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International humanitarian law interoperability in multinational operations

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Abstract

This article describes some of the challenges raised by multinational operations for the application of international humanitarian law. Such challenges are the result of different levels of ratification of treaties, divergent interpretations of shared obligations, and the fact that there is no central authority that determines who is a party to an armed conflict. The article discusses methods that have been developed to ensure 'legal interoperability'. Some of these methods attempt to avoid situations where such interoperability is required. Where this is not possible, a 'maximalist' or a 'minimalist' approach can be taken, and in practice these are usually combined.

Keywords: international humanitarian law, multinational forces, multinational operations, interoperability.

Multinational forces are not a new phenomenon. Perhaps more than ever before, however, today's military operations are carried out by multinational forces. This is not likely to change in the near future, as many national armed forces are faced with

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austerity measures due to the financial crisis. As a result, they are increasingly less able to carry out certain operations individually. This provides an important incentive to seek closer cooperation with other armed forces in order to utilise the available capabilities as efficiently and cost-effectively as possible.[1] Cost-effectiveness is one important argument put forward by advocates of multinational forces, but such forces have other advantages as well, including the potential for increased legitimacy. There are also a number of drawbacks to multinational forces, however. One of these concerns the application of international humanitarian law (IHL). This application is complicated considerably in multinational operations. In its report on IHL and the challenges of contemporary armed conflict to the 31st International Conference of the Red Cross and Red Crescent, the International Committee of the Red Cross (ICRC) described this complication in the following terms:

> The participation of states and international organisations in peace operations not only gives rise to questions related to the applicable law, but also to its interpretation. This is because the 'unity of effort' – in military parlance – sought in peace operations is often impacted by inconsistent interpretations and application of IHL by troop contributing countries operating on the basis of different legal standards. The concept of 'legal interoperability' has emerged as a way of managing legal differences between coalition partners with a view to rendering the conduct of multinational operations as effective as possible, while respecting the relevant applicable law. An important practical challenge is to ensure that peace operations are conducted taking into consideration the different levels of ratification of IHL instruments and the different interpretations of those treaties and of customary IHL by troop contributing states.[2]

The report went on to refer to the complexity of the legal framework in peace operations, in which a number of legal instruments such as United Nations (UN) Security Council resolutions and Status of Forces Agreements play a role. It concluded that the many legal sources that must be taken into account may make it objectively difficult for partners in a peace operation to reach a common understanding of their respective obligations, and may negatively affect respect for IHL.

Even though ensuring legal interoperability within multinational operations also raises challenges in other fields of international law (such as human rights law), this article will focus solely on 'legal interoperability' within multinational operations from the perspective of IHL.

1 By way of example, the conclusions of the European Council of 13–14 December 2012 state that 'the European Council stresses that current financial constraints highlight the urgent necessity to strengthen European cooperation in order to develop military capabilities and fill the critical gaps, including those identified in recent operations.' European Union, *Conclusions of the European Council of 13–14 December 2012*, 14 December 2012, EUCO 205.12, para. 22.

2 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (hereinafter Challenges Report), October 2011, p. 32, 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. All internet references were accessed in November 2013.

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This article will not discuss a number of issues that can also affect the application of IHL in multinational operations. One of these is the fact that many such operations are led by an international organisation such as the UN, the North Atlantic Treaty Organisation (NATO), the African Union or the European Union (EU). There is much debate concerning the potential consequences for the application of IHL in cases where an international organisation is involved, in particular regarding organisations with international legal personality that have the capability under international law of having their own international obligations.[3] In such cases, are the international obligations of the international organisation concerned relevant, or are they solely, or at least primarily, the obligations of the troop-contributing states?[4] In the experience of the author, in the actual practice of multinational operations, the focus is still primarily on the latter. This article will also not analyse the interrelationship between IHL and human rights law. The issue of this interrelationship is not one that is specific to multinational operations, though it is an issue that is further complicated by the fact that states participating in such operations are often not all states parties to the same human rights treaties, nor do they interpret those treaties' scope of application identically.[5]

This article starts by defining a number of expressions. It then describes a hypothetical case study that will be used for illustration purposes throughout the article. The article further focuses on a number of phenomena that may raise complex questions of interoperability within multinational operations, and discusses methods that states have developed to address these questions.

Before embarking on the substantive discussion, it is however necessary to clarify the meaning of a number of expressions that will be used frequently throughout the article. This article is devoted to legal interoperability within multinational operations. It is therefore important first to define both 'multinational operation' and 'legal interoperability'.

In this article, the terms 'multinational force' and 'multinational operation' will be used interchangeably. 'Operation' is generally used to refer to the mandate and the manner in which the mandate is carried out, whereas 'force' is used to refer to the personnel and materiel involved in carrying out the mandate. For the purposes of this article, the term 'multinational operation' refers to a military

3 See for example Marten Zwanenburg, 'The duty to respect international humanitarian law during European Union-led operations', in Aurel Sari and Ramses A. Wessel (eds.), *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?*, CLEER Working Papers 2012/6, 2012, pp. 63–78, available at: www.asser.nl/upload/documents/20121221T112600-CLEER%20Working%20Paper.pdf.

4 ICRC, Challenges Report, above note 2, p. 32. See also Marten Zwanenburg, 'International organisations vs. troops contributing countries: which should be considered as the party to an armed conflict during peace operations?', in *International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility*, Proceedings of the 12th Bruges Colloquium, 20–21 October 2011, pp. 23–28, available at: www.coleurope.eu/sites/default/files/uploads/news/12th_bruges_colloquium_0.pdf.

5 See, for example, Charles Garraway, 'Interoperability and the Atlantic divide – a bridge over troubled waters', in *Israel Yearbook on Human Rights*, Vol. 34, 2004, pp. 121–125.

