
The Applicability of International Humanitarian Law to Multinational Forces

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This is a summary of a discussion with members of the UK international humanitarian law (IHL) academic community.¹ The discussion, on the basis of an article by Dr Tristan Ferraro, published in the *International Review of the Red Cross*,² addressed the applicability and application of IHL to multinational forces.

Rationale for discussion

The question of the applicability and application of IHL to multinational forces is at the forefront of legal discussion. The issue is not a new topic for the International Committee of the Red Cross (ICRC); the ICRC has done decades of work on the matter and has a wealth of operational experience in the context of multinational forces.

Many questions on the issue are still under discussion with states. The main obstacles remain securing admission by the relevant international organizations (IOs) and the troop-contributing countries (TCCs) that they are bound by IHL when engaged in armed conflict; and ensuring that there is a common understanding of the applicable legal framework.

Scope of discussion

For the purposes of the present discussion, peace operations provide the context in which the applicability of IHL to multinational forces is considered. Operations in which multinational forces are acting on the basis of a UN Security Council resolution are included; operations of a humanitarian nature are excluded. Many aspects of the article under discussion – particularly with regard to the classification of conflicts – are applicable beyond multinational peace operations to coalition warfare, as well as to the intervention of other states in pre-existing non-international armed conflict (NIAC).

Classification of conflicts and IHL applicability to multinational forces

Hostilities in Libya, Afghanistan and the Democratic Republic of the Congo (DRC) provide examples of the problems that exist on this subject. The argument presented by stakeholders in some instances has been that because the forces were engaged on behalf of the international community and mandated by the Security Council, they could not be considered belligerents within the meaning of IHL and, accordingly, IHL was not applicable. Variants of the argument were that IHL applied differently because they were internationally mandated forces, or that IHL applied only as a matter of policy with scope for selectivity, applying the advantageous provisions of IHL – greater leeway on the use of force – while claiming the protection of those not involved as belligerents. This situation highlights the importance of reminding of the strict separation of *jus ad bellum* and *jus in bello*, and of underlining that IHL applicability depends on the facts only, irrespective of the mandate assigned to the multinational forces. Such a mandate has no bearing on IHL applicability and application.

It was against this background that the necessity of developing a theory that would ensure a common understanding of the conditions for the applicability of IHL in such circumstances emerged.

In discussion, it was agreed that the fact that multinational operations are undertaken on the basis of a Chapter VI or VII resolution does not accord the relevant forces an exceptional status in relation to the

¹ This summary was prepared by Shehara de Soysa.

² T. Ferraro, The applicability and application of international humanitarian law to multinational forces 95 (891/892) *IRRC* 561 (2014); <https://www.icrc.org/eng/assets/files/review/2013/irrc-891-892-ferraro.pdf>.

classic rules for the classification of armed conflict. Accordingly, classification is approached for such forces in the same way as if there were no mandate from the international community.

It was emphasized that the nature of a Security Council mandate may increase the scope for ambiguity. For instance, in Bosnia, the UN Protection Force (UNPROFOR) initially exercised a humanitarian and protective role. However, NATO (under the auspices of which UNPROFOR was reflagged) later became very much like a belligerent. Accordingly, it was suggested that it might be more practical to look at the application of rules on a wide variety of matters. It was agreed that the determination of whether IHL applies to individual peace missions cannot be done in the abstract. Military forces undertaking a combination of military and policing functions render it more difficult to identify the nature of a particular activity as either a military or police nature. Accordingly, the solution is to identify the circumstances and activities in which IHL would be applicable, within the overall classification of the conflict.

From another perspective, where multinational forces are engaged in armed conflict as belligerents, they become combatants for the purposes of the principle of distinction, irrespective of their functions within the military component. Soldiers undertaking humanitarian activities should not be considered, for the purposes of IHL, as civilians. The soldiers are in uniform, and on a mission engaged in armed conflict to which the mission is party. Engaging the IOs under the auspices of which peace operations are conducted is important, so that they can ensure that civilian tasks are assigned to civilians and military tasks to members of the military. This would serve to eliminate confusion in defining the applicability of IHL to various military components.

The Convention on the Safety of UN and Associated Personnel, and the Secretary-General's Bulletin of 1999 (Secretary-General's Bulletin) raise particular questions. Is there some flexibility as to the level of protection forces might enjoy depending on the capacity in which they are acting, rather than there being a single answer to the question of the applicability of IHL to an overall conflict? It was suggested that the focus should not be the theoretical, overall classification. A practical consideration against this background is the treatment of detainees. The argument can be made that, irrespective of a force's role as peacekeepers or belligerents, there must be common standards of treatment of detainees.

