

PERSPECTIVES ON IHL AND MULTINATIONAL FORCES

A NATO perspective on applicability and application of IHL to multinational forces

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Questions of the applicability and application of international humanitarian law (IHL) to multinational forces are of central interest to the North Atlantic Treaty Organisation (NATO, also referred to as ‘the Alliance’ or ‘the Organisation’). Far from being incidental, multinational military coordination is the Organisation’s *raison d’être* and the driving concept behind its methods, history and operations. Since the end of the Cold War, it has conducted a series of major multinational military operations – in and around the Balkans, Afghanistan, Libya and elsewhere – in which questions of the application of IHL have inevitably arisen.

NATO’s perspectives on such issues derive from certain basic features of the Organisation itself. The Alliance was established by a group of sovereign states which were politically closely aligned; which had a shared consciousness of being under the shadow of a massive ideological, strategic and military threat; and which together concluded that their individual national security interests were best

* The views expressed in this article are those of the author and do not necessarily reflect official NATO policy.

pursued, particularly in Europe, by coordinated action in the military as well as the political sphere.

Although much has changed in the two-thirds of a century since the conclusion of the Washington Treaty that created NATO, the structure and methods that followed from these origins are central to how NATO operates today – notably in the tight control that the Allies maintain over NATO actions. Although the popular perception may be otherwise, NATO is not a free-standing entity differentiated from its member states; rather, the Organisation was created as a mechanism for coordination of a group of sovereign states, and is better understood as a tool, or set of tools, available for use by the Allies when and if they wish to do so. Of particular relevance to the topic under discussion is that NATO has policies and takes actions only when and to the extent that doing so has been specifically approved by the North Atlantic Council – NATO's supreme governing body, made up of ambassadorial representatives from all twenty-eight Allied states. Since such decisions must be taken by consensus, as a practical matter any member state can effectively veto any proposed policy or action. Moreover, the actions taken by NATO in conducting military operations are, with only a few exceptions for assets owned by the Alliance collectively, carried out by contingents provided by, and under the command of, the participating individual Allies or NATO operational partners – and over which those states retain ultimate, and often substantial daily, control.

All Allies are party to the core IHL instruments – the 1949 Geneva and earlier Hague Conventions – and are thus subject to the conventional obligations forming the heart of IHL. They also share broadly common views regarding IHL obligations arising under customary law. Equally importantly, after as much as six decades of training and operating together, they have developed common understandings of how to implement those obligations in operations. Consistent with the progressive adoption of common standards across the range of Alliance military activities, all NATO military forces follow a largely common curriculum in educating their personnel in the rules and responsibilities of IHL. The Allies accept as a given that the Alliance must comply with IHL obligations in conducting its operations, and expect the Alliance to set the standard for the lawful conduct of military operations. Faithful compliance with IHL obligations is thus at the core of the conception, planning and conduct of Alliance military operations, and non-NATO troop-contributing states are expected to share that perspective.¹

The Alliance is nonetheless made up of sovereign states, and both the overall content of their international legal obligations and the national legal frameworks through which those states implement their IHL obligations vary significantly. Members of the Alliance have accepted differing substantive obligations with respect to certain weapons, such as anti-personnel mines and cluster munitions. Even in circumstances where Allies have formally identical

1 Although not an issue to date, this expectation could be put to the test if NATO were to conduct military operations involving active participation by states with less robust training programs and traditions of compliance with IHL.

international obligations, the concrete content of their obligations may be interpreted differently in certain cases – for example, with respect to the specific categories of persons subject to detention. They may also be subject to different legal obligations and adjudicatory mechanisms that will affect their understanding and application of IHL: twenty-six out of twenty-eight Allies are subject to the rulings of the European Court of Human Rights, whose jurisprudence increasingly ventures into areas formerly considered to fall exclusively within the realm of IHL as *lex specialis*, and twenty-seven are party to the Rome Statute creating the International Criminal Court. For these reasons, there are limits to the degree to which one can speak of ‘NATO doctrine’ on the application of IHL in military operations, or regarding its specific content.

There is room for debate with respect to the specific rules applicable to actions of multinational military peace and peacekeeping forces, or to those conducting operations under a Security Council mandate. It is not clear, however, that the answer to this question has a great effect on NATO from a practical operational perspective, because NATO’s focus is on planning and conducting operations under operation plans (OPLANs) and rules of engagement (ROE) that are consistent with the legal rules that each individual Ally and participating partner considers applicable within its legal framework.² As a practical matter, for example, while some question whether IHL is strictly speaking applicable to actions taken in the implementation of a United Nations (UN) mandate, the NATO air campaign directed at protecting civilians in Libya was conducted as if it was properly considered part of an international armed conflict entailing application of the rules of IHL appropriate to such a conflict.³

One highly charged issue relating to the application of IHL in the context of a NATO-led operation has been that of treatment of persons detained by the International Security Assistance Force (ISAF) forces in Afghanistan. The issue is politically salient and has been faced continually by NATO forces throughout their decade-long presence in Afghanistan. Because each detainee is captured by a unit of a specific nationality, however, responsibility for his or her treatment thereafter falls to that individual participating state, and is determined by that state’s own understanding of its IHL obligations toward detainees, including the implications of its classification of the conflict. The ISAF commander has no authority to dictate a common general policy on detentions, and the Allies have not considered it necessary to agree on one.