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operation conducted by military forces of two or more states acting together. This definition closely follows the one used by NATO.[6] In military parlance, the term 'multinational' is interchangeable with the term 'combined'. Multinational or combined operations come in many different shapes and sizes. One distinction that can be made is between operations that are led by an international organisation and those that are not. In the latter category, there will often, but not always, be a lead nation that provides a large part of the forces and the force commander. Within the former category, a further distinction can be made between operations conducted by pre-formed multinational forces on the one hand and forces assembled on an *ad hoc* basis on the other. Such pre-formed forces are increasingly being established under the aegis of international organisations. Examples are the EU Battlegroups, the NATO Response Force, and the African Standby Force. The UN Charter also envisaged pre-formed units being placed at the disposal of the organisation by member states. Article 43 of the Charter provided for agreements to be concluded between member states and the UN to place armed forces at the disposal of the organisation that would be available on its call. In practice, such agreements have never been concluded. It may be pointed out that none of the above-mentioned pre-formed forces have yet been deployed in an actual crisis situation. Rather, it is usual for multinational operations to be conducted by forces made available by states specifically for that operation.

'Legal interoperability' is understood here as the ability of the forces of two or more nations to operate effectively together in the execution of assigned missions and tasks and with full respect for their legal obligations, notwithstanding the fact that nations concerned have varying legal obligations and varying interpretations of these obligations.[7]

Hypothetical case study

This section describes a case study that is hypothetical but that incorporates elements of actual events that occurred in the NATO-led International Stabilization Force (ISAF) in Afghanistan. It describes a form of cooperation between military forces from different states that takes place in many other multinational operations in much the same way. It will be used throughout the article to illustrate issues of interoperability that arise in multinational operations.

The Quick Reaction Alert (QRA) alarm goes off. The two pilots on QRA and the two technicians stop with whatever they were doing. One of the pilots, the flight lead, grabs the phone and calls the operations officer on a direct line. The operations officer on the other side of the phone confirms the scramble. There is a Troops in Contact (TIC) situation involving allied troops from another

6 'An operation conducted by forces of two or more nations acting together': see NATO Standardization Agency (NSA), *NATO Glossary of Terms and Definitions (English and French)*, AAP-06, 2013, p. 2-M-11, available at: http://nsa.nato.int/nsa/zPublic/ap/aap6/AAP-6.pdf.

7 This definition is adapted from the NATO definition of 'force interoperability': 'The ability of the forces of two or more nations to train, exercise and operate effectively together in the execution of assigned missions and tasks.' See NSA, above note 6, p. 2-F-5.

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nation participating in the operation a hundred nautical miles west of the airfield. The operations officer orders the flight lead to get airborne quickly and gives him instructions in a standard format; location of the TIC, call sign and frequency of the Joint Terminal Attack Controller (JTAC) of the unit on the ground, and any additional information.[8]

While the flight lead is on the phone, the technicians hurry to the jets to get them ready to fly. A few minutes later, the pilots arrive at the jets. They climb into their cockpits and the engines are started up. A couple of minutes later, after completion of all the necessary checks, the pilots are ready to go. With clearance from ground control, both F-16s taxi to the runway, contact the tower, and get clearance to take off. Ten minutes after the alarm went off, the 'Blades' are airborne on their way to the TIC.

The flight lead contacts the Air Operations Centre (AOC) for additional instructions. The AOC gives an update on the situation and the position of the air-to-air refuelling tanker. The pilots continue their route inbound to the TIC while checking their sensors and weapon systems. The targeting pods are working properly. Some fifty nautical miles from the TIC, the flight lead contacts the JTAC. The JTAC responds quickly. After authentication and confirmation that the secure radios are working, the flight lead gives the JTAC a 'fighter to JTAC' brief according to a standard format: type of aircraft, weapons, sensors, time on station, the abort code, and any additional information. The JTAC acknowledges the information and asks the flight lead if he is ready to copy the nine-line brief (or 'nine-liner'), a standard format for a 'JTAC to fighter' communication. The JTAC continues with a situation update. His convoy was struck by an improvised explosive device (IED) that destroyed one of the vehicles. Two soldiers are severely wounded. After the IED attack, the opposing militant forces opened fire from several directions. The ground forces took cover and are defending themselves. The JTAC gives an accurate GPS update of his own position and the position of the enemy. The forces are taking small arms fire from a tree line 300 feet south of their own position. They have also taken some mortar fire from a house 3,000 feet east of their position. Furthermore, the ground forces have identified the occupant of a house nearby as a drug trafficker known to provide large sums of money to the insurgents.

The Blade flight arrives at the location of the TIC. Both F-16s circle the location, in a so-called 'wheel' formation, at 16,000 feet; the position of the TIC is in the centre of the circle, making it easy to keep eyes and sensors focused on the point of interest. The flight lead enters the coordinates of the enemy locations in his systems. Looking out of the window, both pilots identify the convoy on the road. One vehicle is burning. To the east there are many houses, but the tree line to the south is easy to see. The flight lead describes what he sees looking out of the window and on his sensor display in the cockpit. The JTAC and flight lead

8 A JTAC is a qualified (certified) service member who, from a forward position, directs the action of combat aircraft engaged in close air support and other air operations. See United States Joint Chiefs of Staff, *Joint Publication 3-09.3: Close Air Support*, 8 July 2009, p. ix.

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confirm that they are talking about the same location. The JTAC tells the pilots that the mortar fire from the east has stopped. The situation of the wounded soldiers has worsened. They have already called for a medevac (medical evacuation) helicopter. The ground forces are still taking fire from the tree line. The JTAC directs the Blades to focus on the tree line. The flight lead swings his targeting pod over to the tree line and sees possible Opposing Militant Forces (OMF) with rifles in a firing position. On switching to infrared, he notices more OMF hiding underneath the trees. The JTAC and the flight lead again agree on the actual position. The ground forces are still taking fire, and the JTAC requests an air attack with 20 mm ammunition. To minimise the risk of collateral damage, he orders the flight lead to use a mandatory attack heading from east to west or west to east (parallel to his own position). The flight lead acknowledges the orders and prepares himself for the attack.

The flight lead rolls in on the target with a positive identification of the enemy. While diving down from 16,000 feet the JTAC clears the flight lead to continue the attack and fire his gun with the words 'cleared hot'. The wingman comes on the radio to confirm that the area is clear. The flight lead repeats the clearance of the JTAC and is now heading east to west with the sun at his back. He aims and fires a 'walking' burst on the tree line. After the attack, the JTAC responds with a battle damage assessment. The OMF have ceased firing from the south. During the attack, the wingman spotted some activity in the previously mentioned house. People outside the house are carrying heavy material, possibly mortars. The wingman comes on the radio and passes his information to the flight lead and the JTAC. The JTAC requests a show of force at low altitude over the house. The wingman rolls in and dives down towards the house. He pulls up at low altitude while popping flares. The flight lead monitors the situation and notices that the persons on the ground have ceased their activities.

