and persons *hors de combat* would benefit from the more numerous and detailed protective provisions of IHL. It is inconsistent, however, with certain operational and legal realities.

Indeed, the position that the law governing international armed conflict applies as soon as multinational forces are involved in armed conflict runs up against some fairly insurmountable objections.

First of all, the *travaux préparatoires* of the 1949 Geneva Conventions show that the delegates viewed the law of NIAC as a residual body of law which would apply only when armed violence did not involve two or more states. From that viewpoint, it may be concluded that when a conflict sets an entity possessing international legal personality against a non-state armed group, such as a rebel group, the law of NIAC applies. It is difficult to locate the precise legal basis of the position adopted by legal writers who support the application of the law governing international armed conflict to the context of multinational NIACs. This uncertainty is also confirmed in practice, as it cannot be claimed that the doctrine advocated by some scholars is borne out by operational realities. Indeed, the prevailing view of the ongoing peace operation in Afghanistan against the Afghan armed opposition is that it constitutes a NIAC.¹¹⁴

112 See ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', above note 40, p. 10.

113 See footnote 107.

114 Françoise Hampson, 'Afghanistan 2001–2010', in E. Wilmshurst (ed.), above note 41, pp. 255–258.

Indeed, 'it takes two to tango' for IHL classification purposes. This idiomatic expression well reflects the link existing between the parties to an armed conflict. When determining how to classify an armed conflict involving multinational forces, one should not look at only one of the belligerents and should not deduce from its international status that the conflict is necessarily international in nature. Armed conflict is a belligerent relationship involving at least two opposing parties which are inextricably related, with the result that the classification process must take into account the nature of both belligerents, and not just one of them, in order to determine whether the armed conflict is international or non-international.¹¹⁵

Secondly, the position favouring the internationalisation of the conflict is probably unacceptable to host states, TCCs and the organisations under whose responsibility these troops are operating. This is because the application of the law of international armed conflict would mean granting combatant and prisoner-of-war status (insofar as the relevant criteria are fulfilled) to the members of armed groups fighting against the international forces, and that in itself would make it impossible to prosecute them for the mere fact of having taken up arms. It is quite inconceivable that the states concerned would give up the possibility offered by the law of NIAC to prosecute rebels under national law on the sole grounds of their having taken up arms against the government.

Thirdly, some academic writers have relied on Article 2(2) of the 1994 Safety Convention in order to contend that an armed conflict involving UN forces is international in nature.¹¹⁶ This position was based on an erroneous perception that IHL and the 1994 Convention were mutually exclusive, combined with a literal interpretation of the terms 'to which the law of international armed conflict applies' contained in the aforementioned paragraph. However, the negotiating history of this instrument shows that some states' representatives expressly wished to include NIACs in the Convention's field of application. Some delegates clearly stated that, when UN forces were involved in a NIAC, the 1994 Convention continued to apply and the forces in question continued to enjoy the protection provided by that instrument.

Fourthly, the application of the law of international armed conflict means that the relevant obligations under IHL will apply not only to multinational forces but also to the other belligerent parties, in other words to non-state armed groups. IHL is meant to be a realistic and pragmatic body of law based on the principle of effectiveness. It is pointless to impose on one party to a conflict obligations which it cannot fulfil owing to a lack of sufficient means to do so. The law of international

115 E. Wilmschurst, in E. Wilmschurst (ed.), above note 41, p. 487: 'International forces may also be involved in non-international armed conflicts, where they are fighting alongside the armed forces of a State within its territory against one or more organised armed groups. Although not without controversy, the better view is that such a conflict is indeed non-international, regardless of the international components of the multinational force.'

116 Philippe Kirsch, 'La Convention sur la sécurité du personnel des Nations Unies et du personnel associé', in Claude Emanuelli (ed.), *Les casques bleus: policiers ou combattants*, Wilson et Lafleur, Montreal, 1997, p. 56; V. Koutroulis, above note 26.

armed conflict was intended to be applied by states possessing logistic means which the vast majority of non-state armed groups do not have. To make IHL in its entirety applicable *de jure* to non-state armed groups incapable of complying with its provisions would deprive these provisions of any sense and, in particular, prevent them from fulfilling the purposes for which they were drawn up. A law that is not systematically respected is a law at risk, a risk that we cannot afford to take when it comes to a *corpus juris* as fundamental as the rules regulating armed conflict. It is therefore much more realistic to require non-state armed groups to apply the more basic provisions of the law governing NIAC.

Finally, it has been argued that the obligations incumbent upon the parties to a NIAC are limited by the sovereignty of the state affected by the insurrection. As Marten Zwanenburg points out:

Another perspective has its starting point in the reason behind the international-non-international armed conflict dichotomy that is state sovereignty. A majority of states are unwilling to subject what they consider their internal affairs to international scrutiny and are therefore unwilling to accept detailed regulation of non-international conflicts. Schindler states that a Norwegian proposal at the conference of experts in 1971 and 1972 to adopt one uniform protocol for all armed conflicts did not find much approval because “international law has to take into account that the world is divided into sovereign states, and that these states keep to their sovereignty. They are not willing to put insurgents within their territory on equal terms with the armed forces of enemy states or members thereof”. The UN and NATO, in contrast to States, do not have territorial sovereignty, and as a consequence sovereignty is not a reason for them not to apply the regime which offers the highest level of protection.¹¹⁷

The *rationale* underlying this interpretation of the application of the law of NIAC cannot, however, be fully transposed to the case of an armed conflict involving multinational forces. In the great majority of cases, these forces take action in support of a state affected by the presence of non-state armed groups and, when all is said and done, they therefore fight on the side of the government troops. From this viewpoint, it is entirely valid and appropriate to restrict the application of IHL on the grounds of sovereignty when international forces come to the aid of a government in order to counter an insurrection.

IHL application to multinational forces: the personal scope¹¹⁸

The issue of the personal scope of application of IHL is particularly important for ‘multidimensional’ or ‘integrated’ peace operations whose tasks may consist not

117 M. Zwanenburg, above note 1, p. 185.

118 This section addresses situations in which multinational forces have already become a party to an armed conflict. When peace missions are deployed in the context of an armed conflict, be it international or non-international, without being a party to it, the legal status of the peace mission’s personnel is crystal clear from an IHL perspective: they benefit from the protection afforded by this body of law to civilians. When a

only in carrying out military operations against designated enemies, but also in engaging in economic governance, civil administration, rule of law, disarmament-demobilisation-reintegration (DDR) and political processes, promotion/protection of human rights and humanitarian assistance, to name the more significant ones.¹¹⁹ In order to perform these tasks, 'integrated' peace operations employ a mix of military, police and civilian personnel. The implementation of various objectives set for a peace mission that has become party to an armed conflict definitely raises some questions concerning the legal status of these different categories of personnel under IHL.¹²⁰

In this context, the peace mission's personnel must be divided into different categories, as far as integrated peace operations are concerned, in order to evaluate the extent of the protection accorded to each of them by IHL. To this end, the situation of military, civilian and police personnel must be analysed separately.

Members of the military component of a peace mission involved in an armed conflict must be distinguished from the rest of the mission's personnel. Once the military personnel of a peace operation become engaged in the armed conflict, they become combatants for the purposes of the principle of distinction and, irrespective of their function within the military component, they lose their protection against attacks as long as the peace mission is party to the armed conflict. All peace forces placed in this situation would become lawful targets under IHL, from the private soldier up to the Force Commander (and others who decide on military operations). Their status as lawful targets under IHL applies across the board to the entire military contingent, even if the peace forces are made up of different units coming from different TCCs and if the military units forming the peace forces are assigned different tasks within the peace mission.¹²¹ Their status under IHL and that of all the peace forces is therefore determined on the basis of the classification of the situation and the applicable legal framework.

Civilian personnel involved in the economic/political governance, promotion/protection of human rights or humanitarian assistance must be regarded

peace mission is not acting as a belligerent, its entire personnel (i.e., including its military component) must therefore be regarded as civilians for the purposes of IHL.

119 Actually, 'integrated peace operations' are essentially carried out under the command and control of the UN (see, in this connection, *United Nations Peacekeeping Operations: Principles and Guidelines*, above note 1, p. 59).

120 When peace missions comprise solely a military component, the determination of the legal status of their personnel under IHL will be easier, insofar as it will depend upon the engagement of these peace forces in the armed conflict *qua* a party to it. Once they have become a party to an armed conflict, be it international or non-international in nature, all the military personnel lose their protection against direct attacks and become lawful targets under IHL.

121 It has been argued, on the contrary, in the context of the UN peace operation in the DRC (MONUSCO), in particular in the wake of Security Council Resolution 2098 (2013) establishing the so-called 'Intervention Brigade' within MONUSCO, that the military units of this UN mission should be distinguished according to the functions they perform. Only those engaged in actual fighting would be parties to the non-international armed conflict, whereas those involved in other tasks stopping short of combat operations would be regarded as civilians under IHL. For an overview of these arguments, see Bruce 'Ossie' Oswald, 'The Security Council and the Intervention Brigade: Some Legal Issues', in *ASIL Insights*, Vol. 17, No. 15, 6 June 2013, available at: www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues.

as civilians for the purposes of IHL, irrespective of the fact that the peace mission qualifies as a party to the armed conflict. The civilian component of a peace mission must be distinguished from its military component, whose task, among others, is to eradicate the threat from the organised armed groups opposing it. Civilian personnel will therefore remain protected from direct attacks and benefit from the protection which IHL confers on civilians unless and for such time as they directly participate in the hostilities.

Indeed, the possibility should not be discounted that civilian personnel of a peace mission might carry out activities which are closely connected with the military operations undertaken by the peace forces. But in which circumstances would the conduct of civilian personnel amount to direct participation in hostilities within the meaning of IHL?

The answer to this question determines when the individual conduct of a peace mission's civilian personnel leads to the suspension of a civilian's protection against direct attack. The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals (who are not members of the military component of the peace mission) in the course of hostilities between the parties to either an international or a non-international armed conflict.

In the ICRC's view, in order to qualify as direct participation in hostilities, a specific act carried out by a civilian member of a peace mission must fulfil all the following criteria:

- The act must be likely to adversely affect the military operations or military capacity of a party opposed to the peace forces or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm), and
- There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
- The act must be specifically designed to directly cause the required threshold of harm in support of the military component of the peace mission to the conflict and to the detriment of the party opposing the peace forces (belligerent nexus).

Applied together, the three requirements of threshold of harm, direct causation and belligerent nexus make it possible to draw a reliable distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and therefore do not entail loss of protection against direct attack.

In addition, measures preparatory to the execution of a specific act of direct participation in hostilities, as well as deployment to and return from the location of its execution, constitute an integral part of that act.

On this basis, the members of a peace mission's civilian personnel who directly participate in hostilities lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities. Once they no

longer participate directly in hostilities, they regain full civilian protection against direct attack, but they are not exempt from prosecution for any violations of domestic and international law that might have been committed.¹²²

The situation with regard to the police component of the peace mission might vary according to its use by the peace operation's command. Indeed, in accordance with the mandate assigned to them by the Security Council, members of the peace mission's police personnel are generally employed to advise and train the local police force and other domestic law enforcement agencies and/or to carry out law enforcement operations – most of the time alongside the police of the host state. In the vast majority of cases their tasks are therefore confined to classic law enforcement activities and have no direct connection with the military operations that might be undertaken by the military component of the peace mission.

While performing tasks related to law enforcement, police personnel must be regarded as civilians for the purposes of IHL and will benefit from the protection afforded by this body of law to this category of persons.

However, the volatile, difficult context in which the police component of the peace mission operates might well bring it face to face with members of organised armed groups opposing the peace forces, and it could be drawn into the hostilities. In this case a distinction must be drawn between two situations.¹²³

Firstly, if police officers participate directly in the armed conflict on a sporadic or spontaneous basis, they should be regarded as civilians directly participating in the hostilities. The 'revolving door theory'¹²⁴ would therefore apply to them in the same way as it does to civilians as outlined above.

Secondly, in some exceptional circumstances, police personnel of the peace mission (more likely parts thereof, for instance anti-terrorism police units) may be required through either a formal or an informal decision taken by the peace mission's command to provide military support for the military component of the mission during operations against organised armed groups. If this situation arises, the members of these units supporting the military personnel do, in fact, assume the functions of the armed forces under the command of one of the parties to the armed conflict. As a result, all the police personnel forming part of the police units which

122 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (hereinafter ICRC Interpretive Guidance). See also ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', above note 40, pp. 42–45.

123 These two situations do not affect the police personnel's inherent right to self-defence. For instance, the use of force by police personnel in self-defence or in defence of others against violence prohibited under IHL lacks belligerent nexus. If self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimising a previously unlawful attack. The use of necessary and proportionate force in such situations cannot therefore be regarded as direct participation in hostilities. See ICRC Interpretive Guidance, above note 123, p. 61.

124 According to this theory, civilians' loss and recovery of protection against direct attack is contingent upon their direct participation in hostilities. In other words, the duration of the loss of protection against direct attack directly depends on the beginning and end of 'direct participation in hostilities'. Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', in *New York University Journal of International Law and Politics*, Vol. 42, No. 3, Spring 2010, pp. 883 ff.

have been instructed to undertake combat action, but only these officers, would lose their immunity against direct attacks right up until the moment that they leave these units, or are lastingly discharged from the military operations undertaken by the military component of the mission.

Lastly, recent practice has showed that private military and security companies (PMSCs) are increasingly hired to carry out tasks on behalf of TCCs or international organisations involved in peace operations.¹²⁵ The UN currently awards PMSCs contracts for services such as guarding civilian compounds and logistical support.¹²⁶ In general, activities performed by PMSCs on behalf a peace mission, in particular when the latter is under UN command and control, are not connected with the collective conduct of hostilities and do not encompass traditional functions of the armed forces. However, one cannot rule out the possibility that PMSCs might be or have been used for combat purposes during peace operations. In this regard, a distinction must be drawn between situations where PMSCs are involved in combat action on a sporadic, unsystematic or spontaneous basis and those where they are repeatedly involved as a result of a decision taken by the peace mission's command.

In the first scenario, i.e. an involvement in military operations without the authorisation of the party to the armed conflict on whose behalf they act, members of PMSCs should still be considered to be civilians under IHL and would lose protection from direct attacks only for such time as they directly participate in the hostilities. Their situation would be the same as that of police personnel sporadically or spontaneously involved in hostilities. The criteria for deciding whether or not they are directly participating in hostilities are the same as those which would apply to any other civilian. However, because of the role played by these companies, due heed must be paid to the organisational closeness of the PMSCs to the peace mission's military personnel and operations.

However, in the second scenario (i.e. PMSCs participating in combat operations on a regular basis, usually with the express or tacit authorisation of the peace mission), it is plain that to all intents and purposes PMSCs are effectively incorporated into the peace forces, whether through a formal procedure or on a *de facto* basis, by being given a continuous combat function. Their personnel then become members of an organised armed force, group or unit under the command responsibility of a party to an armed conflict.¹²⁷ For this reason, they can no longer be qualified as civilians and become lawful targets under IHL for the duration of their combat function.

125 Chia Lehnardt, 'Peackeping', in Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: the Outsourcing of Public Services and Its Limits*, Oxford University Press, Oxford, 2009, pp. 205–221.

126 Åse Gilje Østensen, *UN Use of Private Military and Security Companies, Practices and Policies*, SSR Paper 3, DCAF, 2011, p. 15.

127 See ICRC Interpretive Guidance, above note 123, pp. 37–40.

IHL application to multinational forces: the temporal scope

Determining the duration of IHL application once multinational forces have become a party to an armed conflict and the consequences thereof on the temporal scope of their loss of protection against direct attacks is another important issue.

It has been argued that multinational forces drawn into an armed conflict would be bound by IHL only for such time as they are directly participating in hostilities,¹²⁸ thereby limiting the period during which IHL would govern their actions and during which they could be subject to direct attacks under IHL. The supporters of this narrow approach initially took the view that the UN Secretary-General's 1999 Bulletin formed the legal basis justifying this restrictive interpretation of the temporal scope of application of IHL when multinational forces have become party to an armed conflict.¹²⁹

Daphna Shruga has subsequently held that the application of IHL to UN forces would be limited to 'combat missions' and would end as soon as the 'combat mission ends regardless of whether or not the situation as a whole still qualifies as an armed conflict'.¹³⁰ The supporters of this argument consider that when UN forces, and multinational forces in general, become party to an armed conflict they should not be considered combatants (in the technical meaning of the term) under IHL but rather civilians directly participating in hostilities.¹³¹ This position would have a direct impact on the duration of the application of IHL to the multinational forces' action.

Recent decisions of the ICC¹³² and the Special Court for Sierra Leone (SCSL)¹³³ have also followed the same reasoning vis-à-vis UN forces and have

128 D. Shruga, 'The Secretary General's Bulletin. . .', above note 61, pp. 358–359.

129 Section 1.1 of the 1999 UN Secretary-General's Bulletin reads as follows: 'The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, *to the extent and for the duration of their engagement*' (emphasis added).

130 D. Shruga, 'The Secretary General's Bulletin. . .', above note 61, pp. 358–359.

131 The legal basis of this exception to the classic IHL regime applicable to organised armed forces such as multinational forces is not easy to identify. Since the special status of multinational forces under *jus ad bellum* has been often invoked by some people in order to tailor the legal framework governing peace operations (as explained above), it is conceivable that the same argument could be made to justify a narrow interpretation of the temporal scope of application of IHL when multinational forces are engaged in armed conflict. However, it is submitted that the special legal status of peace forces under *jus ad bellum* can in no way lead to an interpretation of IHL norms running contrary to one of the basic principles of IHL, namely that of the equality between belligerents. *Jus ad bellum* arguments cannot be used to interpret narrowly the temporal scope of application of IHL.

132 ICC, *The Prosecutor v. Abu Garda*, Case No. ICC 02/05-02/09, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 8 February 2010, paras. 78 ff, in particular para. 83, which states: 'The Majority concludes that, under the Statute, personnel involved in peacekeeping mission enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities'; ICC, *The Prosecutor v. Abdallah Banda et al.*, Case No. ICC 02/05-03/09, Decision on the Confirmation of Charges (Pre-Trial Chamber), 7 March 2011, paras. 61 ff.

133 Special Court for Sierra Leone (SCSL), *The Prosecutor v. Hassan Sasay*, Case No. SCSL 04-15-T, Judgment (Trial Chamber), 2 March 2009, para. 233: 'In the Chamber's view, common sense dictates that peacekeepers are considered to be civilians only insofar as they fall within the definition of civilians laid down for non-combatants in customary international law and under Additional Protocol II as discussed above – namely, that they do not take a direct part in hostilities. It is also the Chamber's view that by force of logic, personnel of peacekeeping missions are entitled to protection as long as they are not taking a

considered that their loss of protection from direct attacks would be limited to such time as they play a direct part in the hostilities.

While some may find this argument interesting insofar as it enhances the protection from direct attacks afforded by IHL to UN peacekeepers by limiting their time exposure to such attacks, this reasoning reflects a very narrow (and flawed) interpretation of IHL applicability to multinational forces from a *rationae temporis* perspective.

The position adopted by the ICC and the SCSL in the cases mentioned reveals a misconception of IHL's structure. The international tribunals' analysis is erroneous, as they have confused two quite separate notions under IHL: that of a civilian 'directly participating in hostilities' and that of combatant. IHL draws a clear distinction between the two notions and does not justify applying to combatants as defined under this body of law the loss of protection against direct attacks attached to the notion of civilian directly participating in the hostilities.

Indeed, the concept of direct participation under IHL has been crafted exclusively to cover acts carried out by individuals not affiliated to a state's armed forces or the military wing of a non-state armed group. For the purposes of IHL, loss of protection restricted to the duration of specific acts is intended to apply only to spontaneous, sporadic or unorganised action carried out by civilians and not by armed forces.

Extending the concept of direct participation in hostilities beyond individual acts carried out on a sporadic, spontaneous or unorganised basis, as was done in the aforementioned cases, would blur the distinction made by IHL between civilians' temporary and activity-based loss of protection and the continuous and status-based or function-based loss of protection that occurs when armed forces and other organised armed groups are parties to an armed conflict. Under IHL, the duration of armed forces' loss of protection depends on criteria unrelated to the notion of direct participation in hostilities. All members of organised armed forces that have become party to an armed conflict – irrespective of their affiliation to TCCs or international organisations acting for the restoration of international peace and security – can be targeted by virtue of their membership.

It is therefore submitted that the concept of combatant 'directly participating in hostilities' as reflected in the recent decisions taken by the ICC and the SCSL does not exist under IHL. This paradigm would deny the mutual exclusiveness of the concepts of civilians and combatants under IHL¹³⁴ and would undermine the conceptual integrity of the categorisation of persons underlying the principle of distinction.

The fact that the temporal scope of loss of protection is broader for armed forces, including multinational forces, is due to the existence of a reliable, reasonable

direct part in the hostilities – and thus have become combatants – at the time of the alleged offence. Where peacekeepers become combatants, they can be legitimate targets for the extent of their participation [in the hostilities] in accordance with international humanitarian law.'

134 Under IHL, the concepts of civilians and armed forces are mutually exclusive. For instance, the ICTY defined civilians as 'persons who are not, or no longer, members of armed forces' (ICTY, *The Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 180).

presumption that they will be involved in future military operations against the enemy. Applying the 'direct participation in hostilities' approach to multinational forces would increase the risk of confusing belligerents and civilians and thus undermine the principle of distinction under IHL. It would also create an illogical disparity between them and their opponents and would give an operational advantage to the multinational forces, because the opposing party in the armed conflict would continue to be subject to lawful direct attack at any time. This would undermine the principle of equality between belligerents, as the party opposing UN forces would not be placed on an equal footing and it might thus adversely affect respect for IHL by the parties to the armed conflict. As far as the author knows, peace forces, such as the NATO forces deployed in Libya or Afghanistan or the AU forces fighting in Somalia, have never used any similar argument to claim that their loss of protection against direct attack as the result of their engagement in the armed conflict was not continuous and status-based.

A closer look at the decisions handed down by the ICC and the SCSL shows that they seem to have been influenced by the 1998 Rome Statute according to which intentionally directing attacks against peacekeeping operations' personnel is a war crime as long as they are entitled to the protection given to civilians by IHL. In this regard, the drafters of the UN Secretary-General's Bulletin and the judges of the ICC and the SCSL might well have misconstrued the phrase contained in Article 8(2)(b) (iii) and (e)(iii) of the Rome Statute and might have stretched the reference made to 'civilian' status under these provisions.

The fact that multinational forces *not engaged* in armed conflict are entitled to civilian status¹³⁵ (by default as the IHL binary approach of combatant vs. civilians does not allow for an intermediary status) for the purposes of protection against direct attack does not mean that, if they were to become a party to an armed conflict, they should be treated as civilians directly participating in hostilities and would lose their protection against direct attack on the basis of the 'revolving door' theory.

If multinational forces can be regarded as civilians when they are not a party to the armed conflict, the consequences of their involvement therein in terms of loss of protection against direct attack are different to those affecting civilians. One should not confuse the legal status of the multinational forces when not belligerent (i.e. when they benefit by default from the protection granted to civilians) and the consequences of their involvement in armed conflict in terms of loss of protection against direct attack when they have become a party to the armed conflict (i.e. the military contingents of the peace mission can be targeted at all times as long as they are a party to the armed conflict).

In other words, when engaged in an armed conflict, the multinational armed forces' loss of protection against direct attack can in no way be modelled on that applicable to civilians.

The implications of the option chosen are of fundamental importance, because if it is agreed that multinational forces' loss of protection against direct attack is continuous and status-based, this means that, under IHL, peace missions'

135 As discussed above.

military personnel can be targeted at any time (and can be detained) until the peace forces cease to be deemed a party to the armed conflict.

From a *rationae temporis* perspective, IHL therefore applies to multinational forces and uninterruptedly governs their action¹³⁶ as long as they are a party to an international or non-international armed conflict. IHL will cease to apply to multinational forces only once they can no longer be deemed a party to the armed conflict in which they were previously engaged.¹³⁷

When multinational forces have been involved in an international armed conflict, the latter would be terminated when the armed confrontation between the multinational forces and the state(s) opposing them has ceased to such an extent that the situation may reasonably be interpreted as a general close of military operations.¹³⁸

In a NIAC, where IHL applies to multinational forces on the basis of the classic criteria, they will cease to be considered a party to the conflict at the end of the latter. It is important to specify that a mere lull in the fighting or low in hostilities will not suffice to end the application of IHL to multinational forces' actions. A NIAC involving multinational forces can therefore be said to have terminated when:

- The non-state armed group opposing the multinational forces has disappeared or otherwise no longer meets the level of organisation required by IHL;
- Or, where the hostilities have ceased and there is no risk of their resumption, with the result that the situation amounts to a general close of the military operations involving multinational forces against a particular opposing party.

When IHL applies to multinational forces involved in a pre-existing NIAC by virtue of the support-based approach,¹³⁹ IHL will no longer bind these forces after their lasting disengagement from the collective conduct of hostilities. A prolonged cessation of the support previously given to one of the belligerents engaged in the pre-existing conflict would therefore be sufficient to determine that the multinational forces are no longer a party to that conflict.

136 With all the consequences this entails for the peace mission personnel's loss of protection against direct attack.

137 The end of armed conflict does not mean that international humanitarian law will cease to apply entirely. Some specific provisions will survive after the end of armed conflict, in particular those dealing with persons whose final release, repatriation or re-establishment takes place thereafter. These persons continue to benefit from the relevant provisions of the Conventions and the Protocols thereto until their final release, repatriation or re-establishment.

138 This notion of general close of military operations was interpreted in the ICRC commentary of 1958 as the 'final end of all fighting between all those concerned'. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 62. Later on, in the ICRC commentary on Additional Protocol I, it was argued that the expression 'general close of the military operations' means something more than the mere cessation of active hostilities since military operations of a belligerent nature do not necessarily imply armed violence and can continue despite the absence of hostilities. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 68. In this connection, one can infer that the general close of the military operations would include not only the end of active hostilities, but also the end of military manoeuvres of a bellicose nature, so that the likelihood of the resumption of hostilities can be reasonably ruled out.

139 See above.

IHL application to multinational forces: the geographical scope

This paper would be incomplete if it did not address the question of the geographical scope of IHL in the context of peace operations. Defining the geographical scope of IHL is an important but difficult task, mainly because contemporary armed conflicts are increasingly characterised by the absence of clear front lines and by the fluidity of combat zones. This task is rendered even more complex when armed conflicts involve multinational forces, as the latter inherently bring with them an extraterritorial component and often operate from military bases located in third countries, factors which have a bearing on the determination of the geographical scope of IHL.

Recent peace operations have made it plain that addressing the territorial reach of IHL encompasses an operational dimension. Important questions must be answered in order to arrive at a more precise definition of the legal framework governing armed conflicts involving multinational forces. Is IHL applicable only to the battlefield? Does it extend to the whole territory subject to multinational forces' intervention? Does IHL apply even beyond the confines of the territory in which multinational forces intervene (i.e. in the intervening states' own territory or in the territory of non-belligerent states from which the belligerents may operate)?

It has been argued that IHL would not apply outside the strict boundaries of the battlefield.¹⁴⁰ These arguments were put forward mainly in the context of multinational NIACs.¹⁴¹ The rationale behind them seems to be twofold. First, limiting IHL application to battlefield areas would make it possible to maintain that TCCs outside the areas of combat could not be considered parties to the NIAC. Second, the argument would also ensure that multinational forces involved in an armed conflict but outside the battlefield would regain or continue to enjoy the protection afforded to civilians under IHL.

A less restrictive, albeit still narrow, view has also taken shape in some academic writings¹⁴² and judicial decisions.¹⁴³ Based on the plain language of the 'chapeau' of Common Article 3 of the Geneva Conventions, it holds that the

140 For a summary of these arguments, see Tristan Ferraro, 'The Geographical Reach of IHL: the Law and Current Challenges', *Proceedings of the 13th Bruges Colloquium*, above note 6, pp. 105–113. However, this author does not share such restrictive views.

141 It is generally agreed that in a situation of international armed conflict, irrespective of the involvement of multinational forces therein, IHL applies to the whole territory of the belligerents. See for example D. Fleck, above note 41, pp. 39–51; Y. Dinstein, above note 15, p. 19.

142 Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 31. A major source cited in support of this view is the ICRC's Commentaries on the Geneva Conventions, in which Jean Pictet unequivocally states that the Article applies to a non-international conflict occurring within the territory of a single state. See, for example, J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 36 : 'Speaking generally, it must be recognised that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.'

143 ICTR, *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment (Trial Chamber), 27 January 2000, paras. 247–248.

territorial reach of the law governing NIAC is limited to the territory of the state in which the armed conflict originated and mainly takes place.

It is submitted here that none of these arguments is supported by IHL. There is nothing in the drafting history of IHL from which it may be concluded that a territorial clause was deliberately formulated to link the geographical scope of IHL to the battlefield or to the territory of a single state.¹⁴⁴ In this regard, Common Article 3 could be read as applying to all conflicts other than those between states, so long as the NIAC originated in the territory of one of the High Contracting Parties to the Geneva Conventions.¹⁴⁵

Even if treaty law is almost silent on the geographical scope of IHL, a careful examination of the provisions applicable to NIAC proves that they are drafted in a way that justifies the application of IHL beyond the limits of the battlefield.¹⁴⁶

Further research shows that the geographical scope of IHL is a matter of well-settled precedent in the case law of international tribunals.¹⁴⁷ These tribunals have all used a broader interpretation of geographical scope to find that IHL applies to the whole territory of the state affected by the NIAC and cannot be limited to the battlefield. For example, the ICTR decided in 2003 that once the conditions for applicability of Common Article 3 and Additional Protocol II are satisfied, their

144 For an overview of the drafting history of Common Article 3, see Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010.

145 *Ibid.*, pp. 140–142.

146 For example, Common Article 3 of the Geneva Conventions provides: ‘The following acts are prohibited at any time and in any place whatsoever’. Even if less explicit, other provisions such as Article 6(2) of Geneva Convention IV, Article 3(b) of Additional Protocol I and Article 2(6) of Additional Protocol II tend to favour a broad interpretation of the geographical scope of application of IHL. In addition, it is worth noting that Article 49(2) of Additional Protocol I, dealing with the notion of attacks, implies that attacks may be conducted throughout the territory of the parties to an armed conflict. The ICTY stated in this regard that ‘The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking an active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions also suggests a broad scope. First, like common Article 3, it explicitly protects “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities.” . . . Article 2(1) provides: “[t]his Protocol shall be applied . . . to all persons affected by an armed conflict as defined in Article 1.” The same provision specifies in paragraph 2 that: “[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.” . . . The relatively loose nature of the language “for reasons related to such conflict”, suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.’ ICTY, *The Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 69.

147 ICTY, *The Prosecutor v. D. Tadić*, Interlocutory Appeal on Jurisdiction (Appeals Chamber), paras. 67 and 70; ICTY, *The Prosecutor v. Kunarac, Kovac, and Vokovic*, Judgment (Appeals Chamber), 12 June 2002, para. 57; ICTR, *The Prosecutor v. Akayesu*, Judgment (Trial Chamber), 2 September 1998, paras. 635–636; Special Court for Sierra Leone, *The Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL 04-16-T, Judgment (Trial Chamber II), 20 June 2007, para. 245; ICC, *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-1/06, Judgment (Trial Chamber I), 14 March 2012, para. 533.

scope ‘extends throughout the territory of the State where the hostilities are taking place without limitation to the “war front” or to the “narrow geographical context of the actual theatre of combat operation”’.¹⁴⁸

Today, the ongoing legal discourse on the geographical scope of IHL in the context of a multinational NIAC seems no longer to be whether IHL applies only throughout the territory of the ‘host state’ but whether it applies beyond the confines of the territory of the state in which the conflict commenced. In the context of this discussion, the question of IHL application in the territories of the ‘intervening’ states must be posed.

To limit the territorial reach of IHL solely to the territory of the state in which the NIAC originated is too narrow an interpretation of the geographical scope of the application of IHL¹⁴⁹ and ignores the new features of contemporary NIACs. Indeed, the latter are tending to expand beyond the boundaries of one single state. The increasingly widely accepted concepts of spillover NIACs, multinational NIACs or cross-border NIACs are cases in point.¹⁵⁰ Jelena Pejic has stated:

it is submitted ... that the text [of Common Article 3] can also be given a different interpretation and that, in any event, its provisions may nowadays be evolutively interpreted to apply to any situation of organised armed violence that has been classified as a non-international armed conflict based on the criteria of organisation and intensity, therefore also to a NIAC that exceeds the boundaries of one state.¹⁵¹

Some legal literature follows the same expansive view and supports the position that, in a situation of NIAC, IHL is applicable not only in the limited theatre of combat but also throughout the territory of the states engaged in the NIAC.¹⁵² It has been rightly contended that ‘the common thread ... is the widely accepted territorial interpretation of the scope of IHL that is independent from the

148 ICTR, *The Prosecutor v. Semanza*, Judgment (Trial Chamber), 15 May 2003, para. 367.

149 This narrow approach is reflected in recent advice to the Government, the House of Representatives and the Senate of the Netherlands by the Advisory Committee on Issues of Public International Law, which noted that in non-international armed conflicts, international humanitarian law ‘applies only to the territory of the State where a conflict is taking place’. Advisory Committee on Issues of Public International Law, main conclusions of advice on armed drones, The Hague, July 2013.

150 S. Vité, above note 41, pp. 87–92; ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, above note 40, pp. 9–10. Furthermore, Articles 1 and 7 of the Statute of the ICTR extend the tribunal’s jurisdiction over the enforcement of the law of non-international armed conflicts to Rwanda’s neighbouring countries. This confirms that the IHL applicable to a non-international armed conflict is not restricted to the territory of one single state and extends to the territory of contiguous non-belligerent countries.

151 Jelena Pejic, ‘The Protective Scope of Common Article 3: More than Meets the Eye’, in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, p. 199.

152 Louise Arimatsu, ‘Territory, Boundaries and the Law of Armed Conflict’, in *Yearbook of International Humanitarian Law*, Vol. 12, 2009, p. 178; David Kretzmer, ‘Targeting Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’, in *European Journal of International Law*, Vol. 16, No. 2, 2005, p. 195; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford University Press, Oxford, 2010, p. 104; Steven Ratner, ‘Predator and Prey: Seizing and Killing Suspected Terrorists Abroad’, in *Journal of Political Philosophy*, Vol. 15, No. 3, 2007, p. 261; Jann Kleffner, ‘Scope of Application of International Humanitarian Law’, in Dieter Fleck *et al.*, *The Handbook of International Humanitarian Law*, Oxford University Press, 2013, pp. 56–57; Mutsa Mangezi, ‘Localised Armed

concept of hostilities and extends to the geographical borders of the relevant state(s).¹⁵³ In the context of multinational NIACs, states making a military contribution to the operation should be included within the category of 'relevant states' in the territory of which IHL will govern actions having a nexus with the ongoing conflict.

Indeed, it is submitted that in cases of operations where multinational forces fight alongside the armed forces of a host state in its territory against one or more organised armed groups, IHL extends and applies to the territories of the 'intervening' states as well (provided the control over their troops has not been handed over to the international organisation under the auspices of which the military operations are carried out). In other words, the geographical scope of IHL in the context of peace operations covers the whole territory of the states involved in the multinational NIAC. Hostilities between the parties to the conflict are governed by IHL wherever they occur in the affected states. For example, persons deprived of their liberty in relation to a multinational NIAC must be afforded protection even if the place of detention is located not in the territory of the state in which the conflict commenced, but within the intervening states' own territory. Individuals captured in relation to a multinational NIAC but detained far away from the combat areas would still need legal protection and will benefit from that afforded by IHL. Any other interpretation would defeat the protective purpose of IHL provisions.

This position is also justified by the fact that states intervening in a multinational NIAC should not be able to evade the operation of the principle of equality between belligerents under IHL once they have become a party to the conflict. As a result, acts possibly undertaken as part of the hostilities by a non-state armed group in the territory of a state contributing to the multinational operation must be considered to fall within the territorial scope of IHL and may, under some circumstances, be considered lawful under IHL.¹⁵⁴ This would be the case if an attack by the relevant non-state actor were, for example, directed at a military objective in the intervening state's territory.

This position is particularly relevant since some states involved in multinational operations often operate weapons systems such as Remotely Piloted

Conflicts: a Factual Reality, a Legal Misnomer', in *African Yearbook on International Humanitarian Law*, 2012, p. 84; Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law', Program on Humanitarian Policy and Conflict Research, Harvard University, *Occasional Paper Series*, No. 6, Winter 2006, pp. 8–9. See also Maj. Sean Condrón (ed.), *U.S. Operational Law Handbook*, The Judge Advocate General Legal Center and School, US Army, Charlottesville, 2011, p. 156: 'the scope of [non-international armed conflict] has expanded to include conflicts not contained within the boundaries of a single state'.

153 Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict', in *Journal of International Criminal Justice*, Vol. 11, No. 1, March 2013, p. 70; M. Mangezi, above note 152, p. 84.

154 If the attacks were directed at civilians or civilian objects, they would be criminal and open to prosecution as such under IHL, as well as a war crime. In addition, such action would certainly be criminalised under the affected state's domestic law. A broad interpretation of the territorial scope of IHL does not mean that each and every incident or use of force involving multinational forces is governed by IHL. Only action having a clear nexus with the ongoing multinational non-international armed conflict and the related hostilities will be subject to IHL rules.

Aircraft (i.e. drones) directly from their own territory and/or use operational centres located therein. Maintaining that IHL would not apply to the territory of the intervening states would in fact create incentives for the parties which have the means and logistic capabilities to ‘delocalise’ their military assets and render them immune from direct attack under IHL by simply transferring them to a place located beyond the geographical scope of IHL. This would defy the logic of IHL and could in a way be interpreted as conflicting with the principle of equality between belligerents that underpins this body of law. The only way to avoid this situation is to accept that, in the context of multinational NIACs, the geographical scope of IHL encompasses the territory of the states making a military contribution to the peace operation.

Lastly, ongoing peace operations such as those in Afghanistan or the DRC have raised the question of whether IHL applies to the territory of non-belligerent states affected by the multinational NIAC. A growing number of fighters of non-state armed groups opposing multinational forces are tending to take refuge in, or even operate from, the territory of a non-belligerent state, generally a neighbouring country. Similarly, states involved in a multinational NIAC often install and use for combat purposes military bases located in the territory of non-belligerent states.

As mentioned earlier, the concept of a spillover NIAC, allowing the application of IHL to military operations spilling over into a neighbouring non-belligerent state, is no longer disputed. This being so, the application of IHL to spillover multinational NIACs raises other issues in relation to its territorial reach: does the contiguity of the neighbouring state into which the conflict spills constitute a prerequisite for the extraterritorial application of IHL? Does IHL apply to the whole territory of that state or would it be restricted to combat areas or to areas located in the vicinity of the border? Where do we draw the line of the geographical scope of IHL in such circumstances? Some people might possibly argue that if one accepts that IHL applies extraterritorially to spillover NIACs, why should it not apply to the territory of other non-belligerent states if fighters or military objectives belonging to the parties to the multinational NIAC are located therein? For example, would IHL govern the bombing of a non-state actors’ training camp or a multinational military base established in a non-belligerent state but used to support military operations conducted within the framework of a multinational NIAC?

These are still unanswered questions deserving further analysis on account of their operational, humanitarian and legal consequences.

The legal status of personnel involved in United Nations peace operations

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Abstract

This article examines the status of military and civilian personnel of sending states and international organisations involved in UN peace operations. It undertakes an assessment of relevant customary law, examines various forms of treaty regulation and considers topics and procedures for effective settlement of open issues prior to the mission. The author stresses the need for cooperation between the host state, the sending states and the international organisation in this context. He draws some conclusions with a view to enhancing the legal protection of personnel involved in current and future UN peace operations.

Keywords: accountability, immunity, multinational operations, peace operations, post-conflict peacebuilding, 1994 UN Safety Convention, status-of-forces agreement, status-of-mission agreement, UN Model SOFA.

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This article examines the status of military and civilian personnel of sending states and international organisations involved in United Nations (UN) peace operations in a host state; that is, the legal nature and consequences of their actions defined by law. It focuses on military operations *outside* of an armed conflict – situations in which international humanitarian law (IHL) does not apply. The status of such personnel in the host state is regulated in customary and treaty law, but there are certain inconsistencies and gaps which should be filled by best practice.¹ Generally speaking, the use of force in self-defence, including in defence of the mandate,² does not affect the legal status of peacekeepers. That status continues to apply even in exceptional situations, when they become involved in hostilities in an armed conflict, but in such situations status issues will most likely be superposed by rules of IHL. Peace operations are not directed against warring parties, yet peacekeepers may become parties on the side of states, or rarely on the side of non-state actors fighting as individuals or on behalf of an insurgent movement. When the level of a non-international armed conflict has been reached and peacekeepers become involved in it, the rules of IHL apply. Yet in such conflicts there is no combatant status and the specific protections of prisoners of war do not apply.³

This essay will first assess the customary status of military and civilian personnel participating in peace operations not amounting to an armed conflict, and will then look into various forms of treaty regulation, also exploring the gaps and shortcomings of those treaties. Finally, it will try to draw some conclusions for best practice and future regulation.

The status of military and civilian personnel participating in peace operations under customary law

Military and civilian personnel of sending states operating on the territory of a host state have a special legal status.⁴ They enjoy immunity from legal process in any other state, including the host state and transit states. Indeed, this immunity applies not only to heads of state or government or secretaries of foreign affairs *ratione personae*, but also to any organ of the state *ratione materiae*. James Crawford has noted ‘the development of the so-called restrictive theory of immunity, which holds that immunity is only required with respect to transactions involving the exercise of governmental authority (*acta iure imperii*) as distinct from commercial or other transactions which are not unique to the

- 1 Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, pp. 94–109, 143–149 and 199–200.
- 2 *United Nations Peacekeeping Operations, Principles and Guidelines* (Capstone Doctrine), DPKO Publications, UN Secretariat, March 2008, p. 34, available at: http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf. All internet references were accessed in March 2014.
- 3 Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, Sections 1213–1215, pp. 603–605.
- 4 Ola Engdahl, *Protection Of Personnel in Peace Operations: The Role of the ‘Safety Convention’ against the Background of General International Law*, International Humanitarian Law Series, Martinus Nijhoff, Leiden, 2007, pp. 29–56; Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, Oxford, 2001, pp. 3–6 and 487–506.

State (*acta iure gestionis*)'.⁵ This understanding of immunity and its application to military forces is broadly shared today.

Sir Ian Sinclair, devoting his general course in the Hague Academy in 1980 exclusively to the law of sovereign immunity, has provided abundant material on state practice which reveals that there is not any criminal case where a host state has claimed criminal jurisdiction on a member of visiting forces of a sending state, unless such jurisdiction was exceptionally granted by a treaty between those states. Already at that time he observed a continuing trend in the direction of 'recognising and applying the restrictive theory' on state immunity, but confirmed 'a functional need to maintain a measure of jurisdictional immunity for foreign States',⁶ thus explaining the core principle of state immunity. There are certain restrictions stemming from that focus on 'functional needs': immunities *ratione materiae* are not granted as personal privileges, and they do not extend to acts or omissions outside the performance of official duties. Acts *iure imperii* are not subject to control by any other state. In respect of those acts, there is a presumption that a foreign state organ possesses immunity. As states are independent and free to direct their affairs, no government is obliged to accept outside interference with respect to its own organs by another state. Organs of a sending state that have committed a wrongful act may be requested to leave the host state, but their immunity before foreign state authorities and courts remains.⁷

The principle of immunity applies not only to organs of states, but likewise to military and civilian personnel of entities enjoying international legal personality, such as the UN and other international or regional organisations. However, most of the personnel engaged in peace operations are and will be contributed by sending states, even if certain limited forms of command or control – mostly operational control,⁸ but not full command⁹ – may be exercised by the international

5 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2012, p. 488.

6 Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, Hague Academy of International Law, Collected Courses, Vol. 1980–II, Martinus Nijhoff, Leiden, 1980, pp. 216–217.

7 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p. 94.

8 *US Military Dictionary: The Oxford Essential Dictionary of the U.S. Military*, Oxford University Press, Oxford, 2001: 'Operational control may be delegated and is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the missions. Operational control includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. Operational control should be exercised through the commanders of subordinate organizations. Normally this authority is exercised through subordinate joint force commanders and service and/or functional component commanders. Operational control normally provides full authority to organize commands and forces and to employ those forces as the commander in operational control considers necessary to accomplish assigned missions. Operational control does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training' (emphasis added). Definitions set up in pertinent documents of the UN or regional organisations do not essentially deviate from this.

9 *Ibid.*: Full command includes '[t]he military authority and responsibility of a superior officer to issue orders to subordinates. It covers every aspect of military operations and administration and exists only within national services. The term *command*, as used internationally, implies a lesser degree of authority than when it is used in a purely national sense. It follows that no NATO commander has full command

organisation involved.¹⁰ Hence the immunity of peacekeepers is foremost that of their sending states, and the latter remain accountable for wrongful acts committed under their control.¹¹ It is important to understand that immunity does not imply impunity for military or civilian members of the forces of a sending state or international organisation. Neither can immunity limit the accountability of that state¹² or international organisation.¹³ Rather, it bars the host state from taking direct action against the members of a visiting force, whereas the sending state and/or the international organisation is accountable. Individual perpetrators are to be prosecuted by the sending state. In exceptional situations their immunity may be waived *vis-à-vis* the host state. But a host state interested in the successful performance of a peace operation may expect the sending state to exercise its jurisdiction exclusively and in a responsible manner.

This immunity derives from the principle of state sovereignty as recognised in customary international law and does not depend on consent of the host state.¹⁴ The purpose of such immunity is not to provide personal benefits to individuals, but rather to ensure an unimpeded performance of their official functions, to respect the equality of states under the law and to exclude any outside interference inconsistent with the Purposes of the United Nations.¹⁵ State immunity is of utmost importance for the effectiveness of any peace operation. For the members of participating military forces, including their civilian component, immunity is essential for an impartial and effective performance of the mandate which is a prerequisite for the success of the mission.¹⁶ As a rule, UN forces engaged in peace operations enjoy full immunity from host state jurisdiction while the sending state exercises exclusive criminal jurisdiction. While certain treaty limitations to the immunity principle are not free from misunderstandings, as will be shown below, it must be underlined that

over the forces that are assigned to him. This is because nations, in assigning forces to NATO, assign only operational command or operational control' (emphasis added).

10 See, for example, Capstone Doctrine, above note 2, p. 66.

11 See Terry D. Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations', in *Netherlands Yearbook of International Law*, Vol. 42, 2011, pp. 37–68, esp. 46–49 and 51–52. Insofar as peacekeepers are recruited and sent by an international organisation rather than a sending state, their immunity derives from the immunity of the international organisation. See e.g. United Nations Secretariat, 'Responsibility of International Organizations: Comments and Observations Received from International Organizations', 56th Session, UN Doc. A/CN.4/545, 25 June 2004, p. 17. For a discussion on the attribution of responsibility of wrongful behaviour of peacekeepers, see Paolo Palchetti's article in this issue of the *Review*.

12 Articles on Responsibility of States for Internationally Wrongful Acts, United Nations, International Law Commission, Report on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, 56th Session, Supplement No. 10 (A/56/10), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

13 Draft Articles on Responsibility of International Organizations, United Nations, International Law Commission, Report on the Work of Its Sixty-Third Session (26 April–3 June and 4 July–12 August 2011), General Assembly, Official Records, 63rd Session, Supplement No. 10 (A/66/10), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

14 D. W. Bowett *et al.*, 'United Nations Forces: A Legal Study of United Nations Practice', Stevens & Sons, London, 1964, pp. 428–467; T. D. Gill and D. Fleck (eds), above note 1, p. 143.

15 Charter of the United Nations, 26 June 1945, XV UNCIO 335, Art. 1.

16 See Dieter Fleck, 'Securing Status and Protection of Peacekeepers', in Roberta Arnold and Geert-Jan Alexander Kooops (eds), *Practice and Policies of Modern Peace Support Operations Under International Law*, Transnational Publishers, New York, 2006, p. 155.

the privileges and immunities of the sending state's military and civilian personnel in the host state are crucial for the mission.

