

On this very issue the ICRC has developed a so-called “support-based approach” complementing the determination of IHL applicability on the basis of the classic criteria stemming from Common Article 3 of the Geneva Conventions. This approach focuses more on the nature of the activities performed by multinational forces within the framework of the pre-existing NIAC. If the multinational forces’ actions contribute to the collective conduct of hostilities, these forces must be considered party to the pre-existing NIAC.

Agreeing with stakeholders involved in PSOs on IHL applicability is not, however, the only obstacle to surmount. Once such agreement has been reached, the difficulties lie in determining to whom and how IHL will apply in the PSO context.

Identifying who is party to the armed conflict when multinational forces are engaged therein is not an easy task, but it is crucial from a legal and practical standpoint. The difficulty arises from the fact that, in general, multinational forces operate on behalf or under the auspices of international organizations (IO). However, these IOs share one characteristic: they do not have armed forces of their own. To carry out peace operations, they must rely on their member states. When these states put their troops at the IOs’ disposal, they never transfer full authority over them to the IOs. These states always retain some form of authority over the troops lent to the IOs so that it can be said that even when operating on behalf of the IOs, these troops were still acting as organs of their respective states. This complicates the determination of who should be considered as a party to the armed conflict in the context of PSOs. The ICRC has made its own determination based on the command and control (C2) relationships within the organization of the PSO, which may vary from one IO to another and from one PSO to another. The bottom line for us is that determining the parties to an armed conflict ultimately comes down to the question of the level of control effectively exerted by the IO over the troops put at its disposal.

Many other questions remain on how IHL applies to multinational forces. Even if the characterization of the armed conflict in which multinational forces are involved is no longer a subject of much divergence, our experience shows that within the framework of our legal dialogue with key stakeholders involved in PSOs, attempts have been made in order to narrow—as far as possible—the scope of application of IHL. These attempts relate in particular to the personal, the temporal, and the geographical scopes of application of IHL in the context of peace operations.

#### **REMARKS BY MARTEN ZWANENBURG\***

By way of introduction to our discussion, I would like to put to you various pairs of concepts. These concepts are important in thinking about the application of IHL to peace operations. Depending on the view one has on the topic of this panel, these pairs may be seen as conflicting or not.

The first pair is *jus ad bellum* and *jus in bello*. Traditionally, a strict distinction is made between these two. Consequently, *jus ad bellum* considerations have no bearing on the applicability or application of *jus in bello*. This is reflected *inter alia* in the preamble to Additional Protocol I. This means that the mandate given to a peace operation does not in itself determine whether that operation is bound by international humanitarian law (IHL). Whether IHL applies must be determined on the basis of what the operation actually does,

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not on what it is authorized to do. The mandate can, at most, be an indication that the operation is a party to an armed conflict, in particular if it provides for combat operations.

The second pair of concepts is international organizations and states. When we say that a peace operation is party to an armed conflict, we use the term “party” loosely. A peace operation does not have international legal personality, and therefore cannot be a party in its own right. Rather, the international organization leading the operation and/or the troop-contributing states are parties. The question is, what criteria should be used to determine who is a party? I suggest that the criteria for the attribution of conduct under the law of international responsibility are a useful place to start.

The third pair of concepts is individual and collective. As described by Tristan Ferraro, the United Nations suggests that in order to determine whether IHL applies to peacekeepers, one must look at the conduct of the individual peacekeeper. If he takes a direct part in hostilities, he becomes bound by IHL. If not, he is a civilian who enjoys the protection bestowed on civilians by IHL. This view leads to the situation where a peacekeeper can be bound by IHL one day, but not the next, and so on. Also, it is possible for peacekeepers to be bound by IHL while at the same moment another unit in the same operation is not so bound. This raises serious questions of legal certainty that can negatively affect respect for IHL.

In my view, we should also take into account the collective aspect of the application of IHL. By this I mean that the force as a whole can become party to an armed conflict. When that is the case, the members of that force are bound by IHL, irrespective of whether they are directly participating in hostilities. As to the threshold for the force becoming such a party, I have some concerns relating to the theory put forward by Tristan Ferraro. According to this theory, a peace force can become a party to a pre-existing non-international armed conflict without itself becoming involved in hostilities, by supporting the state party in that conflict. This would seem to set a very low threshold for becoming a party. I think we should carefully consider whether this is desirable: when IHL becomes applicable, the parties to the conflict have far-reaching powers that they did not have before—notably the right to kill enemy fighters.

The final pair of concepts is practical training in and dissemination of IHL versus theoretical considerations. I think that it is important to discuss the finer points of the application of IHL to peace operations. But for the purpose of ensuring respect for IHL it is vital to provide robust training in and dissemination of IHL.

#### **REMARKS OF MONA KHALIL\***

By way of introduction, I would first like to describe how peacekeeping and international humanitarian law (IHL) are dealt with in my office, the UN Office of the Legal Counsel (OLC). I am one of many who deal with these issues within OLC, and we each deal with different aspects, albeit working together.

We have a team that deals with issues arising under customary international law including, where applicable, international humanitarian and human rights law. Another team deals with peace and security issues and also deals with MONUSCO (United Nations Organization Stabilization Mission in the DR Congo), given its historical evolution and unique mandate and authority to use force.

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