The JTAC comes on the radio saying that the situation is under control for the moment and that the medevac helicopter is inbound. The JTAC has an additional request for the Blades. One of the reasons for the convoy being at its current location was to investigate one of the houses to the east. In the house in question, a so-called 'high-value target', a drug trafficker and money launderer for the OMF, is hiding. The JTAC provides the Blades with a nine-liner and requests the F-16s to attack the house. He also provides the Blades with the required Rules of Engagement (ROE) and his initials. The flight lead responds that he has to contact higher headquarters for authorisation. The flight lead contacts higher headquarters and asks if the nation's Red Card Holder is involved in the process. The Red Card Holder is responsible for checking the task against the nation's caveats. Higher headquarters denies authorisation to the Blades, telling them that a two-ship formation of A-10s is inbound to perform the task. The flight lead switches back to the JTAC and explains the situation. For the moment the Blades remain on station to monitor events. The flight lead directs his wingman to go to the tanker for air-to-air refuelling. After the wingman returns to the scene, the flight lead goes to the tanker. The A-10s arrive at the scene and the F-16s are released to go back to their home base.

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Aspects of complexity in interoperability

Determining the applicability of IHL

Before answering the question of which IHL obligations apply and how they must be interpreted, it is necessary to determine whether IHL applies in the first place. This determination comprises assessing whether there is an armed conflict and whether the actor concerned has become a party to that conflict. Although the threshold for an armed conflict is notoriously vague, in many cases it will be clear that there is no armed conflict or at least that the multinational force is not a party to the conflict. For example, there is no doubt that the EU operation in Bosnia (EUFOR Althea) and the UN Force in Cyprus are not a party to an armed conflict.[9] In other cases, the situation is less straightforward. In such situations, different states contributing troops to a multinational operation may come to different conclusions concerning the application of IHL. An illustration of such a situation is the ISAF operation in Afghanistan.[10] Some states contributing troops to this operation considered there to be a non-international armed conflict between ISAF and the Afghan government on the one hand and one or more organised armed groups on the other.[11] The Netherlands, at least initially, was of the view that it was not engaged in an armed conflict.[12] Germany also initially denied that its forces were involved in an armed conflict.[13] Only in February 2010 did the German government accept that in northern Afghanistan, where German forces were deployed, there was an armed conflict in the sense of IHL.[14] The reference to 'northern Afghanistan' suggests that, in determining whether or not troops forming part of a multinational operation are engaged in an armed conflict, the security situation in the specific area in which those troops are deployed may play a role. This raises interesting questions regarding the geographical scope of application of IHL, which are outside the

9 For a general discussion on the application of IHL to peace operations, see Christopher Greenwood, 'International humanitarian law and United Nations military operations', in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 3–34.

10 The discussion in this section is based on Marten Zwanenburg, 'Legal interoperability in multinational forces: a military necessity', in *Proceedings of the Bruges Colloquium: Current Challenges to the Law of Occupation*, 2005, pp. 108–115, available at: www.coleurope.eu/content/publications/pdf/Collegium%2034.pdf. For an academic discussion of the legal qualification of the ISAF operation, see Constantine D. Mortopoulos, 'Could ISAF be a PSO? Theoretical extensions, practical problematic and the notion of neutrality', in *Journal of Conflict & Security Law*, Vol. 15, 2010, pp. 573–587.

11 The Canadian government argued that IHL applied to detainees taken by Canadian forces in ISAF. See the report provided by Christopher Greenwood at the request of the Government for the case of *Amnesty International Canada v. Canada (Chief of Defence Staff)*, 2008 FC 336, [2008] 4 FCR 540; Christopher Greenwood, *Report: International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces*, p. 15, available at: http://bccla.org/wp-content/uploads/2012/04/Report-of-Prof.-Greenwood-London-School-of-Economics.pdf.

12 Kamerstukken II 2007–2008 (parliamentary papers), 27925, No. 287, p. 121.

13 Interview with Defence Minister zu Guttenberg, *Bild*, 3 November 2009, available at: www.bundesregierung.de/Content/DE/Interview/2009/11/2009-11-03-interview-guttenberg-bild.html.

14 Statement by Minister of Foreign Affairs Westerwelle in Parliament, 10 February 2010, available at: www.auswaertiges-amt.de/DE/Infoservice/Presse/Reden/2010/100210-BM-BT-Afghanistan.html.

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purview of this article.[15] For the present purposes, the important point is that different states that cooperate in a multinational operation may reach different conclusions concerning the application of IHL. In multinational operations, there is no central authority that determines the law that applies to the operation.[16] Such a determination is left in principle to each individual troop-contributing state. This makes sense in the context of legal regimes that do not bind all the participating states. For example, there are a number of states participating in ISAF that are States Parties to the Additional Protocols to the Geneva Conventions, but also states that are not. The latter are not involved in determining whether one of the Protocols applies. The lack of a centralised, or at least coordinated, determination of the applicable law is less understandable in the case of the Geneva Conventions. These treaties have been universally ratified, and therefore all participating states are parties to them. It would be logical for participating states that are faced with roughly the same facts on the ground to come to the same conclusion on the application of the Conventions. In practice, however, each state makes this determination on its own. The outcome of this determination sometimes leads to different results, as illustrated by the case of ISAF discussed above.

Turning again to the hypothetical case study described above, it is clear that it is of tremendous importance to know whether IHL is applicable. For example, if the state of the JTAC considers that it is engaged in an armed conflict but the state of the pilot does not, then the former may attack any legitimate military objective but the latter's scope of action is much more limited. This is because outside a situation of armed conflict, the authority for using force against persons and objects is much more circumscribed.

Different obligations under IHL

There is no uniformity of obligations under conventional IHL between states. The four Geneva Conventions of 1949 have been universally ratified, so that all forces participating in a multinational operation are bound by them. The situation is different for other IHL treaties, however. There are 173 States Parties to Additional Protocol I, and 167 to Additional Protocol II.[17] Although this is a relatively large number, it does not include the most important military power in the world today, the United States, or other important military powers such as Pakistan and Turkey.