The immunity of members of foreign armed forces for acts committed in their official capacity has always been honoured in jurisprudence. In the *Armed Activities on the Territory of the Congo* case, the International Court of Justice (ICJ) confirmed the customary rule that 'the conduct of individual soldiers ... is to be considered as the conduct of a State organ'.¹⁷ In the *Jurisdictional Immunities of the State* case, the ICJ had no doubt that acts committed by armed forces abroad in the performance of a duty must be characterised as acts *iure imperii* – that is, acts covered by a full immunity.¹⁸ In *Prosecutor v. Blaškić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that, while it is empowered to issue binding orders and requests to states, the Tribunal may not issue binding orders to state officials acting in their official capacity.¹⁹ In *Jones v. United Kingdom*, the European Court of Human Rights was fully satisfied that the granting of immunity to state officials in the applicants' civil cases had reflected generally recognised current rules of public international law and did therefore not amount to an unjustified restriction on access to court,²⁰ as enshrined in Article 6 of the European Convention on Human Rights.²¹ In the *Lozano* case, the Italian Court of Cassation, deciding on criminal proceedings brought against a US soldier who had killed an Italian intelligence officer during service at a checkpoint outside Baghdad, concluded that criminal proceedings for wilful killing could not be conducted by Italian authorities as a result of the fact that the US soldier was acting in an official capacity and therefore enjoyed immunity due to his status as official of his state.²² In *Mothers of Srebrenica et al. v. Netherlands and the United Nations*, the Hague Court of Appeal ruled that it is impossible to bring the UN before a Dutch court due to the immunity from prosecution granted to the UN pursuant to international conventions, and it accepted that the Netherlands should share UN immunity in this respect.²³ Later on, in *Netherlands v. Hasan Nuhanović*, the Supreme Court of the Netherlands concluded that the Netherlands was responsible for the death of three Muslim men from Srebrenica and stated that the pertinent conduct of Dutchbat, as part of a UN peacekeeping force, could be attributed to the Netherlands because public international law allows the conduct to be attributed in

17 ICJ, *Democratic Republic of the Congo v. Uganda*, Judgment, 19 December 2005, *ICJ Reports 2005*, para. 213, available at: www.icj-cij.org/doCKET/files/116/10455.pdf.

18 ICJ, *Germany v. Italy: Greece Intervening*, Judgment, 3 February 2012, *ICJ Reports 2012*, para. 9978, available at: www.icj-cij.org/doCKET/files/143/16883.pdf.

19 ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 29 October 1997, available at: www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html, para. 43.

20 European Court of Human Rights (ECtHR), *Jones v. United Kingdom* (Applications Nos. 34356/06 and 40528/06), Judgment, 14 January 2014, para. 189, available at: <http://justsecurity.org/wp-content/uploads/2014/01/Jones-v-United-Kingdom-ECtHR-2014.pdf>.

21 European Convention on Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 22.

22 Italy, Court of Cassation, *Lozano v. Italy*, Appeal Judgment, Case No 31171/2008, ILDC 1085 (IT 2008), 24 July 2008, First Criminal Division.

23 Appeal Court in The Hague, *Association of Citizens Mothers of Srebrenica v. (1) State of the Netherlands and (2) United Nations*, Judgment, 30 March 2010, para. 4.2, available at: www.haguejusticeportal.net/Docs/Dutch%20cases/Appels_Judgment_Mothers_Srebrenica_EN.pdf.

this specific case to the sending state and not to the UN, insofar as the state had effective control over the disputed conduct.²⁴ Immunity was not invoked here, because the Court was deciding on the conduct of national military personnel. It rather concluded that the UN did not have (or no longer had) exclusive operational control over Dutchbat, and that the state of the Netherlands was responsible for those actions in terms of domestic tort law.

More recent developments in legal doctrine have focused on procedural aspects of and possible exceptions from immunity, without in any way qualifying the role of military personnel as organs of their sending state.²⁵ Other treaties have expressly confirmed the immunity of state officials before foreign authorities and courts, with the arguable exception of prosecution for international crimes.²⁶

Treaty regulation of the status of personnel involved in UN peace operations

Status under the UN Charter

There is little generic treaty regulation on the issue – that is, treaty law that is readily available and can be used in peace operations without entering into new negotiations during the difficult stages of planning and mission start-up.

Article 105 of the UN Charter states in rather broad terms that the Organisation ‘shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes’ and that officials of the Organisation ‘shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation’. The 1946 Convention on Privileges and Immunities of the United Nations²⁷ provides for immunity of ‘officials’ (Article V) and also of ‘experts on missions’ (Article VI), but there is no consensus, let alone consistent practice as to the application of these provisions to peacekeepers.²⁸ General Assembly Resolution 76(I) of 7 December 1946 approved the granting of these privileges and immunities

24 Supreme Court of the Netherlands, *The State of the Netherlands v. Hasan Nuhanović*, Judgment, 6 September 2013, available at: www.internationalcrimesdatabase.org/Case/1005/The-Netherlands-v-Nuhanovi%C4%87/.

25 See Andrew Dickinson, Rae Lindsay, James P. Loonamand Clifford Chance LLP, *State Immunity: Selected Materials and Commentary*, Oxford University Press, Oxford, 2004.

26 Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, Oxford, 2008, pp. 102, 139 and 419; Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 94 and 611.

27 Convention on the Privileges and Immunities of the United Nations, 14 December 1946, 1946–1947 UNTS 15 (entered into force 17 September 1946).

28 In ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, 15 December 1989, *ICJ Reports 1989*, p. 177, the ICJ has confirmed the expert on mission status of a special rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. No such confirmation has been given for peacekeepers so far. See Steven J. Lepper, ‘The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate’s Analysis’, in *Houston Journal of International Law*, Vol. 18, 1996, p. 367.

‘to all members of the staff of the United Nations with the exception of those who are recruited locally and are assigned to hourly rates’.

In 1981, the UN Legal Counsel confirmed that there was no doubt in law or in practice that field service officers under a headquarters agreement between France and UNESCO are ‘officials’ within the meaning of that agreement and the 1946 Convention, and that all staff members including the locally recruited (except for those who were employed at hourly rates) qualified as officials of the UN.²⁹ In 1995, the UN Legal Counsel confirmed that, in accordance with customary law, military personnel of sending states enjoy privileges and immunities. However, civilian contractors do not share such immunities, not even as ‘experts on mission’, as this term is understood to apply to persons charged with performing specific functions or tasks for the UN, but does not include functions that are commercial in nature.³⁰ Under Article V (Section 20) and Article VI (Section 23) of the 1946 Convention, the Secretary-General shall have the right and the duty to waive the immunity of any official or expert on mission ‘in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations’. But the application of these provisions to peace operations never became relevant in practice. Sending states would not need any waiver to exercise criminal or disciplinary jurisdiction on their own personnel. As far as UN personnel, including locally recruited staff, are concerned, however, the Secretary-General would be bound to consider a waiver of immunity.

The 1961 Vienna Convention on Diplomatic Relations³¹ provided for certain immunities of technical staff of a sending state’s embassy. While personnel performing military missions in a host state are sometimes – in lieu of a more specific regulation – listed this way, peacekeepers are not expressly mentioned here and there is no practice on using this Convention for peace operations.

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons³² establishes intentional attacks against an ‘internationally protected person’ as an international crime and requires any state party in whose territory the alleged offender is present to ‘take the appropriate measures under its internal law so as to ensure his presence for the purpose of

29 Statement made by the Legal Counsel at the 59th meeting of the Fifth Committee of the General Assembly on 1 December 1981, *United Nations Juridical Yearbook*, 1981, pp. 161–162, relating to field service officers under the Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory, 2 July 1954 (entered into force 23 November 1955), available at: http://portal.unesco.org/en/ev.php-URL_ID=48888&URL_DO=DO_TOPIC&URL_SECTION=201.html. See also Michael Gerster and Dirk Rottenberg, Art. 105, MN 22, in Bruno Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford University Press, Oxford, 2012. See generally Anthony J. Miller, ‘Privileges and Immunities of United Nations Officials’, in *International Organizations Law Review*, Vol. 4, 2007, pp. 169–257.

30 Memorandum of the Legal Counsel to the Assistant Secretary-General for Peacekeeping Operations, 23 June 1995, *United Nations Juridical Yearbook*, 1995, p. 407, paras. 3–6.

31 Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).

32 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

prosecution or extradition' (Article 6). This Convention is related to international criminal justice and the term 'protected person' used here is separate from immunities, although linked. The definition of internationally protected persons (Article 1(1)(b)) includes

[a]ny representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

It remains an open question whether and to what extent military or civilian personnel participating in UN peace operations qualify as internationally protected persons under this Convention. An argument was made that if accorded 'expert on mission' status, UN peacekeeping personnel would qualify as internationally protected persons.³³ However, this argument is not convincing for two reasons: on the one hand, the Convention does not require that status to be specifically 'accorded', and on the other, 'expert on mission' status is not expressly covered under the terms 'representative' or 'official' or 'other agent'. Yet, when a person is specially protected under this Convention, this may be used as an argument in favour of immunity.

The UN International Law Commission (ILC) has included the topic 'immunity of State officials from foreign criminal jurisdiction' in its long-term program to develop possible future legal instruments. While it would be premature to envisage a comprehensive codification of the issue in the near future, customary rules of state immunity are well respected in these efforts.³⁴

A specific legal basis for the protection of personnel participating in UN peace operations may be seen in the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Optional Protocol.³⁵ This Convention applies to persons engaged or deployed by the Secretary-General (Article 1(a)) as well as to persons assigned by a government or intergovernmental organisation (Article 1(b)). It covers all UN operations conducted 'for the purpose of maintaining or restoring international peace and security' or when the Security Council or the General Assembly 'has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation' (Article 1(c)), conditions that are generally met in peace operations by

33 S. J. Lepper, above note 28, p. 368.

34 See Second report on the immunity of state officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/661, 4 April 2013, available at: http://legal.un.org/ilc/guide/4_2.htm.

35 Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999); and the Optional Protocol thereto, 8 December 2005, UN Doc. A/RES/60/42, Annex, Registration No. A-35457 (entered into force 19 August 2010). Both documents are reprinted with a short commentary in Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations*, Oxford University Press, Oxford, 2010, pp. 185–194.

the mandate of the Security Council.³⁶ Although strictly speaking ‘safety’ and ‘security’ have a different meaning,³⁷ both terms are used interchangeably in the Convention and its Optional Protocol. Under the Convention, all parties are obliged to ensure the safety and security of UN and associated personnel and take appropriate steps to protect such personnel deployed in their territory. The Optional Protocol extends that obligation to the protection of UN operations delivering humanitarian, political and development assistance. The Convention includes an obligation to conclude status agreements on the UN operation and all personnel engaged in it,³⁸ agreements which – subject to the composition of the personnel involved – are called status-of-forces agreements (SOFAs) or status-of-mission agreements (SOMAs). This obligation underlines the need for closing gaps in regulation and ensuring cooperation between the host state and the international organisation; but as will be shown below, it is difficult to fully comply with the Convention in practice. It is important to first consider the text of the Convention and its shortcomings.

Shortcomings of the 1994 UN Safety Convention

The Convention, developed because of deep concern over ‘the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel’,³⁹ falls short of its declared purpose. It suffers from five main shortcomings, which clearly limit its practical relevance for current peace operations: (a) the international obligations created in the Convention are those of states, not of non-state actors, yet the responsibility of states to ensure its application is not sufficiently addressed; (b) the application of the Convention and the Optional Protocol is formally excluded in certain ill-defined enforcement actions under Chapter VII of the Charter; (c) in other forms of robust peace operations the relevance of both instruments is unclear and disputable; (d) peace operations conducted by states or regional organisations, even if authorised by the Security Council, are not clearly covered by the text of the Convention; and (e) hardly any of the many host states to a peace operation so far has ratified the Convention, let alone the Optional Protocol. These shortcomings shall be discussed here in turn.

36 The legal character of ‘UN operation’ may also be confirmed by a special declaration by the Security Council or the General Assembly under Art. 1(c)(ii) ‘that there exists an exceptional risk to the safety of the personnel participating in the operation’.

37 ‘Safety issues’ comprise any hazards of deployment, including for example the handling of equipment or exposure to tropical diseases. ‘Security issues’ include external threats ranging from military assault to petty crime.

38 Art. 4: ‘Agreements on the status of the operation. The host State and the United Nations shall conclude as soon as possible an agreement on the status of the United Nations operation and all personnel engaged in the operation including, *inter alia*, provisions on privileges and immunities for military and police components of the operation.’ The latter formulation is open to misunderstanding, as immunities are derived from customary international law so that SOFA or SOMA provisions can be no more than declaratory in nature.

39 Preamble, para. 1.

Non-state actors

The Convention is binding on state parties but, unlike the principles and rules of IHL,⁴⁰ this does not engender direct obligations for non-state actors under international law. Article 19 of the Convention provides for the dissemination of the text and its inclusion in military instruction programmes of states party to it. However, it says nothing on dissemination among non-state actors. While it is fair to say that non-state actors are subject to the criminal law of the state where they are present, the obligations on implementation which are included in the Convention, such as those in Article 7(2) and (3) and Article 9(1) and (2), will remain dead letters unless taken more seriously and transformed into national legislation. The duty to take appropriate implementing measures⁴¹ needs to be fulfilled by states. As acknowledged in Article 7(3), relevant initiatives are particularly required ‘in any case where the host State is unable itself to take the required measures’. Such initiatives should include exchange of experience, training activities and the development of model legislation.

The general principle of *pacta sunt servanda* is one of the long-standing and universally recognised principles of international law,⁴² but neither the Convention nor SOFAs become automatically part of the national law of either the host state or the sending state. While certain provisions are declaratory in nature in that they reaffirm pre-existing obligations, others have a constitutive character, as they create or amend rights and obligations. Each participating state has its own constitutional mechanisms regulating how international agreements become domestically binding. Most states will need to adopt legislation for that purpose, and they should take appropriate additional measures at the national level to ensure compliance with international legal obligations. This is particularly important where criminal jurisdiction is involved.

Under Article 7(2) of the Convention, states are obliged to ‘take all appropriate measures to ensure the safety and security of UN and associated personnel’, and under Article 8 personnel captured or detained shall be promptly released and returned.⁴³ However, as explained above, in most legal systems these

40 On the applicability of IHL to non-state actors, see D. Fleck (ed.), above note 3, Section 1201, para. 5, pp. 585–586.

41 For a general consideration of the problem of compliance with international treaty obligations, see Geir Ulfstein, Thilo Marauhn and Andreas Zimmerman (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control*, Cambridge University Press, Cambridge, 2007. For some first steps taken, see GA Res. 67/85 (21 March 2013) and 68/101 (18 February 2014), *Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel*.

42 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art. 26: ‘Every treaty in force is binding upon the parties to it and must be performed in good faith.’

43 Art. 8: ‘Duty to release or return United Nations and associated personnel captured or detained. Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.’

obligations remain those of the state party, not of its citizens, unless further steps are being taken through national legislation. The requirement to take not only executive but also legislative steps and ensure their effective implementation in cooperation with the UN and other states has not been addressed in the Convention, except in very broad terms. Even two decades after the adoption of the Convention, when the right of states parties 'to take action in the exercise of [their] national jurisdiction over any United Nations or associated personnel who violates the laws and regulations of that State' was expressly acknowledged in Article 3 of the Optional Protocol, no reference was made to the duty of states to enact legislation binding their own citizens and ensuring the protection of peacekeepers under national law.

While this gap may be criticised, this is not to suggest that there are easy solutions to create legal obligations for non-state actors in this respect. Large-scale crimes, such as those committed against the UN Mission in Sierra Leone in May 2000, when up to 500 UN peacekeepers were taken hostage, disarmed and disrobed by the Revolutionary United Front,⁴⁴ do require resolute action by states in accordance with existing obligations under Article 9 of the Convention, before perpetrators may be brought to justice. Peacekeepers acting under a UN mandate are bound to impartiality even in the performance of the most robust operations. They are acting on behalf of the international community and hence cannot be considered parties to a conflict, unless they take a direct part in the conflict, hence losing their impartiality. Indeed, more should be done to qualify attacks against peacekeepers as crimes when they are not to be considered parties to the conflict (and to hold perpetrators accountable for such crimes). But also specific policies should be developed in order to avoid peacekeepers becoming involved in hostilities which in terms of intensity and duration rise to the level of participation as a party to an armed conflict.

Article 9(2) of the Convention requires states parties to make crimes against UN and associated personnel 'punishable by appropriate penalties which shall take into account their grave nature'. There is still a lack of relevant national legislation on the issue. States, including those sending or hosting peacekeeping personnel, seem to take the position that attacks against such personnel may be sufficiently prosecuted as regular crimes against civilians such as manslaughter, hostage-taking or wilful killing, thus neglecting the specific obligation under Article 9(2). Many states specifically sanction attacks against law enforcement officers,⁴⁵ but

44 Peacekeeping Best Practices Unit/Department of Peacekeeping Operations, *Lessons Learned from United Nations Peacekeeping Experiences in Sierra Leone*, United Nations, September 2003, p. 3/83, available at: http://pbpu.unlb.org/PBPS/Pages/PUBLIC/ViewDocument.aspx?docid=275&cat=1&scat=111&menukey=_6_2_17; Thorsten Benner, Stephan Mergenthaler and Philipp Rotmann, *The New World of UN Peace Operations: Learning to Build Peace?*, Oxford University Press, Oxford, 2011, p. 174.

45 For an example, see Arts. 113(1) and (2) of the German Criminal Code: '(1) Whosoever, by force or threat of force, offers resistance to or attacks a public official or soldier of the Armed Forces charged with the enforcement of laws, ordinances, judgments, judicial decisions or orders acting in the execution of such official duty shall be liable to imprisonment not exceeding two years or a fine. (2) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if (a) the principal or another accomplice carries a weapon for the purpose of using it during the commission of the offence; or (b) the offender through violence places the person assaulted in danger of death or serious injury.'

these laws will hardly suffice as they are designed for normal peacetime situations and the penalties may be too weak to ensure compliance with the rule of law in post-conflict peacebuilding. Peacekeepers may not even qualify as personnel specially protected under such existing national legislation. Should they become victims of attacks, such particular sanctions would then not apply, although the UN mandate may be considered as an aggravating circumstance in the adjudication of the penalty.⁴⁶ International criminal jurisprudence so far is silent on attacks against peacekeepers in peacetime and in post-conflict situations.⁴⁷

Non-applicability in certain enforcement actions

It remains difficult to define those limits of robust peace operations beyond which the Convention ceases to apply. Article 2(2) of the Convention is less than clear in providing:

This Convention shall not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations, in which any of the personnel are engaged as combatants against organised armed forces and to which the law of international armed conflict applies.⁴⁸

As admitted by Mahnoush Arsanjani in an official UN publication, the purport of Article 2(2) of the Convention is not entirely clear and is open to interpretations which may not have been anticipated at the time of the negotiation of the Convention.⁴⁹ According to one possible reading, such enforcement actions may be understood as being confined to those operations in which the UN force itself becomes party to an armed conflict. Another reading might include certain aspects of peace enforcement operations,⁵⁰ but in that case it will be difficult to agree in practice on exact criteria for an engagement 'as combatants against organised armed forces'. The beginning and end of that situation will be a matter of dispute, and any conclusion that such combatants might be held as prisoners of war until the

46 See e.g. Special Court for Sierra Leone, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment (Trial Chamber I), 8 April 2009, para. 218, available at: www.refworld.org/pdfid/49e71f1b2.pdf.

47 The provisions in Art. 8 (2)(c)(iii) and 8(d)(iii) of the ICC Statute deal with attacks against persons protected under the law of (international or non-international) armed conflict, thus excluding most peace operations.

48 This provision also applies to the Optional Protocol, which shall be read and interpreted together with the Convention as a single instrument.

49 Mahnoush H. Arsanjani, Commentary on the UN Convention on the Safety of United and Associated Personnel, *United Nations Audiovisual Library of International Law*, p. 4, available at: http://legal.un.org/avl/pdf/ha/csunap/csunap_e.pdf; see also Mahnoush H. Arsanjani, 'Defending the Blue Helmets: Protection of United Nations Personnel', in Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer (eds), *Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law*, Proceedings of the international symposium held on the occasion of the 50th anniversary of the United Nations, Geneva, 19–21 October 1995, Pedone, Paris, 1996, pp. 115 and 132–145.

50 See the sub-section on 'Applicability in other forms of robust peace operations' below.

cessation of active hostilities⁵¹ would be unacceptable as long as the mandate of the peace operation is to be upheld. A full exclusion of all peace enforcement operations from the application of the Convention would be illogical, as it would deprive UN and associated personnel from protection even below the threshold of combat action.

Sir Christopher Greenwood has convincingly explained that while the effect of Article 2(2) is that ‘the threshold for the applicability of IHL of international armed conflicts thus becomes the ceiling for the operation of the Convention’,⁵² those who drafted the Convention hardly intended its applicability to cease as soon as there was any fighting, however low-level, between members of a UN force and members of other organised armed forces, as this would reduce the scope of application of the Convention to almost nothing.⁵³ Article 2(2) is also misconceived for an additional reason: it excludes the application of the Convention *in toto* as soon as ‘any’ of the personnel are engaged as combatants, thus depriving even non-military personnel of special protection.⁵⁴ Regrettably, in the two decades of the Convention’s existence, no attempt was made to relieve it of these severe defects.

There is some international criminal jurisprudence on attacks against peacekeepers in armed conflicts. In an assessment of recent cases before the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the ICTY and the International Criminal Court (ICC), in which a number of crimes against peacekeepers, all committed during non-international armed conflicts, had to be adjudicated, Ola Engdahl has analysed pertinent jurisprudence on determining whether peacekeepers are entitled to the protection of civilians under IHL.⁵⁵ He questions whether it was correct to focus only on whether or not peacekeepers as members of a military operation had directly participated in hostilities. Instead, he suggests that, since peacekeepers are members of an armed force, the most appropriate way to address this issue would be to analyse whether they belong to the armed forces of a party to an armed conflict. But that would depend on the court that was competent to decide in accordance with its statute. A qualification of peacekeepers as party to an armed conflict would exclude, as Engdahl convincingly underlines, that they could be regarded as civilians only temporarily taking part in hostilities.⁵⁶ It should be noted that permanent fighting under UN mandate is extremely rare. It is not to be understood as a ‘peace operation’, but happened in enforcement operations such as the Korean War

51 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 118(1).

52 Christopher Greenwood, ‘Protection of Peacekeepers: The Legal Regime’, in *Duke Journal of Comparative & International Law*, Vol. 7, 1996, pp. 199–200.

53 Christopher Greenwood, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008, para. 4 to Section 208, p. 53.

54 C. Greenwood, above note 52, pp. 197–202 and 207.

55 Ola Engdahl, ‘Prosecution of Attacks against Peacekeepers in International Courts and Tribunals’, in *Military Law and the Law of War Review*, Vol. 51, No. 2, 2012, pp. 279–280.

56 *Ibid.*, p. 279: ‘There is a risk that such an approach adversely affects the respect for the protection of peacekeepers.’

(1950–1953),⁵⁷ Operation Desert Storm in Iraq (1991)⁵⁸ and Operation Unified Protector in Libya (2011).⁵⁹

Applicability in other forms of robust peace operations

Robust forms of peace operations in which peacekeepers become involved in using force, however low-level, to act in self-defence or defence of their mandate are sadly part of today's reality.⁶⁰ On numerous occasions the Security Council has authorised peace enforcement operations which,

while potentially involving combat, will not amount to full-scale warfare on a sustained basis against a State, and which fall conceptually and in terms of their objectives and the intensity of the use of force between enforcement operations and traditional peacekeeping.⁶¹

These include the UN Operation in the Congo (ONUC),⁶² the Stabilization Force in post-conflict Bosnia-Herzegovina and Croatia (SFOR),⁶³ the Kosovo Force (KFOR)⁶⁴ and the Intervention Brigade in the Democratic Republic of the Congo.⁶⁵ The mandate of the Security Council foresaw the members of these operations not as becoming party to an armed conflict, but rather as maintaining or restoring international peace and security in cooperation with the host state, yet there were circumstances of participation in support of the host state in the conduct of hostilities.

The situations which are to be considered here are mostly those of law enforcement rather than the conduct of hostilities. With very few exceptions, they

57 SC Res. 82, 25 June 1950; SC Res. 83, 27 June 1950; GA Res. 377(V), 3 November 1950; GA Res. 498(V), 1 February 1951; GA Res. 500(V), 18 May 1951.

58 SC Res. 678, 29 November 1990.

59 SC Res. 1973, 26 February 2011.

60 Mona Khalil, 'Humanitarian Law and Policy in 2014: Peacekeeping Missions as Parties to Conflicts', 13 February 2014, available at: <http://phap.org/thematic-notes/2014/february/humanitarian-law-policy-2014-peacekeeping-missions-parties-conflicts>.

61 T. D. Gill and D. Fleck (eds), above note 1, Section 5.01, p. 81.

62 SC Res. 161, 21 February 1961; SC Res. 169, 24 November 1961; see Trevor Findlay, *The Use of Force in UN Peace Operations*, Oxford University Press, Oxford, 2002, p. 71.

63 SC Res. 1088, 12 December 1996; SC Res. 1174, 15 June 1998.

64 SC Res. 1244, 10 June 1999.

65 SC Res. 2053, 27 June 2012; SC Res. 2076, 20 November 2012; and SC Res. 2098, 18 March 2013. In the Democratic Republic of the Congo, the United Nations Organization Stabilization Mission (MONUSCO) found itself supporting government forces against the rebel group M23. The Security Council, '[e]xpressing its deep concern regarding the threat posed by the presence of M23 in the immediate vicinity of the city of Goma in violation of resolution 2076 (2012), as well as the continuation of serious violations of international humanitarian law and abuses of human rights by the M23 and other armed groups', readjusted MONUSCO's mandate to include protection of civilians, neutralising armed groups through the Intervention Brigade, monitoring the implementation of the arms embargo, and provision of support to national and international judicial processes (SC Res. 2098, Preamble para. 9; op. paras. 12–16), tasks that should not be misunderstood as deviations from the fundamental principles of consent of the host state, impartiality, and non-use of force except in self-defence or defence of the mandate. For a first discussion on background and legal interpretation, see Bruce Oswald, 'The UN Security Council and the Force Intervention Brigade: Some Legal Issues', in *ASIL Insights*, Vol. 17, No. 15, 6 June 2013, available at: www.asil.org/sites/default/files/insight130606_0.pdf.

cannot be considered as armed conflicts, so IHL does not formally apply. This could speak for the applicability of the Convention and its Optional Protocol in most cases in which peacekeepers are using force. But the situation is not clear-cut. While the applicability of IHL to a situation depends not on the qualification of the situation by the parties involved but rather on the facts on the ground, any assessment may be disputed, and many will hesitate to conclude from single incidents, even when such incidents occur frequently, that they have become part of an armed conflict. Sometimes armed opposition groups may be interested in seeing their case so qualified, while the government still speaks of internal disturbances. A clear understanding of possible consequences is necessary at the level of decision-makers within the UN and states. It should inform the planning and conduct of the relevant peace operation and be made public.

Peace operations by regional organisations

Peace operations conducted by regional organisations or coalitions of willing states acting under a Security Council mandate are not included in the text of the Convention. Article 1(c) rather refers to 'United Nations operation[s]', thus neglecting important parts of the reality in many areas of post-conflict peace-building. The Optional Protocol has expanded the range of applicability of the Convention to 'humanitarian, political or development assistance', while still insisting that the operation is conducted under 'United Nations authority and control' (Article II(1)). It would be worthwhile to seek agreement that such 'control' should be understood here as political rather than operational control and that states and regional organisations have the right and responsibility to ensure an adequate protection of peacekeepers also in such missions.

Lack of ratification

So far, hardly any of the many host states to a peace operation have ratified the Convention,⁶⁶ let alone the Optional Protocol,⁶⁷ and hardly any visible effort has been undertaken to change this situation. Current UN practice has been relatively successful in coping with it, however: in accordance with Security Council and General Assembly resolutions, SOFAs or SOMAs concluded with the host state often provide that relevant parts of the UN Safety Convention will apply.⁶⁸

66 The list of States Parties to the Convention is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8&chapter=18&lang=en.

67 The list of States Parties to the Optional Protocol is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8-a&chapter=18&lang=en.

68 Information kindly provided to the author by Ms. Katarina Grenfell, Office of the Legal Counsel, United Nations. See for example SC Res. 1502 (2003), 26 August 2003, op. para. 5(a); Protocole modifiant l'Accord entre l'Organisation des Nations Unies et la République démocratique du Congo concernant le statut de la Mission de l'Organisation des Nations Unies en République démocratique du Congo (MONUSCO), Kinshasa, 6 June 2006, 2106 UNTS 357; and GA Res. 67/85 of 13 December 2012, op. paras. 16 and 17.

The Security Council has confirmed this practice.⁶⁹ Yet a number of recent SOFAs were concluded without any reference to the UN Safety Convention, referring instead to the privileges and immunities of the peacekeeping mission and its members under the 1946 Convention.⁷⁰ Other SOFAs further confuse the picture by also mentioning

the principles and rules of the international humanitarian law conventions applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, and the UNESCO Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict.⁷¹

Even if such SOFA provisions are included without prejudice to the mandate of the mission and its international status, this appears to be an unfortunate distraction from the legal status of the personnel involved and the international protection it deserves. The treaties referred to here are only applicable in armed conflicts. When the SOFAs were concluded for Sudan and South Sudan, the Comprehensive Peace Agreement⁷² and the Addis Ababa high-level consultation on the situation in Darfur of 16 November 2006⁷³ were assumed to have ended Africa's longest-running civil war.⁷⁴ While the situation continued to constitute a threat to international peace and security,⁷⁵ none of the states sending military contingents to UNAMID, UNISFA or UNMISS, many of them after parliamentary debates at home, had acted under the impression that the situation would again amount to an armed conflict.⁷⁶ A clear distinction should have been drawn between assistance in post-conflict law enforcement and the conduct of hostilities rather than confusing these two different modes of operation. The reference in SOFAs to IHL treaties might indicate that many negotiators involved were more familiar with these than

69 See, for example, SC Res. 1778, 25 September 2007, Preambular para. 9, op. para. 4.

70 See, for example, Agreement between the United Nations and the Government of Sudan concerning the status of the United Nations Interim Security Force for Abyei (UNISFA) (with exchange of letters), New York, 1 October 2012, I-50146; Status-of-Forces Agreement between the United Nations and the Government of the Republic of South Sudan (with supplemental arrangement) concerning the UN Mission in South Sudan (UNMISS), Juba, I-48873 (entered into force 8 August 2011).

71 Agreement between the United Nations and the African Union and Sudan concerning the Status of the African Union/United Nations Hybrid Operation in Darfur (UNAMID), Khartoum, 9 February 2008, 2503 UNTS 217, para. 6(a), available at: <http://unamid.unmissions.org/Portals/UNAMID/UNAMID%20SOFA.pdf>.

72 Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, 31 December 2004, available at: <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>.

73 See communiqué of the 66th meeting of the Peace and Security Council of the African Union held in Abuja on 30 November 2006, available at: www.peaceau.org/uploads/communiquedarfureng-68th.pdf; and communiqué of the 79th meeting of the Peace and Security Council of the African Union on 22 June 2007, available at: www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sudan%20AU%20PSC%20PR%20COMM%20LXXIX.pdf.

74 For a legal assessment of the conflict in Sudan, see the Rule of Law in Armed Conflicts Project (RULAC) website, available at: www.geneva-academy.ch/RULAC/state.php?id_state=205.

75 SC Res. 1769 (2007), 31 July 2007.

76 See Alex J. Bellamy and Paul D. Williams, *Providing Peacekeepers*, Oxford University Press, Oxford, 2013.

with the principles and rules of post-conflict peacebuilding, but the UN Safety Convention, its many shortcomings notwithstanding, would have been the more appropriate document to offer legal guidance for those hosting and participating in the missions. Yet it was either ignored or neglected at the time and some may have felt that, unlike UN and associated personnel, peacekeepers provided by regional organisations would not enjoy protection under the text of the Convention.

Summarising these developments, the purpose of the Convention, which was to take effective legal action on deliberate attacks against UN and associated personnel, has not been convincingly met so far. New efforts will be necessary to ensure ratification by states engaged in peace operations (host states and sending states alike), improve implementation efforts and reach appropriate understandings and amendments to overcome the existing shortcomings.

Status-of-forces or status-of-mission agreements

The conclusion of SOFAs or SOMAs is of practical value for each mission.⁷⁷ While the sovereign immunity of peacekeepers derives from customary law rather than SOFAs and SOMAs, the latter may have three important effects: to confirm the principle of immunity; to jointly agree on certain limitations to existing privileges where this may be appropriate; and to establish rules and procedures for cooperation between the sending state and the host state.

It may be noted here that, since the end of the Cold War, UN peacekeeping operations have undergone a legal development in that mandates could explicitly be based on Chapter VII of the Charter due to more frequent unanimous Security Council support. Peace operations have increased in number and intensity ever since. The UN Secretary-General has prepared, in 1990, a Model Status-of-Forces Agreement for Peacekeeping Operations⁷⁸ which should serve as a basis for individual agreements to be concluded between the UN and host countries. This document marks an important development, as it describes the specific requirements of peace operations that are different from those for stationing visiting forces for other purposes, such as military cooperation, training or exercises.

Host states may be interested in temporary or long-term military cooperation with another state or a group of states, involving the presence of foreign troops on their territory. They may also agree on the joint use of specialised or expensive equipment and infrastructure. In such cases, there may be a mutual interest in proposing and accepting certain limitations for the exercise of privileges and immunities by the sending state, in order to support close cooperation according

77 See 'Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?', Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, House of Representatives, 28 February 2008, Serial No. 110-153, available at: http://psm.du.edu/media/documents/congressional_comm/house_foreign_affairs/us_house_foreign_affairs_hearing_feb_28_2008.pdf; William Thomas Worster, 'Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement', in *Military Law and the Law of War Review*, Vol. 47, No. 3-4, 2008, pp. 277-375.

78 UN Doc. A/45/594 (9 October 1990), reprinted with a short commentary in B. Oswald, H. Durham and A. Bates, above note 35, pp. 34-50.

to the host nation's principles and rules. The North Atlantic Treaty Organisation (NATO) SOFA⁷⁹ and the European Union (EU) SOFA⁸⁰ serve exactly such purposes. They were concluded as reciprocal and long-term arrangements for peacetime deployments on allied territories, a cooperation which was made possible in part due to the relatively comparable legal systems of the participating states and the desire by all parties to participate in the exercise of relevant rights and responsibilities in a balanced form. Close peacetime cooperation between participating states offers the necessary conditions for sharing even the exercise of jurisdiction in certain matters.⁸¹

Yet such conditions will generally be absent in operations carried out to maintain or restore peace. For these, the UN Model SOFA provides appropriate service conditions for the commander of the military component and the head of the UN civilian police component; the civilian staff; military personnel of sending states; and locally recruited personnel. As peace operations are also conducted by other international organisations, such as the African Union, the Economic Community of West African States, the EU⁸² and NATO, the UN Model SOFA may be used, *mutatis mutandis*, as a basis for agreements between the latter organisations and host countries in which military and civilian personnel are deployed. This may be practical, as similar issues are to be solved in peace operations conducted by these organisations and the UN experience may help to standardise similar activities. Once enacted in the national law of the host state, these provisions may effectively contribute to the respect for the status of personnel participating in peace operations and their protection.

79 Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces (NATO SOFA), 19 June 1951, available at: www.nato.int/cps/en/natolive/official_texts_17265.htm; Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces (PfP SOFA), 19 June 1995, available at: www.nato.int/cps/en/natolive/official_texts_24742.htm; Additional Protocol of 19 June 1995 to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces, available at: http://www.nato.int/cps/en/natolive/official_texts_24743.htm?selectedLocale=en; Further Additional Protocol of 19 December 1997 relating to the application of the Paris Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, 28 August 1952, available at: www.nato.int/cps/en/natolive/official_texts_17300.htm.

80 Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Art. 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), 17 November 2003, available at: www.statewatch.org/news/2009/mar/eu-uk-military-staff-agreement.pdf.

81 Lady Hazel Fox and Philippa Webb, above note 26, p. 595, observed that the NATO SOFA observes a principle of 'equivalence, by which the host State is only obliged to extend to visiting forces the privileges and benefits that it extends to its own forces'. But this may be based on a misunderstanding. It should be noted that equivalence may exist for support standards for these forces which are more or less comparable within the Alliance, but definitely not with respect to their legal status, as armed forces of the receiving state do not enjoy immunity at home.

82 The EU, however, has adopted its own Draft Model Agreement on the Status of the European Union-Led Forces between the European Union and a Host State, Council of the European Union, 2007, available at: <http://register.consilium.europa.eu/pdf/en/07/st11/st11894.en07.pdf>; see also Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), 17141/08, 15 December 2008, available at: <http://register.consilium.europa.eu/pdf/en/08/st17/st17141.en08.pdf>.

A SOFA can take many different forms. It can be a legally binding instrument, such as a treaty or agreement, which must be signed and ratified by the parties. Alternatively, it can be an expression of a political commitment set out in a memorandum of understanding or an exchange of notes. SOFAs can be concluded bilaterally between one sending state and the host state. They may also take the form of a multilateral arrangement between several parties, especially when the armed forces of more than one sending state are operating in the host state. SOFAs can be designed for a specific mission or for recurring or permanent missions. Considering the complexity of the issues involved and time constraints during the negotiations, all parties must concentrate on finding pragmatic solutions to the problems identified. In the preparatory phase and during the actual negotiations, each party may wish to seek expert advice at the national and international levels. This may help to identify the interests of relevant branches of the other party's government (the ministries of foreign affairs, defence, the interior and finance, including taxation, customs and border control agencies, and so on) and formulate negotiating strategies. Such information may prove to be very useful for the negotiations. Although certain information may be kept classified for security reasons, the parties could share fundamental principles of good governance, transparency and democratic control.⁸³ In many – if not most – cases, negotiations will be influenced by a lack of time, a lack of expertise, and difficulties in ensuring smooth implementation and settling disputes in close cooperation. Legislative acts will be necessary under the constitution of the host state for implementing certain SOFA provisions, and this may need more time or even turn out to be unrealistic. As with any treaty negotiation, political control of (and support for) the negotiators, based on a willingness to reach practical solutions, may greatly affect the outcome of SOFA negotiations and help to secure acceptance on both sides.

It remains an open problem that SOFAs on peace operations are rarely transformed into the national law of the host state. To reach that goal, relevant provisions may need to be enacted by the parliament of the host state, which will not happen easily in a post-conflict situation. In order to cope with the notorious lack of time for deployment and mission start-up, the Security Council resolution establishing a peace operation often decides that the UN Model SOFA shall apply provisionally, pending the conclusion of a specific SOFA.⁸⁴ With this practice,

83 See Jan Wouters and Cedric Ryngaert, 'Good Governance: Lessons From International Organizations', K.U. Leuven, Institute for International Law, Working Paper No. 54, May 2004, available at: www.law.kuleuven.be/iir/nl/onderzoek/wp/WP54e.pdf, with reference to the definition used by the United Nations Economic and Social Commission for Asia and the Pacific: 'Good governance has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law.' See also Victor-Yves Ghebali and Alexander Lambert, *The OSCE Code of Conduct on Politico-Military Aspects of Security: Anatomy and Implementation*, Martinus Nijhoff, Leiden, 2005.

84 Examples include SC Res. 1320 (2000), para. 6, in respect of the UN mission in Ethiopia and Eritrea (UNMEE), and SC Res. 2043 (2012), para. 7, noting the agreement between the Syrian government and the UN in respect to the UN Supervision Mission in Syria, to be established under the command of a Chief Military Observer. Some of these decisions were taken under Chapter VII of the UN Charter: see SC Res. 1990 (2011), para. 4, to apply the SOFA for the UN Mission in Sudan (UNMIS) *mutatis mutandis* to UNISFA; and SC Res. 1996 (2011), para. 26, to apply the UN Model SOFA *mutatis mutandis* to UNMISS.

the Security Council has finally adopted a solution that this author had proposed many years ago in the interest of legal clarity and to support an effective legal protection of the military and civilian personnel involved.⁸⁵ But it should be considered that this is just a provisional solution which cannot fully replace implementation under the law of the host state. The enactment of status provisions by the relevant Security Council resolution should be the first step, to be followed by SOFA negotiations aimed at reaching appropriate provisions and procedures, and the implementation of these in close cooperation between the host state, the sending states and the international organisation involved.

A significant part of SOFA negotiations will focus on the extent to which the law of the host state applies to military and civilian personnel of the sending state. Article 6 of the UN Safety Convention provides in rather general terms that:

1. Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, United Nations and associated personnel shall:
 - (a) Respect the laws and regulations of the host State and the transit State; and
 - (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.
2. The Secretary-General of the United Nations shall take all appropriate measures to ensure the observance of these obligations.

To be effective, such measures should not be taken only on an *ad hoc* basis, and they should be developed in cooperation with the host state.

The international legal obligations of the host state are of particular relevance in this respect. While the human rights obligations of sending states will apply extraterritorially only to acts committed within their territory and subject to their jurisdiction,⁸⁶ respect for the human rights commitments of the host state and the shared interest in the success of the mission requires sending states to take a sensitive approach in order to ensure human rights protection.⁸⁷ The same applies to obligations under environmental law. The role of peacekeepers in protecting human rights and the environment is significant today and will likely become increasingly important in the future. SOFA provisions may address this role by referring to relevant international law principles or supplementing them for the mission under consideration.

Organs of a foreign sending state are not automatically subjected, however, to all the laws of the host state.⁸⁸ Some of these laws, such as traffic regulations, will generally apply to peacekeepers. The host state's requirements may

85 Dieter Fleck and Michael Saalfeld, 'Combining Efforts to Improve the Legal Status of UN Peace-Keeping Forces and Their Effective Protection', in *International Peacekeeping*, Vol. 1, No. 3, 1994, pp. 82–84.

86 See, for example, the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 2(1). See Jann K. Kleffner, 'Human Rights and International Humanitarian Law: General Issues', in T. D. Gill and D. Fleck (eds), above note 1, pp. 51–77.

87 See Ben F. Klappe in D. Fleck (ed.), above note 3, Section 1307, pp. 619–625.

88 See Rodney Batstone in D. Fleck (ed.), above note 4, pp. 61–69.

also be relevant for building measures and fire precautions, particularly where local employees are involved. Other laws, however, do not apply – for example, rules on the use of firearms or on taxation. It would also not make sense for the host state to seek to regulate matters such as the command structure, terms of service and salaries of the members of the peacekeeping force. This situation is comparable to that of foreign diplomatic or consular personnel in the host state.⁸⁹ Hence, SOFA and SOMA negotiations should identify the laws of the host state that will apply to the foreign personnel, and both the host state and sending states or organisations should agree to cooperate on these issues, notwithstanding the exclusive jurisdiction in criminal, disciplinary and civil matters which remains a prerogative of the sending state in peace operations, is confirmed under the UN Model SOFA⁹⁰ and has never been waived in practice. Judicial control in this complex field must respect the exclusive criminal and disciplinary jurisdiction of the sending state.⁹¹

Receiving states are rarely able to offer a full guarantee for the safety and security of the foreign visiting force. Hence, this responsibility to a large extent needs to be shouldered by the sending state. For this reason, the sending state will have to ensure the safety of its personnel through the use of its military and police forces and/or private security companies. The SOFA should reflect this shared responsibility for safety and security, identify competent authorities on both sides, describe their respective tasks and arrange for cooperation.

The increasing role of civilian employees and private contractors in support of any peace operation makes it essential to clearly define their status in the host state and regulate their tasks. Some peace operations are entirely civilian in nature. This explains the relevance of SOMAs as opposed to SOFAs. The personnel involved may be individually employed, either by the sending state or by a contracting company. They may be brought to or recruited within the host state. In both cases, the UN Model SOFA, which applies to military and civilian personnel alike, provides for immunities for such civilian personnel, making an exception only for locally recruited personnel insofar as the latter do not enjoy tax exemptions (Section 15(b)), but deliberately affirming their immunity from legal process in the host state (Section 46). While this is adequate to secure effective performance of the peace operation, existing legal limitations for the work to be performed are often neither clearly regulated nor explained to those concerned. All tasks to be performed should be limited to a strictly civilian function. Attributability either to the sending state⁹² or to the organisation⁹³ should be considered, and the regulatory regime for

89 Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Art. 41(1); Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261 (entered into force 24 June 1964), Art. 55(1): 'Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.'

90 See UN Doc. A/45/594, above note 78, Sections 46–49.

91 Françoise J. Hampson and Ai Kihara-Hunt, 'The Accountability of Personnel Associated with Peacekeeping Operations', in Chiyuki Aoi *et al.* (eds), *Unintended Consequences of Peacekeeping Operations*, United Nations University Press, Tokyo, 2007, p. 198.

92 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, above note 12, Arts. 4–11.

93 Draft Articles on the Responsibility of International Organisations, above note 13, Arts. 6–9.

private companies, in particular issues of accountability and oversight requirements, made more transparent.

A number of international instruments and initiatives offer guidance on the proper conduct of private security companies and may be referred to in SOFAs. For example, the 2008 Montreux Document on Private Military and Security Companies describes pertinent international legal obligations and good practices for states and private military and security companies.⁹⁴ Moreover, an international Code of Conduct for Private Security Companies has been developed by the Swiss government in collaboration with other government experts and representatives of the private security industry.⁹⁵ The latter document incorporates internationally recognised human rights standards and promotes best practice activities to ensure supervision and accountability of private contractors. It is supported by states and civil society organisations. The UN requires adherence to this document for the hiring of private security companies by UN agencies. An open-ended intergovernmental working group was established by the UN Human Rights Council to consider the possibility of elaborating an international regulatory framework for monitoring and oversight of the activities of private military and security companies.⁹⁶ It should be in the interests of both the host state and the sending state to address the role of such companies in the SOFA and provide for cooperative solutions of contentious issues which may arise in this context.

It is a widely shared experience that in peace operations sending states and international organisations, as well as host states, often face unforeseeable challenges which may include legal and policy issues and might even lead to changes in the character of the mission. A SOFA should therefore be as flexible as possible and remain open for adaptations.

Conclusions

Gaps in the regulation and uncertainties in the interpretation of various rules may affect the practice of peace operations and jeopardise the security and safety of military and civilian personnel to an extent that may impede the effective performance of the mandate.

The 1994 UN Safety Convention and its 2005 Optional Protocol are characterised by shortcomings and a lack of adequate implementing activities by states. While a focus has been placed on criminal provisions for the prosecution of

94 Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict of 17 September 2008, UN Doc. A/63/467-S/2008/636, 6 October 2008, available at: [www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20\(e\).pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20(e).pdf).

95 International Code of Conduct for Private Security Providers, 9 November 2010, available at: www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

96 UN Human Rights Council Resolution 15/26, 7 October 2010, para. 5, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/167/42/PDF/G1016742.pdf?OpenElement>.

individual perpetrators, issues of state responsibility and the responsibility of the UN and other international organisations are not sufficiently addressed in these instruments. Their scope of application in robust forms of peace operations is unclear and, regrettably, peace operations conducted by states or regional organisations, even when authorised by the Security Council, are not formally covered. It is a particular matter of concern that, two decades after the Convention was adopted, hardly any of the many host states to a peace operation has become party to it.

While the deficiencies of the Convention should be overcome by formal amendments, this process would likely take time, and its potential results are uncertain. States and international organisations deploying military or civilian personnel abroad will negotiate SOFAs or SOMAs anyway, to define more precisely the rights and obligations of their personnel in the host state. Host states, in turn, may be more ready to enter into such negotiations than to accede to general treaties at a time of ongoing crisis in post-conflict peacebuilding, when resources are limited and activities have to concentrate on *ad hoc* measures rather than general regulation. Hence, it may be preferable to concentrate on comprehensive SOFA negotiations in the preparation of peace operations and devote some time to establishing cooperation between the host state, the sending states and the international organisation on this issue, rather than pressuring the host state to accede to a treaty which is neither comprehensive nor fully understood in all of its requirements and consequences.

SOFA negotiations, which could be preceded by provisional regulations based on Security Council decisions, ought to use standardised principles and rules and supplement them as appropriate. All participating states will need to be involved, as this may offer the best guarantee of establishing confidence in their willingness and ability for achieving cooperative solutions for faithful implementation and the settlement of any disputes. To the extent that command and control will be exercised by the UN or a regional organisation, the relevant organisation may represent the contributing states during the negotiations, but the latter should also be closely involved, as their personnel will be directly affected by the result of the negotiations.

In critical situations, status issues may become superposed by rules of IHL. Yet international organisations and participating states have a shared interest in maintaining and restoring peace rather than waging war through peace operations. They should focus on law enforcement operations and avoid peacekeepers becoming parties to an armed conflict. Strict policy rules should make their impartiality more visible, strengthen their policing role and limit any involvement in the conduct of hostilities.