Another issue is the ambiguity introduced by the wording of the Secretary-General's Bulletin. It was suggested that the UN might issue an updated version or clarification. The possibility of changes to the Bulletin has been considered and dismissed – largely because states, most of which were not involved in the first drafting of the Bulletin, would be likely to want a different process for issuing a redrafted Bulletin and a new draft would be unlikely to reach general consensus. However, there should at the least exist rules of interpretation internal to the UN regarding the applicability of IHL to UN forces.

Determining the nature of an armed conflict

Once the conditions for the existence of armed conflict are met, there should be a pragmatic approach to determine the kind of conflict to which multinational forces are parties. The ICRC, for instance, takes the view that the conflict is not necessarily an international armed conflict (IAC) just because of the involvement of mandated foreign armed forces. The conflict may be IAC if the multinational force is engaged with state armed forces. However, when engaged in armed conflict with a non-state armed group (NSAG), the conflict will be of a non-international character, between a subject of international law and an actor with no legal personality under international law. The fact that NSAGs have some form of legal personality does not elevate them to the same level as states and IOs for the purpose of being regarded as parties to IAC.

The scope of application of IHL and self-defence

Acting in defence of a self-defence mandate

The existence of different definitions of self-defence was highlighted, in particular the fact that a UN self-defence mandate is considered to include defence of the mandate itself. The issue was raised as to whether recourse may be had to force in defence of a mandate without triggering the application of IHL. The example of the African Union Mission in Somalia (AMISOM) was highlighted, which was deployed in Somalia initially on the basis of a resolution adopted under Chapter VI, rather than Chapter VII. The mission was attacked, and while its initial response was sporadic retaliation, this escalated to systematic response as it came under attack daily.

Given the nature and recurrence of the acts of self-defence, it was questioned if the requisite threshold of intensity for NIAC could be reached. The ICRC's view is that it is possible to have an NIAC in which the condition of intensity is satisfied by sporadic but recurrent use of force in self-defence. The question then arises as to whether it is possible to become party to an armed conflict simply by virtue of mission creep. The importance of setting aside the question of the mandate in conflict classification was emphasized.

The application of IHL to acts of self-defence

On the contours of the threshold for the application of IHL in respect of acts of self-defence, only recurrent and organized use of force in self-defence has led to involvement in a new NIAC. This was the case of AMISOM in Somalia and the UN Mission in Sierra Leone (UNAMSIL) in Sierra Leone. These cases were, however, exceptional. Most instances of individual or unit self-defence are below the threshold of intensity for NIAC, thereby excluding the applicability of IHL.

International legal personality and IHL

The status of international organizations

IOs do not claim that the fact that no IHL provision mentions IOs as parties to an armed conflict means that they *cannot* be parties. Rather, IOs challenge only whether the conditions for the applicability of IHL are met, and whether they may accordingly become *de facto* and *de jure* parties to the conflict.

A preliminary stage consists of the relevant states or IOs agreeing that they are involved in a particular armed conflict. The second stage entails identification of the parties to the conflict by examining the structure of the force in question. Whether the party to the conflict is each national contingent or the total multinational force depends on the IO in question. In the case of UN operations, there is a presumption for the ICRC that once the mission is involved in an armed conflict and meets the IHL requirements with respect to belligerency, only the UN mission is party to the armed conflict, to the exclusion of the TCCs. This is by virtue of the command and control structure of UN operations and the delegation of operational control to the UN by the TCCs.

The complexity of the issue is highlighted by the fact that, for instance, states involved in NATO operations tend to take differing views regarding the command and control structure, and who should be considered party to the armed conflict. With respect to NATO operations, states have a say at each level organizationally in the decision-making process on the conduct of hostilities. In the case of UN forces, there is the issue of interference from the national capitals. This may raise the question whether the extent of interference can disrupt effective control and the chain of command, with the result that the

mission is no longer considered a UN mission. In the absence of this, the ICRC takes the view that only the UN is to be considered party to the armed conflict and not the TCCs.

From the perspective of the ICRC, the reality is that considering both the UN and TCCs as parties to a conflict would be inconsistent with the classic reading of the way in which effective control, and command and control, are carried out in UN operations. It would be difficult as well as counterproductive to tell TCCs that they are also considered parties. Moreover, if TCCs were considered parties to armed conflict it would increase the geographic scope of IHL application, including inter-territorial application on the territories of the TCCs.