15 For a discussion of this issue, see *inter alia* Noam Lubell and Nathan Derejko, 'A global battlefield? Drones and the geographical scope of armed conflict', in *Journal of International Criminal Justice*, Vol. 11, 2013, pp. 65–88.

16 It may be noted that on occasion, the UN Security Council has referred to certain international obligations in the context of resolutions authorising the use of force by multinational military operations. Such references generally do not specify particular applicable treaties. For example, in Resolution 2011 extending the authorisation for ISAF, the Council called on 'all parties to comply with their obligations under International Humanitarian Law'. UNSC Res. 2011, 12 October 2011, UN Doc. S/RES/2011, Preamble, para. 24.

17 The list of States Parties to the Additional Protocols is available at: www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 for Additional Protocol I (AP I), and www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 for Additional Protocol II (AP II).

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With regard to ratification of other treaties in the field of IHL, the situation is even more diverse.[18] As a consequence, it is highly likely that in a multinational operation some forces will be bound by treaties that do not bind some of the other forces with which they are cooperating.

States that are not bound by a particular rule of IHL as a matter of conventional law may nevertheless be bound by an identical or similar rule of customary international law. Article 38 of the Statute of the International Court of Justice (ICJ), which is generally recognised as an authoritative statement of sources of international law, describes custom as 'evidence of a general practice accepted as law'. The article refers to two elements that must be present to form a rule of customary international law. The first is that there must be evidence that demonstrates a consistent practice followed by states, also referred to as *usus*. The second is that states must follow this practice because they consider that they are legally obliged to do so. This element is also referred to as *opinio iuris sive necessitatis*. Both elements must be present for a rule of customary law to exist, as explained by the ICJ in its judgement in the *North Sea Continental Shelf* cases.[19]

It is obvious that the method for identifying rules of customary international law is not very precise and leaves much room for interpretation. This is even more the case in the field of IHL than in many other fields of international law. In this field, state practice is particularly difficult to identify because of the 'fog of war' and because states are often reluctant to disclose information due to national security concerns. This is why certain commentators and courts have tended to focus to a large degree on statements made by states and on the content of military manuals in attempting to identify customary norms of IHL.[20] This is also the case for the extensive study conducted by the ICRC that was published in 2005.[21] This study identified a large number of rules of customary IHL applicable in international and, for most of them, in non-international armed conflict. The method and outcome of the study have received strong criticism from certain commentators as well as a number of governments, however.[22] This reflects the fact that, given the

18 For example, the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999, as well as the 2008 Convention on Cluster Munitions.

19 The ICJ held that actions by states 'not only must amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.' See *North Sea Continental Shelf*, Judgement, *ICJ Reports 1969*, p. 45, para. 77.

20 See Jean d'Aspremont, 'Théorie des sources', in R. van Steenberghe (ed.), *Droit International Humanitaire: Un Régime Spécial de Droit International?*, Bruylant, Brussels, 2013, p. 73.

21 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2006.

22 See generally Elizabeth Wilmshurst (ed.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007; John Bellinger and William J. Haynes, 'A US government response to the International Committee of the Red Cross study on customary international humanitarian law', in *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, p. 433; and Eloisa Newalsing, 'Fruit of the loom: custom revisited', in *Leiden Journal of International Law*, Vol. 21, 2008, p. 255.

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imprecise method of identifying customary norms, states can and will disagree on whether certain norms have entered into customary law.

Apart from differences in conventional IHL obligations, the case study above points to another question that may arise in multinational operations concerning the applicable law: whose obligations are relevant? If the JTAC is from a state that is not a party to Additional Protocol I and the pilot of the aircraft is from a state that is, must the pilot, before releasing a bomb, ensure that the target is a military objective in accordance with Article 52 of Additional Protocol I? Or do the relevant obligations follow the nationality of the JTAC (the JTAC 'buys the bomb' in military parlance) so that only the IHL obligations of his state apply?[23] A pilot in a military fighter aircraft has limited ability to observe the situation on the ground. He may be flying at an altitude of several thousand feet, at a speed of hundreds of miles per hour, while having to control the aircraft. Modern aircraft will often be equipped with a number of sensors that assist the pilot, such as infrared and electro-optic. Even these sensors are not able to see through clouds, however. As a consequence, the JTAC will generally have much better 'situational awareness' than the pilot. Against this background, it is understandable that it is the JTAC who is responsible for acquiring the target. He will provide the information to the pilot that the latter requires to be able to attack that target.[24] This will include a description of the target, but in very general terms. This information may not be sufficient for the pilot to determine whether the target is a military objective in the sense of Article 52 of Additional Protocol I. In such a case, the pilot may need to ask the JTAC for additional information to enable him to make this determination. The JTAC then in effect performs the function of additional sensor for the pilot.[25] The pilot will determine, *inter alia* on the basis of the information from this sensor, whether the object is a legitimate target in accordance with the international obligations of his state. The pilot is the person pulling the trigger, which makes him the person 'deciding upon an attack' in the sense of Article 57(2)(a)(i). He must do everything feasible to verify whether the objective to be attacked is neither a civilian nor a civilian object in accordance with that article.

Diverging interpretations of IHL obligations

Even where states have the same obligations, they may not agree on the interpretation to be given to a particular obligation. In most if not all fields of international law, it is inevitable that different states will interpret obligations differently. The case of IHL is no exception to this rule. The potential for divergent interpretations in IHL is however increased by two characteristics of this branch of international law. The first is that there is no specific body that has been given the

23 This example assumes that the state does not accept Art. 52 of AP I as reflecting customary international law.

24 In the United States and NATO, this is referred to as the 'nine-line briefing'. This refers to the nine subjects that the briefing covers. See US Joint Chiefs of Staff, above note 8, p. V-40.

25 J. F. R. Boddens Hosang, 'Aandachtspunten in de ISAF ROE vanuit het Strategisch-juridisch Niveau', in *Militair Rechtelijk Tijdschrift*, Vol. 105, No. 5, 2009, p. 219.