Issues of state responsibility and responsibility of the international organisation involved should be clearly addressed in the SOFA. Host states must be held accountable to ensure respect for military and civilian personnel participating in the peace operation. Likewise, the SOFA should include provisions and procedures for the settlement of any claims for wrongful acts committed by peacekeepers, as it is in the interests of the peacebuilding process to settle such

claims quickly and convincingly. Effective claims settlement worked well in many peace operations.⁹⁷ It should be mandatory for any mission.

For the settlement of claims in peace operations, transparent procedures should be put in place and appropriate forms of judicial control should be ensured. It appears unacceptable under the rule of law, and counter-productive for the success of peacebuilding, if an international organisation prefers to hide behind its immunity rather than taking an active and forthcoming role in providing reparations for wrongful acts falling under its responsibility. Special procedures for judicial review of acts falling under the responsibility of the UN and other relevant international organisations are overdue.

The Secretary-General has recently been tasked with taking 'all measures deemed necessary to strengthen United Nations field security arrangements and improve the safety and security of all military contingents, police officers, military observers and, especially, unarmed personnel'.⁹⁸ Activities initiated under this mandate are yet to be taken and appropriately promulgated. Jurisdiction and control by sending states and the responsibility of the relevant international organisation should be explored in the light of current practice, taking into consideration that attacks against peacekeepers with no sufficient action taken by host states to investigate and prosecute such acts are sadly part of the reality. The occurrence of attacks and threats against humanitarian personnel and UN and associated personnel is a factor that increasingly restricts the provision of assistance and protection to populations in need: acts of wilful killing and other forms of violence, armed robbery, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention continue to endanger peacekeepers and severely jeopardise the success of current peace operations.

Existing deficiencies in legal regulations on the status of personnel participating in peace operations may challenge those seeking pragmatic solutions, but they also offer opportunities for legal innovation. Future trends in the law will be influenced by the way in which states and international organisations respond to developments in the global and regional security architecture in order to improve civil-military cooperation for post-conflict peacebuilding.

97 See, for example, Jody M. Prescott, 'Claims Operations in the Former Yugoslavia', in D. Fleck (ed.), above note 4, pp. 170–182.

98 SC Res. 2086, 21 January 2013, para. 20.

PERSPECTIVES ON IHL AND MULTINATIONAL FORCES

Observance of international humanitarian law by forces under the command of the European Union

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Abstract

In this contribution, I will identify the main issues relevant for the applicability and application of international humanitarian law (IHL) in military operations under the command of the European Union (EU) and I will briefly describe the EU's practice and policy in this respect.¹

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The planning, decision-making, command and control, and conduct of EU operations²

Key decisions in the planning and decision-making process for operations under the EU's Common Security and Defence Policy (CSDP)³ are taken by the Council of Ministers of the European Union.⁴ Legal issues are taken into account from the early stages of this process.

The planning culminates in the Operation Plan (OPLAN)⁵ and, when the use of force is authorised beyond self-defence, the Rules of Engagement

* The views expressed are solely those of the author and do not bind the Council or its Legal Service.

(ROE, requested by the Operation Commander and authorised by the Council, based on the EU's policy on the use of force⁶). The OPLAN for military operations usually contains specific annexes dealing with legal issues and with the use of force. The EU's policy on the use of force explicitly requires respect for international law and political guidance based on military and legal advice.⁷

The highest level of military command in EU military operations⁸ rests with the Operation Commander. The Operation Commander will normally receive operational control over forces put at his disposal by the participating states via a transfer of authority.⁹

Applicability and application of international humanitarian law¹⁰

EU policy on the applicability of IHL

Under Article 42(1) of the Treaty on European Union (TEU)¹¹, the CSDP shall provide the Union with a military and civilian operational capacity for 'missions

- 1 See more extensively Frederik Naert, 'Observance of international humanitarian law by forces under the command of the European Union', in Stanislas Horvat and Marco Benatar (eds.), *Recueil of the XIXth International Congress of the International Society for Military Law and the Law of War* (Québec City, 1–5 May 2012), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments*, International Society for Military Law and the Law of War, Brussels, 2013, pp. 373–404.
- 2 See Frederik Naert, 'The application of human rights and international humanitarian law in drafting EU missions' mandates and rules of engagement', in Mariano J. Aznar Gómez and Milena Costas Trascasas (eds.), *The Integration of the Human Rights Component and International Humanitarian Law in Peacekeeping Missions Led by the European Union*, CEDRI/ATLAS, 2011, pp. 61–71 (also available at: www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf). All internet references were last accessed on 30 May 2013.
- 3 See generally www.consilium.europa.eu/eeas/security-defence?lang=en; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Intersentia, Antwerp, 2010 (based on a thesis available at: https://lirias.kuleuven.be/bitstream/1979/1986/1/Doctoraatsthesis_Frederik_Naert_08-09-2008_final.pdf); and Steven Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects*, TMC Asser Press, The Hague, 2008.
- 4 See the (revised) 'Suggestions for crisis management procedures for CSDP crisis management operations', EU Council Doc. 7660/2/13, 18 June 2013, available in the public register of Council documents at: www.consilium.europa.eu/documents/access-to-council-documents-public-register?lang=en (unless stated otherwise, Council documents cited below are available there).
- 5 Sometimes called the Mission Plan.
- 6 See Concept for the Use of Force in EU-led Military Operations (partially declassified in EU Council Doc. 17168/09 EXT 1, 2 February 2010).
- 7 *Ibid.*, p. 6, paras. 1–2.
- 8 See especially EU Concept for Military Command and Control, Council Doc. 10688/08 REV 3, 13 September 2012. For civilian CSDP operations, see Council Doc. 9919/07 EXT 2, 1 February 2008 (partially declassified).
- 9 Operational Control (OPCON) is defined in Council Doc. 10688/08 REV 3, p. 25.
- 10 This section draws on Frederik Naert, 'Challenges in applying international humanitarian law in crisis management operations conducted by the EU', in Anne-Sophie Millet-Devalle (ed.), *L'Union européenne et le droit international humanitaire*, Paris, Pedone, 2010, pp. 139–150. See also generally F. Naert, above note 1; F. Naert, above note 3, pp. 463–540; and Marten Zwanenburg, 'Toward a more mature ESDP: responsibility for violations of international humanitarian law by EU crisis management operations', in S. Blockmans (ed.), above note 3, pp. 395–416.
- 11 *Official Journal of the European Union (OJ)*, C 326, 26 October 2012 (consolidated version after the Treaty of Lisbon).

outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the [UN] Charter'. These missions shall comprise, *inter alia*, 'peace-keeping tasks [and] tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation' (TEU, Article 43).¹² This includes peace enforcement.¹³

IHL applies to situations of armed conflict and occupation; thus, it also applies to peace operations when they amount to engagement in an armed conflict (or an occupation).¹⁴ Consistent with the requirement that the EU respect international law in its external relations,¹⁵ the EU and its member states accept that if EU-led forces become engaged in an armed conflict, IHL will fully apply to them.¹⁶

However, this is likely to be the case in only a few EU operations. Indeed, EU military operations have included training missions, an anti-piracy operation, and several operations closer to peacekeeping than to peace enforcement.¹⁷ EU policy is accordingly that IHL does not necessarily apply in all EU military operations,¹⁸ nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations (when not applicable as a matter of law).

In fact, EU-led forces have not so far become engaged in combat as a party to an armed conflict in any of the EU's military operations. While IHL could have become applicable if the situation had escalated in some of these operations, especially Artemis (in the Democratic Republic of the Congo) and EUFOR Tchad/RCA, this did not happen.¹⁹ Nevertheless, the EU and its member states remain fully aware of the potential obligations of EU-led forces under IHL, in particular when the situation escalates.

When IHL does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct of EU military operations (furthermore, human rights may be relevant when IHL does apply

12 See generally F. Naert, above note 3, pp. 97–191; and Frederik Naert, 'Legal aspects of EU operations', in *Journal of International Peacekeeping*, Vol. 15, 2011, pp. 218–242. In addition, Art. 42(7) of the TEU contains a mutual assistance clause.

13 See F. Naert, above note 3, pp. 197–206.

14 This is recognised, at least to some extent, in Art. 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel, New York, 9 December 1994, and in section 1.1 of the UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999, available at: www.icrc.org/eng/resources/documents/misc/57jq7l.htm.

15 See Arts. 3(5), 21(1) and (2)b–c of the TEU; and Frederik Naert, 'The application of international humanitarian law and human rights law in CSDP operations', in Enzo Cannizzaro, Paolo Palchetti, and Ramses Wessel (eds), *International Law as Law of the European Union*, Martinus Nijhoff, Leiden, 2011, pp. 189–212.

16 See e.g. the Salamanca Presidency Declaration (outcome of the seminar of 22–24 April 2002, Doc. DIH/Rev.01.Corr1, on file with the author): 'Respect for [IHL] is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party.'

17 See www.consilium.europa.eu/eeas/security-defence/eu-operations?lang=en for details on all operations.

18 Moreover, if the EU and/or its member states become a party to an armed conflict because of the actions of one CSDP operation, this may also affect the legal status of other EU operations in the same conflict area.

19 See F. Naert, above note 10, pp. 142–143.

as both regimes may apply concurrently²⁰). I cannot elaborate on this here²¹ except to say that the EU itself has extensive human rights obligations, especially under Article 6 of the TEU and its Charter of Fundamental Rights,²² and is in the process of acceding to the European Convention on Human Rights (ECHR).²³ Combined with all member states being parties to the ECHR, this limits legal interoperability challenges.

Nevertheless, the controversies regarding the applicability of human rights law to peace operations also arise for EU military operations,²⁴ notably the extraterritorial scope of application of human rights, the derogation from human rights on the basis of UN Security Council resolutions, recourse to ‘extraterritorial derogations’, and the IHL–human rights relationship.²⁵ In any event, at least as a matter of *policy*, human rights provide significant guidance in EU military operations, and in practice, EU operational planning and ROE reflect human rights standards. Moreover, some of the legal acts relating to CSDP operations explicitly require respect for human rights.²⁶

An assessment must be made for each operation of whether IHL and/or human rights law are, or may become, applicable to the mission as a matter of law and/or should be applied as a matter of policy. In addition, it may be relevant to determine the obligations of the parties in theatre.

20 See e.g. European Court of Human Rights (ECtHR), *Varnava and Others v. Turkey* (18 September 2009, para. 185) and *Al-Jedda v. UK* (7 July 2011, para. 107); and the EU’s guidelines on promoting compliance with IHL (OJ, C 303, 15 December 2009, p. 12), para. 12.

21 See F. Naert, above note 3, pp. 397–408, 418–419, and 544–567; Aurel Sari and Ramses Wessel (eds.), *Human Rights in EU Crisis Management Operations: a Duty to Respect and to Protect?*, Centre for the Law of EU External Relations, Working Paper 2012/6, The Hague, 2012, available at: www.asser.nl/upload/documents/20121221T112600-CLEER%20Working%20Paper.pdf; and Frederik Naert, ‘Applicability/application of human rights law to international organisations involved in peace operations – a European/EU perspective’, in Stéphane Kolanowski et al. (eds.), *Proceedings of the Bruges Colloquium. International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20–21 October 2011*, ICRC & College of Europe, Bruges, 2012, pp. 45–56, available at: www.coleurope.eu/sites/default/files/uploads/page/collegium_42_0.pdf.

22 OJ, C 326, 26 October 2012, p. 391. See also TEU, Arts. 3(5) and 21.

23 See ECHR, Art. 59, as amended by Protocol 14 to the ECHR and Council of Europe Doc. 47 + 1(2013)008 of 5 April 2013, available at: www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp.

24 See e.g. Doc. 47 + 1(2013)008, above note 23, pp. 5 and 19–20.

25 See the contribution by Kjetil Larsen and my response thereto in S. Horvat and M. Benatar (eds.), above note 1, pp. 324–335 and 336–344; and especially ECtHR, *Al-Jedda v. UK* and *Al-Skeini v. UK*, both 7 July 2011; as well as the agora in *Military Law and the Law of War Review*, Vol. 50, 2011, pp. 315–445.

26 See e.g. Art. 12 of Council Joint Action 2008/851/CFSP of 10 November 2008 (Atalanta), OJ, L 301, 12 November 2008, p. 33 (as amended); and Art. 3(i) of Council Joint Action 2008/124/CFSP of 4 February 2008 (EULEX KOSOVO), OJ, L 42, 16 February 2008, p. 92. These Joint Actions (now Council Decisions) are the basic legal instrument governing each EU operation. They are adopted unanimously (abstentions are possible) and *inter alia* set out the mandate, political direction, military command and control, status and funding provisions, relations with other actors, handling of EU classified information, launching and termination/duration of the operation, and participation of third states (i.e. non-EU member states). The modalities for the latter are usually agreed in participation agreements with the EU, either for a given operation (e.g. with Croatia on Atalanta, OJ, L 202, 4 August 2009, p. 84) or in a framework agreement covering participation in any EU operation (e.g. with the US (OJ, L 143, 31 May 2011, p. 2) and with Ukraine (OJ, L 182, 13 July 2005, p. 29)). See Panos Koutrakos, ‘International agreements in the area of the EU’S Common Security and Defence Policy’, in E. Cannizzaro, P. Palchetti, and R. Wessel (eds.), above note 15, pp. 157–187.

In some cases, this analysis is relatively simple: for instance, IHL does not apply to the EU's counter-piracy operation *Atalanta*.²⁷ In some cases, however, the assessment is more complex. For instance, in the case of a military mission in a theatre where an armed conflict is ongoing, a robust mandate may lead to the EU forces becoming engaged in combat and becoming a party to the conflict, even if this is not intended. This risk was present in EUFOR Tchad/RCA, for example. In such a case, the planning documents and the ROE should be flexible enough to address an escalation. There are various ways to achieve this flexibility, including defining the circumstances that will trigger more offensive/robust ROE combined with retaining such ROE at the level of the Operation Commander. Also, the Operation Commander may request additional or amended ROE.

Convergence of member states' IHL obligations and EU IHL commitments

States' different treaty obligations in the field of IHL can create problems of 'legal interoperability' in multinational operations.²⁸ However, the importance of such divergences is limited by the fact that a significant body of IHL rules has become part of customary international humanitarian law.²⁹ Furthermore, there is a marked convergence between EU member states' treaty obligations relating to IHL. All 27 EU member states are parties to the 1949 Geneva Conventions, the two 1977 Additional Protocols and the Statute of the International Criminal Court,³⁰ as well as to the 1980 Convention on Certain Conventional Weapons and the 1993 Chemical Weapons Convention. Yet even within the EU, if one looks at all IHL treaties, there are still differences because of differentiated ratifications,³¹ reservations or divergent interpretations of common obligations.

So far, IHL obligations in EU military operations seem to be primarily conceived as resting on the participating states.³² However, the EU may also have its own IHL obligations, especially under customary IHL.³³ In fact, the question of who the parties are to a conflict involving multinational operations is currently being examined by the International Committee of the Red Cross

27 SC. Res. 1851, 16 December 2008, para. 6, refers to 'applicable international humanitarian and human rights law' but the word 'applicable' leaves open the question of whether IHL does in fact apply.

28 Art. 21(3) of the 2008 Convention on Cluster Munitions specifically addresses the matter of joint operations by state parties and non-state parties. However, most treaties do not (explicitly) address this.

29 See especially www.icrc.org/customary-ihl/eng/docs/home (but note that some of the ICRC's views on this are contested).

30 Moreover, the EU strongly supports the International Criminal Court in several ways.

31 For example, Ireland and Malta are not party to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and several member states are not party to the 2008 Convention on Cluster Munitions.

32 For example, the Presidency Conclusions of the 19–20 June 2003 Thessaloniki European Council, para. 74 (available at: www.european-council.europa.eu/council-meetings/conclusions?lang=en) and the Salamanca Presidency Declaration (above note 16).

33 See F. Naert, above note 3, esp. pp. 515–537; and Zwanenburg, above note 10, pp. 400–406 and 412–415.

(ICRC).³⁴ The EU has not developed a position on this,³⁵ but it has started to make political commitments in the field of IHL. In addition to its guidelines on promoting respect for IHL (by others),³⁶ it has made pledges at recent International Conferences of the Red Cross and Red Crescent³⁷ and has signed up to the Montreux Document on Private Military and Security Companies.³⁸

Issues of attribution, responsibility, and remedies are not addressed here.³⁹ It would seem, however, that as of now, very few issues of responsibility have actually arisen in practice.⁴⁰

EU policy options and mechanisms to deal with divergences

Difficulties may arise when member states have different views on the qualification of a situation/mission and/or the applicable law.⁴¹ Fortunately, a number of factors limit such disagreements or their impact.

First, policy choices may overcome different legal positions. For instance, Finland accepted that its forces would not use anti-personnel mines in EU military

34 See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, October 2011, 31IC/11/5.1.2, pp. 30–33, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

35 Compare F. Naert, above note 3, pp. 524–526. In the framework of operation EUFOR Libya (which was established but never launched; see www.consilium.europa.eu/eeas/security-defence/eu-operations/completed-eu-operations/eufor-libya?lang=en), the question arose as to whether forces from a member state which was participating in NATO's Operation Unified Protector could participate in an EU-led operation that was to support humanitarian assistance and not be regarded as the forces of a party to the conflict in the latter operation. Compare generally Ola Engdahl, 'Multinational peace operations forces involved in armed conflict: who are the parties?', in Kjetil Larsen *et al.* (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge University Press, Cambridge, 2013, pp. 233–271.

36 See above note 20.

37 See Pledge P091 at the 30th International Conference (available at: www.icrc.org/applic/p130e.nsf/va_navPage/POAI?openDocument&count=-1); and Pledges P1311, P1318, and P1319 at the 31st International Conference (available at: www.icrc.org/pledges).

38 See www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html and the Council conclusions of 27 February 2012 on EU priorities at the UN Human Rights Council, para. 13, p. 19, available at: www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/128226.pdf.

39 See F. Naert, above note 3, pp. 355–357, 435–449, 506–526, and 641–646; and Frederik Naert, 'The international responsibility of the Union in the context of its CSDP operations', in Panos Koutrakos and Malcolm Evans (eds.), *The International Responsibility of the European Union*, Hart, Oxford, 2013, pp. 313–338. See e.g. Treaty on the Functioning of the European Union, Arts. 19(1), 274, 275, 340, and 343 and Protocol No. 7 on the privileges and immunities of the EU as well as relevant SOFAs. The EU will normally conclude a status of forces/mission agreement (SOFA/SOMA) with the host state. See Aurel Sari, 'Status of forces and status of mission agreements under the ESDP: the EU's evolving practice', in *European Journal of International Law*, Vol. 19, 2008, pp. 67–100. These are negotiated on the basis of a model SOFA or SOMA: see, on the one hand, EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR 1 of 5 September 2007; and on the other, EU Council Doc. 17141/08 of 15 December 2008.

40 For an exception relating to operation Atalanta, see a judgement of the Cologne administrative court of 11 November 2011, available in German at: www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html (under appeal).

41 For example, whether the threshold of an armed conflict has been crossed, whether a conflict has an international or non-international character, or whether the EU and/or its member states are a party to the conflict. See, in respect of multinational operations, ICRC, above note 32, pp. 10 and 31. Compare F. Naert, above note 3, p. 535.

operations even though Finland had no obligation to this effect prior to 2012. Such a policy choice may minimise legal discussions. It may be made on an *ad hoc* basis for a given mission or in horizontal policy or conceptual documents.

Second, the combination of a common OPLAN and ROE (see above) with national caveats which member states may issue in relation to their forces also allows for interoperability while ensuring respect for each member state's obligations/positions. Caveats impose further *restrictions* on the use of force or tasks and permit a member state to ensure that its forces can respect any political or legal restrictions particular to it⁴² without imposing these restrictions on the other member states. Therefore, while caveats complicate life, they are often the best solution in terms of respecting the different positions of member states.

The OPLAN should clarify as much as possible the applicable law and specify whether IHL and/or human rights law applies. However, this is not always the case, possibly in part to retain some flexibility when the situation may evolve. In this respect, references to 'applicable' rules of IHL or human rights law do not clarify whether, when or which of those rules actually are applicable and may require an Operation Commander to determine the applicable rules, with the assistance of legal advice at his/her level.

Final remarks

The EU attaches importance to respect for international law, including IHL, in its external relations. This is enshrined in its constitutive treaties and reflected in practice in its military operations.

The EU and its member states accept that if EU-led forces become a party to an armed conflict, IHL will fully apply to them. In that case, the EU is arguably bound by customary IHL, while its member states' forces also remain bound by their IHL treaty obligations. However, this has not been the case so far and will probably remain the exception. EU policy is that IHL does not necessarily apply in all EU military operations nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations (when not applicable as a matter of law). Rather, in most operations the EU looks to human rights law as a more appropriate standard.

In EU military operations, the IHL (and human rights) obligations of the EU and those of its member states are largely similar. This limits legal interoperability issues. Where such issues nonetheless arise, the EU has a number of tools to deal with them, which so far have been adequate.

42 The OPLAN and ROE cannot require a member state's forces to act contrary to their national law.

PERSPECTIVES ON IHL AND MULTINATIONAL FORCES

Perspective on the applicability and application of international humanitarian law: the UN context

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Keywords: United Nations peacekeeping operations, applicability of international humanitarian law, 1994 Convention on the Safety of United Nations and Associated Personnel, Rome Statute of the International Criminal Court.

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The applicability of international humanitarian law (IHL) to United Nations (UN) forces has long generated discussion. When peacekeepers have become engaged in hostilities of such a nature as to trigger the application of IHL (either via acts in self-defence, or in the course of carrying out a mandate as authorised by the UN Security Council under Chapter VII of the Charter of the United Nations¹), questions have arisen as to whether they should be equally subject to the rules of IHL. Such questions arise as UN peacekeeping forces act on behalf of the international community and thus have a ‘just cause’, so to speak, to use force.² Despite these questions, however, it now appears well settled that the distinction between *jus ad bellum* (the right to use force under public international law) and *jus in bello* (the law governing the conduct of hostilities) should be maintained, and that IHL applies

* The views expressed herein are those of the author in her personal capacity and do not necessarily reflect the official position of the United Nations.

in respect of UN peacekeeping operations³ whenever the conditions for its application are met.⁴ That said, questions regarding the conditions for the application of IHL, as well as its scope of application, continue to be relevant, particularly at a time when the Security Council is tasking UN operations with increasingly robust mandates.

On 28 March 2013, the Security Council adopted Resolution 2098 (2013) by which it extended the mandate of the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) and established the Intervention Brigade, a special combat force, as part of MONUSCO. '[C]onsisting, *inter alia*, of three infantry battalions, one artillery and one Special force and Reconnaissance company... under direct command of the MONUSCO Force Commander',⁵ the Intervention Brigade is mandated 'to carry out targeted offensive operations... to prevent the expansion of all armed groups, neutralise these groups, and to disarm them'.⁶ While mandates to perform enforcement tasks are not new in UN operations, this mandate has generated increased discussion about the application of IHL to UN forces, including by members of the UN Security Council in the course of adopting the resolution.⁷ For instance, Rwanda underscored 'the need to ensure that the impartiality of the military component of MONUSCO and the protection of the Blue Helmets not be endangered at any cost' and reiterated

1 For example, current peacekeeping operations, such as the UN Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO), the United Nations Operation in Côte d'Ivoire (UNOCI), the UN Stabilisation Mission in Haiti (MINUSTAH), and the African Union/UN Hybrid Operation in Darfur (UNAMID) are authorised by the Security Council under Chapter VII of the Charter of the UN to carry out tasks such as the protection of civilians under imminent threat of physical violence. See the mandates of MONUSCO under SC Res. 2098, 28 March 2013; ONUCI under SC Res. 2000, 27 July 2011, as extended by SC Res. 2112, 30 July 2013; MINUSTAH under SC Res. 1542, 30 April 2004, as extended by SC Res. 2119, 10 October 2013; UNAMID under SC Res. 1769, 31 July 2007, as extended by SC Res. 2113, 30 July 2013.

2 For example, in 1952, the Committee on Study of Legal Problems of the UN considered the question, 'should the laws of war apply to United Nations enforcement action?' Without resolving the issue, it concluded that '[t]he purposes for which the laws of war were instituted are not entirely the same as the purposes of regulating the use of force by the United Nations. This we may say without deciding whether United Nations enforcement action is war, police enforcement of criminal law, or *sui generis*.' Report of the Committee on Study of Legal Problems of the United Nations, *Proceedings of the American Society of International Law*, Vol. 46, 1952, p. 216.

3 References hereinafter to UN peacekeeping operations concern those operations which are conducted under UN command and control. Regarding the distinction between military operations conducted under UN command and control, and military operations authorised by the UN and conducted under national or regional command and control, see the comments by the UN to the International Law Commission on the responsibility of international organisations: *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN Doc. A/CN.4/637/Add.1, 17 February 2011, p. 10.

4 See Christopher Greenwood, 'International humanitarian law and United Nations military operations', in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 3–34; Daphna Shrager, 'The United Nations as an actor bound by international humanitarian law', in *International Peacekeeping*, Vol. 5, No. 2, Summer 1998, pp. 64–81; Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 159–208; Dapo Akande, 'Classification of armed conflicts: relevant legal concepts', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 64–70.

5 SC Res. 2098, 28 March 2013, op. para. 9.

6 *Ibid.*, op. para. 12(b).

7 UN Doc. S/PV.6943, Security Council provisional records of the 6943rd meeting, 28 March 2013.

‘the importance of a clear separation between the role of the Intervention Brigade and that of the regular forces of MONUSCO, whose main purpose is to protect civilians’.⁸ Guatemala voiced concerns ‘that the entire MONUSCO runs the risk of indirectly becoming a peace enforcement mission’, noting that such a development ‘would raise many conceptual, operational and legal considerations that . . . have not been adequately explored’.⁹

The notion that a UN peacekeeping operation may, by virtue of engaging in a sufficiently intense level of hostilities against another organised armed force so as to trigger the application of IHL, be considered a ‘party to an armed conflict’ gives rise to a number of concerns, not least that it appears to contradict one of the basic principles of peacekeeping – that of impartiality.¹⁰ As UN peacekeeping operations act pursuant to a mandate of the UN Security Council on behalf of the international community, the fact that a UN operation may become a ‘party to a conflict’ runs counter to the idea that such forces act in a role akin to that of an ‘international policeman’,¹¹ and that they should not promote a particular national or other political agenda.

Further, there is the understandable concern of troop-contributing countries for the safety of their personnel. The application of IHL usually entails that members of the armed forces belonging to a party to the armed conflict become lawful targets at all times during the armed conflict, including times when they are not actually engaged in combat. Civilians, of course, may not be the object of attack, unless and for such time as they take a direct part in hostilities. Subject to the application of the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter ‘the Safety Convention’),¹² which will be discussed below, these principles could also apply in respect of UN peacekeeping operations, should a peacekeeping operation become a ‘party to an armed conflict’.

Regarding the application of IHL to UN forces, as the UN is not a party to any IHL treaties, including the Geneva Conventions and their Additional Protocols, it is not formally bound by these instruments.¹³ That being said, as the

8 *Ibid.*, p. 3.

9 *Ibid.*, p. 4.

10 See UN Department of Peacekeeping Operations and Department of Field Support (DPKO/DFS), UN Peacekeeping Operations: Principles and Guidelines (the ‘Capstone Doctrine’), 2008, p. 33, available at: http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (last visited in December 2013).

11 Report of the Committee on Study of Legal Problems of the United Nations, above note 2, p. 218.

12 Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999). Art. 2(2) of the Safety Convention provides that it ‘shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies’.

13 In 1972, proposals were made that Additional Protocol I include a provision under which the Geneva Conventions would be open for accession by the UN, to apply ‘each time the forces of the United Nations are engaged in operations’. See Report of the Secretary-General, UN Doc. A/8781, 20 September 1972. However, these proposals were ultimately not adopted following an explanation on behalf of the Secretary-General that such ‘accession would raise questions as to the legal capacity of the Organisation to become a party to multilateral treaties . . . Chiefly, the lack of certain competences, including the lack of territorial jurisdiction and of disciplinary and penal authority, would make it impossible for the Organisation to discharge many of the obligations laid down in the Geneva Conventions’. *Ibid.*, para. 218.

*Reparation Case*¹⁴ makes clear, the UN is a 'subject of international law and capable of possessing international rights and duties',¹⁵ including under customary international law. The question is what rules of customary international law apply to the UN and, in particular, how the rules that are generally applicable to states may be modulated or adapted to the case of an international organisation such as the UN.

There have been a number of developments which have assisted in clarifying the scope of the UN's obligations. Dating back to its operation in the Congo in the 1960s, the UN has stipulated that its forces should 'observe the principles and spirit of the general international conventions applicable to the conduct of military personnel'.¹⁶ While this practice was followed in a number of successive operations, further clarity was provided in 1999 when the UN Secretary-General issued an internal instruction entitled 'Observance by United Nations forces on international humanitarian law'¹⁷ (hereinafter 'the Secretary-General's Bulletin'). Prepared as a 'code of conduct' at the request of the Special Committee on Peacekeeping Operations,¹⁸ the Secretary-General's Bulletin sets out minimum 'fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control'.¹⁹ Without differentiating whether a conflict is international or non-international in nature, the Secretary-General's Bulletin sets forth obligations concerning: the protection of the civilian population; means and methods of combat; the treatment of civilians and persons *hors de combat*; the treatment of detained persons; and the protection of the wounded, the sick, and medical and relief personnel. It specifies that its provisions 'do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation'.²⁰

In contemporary operations, the UN typically undertakes in its status-of-forces agreements (SOFAs) entered into with states hosting peacekeeping operations to:

conduct its operation . . . with full respect for the principles and rules of the international conventions applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949, and their Additional Protocols of 8 June 1977 and the UNESCO

14 International Court of Justice (ICJ), *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Reports 1949*, p. 174.

15 *Ibid.*, p. 179.

16 Regulations issued by the Secretary-General for the United Nations Forces in the Congo (ONUC), UN Doc. ST/SGB/ONUC/1, 15 July 1963, Art. 43.

17 United Nations, Secretary-General's Bulletin, UN Doc. ST/SGB/1999/13, 6 August 1999.

18 Report of the Special Committee on Peacekeeping Operations, UN Doc. A/50/230, 22 June 1995, para. 73.

19 Secretary-General's Bulletin, above note 17, Preamble.

20 Secretary-General's Bulletin, above note 17, Section 2.

Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict.²¹

Such SOFAs typically include a corresponding undertaking by the host state:

to treat at all times the military personnel of [the operation] with full respect for the principles and rules of the international conventions applicable to the treatment of military personnel. These international conventions include the four Geneva Conventions of 1949 and their Additional Protocols of 8 June 1977.²²

Today the issue is not so much whether the UN force should observe IHL. Depending on the mandate of the operation concerned, relevant IHL principles are incorporated into the rules of engagement of a force, and are to be applied at all times where conditions for their application arise. Rather, the issue is to determine when and for how long IHL applies. This is particularly important because the application of IHL may entail a corresponding loss of legal protection accorded to peacekeepers under the Safety Convention and the Rome Statute of the International Criminal Court (hereinafter ‘the Rome Statute’).²³

Contemporary SOFAs entered into between the UN and states hosting peacekeeping operations usually require that the host government ‘shall ensure that the provisions of the Safety Convention are applied to and in respect of the peacekeeping operation, its members and associated personnel’, and that it shall criminalise and prosecute attacks against them.²⁴ However, regarding the scope of application of the Safety Convention, Article 2(2) provides that the Convention:

shall *not* apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which *the law of international armed conflict applies*.²⁵

As such, peacekeepers would lose the protection they are granted under the Safety Convention in situations in which a UN operation, authorised by the Security Council as an enforcement action under Chapter VII, has become a party to an

21 For example, see the Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan concerning the United Nations Mission in South Sudan (UNMISS), Registration No. 48873 (entered into force on 8 August 2011), para. 6. While such provisions are not included in the ‘Model status-of-forces agreement for peacekeeping operations’ as prepared by the Secretary-General at the request for the General Assembly (UN Doc. A/45/594, 9 October 1990), they have been included in relevant SOFAs since the UN concluded a SOFA with the Republic of Rwanda in respect of the UN Assistance Mission in Rwanda (UNAMIR) on 5 November 1993, 1748 UNTS 3.

22 *Ibid.*

23 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/Conf.183/9 (entered into force 1 July 2002).

24 For example, see the Status of Forces Agreement between the UN and the Government of the Republic of South Sudan concerning UNMISS, above note 21, para. 48.

25 Safety Convention, Art. 2(2) (emphasis added).

international armed conflict.²⁶ However, as Article 2(2) only excludes the application of the Safety Convention to situations to which the law of ‘international armed conflict’ applies, the Convention would appear to continue to apply in respect of situations in which the UN operation has become a party to a non-international armed conflict.²⁷

Under the Rome Statute, however, attacks against peacekeepers in situations of both international and non-international armed conflicts will not be considered ‘war crimes’ if the peacekeeping operation has become a ‘party to an armed conflict’. Indeed, the Rome Statute only criminalises as ‘war crimes’ attacks intentionally directed against ‘personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission . . . as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict’.²⁸ As such, the Rome Statute does not differentiate between situations of international or non-international armed conflict with respect to the loss of protection of UN peacekeepers when they have become a party to an armed conflict.

With respect to the field of application of IHL, the Secretary-General’s Bulletin states that IHL applies to UN forces:

when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. [IHL is] accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.²⁹

In accordance with general principles of IHL, the writer understands that the principles and rules of IHL as set out in the Secretary-General’s Bulletin apply in respect of a UN peacekeeping operation whenever it engages in such a level of hostilities with a state or sufficiently organised non-state armed group as would render it a ‘party to a conflict’. This could occur either (i) in the course of performing an ‘enforcement mandate’ authorised under Chapter VII of the Charter of the UN, or (ii) when using force in self-defence. In either case, the fighting would need to reach the intensity of an ‘armed conflict’ so as to trigger the application of IHL.

While it is clear that IHL applies whenever the factual conditions for its application arise, it is not always apparent, as a practical matter, when that threshold has been met. As peacekeeping forces are typically deployed with the consent of the host state, most situations in which peacekeeping operations are likely to become involved in an armed conflict concern those to which the law of non-international armed conflicts would apply. As the law concerning non-international armed conflicts is not as well developed as that regarding international armed conflicts,

26 See M.-Christiane Bourloyannis-Vrailas, ‘The Convention on the Safety of United Nations and Associated Personnel’, in *International and Comparative Law Quarterly*, Vol. 44, 1995, pp. 567–568, for further discussion concerning the scope of the exclusion in Art. 2(2) of the Safety Convention, including the reference to UN operations authorised by the Security Council as an ‘enforcement action’ under Chapter VII of the Charter of the UN.

27 See Report of the Secretary-General on Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/55/637, 21 November 2000, note 3.

28 Rome Statute, above note 23, Arts. 8(2)(b)(iii) and 8(2)(c)(iii) (emphasis added).

29 Secretary-General’s Bulletin, above note 17, Section 1.1.

and there is little international jurisprudence concerning its application in the context of UN operations, there is minimal guidance as to its scope of application.³⁰

For example, regarding the factual conditions for the application of IHL, where peacekeepers provide support to state armed forces involved in a pre-existing conflict with non-state armed groups, what level of support would be required to render the UN operation a 'party to a conflict' with those non-state armed groups?

While such issues have to date been largely theoretical, recent developments in UN peacekeeping have made them increasingly relevant. In 2008, the UN Security Council acting under Chapter VII of the Charter mandated the UN Organisation Mission in the Democratic Republic of the Congo (MONUC) to carry out a broad range of tasks, including to 'support operations led by and jointly planned with [FARDC³¹-integrated] brigades' with a view, *inter alia*, to disarming recalcitrant local and foreign armed groups and securing the release of children associated with such groups.³² More recently the Security Council requested the Secretary-General to report on options under which the UN would provide logistics support to the African-led International Support Mission in Mali (AFISMA)³³ – a task which seemed at one point might fall to be discharged by the UN special political mission established pursuant to Security Council Resolution 2085 (2012). Matters have since evolved;³⁴ however, these examples, as well as MONUSCO's recently extended mandate under Resolution 2098 as discussed above, demonstrate that the questions posed above are currently of practical significance for the UN.

In addition, once the threshold for the application of IHL is met, what is its temporal and geographical scope of application? Does IHL apply in respect of peacekeepers in areas where they are not engaged in actual combat? This is particularly relevant in situations where peacekeepers may be deployed throughout a large territory and are carrying out a range of tasks, including purely humanitarian ones, under their mandate.

In conclusion, issues concerning the application of IHL in respect of UN operations continue to stir discussion. While it is clear that IHL applies in respect of UN operations once the factual conditions for its application are fulfilled, such application continues to raise practical questions, particularly in relation to its scope. As peacekeeping operations are often tasked with multi-dimensional mandates involving a range of responsibilities, the loss of protected status may conceivably compromise their ability to undertake their mandates. In light of these considerations, it is submitted that when mandating UN operations with enforcement tasks, the UN Security Council may wish to consider the full

30 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules, ICRC, Cambridge University Press, Cambridge, 2005, for helpful guidance on many issues concerning the application of customary law in the context of non-international armed conflicts.

31 Armed Forces of the Democratic Republic of the Congo.

32 SC Res. 1856, 22 December 2008, op. para 3(g).

33 See SC Res. 2071, 12 October 2012; SC Res. 2085, 20 December 2012; letter dated 20 January 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/37.

34 However, UN support for AFISMA from the trust fund established pursuant to SC Res. 2085, 20 December 2012, may still raise questions until the new UN peacekeeping mission, MINUSMA, commences its military operations pursuant to SC Res. 2100, 25 April 2013.

implications of its peacekeeping operations becoming subject to the application of IHL. This may require the taking of certain measures to ensure the safety and security of its personnel, the provision of additional resources in the event that its personnel are required to intern large numbers of fighters in the course of performing their operations, and consideration as to whether all aspects of particular mandates may realistically be performed within such an environment.

PERSPECTIVES ON IHL AND MULTINATIONAL FORCES

A NATO perspective on applicability and application of IHL to multinational forces

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Questions of the applicability and application of international humanitarian law (IHL) to multinational forces are of central interest to the North Atlantic Treaty Organisation (NATO, also referred to as ‘the Alliance’ or ‘the Organisation’). Far from being incidental, multinational military coordination is the Organisation’s *raison d’être* and the driving concept behind its methods, history and operations. Since the end of the Cold War, it has conducted a series of major multinational military operations – in and around the Balkans, Afghanistan, Libya and elsewhere – in which questions of the application of IHL have inevitably arisen.

NATO’s perspectives on such issues derive from certain basic features of the Organisation itself. The Alliance was established by a group of sovereign states which were politically closely aligned; which had a shared consciousness of being under the shadow of a massive ideological, strategic and military threat; and which together concluded that their individual national security interests were best

* The views expressed in this article are those of the author and do not necessarily reflect official NATO policy.

pursued, particularly in Europe, by coordinated action in the military as well as the political sphere.

Although much has changed in the two-thirds of a century since the conclusion of the Washington Treaty that created NATO, the structure and methods that followed from these origins are central to how NATO operates today – notably in the tight control that the Allies maintain over NATO actions. Although the popular perception may be otherwise, NATO is not a free-standing entity differentiated from its member states; rather, the Organisation was created as a mechanism for coordination of a group of sovereign states, and is better understood as a tool, or set of tools, available for use by the Allies when and if they wish to do so. Of particular relevance to the topic under discussion is that NATO has policies and takes actions only when and to the extent that doing so has been specifically approved by the North Atlantic Council – NATO’s supreme governing body, made up of ambassadorial representatives from all twenty-eight Allied states. Since such decisions must be taken by consensus, as a practical matter any member state can effectively veto any proposed policy or action. Moreover, the actions taken by NATO in conducting military operations are, with only a few exceptions for assets owned by the Alliance collectively, carried out by contingents provided by, and under the command of, the participating individual Allies or NATO operational partners – and over which those states retain ultimate, and often substantial daily, control.

All Allies are party to the core IHL instruments – the 1949 Geneva and earlier Hague Conventions – and are thus subject to the conventional obligations forming the heart of IHL. They also share broadly common views regarding IHL obligations arising under customary law. Equally importantly, after as much as six decades of training and operating together, they have developed common understandings of how to implement those obligations in operations. Consistent with the progressive adoption of common standards across the range of Alliance military activities, all NATO military forces follow a largely common curriculum in educating their personnel in the rules and responsibilities of IHL. The Allies accept as a given that the Alliance must comply with IHL obligations in conducting its operations, and expect the Alliance to set the standard for the lawful conduct of military operations. Faithful compliance with IHL obligations is thus at the core of the conception, planning and conduct of Alliance military operations, and non-NATO troop-contributing states are expected to share that perspective.¹

The Alliance is nonetheless made up of sovereign states, and both the overall content of their international legal obligations and the national legal frameworks through which those states implement their IHL obligations vary significantly. Members of the Alliance have accepted differing substantive obligations with respect to certain weapons, such as anti-personnel mines and cluster munitions. Even in circumstances where Allies have formally identical

1 Although not an issue to date, this expectation could be put to the test if NATO were to conduct military operations involving active participation by states with less robust training programs and traditions of compliance with IHL.

international obligations, the concrete content of their obligations may be interpreted differently in certain cases – for example, with respect to the specific categories of persons subject to detention. They may also be subject to different legal obligations and adjudicatory mechanisms that will affect their understanding and application of IHL: twenty-six out of twenty-eight Allies are subject to the rulings of the European Court of Human Rights, whose jurisprudence increasingly ventures into areas formerly considered to fall exclusively within the realm of IHL as *lex specialis*, and twenty-seven are party to the Rome Statute creating the International Criminal Court. For these reasons, there are limits to the degree to which one can speak of ‘NATO doctrine’ on the application of IHL in military operations, or regarding its specific content.

There is room for debate with respect to the specific rules applicable to actions of multinational military peace and peacekeeping forces, or to those conducting operations under a Security Council mandate. It is not clear, however, that the answer to this question has a great effect on NATO from a practical operational perspective, because NATO’s focus is on planning and conducting operations under operation plans (OPLANs) and rules of engagement (ROE) that are consistent with the legal rules that each individual Ally and participating partner considers applicable within its legal framework.² As a practical matter, for example, while some question whether IHL is strictly speaking applicable to actions taken in the implementation of a United Nations (UN) mandate, the NATO air campaign directed at protecting civilians in Libya was conducted as if it was properly considered part of an international armed conflict entailing application of the rules of IHL appropriate to such a conflict.³

One highly charged issue relating to the application of IHL in the context of a NATO-led operation has been that of treatment of persons detained by the International Security Assistance Force (ISAF) forces in Afghanistan. The issue is politically salient and has been faced continually by NATO forces throughout their decade-long presence in Afghanistan. Because each detainee is captured by a unit of a specific nationality, however, responsibility for his or her treatment thereafter falls to that individual participating state, and is determined by that state’s own understanding of its IHL obligations toward detainees, including the implications of its classification of the conflict. The ISAF commander has no authority to dictate a common general policy on detentions, and the Allies have not considered it necessary to agree on one.

2 Note, in this regard, that individual Allies had at times sharply differing views regarding the legal basis for conducting Operation Allied Force (the 1999 NATO air campaign in the context of the Kosovo conflict). It was unnecessary for the Alliance to agree on a specific legal basis, however, because there was no disagreement on the lawfulness of the campaign or on the ROE to govern its conduct.

3 See also letter of 23 January 2012 from the NATO legal adviser to the chair of the International Commission of Inquiry on Libya, in which NATO accepted that IHL was the *lex specialis* applicable to armed conflict and, by implication, the legal standard against which its actions would be tested in the element of NATO’s Operation Unified Protector aimed at preventing attacks on civilians in Libya. Human Rights Council, Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68, 2 March 2012, Annex II.

A second recent context in which questions of compliance with IHL by NATO were raised was that of designation of Libyan targets during Operation Unified Protector (OUP). By contrast with the detentions situation, identification of targets and planning for striking them was conducted by multinational staff at the NATO operational headquarters, and orders to conduct those strikes were issued by the NATO operational commander on the basis of general criteria agreed by Allies in the OUP OPLAN and the authority vested in him by the North Atlantic Council. The strikes themselves, however, were carried out by units under national command within the overall NATO operational context.

These two examples highlight one of the most difficult questions associated with application of IHL in NATO operations – the attribution of responsibility for violations of that body of law. Like the UN, the EU, the African Union and others, NATO conducts its military operations through volunteered contingents of national forces, a practice potentially raising the question of whether legal responsibility for an alleged violation of IHL or another applicable body of law falls to the Organisation or to the contributing state whose forces are involved in a given incident.

It may in some circumstances be appropriate to attribute actions to the Organisation even when those actions are taken by members of national forces – as, for example, in the earlier-noted case in which targets to be struck in Libya were designated by the NATO commander, a Canadian general officer, exercising authority granted him by the North Atlantic Council.⁴ With such limited exceptions, however, national contingents participating in NATO operations generally possess considerable scope to condition their actions on their national rules and policies. In NATO practice, for example, the individual forces involved may be made available only subject to national ‘caveats’ based on national policy or legal obligations that limit how those contingents can be employed in an operation, or may even in some circumstances decline to carry out an individual mission within an operation. While such limitations might challenge commanders of a multinational military operation, they are an accepted feature of the landscape at least in the NATO context.

What may differentiate the situations of NATO and other entities conducting multinational military operations, however, is the fact that actions of the Organisation are, under NATO rules, indistinguishable from the collective, common action of all its individual member states. Because every major NATO decision is taken by the North Atlantic Council rather than by the Secretary-General, each such decision entails a consensus process in which no Ally can be

4 Note in this context the determination of the International Criminal Court’s Office of the Prosecutor that it had no information to suggest that the actions of the North Atlantic Council in approving OUP, or of the operational commander in carrying out that operation, raised issues of compliance with legal obligations falling within its jurisdiction. While suggesting the theoretical possibility that participating states might bear individual responsibility for the conduct of specific strikes, the Office of the Prosecutor cited no evidence suggesting that any misconduct had in fact occurred. Office of the Prosecutor of the International Criminal Court, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), 16 May 2012, paras. 57 and 58.

outvoted and for the outcome of which each Ally therefore bears responsibility. Every NATO operation is thus initiated by the consensus authorisation of all Allies; every OPLAN and every set of ROE, and every amendment to them, is similarly approved by consensus of all Allies. The Allies decide when to initiate an operation, and when to terminate it.⁵ In such contexts, it may seem anomalous to ascribe a responsibility to NATO as a whole, in distinction to the individual states participating in an operation.

Fortunately, NATO has to date not had to face serious legal questions relating to the allocation of responsibility for alleged violations of IHL. This fact is far from accidental, however, and reflects the seriousness with which the Organisation, its member states and NATO operating partners take their responsibility to comply fully with their obligations under IHL.

5 While non-NATO participating states do not have a formal decision-making role, they are full participants in 'NATO+N' meetings at which operational issues are discussed and proposed decisions are developed, and retain the same freedom to cease participating as they exercised in joining the operation.

DEBATE

How does the involvement of a multinational peacekeeping force affect the classification of a situation?

Eric David and Ola Engdahl

The ‘debate’ section of the Review aims at contributing to the reflection on current ethical, legal, or practical controversies around humanitarian issues.

*In this issue of the Review, we invited two experts in international humanitarian law (IHL) and multinational peace operations – **Professor Eric David** and **Professor Ola Engdahl** – to debate on the way in which the involvement of a multinational force may affect the classification of a situation. This question is particularly relevant to establishing whether the situation amounts to an armed conflict or not and, if so, whether the conflict is international or non-international in nature. This in turn will determine the rights and obligations of each party, especially in a context in which multinational forces are increasingly likely to participate in the hostilities.*

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Eric David*

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The question raised in this issue of the *Review* is all the more difficult in that it is extremely general and the answer is not codified in positive international law – but this also makes it that much more intriguing to consider! The question does not specify whether or not the multinational peacekeeping force is involved in the context of an armed conflict or whether it has been given a coercive mandate. Nor does it specify if it concerns a United Nations (UN) multinational peace force or one led by a regional organisation or by states. The conclusions of the present analysis mostly concern the multinational peace operations deployed or authorised by the UN Security Council.

We have construed the question as follows: when a multinational peacekeeping force is deployed in a country, how are we to qualify its relations with any forces opposing its action? If its confrontation with adverse forces amounts to an armed conflict and if that conflict is classified as international, can we consider that the situation of general unrest in the country as a whole has become an international armed conflict?