One critical difference was observed between UN and NATO forces, namely their institutional status. The former are a subsidiary organ of the Security Council, part of the institutional machinery of an IO. In contrast, NATO operations are characterized by two lines of attribution – one is control, the other institutional.

The intervention of multinational forces in pre-existing NIAC: the ‘support-based approach’

Rationale for the development of the ‘support-based approach’

Besides the classical rules on classification under IHL, complementary rules have been suggested. The background to the development of the ‘support-based approach’ is the situation in Afghanistan and that in the DRC. In particular, in Afghanistan, at some points in time most of the national capitals of forces contributing to the International Security Assistance Force (ISAF) mission rejected the notion that they were parties to the armed conflict on the basis that they were not involved in combat operations or were involved only sporadically.

Accordingly, the question arose as to the legal status of these troops who contributed significantly to the ISAF operation, yet were claimed to be civilians for the purposes of IHL. The need arose to circumvent the intensity requirements of an NIAC by trying to identify participation in the collective conduct of hostilities and to establish a link between participation of the TCCs/IOs and a pre-existing NIAC in which a coalition was clearly a party. This is the rationale for the support-based approach, in which there is a greater focus on function than on the condition of intensity. The support-based approach seeks to link to IHL multinational forces’ actions that undoubtedly form an integral part of the pre-existing NIAC.

The support-based approach states that IHL is applicable to multinational operations when:

- 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 IO in question to support a party involved in that pre-existing conflict.

This is not used as an autonomous approach; an attempt is first always made to apply the classic criteria, but if it is deemed that the condition of intensity is not fulfilled by one of the states in a coalition party to an NIAC, the relevant state's function is then examined. For instance, a state might be engaged exclusively in tasks having no connection with the conduct of hostilities (e.g. medical activities). Such a state is part of a coalition, though not connected to the conduct of hostilities; for this reason, the presumption that a state is party to the conflict is rebuttable. The solution that the ICRC proposes in this context is the support-based approach accompanied by a rebuttable presumption of being considered a belligerent party.

The notion of direct participation in hostilities cannot be applied to organized armed forces. That is the reason for the development of some of the factors underpinning the support-based approach, indicating that to be considered as a party to armed conflict, support-based action needs to be closely connected to the conduct of hostilities: not all support renders an entity party to a pre-existing NIAC. For instance, a state that only undertakes casualty evacuation will not be considered party to armed conflict. However, the gathering of military intelligence that is immediately used, the provision of ammunition to the front line, and involvement in the planning and organization of military operations are instances of acts so closely connected to the conduct of hostilities by the supported party that there is a close connection between the supporting party and IHL and the former's actions need to be governed by IHL. It may be difficult to draw the consequence from one action that a state becomes a belligerent, but in some instances a very specific action could be sufficient to transform a state into a belligerent.

With respect to NATO operations, there is a presumption that each state participating in an operation where NATO is party to the conflict is itself party to the conflict unless it clearly operates in a different way to other participating states. When considering this approach, the applicability of IHL as rooted in the facts on the ground must be borne in mind. The notion that a state is party to the conflict because a status of forces agreement specifies a support role, irrespective of the actions involved, is at odds with the classic IHL applicability criteria based on the facts on the ground.

Criteria and legal basis for the support-based approach

Concern was expressed that the four criteria of the support-based approach are cumulative. The effect of this would be exclusion of certain bodies of law in a situation that evinces elements of an international and non-international nature, thereby creating uncertainty.

The idea behind the support-based approach is to identify a state's objectivized belligerent intent, where, by its action, a state proves its willingness to be involved in the armed conflict. For instance, in the 2011 hostilities in Libya some states asserted that they were only fulfilling their mandate of protecting civilians, and so had no belligerent intent. However, this mandate was fulfilled by aerial operations and lethal force targeted at Libyan state soldiers. The simple fact of acting in such an operation clearly evidences belligerent intent.

Concern was expressed by participants that whereas the ICRC had stressed that the ordinary rules of IHL on classification of conflicts applied to determine whether multilateral forces were parties to an IAC, it was importing new rules in relation to its support-based approach for an NIAC.

The legal basis of the support-based approach is not to be found in any provision of IHL. From the perspective of the ICRC, this interpretative and complementary approach flows from the logic of IHL and is in line with the principle of distinction between combatants and civilians; at the core of the discussion is determination of the distinction of those who do and do not actively participate in this coalition. The

support-based approach is also grounded in the principle of the equality of belligerents and the notion that a state, though not clearly involved in kinetic operations, cannot claim to be part of a coalition using IHL rules while claiming to be protected from direct attack. The rationale is to link to IHL action that forms an integral part of a pre-existing armed conflict.