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power to authoritatively interpret the law. It is true that international courts and tribunals have had the opportunity to interpret provisions of IHL. The ICJ has, in a number of judgements and advisory opinions, opined on the way in which some provisions must be understood. Although these are important, they have rarely involved in-depth interpretations of specific provisions. The ICJ's *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, for example, led one commentator to criticise the Court for its 'light treatment' of IHL.[26] In addition, the rule of *stare decisis* – that is, that judges are obliged to respect precedent – does not apply to decisions by the ICJ and other international courts and tribunals.[27] Article 59 of the ICJ Statute provides that: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' The International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR) have engaged extensively in the interpretation of IHL norms. In contrast to the ICJ, these tribunals have frequently delved deeply into the question of how a particular rule should be understood. Also in the case of these tribunals, however, there is no rule of *stare decisis* binding them to their own precedent, let alone binding states. There are indications that at least certain states do not agree with some of the interpretations of the ICTY.[28] This is not surprising, given the fact that there has on occasion been a current of teleological interpretation in the tribunals' judgements. This current has been described by one commentator as 'adventurous interpretation'.[29]

The second characteristic of IHL that increases the potential for divergent interpretations is the development of new methods and means of warfare. The principal instruments of IHL, the four Geneva Conventions, were drafted more than sixty years ago. The Hague Regulations of 1907 are more than a century old. These treaties are still largely adequate to address contemporary armed conflict, and they are certainly not 'obsolete' or 'quaint' as has sometimes been suggested.[30] Nevertheless, it is true that the existing rules are not always a neat 'fit' for new methods and means of war, with which the drafters of the conventions were not

26 David Kretzmer, 'The Advisory Opinion: the light treatment of international humanitarian law', in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 88–102.

27 On precedent in international courts, see generally Gilbert Guillaume, 'The use of precedent by international judges and arbitrators', in *International Journal of Dispute Settlement*, Vol. 2, No. 1, 2011, pp. 5–23.

28 See, for example, *Operational Law Experts Roundtable on the Gotovina Judgement: Military Operations, Battlefield Reality and the Judgement's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, International Humanitarian Law Clinic, Emory Law School, 2012, available at: www.law.emory.edu/fileadmin/NEWWEBSITE/Centers_Clinics/IHLC/Gotovina_Meeting_Report.pdf.

29 Mia Swart, 'Judicial lawmaking at the ad hoc tribunals: the creative use of the sources of international law and "adventurous interpretation"', in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Vol. 70, 2010, p. 459. Swart criticises the definition of rape given by the ICTY Trial Chamber in the *Furundžija* case: see *ibid*., p. 485.

30 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, pp. 104–107. The words 'obsolete' and 'quaint' were used by White House Counsel Roberto Gonzalez to describe certain provisions of the Geneva Conventions concerning treatment of detainees. See www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

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familiar and thus could not take into account. Examples are the use of cyber attacks during armed conflict and the potential use of autonomous agents. To apply the existing law to such new methods and means is not impossible, but requires interpreting the law to achieve a good fit. This increases the possibility for divergent understandings between states of how the law applies. Against this background, it is not surprising that divergences in interpretation of particular IHL rules occur between states' contributing forces to a multinational operation. These sometimes concern relatively minor points of IHL;[31] in other cases they relate to some of the key provisions of IHL treaties.

An important example of different interpretations of IHL is the United States' understanding of what is a 'military objective' that may be legitimately attacked. The United States is not a party to the Additional Protocols to the Geneva Conventions, but it appears to view at least the first two paragraphs of Article 52 of Additional Protocol I as reflecting customary law.[32] The United States' interpretation of these paragraphs, however, is broader than that of many other states, including a number of the United States' NATO allies.[33] The difference lies particularly in the meaning that is given to what constitutes an 'effective contribution to military action' in the sense of Article 52(2). Many states understand this to mean that only objects that are of value for the enemy's war-fighting effort may be legitimate targets. The United States, however, understands this also to mean objects that are of value for the enemy's war-sustaining effort. The *2007 U.S. Commanders Handbook on the Law of Naval Operations*, for example, states that:

> An object is a valid military objective if by its nature (e.g., combat ships and aircraft), location (e.g., bridge over enemy supply route), use (e.g., school building being used as an enemy headquarters), or purpose (e.g., a civilian airport that is built with a longer than required runway so it can be used for military airlift in time of emergency) it makes an effective contribution to the enemy's war fighting/war sustaining effort and its total or partial destruction, capture, or neutralization, in the circumstance at the time, offers a definite military advantage.[34]

31 An example is the United Kingdom's attempts to foster an agreed interpretation of the IHL rules relevant to the protection of prisoners of war against public curiosity. The United Kingdom made a pledge to this effect at the 28th International Conference of the Red Cross and Red Crescent: see www.icrc.org/Applic/p128e.nsf/pbk/DCOE-5TWNNH?OpenDocument&section=PBGO.

32 Memorandum for John H. McNeill, Assistant General Counsel (International), OSD (9 May 1986), in *Law of War Documentary Supplement*, United States Army Judge Advocate General's Legal Center and School, 2007, p. 399. Art. 52(3) provides: 'In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.'

33 Kenneth Watkin, 'Coalition operations: a Canadian perspective', in Michael D. Carsten (ed.), *International Law and Military Operations, U.S. Naval War College International Law Studies*, Vol. 84, 2008, p. 255.

34 Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, July 2007, pp. 5–2 and 5–3, available at: www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/.

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A similar reference to the enemy's 'war-sustaining' capability in the context of the definition of a military objective is included in the 2009 United States Military Commissions Act, which amended the United States Code thusly:

> (1) The term 'military objective' means combatants and those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability of an opposing force and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack.[35]

The reference to 'war-sustaining' capability suggests that objectives that do not directly contribute to war-fighting but that indirectly contribute to it, such as exports that raise funds which are in turn used to finance the armed forces, are considered as legitimate military objectives. This is confirmed by the *2011 Operational Law Handbook*, which states that: 'The U.S. defines "definite military advantage" very broadly to include "economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability".'[36] The consequence of this definition is that the United States considers certain objects legitimate targets for attack that some of its allies consider civilian objects.