In our view, under international law as it stands today, the effect of the presence of a multinational peacekeeping force in a country on the classification of the situation in that country depends chiefly on the nature of the mandate conferred to the force. As multinational peacekeeping forces tend to be deployed in situations of serious unrest rather than in peaceful lands, two hypotheses have to be considered: either the multinational peacekeeping force does not have a coercive mandate under Chapter VII of the UN Charter and is a *peacekeeping force*, or it has been given such a mandate and is therefore a *peace-enforcement force*.

Multinational peacekeeping forces deployed without a Chapter VII-like coercive mandate

Most multinational peacekeeping forces established by the UN Security Council (to date over eighty¹) are usually entrusted with overseeing a ceasefire; in the past twenty years they have also often been mandated to help restore the rule of law and respect for human rights in the countries in which they are deployed. These are not enforcement actions. The members of these *peacekeeping forces* are armed, it is true,

* The author wishes to thank M. Vaios Koutroulis, assisting professor at the Université Libre de Bruxelles (ULB), for his valuable observations.

1 For a list of these operations, see Eric David, *Droit des organisations internationales*, 22nd ed., Presses Universitaires de Bruxelles, 2012, para. 3.3.5.

but only so that they can exercise their right to self-defence in the event of an attack or if they are prevented from discharging their mandate.²

Even if the multinational peacekeeping force is deployed in a situation akin to a non-international armed conflict, its role is essentially the same as that of a service tasked with ensuring respect for law and order; as such, it is not a party to the ongoing conflict and its presence will not internationalise the conflict as a whole. By way of comparison, Article 43(3) of Additional Protocol I to the 1949 Geneva Conventions contains the following significant provision: ‘Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties.’ Thus, unless it has a specific coercive mandate, the multinational peacekeeping force is not one of the forces in combat and its presence does not transform a situation of internal tension or disturbances into an armed conflict; even if the situation in the country is akin to an armed conflict, the presence of the multinational peacekeeping force does not internationalise the conflict because the force does not participate in it.

In some cases, however, clashes between the multinational peacekeeping force and one of the belligerents deteriorate to the point that they become a genuine armed conflict between the two sides, in that both engage in open hostilities and are subjects of public law that may appear to be ‘parties to the conflict’³: the state or insurgents on one side, and the international organisation on the other. Thus, when the Rwandan armed forces captured and massacred ten Belgian soldiers from the UN Assistance Mission for Rwanda (UNAMIR) on 7 April 1994, it can be said that, for at least one morning (the time during which the Belgian soldiers were detained and massacred⁴), an international armed conflict existed between the UN and Rwanda.⁵ This being the case, the UNAMIR commanding officer, Canadian General R. Dallaire, would have been well advised to bring this fact to the attention of the Rwandan authorities in order to make them aware of the extreme legal consequences of the clash, no matter how brief, between Rwanda and the UN. The International Criminal Tribunal for Rwanda was no better advised than General Dallaire, however, for it convicted Colonel Théoneste Bagosora, prime minister in the interim Rwandan government at the time, for his responsibility in the massacre on the grounds that he had violated Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II – that is, provisions applicable in a *non*-international armed conflict! This shows the extent to which the simple logic of our earlier observations is far from being shared by everyone.

And yet that is the logic underpinning the UN Secretary-General’s Bulletin on ‘Observance by United Nations forces of international humanitarian law’,⁶

2 *Ibid.*, para. 3.4.67.

3 For more on these points, see Eric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, paras. 1.68ff.

4 For further details on the case, see International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Theoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva*, ICTR-98-41-T, Judgment and sentence (Trial Chamber I), 18 December 2008, paras. 18ff.

5 For more on this example, see E. David, above note 1, paras. 3.4.73ff.

6 United Nations, Secretary-General’s Bulletin, UN. Doc. ST/SGB/1999/13, 6 August 1999 (hereinafter the Bulletin).

certain sections of which would seem to conclude that a multinational peacekeeping force's armed opposition to another belligerent constitutes an armed conflict, even an international armed conflict. Indeed, under Section 1.1 of the Bulletin:

the fundamental principles and rules of international humanitarian law set out in the Bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged . . . therein as combatants . . . They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

In other words, even if the role of the multinational peacekeeping force is, from some points of view, reminiscent of that of a service tasked with maintaining public order, the Bulletin nevertheless obliges it to comply with the rules of IHL, which, by definition, apply only in armed conflicts. Thus, although the presence of the multinational peacekeeping force does not legally transform the situation into an armed conflict, an external observer might be tempted to believe that it does so transform the situation, given the nature of the rules that the multinational peacekeeping force must respect.

Such an observer might even consider that the presence of the multinational peacekeeping force constitutes an international armed conflict since Section 8 of the Bulletin provides that UN forces must 'treat' the members of the armed forces that they detain in compliance with the Third Geneva Convention on prisoners of war,⁷ and since prisoner-of-war status applies only in international armed conflicts. That reasoning would be incorrect: 'treatment' is not equivalent to 'status', and it would therefore be excessive to construe the rule set out in Section 8 as proof that the presence of the multinational peacekeeping force internationalises the relationship of conflict between it and the party responsible for the persons arrested.

In conclusion, while the Secretary-General's Bulletin obliges multinational peacekeeping forces to apply the rules of IHL, that does not mean that the deployment of a multinational peacekeeping force without a coercive mandate in a situation of disturbances transforms that situation into an armed conflict or even an international armed conflict. This is confirmed by the United Nations Convention of 9 December 1994 on the Safety of United Nations and Associated Personnel. Article 2 of that Convention states that it does not apply to UN operations authorised by the Security Council as an enforcement action under Chapter VII of the UN Charter,⁸ because such actions imply a situation of belligerency covered by

7 *Ibid.*, Section 8: 'The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, *they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them mutatis mutandis*' (emphasis added).

8 Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999), Art. 2: 'This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.'

IHL, which is not the case with operations conducted solely for the purpose of ‘maintaining or restoring international peace and security’.⁹ Any violent attack directed against the members of a non-belligerent force in such a case is therefore defined as a crime under international law.¹⁰

Multinational peacekeeping forces deployed with a Chapter VII-like coercive mandate

Since the UN Operation in the Congo in 1962 (ONUC), the Security Council has explicitly authorised UN multinational peacekeeping forces in about a dozen instances to use ‘force’ or ‘any means’ to meet their assigned objective: Bosnia and Herzegovina, Somalia and Mozambique in 1992; Rwanda in 1993; Sierra Leone and East Timor in 1999; the Democratic Republic of the Congo in 2000; Liberia in 2003; Côte d’Ivoire, Burundi and Sudan in 2004; and Lebanon in 2006.¹¹

Those situations shared two main features: first, the multinational peacekeeping forces could use armed force to discharge their mission, and second, they could end up fighting either governmental forces or organised armed groups similar to a ‘party to the conflict’ within the meaning of Common Article 3 of the 1949 Geneva Conventions, and thereby find themselves in a situation of armed conflict governed by IHL.¹²

In such situations, the armed operations of multinational peacekeeping forces constitute an armed conflict for the reasons set out in the conclusion to the first part of this article: by stating that the 1994 Convention does not apply to enforcement actions by a multinational peacekeeping force acting under Chapter VII of the UN Charter, Article 2 of the Convention confirms that the situation is one in which the rules of ordinary criminal law criminalising murder, deliberate assault, the destruction of property, etc., *do not apply* – that is, an armed conflict, in which one can kill, wound, deprive of freedom or destroy, provided one does so in accordance with the law of armed conflicts, as Article 2(2) says.

Section 8 of the Secretary-General’s Bulletin could lead to the same conclusion: by providing that the troops captured by a multinational peacekeeping force must be treated in conformity with the rules of the Third Geneva Convention, Section 8 suggests that the armed operations of a multinational peacekeeping force are akin to an international armed conflict. This would certainly be the case if the multinational peacekeeping force was empowered to take coercive action and ended up capturing members of the opposing forces. The Bulletin does not say, however, that the captured combatants *must* benefit from prisoner-of-war

9 *Ibid.*, Art. 1(c)(i): “‘United Nations operation’ means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control: (i) Where the operation is for the purpose of maintaining or restoring international peace and security. . .”.

10 *Ibid.*, Art. 9.

11 For references and greater detail, see E. David, above note 1, paras 3.4.70ff.

12 E. David, above note 3, paras 1.74ff.

status; it merely says that they must be treated with due regard for the Third Geneva Convention, while specifying that said treatment shall be ‘without prejudice to their legal status’. The Bulletin therefore leaves open the question of the status of combatants captured by a UN force. The fact, however, that the multinational peacekeeping force has to treat captured combatants in accordance with the Third Geneva Convention would seem to indicate that, in the eyes of the UN Secretary-General, the Third Geneva Convention applies, if not in respect of the captured combatants’ status, at least in respect of their treatment. The intervention of the multinational peacekeeping force would therefore constitute an international armed conflict.

However, the Bulletin does not settle the question of the captured combatants’ legal status. Its silence on this issue is probably due to the fact that if the UN refused to grant such combatants prisoner-of-war status, their mere participation in the hostilities would become a criminal offence, and the UN has no legal authority to penalise criminal offences (except in the special case of the international criminal tribunals it has established for that purpose). The fact remains that the Bulletin’s reference to the Third Geneva Convention tends to confirm that enforcement action by a multinational peacekeeping force is tantamount to an armed conflict. The nature of the mandate conferred on the multinational peacekeeping force would therefore appear to determine the legal classification of the conflict in which it is involved.

Internal or international armed conflict?

If the multinational peacekeeping force is established by the Security Council, it becomes a subsidiary organ of the latter and has the same legal personality as the UN. As the legal personality of the UN is separate from that of the state in which the multinational peacekeeping force is deployed, the hostilities between the multinational peacekeeping force and the forces it is fighting take the form of a clash between two distinct international legal personalities.¹³

Should a distinction be made between situations in which the forces opposing the multinational peacekeeping force are government troops and those in which they belong to a non-state armed group? If the opposing forces are government troops, the international character of the opposition is obvious, since the multinational peacekeeping force is the same as an international organisation – usually the UN – and the government troops are an organ of the state they represent. The answer is no different if the opposing forces are an organised armed group: that group may also claim to represent the state, a point which if not

13 See Vaios Koutroulis, *Les relations entre le jus contra bellum et le jus in bello: étanchéité absolue ou vases communicants?*, ULB thesis, 2011 (to be published by Bruylant), pp. 198–200 ; *idem*, ‘International organizations involved in armed conflict: material and geographical scope of application of international humanitarian law’, in *Proceedings of the 12th Bruges Colloquium, International Organisations’ Involvement in Peace Operations: Applicable Legal framework and the Issue of Responsibility*, 20–21 October 2011, Collegium No. 42, Autumn 2012, College of Europe/ICRC, 2012, pp. 32–36.

conceded would violate the principle of non-intervention¹⁴ unless the Security Council or General Assembly has determined differently.¹⁵ As a reminder, the principle of non-intervention does not distinguish between the government and the population: it prohibits intervention in the internal affairs of a 'state' without specifying whether the intervention is in favour of the government or in favour of an insurgent armed group.¹⁶ Since the population is a constitutive element of the state, like the government, intervening against one in favour of the other means fighting against a constitutive element of the state, and thus against the state itself. This is why a confrontation between an international organisation and an insurgent armed group remains one between this organisation and the state to which the group belongs, and therefore an international armed conflict.

The last question is whether the international nature of the conflict is limited to the bilateral relations between the multinational peacekeeping force and the adverse party, or whether it spreads to the entire conflict, to the point that the relations of conflict between the local parties thereto (government and insurgents or organised armed groups between themselves) are also internationalised. Again, this type of situation is not codified and we can therefore do no more than extrapolate from the existing rules. In our view, it runs counter to the general spirit of IHL for combatants to be treated differently depending on whether they were captured by a foreign force – in this case, by a multinational peacekeeping force – or by a national force: discrimination of this kind would be incompatible with the spirit of the law, even though the matter was not regulated with this in mind.¹⁷

In addition, the now classic criterion for deeming that an internal armed conflict has been internationalised by a foreign intervention – overall control by the foreign state over one of the parties to the conflict¹⁸ – can, of course, be transposed to a multinational peacekeeping force, but we know of no case in which a multinational peacekeeping force has exercised such control over a belligerent in an internal armed conflict. It would not be far-fetched, however, to imagine that such a situation could arise. It is a question of fact to be determined on a case-by-case basis. A significant precedent is the Vietnam War, in which the ICRC asked the parties to consider that, in view of the spread of the conflict, the hostilities be governed by all the rules of IHL.¹⁹ The question nevertheless remains: from what moment on can a conflict be deemed sufficiently widespread to consider that it has been internationalised by external interventions? The law provides no response. It is left to the qualifying authority to find a reasonable answer.

14 See E. David, above note 3, para. 1.117a.

15 *Ibid.*

16 See GA Res. 2625 (XXV), 3rd principle.

17 Art. 12 of GC I; Art. 12 of GC II; Art. 16 of GC III; Art. 27 of GC IV; Preamble, para. 5, of Additional Protocol I; ICRC, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005, Rule 88. See also E. David, above note 3, para. 1.121.

18 *Ibid.*, para. 1.112.

19 *Ibid.*, para. 1.118.

Conclusion

To sum up, for the reasons given above, the influence of a multinational peacekeeping force on the classification of a conflict would appear to depend on the mandate with which it has been entrusted. If that mandate is not coercive in nature, the multinational peacekeeping force plays a role that brings to mind that of the state's forces of law and order, even though, as a rule, the multinational peacekeeping force does not identify itself with such a force. It may however happen that, in the discharge of its mandate, the relationship between the multinational peacekeeping force and one of the parties reaches a level of open hostilities amounting to a genuine situation of armed conflict. In that case, the law of armed conflicts should apply. Certain provisions of the 1994 Convention and of the 1999 Secretary-General's Bulletin confirm that conclusion.

If the Security Council gives the multinational peacekeeping force a coercive mandate, the military operations conducted by that force are a form of armed conflict governed by IHL, provided that they consist in open hostilities between the multinational peacekeeping force and government troops or armed groups that are sufficiently well organised to be termed a 'party to the conflict'. Such a conflict can be classified as international in that it opposes clearly distinct legal personalities under international law.

Does such internationalisation encompass the relations of conflict between local belligerents? International positive law does not reply to the question, but it can be argued that this is indeed the case, either for humanitarian reasons of non-discrimination between captured combatants, or by application of the theory of overall control if the multinational peacekeeping force exercises such control over the belligerent it supports, in accordance with the criteria established in the case-law to evaluate the influence of intervention by a third state on the internationalisation of an internal armed conflict.

In conclusion, in the absence of a specific rule and of precedents for measuring the influence of the involvement of a multinational peacekeeping force in a conflict on the international status of that conflict as a whole, the question has to be resolved on a case-by-case basis by the players themselves or by a third party that can take account of the humanitarian requirements and factual elements, such as the extension of the conflict, for which positive law provides no form of measure. In our view, however, there is no doubt that the enforcement action of a multinational peacekeeping force in a state gives rise to conflict relations that are international in nature between that force and the party it is combating.

A rebuttal to Eric David

Ola Engdahl

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Multinational peacekeeping forces are often deployed in areas characterised by violence that sometimes even qualify as armed conflict, and there is always the risk of their becoming involved in the armed conflict in question. Some argue that peacekeeping forces can never become involved in armed conflicts, while others maintain that an armed conflict would, in such a case, be internationalised, irrespective of the nature of the opposing forces. Such assertions have primarily been based on two characteristics of peacekeeping forces. The first is the fact that such forces act under a UN mandate. When implementing a decision by the UN Security Council, the forces concerned are representatives of the international community and thus act on a higher moral ground than that of their opponents. According to them, if peacekeeping forces would become involved in an armed conflict anyway, they should be held to the highest possible standards, which are those rules applicable to international armed conflicts (IACs). The second characteristic concerns the multinational nature of a peacekeeping force. The involvement of a peacekeeping force in an armed conflict would bring such a strong international element to it that it would, in fact, become internationalised.

I contend in this article that a mandate from the UN Security Council only concerns the authority to use force, which belongs to the law known as *jus ad bellum*, while the determination of the classification of an involvement in an armed conflict is decided solely on the basis of *jus in bello* considerations, where the analysis is based on the facts on the ground. Furthermore, the article argues that one needs to identify each party to any particular situation and determine the nature of the conflict by examining all of the bilateral relationships between the particular parties. Finally, the effects of internationalising an armed conflict are discussed.

The mandates of peacekeeping operations

The classical peacekeeping operation lacks enforcement powers, and its members may only use force in self-defence. This may be contrasted with so-called 'peace

enforcement operations', which are decided under Chapter VII of the UN Charter and include a right to use force to achieve a certain objective, and not only for reactive purposes. Irrespective of the nature of the mandate, consent of the host state is almost always received in some form and it is only in extreme situations, such as the Libya operation of 2011, that an operation is launched without the consent of the host state.²⁰ This does not mean that there is always the consent of other stakeholders within the territory of the state.

The practice of the UN Security Council has been geared towards a more common use of Chapter VII mandates authorising the use of 'all necessary measures' (or words to that effect) to fulfil certain parts of the mandate.²¹ This practice increases the possibility of peacekeeping forces becoming involved in an armed conflict. The default position, however, is almost always a 'law enforcement' mode where the operation aims to assist the state in stabilising the country in question and creating conditions for peace. It is only in exceptional cases that peacekeeping operations become involved in armed conflicts. The International Security Assistance Force (ISAF) operation in Afghanistan and the new Intervention Brigade of the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) may be considered contemporary examples.

It should also be noted that the classical divide between peacekeeping and peace enforcement operations has become blurred. The UN, for example, in its 'Capstone Doctrine' has referred to the notion of 'robust peacekeeping', which includes enforcement powers as long as there is the consent of the host government.²² Terms such as 'peacekeeping operations' and 'peace enforcement operations' lack clear legal definitions and can mean different things to different actors. The relevance of such terms may indeed be questioned from a legal point of view. For the purpose of this article, however, 'peacekeeping' will be used as a term of convenience denoting multinational operations based on a mandate from the UN Security Council regardless of whether such a mandate is grounded in Chapter VII.

Professor David attaches significant importance to the mandate as a criterion for establishing whether or not a particular peacekeeping force has become involved in an armed conflict. I argue that the nature of the mandate may affect the *probability* of becoming involved in such conflict, but in law, the authority to use force (*jus ad bellum*) does not affect the existence of an armed conflict (*jus in bello*). In the case of peacekeepers being authorised to use force only in self-defence, there is an argument that it would not have been the intention of the UN Security Council that the peacekeepers concerned would become involved in armed conflict. However, if a peacekeeping force is *de facto* drawn into an armed conflict, the

20 See SC Res. 1973, 17 March 2011. It should be noted that the consent of the state in which territory the operations is conducted is not necessary under Chapter VII of the UN Charter.

21 See, for example, SC Res. 1528, 27 February 2004, op. para. 8 (UNOCI in Côte d'Ivoire); SC Res. 1244, 10 June 1999, op. para. 7 (KFOR in Kosovo).

22 UN Department of Peacekeeping Operations and UN Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* ('Capstone Doctrine'), 2008, p. 34, available at: http://pbpu.unlb.org/pbps/library/capstone_doctrine_eng.pdf. The Capstone Doctrine is an internal UN document which 'sits at the highest-level of the current doctrine framework for United Nations peacekeeping': *ibid.*, p. 9.

mandate in itself could not prevent such an involvement.²³ The mandate of the Security Council does not provide instruction on whether forces are to participate in armed conflict. The fact that ISAF forces became involved in the armed conflict in Afghanistan was not stipulated in the mandate, and the UN Security Council has not found a need to change the mandate in accordance with that situation. The so-called 'Intervention Brigade' participating in the MONUSCO operation is indeed the first mandate in which the Security Council has provided a more explicit mandate to engage in armed conflict.²⁴ However, the existence of such an armed conflict would be based on the *actual conduct of the forces* on the ground and not simply on whether the Intervention Brigade is mandated to engage in armed conflict. In that particular operation, the forces would need to become involved in actual fighting with organised armed groups to be considered as participating in an armed conflict.

States and international organisations may show reluctance to recognise that peacekeeping forces have become involved in armed conflicts, but there does not seem to be any support in law that a special threshold applies to peacekeeping forces. The same criteria apply for determining when such forces become involved in an armed conflict as for any other armed forces. There may, however, be some support in *practice* to say that a higher threshold exists for peacekeeping forces.²⁵

Professor David draws some support for his argument (that the nature of the mandate of a peacekeeping operation is important to establish whether the forces of such an operation have become involved in an armed conflict) from an analysis of the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter the Safety Convention). The Safety Convention obligates states parties to criminalise attacks against peacekeepers, but does not apply 'to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organised armed forces and to which the law of international armed conflict applies'.²⁶ The reference to Chapter VII may be explained by the fact that, during negotiations, delegates found that only operations decided under Chapter VII were likely to involve UN forces as combatants in IACs. It should not be regarded as evidence that a Chapter VII mandate is *required* for becoming involved in armed conflict.²⁷ The cumulative criteria clearly stipulate that the personnel concerned *also* need to be involved as combatants. The strength of IHL is that it applies based on an objective assessment of the facts on the ground, irrespective of the cause of the armed conflict.

23 On the relationship between the mandate of peacekeeping operations and the status of peacekeeping forces under international humanitarian law, see Ola Engdahl, 'Prosecution of attacks against peacekeepers in international courts and tribunals', in *Military Law and Law of War Review*, Vol. 51, No. 2, 2012, p. 249.

24 SC Res. 2098, 28 March 2013.

25 Christopher Greenwood, 'International humanitarian law and United Nations military operations', in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 24.

26 Safety Convention, above note 8, Art. 2.

27 See Steven J. Lepper, 'The legal status of military personnel in United Nations peace operations: one delegate's analysis', in *Houston Journal of International Law*, Vol. 18, 1996, p. 398.

The application of IHL is thus not dependent on whether a state has wrongfully attacked another state, or armed groups have attacked governmental forces in contravention of national law – or on the nature of the mandate of peacekeeping troops.

The multinational character of peacekeeping operations

An IAC is often defined as the resort to armed force between two or more states. A non-international armed conflict (NIAC) has been identified as ‘protracted armed violence between governmental authorities and organised armed groups or between such groups within a state’.²⁸ The existence of an IAC does not require the same intensity of armed violence as the existence of a NIAC. The identification of the parties to an armed conflict is therefore essential for establishing not only the nature of the conflict, but also its very existence. Identifying the parties to an armed conflict involving a multinational peacekeeping force requires a deconstruction of the multinational operation in order to analyse its components and the possible parties (on the multinational side) to the armed conflict. An internationalised armed conflict does not denote a third category of conflict, but rather that a NIAC is transformed into an IAC through the involvement of an external actor.

Becoming a party to an armed conflict would largely seem to depend on a condition of command over the armed forces. In IACs, Article 43(1) of Additional Protocol I to the Geneva Conventions states:

The armed forces of a Party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party.

The Commentaries indirectly define a party to an IAC when stating that such forces must, *inter alia*, be subordinate ‘to a “Party to the conflict” which represents a collective entity which is, at least in part, a subject of international law’.²⁹ This would appear to include intergovernmental organisations such as the UN, NATO and the EU. That these organisations are capable of becoming parties to an IAC is also supported in the literature and, at least implicitly, by recent international instruments such as the Safety Convention and the ICC Statute.³⁰

28 See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case IT-94-1-AR72, Appeal on Jurisdiction, 2 October 1995, para. 70.

29 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1681.

30 See for example Derek W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice*, Stevens & Sons, London, 1964, pp. 493–516; Finn Seyfersted, *United Nations Forces in the Law of Peace and War*, A. W. Sijthoff, Leiden, 1966, pp. 23–26 and 197–220; Brian D. Tittmore, ‘Belligerents in blue helmets: applying international humanitarian law to United Nations peace operations’, in *Stanford Journal of International Law*, Vol. 33, 1997, p. 109; Frederik Naert, *International Law Aspects of the EU’s Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Katholieke Universiteit Leuven, 2009, p. 534; Safety Convention, above note 8, Art. 2; Rome Statute of the

A NIAC may transform into an IAC if a foreign state, or possibly an international organisation, exercises necessary control over the armed groups involved. When the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case needed to determine the parties to the armed conflict, in order to classify the conflict as an IAC or a NIAC, it took as a point of departure Article 4 of the Third Geneva Convention, according to which militias and organised armed groups are to be regarded as legitimate combatants if they belong to a party to an armed conflict. Even though Article 4(A)(2) concerned the criteria for granting prisoner-of-war status, the ICTY found as a logical consequence that if armed groups *belonged* to a state party to the conflict (other than the one they were fighting against), the conflict would become international.³¹

In multinational operations based on a UN mandate, troop-contributing states put their military forces at the disposal of the UN or any other organisation, and operational control of those forces is generally exercised by that organisation. In operational matters, there is a presumption that the organisation leading the operation exercises control over the military forces involved. The principle of unity of command in multinational operations has repeatedly been mentioned as a necessary condition for successful operations. There is thus some support for the position that the organisation exercising control over the troops in a multinational peacekeeping operation could be regarded as a party to the armed conflict if the military forces became involved in such a conflict. It naturally follows that the operation itself (such as ISAF or MONUSCO) is not capable of becoming a party to an armed conflict, since it does not possess the necessary independence from the subjects of international law of either troop-contributing states or the involved organisations.³²

Professor David interprets the UN Secretary-General's Bulletin as an instrument indicating that the involvement of UN forces would internationalise an armed conflict, irrespective of the character of the opponent. Some parts of the Bulletin are however considered by some as containing doctrine and obligations that go beyond treaty or customary law.³³ Caution should therefore be exercised when interpreting the different sections. When Section 8 of the Bulletin, in relation to the treatment of detainees, accords the protection of the Third Geneva Convention to all

International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc A/CONF.183/9, Arts. 8(2)(b)(iii) and 8(2)(e)(iii).

- 31 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para 92. The ICTY employed a test of 'overall control' over the armed group, a test which the International Court of Justice (ICJ) in the genocide case criticised as a criterion for establishing state responsibility but did not rule out as a test for determining the nature of an armed conflict. See ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, para. 404.
- 32 For a more thorough discussion, see Ola Engdahl, 'Multinational peace operations forces involved in armed conflict: who are the parties?', in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge University Press, Cambridge, 2012. Professor David seems to share the same view.
- 33 See for example the Commentary on the Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, in Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations*, Oxford University Press, Oxford, 2010, pp. 198–201.

detainees regardless of the nature of the conflict, this may not necessarily be taken as evidence that it is the view of the Secretary-General that the operations of a multinational peacekeeping force would constitute an IAC. It simply means that the provisions of that Convention should be applied *mutatis mutandis* to detained persons.³⁴

The classification of a conflict involving multinational peacekeeping forces is instead primarily decided on the classification of the opponent. This may be illustrated by two contemporary examples. First, in the Afghan context, ISAF forces are involved in an armed conflict with insurgent forces. Possible parties on the multinational side are the troop-contributing states, NATO and the UN. These intergovernmental organisations can hardly be regarded as being non-state actors in relation to the classification of an armed conflict, notwithstanding that they are not parties to the Geneva Conventions. Where an armed conflict occurs between a troop-contributing state on the one hand and insurgents (that is, organised armed groups) on the other, it would be classified as a NIAC. If some, or all, of the troop-contributing states are involved in armed conflict with insurgents, there would be more than one armed conflict. These conflicts would all be characterised as NIACs due to the nature of the parties involved. If NATO, or the UN, were to be characterised as a party to such armed conflicts, then there would be one single conflict between the particular organisation and the insurgents. It would, however, still be a NIAC, since the opponents, in the case of Afghanistan, are a non-state actor.

The Libya conflict would be regarded as an IAC irrespective of whether the party, or parties, to it were the troop-contributing states or NATO, or the UN, since the armed conflict was conducted against the Libyan government. At the same time as this IAC was taking place, there also existed a NIAC between the Libyan government and the armed groups (at least from the point at which they became sufficiently organised). One could furthermore consider a situation in which the multinational force would also have become involved in an armed conflict with the armed groups. The mandate was to protect civilians and did not preclude attacks against forces other than the governmental ones that would attack the civilian population. In such a case, the multinational forces would simultaneously have been involved in a NIAC with the organised armed groups and in an IAC with the Libyan governmental forces. It may also be noted that if the multinational forces continued to be involved in an armed conflict with the opposition groups, even after the fall of the government, that particular armed conflict could have developed into an IAC, where the former opposition forces instead would constitute the new governmental forces. Exactly when this change in status of the opposition forces occurs may be difficult to define, but there is possibly a presumption of continuity that the government remains the representative of the state until it is established that a change has occurred.

34 See Marten Zwanenburg, 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: a pyrrhic victory?', in *Military Law & Law of War Review*, Vol. 39, 2000, pp. 25–26.

The consequences of internationalising an armed conflict when peacekeeping forces become involved

The need to distinguish between categories of armed conflicts has gradually become less important because of the development of customary law, through which large parts of the law applicable in IACs are arguably also applicable in NIACs.³⁵ However, in NIACs, one must also consider the impact of national criminal law. States have so far not been willing to endow members of organised armed groups with the combatant privilege, applicable in IACs, of not being prosecuted for legitimate acts of war. Notwithstanding compliance with IHL, members of organised armed groups participating in NIACs may still be prosecuted under national criminal law. The Safety Convention should also be interpreted against this background. As we have said earlier, the obligation of states parties to criminalise attacks against peacekeepers under that Convention does not apply to situations where UN forces 'are engaged as combatants against organised armed forces and to which the law of international armed conflict applies'. The exception is limited to IACs, which means that the Convention continues to apply in NIACs and that it is a crime to attack peacekeeping forces in a NIAC, even if they are participating in the hostilities. This may be regarded as a reflection of the relationship between national criminal law and IHL in NIACs. Even legitimate acts under IHL may be prosecuted under national criminal law – which the Safety Convention would seem to recognise.³⁶

Furthermore, under the applicable Status-of-Forces Agreement (SOFA), it is usually incumbent on the government of the host state to criminalise attacks against invited peacekeeping forces.³⁷ If the involvement of peacekeeping forces in a NIAC between government forces and insurgents automatically internationalised the armed conflict between them and the insurgents, thereby rendering the rules of IAC applicable to the conflict, attacking peacekeeping forces could no longer be a criminal offence under national law. The host state would need to change its national criminal laws in relation to the peacekeeping forces to legitimise attacks against these forces as long as such attacks were in accordance with the laws of IACs. It would, however, follow from this argument that the host state would not need to change its criminal laws for attacks on its own military forces. That would create a situation whereby attacks against peacekeeping forces would not be considered criminal acts (if complying with applicable IHL), while similar attacks against host

35 See J.-M. Henckaerts and L. Doswald-Beck (eds), above note 17.

36 However, the duty of states parties to the Safety Convention to prosecute or extradite suspected perpetrators may run counter to the obligation of states to grant the broadest possible amnesty to persons involved in the armed conflict, enshrined in Art. 6(5) of Additional Protocol II to the Geneva Conventions.

37 Art. 45 of the Model SOFA states: 'The Government shall ensure the prosecution of persons subject to its criminal jurisdiction who are accused of acts in relation to the United Nations peace-keeping operation or its members which, if committed in relation to the forces of the Government, would have rendered such acts liable to prosecution'. See Model Status-of-Forces Agreement for peacekeeping operations, Report of the Secretary-General, UN Doc. A/45/594, 9 October 1990.

state forces would still be punishable under national criminal law. If nothing else, it would certainly have a negative effect on future troop contributions.

The question also arises as to whether the involvement of a multinational force internationalises the conflict as a whole, including the relationship between insurgents and the host state. Professor David finds that this type of situation is not codified, but that an extrapolation of existing rules leads to the conclusion that it would run counter to the general spirit of IHL to treat combatants differently depending on which force they were captured by. A counter-argument, based on the bilateral relations between each party, would instead hold that it is possible that more than one conflict exists in the same area. While it may lead to factual difficulties, it would not seem to be a complicated legal issue. An invited foreign force helping the state to defeat armed groups on its territory may lead to the existence of at least two or more armed conflicts. While IHL may not explicitly codify such a situation, an analysis of the different parties and of the bilateral relations would seem to be a sound application of IHL and well within the codified law.

Conclusion

To sum up, it is high time to treat peacekeeping forces on the same terms as any other force from a *jus in bello* perspective: in the absence of any contrary evidence, IHL applies to peacekeeping forces in the same manner as it does to any other force. The involvement of a multinational peacekeeping force in an armed conflict will bring to it a strong international element. The nature of the armed conflict, however, will only change based on the classification of the parties and the facts on the ground. On the 'multinational side', the parties may either be the international organisations included in the chain of command or the troop-contributing states. The force itself would not possess the necessary independence from the organisations or states involved. This article has held that an analysis of control over troops carries great weight when determining the parties to the conflict. The character of the conflict, or conflicts, is decided based upon each bilateral relation between the parties.

Even though IHL is based on an equal application of its rules to all the parties to the armed conflict, the role of national criminal law in NIACs will tip the scale in favour of government forces, as it will be a crime under national law to attack such forces. Host states are under an obligation to criminalise attacks against peacekeeping forces both under applicable SOFAs and under the Safety Convention. This obligation applies also in relation to attacks by members of organised armed groups involved in a NIAC with peacekeeping forces.

The mandate of peacekeeping forces does not affect the classification of an armed conflict, and such forces, whether they represent each troop-contributing state or an intergovernmental organisation, are on the same footing as governmental forces involved in an armed conflict against non-state actors. If peacekeeping forces were to be involved in an armed conflict against governmental forces, hitherto an exceptional situation, the conflict would instead be characterised as an IAC.

A reply to Ola Engdahl

Eric David

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The question raised by the ICRC serves as a basis for a debate between Dr Ola Engdahl and the author of this text.

On closer examination, Dr Engdahl's analysis reveals not so much disagreement as a certain misunderstanding, mainly on the influence of the mandate of a multilateral peacekeeping force on the application of IHL to that force; the role played by the 1994 Convention in the analysis of the application of IHL to multilateral peacekeeping forces; the application of a non-fragmented IHL to a multilateral peacekeeping force's intervention; and the international nature of the conflict in which a multilateral peacekeeping force is participating. Let us take a look at the differences in interpretation with regard to these matters between Dr Engdahl and the current author.

The influence of a multilateral peacekeeping force's mandate on the application of IHL to its action

Dr Engdahl writes:

Professor David attaches significant importance to the mandate as a criterion for establishing whether or not a particular peacekeeping force has become involved in an armed conflict. I argue that the nature of the mandate may affect the *probability* of becoming involved in such conflict, but in law, the authority to use force (*jus ad bellum*) does not affect the existence of an armed conflict (*jus in bello*).

This author agrees. However, this author did not claim that the force's mandate would determine whether or not a conflict existed. Rather, a purely methodological distinction between two possible situations was drawn: that where the multilateral peacekeeping force being deployed does not have a coercive mandate, and that where it does. A presentation chiefly for instructive purposes does not necessarily call for the setting out of substantive arguments, but these two hypothetical situations shed light on the influence which the mandate given to a force by the Security Council can have on the application of IHL to the multilateral peacekeeping force's action. Several caveats are, however, necessary.

First, the point at issue is not codified by international law. It can therefore be debated only on the basis of theoretical inferences drawn from the reasoning of positive law and on the basis of practice, case law and doctrine. This is the purpose of this exercise.

Second, in theory an armed conflict exists when there is an armed confrontation between two belligerent 'parties'; while a multilateral peacekeeping force with a coercive mandate can be deployed in a state's territory without this giving rise to armed violence, any deployment of such a force in a state remains 'an intervention of members of armed forces', and as the Commentary on Common Article 2 of the Geneva Conventions states:

Any difference arising between two States and leading to the *intervention of armed forces* is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. (Emphasis added.)

Of course, the deploying of a multilateral peacekeeping force in a state's territory does not amount to a 'difference' arising between states, but whether one likes it or not, it is an 'intervention . . . of armed forces', and even if they do not necessarily make any use of their weapons, the possibility that they might be employed cannot be ruled out completely. If this did happen, there would be victims, and it is plain that they would then come under the protection of IHL. The reasoning underpinning the commentary on Common Article 2 quoted above can therefore be transposed, *mutatis mutandis*, to the deploying of a multinational peacekeeping force in a state's territory.

Third, conversely, a multilateral peacekeeping force without a coercive mandate may be deployed in a state's territory and may include armed forces without this 'intervention . . . of armed forces' constituting an armed conflict entailing the application of IHL. IHL does not apply in this case because the multilateral peacekeeping force's mandate is not that of a coercive intervention allowing it to use force against a state or non-state 'party'. If, in this situation, a multilateral peacekeeping force has to use force, it may do so only against ordinary criminals, but not against a government or insurgent authority or against an organised armed group within the meaning of IHL. If such a case were to arise, the multilateral peacekeeping force would be faced with clashes constituting an armed conflict (see, for example, the above mentioned case of UNAMIR). IHL would then apply immediately to such clashes. This author endorses Dr Engdahl's view that the application of IHL is based 'on an objective assessment of the facts on the ground'.³⁸ Nevertheless, *a priori*, IHL is not supposed to apply to the deployment of a multilateral peacekeeping force without a coercive mandate.

This shows that, to a great extent, the multilateral peacekeeping force's mandate has a bearing *a priori* on the application or otherwise of IHL

38 See, in connection to this, Jacob Kellenberger, 'Keynote address', in Gian Luca Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations*, International Institute of Humanitarian Law/ICRC, 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4–6 September 2008, p. 33.

to the force, but without prejudice to the possible application of IHL in situations where it should not normally apply owing to the non-coercive nature of the force's mandate.

The role played by the 1994 Convention in the application of IHL to multinational peacekeeping forces

Dr Engdahl then describes the purpose of the 1994 Convention and concludes by saying that:

The strength of IHL is that it applies based on an objective assessment of the facts on the ground, irrespective of the cause of the armed conflict. The application of IHL is thus not dependent on whether a state has wrongfully attacked another state, or armed groups have attacked governmental forces in contravention of national law – or on the nature of the mandate of peacekeeping troops.

This author agrees, except for the end of the sentence, which states that the nature of the mandate has no bearing on the application of IHL. We have just seen why *a priori* this mandate can in fact influence the application or otherwise of IHL. The 1994 Convention confirms this.

Some parts of IHL apply to some conflicts

Dr Engdahl says the following about the involvement of a multinational force in an armed conflict:

Professor David finds that this type of situation is not codified, but that an extrapolation of existing rules leads to the conclusion that it would run counter to the general spirit of IHL to treat combatants differently depending on which force they were captured by. A counter-argument, based on the bilateral relations between each party, would instead hold that it is possible that more than one conflict exists in the same area. While it may lead to factual difficulties, it would not seem to be a complicated legal issue.

I maintain that, since this type of situation is not codified, IHL should be applied as one single body of rules, rather than as rules which, in respect of the same armed act, would vary according to the status of those performing it; for example, in a civil war where foreign intervention took place, a captured combatant would be a prisoner of war or an ordinary criminal depending on whether he fell into the hands of a foreign or a national force. That would amount to unjust discrimination and would complicate the situation. The factual difficulties to which Dr Engdahl alludes in the passage quoted above would be bound to lead to legal complications. The French physicist Etienne Klein, director of the French National Centre for Scientific Research (CNRS) once said in an interview on the radio: 'facts are the crude ingredient of science'. The same goes for law: facts are also its raw material.

The international nature of an armed conflict between a multinational peacekeeping force and an organised armed group

Dr Engdahl holds that an armed conflict between an international organisation and state armed forces is an IAC, but that an armed conflict between an international organisation and a group of insurgents is a NIAC. This is where the current author disagrees most radically with Dr Engdahl, who writes with regard to the conflict in Afghanistan: 'Where an armed conflict occurs between a troop-contributing state on the one hand and insurgents (that is, organised armed groups) on the other, it would be classified as a NIAC.' If NATO or the UN were to fight against insurgents, he adds: 'It would, however, still be a NIAC, since the opponents, in the case of Afghanistan, are a non-state actor.' In other words, any clash between a foreign state or an international organisation and an organised armed group or insurgents would not be international because the armed group or insurgents are a 'non-state actor'.

This contention is rather unconvincing. First, the way in which Dr Engdahl's text seems to define a NIAC is not consistent with the determination of the material field of application of Article 1(1) of Additional Protocol II, which concerns only 'armed conflicts ... which take place in the territory of a High Contracting Party between *its* armed forces and dissident armed forces or other organized armed groups' (emphasis added). It is significant to note that this text does not mention the armed opposition of a third state's armed forces to another state's insurgents. Of course, this does not mean that NIACs are confined to those conflicts covered by this text – but what, then, would be the source text defining the armed opposition of a state or international organisation to a *foreign*, non-state group as a NIAC? Dr Engdahl is silent on this matter, and the author does not know of such a text either. We are therefore still left with a situation in which two belligerent parties are foreign to one another. Defining this situation as a NIAC is tantamount to disregarding this legal, political and geographical foreignness of the parties and to identifying the state with its government.

Second, a state is generally defined as comprising four elements: territory, population, government and independence. But if the population fights against its government, can it be dissociated from the state? Article 1 of the Draft Declaration on Rights and Duties of States (International Law Commission (ILC), 1949) reads: 'Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.'³⁹ In speaking of the 'state's' free choice of its own form of government, the ILC showed that a government could not be identified with a state unless it had been 'freely' chosen by that state and therefore, in democratic states, by its population. This is no longer the case when the population is opposed to its government. In this situation, what grounds are there for saying that the state would be better represented by its government than by a section of its population, and that the conflict setting the population or part of it against a third state or an

39 GA. Res 375 (IV), 6 December 1949, annex.

international organisation would be a NIAC – in other words, an internal conflict or a civil war? Such a conclusion borders on the absurd given that the belligerent parties are foreign to one another in legal, political and geographical terms.

Would it be nevertheless possible to base such a position on the non-state nature of the group representing a section of the population? For that, the disputed government would have to be able to show that it could lay a better claim to constituting the state than the section of the population opposing it. This might be the case if the government had been recognised by a legal authority such as the Security Council. Failing this, the government side is no more of a 'state' than the opposing party. This demonstrates the unpersuasive character of the argument based on the fact that the organised group is a 'non-state actor'. The group in question is indeed a non-state actor, but so is the government, because it is disputed. The only objective criterion still left is the fact that the organised armed group and the opposing belligerent party (a state or an international organisation) are foreign to one another. In the author's opinion, the international nature of the conflict is due to this foreignness.

In this type of debate, the only people who will be convinced are those who wish to be persuaded. Whatever side is taken, legal truth will remain relative. Remember the fable of the bat who falls into some weasels' nests and who does not want to be eaten alive: when she lands in the nest of weasels which are foes of rats, she says, 'I'm a bird, look at my wings'; and when she lands in the nest of some other weasels who hate birds, she cries, 'I'm a mouse, long live the rats!' In the words of La Fontaine (in *The Bat and the Two Weasels*), 'The bat by such adroit replying, twice saved herself from dying.' The author knows that his life is not at stake, but Einstein would not contradict me when I say that everything is relative in law and physics. . .

International humanitarian law interoperability in multinational operations

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Abstract

This article describes some of the challenges raised by multinational operations for the application of international humanitarian law. Such challenges are the result of different levels of ratification of treaties, divergent interpretations of shared obligations, and the fact that there is no central authority that determines who is a party to an armed conflict. The article discusses methods that have been developed to ensure ‘legal interoperability’. Some of these methods attempt to avoid situations where such interoperability is required. Where this is not possible, a ‘maximalist’ or a ‘minimalist’ approach can be taken, and in practice these are usually combined.

Keywords: international humanitarian law, multinational forces, multinational operations, interoperability.

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Multinational forces are not a new phenomenon. Perhaps more than ever before, however, today’s military operations are carried out by multinational forces. This is not likely to change in the near future, as many national armed forces are faced with

* This article was written in a personal capacity and does not necessarily reflect the views of the ministry of Defence of the Netherlands or any other part of the Netherlands government. The author is grateful to Wido van de Mast and Hans Boddens Hosang for a draft of the case study and comments on a previous draft of this article. Email: martenzwanenburg@yahoo.com.

austerity measures due to the financial crisis. As a result, they are increasingly less able to carry out certain operations individually. This provides an important incentive to seek closer cooperation with other armed forces in order to utilise the available capabilities as efficiently and cost-effectively as possible.¹ Cost-effectiveness is one important argument put forward by advocates of multinational forces, but such forces have other advantages as well, including the potential for increased legitimacy. There are also a number of drawbacks to multinational forces, however. One of these concerns the application of international humanitarian law (IHL). This application is complicated considerably in multinational operations. In its report on IHL and the challenges of contemporary armed conflict to the 31st International Conference of the Red Cross and Red Crescent, the International Committee of the Red Cross (ICRC) described this complication in the following terms:

The participation of states and international organisations in peace operations not only gives rise to questions related to the applicable law, but also to its interpretation. This is because the ‘unity of effort’ – in military parlance – sought in peace operations is often impacted by inconsistent interpretations and application of IHL by troop contributing countries operating on the basis of different legal standards. The concept of ‘legal interoperability’ has emerged as a way of managing legal differences between coalition partners with a view to rendering the conduct of multinational operations as effective as possible, while respecting the relevant applicable law. An important practical challenge is to ensure that peace operations are conducted taking into consideration the different levels of ratification of IHL instruments and the different interpretations of those treaties and of customary IHL by troop contributing states.²

The report went on to refer to the complexity of the legal framework in peace operations, in which a number of legal instruments such as United Nations (UN) Security Council resolutions and Status of Forces Agreements play a role. It concluded that the many legal sources that must be taken into account may make it objectively difficult for partners in a peace operation to reach a common understanding of their respective obligations, and may negatively affect respect for IHL.

Even though ensuring legal interoperability within multinational operations also raises challenges in other fields of international law (such as human rights law), this article will focus solely on ‘legal interoperability’ within multinational operations from the perspective of IHL.

- 1 By way of example, the conclusions of the European Council of 13–14 December 2012 state that ‘the European Council stresses that current financial constraints highlight the urgent necessity to strengthen European cooperation in order to develop military capabilities and fill the critical gaps, including those identified in recent operations.’ European Union, *Conclusions of the European Council of 13–14 December 2012*, 14 December 2012, EUCO 205.12, para. 22.
- 2 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (hereinafter Challenges Report), October 2011, p. 32, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf. All internet references were accessed in November 2013.

This article will not discuss a number of issues that can also affect the application of IHL in multinational operations. One of these is the fact that many such operations are led by an international organisation such as the UN, the North Atlantic Treaty Organisation (NATO), the African Union or the European Union (EU). There is much debate concerning the potential consequences for the application of IHL in cases where an international organisation is involved, in particular regarding organisations with international legal personality that have the capability under international law of having their own international obligations.³ In such cases, are the international obligations of the international organisation concerned relevant, or are they solely, or at least primarily, the obligations of the troop-contributing states?⁴ In the experience of the author, in the actual practice of multinational operations, the focus is still primarily on the latter. This article will also not analyse the interrelationship between IHL and human rights law. The issue of this interrelationship is not one that is specific to multinational operations, though it is an issue that is further complicated by the fact that states participating in such operations are often not all states parties to the same human rights treaties, nor do they interpret those treaties' scope of application identically.⁵

This article starts by defining a number of expressions. It then describes a hypothetical case study that will be used for illustration purposes throughout the article. The article further focuses on a number of phenomena that may raise complex questions of interoperability within multinational operations, and discusses methods that states have developed to address these questions.

Before embarking on the substantive discussion, it is however necessary to clarify the meaning of a number of expressions that will be used frequently throughout the article. This article is devoted to legal interoperability within multinational operations. It is therefore important first to define both 'multinational operation' and 'legal interoperability'.

In this article, the terms 'multinational force' and 'multinational operation' will be used interchangeably. 'Operation' is generally used to refer to the mandate and the manner in which the mandate is carried out, whereas 'force' is used to refer to the personnel and materiel involved in carrying out the mandate. For the purposes of this article, the term 'multinational operation' refers to a military

3 See for example Marten Zwanenburg, 'The duty to respect international humanitarian law during European Union-led operations', in Aurel Sari and Ramses A. Wessel (eds.), *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?*, CLEER Working Papers 2012/6, 2012, pp. 63–78, available at: www.asser.nl/upload/documents/20121221T112600-CLEER%20Working%20Paper.pdf.

4 ICRC, Challenges Report, above note 2, p. 32. See also Marten Zwanenburg, 'International organisations vs. troops contributing countries: which should be considered as the party to an armed conflict during peace operations?', in *International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility*, Proceedings of the 12th Bruges Colloquium, 20–21 October 2011, pp. 23–28, available at: www.coleurope.eu/sites/default/files/uploads/news/12th_bruges_colloquium_0.pdf.

