

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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We also have a team, which I lead, that deals with other peacekeeping operations (PKOs) and all other peacekeeping matters. This includes cross-cutting thematic issues such as protection of civilians, the Human Rights Due Diligence Policy (HRDDP), the Human Rights Screening Policy, the Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law,¹ and the Zero Tolerance Policy, as well as mission-specific advice or assistance on the interpretation of mandates, rules of engagement, the status, rights, and obligations of UNPKOs and their personnel, as well as the legal framework applicable to UN peacekeeping and the use of force by UN peacekeepers, including IHL and other implications thereof.

In providing our advice, we strive to be both legally and operationally sound. As public international lawyers and civil servants, we are bound to uphold the Charter, Security Council resolutions, and customary principles of international law, as well as UN policies and rules. As members of the UN peacekeeping family, we must ensure that our advice is clear, actionable, and responsive to the needs of our men and women on the ground—whether civilian, police, or military. We are thus called upon to assess and advise on not only the legal, but also the practical implications of the legal issues and challenges that arise when UN peacekeepers are engaged in an armed conflict.

In approaching the subject of our panel today, I will first draw clear distinctions between peace enforcement which has, in the UN, traditionally been carried out by member states, individually or collectively, including through NATO, the African Union, or other arrangements. Peace enforcement operations include the NATO operations in Libya, the International Security Assistance Force (ISAF) in Afghanistan, the Kosovo Force (KFOR) in Kosovo, and the U.S. coalition in the first war in Iraq. While authorized by the United Nations, we do not regard these as UN forces.

Second, I must also distinguish MONUSCO from other UN peacekeeping missions. Even before the establishment of the Force Intervention Brigade, MONUSCO was likely to be deemed a party to the conflict, more so than any other existing PKO, based on its mandated role vis-à-vis armed groups, in particular the M23 (March 23 Movement), as well as its support to and joint operations with the FARDC (Armed Forces of the Democratic Republic of Congo).

While any military component of any peacekeeping mission may in the course of defending itself or protecting civilians become engaged in sustained or intensive armed hostilities within a non-international armed conflict, thereby becoming a party to the conflict, the likelihood of that eventuality is exponentially increased where peacekeepers are deployed not only in operating environments where armed conflict is ongoing—such as in DRC, Mali, or soon in the Central African Republic—but also where the mandate, by definition, places the UN forces in direct opposition with named actors. This we have seen with MONUSCO's undertaking of mandated enforcement tasks against armed groups, including, but not limited to, the explicit authorization given to its Force Intervention Brigade (FIB) to conduct targeted offensive operations against the M23.

We should not see the other UNPKOs through the prism of MONUSCO. There is no such presumptive trigger of applicability with respect to the other current PKOs. The determination cannot be made based on mandate, but rather must rely on the nature, intensity, and duration of actual military actions taken by the UN PKO forces in response to actions taken by other

¹ ST/SGB/1999/13.

armed actors or in support of government forces in light of the situation in the operating environment.

We are aware that the high-threat operating environment facing MINUSMA (the United Nations Stabilization Mission in Mali) in northern Mali similarly increases the likelihood of its also becoming a party to the conflict in that country. This is because even in the course of defending itself or protecting civilians, MINUSMA may be compelled to militarily engage terrorists and/or insurgents in sustained and/or intense hostilities. While this has not yet happened, we are prepared for the possibility.

We owe it to our men and women on the ground to speak about these issues with clarity, coherence, and transparency.

REMARKS BY JOHAN HEYNS*

It is my pleasure to discuss the application and bearing of international humanitarian law, also known as the law of armed conflict, on United Nations peacekeeping operations. Considering today's topic, I will use the United Nations Stabilization Mission in the Democratic Republic of the Congo (known by its French acronym MONUSCO) as a prime example, but will make generalized statements that are applicable to the other United Nations peacekeeping missions.

The United Nations Department of Peacekeeping Operations currently manages 16 peacekeeping operations, with the likelihood of an additional mission to be authorized in the Central African Republic today (April 10, 2014). Peacekeeping is an immense undertaking, with the numbers of peacekeepers above 100,000 world-wide, the majority of whom are men and women in uniform.

I would respectfully disagree with characterizing United Nations peacekeeping operations as being at war, but will concede that some of the peacekeeping operations certainly have a fairly robust mandate. It is important to note that these mandates are derived from or necessitated by one of the core tasks of peacekeeping operations, protection of civilians. As you are well aware, the authority for peacekeeping missions—and by extension, to use military force—is derived from the resolutions adopted by the executive organ of the United Nations, the Security Council.

If I may step back to reflect upon the framework in which peacekeeping operations are conducted, it includes the United Nations Charter, international humanitarian law (including the four Geneva Conventions and its Protocols), and other international legal instruments including those relating to international human rights law. From a military perspective, I can assure you that the United Nations is acutely aware of the need for strict adherence to the international law standards provided by these instruments and has incorporated its tenets in our executive documents.¹

To return to the subject at hand, and interchanging the term “war” with *military* activities in the context of peacekeeping operations, there has been an important evolution in the robustness of the military mandate for MONUSCO, as promulgated by the Security Council since 2013 and again in 2014, through its Resolutions 2098 (2013) and 2147 (2014). I quote from Resolution 2147, which authorizes MONUSCO to do the following:

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¹ Including, among others, the Secretary-General's Bulletin on IHL of 1999, and various texts on the rules of engagement.