Another example of diverging interpretations is the definition of 'active' or 'direct' participation in hostilities. Common Article 3 of the Geneva Conventions provides that persons not actively taking part in hostilities may not be attacked. Article 51 of Additional Protocol I provides that civilians shall enjoy protection from attack unless and for such time as they take a direct part in hostilities. The distinction between persons who participate 'actively' or 'directly' in hostilities and those who do not is thus a matter of life and death, as the former may be attacked whereas the latter may not. The Conventions and Protocols do not provide a definition of 'direct participation'.[37] Many commanders and military legal advisers might say that they know a person directly participating in hostilities when they see one. This does not alter the fact, however, that there is no authoritative interpretation and there is therefore room for interpretation. This led the ICRC to embark on an endeavour to clarify the notion of direct participation in hostilities. Together with the T.M.C. Asser Institute, it organised a number of meetings of legal experts to discuss the notion. Based *inter alia* on the discussions during these meetings, the ICRC published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities* in 2009.[38] This document provides a legal

35 Military Commissions Act of 2009, Pub. L. No. 111-84, para. 950(p), 123 Stat. 2190 (codified at 10 U.S.C. para. 47A (2006)).

36 United States Army Judge Advocate General's Legal Center and School, *Operational Law Handbook*, 2011, p. 132, available at: www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf.

37 In this context, 'direct' and 'active' are generally considered to be synonymous. See, for example, ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 629.

38 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (hereinafter 'Interpretive Guidance').

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reading of the notion of 'direct participation in hostilities' with a view to strengthening the implementation of the principle of distinction. It stresses that the positions enunciated in it are the ICRC's alone, and that it is not a text of a legally binding nature. This has not prevented a number of experts who were involved in the process from strongly criticising both the process by which the Interpretative Guidance was arrived at and its substance, however.[39] Some of these critics were working for their governments at the time of the meetings, and although they participated in a personal capacity, it is likely that their criticism is shared by the governments that they advise. It is very difficult to ascertain this, however, because very few states appear to have made public their own interpretation of direct participation in hostilities in anywhere near as sophisticated and detailed a manner as is presented in the Interpretive Guidance. It is thus very difficult to know what the views of states on the Interpretive Guidance are, but it does appear that these views are not the same even within an alliance such as NATO.

This is illustrated by the controversy that arose in 2009 concerning the targeting of drug producers and traffickers by NATO's ISAF in Afghanistan.[40] In October 2008, upon the request of the Afghan government, NATO defence ministers meeting in Budapest agreed that ISAF could 'act in concert with the Afghans against facilities and facilitators supporting the insurgency, in the context of counter-narcotics, subject to the authorisation of respective nations'.[41] Pursuant to this decision, the Supreme Allied Commander in Europe, US General John Craddock, issued a 'guidance' providing NATO troops with the authority 'to attack directly drug producers and facilities throughout Afghanistan'.[42] It was reported that according to the document, deadly force was authorised even in those cases where there is no proof that suspects are actively engaged in the armed resistance against the Afghanistan government or against Western troops. It is 'no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective', Craddock wrote.[43] The directive was sent to Egon Ramms, the German commander at NATO Command in Brunssum, the Netherlands, which was in charge of the NATO ISAF mission. Reportedly, he did not want to follow the guidance and considered it a violation of IHL. There was also strong pushback by a number of participating states in ISAF. This undoubtedly contributed to the fact that the guidance was subsequently withdrawn. Although the controversy involved commanders and not states, it is submitted that indirectly it reflects different

39 See, for example, W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" study: no mandate, no expertise, and legally incorrect', in *New York University Journal of International Law and Politics*, Vol. 42, 2010, pp. 768–830.

40 See Michael N. Schmitt, 'Targeting narcoinsurgents in Afghanistan: the limits of international humanitarian law', in *Yearbook of International Humanitarian Law*, Vol. 12, 2009, pp. 1–20.

41 NATO, 'NATO steps up counter-narcotics efforts in Afghanistan', available at: www.nato.int/cps/en/natolive/news_50120.htm.

42 Susanne Koelbl, 'Battling Afghan drug dealers: NATO high commander issues illegitimate order to kill', in *Der Spiegel Online*, 28 January 2009, available at: www.spiegel.de/international/world/battling-afghan-drug-dealers-nato-high-commander-issues-illegitimate-order-to-kill-a-604183.html.

43 *Ibid.*

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views by states on the interpretation of the notion of direct participation in hostilities. The answer to the question of whether 'narco-insurgents' may be attacked turns on whether or not they can be considered as directly participating in hostilities. Although, as noted above, few if any states have publicly set forth their interpretation of this notion, in the practical experience of this author these interpretations vary between states. Even between states working particularly closely with the United States, there remain areas of the definition of 'direct participation in hostilities' on which there is consensus and other areas on which there are different views.[44] One of the areas where there appears to be such a range of views concerns the circumscription of the acts which constitute direct participation in hostilities. Although the United States has not put forward an official view on the definition of direct participation, there is evidence that it considers the definition in the ICRC's Interpretive Guidance as too narrow.[45] In particular, it appears to consider that the act of providing funds which finance the carrying out of military operations may be an act that constitutes direct participation in hostilities. Indeed, two American generals who were interviewed by the United States Senate Foreign Relations Committee suggested that the reason why a number of drug traffickers had been placed on a Pentagon target list to be captured or killed was that they contributed money to the Taliban.[46] At least some other states participating in NATO appear to have a more restrictive view.[47]

Consequences of the divergence of views on the applicable law in a given case

It is clear from the above that in a multinational operation, there may be important differences between the legal frameworks that the various contributing states consider as applying to their troops. For obvious reasons, states will require that their troops operate at all times within the specific legal framework that applies to them. This fact has operational consequences. It means that an international commander will be able to use certain troops but not others for particular missions. An example is the targeting of drug traffickers in the hypothetical case study above.

There are also important legal consequences. These revolve around questions of responsibility: by cooperating with troops from other states operating within a different legal framework, troops may expose their state to an

44 Stephen Pomper, 'Toward a limited consensus on the law of immunity in non-international armed conflict: making progress through practice', in Kenneth Watkin and Andrew J. Norris (eds.), *Non-International Armed Conflict in the Twenty-First Century, US Naval War College International Law Studies*, Vol. 88, 2012, p. 182.

45 Trevor A. Keck, 'Not all civilians are created equal: the principle of distinction, the question of direct participation in hostilities, and evolving restraints on the use of force in warfare', in *Military Law Review*, Vol. 211, 2012, pp. 144–146.