5 See, for example, Charles Garraway, 'Interoperability and the Atlantic divide – a bridge over troubled waters', in *Israel Yearbook on Human Rights*, Vol. 34, 2004, pp. 121–125.

operation conducted by military forces of two or more states acting together. This definition closely follows the one used by NATO.⁶ In military parlance, the term ‘multinational’ is interchangeable with the term ‘combined’. Multinational or combined operations come in many different shapes and sizes. One distinction that can be made is between operations that are led by an international organisation and those that are not. In the latter category, there will often, but not always, be a lead nation that provides a large part of the forces and the force commander. Within the former category, a further distinction can be made between operations conducted by pre-formed multinational forces on the one hand and forces assembled on an *ad hoc* basis on the other. Such pre-formed forces are increasingly being established under the aegis of international organisations. Examples are the EU Battlegroups, the NATO Response Force, and the African Standby Force. The UN Charter also envisaged pre-formed units being placed at the disposal of the organisation by member states. Article 43 of the Charter provided for agreements to be concluded between member states and the UN to place armed forces at the disposal of the organisation that would be available on its call. In practice, such agreements have never been concluded. It may be pointed out that none of the above-mentioned pre-formed forces have yet been deployed in an actual crisis situation. Rather, it is usual for multinational operations to be conducted by forces made available by states specifically for that operation.

‘Legal interoperability’ is understood here as the ability of the forces of two or more nations to operate effectively together in the execution of assigned missions and tasks and with full respect for their legal obligations, notwithstanding the fact that nations concerned have varying legal obligations and varying interpretations of these obligations.⁷

Hypothetical case study

This section describes a case study that is hypothetical but that incorporates elements of actual events that occurred in the NATO-led International Stabilization Force (ISAF) in Afghanistan. It describes a form of cooperation between military forces from different states that takes place in many other multinational operations in much the same way. It will be used throughout the article to illustrate issues of interoperability that arise in multinational operations.

The Quick Reaction Alert (QRA) alarm goes off. The two pilots on QRA and the two technicians stop with whatever they were doing. One of the pilots, the flight lead, grabs the phone and calls the operations officer on a direct line. The operations officer on the other side of the phone confirms the scramble. There is a Troops in Contact (TIC) situation involving allied troops from another

- 6 ‘An operation conducted by forces of two or more nations acting together’: see NATO Standardization Agency (NSA), *NATO Glossary of Terms and Definitions (English and French)*, AAP-06, 2013, p. 2-M-11, available at: <http://nsa.nato.int/nsa/zPublic/ap/aap6/AAP-6.pdf>.
- 7 This definition is adapted from the NATO definition of ‘force interoperability’: ‘The ability of the forces of two or more nations to train, exercise and operate effectively together in the execution of assigned missions and tasks.’ See NSA, above note 6, p. 2-F-5.

nation participating in the operation a hundred nautical miles west of the airfield. The operations officer orders the flight lead to get airborne quickly and gives him instructions in a standard format; location of the TIC, call sign and frequency of the Joint Terminal Attack Controller (JTAC) of the unit on the ground, and any additional information.⁸

While the flight lead is on the phone, the technicians hurry to the jets to get them ready to fly. A few minutes later, the pilots arrive at the jets. They climb into their cockpits and the engines are started up. A couple of minutes later, after completion of all the necessary checks, the pilots are ready to go. With clearance from ground control, both F-16s taxi to the runway, contact the tower, and get clearance to take off. Ten minutes after the alarm went off, the 'Blades' are airborne on their way to the TIC.

The flight lead contacts the Air Operations Centre (AOC) for additional instructions. The AOC gives an update on the situation and the position of the air-to-air refuelling tanker. The pilots continue their route inbound to the TIC while checking their sensors and weapon systems. The targeting pods are working properly. Some fifty nautical miles from the TIC, the flight lead contacts the JTAC. The JTAC responds quickly. After authentication and confirmation that the secure radios are working, the flight lead gives the JTAC a 'fighter to JTAC' brief according to a standard format: type of aircraft, weapons, sensors, time on station, the abort code, and any additional information. The JTAC acknowledges the information and asks the flight lead if he is ready to copy the nine-line brief (or 'nine-liner'), a standard format for a 'JTAC to fighter' communication. The JTAC continues with a situation update. His convoy was struck by an improvised explosive device (IED) that destroyed one of the vehicles. Two soldiers are severely wounded. After the IED attack, the opposing militant forces opened fire from several directions. The ground forces took cover and are defending themselves. The JTAC gives an accurate GPS update of his own position and the position of the enemy. The forces are taking small arms fire from a tree line 300 feet south of their own position. They have also taken some mortar fire from a house 3,000 feet east of their position. Furthermore, the ground forces have identified the occupant of a house nearby as a drug trafficker known to provide large sums of money to the insurgents.

The Blade flight arrives at the location of the TIC. Both F-16s circle the location, in a so-called 'wheel' formation, at 16,000 feet; the position of the TIC is in the centre of the circle, making it easy to keep eyes and sensors focused on the point of interest. The flight lead enters the coordinates of the enemy locations in his systems. Looking out of the window, both pilots identify the convoy on the road. One vehicle is burning. To the east there are many houses, but the tree line to the south is easy to see. The flight lead describes what he sees looking out of the window and on his sensor display in the cockpit. The JTAC and flight lead

8 A JTAC is a qualified (certified) service member who, from a forward position, directs the action of combat aircraft engaged in close air support and other air operations. See United States Joint Chiefs of Staff, *Joint Publication 3-09.3: Close Air Support*, 8 July 2009, p. ix.

confirm that they are talking about the same location. The JTAC tells the pilots that the mortar fire from the east has stopped. The situation of the wounded soldiers has worsened. They have already called for a medevac (medical evacuation) helicopter. The ground forces are still taking fire from the tree line. The JTAC directs the Blades to focus on the tree line. The flight lead swings his targeting pod over to the tree line and sees possible Opposing Militant Forces (OMF) with rifles in a firing position. On switching to infrared, he notices more OMF hiding underneath the trees. The JTAC and the flight lead again agree on the actual position. The ground forces are still taking fire, and the JTAC requests an air attack with 20 mm ammunition. To minimise the risk of collateral damage, he orders the flight lead to use a mandatory attack heading from east to west or west to east (parallel to his own position). The flight lead acknowledges the orders and prepares himself for the attack.

The flight lead rolls in on the target with a positive identification of the enemy. While diving down from 16,000 feet the JTAC clears the flight lead to continue the attack and fire his gun with the words 'cleared hot'. The wingman comes on the radio to confirm that the area is clear. The flight lead repeats the clearance of the JTAC and is now heading east to west with the sun at his back. He aims and fires a 'walking' burst on the tree line. After the attack, the JTAC responds with a battle damage assessment. The OMF have ceased firing from the south. During the attack, the wingman spotted some activity in the previously mentioned house. People outside the house are carrying heavy material, possibly mortars. The wingman comes on the radio and passes his information to the flight lead and the JTAC. The JTAC requests a show of force at low altitude over the house. The wingman rolls in and dives down towards the house. He pulls up at low altitude while popping flares. The flight lead monitors the situation and notices that the persons on the ground have ceased their activities.

The JTAC comes on the radio saying that the situation is under control for the moment and that the medevac helicopter is inbound. The JTAC has an additional request for the Blades. One of the reasons for the convoy being at its current location was to investigate one of the houses to the east. In the house in question, a so-called 'high-value target', a drug trafficker and money launderer for the OMF, is hiding. The JTAC provides the Blades with a nine-liner and requests the F-16s to attack the house. He also provides the Blades with the required Rules of Engagement (ROE) and his initials. The flight lead responds that he has to contact higher headquarters for authorisation. The flight lead contacts higher headquarters and asks if the nation's Red Card Holder is involved in the process. The Red Card Holder is responsible for checking the task against the nation's caveats. Higher headquarters denies authorisation to the Blades, telling them that a two-ship formation of A-10s is inbound to perform the task. The flight lead switches back to the JTAC and explains the situation. For the moment the Blades remain on station to monitor events. The flight lead directs his wingman to go to the tanker for air-to-air refuelling. After the wingman returns to the scene, the flight lead goes to the tanker. The A-10s arrive at the scene and the F-16s are released to go back to their home base.

Aspects of complexity in interoperability

Determining the applicability of IHL

Before answering the question of which IHL obligations apply and how they must be interpreted, it is necessary to determine whether IHL applies in the first place. This determination comprises assessing whether there is an armed conflict and whether the actor concerned has become a party to that conflict. Although the threshold for an armed conflict is notoriously vague, in many cases it will be clear that there is no armed conflict or at least that the multinational force is not a party to the conflict. For example, there is no doubt that the EU operation in Bosnia (EUFOR Althea) and the UN Force in Cyprus are not a party to an armed conflict.⁹ In other cases, the situation is less straightforward. In such situations, different states contributing troops to a multinational operation may come to different conclusions concerning the application of IHL. An illustration of such a situation is the ISAF operation in Afghanistan.¹⁰ Some states contributing troops to this operation considered there to be a non-international armed conflict between ISAF and the Afghan government on the one hand and one or more organised armed groups on the other.¹¹ The Netherlands, at least initially, was of the view that it was not engaged in an armed conflict.¹² Germany also initially denied that its forces were involved in an armed conflict.¹³ Only in February 2010 did the German government accept that in northern Afghanistan, where German forces were deployed, there was an armed conflict in the sense of IHL.¹⁴ The reference to 'northern Afghanistan' suggests that, in determining whether or not troops forming part of a multinational operation are engaged in an armed conflict, the security situation in the specific area in which those troops are deployed may play a role. This raises interesting questions regarding the geographical scope of application of IHL, which are outside the

- 9 For a general discussion on the application of IHL to peace operations, see Christopher Greenwood, 'International humanitarian law and United Nations military operations', in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 3–34.
- 10 The discussion in this section is based on Marten Zwanenburg, 'Legal interoperability in multinational forces: a military necessity', in *Proceedings of the Bruges Colloquium: Current Challenges to the Law of Occupation*, 2005, pp. 108–115, available at: www.coleurope.eu/content/publications/pdf/Collegium%2034.pdf. For an academic discussion of the legal qualification of the ISAF operation, see Constantine D. Mortopoulos, 'Could ISAF be a PSO? Theoretical extensions, practical problematic and the notion of neutrality', in *Journal of Conflict & Security Law*, Vol. 15, 2010, pp. 573–587.
- 11 The Canadian government argued that IHL applied to detainees taken by Canadian forces in ISAF. See the report provided by Christopher Greenwood at the request of the Government for the case of *Amnesty International Canada v. Canada (Chief of Defence Staff)*, 2008 FC 336, [2008] 4 FCR 540; Christopher Greenwood, *Report: International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces*, p. 15, available at: <http://bccla.org/wp-content/uploads/2012/04/Report-of-Prof.-Greenwood-London-School-of-Economics.pdf>.
- 12 Kamerstukken II 2007–2008 (parliamentary papers), 27925, No. 287, p. 121.
- 13 Interview with Defence Minister zu Guttenberg, *Bild*, 3 November 2009, available at: www.bundesregierung.de/Content/DE/Interview/2009/11/2009-11-03-interview-guttenberg-bild.html.
- 14 Statement by Minister of Foreign Affairs Westerwelle in Parliament, 10 February 2010, available at: www.auswaertiges-amt.de/DE/Infoservice/Presse/Reden/2010/100210-BM-BT-Afghanistan.html.

purview of this article.¹⁵ For the present purposes, the important point is that different states that cooperate in a multinational operation may reach different conclusions concerning the application of IHL. In multinational operations, there is no central authority that determines the law that applies to the operation.¹⁶ Such a determination is left in principle to each individual troop-contributing state. This makes sense in the context of legal regimes that do not bind all the participating states. For example, there are a number of states participating in ISAF that are States Parties to the Additional Protocols to the Geneva Conventions, but also states that are not. The latter are not involved in determining whether one of the Protocols applies. The lack of a centralised, or at least coordinated, determination of the applicable law is less understandable in the case of the Geneva Conventions. These treaties have been universally ratified, and therefore all participating states are parties to them. It would be logical for participating states that are faced with roughly the same facts on the ground to come to the same conclusion on the application of the Conventions. In practice, however, each state makes this determination on its own. The outcome of this determination sometimes leads to different results, as illustrated by the case of ISAF discussed above.

Turning again to the hypothetical case study described above, it is clear that it is of tremendous importance to know whether IHL is applicable. For example, if the state of the JTAC considers that it is engaged in an armed conflict but the state of the pilot does not, then the former may attack any legitimate military objective but the latter's scope of action is much more limited. This is because outside a situation of armed conflict, the authority for using force against persons and objects is much more circumscribed.

Different obligations under IHL

There is no uniformity of obligations under conventional IHL between states. The four Geneva Conventions of 1949 have been universally ratified, so that all forces participating in a multinational operation are bound by them. The situation is different for other IHL treaties, however. There are 173 States Parties to Additional Protocol I, and 167 to Additional Protocol II.¹⁷ Although this is a relatively large number, it does not include the most important military power in the world today, the United States, or other important military powers such as Pakistan and Turkey.

15 For a discussion of this issue, see *inter alia* Noam Lubell and Nathan Derejko, 'A global battlefield? Drones and the geographical scope of armed conflict', in *Journal of International Criminal Justice*, Vol. 11, 2013, pp. 65–88.

16 It may be noted that on occasion, the UN Security Council has referred to certain international obligations in the context of resolutions authorising the use of force by multinational military operations. Such references generally do not specify particular applicable treaties. For example, in Resolution 2011 extending the authorisation for ISAF, the Council called on 'all parties to comply with their obligations under International Humanitarian Law'. UNSC Res. 2011, 12 October 2011, UN Doc. S/RES/2011, Preamble, para. 24.

17 The list of States Parties to the Additional Protocols is available at: www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 for Additional Protocol I (AP I), and www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 for Additional Protocol II (AP II).

With regard to ratification of other treaties in the field of IHL, the situation is even more diverse.¹⁸ As a consequence, it is highly likely that in a multinational operation some forces will be bound by treaties that do not bind some of the other forces with which they are cooperating.

States that are not bound by a particular rule of IHL as a matter of conventional law may nevertheless be bound by an identical or similar rule of customary international law. Article 38 of the Statute of the International Court of Justice (ICJ), which is generally recognised as an authoritative statement of sources of international law, describes custom as ‘evidence of a general practice accepted as law’. The article refers to two elements that must be present to form a rule of customary international law. The first is that there must be evidence that demonstrates a consistent practice followed by states, also referred to as *usus*. The second is that states must follow this practice because they consider that they are legally obliged to do so. This element is also referred to as *opinio iuris sive necessitatis*. Both elements must be present for a rule of customary law to exist, as explained by the ICJ in its judgement in the *North Sea Continental Shelf* cases.¹⁹

It is obvious that the method for identifying rules of customary international law is not very precise and leaves much room for interpretation. This is even more the case in the field of IHL than in many other fields of international law. In this field, state practice is particularly difficult to identify because of the ‘fog of war’ and because states are often reluctant to disclose information due to national security concerns. This is why certain commentators and courts have tended to focus to a large degree on statements made by states and on the content of military manuals in attempting to identify customary norms of IHL.²⁰ This is also the case for the extensive study conducted by the ICRC that was published in 2005.²¹ This study identified a large number of rules of customary IHL applicable in international and, for most of them, in non-international armed conflict. The method and outcome of the study have received strong criticism from certain commentators as well as a number of governments, however.²² This reflects the fact that, given the

18 For example, the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999, as well as the 2008 Convention on Cluster Munitions.

19 The ICJ held that actions by states ‘not only must amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.’ See *North Sea Continental Shelf*, Judgement, *ICJ Reports* 1969, p. 45, para. 77.

20 See Jean d’Aspremont, ‘Théorie des sources’, in R. van Steenberghe (ed.), *Droit International Humanitaire: Un Régime Spécial de Droit International?*, Bruylant, Brussels, 2013, p. 73.

21 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2006.

22 See generally Elizabeth Wilmshurst (ed.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007; John Bellinger and William J. Haynes, ‘A US government response to the International Committee of the Red Cross study on customary international humanitarian law’, in *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, p. 433; and Eloisa Newalsing, ‘Fruit of the loom: custom revisited’, in *Leiden Journal of International Law*, Vol. 21, 2008, p. 255.

imprecise method of identifying customary norms, states can and will disagree on whether certain norms have entered into customary law.

Apart from differences in conventional IHL obligations, the case study above points to another question that may arise in multinational operations concerning the applicable law: whose obligations are relevant? If the JTAC is from a state that is not a party to Additional Protocol I and the pilot of the aircraft is from a state that is, must the pilot, before releasing a bomb, ensure that the target is a military objective in accordance with Article 52 of Additional Protocol I? Or do the relevant obligations follow the nationality of the JTAC (the JTAC 'buys the bomb' in military parlance) so that only the IHL obligations of his state apply?²³ A pilot in a military fighter aircraft has limited ability to observe the situation on the ground. He may be flying at an altitude of several thousand feet, at a speed of hundreds of miles per hour, while having to control the aircraft. Modern aircraft will often be equipped with a number of sensors that assist the pilot, such as infrared and electro-optic. Even these sensors are not able to see through clouds, however. As a consequence, the JTAC will generally have much better 'situational awareness' than the pilot. Against this background, it is understandable that it is the JTAC who is responsible for acquiring the target. He will provide the information to the pilot that the latter requires to be able to attack that target.²⁴ This will include a description of the target, but in very general terms. This information may not be sufficient for the pilot to determine whether the target is a military objective in the sense of Article 52 of Additional Protocol I. In such a case, the pilot may need to ask the JTAC for additional information to enable him to make this determination. The JTAC then in effect performs the function of additional sensor for the pilot.²⁵ The pilot will determine, *inter alia* on the basis of the information from this sensor, whether the object is a legitimate target in accordance with the international obligations of his state. The pilot is the person pulling the trigger, which makes him the person 'deciding upon an attack' in the sense of Article 57(2)(a)(i). He must do everything feasible to verify whether the objective to be attacked is neither a civilian nor a civilian object in accordance with that article.

Diverging interpretations of IHL obligations

Even where states have the same obligations, they may not agree on the interpretation to be given to a particular obligation. In most if not all fields of international law, it is inevitable that different states will interpret obligations differently. The case of IHL is no exception to this rule. The potential for divergent interpretations in IHL is however increased by two characteristics of this branch of international law. The first is that there is no specific body that has been given the

23 This example assumes that the state does not accept Art. 52 of AP I as reflecting customary international law.

24 In the United States and NATO, this is referred to as the 'nine-line briefing'. This refers to the nine subjects that the briefing covers. See US Joint Chiefs of Staff, above note 8, p. V-40.

25 J. F. R. Boddens Hosang, 'Aandachtspunten in de ISAF ROE vanuit het Strategisch-juridisch Niveau', in *Militair Rechtelijk Tijdschrift*, Vol. 105, No. 5, 2009, p. 219.

power to authoritatively interpret the law. It is true that international courts and tribunals have had the opportunity to interpret provisions of IHL. The ICJ has, in a number of judgements and advisory opinions, opined on the way in which some provisions must be understood. Although these are important, they have rarely involved in-depth interpretations of specific provisions. The ICJ's *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, for example, led one commentator to criticise the Court for its 'light treatment' of IHL.²⁶ In addition, the rule of *stare decisis* – that is, that judges are obliged to respect precedent – does not apply to decisions by the ICJ and other international courts and tribunals.²⁷ Article 59 of the ICJ Statute provides that: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' The International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR) have engaged extensively in the interpretation of IHL norms. In contrast to the ICJ, these tribunals have frequently delved deeply into the question of how a particular rule should be understood. Also in the case of these tribunals, however, there is no rule of *stare decisis* binding them to their own precedent, let alone binding states. There are indications that at least certain states do not agree with some of the interpretations of the ICTY.²⁸ This is not surprising, given the fact that there has on occasion been a current of teleological interpretation in the tribunals' judgements. This current has been described by one commentator as 'adventurous interpretation'.²⁹

The second characteristic of IHL that increases the potential for divergent interpretations is the development of new methods and means of warfare. The principal instruments of IHL, the four Geneva Conventions, were drafted more than sixty years ago. The Hague Regulations of 1907 are more than a century old. These treaties are still largely adequate to address contemporary armed conflict, and they are certainly not 'obsolete' or 'quaint' as has sometimes been suggested.³⁰ Nevertheless, it is true that the existing rules are not always a neat 'fit' for new methods and means of war, with which the drafters of the conventions were not

26 David Kretzmer, 'The Advisory Opinion: the light treatment of international humanitarian law', in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 88–102.

27 On precedent in international courts, see generally Gilbert Guillaume, 'The use of precedent by international judges and arbitrators', in *International Journal of Dispute Settlement*, Vol. 2, No. 1, 2011, pp. 5–23.

28 See, for example, *Operational Law Experts Roundtable on the Gotovina Judgement: Military Operations, Battlefield Reality and the Judgement's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, International Humanitarian Law Clinic, Emory Law School, 2012, available at: www.law.emory.edu/fileadmin/NEWWEBSITE/Centers_Clinics/IHLC/Gotovina_Meeting_Report.pdf.

29 Mia Swart, 'Judicial lawmaking at the ad hoc tribunals: the creative use of the sources of international law and "adventurous interpretation"', in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Vol. 70, 2010, p. 459. Swart criticises the definition of rape given by the ICTY Trial Chamber in the *Furundžija* case: see *ibid.*, p. 485.

30 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, pp. 104–107. The words 'obsolete' and 'quaint' were used by White House Counsel Roberto Gonzalez to describe certain provisions of the Geneva Conventions concerning treatment of detainees. See www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

familiar and thus could not take into account. Examples are the use of cyber attacks during armed conflict and the potential use of autonomous agents. To apply the existing law to such new methods and means is not impossible, but requires interpreting the law to achieve a good fit. This increases the possibility for divergent understandings between states of how the law applies. Against this background, it is not surprising that divergences in interpretation of particular IHL rules occur between states' contributing forces to a multinational operation. These sometimes concern relatively minor points of IHL,³¹ in other cases they relate to some of the key provisions of IHL treaties.

An important example of different interpretations of IHL is the United States' understanding of what is a 'military objective' that may be legitimately attacked. The United States is not a party to the Additional Protocols to the Geneva Conventions, but it appears to view at least the first two paragraphs of Article 52 of Additional Protocol I as reflecting customary law.³² The United States' interpretation of these paragraphs, however, is broader than that of many other states, including a number of the United States' NATO allies.³³ The difference lies particularly in the meaning that is given to what constitutes an 'effective contribution to military action' in the sense of Article 52(2). Many states understand this to mean that only objects that are of value for the enemy's war-fighting effort may be legitimate targets. The United States, however, understands this also to mean objects that are of value for the enemy's war-sustaining effort. The *2007 U.S. Commanders Handbook on the Law of Naval Operations*, for example, states that:

An object is a valid military objective if by its nature (e.g., combat ships and aircraft), location (e.g., bridge over enemy supply route), use (e.g., school building being used as an enemy headquarters), or purpose (e.g., a civilian airport that is built with a longer than required runway so it can be used for military airlift in time of emergency) it makes an effective contribution to the enemy's war fighting/war sustaining effort and its total or partial destruction, capture, or neutralization, in the circumstance at the time, offers a definite military advantage.³⁴

31 An example is the United Kingdom's attempts to foster an agreed interpretation of the IHL rules relevant to the protection of prisoners of war against public curiosity. The United Kingdom made a pledge to this effect at the 28th International Conference of the Red Cross and Red Crescent: see www.icrc.org/Apply/p128e.nsf/pbk/DCOE-5TWNNH?OpenDocument§ion=PBGO.

32 Memorandum for John H. McNeill, Assistant General Counsel (International), OSD (9 May 1986), in *Law of War Documentary Supplement*, United States Army Judge Advocate General's Legal Center and School, 2007, p. 399. Art. 52(3) provides: 'In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.'

33 Kenneth Watkin, 'Coalition operations: a Canadian perspective', in Michael D. Carsten (ed.), *International Law and Military Operations*, U.S. Naval War College International Law Studies, Vol. 84, 2008, p. 255.

34 Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, July 2007, pp. 5–2 and 5–3, available at: www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/.

A similar reference to the enemy's 'war-sustaining' capability in the context of the definition of a military objective is included in the 2009 United States Military Commissions Act, which amended the United States Code thusly:

(1) The term 'military objective' means combatants and those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability of an opposing force and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack.³⁵

The reference to 'war-sustaining' capability suggests that objectives that do not directly contribute to war-fighting but that indirectly contribute to it, such as exports that raise funds which are in turn used to finance the armed forces, are considered as legitimate military objectives. This is confirmed by the *2011 Operational Law Handbook*, which states that: "The U.S. defines "definite military advantage" very broadly to include "economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability".³⁶ The consequence of this definition is that the United States considers certain objects legitimate targets for attack that some of its allies consider civilian objects.

Another example of diverging interpretations is the definition of 'active' or 'direct' participation in hostilities. Common Article 3 of the Geneva Conventions provides that persons not actively taking part in hostilities may not be attacked. Article 51 of Additional Protocol I provides that civilians shall enjoy protection from attack unless and for such time as they take a direct part in hostilities. The distinction between persons who participate 'actively' or 'directly' in hostilities and those who do not is thus a matter of life and death, as the former may be attacked whereas the latter may not. The Conventions and Protocols do not provide a definition of 'direct participation'.³⁷ Many commanders and military legal advisers might say that they know a person directly participating in hostilities when they see one. This does not alter the fact, however, that there is no authoritative interpretation and there is therefore room for interpretation. This led the ICRC to embark on an endeavour to clarify the notion of direct participation in hostilities. Together with the T.M.C. Asser Institute, it organised a number of meetings of legal experts to discuss the notion. Based *inter alia* on the discussions during these meetings, the ICRC published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities* in 2009.³⁸ This document provides a legal

35 Military Commissions Act of 2009, Pub. L. No. 111-84, para. 950(p), 123 Stat. 2190 (codified at 10 U.S.C. para. 47A (2006)).

36 United States Army Judge Advocate General's Legal Center and School, *Operational Law Handbook*, 2011, p. 132, available at: www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf.

37 In this context, 'direct' and 'active' are generally considered to be synonymous. See, for example, ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 629.

38 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (hereinafter 'Interpretive Guidance').

reading of the notion of ‘direct participation in hostilities’ with a view to strengthening the implementation of the principle of distinction. It stresses that the positions enunciated in it are the ICRC’s alone, and that it is not a text of a legally binding nature. This has not prevented a number of experts who were involved in the process from strongly criticising both the process by which the Interpretative Guidance was arrived at and its substance, however.³⁹ Some of these critics were working for their governments at the time of the meetings, and although they participated in a personal capacity, it is likely that their criticism is shared by the governments that they advise. It is very difficult to ascertain this, however, because very few states appear to have made public their own interpretation of direct participation in hostilities in anywhere near as sophisticated and detailed a manner as is presented in the Interpretive Guidance. It is thus very difficult to know what the views of states on the Interpretive Guidance are, but it does appear that these views are not the same even within an alliance such as NATO.

This is illustrated by the controversy that arose in 2009 concerning the targeting of drug producers and traffickers by NATO’s ISAF in Afghanistan.⁴⁰ In October 2008, upon the request of the Afghan government, NATO defence ministers meeting in Budapest agreed that ISAF could ‘act in concert with the Afghans against facilities and facilitators supporting the insurgency, in the context of counter-narcotics, subject to the authorisation of respective nations’.⁴¹ Pursuant to this decision, the Supreme Allied Commander in Europe, US General John Craddock, issued a ‘guidance’ providing NATO troops with the authority ‘to attack directly drug producers and facilities throughout Afghanistan’.⁴² It was reported that according to the document, deadly force was authorised even in those cases where there is no proof that suspects are actively engaged in the armed resistance against the Afghanistan government or against Western troops. It is ‘no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective’, Craddock wrote.⁴³ The directive was sent to Egon Ramms, the German commander at NATO Command in Brunssum, the Netherlands, which was in charge of the NATO ISAF mission. Reportedly, he did not want to follow the guidance and considered it a violation of IHL. There was also strong pushback by a number of participating states in ISAF. This undoubtedly contributed to the fact that the guidance was subsequently withdrawn. Although the controversy involved commanders and not states, it is submitted that indirectly it reflects different

39 See, for example, W. Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” study: no mandate, no expertise, and legally incorrect’, in *New York University Journal of International Law and Politics*, Vol. 42, 2010, pp. 768–830.

40 See Michael N. Schmitt, ‘Targeting narcoinsurgents in Afghanistan: the limits of international humanitarian law’, in *Yearbook of International Humanitarian Law*, Vol. 12, 2009, pp. 1–20.

41 NATO, ‘NATO steps up counter-narcotics efforts in Afghanistan’, available at: www.nato.int/cps/en/natolive/news_50120.htm.

42 Susanne Koelbl, ‘Battling Afghan drug dealers: NATO high commander issues illegitimate order to kill’, in *Der Spiegel Online*, 28 January 2009, available at: www.spiegel.de/international/world/battling-afghan-drug-dealers-nato-high-commander-issues-illegitimate-order-to-kill-a-604183.html.

43 *Ibid.*

views by states on the interpretation of the notion of direct participation in hostilities. The answer to the question of whether ‘narco-insurgents’ may be attacked turns on whether or not they can be considered as directly participating in hostilities. Although, as noted above, few if any states have publicly set forth their interpretation of this notion, in the practical experience of this author these interpretations vary between states. Even between states working particularly closely with the United States, there remain areas of the definition of ‘direct participation in hostilities’ on which there is consensus and other areas on which there are different views.⁴⁴ One of the areas where there appears to be such a range of views concerns the circumscription of the acts which constitute direct participation in hostilities. Although the United States has not put forward an official view on the definition of direct participation, there is evidence that it considers the definition in the ICRC’s Interpretive Guidance as too narrow.⁴⁵ In particular, it appears to consider that the act of providing funds which finance the carrying out of military operations may be an act that constitutes direct participation in hostilities. Indeed, two American generals who were interviewed by the United States Senate Foreign Relations Committee suggested that the reason why a number of drug traffickers had been placed on a Pentagon target list to be captured or killed was that they contributed money to the Taliban.⁴⁶ At least some other states participating in NATO appear to have a more restrictive view.⁴⁷

Consequences of the divergence of views on the applicable law in a given case

It is clear from the above that in a multinational operation, there may be important differences between the legal frameworks that the various contributing states consider as applying to their troops. For obvious reasons, states will require that their troops operate at all times within the specific legal framework that applies to them. This fact has operational consequences. It means that an international commander will be able to use certain troops but not others for particular missions. An example is the targeting of drug traffickers in the hypothetical case study above.

There are also important legal consequences. These revolve around questions of responsibility: by cooperating with troops from other states operating within a different legal framework, troops may expose their state to an

44 Stephen Pomper, ‘Toward a limited consensus on the law of immunity in non-international armed conflict: making progress through practice’, in Kenneth Watkin and Andrew J. Norris (eds.), *Non-International Armed Conflict in the Twenty-First Century*, US Naval War College International Law Studies, Vol. 88, 2012, p. 182.

45 Trevor A. Keck, ‘Not all civilians are created equal: the principle of distinction, the question of direct participation in hostilities, and evolving restraints on the use of force in warfare’, in *Military Law Review*, Vol. 211, 2012, pp. 144–146.

46 James Risen, ‘U.S. to hunt down Afghan drug lords tied to Taliban’, in *New York Times*, 9 August 2009, available at: www.nytimes.com/2009/08/10/world/asia/10afghan.html?_r=0.

47 This observation is based on discussions by the author with legal advisers to governments of a number of other NATO Member States.

increased risk of state responsibility or themselves to individual criminal responsibility.

In principle, a state is only responsible under international law for its own conduct, including conduct of its armed forces as a state organ. This principle is also referred to as the principle of ‘independent responsibility’. It underlies the Draft Articles on State Responsibility adopted by the International Law Commission (ILC) in 2001.⁴⁸ This does not mean that state conduct is necessarily independent of the conduct of others, or that the latter does not affect the former. In a multinational operation, there will be situations in which troops from one state rely on information provided by other troops. An example is the case of a JTAC guiding an aircraft pilot on to a target. If the pilot, on the basis of information provided by the JTAC, attacks an object that is not a legitimate military objective for the pilot but is for the JTAC, this does not necessarily exclude state responsibility attaching to the state of the pilot. Fault is not an element required for international responsibility to arise.⁴⁹ According to Article 2 of the Draft Articles on State Responsibility, all that is required is conduct that is attributable to the state and that constitutes a breach of an international obligation of that state. Ironically, in the example given, the state of the JTAC will not be responsible for committing the act because the pilot is an agent of another state. Nor will it be responsible for aiding or assisting the pilot’s state’s wrongful act, even if the JTAC deliberately and intentionally provided information that was factually incorrect. The Draft Articles on State Responsibility do provide in Article 16 for the possibility that a state is responsible for aiding or assisting another state in the commission of a wrongful act. For this to lead to the responsibility of the former, however, the act would have had to be internationally wrongful if committed by the state of the JTAC, which is not the case in the hypothetical example. In addition, aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of Article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A state is not responsible for aid or assistance under Article 16 unless the relevant state organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted state.⁵⁰

Also relevant in the context of state responsibility is Common Article 1 to the Geneva Conventions. This article provides that ‘the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances’. Article 1 of Additional Protocol I contains the same undertaking. There is some controversy concerning the precise scope and meaning of the words ‘ensure respect’, but the better view appears to be that it entails an obligation to

48 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Yearbook of the International Law Commission*, 2001, Vol. 2, Part 2, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

49 *Ibid.*, p. 36.

50 *Ibid.*, p. 66.

ensure that other parties to the Geneva Conventions respect IHL.⁵¹ This is an obligation of means, not one of result. The ICJ held in the *Wall* Advisory Opinion that

it follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.⁵²

Common Article 1 does not require a state to ensure respect by another state for an obligation that does not bind the latter. It does apply, however, in a situation in which one state considers that IHL is applicable and the other does not.

Multinational operations may also increase the risk of incurring individual criminal accountability because of the complex web of legal obligations involved. International criminal law provides for a number of different forms of criminal responsibility for conduct that is carried out in conjunction with other persons. The Rome Statute, for example, states that an individual can be responsible for ‘ordering, soliciting or inducing’ the commission of a crime,⁵³ for aiding, abetting, or otherwise assisting in the commission of a crime,⁵⁴ and if the individual in any other way contributes to the commission of a crime by a group of persons acting with a common purpose.⁵⁵ The Statute also provides for the possibility of ‘superior responsibility’ for the conduct of subordinates. A discussion of how these modes of criminal responsibility apply to multinational operations is outside the scope of this article, but it is clear that the existence of different legal frameworks within an operation may make this application very complicated and can potentially increase the risk of being exposed to individual criminal responsibility. An example could be the case of providing intelligence that is subsequently used for an attack. In the hypothetical case study discussed above, if forces of one state provide intelligence to the JTAC, and this leads to an attack on an object that the state providing the intelligence does not consider a military objective, could the troops providing the intelligence be held criminally responsible if the Court finds that in fact, it was a civilian object? The answers to such questions will have to be determined on the basis of the specific factual circumstances of each case, but our example illustrates that the risks may be greater in multinational operations because of the number of actors interacting and their differing legal obligations.

51 See Laurence Boisson de Chazournes and Luigi Condorelli, ‘Common Article 1 of the Geneva Conventions revisited: protecting collective interests’, in *International Review of the Red Cross*, Vol. 82, 2000, pp. 67–87.

52 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para. 158.

53 Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 38544, Art. 25(3)(b).

54 *Ibid.*, Art. 25(3)(c).

55 *Ibid.*, Art. 25(3)(d).

Methods of legal interoperability

Methods to achieve legal interoperability through express regulations and declarations to provisions of IHL treaties

The best way to ensure legal interoperability is for states in a multinational operation to have ratified the same IHL treaties and to have identical interpretations of the provisions in those treaties. Although most if not all IHL treaties aspire to universal ratification, this is not a realistic prospect in the near future. The same holds true for achieving identical interpretations among states parties. The question then becomes how to deal with the differences that exist.

In a multinational operation, it is important for states to limit the risks mentioned above that emanate from cooperation with other states for which a different legal framework applies. Such mitigation of risk can be achieved in a number of different ways.

First, one way is to limit interaction between the troops of different states within the operation. This is achieved to some extent when troops are assigned responsibility for distinct geographical areas, a common phenomenon in multinational operations. Many states wish to have their troops in a multinational operation located as much as possible in one location for operational reasons. This frequently leads to troops from a particular state being assigned 'their' Area of Responsibility. Within this Area of Responsibility, they will interact mostly with other troops from the same state. Even in cases where troops from one state are assigned their own Area of Responsibility, they will still have to cooperate to some extent with troops from other states. Air support by fixed-wing airplanes, for example, is usually not constrained to one particular area, because this would lead to very inefficient use of a costly and sparse asset. In addition, a state may lack or not have available at that particular moment certain capabilities, which other states may then provide. This is why situations such as the one described in the hypothetical case study above, where planes of one state assist ground troops of another state, frequently occur in multinational operations.

Second, interoperability may be expressly addressed in the law itself. The Convention on Cluster Munitions provides the only example at present in IHL of such regulation.⁵⁶ Article 21 of that treaty addresses the relations between States Parties to the Convention on the one hand and states which are not party to it on the other. For present purposes, the most relevant part of Article 21 reads:

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

⁵⁶ Convention on Cluster Munitions, Dublin, 30 May 2008, reproduced in *International Legal Materials*, Vol. 48, 2009, p. 354.

4. Nothing in paragraph 3 of this Article shall authorise a State Party:
- (a) to develop, produce or otherwise acquire cluster munitions;
 - (b) to itself stockpile or transfer cluster munitions;
 - (c) to itself use cluster munitions; or
 - (d) to expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

For a number of states, the inclusion of a provision in this treaty that adequately addresses interoperability was an essential condition for agreeing to the final text.⁵⁷ In this context, ‘adequately addressing’ must be understood as retaining the possibility to operate together with a non-state party to the convention. This possibility is circumscribed by paragraph 4, however.

In the hypothetical case study discussed above, if the state of the JTAC is party to the Convention and the state of the pilot is not, the JTAC could not expressly request the pilot to use cluster munitions if there was a choice of munitions. Conversely, if the state of the JTAC is not a party and the state of the pilot is, the pilot cannot use the cluster munitions even if requested to do so by the JTAC.

A more detailed analysis of Article 21 is outside the scope of this article. It is interesting to note, however, that there appears to be room for different interpretations of this article.⁵⁸ This is particularly interesting because it means that an article that was specifically inserted into the convention to prevent debate concerning the possibilities for cooperation with non-state parties can itself give rise to differences in interpretation.

Third, interoperability may also be achieved through common declarations to provisions in IHL instruments. Such declarations can be instrumental in achieving a common interpretation of IHL. This applies in the first place to provisions of a treaty to which the states concerned are parties. As illustrated above, the wording of IHL treaty provisions such as the one referring to direct participation in hostilities may allow for diverging interpretations. The same is true for the definition of ‘military objective’ in Article 52 of Additional Protocol I. A number of NATO member states have made similar declarations to this article that indicate a common understanding of at least some aspects of the definition.⁵⁹ One of these declarations provides that military commanders and others responsible for planning, deciding upon, or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant

57 See, for example, the Netherlands’ Explanatory Memorandum to the law on ratification of the Convention, Kamerstukken II (parliamentary papers), 2009–2010, 32187 (R 1902), No. 3, p. 8.

58 This is illustrated, *inter alia*, by a debate between the Dutch government and a number of parliamentarians, who understood the prohibition on assisting in the use of cluster munitions set out in the treaty as also including a prohibition on transit. See Kamerstukken II (parliamentary papers), 32187 (R1902) G, 21 January 2011; and Kamerstukken II, 32187 (R1902) K, 2 May 2011. See also Elke Schwager, ‘The question of interoperability – interpretation of Articles 1 and 21 of the Convention on Cluster Munitions’, in *Humanitäres Völkerrecht Informationschriften*, Vol. 21, No. 1, 2008, p. 247.

59 Catherine Wallis, ‘Legitimate targets of attack: considerations when targeting in a coalition’, in *The Army Lawyer*, December 2004, p. 51, available at: www.loc.gov/rr/frd/Military_Law/pdf/12-2004.pdf.

time, and such decisions cannot be judged on the basis of information which has subsequently come to light.⁶⁰ Interpretative declarations may also be a useful mechanism used by states to manage their varying treaty obligations, however. It has been noted, for example, that a declaration made by Australia that includes clarification of the understanding of the term ‘military advantage’ has made it possible to harmonise the approaches taken by the United States and Australia to issues such as targeting.⁶¹

Methods to achieve legal interoperability in the absence of express regulations or declarations

In the absence of express regulation of interoperability in the law or in interpretative declarations to that law, states in a multinational operation have, broadly speaking, two options for addressing the issue of legal interoperability.

The first is referred to here as the ‘maximalist’ approach. It consists of the states participating in a multinational operation agreeing on a common framework that, for some states, entails the application of certain norms as a matter of policy rather than law. This strategy can be employed to harmonise divergent views on whether IHL is applicable in a particular situation. An example of the latter is the policy of the Netherlands to apply the restrictions contained in IHL also in situations where they consider that IHL is not formally applicable.⁶² Such a policy is not without difficulties, however. Applying restrictions from IHL may in effect mean not applying restrictions from other branches of international law that may be more restrictive. An example is the principle of proportionality, one of the fundamental principles of IHL. Underlying the principle of proportionality is the acceptance that military objectives may be attacked. In cases in which IHL is not applicable, however, there are no military objectives that may a priori be attacked and the principle cannot be applied as it is in an armed conflict. It may be noted that the policy as it is employed by the Netherlands does not address differences in ratification of IHL treaties between states. The United States also has a policy of applying IHL as a matter of policy to all military operations, but this policy does not include the application of the rules in Additional Protocol I.⁶³

States participating in a multinational operation could elect to apply a broader policy, so that all states apply the legal framework to which the partner that is legally most restrained is bound. In such a situation, the United States would accept the application of Additional Protocol I as a matter of policy, for example. To the knowledge of the author, such an approach has until now not been taken in any

60 States that have made such a declaration include Canada, Germany, Italy, the Netherlands, and the United Kingdom.

61 Vicki McConachie, ‘Coalition operations: a compromise or an accommodation’, in Michael D. Carsten, *International Law and Military Operations*, U.S. Naval War College International Law Studies, Vol. 84, 2008, p. 241.

62 Kamerstukken I (parliamentary papers), 2005–2006, 30300 X, A, p. 4.

63 US Department of Defence (DoD), Dir. 2311.01E, DoD Law of War Program, 9 May 2006, p. 2. The exact language is: ‘Ensure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.’

multinational operation. It is likely that one reason for this is the fear that such a policy could be interpreted as acceptance of the rules that are applied as a matter of policy as customary international law.⁶⁴

Although states in multinational operations have not adopted such a broad policy generally, it may be noted that they have done so on specific issues in specific operations. In December 2008, ISAF Commander General McKiernan issued a 'tactical directive' to the troops participating in ISAF.⁶⁵ The directive contained a number of measures intended to minimise collateral damage to civilians and maintain the support of the Afghan population for the operation. In July 2009 the directive was updated by McKiernan's successor as ISAF commander, General McChrystal.⁶⁶ This version of the directive contained *inter alia* far-reaching restrictions on the use of air-to-ground munitions and indirect fires. These restrictions went beyond any requirements in conventional or customary IHL. The tactical directive was not issued for the purpose of strengthening interoperability within ISAF. The restrictions in the directive were the result of the fact that the military viewed the operation as a counter-insurgency operation, and in counter-insurgency, the support of the local population for the operation takes centre stage. As General McChrystal explained in the tactical directive:

This is different from conventional combat, and how we operate will determine the outcome more than traditional measures, like capture of terrain or attrition of enemy forces. We must avoid the trap of winning tactical victories – but suffering strategic defeats – by causing civilian casualties or excessive damage and thus alienating the people. While this is also a legal and a moral issue, it is an overarching operational issue – clear-eyed recognition that loss of popular support will be decisive to either side in this struggle.⁶⁷

Although the restrictions were thus made primarily for operational reasons, a secondary effect was to impose certain uniform principles of targeting and thus increase legal interoperability.

It may be pointed out at this juncture that, although the questions that the involvement of an international organisation may raise for the application of IHL are outside the scope of this article, they could have important consequences for a 'maximalist' approach. If the international organisation in charge of a multinational operation should be considered a 'party to an armed conflict' in which the operation is involved, then a logical corollary would be that all the troops in that operation are bound by the IHL obligations of that organisation. This would mean that there

64 See Timothy P. Bullman, 'A dangerous guessing game disguised as an enlightened policy: United States laws of war obligations during military operations other than war', in *Military Law Review*, Vol. 159, 1999, p. 174.

65 ISAF Commander, Tactical Directive, 30 December 2008, available at: www.nato.int/isaf/docu/official_texts/Tactical_Directive_090114.pdf.

66 ISAF Commander, Tactical Directive, 6 July 2009, available at: www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf.

67 *Ibid.*

would be a common level of obligations, although this level might fall below the obligations of some of the individual troop-contributing countries.⁶⁸

The ICRC plays an important role in promoting a ‘maximalist’ approach, by actively encouraging the ratification of IHL treaties. For this purpose, it has *inter alia* drafted model instruments of ratification to IHL instruments. Potentially, processes undertaken by the ICRC with a view to strengthening or clarifying the law can also contribute to this objective. One example is the process that the ICRC has taken up pursuant to an invitation from the 31st International Conference of the Red Cross and Red Crescent to pursue further research, consultation, and discussion, in cooperation with states, as to how the law may be strengthened in regard to detention in non-international armed conflicts, and to propose a range of options and recommendations on this issue. In this context, the ICRC has organised a number of regional consultations with states. Even where the outcome of such processes are rejected by some states, such as in the case of the Interpretive Guidance, the process does contribute to better awareness of the different positions taken by states.

The second option for addressing legal interoperability is referred to here as the ‘minimalist’ approach. As the term suggests, its starting point is the exact opposite of the ‘maximalist’ approach. This starting point is that the common framework that applies to the multinational operation is no more restrictive than the obligations of the participant that is legally least constrained. Participating states can then indicate that their troops will apply stricter standards that reflect the IHL obligations of their state. Generally, such national restrictions or ‘caveats’ are indicated in the message from the national military authorities placing the troops at the disposal of the commander of the multinational operation, also referred to as the Transfer of Authority. Often they will refer to a particular rule in the Rules of Engagement of the operation, but this is not axiomatic.⁶⁹ Caveats are often criticised because they restrict the flexibility of the international commander. At first sight, they appear to be an obstacle to interoperability. Upon closer inspection, however, national caveats can be an important tool. They make it possible for a state to agree to an Operation Plan (OPLAN) and ROE that go beyond the legal framework that it considers as applying to its troops. This can be illustrated with the following example. As noted above, Germany initially did not consider that its participation in ISAF led it to become a party to an armed conflict. This did not prevent it from agreeing to the ISAF OPLAN and ROE, which provided for certain conduct that would only be legal during an armed conflict. This was made possible by the fact that Germany could submit caveats to that OPLAN and those ROE in respect of its

68 For a discussion on this issue, see M. Zwanenburg, above note 4. See also Ola Engdahl, ‘Multinational peace operations forces involved in armed conflict: who are the parties?’, in Kjetil Milutinovic Larsen, Camilla Guldahl, and Gro Nystuen (eds.), *Searching for a ‘Principle of Humanity’ in International Humanitarian Law*, Cambridge University Press, Cambridge, 2012, pp. 233–271.

