

# 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

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forces participate (hereinafter ‘peace operations’ or ‘multinational operations’)<sup>1</sup>, 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.<sup>2</sup> This position was adopted for instance by some troop-contributing countries (TCCs) participating in NATO operations in Afghanistan<sup>3</sup> and Libya.<sup>4</sup> The UN Secretary-General seemed to have expressed a similar view with regard to the UN forces' action in Côte d'Ivoire in 2011.<sup>5</sup>

- 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 31<sup>st</sup> 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<sup>e</sup> 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. CMAC-383, 2 April 1996, 106, Canadian Criminal Cases, 134 DLR (4<sup>th</sup>) 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.<sup>6</sup> 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.<sup>7</sup> 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*, 2<sup>nd</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> 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).<sup>11</sup>

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:<sup>12</sup>

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*.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

- 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*, 4<sup>th</sup> ed., Cambridge University Press, 2004, pp. 156–163; Leslie Green, *The Contemporary Law of Armed Conflict*, 2<sup>nd</sup> 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, 'Jus ad Bellum and Jus 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*, 6<sup>th</sup> 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.<sup>16</sup>

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 maintained<sup>17</sup> – even when multinational forces are involved – in order to preserve the integrity of IHL and the humanitarian objectives pursued by this body of law.<sup>18</sup>

### 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.<sup>19</sup>

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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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](http://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 IHL<sup>23</sup> 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'.<sup>24</sup>

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')<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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)<sup>28</sup> 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.<sup>29</sup> 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 thereof<sup>30</sup> 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 4<sup>th</sup> 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](http://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,<sup>31</sup> 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.<sup>32</sup> 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,<sup>33</sup> 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 circumstances<sup>34</sup> 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'.<sup>35</sup> In a similar vein, the ICTY underlined in

33 For instance Eric David, *Principes de droit des conflits armés*, 5<sup>th</sup> 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’.<sup>36</sup>

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’.<sup>37</sup>

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.<sup>38</sup>

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

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 publication<sup>40</sup> and they form the subject of some fairly detailed academic work.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup>

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](http://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 31<sup>st</sup> 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](http://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, 3<sup>rd</sup> 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](http://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 19<sup>th</sup> 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.<sup>45</sup>

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.<sup>46</sup>

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.<sup>47</sup>

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.<sup>48</sup>

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).<sup>49</sup> 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.<sup>50</sup> Such an interpretation is not reflected in the practice of TCCs.<sup>51</sup> 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.<sup>52</sup> 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 18<sup>th</sup> 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](http://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.<sup>53</sup> Indeed, this notion has been construed as covering acts of violence repeated over time, but which are nevertheless not continuous.<sup>54</sup> 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.<sup>55</sup>

- 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’.<sup>56</sup> 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.<sup>57</sup>

In the light of Article 2(2) of this instrument, which clarifies its relationship with IHL,<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup>

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’.<sup>61</sup>

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,<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

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.<sup>65</sup>

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).<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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 Congo<sup>69</sup> and the NATO troops in Afghanistan.<sup>70</sup>

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.<sup>71</sup>

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.<sup>72</sup> 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 hostilities<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup>

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*.<sup>76</sup>

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 organisation<sup>77</sup> 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.<sup>78</sup> 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 12<sup>th</sup> 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 12<sup>th</sup> 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.<sup>79</sup> 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.<sup>80</sup> However, there is no disputing the fact that TCCs never delegate 'full command'<sup>81</sup> to the international organisations involved in peace operations but generally transfer only 'operational command'<sup>82</sup> or 'operational control' to them.<sup>83</sup> 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.<sup>84</sup> 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 attribution<sup>85</sup> 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, 56<sup>th</sup> 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.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup>

Therefore, the issue of attribution in the context of peace operations leaves room for interpretation.<sup>89</sup> 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 63<sup>rd</sup> 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 12<sup>th</sup> 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,<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> 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 issue<sup>93</sup> 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 TCCs<sup>94</sup> and the potential for TCCs’ (limited) interference, the UN

pp. 649–668; Jörn Griebel and Milan Plücken, ‘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.<sup>95</sup>

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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup>

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, 63<sup>rd</sup> 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.<sup>99</sup> 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.<sup>100</sup>

Indeed, despite the fact that the NATO C2 doctrine provides that TCCs transfer 'operational control' to the NATO Force Commander,<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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](http://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](http://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.<sup>104</sup>

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.<sup>105</sup> 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.'<sup>106</sup> 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).<sup>107</sup> However, this view is far from widely accepted.<sup>108</sup>

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)*.<sup>109</sup> This approach is shared by the ICTY<sup>110</sup> and the ICC.<sup>111</sup> 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 31<sup>st</sup> 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, 26<sup>th</sup> 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.<sup>112</sup>

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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup>

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.<sup>116</sup> 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. Wilmshurst, in E. Wilmshurst (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.<sup>117</sup>

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 scope<sup>118</sup>

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.<sup>119</sup> 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.<sup>120</sup>

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.<sup>121</sup> 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](http://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.<sup>122</sup>

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.<sup>123</sup>

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'<sup>124</sup> 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.<sup>125</sup> The UN currently awards PMSCs contracts for services such as guarding civilian compounds and logistical support.<sup>126</sup> 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.<sup>127</sup> 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,<sup>128</sup> 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.<sup>129</sup>

Daphna Shrager 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'.<sup>130</sup> 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.<sup>131</sup> This position would have a direct impact on the duration of the application of IHL to the multinational forces' action.

Recent decisions of the ICC<sup>132</sup> and the Special Court for Sierra Leone (SCSL)<sup>133</sup> have also followed the same reasoning vis-à-vis UN forces and have

128 D. Shrager, '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. Shrager, '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 IHL<sup>134</sup> 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 status<sup>135</sup> (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 action<sup>136</sup> 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.<sup>137</sup>

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.<sup>138</sup>

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,<sup>139</sup> 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.<sup>140</sup> These arguments were put forward mainly in the context of multinational NIACs.<sup>141</sup> 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 writings<sup>142</sup> and judicial decisions.<sup>143</sup> 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 13<sup>th</sup> 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.<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup>

Further research shows that the geographical scope of IHL is a matter of well-settled precedent in the case law of international tribunals.<sup>147</sup> 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”’.<sup>148</sup>

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 IHL<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup>

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.<sup>152</sup> 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).<sup>153</sup> 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.<sup>154</sup> 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.