46 James Risen, 'U.S. to hunt down Afghan drug lords tied to Taliban', in *New York Times*, 9 August 2009, available at: www.nytimes.com/2009/08/10/world/asia/10afghan.html?_r=0.

47 This observation is based on discussions by the author with legal advisers to governments of a number of other NATO Member States.

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increased risk of state responsibility or themselves to individual criminal responsibility.

In principle, a state is only responsible under international law for its own conduct, including conduct of its armed forces as a state organ. This principle is also referred to as the principle of 'independent responsibility'. It underlies the Draft Articles on State Responsibility adopted by the International Law Commission (ILC) in 2001.[48] This does not mean that state conduct is necessarily independent of the conduct of others, or that the latter does not affect the former. In a multinational operation, there will be situations in which troops from one state rely on information provided by other troops. An example is the case of a JTAC guiding an aircraft pilot on to a target. If the pilot, on the basis of information provided by the JTAC, attacks an object that is not a legitimate military objective for the pilot but is for the JTAC, this does not necessarily exclude state responsibility attaching to the state of the pilot. Fault is not an element required for international responsibility to arise.[49] According to Article 2 of the Draft Articles on State Responsibility, all that is required is conduct that is attributable to the state and that constitutes a breach of an international obligation of that state. Ironically, in the example given, the state of the JTAC will not be responsible for committing the act because the pilot is an agent of another state. Nor will it be responsible for aiding or assisting the pilot's state's wrongful act, even if the JTAC deliberately and intentionally provided information that was factually incorrect. The Draft Articles on State Responsibility do provide in Article 16 for the possibility that a state is responsible for aiding or assisting another state in the commission of a wrongful act. For this to lead to the responsibility of the former, however, the act would have had to be internationally wrongful if committed by the state of the JTAC, which is not the case in the hypothetical example. In addition, aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of Article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A state is not responsible for aid or assistance under Article 16 unless the relevant state organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted state.[50]

Also relevant in the context of state responsibility is Common Article 1 to the Geneva Conventions. This article provides that 'the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances'. Article 1 of Additional Protocol I contains the same undertaking. There is some controversy concerning the precise scope and meaning of the words 'ensure respect', but the better view appears to be that it entails an obligation to

48 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Yearbook of the International Law Commission*, 2001, Vol. 2, Part 2, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

49 *Ibid*., p. 36.

50 *Ibid*., p. 66.

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ensure that other parties to the Geneva Conventions respect IHL.[51] This is an obligation of means, not one of result. The ICJ held in the *Wall* Advisory Opinion that

> it follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.[52]

Common Article 1 does not require a state to ensure respect by another state for an obligation that does not bind the latter. It does apply, however, in a situation in which one state considers that IHL is applicable and the other does not.

Multinational operations may also increase the risk of incurring individual criminal accountability because of the complex web of legal obligations involved. International criminal law provides for a number of different forms of criminal responsibility for conduct that is carried out in conjunction with other persons. The Rome Statute, for example, states that an individual can be responsible for 'ordering, soliciting or inducing' the commission of a crime,[53] for aiding, abetting, or otherwise assisting in the commission of a crime,[54] and if the individual in any other way contributes to the commission of a crime by a group of persons acting with a common purpose.[55] The Statute also provides for the possibility of 'superior responsibility' for the conduct of subordinates. A discussion of how these modes of criminal responsibility apply to multinational operations is outside the scope of this article, but it is clear that the existence of different legal frameworks within an operation may make this application very complicated and can potentially increase the risk of being exposed to individual criminal responsibility. An example could be the case of providing intelligence that is subsequently used for an attack. In the hypothetical case study discussed above, if forces of one state provide intelligence to the JTAC, and this leads to an attack on an object that the state providing the intelligence does not consider a military objective, could the troops providing the intelligence be held criminally responsible if the Court finds that in fact, it was a civilian object? The answers to such questions will have to be determined on the basis of the specific factual circumstances of each case, but our example illustrates that the risks may be greater in multinational operations because of the number of actors interacting and their differing legal obligations.

51 See Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions revisited: protecting collective interests', in *International Review of the Red Cross*, Vol. 82, 2000, pp. 67–87.

52 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, p. 136, para. 158.

53 Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 38544, Art. 25(3)(b).

54 *Ibid.*, Art. 25(3)(c).

55 *Ibid.*, Art. 25(3)(d).

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Methods of legal interoperability

Methods to achieve legal interoperability through express regulations and declarations to provisions of IHL treaties

The best way to ensure legal interoperability is for states in a multinational operation to have ratified the same IHL treaties and to have identical interpretations of the provisions in those treaties. Although most if not all IHL treaties aspire to universal ratification, this is not a realistic prospect in the near future. The same holds true for achieving identical interpretations among states parties. The question then becomes how to deal with the differences that exist.

In a multinational operation, it is important for states to limit the risks mentioned above that emanate from cooperation with other states for which a different legal framework applies. Such mitigation of risk can be achieved in a number of different ways.

First, one way is to limit interaction between the troops of different states within the operation. This is achieved to some extent when troops are assigned responsibility for distinct geographical areas, a common phenomenon in multinational operations. Many states wish to have their troops in a multinational operation located as much as possible in one location for operational reasons. This frequently leads to troops from a particular state being assigned 'their' Area of Responsibility. Within this Area of Responsibility, they will interact mostly with other troops from the same state. Even in cases where troops from one state are assigned their own Area of Responsibility, they will still have to cooperate to some extent with troops from other states. Air support by fixed-wing airplanes, for example, is usually not constrained to one particular area, because this would lead to very inefficient use of a costly and sparse asset. In addition, a state may lack or not have available at that particular moment certain capabilities, which other states may then provide. This is why situations such as the one described in the hypothetical case study above, where planes of one state assist ground troops of another state, frequently occur in multinational operations.

Second, interoperability may be expressly addressed in the law itself. The Convention on Cluster Munitions provides the only example at present in IHL of such regulation.[56] Article 21 of that treaty addresses the relations between States Parties to the Convention on the one hand and states which are not party to it on the other. For present purposes, the most relevant part of Article 21 reads:

> 3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

56 Convention on Cluster Munitions, Dublin, 30 May 2008, reproduced in *International Legal Materials*, Vol. 48, 2009, p. 354.