69 Within NATO, a caveat is defined as ‘any limitation, restriction, or constraint by a nation on its military forces or civilian elements under NATO command and control or otherwise available to NATO, that does not permit NATO commanders to deploy and employ these assets fully in line with the approved operation plan. Note: A caveat may apply *inter alia* to freedom of movement within the joint operations area and/or to compliance with the approved rules of engagement.’ See NSA, above note 6, p. 2-C-2.

own troops.⁷⁰ The ‘minimalist’ approach will provide less clarity concerning the applicable legal framework than the ‘maximalist’ approach. The use of caveats leads to a patchwork of legal regimes and requires the international commander to maintain a matrix of national caveats to avoid inadvertently not taking them into account. For troops in the field confronted with troops from another state that are unable to assist them because of a national caveat, this may be very unsatisfactory, but it may be unavoidable. As Geoffrey S. Corn states:

unless common understandings of key targeting principles and common standards of weapon permissibility are developed for coalition operations, the era of the ‘national caveat’ is unlikely to abate. This may ultimately be unavoidable, and has not been debilitating to date. However, even an adoption of minimum standards accompanied by acknowledgment that national authorities take precedence of coalition directives would add more certainty to these operations than currently exists.⁷¹

In the ‘minimalist’ approach, it is vital that there is a good understanding of the positions of the different participants in the multinational operation, particularly for the international commander and his or her legal adviser.⁷² Such awareness is similarly important for troop-contributing states. This will enable them to determine which kinds of cooperation with the other participating states entail legal risks for the states and their military personnel, and how to address those risks. Awareness of the partner’s legal positions will generally be greater between partners that cooperate on a frequent basis, such as partners in a military alliance. Not only will these states cooperate in operations more frequently, but they will also often be involved in common training as well as in the development of common doctrine. In addition, they will generally have experience with developing common ROE. This is a driver of convergence of legal principle, or at least an important forum in which practical ways to address differences of legal principle can be discussed.⁷³

Concluding remarks

This article has described some of the challenges raised by multinational operations from a legal perspective, focusing specifically on IHL. Such challenges are the result

70 As caveats are classified, it is not possible to cite them here. For an illustration of the use of caveats in practice, see Susanne Koelbl and Alexander Zsandar, ‘Not licensed to kill: German Special Forces in Afghanistan let Taliban commander escape’, in *Der Spiegel Online*, 19 May 2008, available at: www.spiegel.de/international/world/not-licensed-to-kill-german-special-forces-in-afghanistan-let-taliban-commander-escape-a-554033.html.

71 Geoffrey Corn, ‘Multinational operations, unity of effort, and the Law of Armed Conflict’, HPCR Working Paper series, 2009, pp. 25–26, available at: http://reliefweb.int/sites/reliefweb.int/files/resources/84B588812CF91A754925762E00194C41-Harvard_May2009.pdf.

72 Neil Brown, ‘Issues arising from Coalition operations: an operational lawyer’s perspective’, in Fred Borch and Paul Wilson (eds.), *International Law and the War On Terror*, U.S. Naval War College International Law Studies, Vol. 79, 2003, p. 231.

73 Dale G. Stephens, ‘Coalition warfare – challenges and opportunities’, in *Israel Yearbook on Human Rights*, Vol. 36, 2006, pp. 17 and 21.

of different levels of ratification of IHL treaties, of divergent interpretations of shared obligations, and of the fact that each state makes its own determination of whether or not there is an armed conflict and whether or not the state is a party to it. These challenges are further compounded by other thorny questions that have not been discussed here, such as diverging views on the relationship between IHL and human rights. Against this background, it could almost seem surprising that there are so many multinational operations and that generally they appear to function effectively. That this is nevertheless the case is a testament to the methods that states have developed to ensure 'legal interoperability' in multinational operations.

Some of these methods are aimed at separating the spheres of action of different participants in a multinational operation, such as assigning each participating state its own Area of Responsibility. They attempt to avoid or at least limit situations where legal interoperability is required. For cases where it is not possible or desirable to avoid cooperation, states have broadly developed two approaches for fostering legal interoperability. The first is the 'maximalist' approach, and consists of the states participating in a multinational operation agreeing on a common framework for that operation that is broad enough to accommodate the obligations of all participants. The second one is the 'minimalist' approach, which consists of states agreeing on a 'lowest common denominator' legal framework to which individual states can make caveats to ensure they respect their own IHL obligations. In practice, states in multinational operations do not make a choice between the two approaches; rather, they make use of a combination of the two approaches. In ISAF this is illustrated by the use of national caveats on the one hand, and the issuing of strict targeting directives on the other.

Before thought can be given in a multinational operation to managing legal differences and thereby ensuring legal interoperability, it is vital to establish that there are such differences. It is therefore important for legal advisers involved to be aware of the legal obligations of the states involved in the operation as well as of how they interpret these obligations. This will be easier in the case of operations carried out by states that routinely cooperate, such as NATO-led operations. It will present more challenges in operations where states which cooperate have little or no shared history in military operations, such as is more often the case in UN-led operations.

Where differences have been identified, the combination of approaches to ensuring legal interoperability described above can be highly effective. Despite its complexity, effective legal interoperability in multinational operations is common.⁷⁴ This means that differences in legal regimes applicable to different states do not lead to violations of one of those regimes. There is still room for improvement, however; it is submitted that two important prongs of such improvement would be creating better awareness of legal differences between states

⁷⁴ *Ibid.*, p. 20.

and placing more emphasis on the ‘maximalist’ approach in dealing with such differences.

Ultimately, ensuring legal interoperability in multinational operations is a shared concern of all those who wish to see IHL respected. This is because a lack of such legal interoperability leads to legal uncertainty, and ‘[l]egal uncertainty, it hardly needs to be said, could ultimately impinge upon the protection afforded by IHL to the victims of armed conflicts’.⁷⁵

75 ICRC, Challenges Report, above note 2, p. 33.

Some controversies of detention in multinational operations and the contributions of the Copenhagen Principles

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Abstract

This paper discusses three main areas of controversy relating to detention in the context of multinational operations: the relationship between international humanitarian law and human rights law; the principle of legality in the context of relying on United Nations Security Council resolutions as a justification for taking detainees; and the transfer of detainees where there is, for example, a substantial risk of torture or cruel, inhuman or degrading treatment or punishment. The paper then considers how the Copenhagen Principles address these issues.

Keywords: detention, Copenhagen Principles, international humanitarian law, IHL, international human rights law, IHRL, the principle of legality, Security Council resolutions, transfers of detainees, monitoring the treatment of detainees.

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* I am grateful to Carla Ferstman and Jelena Pejic for commenting on an earlier draft of this paper, and Beth Wellington for editing the paper. I also thank Liz Saltnes for her support.

Detention is often a necessary task in multinational operations to ensure that the force is able to carry out its mandate, act in self-defence and protect the local population. In a non-international armed conflict, a soldier serving with a multinational force might, for example, detain a person who is carrying a firearm and is acting in a threatening manner. At the moment of detention a number of key issues will arise, the most critical being the determination of the legal basis for the detention – is it the host nation’s law, or is there some other legal basis which could be used to justify the detention? Once the person has been detained, the question arises as to what rights accrue to the detainee and whether those rights are found in international humanitarian law (IHL) or in international human rights law (IHRL). If the soldier decides to hand the detainee over to the local authorities, what obligations does the soldier have to ensure that the detainee will not be mistreated by those authorities? Each of these questions raises issues that have been controversial in the context of multinational operations conducted by states and international organisations in the last decade. The discussion of the development of the Copenhagen Process on the Handling of Detainees in International Military Operations¹ provides an appropriate opportunity to examine some of these issues and discuss the contribution of the Copenhagen Principles to resolving them.

The first section of this article seeks to outline some of the controversies that arise when dealing with detainees² in multinational operations.³ The second part seeks to discuss the Copenhagen Principles concerning detention by examining the extent to which they respond to the above controversies.

As a caveat, it should be noted that this paper focuses exclusively on detention issues arising from the conduct of multinational operations in non-international armed conflicts or peace operations. The paper does not deal with international armed conflicts or law enforcement operations such as counter-piracy.

Three main controversies regarding detention in multinational operations

If used appropriately, detention can better protect the local population and help the multinational force to achieve its mandate by minimising threats to the security of

- 1 *The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process: Principles and Guidelines* (hereafter Copenhagen Principles), October 2012, available at: <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>. All internet references were last visited in May 2013.
- 2 The term ‘detainee’, as used in this article, refers to a person who has been deprived of liberty for reasons related to a multinational military operation. For example, a detainee might be a person who is a security threat or a person suspected of committing a criminal offence.
- 3 The term ‘multinational operations’, as used in this article, refers to those operations that are conducted by two or more military forces outside their own territories. Such operations include those conducted by the North Atlantic Treaty Organisation (NATO) in Afghanistan and coalition forces in Iraq. They also include peace operations conducted by international organisations such as the United Nations (UN) in the Democratic Republic of the Congo or a coalition of states such as the International Force for East Timor (INTERFET). Such operations may be conducted by land, sea, or air. This paper focuses only on multinational operations conducted on land.

the force or the local population. Used inappropriately, detention can lead to the mistreatment of members of the local population and a loss of international and national support for the multinational force, as well as criminal and disciplinary charges against those who have mistreated detainees. It can also result in claims being brought against the governments comprising the multinational force regarding their responsibility for the breach of human rights and/or IHL norms. In limited circumstances, this can also include claims against the multinational force, to the extent that it constitutes an international organisation with independent legal responsibility that exercises effective control over the conduct of the troop contingents.⁴

Notwithstanding the general acceptance of the importance of detention in contemporary multinational military operations, there have been a number of controversies surrounding the legality of detention. It has been calculated, for example, that in the context of U.S.-conducted operations in Afghanistan and Iraq after the 11 September 2001 terrorist attack on the United States and until 2011, there have been:

more than 200 different lawsuits producing 6 Supreme Court decisions, 4 major pieces of legislation, at least 7 executive orders across 2 presidential administrations, more than 100 books, 231 law review articles (counting those only with the word Guantanamo in the title), dozens of reports by nongovernmental organisations, and countless news analysis articles from media outlets in and out of the mainstream.⁵

However, the United States is not the only country to have faced challenges relating to detention activities. Other states such as Canada,⁶ Denmark⁷ and the

4 For a more detailed discussion regarding the accountability of multinational forces such as those commanded by NATO or the UN, see Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden and Boston, 2005.

5 Deborah N. Pearlstein, 'Detention debates', in *Michigan Law Review*, Vol. 110, No. 6, April 2012, p. 1045.

6 See, for example, Canadian Department of Defence, *Report of the Somalia Commission of Inquiry*, 1997, available at: www.dnd.ca/somalia/somaliae.htm; *Amnesty International Canada v. Canada (Minister of National Defence)* (2007), 287 DLR (4th) 35 (Can); a public interest investigation launched on 9 February 2007 by the Canadian Military Police Complaints Commission regarding the transfer of detainees to Afghan authorities by Canadian Military Police (see Military Police Complaints Commission, *Afghanistan Public Interest Investigation (APII)*, 3 November 2009); and an inquiry by the Canadian Military Police Complaints Commission concerning a complaint made by Amnesty International Canada and British Columbia Civil Liberties Association in June 2008 (see Military Police Complaints Commission, *Afghanistan Public Interest Hearing (APIH)*, 27 June 2012).

7 On Afghanistan, see Case No. 180/2011, *Ghousouallah Tarin v. Ministry of Defense*. On Iraq, see Case No. B3421-11, *Brak and others v. Ministry of Defense*; Case No. B-397-12, *Shahel and others v. Ministry of Defense*; Case No. B-1162-12, *Al Saadoun and others v. Ministry of Defense*; and as yet unnumbered case *Albarrak and others v. Ministry of Defense*. In April 2012, the Danish Justice Ministry announced the establishment of a 'Commission of Inquiry into the Danish decision to participate in the war in Iraq [2003] and the actions by Danish authorities in regard to the detention of individuals during the wars in Iraq and Afghanistan' (unofficial translation from the Danish Justice Ministry from a press release of April 2012). See also Peter Stanners, 'Iraq Commission to Investigate Danish Involvement in War', in *The Copenhagen Post*, 12 April 2012, available at: <http://cphpost.dk/news/international/iraq-commission-investigate-danish-involvement-war>.

United Kingdom⁸ have also had to deal with legal and political concerns relating to detention.

The controversies relate to a range of areas, starting with the justification for taking detainees and their treatment at the point of capture, and extending right up to their final release or transfer. States might have different views concerning the interpretation of their mandate and the extent to which it permits the taking of detainees, the law applicable to the operation, the standards of treatment that they should provide to detainees, and when and to whom they might transfer detainees. In some cases, the law itself might have gaps or might not address all the issues that multinational forces face in contemporary military operations. Jelena Pejic's 2005 influential paper entitled 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence'⁹ was one of the first detailed expositions of some of the controversies that exist when internment and administrative detention are used during international military operations.

John Bellinger III and Vijay Padmanabhan have identified four controversies concerning detention that have arisen in military operations: (1) which individuals are subject to detention? (2) What legal process must the state provide to those detained? (3) When does the state's right to detain terminate? (4) What legal obligations do states have in connection with repatriating detainees at the end of detention?¹⁰ The authors argue that those questions:

were the most difficult questions in our service in the Office of the Legal Adviser at the U.S. Department of State. During our respective tenures at the State Department, we responded regularly to concerns raised by foreign governments, nongovernmental and international organisations, scholars, and the media . . .¹¹

Ashley Deeks also notes that, in the context of multinational operations, states 'develop or adapt procedural rules to fit their specific operational settings'.¹² Deeks

8 See, for example, *Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v. Yunus Rahmatullah (Respondent); Secretary of State for Foreign and Commonwealth Affairs and another (Respondents) v. Yunus Rahmatullah (Appellant)* [2012], UKSC 48; *R (on the Application of Maya Evans) v. Secretary of State for Defence* [2010], EWCH 1445; and *R (on the Application of Al Jedda) (FC) v. Secretary of State for Defence* [2007], UKHL 58. See also inquiries into deaths in custody, such as *The Report of the Baha Mousa Inquiry* (Vols. I–III), The Right Honourable Sir William Gage (Chairman), 2011. The UK Ministry for Defence has allegedly paid out 14 million pounds 'in compensation and costs to Iraqis who complained that they were illegally detained and tortured by British forces during the five-year occupation of the south-east of the country'. See Ian Cobain, 'MoD pays out millions to Iraqi torture victims', in *The Guardian*, 20 December 2012, available at: www.guardian.co.uk/law/2012/dec/20/mod-iraqi-torture-victims.

9 Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, p. 375.

10 John B. Bellinger III and Vijay M. Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Existing Law', in *American Journal of International Law*, Vol. 105, No. 2, April 2011, p. 202.

11 *Ibid.*, pp. 202–203.

12 Ashley S. Deeks, 'Administrative detention in armed conflict', in *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 431.

sets out the approaches taken by multinational forces such as the NATO-led Kosovo Force (KFOR), the International Force for East Timor (INTERFET), and the Multi-National Force – Iraq (MNF-I), and concludes that it is ‘almost impossible to test without field study’ whether in practice states use detention as an exceptional measure.

Some of the controversies that have arisen include the definition of detention, the legal basis for detention, the information that detainees entitled to when they are detained, and the rights of detainees to legal representation. Space, however, only permits three major controversies to be mentioned here: (1) the interaction between IHL and IHRL in the context of detention and the extent to which they complement each other, or one takes precedence over the other; (2) whether a UN Security Council resolution may justify detention if the resolution either explicitly or by implication authorises detention; and (3) the transfer of detainees in situations where there is a concern that the detainee will be mistreated. These controversies are highlighted because, as will be seen in the following sections, commentators have different views as to what the appropriate response should be when confronted by them.

The interaction between international humanitarian law and human rights law

A debate that has continued for a number of years concerns the interaction between IHL and IHRL in the context of dealing with detainees. This debate has a number of complex elements and has been canvassed at length in numerous international court cases,¹³ books,¹⁴ journal articles and research papers,¹⁵ and reports.¹⁶ The issues

13 See, for example, International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, p. 226; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, p. 136, para. 106.

14 See, for example, Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, New York, 2011; Roberta Arnold and Noëlle Quéniwet (eds), *International Humanitarian Law and Human Rights Law*, Martinus Nijhoff Publishers, Leiden, 2008; René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, New York, 2002.

15 See, for example, Christopher Greenwood, ‘Human rights and humanitarian law – conflict or convergence’, in *Case Western Reserve Journal of International Law*, Vol. 43, No. 1/2, 2011, pp. 491–512; Rob McLaughlin, ‘The law of armed conflict and international human rights law: some paradigmatic differences and operational implications’, in Michael Schmitt *et. al.* (eds), *Yearbook of International Humanitarian Law*, Vol. 13, 2010, pp. 213–243; Françoise Hampson, ‘The relationship between international humanitarian law and human rights law from the perspective of a treaty body’, in *International Review of the Red Cross*, Vol. 90, No. 549, 2008, p. 559; Cordula Droeger, ‘The interplay between international humanitarian law and international human rights law in situations of armed conflict’, Research Paper No. 14-07, reprinted in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 310–355; Adam Roberts, ‘Human rights obligations of external military forces’, in International Society for Military Law and the Law of War (ed.), *The Rule of Law on Peace Operations*, 2006, p. 429; Adam Roberts, ‘Counter-terrorism, armed forces and the laws of war’, in *Survival*, Vol. 44, No. 1, 2002.

16 See, for example, ‘Expert meeting on security detention’, prepared by Tyler Davidson and Kathleen Gibson in *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, pp. 323–381; ‘Expert meeting on procedural safeguards for security detention in non-international armed conflict’, Chatham House and International Committee of the Red Cross, London, 22–23 September 2008, (hereinafter ICRC expert meeting), in *International Review of the Red Cross*, Vol. 91, No. 876, December 2009, pp. 859–881.

concern the different roles played by IHL and IHRL, the extraterritorial effect of IHRL treaties, the principle of *lex specialis*, the application of IHRL in military operations that are not considered armed conflict, and the way in which IHL and IHRL complement each other in the context of detention. An appropriate starting point for considering the legal debate is Sir Christopher Greenwood's comment:

neither humanitarian law nor human rights law is . . . 'an island entire to itself' . . . Both are parts of the legal system that is international law, and that system is not divided up into self-contained boxes that have no bearing upon one another . . . International law has to be looked at as whole.¹⁷

The issue is therefore not whether IHL or IHRL apply, but rather which specific area of law or provision will apply as a legal obligation in a particular case. A thorough analysis of both the facts and law in each case is required to determine more precisely when and to what extent provisions of one or both bodies of law apply. It is also relevant to consider the extent to which states act in a particular way when deciding the application of one legal regime over another, as such acts might be driven by political or policy considerations rather than legal ones. To paraphrase William Lietzau,¹⁸ no one doubts that in particular conflicts, such as non-international armed conflicts (NIACs), human rights norms might be far more relevant to detention as a matter of policy but not as a matter of law.¹⁹

There are some who argue that IHL and IHRL cannot apply simultaneously.²⁰ At the end of one International Committee of the Red Cross (ICRC) expert meeting, the debate was summarised thus:

The prevailing view is that IHRL continues to apply during armed conflict and is particularly relevant when addressing the issue of detention in NIAC. However, when giving concrete substance to [the] interplay with IHL in practice, the different cultures of the two regimes need to be taken into account: 'IHL' is not equal to 'IHRL during armed conflict'. The two bodies of law – while similar in some of their purposes and on many points of substance – are designed to address very different contexts. Finally, while IHL imposes obligations on all parties to a conflict, including non-state actors, IHRL – in the current state of international law – can only be said to be directly binding on States.²¹

17 C. Greenwood, above note 15, pp. 503–504.

18 Current Deputy U.S. Assistant Secretary of Defense (Rule of Law and Detainee Policy).

19 William Lietzau, 'Detention of terrorists in the twenty-first century', in Kenneth Watkin and Andrew Norris (eds), *Non-International Armed Conflict in the Twenty-First Century*, U.S. Naval War College, *International Law Studies*, Vol. 88, 2012, p. 332, available at: www.usnwc.edu/getattachment/21b3c656-4160-4090-af57-42fed7f8c6ae/88.aspx.

20 For a more detailed account of this debate, see for example, Jens Olin, 'IHL and IHRL', in *Lieber Code*, 14 January 2012, available at: www.liebercode.org/2012/01/ihl-and-ihrl.html; the subsequent discussions in Gabor Rona, 'A response to Ohlin about IHL and IHRL', in *Opinio Juris*, 17 January 2012, available at: <http://opiniojuris.org/2012/01/17/a-response-to-ohlin-about-ihl-and-ihrl/>; Kevin Heller, 'Ohlin Response to Rona', in *Opinio Juris*, 17 January 2012, available at: <http://opiniojuris.org/2012/01/17/ohlin-response-to-rona/>.

21 ICRC expert meeting, above note 16, p. 861.

Another approach, which is taken by the UN Office of the High Commissioner for Human Rights (OHCHR), is that both IHL and IHRL are considered to be complementary sources of obligations in situations of armed conflict.²² The OHCHR has stated that ‘in an armed conflict, international human rights law is applicable concurrently with international humanitarian law’.²³

Regardless of which approach is taken concerning the application of IHL and IHRL during armed conflict, a multinational force must still determine which principles, rules, and standards it is going to apply during a conflict. Should, for example, security detainees have the same rights of review that criminal detainees have under IHRL, and if so, when should those rights be given to them?²⁴ Does it matter in the context of *habeas* reviews that such reviews are conducted by military members and not by a civilian judiciary? The debate then extends further, because multinational forces must determine how to negotiate the differing interpretations of IHRL norms adopted by states serving on the same operation. This is imperative in order to enable multinational forces to achieve unified command and control, for operational and accountability purposes.

UN Security Council resolutions

Another key area of contention is the question of whether detention can be justified on the basis of a Security Council mandate.²⁵ One view is that a Security Council resolution is not detailed enough to satisfy the principle of legality, and therefore, states cannot use a resolution as a basis for asserting that detention is lawful without breaching the fundamental legal principle that detention must not be arbitrary or unlawful.²⁶ Notwithstanding that argument, the reality is that as a matter of practice both the UN and states have accepted a general power to detain pursuant to the mandates.

22 UN Office of the High Commissioner for Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict*, United Nations Publications, New York and Geneva, 2011, p. 1.

23 *Ibid.*, p. 55.

24 In this paper, the term ‘security detainee’ refers to those individuals detained for imperative reasons of security, such as acting suspiciously, breaching curfew, failing to provide identification when required to do so, or being seen photographing a militarily sensitive site. The term ‘criminal detainee’ refers to those who are detained because they have, or are suspected of having, committed a criminal act. Of course, a person may be both a security and criminal detainee.

25 There are of course other grounds on which detention may be justified. For a more detailed discussion of those grounds, see for example, Bruce Oswald, ‘Detention by United States peacekeepers: searching for definition and categorization’, in *Journal of International Peacekeeping*, Vol. 15, 2011, pp. 119–151; Jan Kleffner, ‘Operational detention and the treatment of detainees’, in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Military Law of Operations*, Oxford University Press, New York, 2010, pp. 465–480; Frederick Naert, ‘Detention in peace operations: the legal framework and the main categories of detainees’, Institute for International Law, Working Paper No. 94, May 2006.

26 For a more detailed discussion about the legal effects of Security Council resolutions, see for example, Marko Oberg, ‘The general legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ’, in *European Journal of International Law*, Vol. 16, 2006, pp. 879–906; Michael C. Wood, ‘The interpretation of Security Council resolutions’, in *Max Planck Yearbook of United Nations Law*, Vol. 2, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany, 1998, pp. 73–95.

In relation to UN peacekeeping operations, on at least three occasions the Security Council has expressly mandated peacekeepers to detain individuals: UN peacekeepers were expressly authorised to take detainees in operations conducted in the Congo in 1961,²⁷ in Somalia in 1993,²⁸ and in Liberia in 2006.²⁹ In circumstances where the Security Council has not expressly mandated detention, peacekeepers have implied such an authority: this has been the case with the UN Emergency Force (UNEF I),³⁰ the UN Transitional Authority in Cambodia (UNTAC),³¹ the UN Mission in Rwanda (UNAMIR II),³² the Stabilisation Force in Bosnia and Herzegovina (SFOR),³³ the UN Mission in the Democratic Republic of the Congo (MONUC),³⁴ the UN Stabilisation Mission in Haiti (MINUSTAH),³⁵ the Kosovo Force (KFOR),³⁶ the INTERFET,³⁷ the UN

27 The Security Council authorised the UN Operation in the Congo (ONUC) to detain 'pending legal action ... all foreign military and para-military personnel and political advisers not under United Nations command, and mercenaries'. See SC Res. 169, 24 November 1961, para. 4.

28 In relation to the UN Operations in Somalia II (UNOSOM II), the Security Council authorised the Secretary-General to take all measures necessary to arrest and detain those responsible for carrying out the armed attacks against the UN military personnel serving with UNOSOM II. See SC Res. 837, 6 June 1993, para. 5.

29 The Security Council authorised the UN Mission in Liberia (UNMIL) to 'apprehend and detain former President Charles Taylor in the event of a return to Liberia'. See SC Res. 1638, 11 November 2005, para. 1.

30 Report of the Secretary-General, *United Nations Emergency Force: Summary Study of the Experience Derived from the Establishment and Operations of the Force*, UN Doc. A/3943, 9 October 1958, paras. 54 and 70.

31 In February 1993, the UN Secretary-General reported that UNTAC was holding two suspects in custody for committing murder. Those detentions were justified by the Secretary-General on the basis that they were undertaken pursuant to 'a special UNTAC office with powers to arrest, detain and prosecute persons accused of politically motivated criminal acts and human rights violations'. *Report of the Secretary-General on the Implementation of Security Council Resolution 792 (1992)*, UN Doc. S/25289, 13 February 1993 (hereinafter 792 Report), para. 15.

32 One UN Secretary-General report concerning detentions in Rwanda noted that UNAMIR peacekeepers detained a 'total of 44 people ... and handed them over to local authorities'. *Progress Report of the Secretary-General on the United Nations Mission for Rwanda*, UN Doc. S/1995/107, 6 February 1995, and *Addendum*, UN Doc. S/1995/107/Add.1, 16 February 1995, p. 26.

33 See, for example, 'SFOR peacekeepers detaining Algerians suspected of threatening Bosnia's security', in *Associated Press*, 22 December 2003; 'NATO peacekeepers detain former Karadzic bodyguard', in *USA Today*, 31 July 2004, available at: http://usatoday30.usatoday.com/news/world/2004-07-31-bosnia-warcrimes_x.htm.

34 For example, in September 2007, the MONUC military commander, Major-General Gaye, acknowledged that 'the [MONUC] force was, therefore, also in charge of holding detainees'. UN Department of Public Information, 'Press conference by Force Commander of Democratic Republic of Congo Mission', 6 September 2007, available at: www.un.org/News/briefings/docs/2007/070906_MONUC.doc.htm.

35 For example, MINUSTAH troops 'detained some 50 suspects, 40 of whom were later released'. See 'Haiti: UN peacekeepers mount new anti-gang operation in capital', in *UN Daily News*, 18 November 2006, available at: www.un.org/apps/news/storyAr.asp?NewsID=16613&Cr=haiti&Cr1=.

36 See, for example, Fisnik Abrashi, 'NATO peacekeepers apprehend suspected ethnic Albanian radicals', in *Associated Press News*, 8 January 2001; Carlotta Gall, 'Peacekeepers in Kosovo seize 19 Macedonian rebel suspects', in *New York Times*, 12 June 2011, available at: www.nytimes.com/2001/06/12/world/peacekeepers-in-kosovo-seize-19-macedonia-rebel-suspects.html.

37 See, for example, Bruce Oswald, 'The INTERFET Detainee Management Unit in East Timor', in *Yearbook of International Humanitarian Law*, Vol. 3, 2000, p. 347.

Mission in Timor-Leste (UNMIT)³⁸ and the African Union Mission in Somalia (AMISOM).³⁹

A very recent and interesting development in relation to detention operations is the creation of an 'Intervention Brigade' (the Brigade) by the Security Council.⁴⁰ The Brigade is the 'first-ever "offensive" combat force'⁴¹ created by the Security Council and is under the direct command of the UN Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) force commander. At the time of writing this paper, it remains to be seen how the UN and those states contributing troops to the Brigade will justify the power to detain. There are a number of different possible approaches; for example, the Brigade's mandate 'to carry out targeted offensive operations ... with the responsibility of neutralizing armed groups'⁴² and to 'prevent the expansion of all armed groups ... and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups'⁴³ may be sufficient to justify detention by way of implied power. Alternatively, the Brigade may be able to justify detention on the basis that, when it is engaged in offensive operations, it can take detainees by using the internment powers found in Geneva Convention IV by analogy.

The practice of implying an authority to detain can be traced to UNEF I – the first UN armed operation.⁴⁴ The UN Secretary-General, reporting on the experiences of that operation, noted that UNEF personnel detained individuals in order to protect civilians and their property, and to stop infiltrators approaching the demarcation line.⁴⁵

The International Criminal Tribunal for the Former Yugoslavia has concluded in at least two cases that a resolution provided a mandate, and therefore justification, for detention:

From the practice of SFOR ... the Chamber deduces that SFOR does have a clear mandate to arrest and detain a person indicted by the Tribunal and to have that person transferred to the Tribunal whenever, in the execution of tasks assigned to it, SFOR comes into contact with such a person.⁴⁶

38 See, for example, 'Indonesia: UN peacekeepers detain two former East Timorese militiamen', in *BBC Summary of World Broadcasts*, 6 April 2003; *UNMIT Situational Report, 19 January–25 January 2007*.

39 See, for example, 'Allied forces arrest about 40 Al-Shabab suspects in central Somali town', reported by *Radio Gaalkacyo*, Somalia, 1 December 2012, and transcribed by *BBC Monitoring Africa – Political*.

40 SC Res. 2098, 28 March 2013. For a brief discussion concerning some of the legal issues surrounding the establishment of the Brigade, see Bruce 'Ossie' Oswald, 'The Security Council and the Intervention Brigade: some legal issues', in *American Society of International Law Insights*, Vol. 17, No. 15, 6 June 2013.

41 UN Security Council, "Intervention Brigade" authorised as Security Council grants mandate renewal for United Nations mission in the Democratic Republic of Congo', UN Press Release SC/10964, 28 March 2013, available at: www.un.org/News/Press/docs/2013/sc10964.doc.htm.

42 SC Res. 2098, above note 40, para. 2.

43 *Ibid.*, para. 12(b).

44 UNEF I was mandated in 1956 to secure and supervise the cessation of hostilities in Egypt, to serve as a buffer between Egyptian and Israeli forces, and to supervise the ceasefire.

45 Report of the UN Secretary-General, above note 30, paras. 54 and 70.

46 International Criminal Tribunal for Yugoslavia (ICTY), *The Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-PT, Decision of Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 53. The ICTY decided in the *Nikolic* case, following the precedent it had set in the *Todorovic* decision (Case No. IT-95-9, 18 October 2000), that the authority of the Stabilisation Force (SFOR) to take

In relation to detentions carried out by KFOR, the European Court of Human Rights (ECtHR) has held that the Security Council resolution establishing the mandate of KFOR, the agreement with the host state, and the KFOR detention directive were evidence that 'KFOR's security mandate included issuing detainee orders'.⁴⁷ However, the more recent ECtHR judgement in the case of *Al-Jedda v. The United Kingdom*⁴⁸ may have confused matters by suggesting that a UN Security Council Chapter VII resolution does not in itself justify detention unless detention is explicitly provided for and the details of the detention regime are specified or the relevant state has derogated from Article 5 of the European Convention on Human Rights (ECHR).⁴⁹ That approach leads to the conclusion that, where states have obligations under the ECHR, they are precluded from taking security detainees unless the Security Council expressly mandated such detention and provided the requisite detail (the Court did not say what it should be). Such an interpretation of the *Al-Jedda* judgement makes it in effect impossible for an ECHR state party to justify detention without the detainee being charged with a criminal offence, unless the Security Council explicitly creates an obligation to detain and elaborates on it, in which case a Chapter VII Security Council resolution would supersede Article 5 of the ECHR by operation of Article 103 of the UN Charter.⁵⁰

If the ECtHR's emphasis on the need for a binding and explicit Security Council resolution to justify detention is taken at face value, it is necessary to consider, as just mentioned, how the Security Council could acquit itself of the obligation to regulate detention in sufficient detail to satisfy the ECtHR's judgement. It could be argued that authorisation to detain would need to be accompanied by a binding resolution concerning the rules that would apply when detaining. This would lead to the Security Council having to develop specific rules concerning detention, which would be a controversial step. As has been argued by Jelena Pejic:

By implying that a Chapter VII UN Security Council [resolution] could possibly displace the operation of the relevant detention provisions of the ECHR, the Court has effectively invited the Security Council to legislate on matters of

detainees stemmed from a variety of sources including the Statute of the Court, the Dayton Peace Agreement, the Security Council resolution establishing the SFOR, an agreement between the ICTY and the Supreme Headquarters Allied Powers Europe (SHAPE), and the force's rules of engagement (ROE) (see paras. 31–55).

47 European Court of Human Rights (ECtHR), *Agim Behrami and Bekir Behrami v. France* (Application No. 71412/01) and *Ruzhdi Saramati v. France, Germany and Norway* (Application No. 78166/01), ECtHR Grand Chamber Admissibility Decision, 2 May 2007, para. 124.

48 ECtHR, *Al-Jedda v. The United Kingdom* (Application No. 27021/08), ECtHR Grand Chamber Judgement, 7 July 2011.

49 *Ibid.*, paras. 100, 107 and 109. See also Jelena Pejic, 'The European Court of Human Rights' *Al-Jedda* judgement: the oversight of international humanitarian law', in *International Review of the Red Cross*, Vol. 93, No. 883, 2011, pp. 837–851, for a more detailed discussion concerning this judgement.

50 Article 103 of the UN Charter states: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. For a more detailed discussion of the importance of this provision in establishing obligations, see for example, Rain Liivoja, 'The scope and supremacy clause of the United Nations Charter', in *International and Comparative Law Quarterly*, Vol. 57, No. 3, 2008, pp. 583–612.

detention. The wisdom or feasibility of the Court's suggestion to this effect may be deemed questionable.⁵¹

There are others who have argued that a Security Council resolution must be carefully read before it can be implied that it permits detention. For example, Jan Kleffner has suggested that 'it may hardly be assumed that a Security Council mandate to "use all necessary means" could provide a legal basis for operational detention that would not be clearly available under any other rules of law'.⁵² Some experts have also stated that the phrase 'use all necessary means' 'is too vague to provide a legal basis for internment, i.e. to be interpreted as giving lawful authority'.⁵³

Finally it is important to note that, notwithstanding the practice of relying on Security Council mandates to justify detentions, the Security Council has not addressed a number of matters that impact on detention. For example, the Security Council has not stipulated how states – when relying on Security Council mandates – are to treat detainees, when to release or transfer them, or what standards need to be met when reviewing their ongoing detention. Thus, even if a Security Council resolution is an accepted justification for detention, there is still considerable uncertainty about the substance of the legal obligations that apply.

The controversy then becomes how to determine how multinational forces might fulfil their mandates and protect themselves and the civilian populations if they cannot rely on Security Council mandates in circumstances where IHL does not apply, or where there is no host state agreement permitting detention. How would UN peacekeepers, for example, justify taking detainees when protecting the local population from people who are malign influences trying to disrupt the operation, or are criminals, if they are not able to rely on a Security Council mandate? The answer remains unsettled for those seeking to find an acceptable legal basis that achieves a balance between state practice and a specific positivist legal justification.

The transfer of detainees

Another controversy that has arisen in relation to multinational operations is the transfer of detainees from the detaining authority to the host state (that is, the state in which the operation is being conducted). This controversy has been particularly prevalent in the context of the armed conflicts in Iraq and Afghanistan, because concerns have been raised that transfers were occurring in situations where there was a real risk of the detainee being abused by the host state's authorities, or where there had been reports of abuse happening upon transfer. In 2010, in the context of Iraq, Amnesty International encouraged the United States' government to ensure that

51 J. Pejic, above note 49, p. 851.

52 J. Kleffner, above note 25, p. 470.

53 ICRC expert meeting, above note 16, p. 869.

no one at risk of torture and other ill-treatment or other grave human rights violations is transferred to Iraqi custody, stressing also that no government should ever directly or indirectly return Iraqis to Iraq if they are at risk of torture or other ill-treatment.⁵⁴

More recently, the UN Assistance Mission in Afghanistan (UNAMA) reported that in 'September 2011, ISAF suspended detainee transfers to 16 NDS [National Directorate of Security] and ANP [Afghan National Police] locations which UNAMA had identified as practicing systematic torture'.⁵⁵ The report went on to be highly critical of the transfer arrangements in place between international military forces or foreign intelligence agencies in Afghanistan.⁵⁶

There are two complex legal issues that arise when transferring detainees in operations that occur in the territory of another state. The first relates to the sovereignty of the host state over all persons within its territory – a matter that is recognised as a general principle of international law⁵⁷ and reinforced in countless Security Council resolutions concerning the independence and sovereignty of states.⁵⁸ This is perhaps why the Supreme Court of the United States held in the *Munaf* case that allegations that a person will be tortured if handed over to the host state's national authorities

are of course a matter of serious concern, but in the . . . context [of being handed over by U.S. military forces in Iraq to the Iraqi authorities] that concern is to be addressed by the political branches, not the judiciary.⁵⁹

Against that general principle of state sovereignty is the growing acceptance that, where there is a substantial belief that a detainee may be tortured by local authorities, the multinational force that has effective control of the detainee is prohibited from transferring the detainee to those authorities.⁶⁰

54 Amnesty International, *Broken Bodies, Tortured Minds: Abuse and Neglect of Detainees in Iraq*, January 2011, pp. 44–45, available at: www.amnesty.org.uk/uploads/documents/doc_21229.pdf.

55 United Assistance Mission in Afghanistan (UNAMA) and OHCHR, *Treatment of Conflict-Related Detainees in Afghan Custody: One Year On*, Kabul, Afghanistan, January 2013, p. 7.

56 *Ibid.*, p. 3. UNAMA found that 31 per cent of detainees interviewed who had been transferred to Afghan custody experienced torture in Afghan National Police, Afghan National Directorate of Security, or Afghan National Army facilities.

57 See, for example, Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, Pearson Education, London, 1992, p. 458; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, *ICJ Reports 1986*, para. 106. That approach confirms Art. 2(7) of the UN Charter, which provides: 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

58 See, for example, the preambular paragraphs in the following Security Council resolutions: SC Res. 2012, 25 April 2013; SC Res. 2010, 25 April 2013; and SC Res. 2096, 19 March 2013.

59 *Munaf et al. v. Geren, Secretary of the Army et al.* (2008), 533 US 23 (US).

60 This belief is based primarily on the principle of non-refoulement, which, it has been argued, prohibits the transfer of detainees if there are substantial reasons for believing that the detainee would be subject to serious ill-treatment, such as torture or arbitrary deprivation of life. See C. Droege, above note 15. See also Emanuela-Chiara Gillard, 'There is no place like home: states' obligations in relation to transfers of persons', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 703–750; *R (Maya Evans) v. Secretary of State for Defence* [2010], EWHC 1445 (Admin) (UK); Human Rights Institute (Columbia

The second issue concerns post-transfer monitoring of detainees. The specific questions in the context of post-transfer monitoring are whether post-transfer monitoring is required as a matter of law, and for how long such monitoring should continue. At present there is no general international law provision that creates an obligation to monitor detainees post-transfer. The reality, however, is that post-transfer monitoring is one of the most effective means to ensure that a detainee is not abused or mistreated. The most thorough discussion by a domestic court on post-transfer monitoring is the case of *R (Maya Evans) v. Secretary of State for Defence*. In that case, the court identified that monitoring is not only a challenging activity to carry out in practice, but it is also a politically and diplomatically sensitive topic that must be navigated carefully by states, particularly in multinational force environments and where host states are sensitive to their sovereignty being infringed upon by other states.⁶¹

The effects of the controversies that surround transfers and post-transfer monitoring will carry into practice in operations, as well as into political and diplomatic discussions, particularly when a state must set up its detention facilities in another state's territory because the host state territory is unable or refuses to adhere to the transferring state's standards of treatment. Controversies are also likely to arise where a transferring state demands the return of a detainee who is allegedly being abused, but the host authority refuses to return that detainee.⁶²

Addressing the controversies

The above-mentioned controversies have led to states and international organisations seeking to address the challenges that arise from differing interpretations and applications of the law. For example, in a report prepared for the 30th International Conference of the Red Cross and Red Crescent, the ICRC noted that the Fourth Geneva Convention that deals, among other things, with internment contains

rules that are fairly rudimentary from the point of view of individual protection. Moreover, recent State practice – e.g. internment by States party to multinational coalitions – has been characterized by divergences in the interpretation

Law School), *U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK and Canada*, December 2010, available at: www.law.columbia.edu/ipimages/Human_Rights_Institute/AfghanBriefingPaper%20FINAL.pdf.

61 *R (Maya Evans) v. Secretary of State for Defence*, above note 60, paras. 268–286; *Amnesty International Canada and BCCLA v. Chief of the Defence Staff for the Canadian Forces and Attorney General of Canada* (2008 FCA 401), A-149-08 (Can), available at: <http://decisions.fca-caf.gc.ca/en/2008/2008fca401/2008fca401.html>.

62 While there is no record in the public domain of a case where a host state has refused to return a detainee to the detaining force, there have been situations where such a result would have occurred. From my own experience in serving on peace operations and multinational operations, that concern has given rise to 'war game' exercises aimed at determining what the multinational force would do if such an event were to occur.

and implementation of the relevant rules, which has given rise to serious concern.⁶³

At the end of that report, the ICRC annexed Jelena Pejić's paper on internment/administrative detention safeguards,⁶⁴ which the ICRC stated reflected its official position and guides its operations in the field.⁶⁵ In 2011, the ICRC prepared another report on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* for the 31st International Conference of the Red Cross and Red Crescent. That report returned to the theme of detention but emphasised the interplay between detention and human rights in both international armed conflicts and non-international armed conflicts. At the conclusion of that conference participants invited the ICRC to 'pursue further research, consultations and discussion . . . to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict'.⁶⁶ That mandate is now being pursued by the ICRC through a series of regional meetings aimed at facilitating consultation and discussion regarding the application of IHL to detention in non-international armed conflicts.

In 2007, the Danish government convened the first of a series of meetings which came to be referred to as the Copenhagen Process.⁶⁷ One of the primary aims of that Process was to develop a better understanding and framework for multinational forces carrying out their operations in situations where they have to navigate between the application of IHL and IHRL, deal with concerns regarding mandates to carry out multinational operations, and work with host governments in relation to transferring and monitoring detainees. The Process concluded in October 2012 with a conference during which states welcomed the Principles. What now follows is an examination of the extent to which the Principles have addressed the controversies discussed above.

63 *Report of the 30th International Conference of the Red Cross and Red Crescent*, Geneva, Switzerland, 26–30 November 2007 (hereinafter 30th ICRC Report), p. 11. See also *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, document prepared by the ICRC, Geneva, October 2007, 30IC/07/8.4, p. 11, available at: www.icrc.org/eng/assets/files/2011/30ic-8-4-ihl-challenges-report-annexes-eng-final.pdf.

64 *Ibid.*, Annex 1.

65 *Ibid.*, p. 11.

66 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November–1 December 2011, Resolution I, para. 6, available at: www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm.

67 For more details on how the Process developed prior to 2009 see, for example, Thomas Winkler, 'The Copenhagen Process on Detainees: a necessity', in *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 489–498; Bruce 'Ossie' Oswald and Thomas Winkler, 'Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations', in *American Society of International Law Insights*, Vol. 16, No. 39, 26 December 2012, available at: www.asil.org/insights121226.cfm; Jacques Hartmann, 'The Copenhagen Process: Principles and Guidelines', in *EJIL Talk!*, 3 November 2012, available at: www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/; Jonathan T. Horowitz, 'Introductory Note to the Copenhagen Principles and Guidelines on the Handling of Detainees in International Military Operations', in *American Society of International Law International Legal Materials*, Vol. 51, No. 6, 2012, p. 1364.

The Copenhagen Principles⁶⁸

The Copenhagen Principles were settled upon following five years of multinational and bilateral discussions between states,⁶⁹ international organisations⁷⁰ and members of civil society.⁷¹ The Copenhagen Principles focus on international military operations conducted in situations of non-international armed conflict and peace operations.⁷² The use of the term ‘international military operations’ signifies that the Principles apply to those military operations that have a cross-border component and include situations where one state deploys forces in the territory of another state to assist the latter in an internal armed conflict (sometimes referred to as an internationalised non-international conflict) or to maintain peace and security. The Principles therefore apply to multinational operations such as those conducted by coalition forces in Iraq and Afghanistan as well as unilateral interventions such as the recent French intervention in Mali.⁷³ Furthermore, the word ‘military’ suggests that the Principles do not apply to law enforcement operations that are conducted by, for example, international civilian police.

The Copenhagen Principles do not address detention in international armed conflicts because participants felt that existing treaty regimes such as the Fourth Geneva Convention and Additional Protocol I to the Geneva Conventions, as well as customary international law, adequately addressed detention in that context.

68 The author of this article was an external consultant to the Danish Ministry of Foreign Affairs on the Copenhagen Process since the inception of that Process.

69 States that participated during the Copenhagen Process included: Argentina, Australia, Belgium, Canada, China, Denmark, Ethiopia, Finland, France, Germany, India, Jordan, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom and the United States.

70 Representatives of the following international organisations attended the various Process conferences and seminars as observers: the African Union (AU), the European Union (EU), NATO, the UN and the ICRC.

71 Examples of the Danish Ministry of Foreign Affairs engaging with civil society on the Process include Thomas Winkler, ‘Transfer of Detainees’, address at the International Institute of Humanitarian Law 33rd Round Table on Current Issues of International Humanitarian Law, ‘Global Violence: Consequences and Responses’, San Remo, 9–11 September 2010. Denmark conducted public briefings on the Process at the San Remo Round Tables in 2008 and 2010, at the Bruges Colloquium in 2008, at a side event during the UN General Assembly in 2008, and at the 31st International Conference of the Red Cross and Red Crescent. Furthermore, the Process has been discussed at a number of academic conferences, including at the London School of Economics in 2009 and at the University of Wollongong in 2011. See Thomas Winkler, ‘The Copenhagen Process on the Handling of Detainees in International Military Operations’, address at the International Institute of Humanitarian Law 31st Round Table on Current Issues of International Humanitarian Law, ‘Human Rights and Peace Operations’, San Remo, 4–6 September 2008; Thomas Winkler, ‘The Copenhagen Process on the Handling of Detainees in International Military Operations’, address at the 9th Bruges Colloquium, ‘Transfers of Persons in Situations of Armed Conflict’, Brussels, 16–17 October 2009; Cordula Droege and Louise Arimatsu, ‘Conference on the European Convention on Human Rights and International Humanitarian Law: conference report’, in *Yearbook of International Humanitarian Law*, Vol. 12, 2009, pp. 435–449.

72 Preamble to the Copenhagen Principles (hereinafter Preamble), para. IX.

73 In early January 2013, the French military commenced military operations against armed groups in Mali. See, for example, Stephanie Pezard and Michael Shurkin, ‘The French intervention in Mali is necessary, but risky’, in *U.S. News*, 17 January 2013, available at: www.usnews.com/opinion/blogs/world-report/2013/01/17/the-french-intervention-in-mali-is-necessary-but-risky.

The Copenhagen Principles were ‘welcomed’ by sixteen states (including the Five Permanent members of the Security Council)⁷⁴ participating in the third and final Copenhagen Process conference held in Copenhagen in October 2012. The term ‘welcomed’ is taken to mean that the participants agreed that the Principles accurately reflect the decisions that were made during the Process, are a useful outline for a global approach to detention that can be used by all states, and are not legally binding but will nevertheless inform practice.⁷⁵ As referred to in the document preamble, the participants ‘took note’ of the annexed commentary, indicating that it reflected the chairman’s views only and that ‘delegations would not be asked to associate themselves with the commentary’.⁷⁶

The Copenhagen Principles preamble also sets out some background issues, including the legal issues that were considered to be fundamental to the engagement of states in the Process, and the contexts in which the Principles apply. The sixteen Principles that follow the preamble deal with issues such as: the legal justification for detention; the distinction between detention and the restriction of liberty; the rights of detainees; the importance of ensuring the humane treatment of all detainees; and the best practice approaches regarding the use of physical force against detainees, conditions of detention, release of detainees, reviewing ongoing detention, transfers of detainees, standard operating procedures, and training. The Principles also include a general savings clause.

The Principles do not create law and are non-binding. As reinforced in the preamble and Principle 16:

Nothing in the . . . [Principles] affects the applicability of international law to international military operations conducted by States or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-State actors.

That savings clause and the commentary supporting it reinforce the idea that the Principles ‘should be interpreted and applied in a manner that fully complies with obligations found in applicable international legal regimes’.⁷⁷

74 Delegates from Argentina, Australia, Canada, China, Denmark, France, Finland, Germany, Malaysia, the Netherlands, Norway, South Africa, Sweden, Uganda, the United Kingdom and the United States of America ‘welcomed’ the Copenhagen Principles. As discussed below, the Swedish and Russian delegations had concerns about the Principles reflecting IHRL appropriately, and made statements to that effect. See 3rd Copenhagen Conference on the Handling of Detainees in International Military Operations, Copenhagen, 18–19 October 2012, Minutes of the Meeting as recorded by the Chair (hereinafter Chairman’s minutes), p. 4, available at: http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Official%20minutes_CP%20ny.pdf.