2 Note, in this regard, that individual Allies had at times sharply differing views regarding the legal basis for conducting Operation Allied Force (the 1999 NATO air campaign in the context of the Kosovo conflict). It was unnecessary for the Alliance to agree on a specific legal basis, however, because there was no disagreement on the lawfulness of the campaign or on the ROE to govern its conduct.

3 See also letter of 23 January 2012 from the NATO legal adviser to the chair of the International Commission of Inquiry on Libya, in which NATO accepted that IHL was the *lex specialis* applicable to armed conflict and, by implication, the legal standard against which its actions would be tested in the element of NATO’s Operation Unified Protector aimed at preventing attacks on civilians in Libya. Human Rights Council, Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68, 2 March 2012, Annex II.

A second recent context in which questions of compliance with IHL by NATO were raised was that of designation of Libyan targets during Operation Unified Protector (OUP). By contrast with the detentions situation, identification of targets and planning for striking them was conducted by multinational staff at the NATO operational headquarters, and orders to conduct those strikes were issued by the NATO operational commander on the basis of general criteria agreed by Allies in the OUP OPLAN and the authority vested in him by the North Atlantic Council. The strikes themselves, however, were carried out by units under national command within the overall NATO operational context.

These two examples highlight one of the most difficult questions associated with application of IHL in NATO operations – the attribution of responsibility for violations of that body of law. Like the UN, the EU, the African Union and others, NATO conducts its military operations through volunteered contingents of national forces, a practice potentially raising the question of whether legal responsibility for an alleged violation of IHL or another applicable body of law falls to the Organisation or to the contributing state whose forces are involved in a given incident.

It may in some circumstances be appropriate to attribute actions to the Organisation even when those actions are taken by members of national forces – as, for example, in the earlier-noted case in which targets to be struck in Libya were designated by the NATO commander, a Canadian general officer, exercising authority granted him by the North Atlantic Council.⁴ With such limited exceptions, however, national contingents participating in NATO operations generally possess considerable scope to condition their actions on their national rules and policies. In NATO practice, for example, the individual forces involved may be made available only subject to national ‘caveats’ based on national policy or legal obligations that limit how those contingents can be employed in an operation, or may even in some circumstances decline to carry out an individual mission within an operation. While such limitations might challenge commanders of a multinational military operation, they are an accepted feature of the landscape at least in the NATO context.

What may differentiate the situations of NATO and other entities conducting multinational military operations, however, is the fact that actions of the Organisation are, under NATO rules, indistinguishable from the collective, common action of all its individual member states. Because every major NATO decision is taken by the North Atlantic Council rather than by the Secretary-General, each such decision entails a consensus process in which no Ally can be

4 Note in this context the determination of the International Criminal Court’s Office of the Prosecutor that it had no information to suggest that the actions of the North Atlantic Council in approving OUP, or of the operational commander in carrying out that operation, raised issues of compliance with legal obligations falling within its jurisdiction. While suggesting the theoretical possibility that participating states might bear individual responsibility for the conduct of specific strikes, the Office of the Prosecutor cited no evidence suggesting that any misconduct had in fact occurred. Office of the Prosecutor of the International Criminal Court, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), 16 May 2012, paras. 57 and 58.

outvoted and for the outcome of which each Ally therefore bears responsibility. Every NATO operation is thus initiated by the consensus authorisation of all Allies; every OPLAN and every set of ROE, and every amendment to them, is similarly approved by consensus of all Allies. The Allies decide when to initiate an operation, and when to terminate it.⁵ In such contexts, it may seem anomalous to ascribe a responsibility to NATO as a whole, in distinction to the individual states participating in an operation.

Fortunately, NATO has to date not had to face serious legal questions relating to the allocation of responsibility for alleged violations of IHL. This fact is far from accidental, however, and reflects the seriousness with which the Organisation, its member states and NATO operating partners take their responsibility to comply fully with their obligations under IHL.

5 While non-NATO participating states do not have a formal decision-making role, they are full participants in 'NATO+N' meetings at which operational issues are discussed and proposed decisions are developed, and retain the same freedom to cease participating as they exercised in joining the operation.