75 *Ibid.*

76 Preamble, para. XIII.

77 Commentary to the Copenhagen Principles (hereinafter Commentary), para. 16.1.

The precise relationship between international humanitarian law and human rights law

The question concerning the application of IHL and IHRL to detention across the spectrum of military operations, including international armed conflict and peace operations, was raised specifically at the first Copenhagen Process conference in 2007 and was a feature of numerous discussions throughout the Process. The preamble of the Copenhagen Principles recognises that ‘participants were challenged to agree upon a precise description of the interaction between international human rights law and international humanitarian law’.⁷⁸ Paragraph V of the Preamble also expresses that participants were ‘motivated by the will to reinforce the principle of humane treatment of all persons who are detained . . . to ensure respect for applicable international humanitarian law and human rights law’.⁷⁹ On a plain reading of paragraphs IV and V of the Preamble, it would therefore seem that those participating in the Process had no difficulties in accepting the application of both IHL and IHRL – the problem rested on agreeing on the precise interaction between the two bodies of law.

The fact that participants could not settle on a single unified approach to the precise application of IHL and IHRL to detention does not mean that they were unable to establish a broad framework of principles, rules and standards to guide international military forces. More specifically, in relation to multinational operations, a key strength of the Principles is that the participants found common ground on matters such as the treatment of detainees and the rights of detainees.

It is appropriate to note that two states participating in the Process felt that greater emphasis should be given to the role of human rights law in the Copenhagen Principles. The Swedish delegation ‘indicated that the Swedish interpretation of the reference to international law in principle 16 is that this also includes human rights law and that Sweden would have preferred if this had been stated explicitly in principle 16’.⁸⁰ The Russian Federation delegation

welcomed the conclusion of [the Process] and took note of [the Principles and Guidelines]. The Russian Federation further indicated that the Copenhagen Process could contribute more to the safeguarding of the humane treatment of detainees by placing greater emphasis on their inherent rights which derive from international human rights law and international humanitarian law.⁸¹

The inability to settle on the precise relationship between IHL and IHRL means that states will continue to determine their interpretation of applicable law on a case-by-case basis. This is perhaps the appropriate response when one considers how difficult it is for states to navigate issues such as the continued applicability of IHRL during armed conflicts and the extra-territorial application of IHRL in situations where they might not, for example, have effective control of territory.

78 Preamble, para. IV.

79 *Ibid.*, para. V.

80 Chairman’s minutes, p. 4.

81 *Ibid.*

The principle of legality

The controversy concerning the legal basis for detention, or for that matter whether Security Council resolutions might justify detentions, was not dealt with specifically by any Principle. The approach taken by the participants was to include a general clause stating that the '[d]etention of persons must be conducted in accordance with applicable law'.⁸² In the commentary, however, it is stated that:

Detention in some international military operations may also be justified as a matter of law pursuant to authorisations by the UN, or on the basis of international law by other competent international organisations such as the NATO, AU or the EU.⁸³

On a plain reading of the principle of legality, it is reasonable to conclude that a competent international organisation acting pursuant to its powers, which by 'necessary implication [are] essential to the performance of its duties'⁸⁴ – that is, the maintenance of international peace and security – would be able to authorise detention. Certainly, from the perspective of practice, it must be concluded that states have accepted that the Security Council may both explicitly and by implication authorise detention. The general reference to the principle of legality also leaves it for states to determine precisely how they will comply with their IHL and IHRL obligations in relation to such matters as the treatment, transfer and monitoring of detainees.

More generally, the commentary also acknowledges that detention might be justified by IHL, national law principles such as self-defence, or arrangements between a host state and states contributing military forces or international organisations.⁸⁵

Transfer and monitoring

The issue of transfers and monitoring is addressed by Principle 15:

A State or international organisation is to only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.

82 Principle 4.

83 Commentary, para. 4.3.

84 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Reports 1949*, p. 182. The doctrine of implied powers of the UN was articulated by the ICJ and has since then been used to justify Security Council mandates in the pursuit of maintaining international peace and security.

85 Commentary, paras. 4.2 and 4.3.

Deconstructing the key components of the above Principle raises three issues. First, transfers are only to occur in compliance with the international law obligations of the state or international organisation undertaking the transfer. This means that a state or international organisation wishing to transfer detainees must apply its international obligations to each case of transfer to determine whether it is complying with those obligations. So, taking a practical example, if there are substantial grounds for believing that the detainee would be tortured if they were to be transferred to a particular state, the transferring state will breach its international obligations by transferring the detainee. What the Principle does not address are situations where a host state claims that, pursuant to the general principle of sovereignty, a state *must* transfer the detainee despite potentially breaching the international law obligations. Furthermore, the Principle does not address what would be an appropriate response if the host state refuses to return a detainee who has been tortured or suffered some other form of severe physical or mental abuse by the host state authorities.

It is also quite important to consider whether a state could refuse to transfer a detainee on the basis that the transfer would be contrary to the Principles. Even though the Principles are non-binding, a state could use Principle 15 as a basis for justifying a policy decision not to transfer. For example, assume that the accepting state does not have a system of conducting ongoing reviews of security detainees. In such circumstances, it might be possible for the transferring state to rely on the existence of Principles 13 and 15 as a basis for denying transfer.⁸⁶ The United States' government's endorsement of the Copenhagen Principles might be one reason why there was a general reticence for the United States to transfer detainees to the Afghan authorities.⁸⁷ Of course, such a position does not overcome the claim of sovereignty that could be made by the host state.

The second issue that arises is the provision of access for a transferring state to the facility in which a transferred detainee is being held so that it may monitor his or her treatment. Principle 15 reinforces the position asserted by participants in the Process that there is no obligation to monitor the treatment or status of the detainee indefinitely. This is an important contribution to the practice of post-transfer monitoring because it establishes when monitoring might cease. That Principle is based on, as stated in the commentary, current practice which 'suggests that monitoring may last at least until the detainee has been released or convicted of a crime in accordance with applicable law'.⁸⁸

While it is clear that Principle 15 does not create an obligation for the receiving authority to permit monitoring, it does provide a basis on which the

86 Principle 13 provides: 'A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to, as soon as circumstances permit, be transferred to or have proceedings initiated against him or her by an appropriate authority. Where such transfer or initiation is not possible in a reasonable period of time, the decision to detain is to be reconsidered in accordance with applicable law.'

87 See Rod Norland and Charlie Savage, 'U.S. delays transfer of Bagram prison to Afghan forces', in *The New York Times*, 9 March 2013, available at: www.nytimes.com/2013/03/10/world/asia/us-delays-transfer-of-bagram-prison-to-afghan-forces.html?hp&r=2&.&

88 Commentary, para. 15.5.

transferring state can argue that it should be permitted to undertake post-transfer monitoring.

Of the three controversies that this paper has focused on, the issue of transfers and monitoring is the one that is evolving most rapidly, both in law and in practice. It would be reasonable to assume that, when the Principles were drafted in 2012, participants in the Process were still uncertain as to the direction in which relevant policies and law would develop. For this reason, it is submitted that Principle 15 can be considered a 'best fit' approach to addressing the issue of transferring and monitoring detainees.

Conclusion

It would be overstating the point to say that by welcoming the Copenhagen Principles, participants fully addressed the legal controversies of the precise relationship between IHL and IHRL, the legality of Security Council resolutions, or issues concerning transfers and monitoring of detainees. However, the fact remains that the negotiations and discussions undertaken during the Copenhagen Process have gone a considerable way to helping states to better understand some of the challenges and tensions that arise when undertaking contemporary multinational operations. It should now be much easier for multinational forces to train and plan for coalition operations that require individuals to be detained, because they have a common starting point from which to address military operations in the context of non-international armed conflicts, and peace operations.

At least in relation to armed conflicts, it must not be forgotten that each of the controversies discussed above is very likely to be addressed by the ICRC as it seeks to fulfil its mandate of strengthening legal protection for persons deprived of liberty in NIACs.

The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations

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Abstract

The article aims to examine, in light of the codification work of the International Law Commission and of the most recent practice, some issues concerning the allocation of responsibility between an organisation and its troop-contributing states for the conduct taken in the course of a multinational operation (with a specific focus on UN operations). After explaining the general rule of attribution of conduct based on the status of the multinational force as an organ or an agent of the organisation, this article will examine the validity of special rules of attribution of conduct based on the notions of ‘effective control’ or ‘ultimate control’ over the acts of the multinational force. Finally, I will discuss the possibility of dual responsibility of both the organisation and the troop-contributing state concerned.

Keywords: responsibility for internationally wrongful acts, multinational operations, United Nations, Draft Articles on the Responsibility of International Organisations, peacekeeping operations.



In 2011, the United Nations (UN) International Law Commission (ILC) adopted sixty-six Draft Articles on the Responsibility of International Organisations, with the objective of establishing a legal framework regulating the internationally wrongful acts of international organisations and the consequences of those acts. One of the most recurrent criticisms directed at the Draft Articles relates to the lack of practice supporting the work of the ILC. It has been observed that this topic was not yet ripe for codification at the time as there were relatively few instances of claims raising the question of the responsibility of an international organisation.¹ Whatever the merits of this criticism are with regard to the work of the ILC, when it comes to the question of responsibility for acts committed in the course of multinational peace-support operations, it cannot be said that practice is lacking. To the contrary, a substantial amount of practice has developed over the years in relation to this issue. Already in 2003, the then UN legal counsel, Mr Hans Corell, observed that it was ‘in connection with peacekeeping operations where principles of international responsibility . . . have for the most part been developed in a fifty-year practice of the Organisation’.² In the last decade several domestic and international tribunals have had to address questions concerning responsibility for acts taken in the context of multinational operations. Comments and observations on the work carried out during this period by the ILC have further contributed to elucidating the position of states and international organisations on this matter.

The present paper will assess the issue of responsibility for conducts taken in the context of multinational operations, mainly focusing on the problem of determining who, between the troop-contributing states and the international organisation, must bear responsibility for the wrongful act. I will also consider whether, and under what circumstances, the same conduct may give rise to the responsibility of both subjects. In most cases, the allocation of responsibility between the organisation and the sending state will depend on the identification of the subject to which the wrongful conduct has to be attributed. Therefore, most of this article will be dedicated to an assessment of the rules on attribution in relation to conducts taken by multinational forces acting under the aegis of an international organisation. This paper will focus on the practice of the UN in this field. In this respect, a distinction will be drawn between UN peacekeeping operations (in which troop-contributing states retain only limited powers over their troops while the UN is given operational command and control – e.g., the UN Stabilisation Mission in the Democratic Republic of the Congo) and multinational operations merely authorised by the Security Council through its Chapter VII powers (in which the authorised forces remain under the command and control of

1 For such criticism, see José E. Alvarez, ‘Revisiting the ILC’s Draft Rules on International Organization Responsibility’, in *American Society of International Law Proceedings*, Vol. 105, 2011, p. 345; Gerhard Hafner, ‘Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks’, in U. Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford, 2011, pp. 700–701.

2 Letter from the United Nations Legal Counsel, Mr Hans Corell, to the Director of the Codification Division, Mr Václav Mikulka, 3 February 2004, reported by Giorgio Gaja in the Second Report on the Responsibility of International Organizations, UN Doc. A/CN.4/541, 2 April 2004, p. 16, n. 52.

the state, the UN power being limited to the possibility of withdrawing the authorisation or delimiting its scope – e.g., the International Security Assistance Force in Afghanistan). This article will first explain the general rule of attribution of a wrongful conduct based on the status of the multinational force as an organ or an agent of the organisation. Then, it will analyse the validity and scope of application of special rules of attribution based on the notions of ‘effective control’ or ‘ultimate control’ over the acts of the multinational force. Finally, it will discuss the possibility of dual attribution of the same conduct to both the organisation and the troop-contributing state concerned.

General rule of attribution: the status of ‘organ’ or ‘agent’ of the organisation

When an individual or an entity has the status of organ of a state, or agent or organ of an international organisation, such status is generally decisive for the purposes of attribution. This reflects a general rule according to which an entity – be it a state or an international organisation – must bear responsibility for the acts of its agents or organs. Both the Draft Articles on State Responsibility and the Draft Articles on the Responsibility of International Organisations refer to this rule as the main criterion for attribution. Indeed, Article 6 of the Draft Articles on the Responsibility of International Organisations, which corresponds to Article 4 of the Draft Articles on State responsibility, provides that ‘[t]he conduct of an organ or agent of an international organisation in the performance of functions of that organ or agent shall be considered an act of that organisation under international law, whatever position the organ or agent holds in respect of the organisation.’ Article 2(c) identifies ‘organs’ of an international organisation as ‘any person or entity which has that status in accordance with the rules of the organization’. Article 2(d) further specifies that “‘agent of an international organisation” means an official or other person or entity, other than an organ, who is charged by the organisation with carrying out, or helping to carry out, one of its functions, and thus through whom the organisation acts’.

Unlike the missions merely authorised by the UN but carried out by national or multinational contingents, UN-led peacekeeping operations have the status of subsidiary organs of the UN established by the Security Council for the performance of its functions under the Charter.³ Because of their characterisation as subsidiary organs of the UN, the first question to be analysed is whether, and to what extent, one may rely on the general rule set forth in the abovementioned Article 6 in order to establish the entity to which their conduct is to be attributed.

3 On the characterisation of UN peacekeeping forces as subsidiary organs of the UN see, for instance, Article 15 of the Draft Model Status-of-Force Agreement between the United Nations and host countries, which provides that ‘[t]he United Nations peace-keeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations’. UN Doc. A/45/594, para. 15.

The same question may arise when the UN avails itself of private military companies (PMCs) to undertake some of the functions of peace operations.

With regard to UN peacekeeping forces, it might be argued that since these forces are given the status of subsidiary organs of the UN, their conduct must be attributed exclusively to the organisation on the basis of the general criterion of attribution set forth in Article 6. This view, which finds some support in legal literature,⁴ was upheld by the European Court of Human Rights (ECtHR). In its decision in the *Behrami* case concerning the killing of a child and injury caused to another child by undetonated cluster bombs that had not been eliminated by the United Nations Interim Administration Mission in Kosovo (UNMIK), the ECtHR found it sufficient to refer to the status of UNMIK as ‘a subsidiary organ of the UN created under Chapter VII of the Charter’ to justify its finding that the acts of UNMIK were attributable exclusively to the UN.⁵ When considering the issue of responsibility for acts committed by peacekeeping forces, the UN also generally gives relevance to the status of these forces as organs of the organisation. In a note recently sent to the ILC about its Draft Articles on the Responsibility of International Organisations, the UN observed that:

[It] has been the long-established position of the United Nations... that forces placed at the disposal of the United Nations are ‘transformed’ into a United Nations subsidiary organ and, as such, entail the responsibility of the Organisation, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, ‘effective’.⁶

However, despite the longstanding position of the UN on this issue, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purposes of attribution. The fact that these forces are accorded the status of organs under the rules of the organisation does not prevent national contingents from acting at the same time as organs of their respective states and therefore does not exclude certain acts of a national contingent composing the multinational force from being attributed to its sending state. As was observed by Lord Morris of Borth-y-Gest in the judgment rendered by the House of Lords in the *Nissan* case, ‘though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British soldiers continued, therefore, to be soldiers of Her Majesty.’⁷ It is this dual status as organs of both the UN and the sending state that justifies the application of a special rule of attribution which is

4 See for instance Finn Seyfersted, ‘United Nations Forces: Some Legal Problems’, in *British Yearbook of International Law*, Vol. 37, 1961, p. 429.

5 European Court of Human Rights (ECtHR), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Apps. No. 71412/01 and 78166/01, Decision (Grand Chamber), 2 May 2007, para. 143.

6 UN Doc. A/CN.4/637/Add.1, 17 February 2011, p. 13.

7 House of Lords, *Attorney General v. Nissan*, Judgment, 11 February 1969, *All England Law Reports*, 1969-I, p. 646. In the same vein, the Supreme Court of the Netherlands expressly rejected the argument submitted by the Dutch government, according to which, since peacekeeping forces are subsidiary organs of the UN, their conduct must be attributed exclusively to the organisation on the basis of the rule set forth

based not on the formal status of peacekeeping forces within the UN system, but rather on the entity which has effective control over the conduct of such forces. As the ILC's Commentary makes clear, for purposes of attribution, what matters is establishing which subject – the UN or the troop-contributing state – has effective control over the contingent in relation to a specific act.⁸ In this respect, the general rule of attribution set out in Article 6, based on the formal status as an agent or as an organ of an international organisation, would only be applicable when troops are fully seconded to the UN by the sending state. Since in practice this never happens, Article 6 does not substantially find application in relation to the conduct of national contingents put at the disposal of the UN for peacekeeping missions.

A situation which may fall within the scope of application of the general rule of attribution relates to the use of PMCs in the context of a multinational operation.⁹ When PMCs are contractually empowered by the rules of the organisation to exercise certain functions on its behalf, there is little doubt that they may be characterised as 'agents' within the meaning given to this term under Article 2 of the ILC's Draft Articles on the Responsibility of International Organisations. In this case, there is no need to show that the conduct of the PMC was in fact carried out under the 'effective control' of the organisation; the only element to be proved is that the PMC was performing one of the organisation's functions. Things are more complicated when there is no contractual link between the organisation and the PMC – namely when the PMC is entrusted with functions of the organisation on the basis of a *de facto* delegation of functions (as in the case in which, in an emergency situation, an organisation instructs a PMC to provide protection to its staff in the absence of any contractual link). In such cases, which admittedly can be considered to be exceptional, the question may be raised as to the degree of control which is required for the conduct of the PMC to be attributed to the organisation.¹⁰ It seems that in this case, in most situations, one should apply by analogy Article 8 of the Draft Articles on State Responsibility.¹¹ This view finds support in the Commentary to Article 6 of the 2011 Draft Articles on the Responsibility of International Organisations, where it is observed that '[s]hould persons or groups of persons act under the instructions, or the direction or control,

in Article 6 of the Draft Articles on the Responsibility of International Organisations. See Supreme Court of the Netherlands, *State of the Netherlands v. Nuhanović*, 6 September 2013, para. 3.10.2.

- 8 Report of the International Law Commission on the work of its sixty-third session, UN Doc. A/66/10, 2011, pp. 87–88.
- 9 For an assessment of questions of attribution raised by the activity of PMCs, see Nigel D. White and Sorcha MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility', in *The European Journal of International Law*, Vol. 19, No. 5, 2008, pp. 965–988; Laura Magi, 'Sull'attribuzione ad una organizzazione internazionale dell'attività di società private che operano per suo conto', in *Rivista di Diritto Internazionale*, Vol. 93, No. 3, 2010, pp. 753–801.
- 10 On this issue, see Antonios Tzanakopoulos, 'Attribution of Conduct to International Organizations in Peacekeeping Operations', EJIL: Talk! Blog of the European Journal of International Law, 10 March 2009, available at: www.ejiltalk.org/attribution-of-conduct-to-international-organizations-in-peacekeeping-operations/ (last visited in December 2013).
- 11 According to Article 8 of the Draft Articles on State Responsibility, '[s]hould persons or groups of persons act under the instructions, or the direction or control, of an international organisation, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2.'

of an international organisation, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2.¹² This means that it has to be proved that the PMC was acting under the instructions, or under the direction or control, of the organisation in order for the latter to be responsible for the acts of the former.

Special rule of attribution: the criterion of ‘effective control’ and the doubtful validity of the ‘ultimate control’ test

The criterion of effective control

In the case of UN peacekeeping operations, even though the organisation exercises command and control over the conduct of the troops, these national contingents are placed at its disposal by states. They are therefore organs of their respective states and of the organisation simultaneously, and the determination of the subject which must bear responsibility for the wrongful act committed in the course of the operation is generally assessed on the basis of Article 7 of the Draft Articles on the Responsibility of International Organisations. Under this provision, the conduct of an organ of a state that is placed at the disposal of an international organisation is to be attributed to that international organisation ‘if the organisation exercises effective control over that conduct’. The same test has been applied by a number of judgments of domestic courts dealing with the problem of attribution with respect to acts of UN peacekeeping forces.¹³ The main problem raised by this criterion of attribution relates to the determination of the meaning of ‘effective control’ within the context of this rule.

It might be argued that the notion of ‘effective control’ referred to in Article 7 has the same meaning as the notion used in the context of the law on state responsibility.¹⁴ If one accepts this view, it should be concluded that, for the act of a

12 Report of the International Law Commission, above note 8, para. 109.

13 For an analysis of the relevant practice, see *ibid.*, pp. 88–91.

14 As is well known, an ‘effective control’ test was employed by the International Court of Justice (ICJ) in the *Nicaragua* and *Genocide Convention* cases in order to determine whether the conduct of groups of individuals who were not organs of a state, and who were connected to the state only on the basis of a *de facto* link, was to be attributed to that state. According to the ICJ, in order for the state to be legally responsible for the conduct of such individuals, it would have to be proved that the state had effective control over the operations during which the wrongful conduct occurred. See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, paras. 399–400. For the view that, in providing the standard of effective control, the Draft Articles on the Responsibility of International Organisations ‘codified what was already a longstanding principle for the attribution of wrongdoing at international law’, as recognised, among others, by the International Court of Justice, see Tom Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’, in *Harvard International Law Review*, Vol. 51, 2010, p. 141. See also Christopher Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’, in

member of a peacekeeping force to be attributed to the UN, it would have to be demonstrated that this specific act was taken under the instructions or the direction and control of the UN. The application of such a test would significantly complicate attribution, as in many cases, it would be extremely difficult to prove the existence of an 'effective control' of this kind. However, it does not seem that Article 7 requires such a high level of control for the purposes of attribution of acts of lent organs. As the Commentary to this provision makes clear, the notion of 'effective control' within the context of the responsibility of international organisations does not play the same role as in the context of the law on state responsibility. Indeed, the ILC was careful to specify that 'control' within the context of Article 7 does not concern 'the issue whether a certain conduct is attributable at all to a state or an international organisation, but rather to which entity – the contributing state or organisation or the receiving organisation – conduct has to be attributed'.¹⁵ While the ILC does not say it expressly, the fact that it stresses the different meaning of the notion of effective control in the context of the placing of an organ at the disposal of the organisation seems to imply that, unlike the rules on state responsibility, the attribution of a certain conduct to the organisation under Article 7 does not necessarily depend on the proof that the conduct was taken on the instruction of, or under the specific control of, the organisation. This suggests, at least indirectly, that a lower degree of control may also be sufficient to justify attribution to the organisation.¹⁶

If specific instructions or direction over each specific conduct is not a necessary requirement, it remains to be seen what other elements can be taken into account for the purposes of determining the entity which could be regarded as exercising effective control under the meaning of Article 7. The ILC's Commentary does not provide clear indications on this issue. A question which may be raised in this respect is whether the manner in which the transfer of powers was formally arranged between the organisation and the troop-contributing state is relevant for the purposes of attribution. Indeed, in the case of UN peacekeeping forces, the UN has operational command over the forces but some important command functions (such as the exercise of disciplinary powers and criminal jurisdiction over the forces, and the power to withdraw the troops and to discontinue their participation in the mission) 'remain the purview of their national authority'.¹⁷ It can be held that,

Melbourne Journal of International Law, Vol. 10, 2009, pp. 348–349. On the relationship between the notion of effective control used by the ICJ and that employed in Article 7, see the observations of Francesco Messineo, *Multiple Attribution of Conduct*, SHARES Research Paper No. 2012–11, pp. 32–33.

15 Report of the International Law Commission, above note 8, p. 88.

16 This interpretation of the ILC Commentary finds support in the following observation of the ILC's Special Rapporteur, Giorgio Gaja: 'In order to settle the issue of where the effective control lies, one needs to consider the "full factual circumstances and particular context in which international organizations and their members operated", as was stressed by the UK in a statement. This implies that, with regard to a United Nations peacekeeping force, while *in principle* the conduct of the force should be attributed to the United Nations, effective control of a particular conduct may belong to the contributing State rather than to the United Nations' (emphasis added). Giorgio Gaja, Eighth Report on the Responsibility of International Organisations, UN Doc. A/CN.4/640, p. 13.

17 Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Report of the Secretary-General, UN Doc. A/49/681, 21 November 1994, p. 3. This document defines the notion of

depending on the manner in which the transfer of authority over the forces is arranged, a presumption may arise that a certain conduct is attributable to the organisation rather than to the contributing state. Indeed, if the force was performing certain functions under the formal authority of the organisation, and not of the contributing states, it can be presumed that its conduct is attributable to the organisation. In other words, the formal transfer of powers giving authority to the organisation generates a presumption that the conduct is to be attributed to the organisation, without the need to demonstrate that the conduct was the result of specific instructions or of effective control over the specific conduct. Such a presumption should not be confused with the status of a subsidiary organ of the organisation. What matters here is not the status of the force under the rules of the organisation but the agreement between the organisation and the sending state, as one may presume that the delimitation of the respective powers agreed upon by the two parties provides an indication as to which entity, in principle, has control over the troops in relation to a given conduct. Obviously, this presumption may be rebutted. It may happen that a force, while acting under the formal authority of the organisation, has undertaken a certain conduct because of the instructions given to it by the contributing state. In such circumstances, the act must evidently be attributed to the state and not to the organisation.

The recent judgment of the Hague Court of Appeal in the *Nuhanović* case appears to support the view that, for purposes of attribution, account must be taken of a combination of legal and factual elements.¹⁸ The Court of Appeal found that the criterion for determining whether the conduct of Dutch troops in Srebrenica had to be attributed to the UN or to the Netherlands was the effective control test now set forth in Article 7 of the Draft Articles on the Responsibility of International Organisations. According to the Court, when applying this criterion,

significance should be given [not only] to the question whether that conduct constituted the execution of a specific instruction, issued by the United Nations or the state, but also to the question whether, if there was no such specific instruction, the United Nations or the state had the power to prevent the conduct concerned.¹⁹

The Court of Appeal refers here to those powers which each contributing state formally retains over its troops. The Court makes the point that, for purposes of attribution, relevance must be given not only to effective control but also to the

'operational command' as 'the full authority to issue operational directives within the limits of (1) a specific mandate of the Security Council; (2) an agreed period of time, with the stipulation that an earlier withdrawal requires adequate prior notification; and (3) a specific geographical range (the mission area as a whole)': *ibid.*, p. 2.

18 This aspect was duly stressed by André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', in *Journal of International Criminal Justice*, Vol. 9, 2011, pp. 1143–1157. See also the judgement of 6 September 2013, by which the Supreme Court of the Netherlands dismissed the appeal in cassation submitted by the State of the Netherlands and substantially confirmed the legal findings and conclusion of the Court of Appeal.

19 The Hague Court of Appeal, *Nuhanović v. Netherlands*, Appeal Judgment, 5 July 2011, ILDC 1742 (NL 2011), para. 5.9.

formal authority of the organisation or of the contributing state to exercise control over the acts concerned. This appears to find confirmation in the reasoning followed by the Court of Appeal in order to justify its findings that the conduct concerned was to be attributed to the Netherlands. The Court relied heavily on the fact that, during the evacuation from Srebrenica, the Dutch government had control over Dutchbat 'because this concerned the preparations for a total withdrawal of Dutchbat from Bosnia and Herzegovina'²⁰ – the power to withdraw the troops being a power belonging to the sending state. The Court also referred to the fact that the Dutch government 'held it in its power to take disciplinary actions' against the conduct concerned.²¹ The formal authority retained by the state over its troops during the evacuation period and the control it had actually exercised at that time were the two elements the Court of Appeal relied on in order to justify its conclusion that the conduct concerned had to be attributed to the Netherlands.²²

The manner in which the transfer of powers was arranged between the organisation and the troop-contributing state appears to be relevant for the attribution of responsibility for an *ultra vires* conduct taken in the context of the peacekeeping operation. No doubt, the fact that a certain conduct was taken by a peacekeeper exceeding his authority or contravening instructions does not exempt the sending state or the organisation from bearing responsibility. This principle is clearly stated in Article 8 of the Draft Articles on the Responsibility of International Organisations and in Article 7 of the Draft Articles on State Responsibility.²³ However, these provisions address, respectively, the situation of an organ of a state and of an organ or agent of an international organisation. They do not refer specifically to the case of an organ of a state which has been placed at the disposal of an international organisation. Given the dual status of peacekeepers, it seems that, in order to determine the entity to which the *ultra vires* conduct must be attributed, the capacity in which the person in question was acting when taking such conduct has to be established. For these purposes, account must primarily be taken of the functions the peacekeeper was performing when engaging in the wrongful conduct and of the respective powers of the organisation and of the state with respect to the exercise of this function. Here again, if a peacekeeper was performing functions

20 *Ibid.*, para. 5.18.

21 *Ibid.*

22 *Ibid.*, paras. 5.18–5.20. See also the judgment of the Court of First Instance of Brussels, where the conduct of the Belgian contingent taking part in the United Nations Assistance Mission for Rwanda peacekeeping force was considered to be attributable to Belgium since such conduct was taken at a time when the Belgian government had decided to withdraw from the peacekeeping operation: Court of First Instance of Brussels, *Mukeshimana-Ngulinzira and others v. Belgium and others*, RG No. 04/4807/A and 07/15547/A, Judgment, 8 December 2010, ILDC 1604 (BE 2010), para. 38.

23 Article 8 of the Draft Articles on the Responsibility of International Organisations provides that '[t]he conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'. According to Article 7 of the Draft Articles on State Responsibility, '[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'.

under the formal authority of the organisation (such as engaging in combat-related activities falling under the operational control of the UN), it creates a presumption that the *ultra vires* conduct must be attributed to the organisation.²⁴ This presumption can be rebutted if it is demonstrated that the peacekeeper had acted on the instructions of the sending state.

The doubtful validity of the 'ultimate control' test

In multinational operations where the organisation only gives its authorisation to a military intervention in which the states retain full control over their national contingents, these contingents operate outside a chain of command leading to the organisation. They are not seconded to the UN, nor are they given the status of organ under the rules of the organisation. The only form of factual control exercised by the UN over the activity of these contingents is limited to receiving periodic reports. This form of control falls short of the 'effective control' which is required by Article 7 of the Draft Articles on the Responsibility of International Organisations for attributing their acts to the organisation. In the absence of any relevant formal or factual link with the organisation, the conduct of national contingents must be attributed exclusively to the sending state by virtue of their status as organs of such states, on the basis of the general rule of attribution codified in Article 4(1) of the Draft Articles on State Responsibility, according to which:

the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

The ECtHR took a different position on this issue in its *Saramati* decision. In this case, Mr Saramati submitted an application against Norway, Germany and France for their involvement in his allegedly unlawful arrest and detention. The applicant had been arrested and detained by troops of these three states participating in the Kosovo Force (KFOR) peace-support operation, a UN-authorized mission established by the Security Council's Resolution 1244 (1999) for the purposes of bringing peace and stability to Kosovo. According to the ECtHR, since the Security Council retained 'ultimate authority and control' over the activities of KFOR, the conduct of KFOR was to be attributed to the UN.²⁵ While the ECtHR did not explain in detail the meaning of the notion of 'ultimate authority and control', this concept appears to refer to the special powers assigned to the Security Council under Chapter VII of the UN Charter. Indeed, in order to demonstrate that the Security Council retained ultimate authority and control, the ECtHR attached relevance to elements such as the fact that Chapter VII of the Charter allows the Security Council

24 For a different view, see Tom Dannenbaum, above note 14, p. 159.

25 *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, above note 5, paras. 133–141.

to delegate tasks to member states or the fact that Resolution 1244 (1999) ‘put sufficiently defined limits on the delegation by fixing the mandate with adequate precision’.²⁶ However, ‘delegation of powers’, no matter its meaning, is not an element which can justify attribution in the absence of a parallel transfer of effective control in the hands of the organisation. Nor can this ‘delegation of powers’ justify the conclusion that the sending states are exempted from any responsibility for the conduct of contingents acting under their full control.²⁷

The ‘ultimate control’ test referred to by the ECtHR does not appear to find support in the practice concerning authorised missions. As observed by the UN, by relying ‘solely on the grounds that the Security Council had “delegated” its powers’ to KFOR and ‘had “ultimate authority and control” over it, the Court disregarded the test of “effective command and control” which for over six decades has guided the United Nations and Member States in matters of attribution’.²⁸ The fact that the ‘ultimate control’ test differs considerably from the ‘effective control’ test advocated by the UN has also been stressed by the ILC in its Commentary to Article 7 of the Draft Articles on the Responsibility of International Organisations.²⁹ It may be noted that in its subsequent decisions, the ECtHR, while reaffirming this criterion of attribution, appears to have narrowed down its scope of application. In particular, the approach taken by the ECtHR in its 2011 judgment in the *Al-Jedda* case represents, in many respects, a welcome departure from the solution applied in *Behrami*. The case concerned actions taken by UK troops operating in Iraq within the Multi-National Force-Iraq (MNF-I) – a force whose presence in Iraq had been authorised by the Security Council. The ECtHR found that the applicants’ detention by British troops was to be attributed to the UK. While the Court referred to the ‘ultimate control’ test and although, with regard to that test, it justified its conclusion by distinguishing the facts of the case from those underlying the *Behrami* case, it is noteworthy that the Court also referred to the ‘effective control’ test.³⁰ The fact that the UK had full command and control over its forces and that this state of affairs had not changed as a result of the authorisation of the Security Council was an element which weighted heavily in the Court’s analysis of the question of attribution.³¹ In its recent judgment in the *Nada* case, the ECtHR has further

26 *Ibid.*, para. 134.

27 For critical remarks concerning the criterion of attribution applied by the ECtHR, see, among others, Pierre Klein, ‘Responsabilité pour les faits commis dans le cadre d’opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l’homme: quelques considérations critiques sur l’arrêt Behrami et Saramati’, in *Annuaire Français de Droit International*, Vol. 53, 2007, p. 55; Linos-Alexander Sicilianos, ‘Entre multilatéralisme et unilatéralisme: l’autorisation par le Conseil de sécurité de recourir à la force’, in *Recueil des Cours*, Vol. 339, 2009, p. 376.

28 UN Doc. A/CN.4/637/Add.1, p. 12.

29 Report of the International Law Commission, above note 8, p. 89: ‘when applying the criterion of effective control, “operational” control would seem more significant than “ultimate” control, since the latter hardly implies a role in the act in question’.

30 ECtHR, *Al Jeddah v. United Kingdom*, Application No. 27021/08, Judgment (Grand Chamber), 7 July 2011, para. 84.

31 It may be useful to note that in this judgment the Court also implied that dual attribution to the UN and the state is possible. See e.g. Marko Milanovic, ‘Al Skeini and Al Jeddah in Strasbourg’, in *The European Journal of International Law*, Vol. 23, No. 1, 2012, p. 136.

restricted the scope of application of ‘ultimate control’ as a criterion of attribution. While this case did not concern acts taken in the context of multinational peace support operations, it is noteworthy that the ECtHR expressly rejected the view advanced by the French government, according to which measures taken by member states of the UN to implement Security Council resolutions under Chapter VII of the Charter are invariably to be attributed to the UN. In particular, it excluded that the ‘ultimate control’ test applies to acts taken by member states to implement, at the national level, a Security Council resolution imposing restrictive measures against individuals.³²

Responsibility of the organisation for actions taken by a state in the context of a multinational operation

The fact that acts committed by a national contingent in the context of an authorised operation are to be attributed to the sending state does not exclude the possibility that the same acts could also give rise to the responsibility of the organisation. The Draft Articles on the Responsibility of International Organisations envisage a number of situations where an organisation may be held responsible in connection with a conduct of an organ of a state. The pertinent provisions are based on the distinction between attribution of conduct and attribution of responsibility. The idea is that, under certain situations, while the conduct is attributable to the state and will normally give rise to its international responsibility, the organisation also has to bear responsibility because of its contribution to the commission of the acts in question by the state. The possible impact of these provisions in the context of an authorised operation should not be underestimated. For example, Article 17(2) of the Draft Articles on the Responsibility of International Organisations provides that, under specific conditions, an organisation has to bear responsibility for having authorised a state to commit an act that would be wrongful if committed by that organisation.³³ Thus, if the Security Council authorises states taking part in a multinational operation to take measures of arbitrary detention contrary to the basic requirements of human rights law or international humanitarian law, the UN may also be held responsible for any such measure taken by states in the course of the operation. The rule set forth in Article 17 appears to be premised on the idea that, since the organisation, by its authorisation, exercised a form of ‘normative control’ over the state, it has to bear the consequence of its contribution to the wrongful act. In this respect, it may be suggested that this provision shares some common characteristics with the ‘ultimate control’ test applied by the ECtHR, as they both appear to rely exclusively on the ‘normative control’ exercised by the organisation,

32 ECtHR, *Nada v. Switzerland*, Application No. 10593/08, Judgment (Grand Chamber), 12 September 2012, para. 120.

33 Article 17(2) provides that ‘[a]n international organisation incurs international responsibility if it circumvents one of its international obligations by authorising member States or international organisations to commit an act that would be internationally wrongful if committed by the former organisation and the act in question is committed because of that authorisation’.

rather than on a factual control. However, unlike the ‘ultimate control’ test, the possibility of holding an organisation responsible under Article 17 because of its authorisation is subject to a number of strict conditions. In particular, this provision specifies that the state must have committed the acts in question ‘because of that authorisation’. The ILC’s Commentary clarifies that ‘this condition requires a contextual analysis of the role that the authorisation actually plays in determining the conduct of the member State or international organisation’.³⁴ Moreover, as noted above, Article 17 concerns the attribution of responsibility and not the attribution of conduct: the fact that the organisation has to bear responsibility is without prejudice to the responsibility of the state to which the conduct concerned has to be attributed.³⁵

Another situation which may give rise to the organisation’s responsibility in connection to an act of a state is when the organisation, by its support to the action taken by the state, may be regarded as facilitating the commission of a wrongful act. Indeed, under Article 14 of the Draft Articles on the Responsibility of International Organisations, an organisation is to be held responsible for the wrongful conduct of a state if it aided or assisted that state in the commission of such conduct. Interestingly, the UN appears to be aware of the possible legal consequences arising from the assistance rendered to other subjects. In one case, which admittedly did not concern an authorised operation, the Security Council modified the mandate of a peacekeeping mission – MONUC – in order to avoid the risk that, by assisting the armed forces of the Democratic Republic of the Congo, which in their fight against rebel groups had committed violations of human rights and international humanitarian law, ‘the United Nations would be perceived as implicated in the commission of the wrongful act’.³⁶

Dual or multiple attribution of the same conduct

Unlike the case in which the organisation bears responsibility for a conduct which is to be attributed exclusively to the state, it may well be that responsibility arises as a consequence of a conduct which is to be attributed simultaneously to the state and to the organisation. It may therefore be asked whether, in the context of peacekeeping operations, situations may arise in which the conduct of a contingent can be jointly attributed to the organisation and to the contributing state.

Having regard to the command and control structure of UN peacekeeping operations, the possibility of dual attribution has been advocated in connection with the role played by the national contingent commander. Since a contributing state, through the national contingent commander, can exercise a form of control over its contingent and, in fact, can decide whether to agree with (or to decline) instructions given to its contingent by the UN force commander, it has been held that the conduct of a peacekeeping force must be jointly attributed to the UN and to the

34 Report of the International Law Commission, above note 8, p. 42.

35 See Article 19 of the Draft Articles on the Responsibility of International Organisations.

36 UN Doc. A/CN.4/637/Add.1, p. 18.

contributing state – the UN for being the originator of the instructions, and the contributing state for having concurred in the instructions.³⁷ It must be admitted, however, that there is little practice supporting this view. '[K]een to maintain the integrity of the United Nations operation vis-à-vis third parties',³⁸ the UN strives to be considered as the sole actor responsible for the conduct of peacekeeping forces operating under its command and control. In this respect, the recognition of dual attribution would increase the risk of sending states interfering with the UN chain of command. Significantly, apart from the implicit recognition of this possibility contained in the ECtHR's judgment in the *Al-Jedda* case³⁹ and the more explicit reference contained in the judgments rendered by Dutch courts in the *Nuhanović* case, judicial practice appears to be substantially lacking.

In its Commentary on the Draft Articles on the Responsibility of International Organisations, the ILC recognised the possibility that the same conduct could be simultaneously attributed to a state and to an international organisation. According to the Commentary, 'although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded'.⁴⁰ While the Commentary does not say anything about the possibility of dual or multiple attribution in situations such as the one characterising UN peacekeeping operations, the work of the ILC seems to lend little support to this possibility. The ILC's approach appears to be premised on the idea that, when an organ of a state is placed at the disposal of an international organisation, it will have to be determined whether the conduct of such an organ must be attributed to the organisation or, alternatively, to the contributing state. Its view appears to be that, in the case of UN peacekeeping operations, the conduct of a national contingent is to be attributed to the organisation if, when taking the conduct at issue, the contingent was operating under a chain of command leading to the UN. The fact that the national contingent commander agreed with the instructions of the UN force commander does not appear to be sufficient to justify the conclusion that the contingent was also acting under the effective control of the state. Significantly, this view appears to have been expressly upheld by the District Court of The Hague in its 2008 judgment in the *Nuhanović* case. According to the District Court, the fact that a state's authorities agree with the instructions from the UN does not amount to an interference with the UN command structure and therefore does not justify the attribution of the conduct to the state. The Court observed: 'If, however, Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient grounds to deviate from the usual rule of attribution.'⁴¹ Admittedly, the decision of the

37 See the views expressed on this issue by Luigi Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire', in *Rivista di Diritto Internazionale*, Vol. 78, 1995, p. 893; and by Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', in *Melbourne Journal of International Law*, Vol. 10, 2009, p. 1.

38 UN Doc. A/CN.4/637/Add.1, p. 14.

39 See above note 31.

40 Report of the International Law Commission, above note 8, p. 81.

41 District Court of The Hague, *HN v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, First Instance Judgment, 10 September 2008, ILDC 1092 (NL 2008), para. 4.14.1.

District Court was later reversed by the Hague Court of Appeal. In particular, while the District Court had expressly excluded the possibility of dual attribution,⁴² the Court of Appeal admitted that the actions taken by a national contingent in the course of a peacekeeping operation may be simultaneously attributed to the sending state and to the UN. It observed that ‘the Court adopts as a starting point that the possibility that more than one party has “effective control” is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party’.⁴³ However, apart from recognising this possibility, the Court of Appeal did not clarify the specific conditions which may justify dual or multiple attribution. In this respect, the contribution given by this judgment to the identification of cases of dual or multiple attribution is rather limited. Similarly, in its judgment of 6 September 2013 in the same case, the Supreme Court of the Netherlands limited itself to admitting that ‘international law, in particular article 7 of the Draft Articles on the Responsibility of International Organisations in conjunction with article 48 (1) of the same Draft Articles, does not exclude the possibility of dual attribution of given conduct’, without providing any further indication on this issue.⁴⁴

While it seems excessive to link dual attribution to the role played by the national contingent commander within the UN command structure, I argue that dual attribution might be admitted in those cases where it is not clear whether the national contingent was acting under the authority of the sending state or of the organisation. In particular, a situation of this kind may arise where, with regard to the conduct concerned, both subjects were formally entitled to exercise their authority over the contingent and the conduct was in fact the result of instructions which were taken by mutual agreement between the organisation and the state. One may refer, for instance, to the situation described by the Hague Court of Appeal with regard to the evacuation of Dutchbat from Srebrenica. As the Court put it, during the transition period following the fall of Srebrenica, it was hard to draw a clear distinction between the power of the Netherlands to withdraw Dutchbat from Bosnia and the power of the UN to decide about the evacuation of the UNPROFOR unit from Srebrenica.⁴⁵ Since during that period both the Netherlands and the UN appeared to be formally entitled to exercise their respective powers over Dutchbat, and since in fact they both exercised their actual control by issuing specific instructions, dual attribution might be regarded as justified.

Concluding remarks

The codification work of the ILC and an increasing amount of judicial practice have strongly contributed to clarifying the rules on responsibility that are applicable

42 *Ibid.*, para. 4.13.

43 *Nuhanović v. Netherlands*, above note 19, para. 5.9.

44 *State of the Netherlands v. Nuhanović*, above note 7, para. 3.11.2.

45 *Ibid.*, para. 5.18.

to multinational operations conducted under the aegis of an international organisation. Clearly, there are still certain difficulties in establishing the allocation of responsibility between the organisation and the troop-contributing states. The notion of 'effective control' requires further elucidation and there is still very little practice on dual or multiple attribution. However, the overall picture is one of progressive consolidation of a legal framework which provides sufficiently clear answers to the problem of allocation of responsibility.

In the end, the most troublesome issue relates to a different set of problems, namely that of the remedies that may be available for obtaining reparation. This problem is particularly acute when the responsibility of international organisations is at stake, as there are generally no effective remedies which can be sought by victims, particularly individuals, in their disputes with international organisations. On the one hand, in most cases, international tribunals cannot extend their jurisdiction over the conduct of international organisations; on the other, access to domestic tribunals is precluded by the rule of immunity.⁴⁶ It is also in the light of this consideration that certain interpretations of the law which attempt to minimise the role and responsibilities of sending states in the context of multinational operations – such as the one advanced by the ECtHR in its *Behrami* and *Saramati* decisions – appear particularly worrisome. Not only does the 'ultimate authority and control' test lead to the quite unreasonable result that a state which has effective control over a UN-authorized contingent does not bear responsibility for its actions; it also greatly limits the possibility that individuals will obtain judicial recognition of, and some form of reparation for, the wrongful acts of which they were victims. As we have seen, the recent judgment in the *Al-Jedda* case shows signs of a change in attitude. It is to be hoped that, in the future, the ECtHR will progressively abandon the notion of 'ultimate control' and will rely solely on the determination of the entity which has effective control for the purpose of attribution in this kind of situation.

46 One may refer, for instance, to the ECtHR's decision in the case *Mothers of Srebrenica*, where the ECtHR concluded that 'the grant of immunity to the UN served a legitimate purpose and was not disproportionate'. See ECtHR, *Stichting Mothers of Srebrenica and others v. the Netherlands*, Application No. 65542/12, Decision of 11 June 2012, para. 169.

REPORTS AND DOCUMENTS

What's new in law and case law around the world?

Biannual update on national implementation of international humanitarian law*

January–June 2013

⋮⋮⋮⋮⋮

The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL).

Besides a compilation of domestic laws and case law, the biannual update includes other relevant information related to regional events organised by the ICRC, to the development of national IHL committees and to accession and ratification of IHL and other related international instruments.

Relevant ICRC regional events

To further its work on implementation of IHL, the ICRC organised a

ICRC Advisory Service

The ICRC Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist states by providing them with the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks; (iii) to collect and facilitate the exchange of information on national implementation measures; and (iv) to support the work of committees on IHL and other bodies established to facilitate the IHL implementation process.

* This selection of national legislation and case law has been prepared by Julian Jaccard, Legal Attaché of the ICRC Advisory Service on International Humanitarian Law.

number of workshops as well as national and regional events in the period under review. Of particular interest was the first Regional Seminar on National Implementation of IHL in Naivasha, Kenya. Held in May 2013 and jointly organised by the ICRC Delegation in Nairobi and the State Law Office of the Government of Kenya, the Seminar brought together governmental officials from seven countries including Djibouti, Ethiopia, Kenya, Somalia, South Sudan, Tanzania and Uganda, as well as an African Union official. The aim of the Seminar was to give the participants an update on IHL developments and to present new tools that could facilitate the process of national implementation.¹ This first regional Seminar provided a forum for participants to share mutual experiences and best practices, and to review the challenges faced and progress made in the implementation of IHL.

Similarly, the Chinese National IHL Committee, with support from the ICRC Delegation in Beijing, organised the first Regional Meeting on the Promotion and Implementation of IHL in Beijing, China. The Meeting was attended by forty-one governmental officials and representatives from the National Red Cross Societies from twelve countries of East and South-East Asia. It was aimed at exploring current issues relating to the national implementation of IHL, in particular regarding the protection of health care in times of armed conflict,² and to the repression of serious violations of IHL.³ Representatives of China, Indonesia and the Philippines took the occasion to present their country's progress in implementing IHL. For the ICRC, this was a unique opportunity to hold bilateral discussions on national implementation of IHL with state representatives from the region.

Update on national IHL committees

Another way in which the Advisory Service facilitates the domestic implementation of IHL is through support of the national IHL committees or similar bodies – inter-ministerial or inter-institutional bodies which advise the governments of their respective countries on all matters related to IHL. Such Committees *inter alia* promote ratification of or accession to IHL treaties, make proposals for the harmonisation of domestic legislation with the provisions of these treaties, and participate in the formulation of the state's position regarding matters related to IHL. There were 102 national IHL committees across the world by mid-2013.

- 1 For further information regarding IHL national implementation, see the section 'IHL and Domestic Law', available at: www.icrc.org/eng/war-and-law/ihl-domestic-law/index.jsp. All internet references were last accessed in June 2013.
- 2 Further information on the ICRC's Health Care in Danger project is available at: www.icrc.org/eng/what-we-do/safeguarding-health-care/solution/2013-04-26-hcid-health-care-in-danger-project.htm.
- 3 For further information, see the fact sheet on 'Penal Repression: Punishing War Crimes', available at: www.icrc.org/eng/assets/files/other/penal_repression.pdf.

Update on the accession and ratification of IHL and other related international instruments

Universal participation in IHL treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict, and is therefore a priority for the ICRC. In the period under review, eighteen of the twenty-eight IHL and other related international conventions and protocols⁴ were ratified or acceded to by various states. In particular, there has been notable accession to the Convention on Cluster Munitions (CCM). Indeed, six states ratified the Convention in the first half of 2013. Moreover, the adoption on 2 April 2013 of the Arms Trade Treaty (ATT) by the United Nations (UN) General Assembly should not go unnoticed. The treaty, largely signed on the date it was opened for signature (3 July), regulates international trade in conventional weapons and ammunition. As of 30 June 2013, no state had yet ratified the ATT. This treaty will enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification (Article 22).

Apart from the twenty-eight IHL-related international conventions and protocols mentioned above, the Advisory Service also follows ratification of other international treaties that may be of a relevance *inter alia* for the protection of persons during armed conflict and the prevention and repression of violations of IHL, such as the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of all Persons from Enforced Disappearance. With regard to the latter, two states have ratified the Convention in the first half of 2013, bringing the total number of ratifications to thirty-nine (as of 30 June 2013). The Convention entered into force in December 2010.

The table on the following page outlines the total number of ratifications, as of June 2013, of relevant IHL treaties and other related international instruments.

National implementation of international humanitarian law

The laws and case law presented in the following sections were either adopted by states or delivered by domestic tribunals in the first half of 2013, or collected by the ICRC Advisory Service during that period. They cover a variety of topics linked to IHL, such as the status of protected persons, criminal and disciplinary repression of IHL violations, and weapons regulations. This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation.

The full texts of these laws and case law can be consulted in the ICRC's database on national implementation.⁵

4 To view the full list of IHL-related treaties, see the ICRC's Treaty Database, available at: www.icrc.org/ihl.

5 See the ICRC Database on National Implementation of IHL, available at: www.icrc.org/ihl-nat.

Conventions	States	Ratification date	Total number of ratifications
1949 Geneva Conventions I–IV	South Sudan	25.01.2013	195
1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and Their Destruction	Cameroon	18.01.2013	170
	Nauru	05.03.2013	
	Guyana	26.03.2013	
	Malawi	02.04.2013	
1977 Additional Protocol I to the Geneva Conventions	South Sudan	25.01.2013	173
1977 Additional Protocol I to the Geneva Conventions – Declaration Article 90	Kuwait	21.06.2013	73
1977 Additional Protocol II to the Geneva Conventions	South Sudan	25.01.2013	167
1980 Convention on Conventional Weapons	Kuwait	24.05.2013	116
1980 Protocol I to the Convention on Conventional Weapons	Kuwait	24.05.2013	111
1980 Protocol III to the Convention on Conventional Weapons	Kuwait	24.05.2013	107
1995 Protocol IV to the Convention on Conventional Weapons (blinding laser weapons)	Kuwait	24.05.2013	102
1996 Amended Protocol II to the Convention on Conventional Weapons	Kuwait	24.05.2013	99
1998 Rome Statute of the International Criminal Court	Côte d'Ivoire	15.02.2013	122
2000 Optional Protocol to the Convention on the Rights of Child	Cameroon	04.02.2013	152
	Zimbabwe	22.05.2013	

(Cont.)

2001 Amendment to the Convention on Conventional Weapons	Kuwait	24.05.2013	77
2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Portugal Nauru Italy Norway	15.01.2013 24.01.2013 03.04.2013 27.06.2013	69
2003 Additional Protocol V to the Convention on Conventional Weapons (explosive remnants of war)	Kuwait	24.05.2013	82
2005 Additional Protocol III to the Geneva Conventions	South Sudan Suriname	25.01.2013 25.06.2013	64
2006 Convention against Enforced Disappearances	Morocco Cambodia	14.05.2013 27.06.2013	39
2008 Convention on Cluster Munitions	Nauru Liechtenstein Chad Andorra Bolivia Iraq	04.02.2013 04.03.2013 26.03.2013 09.04.2013 30.04.2013 14.05.2013	83

A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (January–June 2013). Countries covered are Bangladesh, Croatia, Libya, Mexico, Micronesia, the Philippines, Syria and Venezuela.

Bangladesh

International Crimes (Tribunals) (Amendment) Act, 2013 (Act No. III of 2013)

On 17 February 2013, the Parliament of Bangladesh passed a bill amending the International Crimes (Tribunal) Act of 1973. The amended Act implements an International Crimes Tribunal which has jurisdiction over genocide, crimes against humanity, war crimes and other crimes under international law that could have been committed during the country's liberation war in 1971.

The amendment added three significant changes relating to both substantial and procedural provisions. The first of them deals with the jurisdiction of the Tribunal (Article 3), which, after the amendment, can also try and punish organisations for their participation in the 1971 armed conflict. This amendment is intended to address the important role played by political parties during this war.

The two other changes are related to the right of appeal (Article 21). In particular, the amendment extends the right of appeal to 'the complainant or the informant' (Article 21(2)). Before the amendment, only the convicted person and the Government could lodge an appeal. The amendment also broadened the scope of this right by granting appeals against 'an order of sentence' (Article 21(2)) and not only against 'an order of acquittal'. Finally, Article 21 was also amended regarding the time limits for lodging an appeal. Appeals 'shall be preferred within 30 (thirty) days from the date of conviction . . . or acquittal' and 'shall be disposed of within 60 (sixty) days from the date of [their] filing' (Article 21(3 and 4)).

The Amendment has a retroactive effect starting from 14 July 2009. This allows the Tribunal to review the judgment and the sentence of already closed cases such as that of Abdul Quader Molla, who was already convicted before the Amendment.

Croatia

Law on Defence and Law on Service in the Armed Forces of the Republic of Croatia

In the process of aligning its legislation with European Union standards, the Croatian parliament adopted two laws (published in the *Official Gazette*, No. 73/13,

on 18 June 2013). Both laws include precise obligations regarding the respect of IHL by armed forces.

The first one is the new Law on Defence, which provides that, during military and non-military activities, IHL should be respected by members of the armed forces (Article 40(1)). They have the right and the obligation to refuse a command or an order requiring from them an act that would be contrary to IHL (Article 40(2)).

The second one is the Law on Service in the Armed Forces of the Republic of Croatia, which further develops the obligation of armed forces to respect IHL (Article 10). According to this law, military service members are bound to execute commands and orders from their superiors, except those which violate IHL (Article 17). Moreover, members of the armed forces are required to report the unlawful order and the person who gave it to their immediate superior in the chain of command. Article 178 further provides that there is no disciplinary responsibility for a member of the armed forces who refuses to carry out orders that contravene IHL, the customs of war and the laws of armed conflict.

Libya

Law No. 10 on the Criminalization of Torture, Forced Disappearances and Discrimination

On 14 April 2013, the Libyan General National Congress adopted a law concerning the criminal repression of torture, enforced disappearances and discrimination. Libya is party to the International Convention on the Elimination of All forms of Racial Discrimination since 3 July 1968 and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) since 16 May 1989. However, it is still not party to the International Convention for the Protection of All Persons from Enforced Disappearance.

Law No. 10 aims to protect the rights to personal liberty (Article 1), to physical integrity (Article 2) and to non-discrimination (Article 3). Penalties provided by the Law vary from three to fifteen years of imprisonment for those who restrict by force, threat or treachery the personal liberty of a person, five to fifteen years of imprisonment for committing physical or mental torture, and three to fifteen years of imprisonment for depriving a person of any of his/her rights on the basis of discrimination. The Law provides a penalty of life imprisonment for cases in which the victim dies as a result of the treatment inflicted.

The definition of torture (Article 2) provided in Law No. 10 does not correspond to the one stipulated in the CAT. It establishes that torture is committed when a person inflicts physical or mental suffering to somebody under his or her custody 'to elicit a forced confession . . . or for discrimination of any form, or for revenge of whatever motive' without limiting torture to acts 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity' as specified by Article 2 of the CAT.

Of particular interest are the modes of individual criminal responsibility identified by Law No. 10. For instance, a person can be held responsible when ordering or keeping silence ‘on torture while having the ability to stop it’ (Article 2). Article 5 further establishes that political, administrative, executive or military leaders are responsible for the above-mentioned crimes when committed by those under their control and when they did not take necessary measures to prevent or repress the criminal conduct.

Mexico

Law Decree enacting the General Law on Victims and Law Decree that Reforms, Derogates and Adds Different Provisions to the General Law on Victims; and Reforms the First Paragraph of Article 182-R from the Federal Code of Criminal Procedure

On 9 January 2013, the president of Mexico signed the Decree enacting the General Law on Victims (published in the *Official Gazette* the same day). After bringing some modifications to the draft project, the newly elected president signed the Law so that it could enter into force. However, in order to broaden the protection given to victims, an amendment to the General Law on Victims was already proposed and approved by the Mexican Congress on April 2013. This amendment (signed by the president on 2 May 2013 and published in the *Official Gazette* on 3 May 2013) reforms Articles 1–180 and abrogates Articles 181–189.

The reformed General Law on Victims aims to guarantee victims’ rights to assistance, protection, care, truth, justice, comprehensive reparation and due diligence (Article 2). According to the law, victims are those who have suffered directly or indirectly from any economical, physical and/or psychological harm as a consequence of a violation of the human rights recognised by the Mexican Constitution and by international treaties (Article 4). Protection is also granted to ‘potential victims’ (persons who could face threats to their personal integrity because of the assistance they give to victims) and to groups, communities or organisations from civil society who could have suffered from a human rights violation (Article 4).

In order to guarantee victims’ rights, the Law establishes different protection and assistance mechanisms: a National System for Victim Care for the planning and supervision of the provision of assistance to victims (Title VI); an Executive Commission for Victim Care that will control the execution of the Law (Article 44); the Agency for Legal Aid for Victim Care (Title X); a National Victims Register (Article 96); and a Care, Assistance and Reparation Fund (Title VIII).

From a comprehensive catalogue of rights granted by this law to the victims, one can mention the right to family reunification (Article 7 (XVI)), the right to truth, which implies a right to know the whereabouts and the fate of missing relatives, and the obligation of the authorities to take all effective and urgent measures in order to satisfy the right to truth (Articles 19 and 21). Families of missing persons also have the right to be present during exhumations and to receive the remains of their relatives (Article 21).

Micronesia

Act to further amend Title 11 of the Code of the Federal States of Micronesia, as amended, by creating a new Chapter 13 to implement the provisions of the Chemical Weapons Convention at the National level, and for other purposes

On 14 June 2013, the Eighteenth Congress of the Federated States of Micronesia adopted an act to implement the Chemical Weapons Convention (CWC), which was ratified by Micronesia on 21 June 1999. The Law does so by amending Title 11 of the Code of the Federated States of Micronesia (Criminal Code) and inserting a new Chapter 13, which is entitled the Federated States of Micronesia Chemical Weapons Act.

The definitions of ‘chemical weapon’ and ‘toxic chemical’, among other terms provided for in the Act, correspond to those stipulated in the CWC. The Act prohibits the development, production, acquisition, stockpiling, retention, transfer or use of (including for military purposes) chemical weapons and punishes any breach of these prohibitions with a term of not more than twenty years’ imprisonment (Section 1303). The Act also creates a licensing system for scheduled chemicals (Section 1310) establishing restrictions on their use and transfer and creating criminal offences in case of breaches (Sections 1304, 1305 and 1306).

Section 1309 of the Act establishes a reporting system for those producing, using scheduled chemicals. Section 1311 allows for national and international inspections for compliance purpose, requiring either the consent of the person in control of any premises or a previous warrant. According to Section 1313, ‘the Department of Justice of the Federated States of Micronesia shall be the National Authority for the purposes of implementing the provisions of the Convention’ and the Act.

The Philippines

Republic Act No. 10530, defining the use and protection of the red cross, red crescent and red crystal emblems, providing for penalties for violations thereof and for other purposes

On 7 May 2013, the Congress of the Philippines adopted an act (published the same day in the *Official Gazette*) to protect the red cross, red crescent and red crystal emblems.

The Act includes in its Section 2 a Declaration of Principles wherein it is stated that ‘the Philippines renounces war as an instrument of national policy’ and that it ‘shall secure the protective use and indicative use of the emblems both in times of peace’ and during armed conflict. The Act also provides for a definition of key terms, such as ‘distinctive signals’, ‘emblem’, ‘indicative use’ and ‘perfidious use’ (Section 3).

The legislation further stipulates some responsibilities over state institutions in order to control the use of the emblems. For instance, the Department of National Defence (DND) is expected to supervise and control their use by the Medical Service of the Armed Forces (Section 4) and by the Philippines Red Cross (PRC). The Department of Health (DOH) has to do the same regarding civilian medical personnel, transport and buildings (Section 5). The DND and the DOH must ensure 'strict compliance with the rules governing the use of the emblems', and shall take appropriate measures to prevent their misuse, including dissemination of these rules (Section 10).

The Act establishes penalties with regard to the misuse of the emblems. During peace time it shall be punished with a maximum imprisonment of six months or a fine (Section 11), and in times of armed conflict it shall be punished with a maximum imprisonment of life sentence and a fine (Section 12).

Syria

Law No. 11, Addendum to the Penal Code Regarding the Involvement of Children in Hostilities

On 24 June 2013, the Syrian Parliament approved an amendment to the Syrian Criminal Code in relation to the involvement of children in hostilities. The Syrian Arab Republic ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict on 17 October 2003.

The amendment modifies Article 488 of the Criminal Code by establishing a punishment of ten to twenty years' temporary hard labour for any person recruiting 'a child under 18 years old for the purpose of involving him in hostilities or other related acts such as carrying arms or equipment or ammunitions'. The same sanction is applied to persons recruiting a child to use him/her as a human shield or for any purpose relating to criminal conducts (Article 1(1)). A penalty of lifetime forced labour is foreseen if the child suffers from a permanent disability as a result of his/her participation in the hostilities, or if he/she was sexually abused or given drugs while being recruited. Moreover, the death penalty punishment is foreseen for cases where a child dies as a result of his/her involvement in hostilities (Article 1(2)).

Venezuela

Law for Disarmament and Arms and Munitions Control

On 11 June 2013, the National Assembly of the Bolivarian Republic of Venezuela adopted a law (published on 18 June 2013 in the *Official Gazette*, No. 40.190) aimed at disarmament and the control of the trade of arms and munitions (Article 1). Prior to this, Venezuela ratified the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons and its three Protocols on 19 March 2005, and

the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction on 3 December 1997.

The Law prohibits certain weapons including weapons of mass destruction, atomic weapons, chemical and biological weapons and all other weapons which are prohibited by international treaties ratified by the state (Article 7). Following the same rationale, the Law prohibits production, import, export, transit or trade of weapons which, because of their nature or characteristic, have been prohibited by international treaties ratified by Venezuela (Article 9).

As per Article 8 of the Law, the armed forces have the exclusive competence to deliver authorisation for the production, import, export and trade of non-prohibited weapons. Furthermore, the Law imposes the following penal sanctions for the respective criminal conduct: six to ten years for the illegal years of imprisonment for the illegal possession of weapons (Article 111); eighteen to twenty-five years for the illegal production of weapons; and twenty to twenty-five years for the illegal trade of weapons.

B. Case law

The following section lists, in alphabetical order by country, relevant domestic jurisprudence related to IHL and released during the period under review (January–June 2013). Countries covered are Argentina, Colombia, France, the Netherlands, Pakistan, Sweden and the United Kingdom of Great Britain and Northern Ireland.

Argentina

Campo de Mayo (third case), Cases No. 2047, 2426, 2257 and 2526, Federal Criminal Oral Tribunal No. 1 of San Martín

Keywords: crimes against humanity, Argentinian military junta.

On 12 March 2013, Federal Criminal Oral Tribunal No. 1 of San Martín sentenced Reynaldo Benito Antonio Bignone, former president of Argentina (1982–1983), to life imprisonment. This is the fourth sentence issued against Mr. Bignone resulting from his role during the military junta's regime.

From 6 December 1976 to 2 December 1977, Mr. Bignone was second commander of the military institutes and, as such, was in charge of Campo de Mayo, one of the biggest clandestine detention and torture centres existing during the military regime in Argentina. Mr. Bignone is also known for issuing, as the last member of the junta to be in power, a decree aiming at destroying all documents relating to the detention, torture and murder of disappeared persons. In 1983, he passed a self-amnesty law covering all members of armed forces for acts committed during the regime of the junta (1976–1983).⁶

6 Ley 22.924, Ley de Pacificación Nacional, 22 September 1983, *Boletín Oficial de la República Argentina*, 27 September 1983.

On 14 June 2005, the Argentinian Supreme Court declared amnesty laws⁷ to be unconstitutional as they violated Argentina's international human rights obligations. This key decision allowed the prosecution of those responsible for major human rights violations during the military regime, including Mr. Bignone. On 8 March 2007, as one of the top officers in charge of Campo de Mayo, he was accused of committing enforced disappearances and torture against some detainees of this centre.

In this decision the Tribunal concluded that murders, torture and arbitrary deprivation of liberty (among other criminal conducts) targeting a specific type of population and committed during the military junta by state agents are considered crimes against humanity. On the basis of his individual criminal responsibility relating to the events that took place in Campo de Mayo, Mr. Bignone was sentenced to life imprisonment for his participation in twenty cases of murder, illegal deprivation of liberty and torture as a crime against humanity.

Colombia

Decision No. C-120/13, Constitutional Court

Keywords: protection of families of missing persons.

On 13 March 2013, the Colombian Constitutional Court released a decision broadening the scope of protection granted by Law No. 1531 to the families of missing persons.

On May 2013, the Colombian president signed Law No. 1531 on the declaration of absence of missing persons.⁸ According to Article 7(d) of the Law, such a declaration allowed the family and the underage children of a missing person to receive the salary that the missing person was receiving at the time he/she disappeared. However, the article restricted this guarantee to the families and underage children of public servants.

Considering this provision to be contrary to the constitutional right to equality (Article 13), the Court concluded that it was partially unconstitutional and that it should be interpreted in order to enlarge the protection of missing relatives. In particular, the 'family' concept should be broader and, for the purpose of Article 7(d), should also include partners of the same sex. Furthermore, the notion of underage children should be interpreted as including disabled adults who

7 On June 1983 the Argentinian Supreme Court declared that the self-amnesty law enacted by Bignone was unconstitutional. However, between December 1986 and May 1987, the Argentinian Parliament approved two new amnesty laws, one called 'final point', which set a sixty-day limitation for prosecuting crimes against international law committed during the military junta. The other was called the 'due obedience' law, which exempted from prosecution all members of the armed forces who committed crimes as a result of following given orders. These were the laws that the Argentinian Supreme Court declared to be unconstitutional on 14 June 2005.

8 For further information, see: 'What's New in Law and Case Law across the World? Biannual Update on National Legislation Implementing Humanitarian Law and Relevant Case Law, January–June 2012', in *International Review of the Red Cross*, Vol. 94, No. 887, 2012, p. 1151, available at: www.icrc.org/eng/assets/files/review/2012/irrc-887-national-implementation.pdf.

were sustained by the missing person at the time he/she disappeared. Finally, the Court declared that the protection granted by the Article cannot be restricted to families and children of public servants but should also cover relatives of all other types of workers.

Ruling No. 119 from 2013, Special Chamber for the follow-up of Decision No. T-025-04, Constitutional Court

Keywords: protection of civilians, non-international armed conflict in Colombia.

On 24 June 2013, the Colombian Constitutional Court issued a ruling allowing forced displacement victims (resulting from violent episodes caused by the BACRIM⁹) to be included in the National Victims Register (NVR). This decision put an end to a discriminatory practice that excluded those victims from the benefits offered by Law No. 1448, which was intended to protect, assist and provide reparations to victims of the country's armed conflict.

Law No. 1448 provided for the creation of the NVR, aiming to draw a list of victims that would be entitled to the benefits offered by the Law. According to the head of the National System of Reparations for Victims (NSRV), the definition given by the Law for 'victims'¹⁰ excluded those affected by the violence caused by the BACRIM. Hence people who had suffered from forced displacement because of this kind of violence could not benefit from Law No. 1448.

Considering this practice to be discriminatory, the Colombian Constitutional Court declared it to be unconstitutional. The Court clarified that the inclusion of forced displaced persons in the NVR (a) did not depend on whether the displacement resulted from the armed conflict or not, (b) was independent from the reasons and the armed actor that caused the violence leading to the displacement, and (c) was not related to the place, be it rural or urban, where the violence occurred. For the Court, any person who would meet the forced displacement criteria¹¹ should be included in the NVR and benefit from Law No. 1448.

Moreover, the Court ordered the head of the NSRV to establish a working group comprising the Ombudsman's Office, the Office of the Public Ministry, the Office of the High Commissioner for Human Rights, and the ICRC in order to study and follow up on the cases of victims excluded from the NVR so that they could offer advice and recommendations in this regard.

9 BACRIM (*bandas criminales*), or 'criminal bands', is an expression used by the Colombian government.

10 'The Law defines "victims" as those who, individually or collectively, have suffered harm in acts that occurred on or after 10 January 1985, as a consequence of violations of international humanitarian law or international human rights law, occurring in the midst of the internal armed conflict. The term extends to family members and partners of those killed or disappeared.' See 'What's New in Law and Case Law across the World: Biannual Update on National Legislation and Case Law January–June 2011', in *International Review of the Red Cross*, Vol.93, No. 883, September 2011, p. 859, available at: www.icrc.org/eng/assets/files/review/2011/irrc-883-reports-documents.pdf.

11 For the Court, an enforced displaced person is anyone who had a well-founded fear, resulting from widespread violence, which led him to abandon his place of residence or the place where he was developing his economic activity.

The importance of this decision is also related to the fact that it ordered the head of the NSRV to issue a quarterly document reporting on the advances, obstacles and difficulties relating to the inclusion of victims in the NVR, as well as presenting the patterns of forced displacement in Colombia.

France

Association France-Palestine Solidarité 'AFPS' v. Société ALSTOM Transport SA, Case No. 11/05331, Versailles Court of Appeal

Keywords: corporate liability for IHL violations.

On 22 March 2013, the Versailles Court of Appeal dismissed the legal claims of the France–Palestine Solidarity Association (FPSA) and the Palestine Liberation Organisation (PLO) aiming to hold responsible Alstom, Alstom Transport and Veolia Transport (French corporations) for IHL violations in Israel.

On 22 September 2004, the State of Israel and a French–Israeli private consortium (which included Alstom and Alstom Transport SA) signed a contract to install a public transport service in Jerusalem. Another contract was signed between the city of Jerusalem and Veolia Transport for public transport maintenance. The tram system was built and ready to be used on 19 August 2011. On 22 February 2007, the FPSA filed a lawsuit against Veolia Transport and Alstom denouncing the contract they had signed with Israel for the construction of the tram system as unlawful. Subsequently, the PLO joined the plaintiff's side. According to the FPSA, the unlawfulness of the contract resulted from the fact that it involved the illegal construction of a tram system in the Occupied Territories, which is a violation of IHL. In particular, the FPSA claimed that the French corporations violated Articles 49 and 53 of the Fourth Geneva Convention of 1949, Articles 23(g) and 46 of the Fourth Convention respecting the Laws and Customs of War on Land of 1907, and Articles 4.1 and 4.3 of the Hague Convention of 1954, as well as customary IHL. On 30 May 2011, the Lower Court dismissed the legal claims of the FPSA and PLO, who lodged an appeal against the decision.

The Versailles Court of Appeal did not overturn the decision of the Lower Court. Rather, the Court considered that the provisions cited by the organisations were related to international instruments signed by states, which established concrete obligations for the Occupying Powers, but not for private corporations. The Court further stated that these provisions have neither a vertical¹² nor a horizontal effect¹³ towards corporations. Moreover, the Court set aside the claim

12 For the Court, the vertical effect of treaties relates to those situations where a treaty is sufficiently clear and explicit to create direct obligations for nationals of the country which ratified the treaty. In this case, the Court concluded that the Fourth Geneva Convention did not create direct obligations for French corporations.

13 For the Court, 'horizontal effect' means that only when a corporation is a signatory of an international agreement will this agreement be binding for it. Furthermore, the Court affirms that as corporations are not subjects of international law, they cannot sign an international agreement and, as such, cannot be directly bound by it.

about an alleged violation of a customary rule establishing a 'general responsibility of corporations regarding human rights violations'. For the Court, there is not enough evidence to prove such a customary rule and, therefore, bearing in mind the Statute of the International Court of Justice,¹⁴ it cannot be considered as binding. Finally, the Court dismissed the plaintiffs' argument regarding the *jus cogens* character of the provisions allegedly violated by the corporations. It considered that *jus cogens* is a concept that can only be applied to subjects of international law, and corporations are not considered as such.

The Netherlands

The Prosecutor v. Yvonne Basebya, Case No. LJM BZ4292, District Court of The Hague

Keywords: Rwandan genocide, incitement to commit genocide.

On 1 March 2013 the District Court of The Hague found Ms. Basebya guilty of incitement to genocide in relation to the Rwandan genocide of 1994.

Investigations were initiated against the defendant because of her close links in the National Republican Movement for Democracy and Development (*Mouvement Républicain National pour la Démocratie et le Développement*, MRND), a political party whose youth wing was deeply involved in the Rwandan genocide. Living in Gikongo, one of the neighbourhoods of Kigali considered to be a hotbed of the MRND and its youth wing, the defendant often participated in their rallies where racial hatred against Tutsis was incited. For these reasons, she was accused of abetting genocide, attempted genocide, murder, conspiracy to genocide, incitement to genocide, and war crimes.

The Court acquitted Ms. Basebya on most of the charges due to lack of evidence, but she was convicted for the charge of incitement of genocide. She was found guilty of this charge because of her active participation in MRND rallies where she led the crowd to sing the 'Tubatsembe' song, inciting the listener to 'kill them all'. Bearing in mind the highly volatile political and social context and given that this incitement was direct and public, the Court found that the defendant had the intent to incite people to kill Tutsis. Moreover, citing a decision of the International Criminal Tribunal for Rwanda (ICTR) which recognised Tutsis as a protected group within the meaning of the 1948 Genocide Convention,¹⁵ the Court concluded that all elements for incitement to genocide were met in the case.

Apart from the fact that this is the first time a Dutch citizen has been condemned for being involved in the Rwandan genocide, this decision is also important because it explicitly recognises that incitement to genocide, as an

14 Statute of the International Court of Justice, Art. 38(1) (b): 'the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... b. international custom, as evidence of a general practice accepted as law'.

15 International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, ICTR 97-23-S, Trial Chamber I, 2 September 1998.

international crime, should be strongly punished by national courts. Indeed, even if the Court's hands were tied by the provisions of the previous criminal code,¹⁶ it declared itself to be mindful that the punishment given to the defendant (six years and eight months) was not in accord with the gravity of the conduct. The Court admitted that the incitement to genocide committed by the defendant was an essential step in the outbreak of the Rwandan genocide and, as such, should be strongly punished.

Pakistan

Foundation for Fundamental Rights v. Federation of Pakistan, Decision on the Writ Petition No. 1551-P/2012, Peshawar High Court¹⁷

Keywords: drones/remotely piloted aircrafts, protection of civilian population, war crimes.

On 11 March 2013, the Peshawar High Court released a decision considering, among other conclusions, that US drone strikes in Pakistan amounted to war crimes.

Following a drone strike that took place on 17 March 2011 and which caused several civilian casualties, the Foundation for Fundamental Rights, acting on behalf of the son of one of the victims, lodged a complaint against the Federation of Pakistan. The Court connected this case with other writ petitions also related to drone strikes.

Citing the significant number of civilian casualties and civil property loss caused by drones in the north and south Waziristan region of Pakistan,¹⁸ and given that most of victims were not taking direct part in hostilities, the Court declared that these attacks were violations of international law. In particular, the Court stated that such strikes were a breach to Pakistani national sovereignty and violated Article 2(4) of the UN Charter, as well as the principles of international law established by the UN Declaration on Friendly Relations among States.¹⁹ In addition, the Court ruled

16 Prior to 1 October 2003, the Netherlands' criminal code established a penalty of not more than five years' imprisonment for the crime of incitement to genocide. Because the facts of this case occurred in 1994 and given the principles of most favourable legislation, non-retroactivity and legality, the District Court of The Hague had to apply the past provisions of the Netherlands' criminal code.

17 On 19 December 2013 the Peshawar High Court began contempt proceedings against the government of Pakistan due to its failure to obey the orders given by the Court.

18 According to the decision of the Peshawar High Court, '896 Pakistani civilians, residents of the said Agency, were killed during the last five (05) years till December 2012 while 209 were seriously injured. . . . Many houses & vehicles of different category, make & model, worth millions dollars, were destroyed during these attacks. Besides, many cattle heads of different kinds were torn into pieces & charred, belonging to the local residents. Similarly, in South Waziristan Agency 70 drone strikes were carried out during last five (05) years till June 2012 in which 553 local civilians were killed, 126 were injured, 03 houses were destroyed and 23 vehicles were badly damaged.'

19 See UNGA Res. 2625 (XXV), 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. In particular, the Peshawar High Court states that these drone strikes violated the principle according to which 'every State has the duty to refrain in its international relations from the threat or use of force

that drone strikes which took place in the Waziristan region were also a violation of the right to life. Finally, the Court also declared that these attacks were a violation of the Geneva Conventions of 1949 and their Additional Protocols as they were not respectful of the principles of distinction and proportionality. For these reasons, the Court declared that these strikes amounted to war crimes and were 'absolutely illegal'.

In order to put an end to such violations, the Court requested that the Federation of Pakistan adopt an escalating response at a national and international level. At the national level, if the government of Pakistan could not manage to stop drones strikes, security forces should solve the situation, even by resorting to the use of armed force. At the international level, Pakistan should raise the issue to the UN Security Council and, if facing restrictions relating to veto power, it should ask for an urgent session of the UN General Assembly. Furthermore, Pakistan should ask the UN Secretary-General to 'constitute an independent War Crimes Tribunal which shall have the mandate to investigate and enquire into all these matters and to give a final verdict as to whether the same amounts to War Crime'.²⁰ Finally, if these steps prove to be unsuccessful, according to the Court, the Federation of Pakistan should 'sever ties' with the government of the United States of America and 'deny all logistic and other facilities to the USA within Pakistan'.²¹

Sweden

The Prosecutor v. Stanislas Mbanenande, Stockholm District Court

Keywords: Rwandan genocide, *ne bis in idem*, grave breaches of IHL.

On 20 June 2013, Stanislas Mbanenande was sentenced to life imprisonment for his direct participation in the events that led to the Rwandan genocide of 1994.

Stanislas Mbanenande was an intellectual belonging to the Hutu ethnic group. He was accused of participating in several massacres and other violent events that led to the death and forced displacement of Tutsis in the Kibuye prefecture of western Rwanda in 1994. He was first tried *in absentia* by the Gacaca Courts of Rwanda²² and sentenced to life imprisonment in 2009. As a result of this sentence, Interpol issued an arrest warrant for Mr. Mbanenande and he was captured in Sweden in 2011. However, because of his Swedish citizenship, obtained after fleeing

against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues' (op. para. 1).

20 Peshawar High Court, Peshawar Judicial Department, Writ Petition No. 1551-P/2012, Judgment, 11 March 2013, para. 22(vii).

21 Peshawar High Court, Peshawar Judicial Department, Writ Petition No. 1551-P/2012, Judgment, 11 March 2013, para. 22(ix).

22 The Gacaca Courts were an alternative judicial authority that was created by the Rwandan presidency. These courts were intended to try low- and middle-level perpetrators of the Rwandan genocide, while the International Criminal Tribunal for Rwanda was to try higher-ranked responsible persons. On 18 June 2012, the Rwandan president announced the end of the Gacaca Courts.

Rwanda, and given that the Swedish judicial authorities did not recognise the authority of the sentence issued by the Gacaca Courts, the defendant was indicted in 2012 by the Stockholm District Court for charges of genocide and war crimes, including crimes of murder, attempted murder and abduction.

According to the findings of the Court, Mr. Mbanenande had a leading role at a lower level and directly participated in several events relating to the Rwandan genocide. In this context, he committed criminal offences such as murder, attempted murder, incitement to murder and kidnapping. For the bench, it was clear that the attacks were directly targeting a group of persons because of their ethnic origins. Given that Tutsis were recognised as an ethnic group, the Court concluded that these acts amounted to the crime of genocide. The Court also found that Mr. Mbanenande was involved in the recruitment of new members of the Hutu militias.

With regard to the alleged commission of war crimes, the District Court first recognised that, at the time, there was an ongoing non-international armed conflict between the government army and the Rwandan Patriotic Front. Then it declared that this context played a decisive role in the defendant's ability and decision to engage in criminal conduct. Therefore, the Court found that Mr. Mbanenande was guilty of committing grave breaches of IHL as established by Common Article 3 of the Geneva Conventions of 1949 and by its Second Additional Protocol.

United Kingdom

Smith and others (Appellants) v. The Ministry of Defence (Respondent); Ellis (Respondent) v. The Ministry of Defence (Appellant); and Allbutt and others (Respondents) v. The Ministry of Defence (Appellant), Judgment, United Kingdom Supreme Court

Keywords: positive obligations of the European Convention of Human Rights, state responsibility for IHRL violations.

On 19 June 2013, the United Kingdom (UK) Supreme Court delivered a judgement relating to the extra-territorial applicability of the European Convention on Human Rights (ECHR) to military operations taking place abroad.

The factual background of this case arises from the UK intervention in Iraq and, in particular, from the death of three soldiers in different circumstances, allegedly resulting from the inappropriate equipment given to the deceased by the Ministry of Defence. Three different claims were lodged in relation to these facts, each trying to demonstrate that they represented a violation of Articles 1 and 2 of the ECHR. On 30 June 2011, the Lower Court struck out the claims, considering that such acts were not within the jurisdiction of the UK for the purposes of Article 1 of the ECHR and that there was no basis for extending the scope of positive obligations derived from Article 2 of the ECHR to decisions taken in the course of military operations. On 19 October 2012, the Court of Appeal dismissed the appeals

with regard to whether the UK had jurisdiction over the events that led to the death of the soldiers and considered it unnecessary to go further in the study of the application of the substantive obligations resulting from the ECHR articles.

The Supreme Court first addressed the question of whether the deaths of the soldiers were within the jurisdiction of the UK for the purpose of Article 1 of the ECHR, and then the question of whether Article 2 of the ECHR imposed positive obligations on the UK 'with a view to preventing the deaths of their . . . soldiers in active operations against the enemy'.

In relation to the first question, the Supreme Court followed the ruling of the European Court on Human Rights (ECtHR) in the *Al-Skeini* case, in which the ECtHR ruled that the principle of extra-territorial jurisdiction 'can exist whenever a state through its agents exercises authority and control over an individual', concluding therefore that the death of the soldiers occurred within the jurisdiction of the UK.

In relation to the second question, the Supreme Court started by recognising that an important distinction had to be made between a context relating to military training, where the state has almost absolute control over the outcome of operations, and a context of armed hostilities, where the evolution of military operations is frequently unpredictable. Whereas in the first scenario, it is easiest for a judicial authority to intervene and order the respect of Article 2 of the ECHR, in the second case, an excessive restriction of state discretion resulting from a court's intervention would be incompatible with the nature of military operations. The 'court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate'.²³ Furthermore, some issues, such as training, procurement and the conduct of operations, are closely related to political considerations and thus fall outside the scope of Article 2.

Even if the final conclusion of the judgment was to allow the claims to proceed to trial, the majority of the Supreme Court was ultimately sceptical with respect to extending the responsibilities of the state in such an unpredictable field as that of armed hostilities. According to the Court, the recognition of positive obligations for the purpose of Article 2 in these situations needs to be established on a case-by-case basis.

23 United Kingdom Supreme Court, *Smith and others (Appellants) v. The Ministry of Defence (Respondent); Ellis (Respondent) v. The Ministry of Defence (Appellant); and Allbutt and others (Respondents) v. The Ministry of Defence (Appellant)*, Judgment, 19 June 2013, para. 76.

BOOK REVIEW

Counterinsurgency Law: New Directions in Asymmetric Warfare

Edited by William A. Banks*

Book review by R. James Orr, Dean of the School of Criminal Justice and Social Sciences of Tiffin University. Dean Orr is a retired US Navy judge advocate specialising in international and operational law and served as deputy legal adviser to NATO Headquarters, Supreme Allied Commander Transformation from 2004 to 2008.



As the active engagement of US and North Atlantic Treaty Organisation (NATO) troops in the conflict in Afghanistan winds down, the challenges of that conflict, and the legacy of challenges of the conflict in Iraq, continue to resonate in the policy discussions within governments and in academic literature. Throughout the first decade of the twenty-first century, legal literature has reflected an effort to adapt to what has often been characterised as a new era of conflict.¹

Counterinsurgency Law: New Directions in Asymmetric Warfare, edited by Professor William Banks, is but one of the latest contributions to this literature. The second publication of collected essays produced under the aegis of Syracuse University's Institute for National Security and Counter-Terrorism,² the book provides a collection of well-researched and well-supported papers that serve the legal community. Both publications propose practical analytic approaches intended to help decision-makers and practitioners, as well as scholars, deal with an extremely

* Published by Oxford University Press USA, 2013. The views expressed here are those of the book reviewer alone and not of the International Committee of the Red Cross.

complex and difficult subject – the targeting of insurgents. They both explore the various bodies of law applicable in determining when the targeting is warranted and under what body of laws the decision is to be made in a manner that provides useful guidance on bridging the gap between theory and practice. While all legal advisers who work in the field of international humanitarian law (IHL) will find the book valuable, its greatest utility is to those who educate and train military legal advisers and those developing doctrine and procedures at the operational or strategic level of command.

Before discussing what this collection does, it is necessary to first distinguish what it does not do. There has been a great deal of controversy over the utility of counterinsurgency as either doctrine or as a strategy.³ This book does not wade into that discussion, but assumes that the tensions inherent in applying either human rights law (HRL) or IHL will remain a source of concern in years to come.⁴

Similarly, and despite the title, the book does not presume to provide a comprehensive analysis of all aspects of law applicable to a situation of counterinsurgency. There are books that attempt to provide at least some broader coverage of the subject, such as Ganesh Sitaraman's *The Counterinsurgent's Constitution*.⁵ In this work, Sitaraman provides a brief overview of the law regarding not just the *jus ad bellum* and *jus in bello* aspects of counterinsurgency, but also issues such as transitional justice, development, the rule of law, and constitutionalism in the post-conflict environment.

Professor Banks' approach in choosing the topics to be covered in this book is sound. The title may be overly broad, but the substance of the book is not. It does adopt the underlying premise of counterinsurgency (COIN) doctrine that a counterinsurgency effort must be comprehensive and that protection of the indigenous population is a key focus of military efforts.⁶ Instead of trying to address all aspects of the law that may then be encountered in different parts of a counterinsurgency campaign, this book focuses on only one of them: the question

1 Many books and articles on the subject exist. See, for example, Michael N. Schmitt and Jelena Pejic, *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Joram Dinstein*, Martinus Nijhoff Publishers, Leiden, 2007; Michael W. Lewis, *The War on Terror and the Laws of War*, Oxford University Press, Oxford, 2009; David H. Bayley and Robert M. Perito, *The Police in War: Fighting Insurgency, Terrorism, and Violent Crime*, Lynne Rienner, Boulder, CO, 2010.

2 The first of the series was *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare*, also edited by William A. Banks and published by Columbia University Press in 2011 as part of the Columbia Studies in Terrorism and Irregular Warfare series.

3 See, for example Gian Gentile, 'A strategy of tactics: population-centric COIN and the Army', in *Parameters*, Autumn 2009, pp. 5–17, available at: <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/09autumn/gentile.pdf> (last visited 12 January 2014); Gian Gentile, 'Wrong Turn; America's Deadly Embrace of Counterinsurgency', in *The New Press*, New York, 2013; and Edward Luttwak, 'Dead end: counterinsurgency warfare as military malpractice', in *Harper's Magazine*, February 2009, available at: www.ifri.org/files/politique_etrangere/luttwak.pdf (last visited 29 January 2014).

4 William A. Banks, *Counterinsurgency Law: New Directions in Asymmetric Warfare*, Oxford University Press USA, New York, 2013, pp. xiii–xv.

5 Ganesh Sitaraman, *The Counterinsurgent's Constitution: Law in the Age of Small Wars*, Oxford University Press USA, New York, 2013.

6 W. A. Banks, above note 4, p. xii.

of how to approach the two bodies of law that may apply, HRL and IHL, in order to help a government or its agents determine how the use of lethal force against insurgents shall be regulated. These essays seek to provide a workable framework for addressing the issue in an operational environment that is extremely dynamic and complex. In the view of this reviewer, they succeed.

The book relies, in no small measure, on the International Committee of the Red Cross (ICRC) *Interpretive Guidance on the Notion of Direct Participation in Hostilities*.⁷ That document has provided an incredibly important contribution to the discussion, a fact acknowledged by the writers in the degree to which it is discussed, contested and applied. Any reader of these essays would be well-advised to have a copy of it to hand.

Counterinsurgency Law is divided into four sections, each consisting of essays written by scholars and practitioners recognised for their scholarship in the fields of IHL and HRL. Each section focuses on a different aspect of the question,⁸ but throughout all of the essays written by the different contributors, *Counterinsurgency Law* maintains a focus on the crux of the legal debate – whether and to what degree the legal paradigms of IHL and HRL converge in a climate of irregular or unconventional warfare⁹ and how that should affect the actions of the military personnel involved, from those in the field to those directing the operations.

The book opens with an examination of how the United Nations Human Rights Council (HRC) has assumed the role of addressing this convergence in its work, despite the lack of any references to IHL in its mandate. Concise and readable, this essay provides a point of reference for considering the role not only of the HRC but also of other international and non-governmental organisations. Combining analysis and advocacy on HRL/IHL convergence often goes beyond the mandates of such organisations and, the author argues, beyond their expertise as well.¹⁰ The next chapter in this section examines the application of the rule of proportionality in both IHL and HRL, and considers the convergence of the rules through ‘the republican insight that central features of both HRL and IHL reflect a fiduciary relationship between states and persons who are subject to their control’.¹¹ This relational approach, in which states are entrusted with a certain level of

7 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, 2009.

8 Part I focuses on framing the issue of convergence between the two bodies of law in COIN. Part II explains the issue of ‘Reunifying the laws of armed conflict: non-international conflict and COIN operations’. Part III addresses the specific challenges of protecting civilians and the accompanying increased risk to the military forces involved, while Part IV expands the discussion from COIN to other unconventional battlefields – terrorism, the use of drones, and maritime blockades.

9 The terms ‘irregular warfare’ and ‘unconventional warfare’ are often used interchangeably. In the United States, ‘irregular warfare’ is defined as ‘A violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s)’, while ‘unconventional warfare’ is defined as ‘Activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area.’ United States Department of Defense, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 of 8 November 2010 (as amended through 15 March 2014), pp. 136, 273, available at: www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (last visited 9 April 2014).

10 W. A. Banks, above note 4, pp. 16–18.

11 *Ibid.*, p. 30.

responsibility with respect to persons under their control (a responsibility which may vary depending on the specific relationship involved), helps contextualise the applicable rules to a changing operational landscape.¹²

The essays in the second section of the book move toward developing frameworks for distinguishing when and in what circumstances to apply the different rule sets. Both of the authors of the essays in this section, Eric Jensen and Geoff Corn, are published law professors; they each served as judge advocates in the US Army with extensive experience both in operations and at the headquarters level, including having served as chief of the International Law Branch of the US Army Judge Advocate General's Corps and chief of the Law of War Branch in the US Army International Law Division respectively. Their essays each work towards the goal of ensuring a robust application of the law but also clarity in what the law requires for the armed forces involved.¹³

In COIN, as in other forms of conflict, there is a perceived tension within rules of engagement (ROE) between the freedom of a unit to use the amount of force that its members believe necessary to accomplish their mission and protect themselves in a firefight and the restrictions on the use of force that are often needed to serve broader political, operational and strategic ends. In the broader debate over the usefulness of COIN doctrine in Afghanistan and Iraq, critics have argued that the mission focus on protecting civilians reflected in recent ROE distracts military forces from the traditional techniques of war-fighting, thus reducing effectiveness.

The third section of the book engages this debate by looking directly at the population-centric goal of COIN doctrine and its manifestation in guidance for the use of force issued by the American commanders in Afghanistan. The contributions look at whether this focus is ethically sound, whether it serves the intended operational purpose of furthering the goal of winning hearts and minds, and finally, whether the rules do in fact further the humanitarian goal of protecting civilians who are not participating in hostilities.¹⁴ The broader theme of relationship and obligation is used by these essays through an examination of the question of whether a 'duty to assume risk' exists not just as part of COIN doctrine but perhaps as an emerging legal norm.¹⁵ This latter conclusion is rejected, but the essays in this section provide useful frameworks for balancing the responsibilities in interpreting and applying commanders' guidance.

The final section of the book considers several specific case studies. The challenge of applying potentially conflicting sets of HRL and IHL rules in complex operations leads Boaz Ganor to posit a framework that relies on classifying

12 The nature of the changing operational landscape is illustrated by the discussion by former commandant of the US Marine Corps, General Charles Krulak, in his article 'The strategic corporal: leadership in the three block war', in *Marines Magazine*, January 1999, available at: www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm (last visited 1 December 2013).

13 W. A. Banks, above note 4, pp. 46 and 58.

14 *Ibid.*, p. 87.

15 *Ibid.*, pp. 89–90.

actors into one of four contexts, with each classification of an actor being addressed by a specific mix of IHL and HRL approaches.¹⁶ Robert Chesney addresses the continually vexing issue of using remotely piloted aircraft to engage individuals through an examination of the strike against Anwar al-Awlaki.¹⁷ Finally, Corri Zolli explores the Gaza flotilla incident and the debates which followed the use of force by Israel in that case. These case studies expand the consideration of the issues beyond counterinsurgency and address questions of relationship and obligation involving the military forces and the targeted individuals or organisations in two very different contexts – the targeted killing of a member of Al Qaeda and the enforcement of a blockade.¹⁸

What comes out of all the essays in this book is the consistent theme of relationship as the basis for determining the applicable law. The relationship of the actors to each other and of the actors in the insurgency to the broader civilian population is key to any application of COIN doctrine. It is also, as these essays demonstrate, key to an effective application of HRL and IHL in COIN. The role of the HRC and its willingness to interject itself into the legal debates regarding conflicts is a question of relationship of that body to the broader international community. Similarly, the relationships between both government forces and non-government armed groups on the one hand and the civilian population on the other, as well as whether those relationships can be analogised to fiduciary relationships, provides a way of thinking about the use of force and the question of what serves as reasonable efforts to avoid injury to members of the general population not involved in the conflict.

As noted earlier, there are ongoing arguments over whether the most recent *entrée* into counterinsurgency is a phase which has passed, at least for the US military. This writer believes that it would be a mistake to so conclude. As the past thirty years demonstrate, the likelihood that the armed forces of various nations will be engaged in unconventional forms of conflict remains very high. That being the case, it is extremely important that the scholarship on all aspects of this form of conflict continues the conversation on the legal, political and operational issues that it raises. We are likely to face these issues again in the future.

Counterinsurgency Law represents a significant contribution to the literature and to this conversation. It should be added to the bookshelves of scholars as well as practitioners.

16 *Ibid.*, p. 141.

17 *Ibid.*, p. 161.

18 *Ibid.*, p. 178.

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Published in association with Cambridge University Press.

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The *International Review of the Red Cross* is indexed in the Thomson Reuters Journal Citation Reports/Social Sciences Edition and has an Impact Factor. The Review is available on LexisNexis.

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