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4. Nothing in paragraph 3 of this Article shall authorise a State Party:
(a) to develop, produce or otherwise acquire cluster munitions;
(b) to itself stockpile or transfer cluster munitions;
(c) to itself use cluster munitions; or
(d) to expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

For a number of states, the inclusion of a provision in this treaty that adequately addresses interoperability was an essential condition for agreeing to the final text.[57] In this context, 'adequately addressing' must be understood as retaining the possibility to operate together with a non-state party to the convention. This possibility is circumscribed by paragraph 4, however.

In the hypothetical case study discussed above, if the state of the JTAC is party to the Convention and the state of the pilot is not, the JTAC could not expressly request the pilot to use cluster munitions if there was a choice of munitions. Conversely, if the state of the JTAC is not a party and the state of the pilot is, the pilot cannot use the cluster munitions even if requested to do so by the JTAC.

A more detailed analysis of Article 21 is outside the scope of this article. It is interesting to note, however, that there appears to be room for different interpretations of this article.[58] This is particularly interesting because it means that an article that was specifically inserted into the convention to prevent debate concerning the possibilities for cooperation with non-state parties can itself give rise to differences in interpretation.

Third, interoperability may also be achieved through common declarations to provisions in IHL instruments. Such declarations can be instrumental in achieving a common interpretation of IHL. This applies in the first place to provisions of a treaty to which the states concerned are parties. As illustrated above, the wording of IHL treaty provisions such as the one referring to direct participation in hostilities may allow for diverging interpretations. The same is true for the definition of 'military objective' in Article 52 of Additional Protocol I. A number of NATO member states have made similar declarations to this article that indicate a common understanding of at least some aspects of the definition.[59] One of these declarations provides that military commanders and others responsible for planning, deciding upon, or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant

57 See, for example, the Netherlands' Explanatory Memorandum to the law on ratification of the Convention, Kamerstukken II (parliamentary papers), 2009–2010, 32187 (R 1902), No. 3, p. 8.

58 This is illustrated, *inter alia*, by a debate between the Dutch government and a number of parliamentarians, who understood the prohibition on assisting in the use of cluster munitions set out in the treaty as also including a prohibition on transit. See Kamerstukken II (parliamentary papers), 32187 (R1902) G, 21 January 2011; and Kamerstukken II, 32187 (R1902) K, 2 May 2011. See also Elke Schwager, 'The question of interoperability – interpretation of Articles 1 and 21 of the Convention on Cluster Munitions', in *Humanitäres Völkerrecht Informationsschriften*, Vol. 21, No. 1, 2008, p. 247.

59 Catherine Wallis, 'Legitimate targets of attack: considerations when targeting in a coalition', in *The Army Lawyer*, December 2004, p. 51, available at: www.loc.gov/rr/frd/Military_Law/pdf/12-2004.pdf.

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time, and such decisions cannot be judged on the basis of information which has subsequently come to light.[60] Interpretative declarations may also be a useful mechanism used by states to manage their varying treaty obligations, however. It has been noted, for example, that a declaration made by Australia that includes clarification of the understanding of the term 'military advantage' has made it possible to harmonise the approaches taken by the United States and Australia to issues such as targeting.[61]

Methods to achieve legal interoperability in the absence of express regulations or declarations

In the absence of express regulation of interoperability in the law or in interpretative declarations to that law, states in a multinational operation have, broadly speaking, two options for addressing the issue of legal interoperability.

The first is referred to here as the 'maximalist' approach. It consists of the states participating in a multinational operation agreeing on a common framework that, for some states, entails the application of certain norms as a matter of policy rather than law. This strategy can be employed to harmonise divergent views on whether IHL is applicable in a particular situation. An example of the latter is the policy of the Netherlands to apply the restrictions contained in IHL also in situations where they consider that IHL is not formally applicable.[62] Such a policy is not without difficulties, however. Applying restrictions from IHL may in effect mean not applying restrictions from other branches of international law that may be more restrictive. An example is the principle of proportionality, one of the fundamental principles of IHL. Underlying the principle of proportionality is the acceptance that military objectives may be attacked. In cases in which IHL is not applicable, however, there are no military objectives that may a priori be attacked and the principle cannot be applied as it is in an armed conflict. It may be noted that the policy as it is employed by the Netherlands does not address differences in ratification of IHL treaties between states. The United States also has a policy of applying IHL as a matter of policy to all military operations, but this policy does not include the application of the rules in Additional Protocol I.[63]

States participating in a multinational operation could elect to apply a broader policy, so that all states apply the legal framework to which the partner that is legally most restrained is bound. In such a situation, the United States would accept the application of Additional Protocol I as a matter of policy, for example. To the knowledge of the author, such an approach has until now not been taken in any

60 States that have made such a declaration include Canada, Germany, Italy, the Netherlands, and the United Kingdom.

61 Vicki McConachie, 'Coalition operations: a compromise or an accommodation', in Michael D. Carsten, *International Law and Military Operations, U.S. Naval War College International Law Studies*, Vol. 84, 2008, p. 241.

62 Kamerstukken I (parliamentary papers), 2005–2006, 30300 X, A, p. 4.

63 US Department of Defence (DoD), Dir. 2311.01E, DoD Law of War Program, 9 May 2006, p. 2. The exact language is: 'Ensure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.'

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multinational operation. It is likely that one reason for this is the fear that such a policy could be interpreted as acceptance of the rules that are applied as a matter of policy as customary international law.[64]

Although states in multinational operations have not adopted such a broad policy generally, it may be noted that they have done so on specific issues in specific operations. In December 2008, ISAF Commander General McKiernan issued a 'tactical directive' to the troops participating in ISAF.[65] The directive contained a number of measures intended to minimise collateral damage to civilians and maintain the support of the Afghan population for the operation. In July 2009 the directive was updated by McKiernan's successor as ISAF commander, General McChrystal.[66] This version of the directive contained *inter alia* far-reaching restrictions on the use of air-to-ground munitions and indirect fires. These restrictions went beyond any requirements in conventional or customary IHL. The tactical directive was not issued for the purpose of strengthening interoperability within ISAF. The restrictions in the directive were the result of the fact that the military viewed the operation as a counter-insurgency operation, and in counter-insurgency, the support of the local population for the operation takes centre stage. As General McChrystal explained in the tactical directive:

> This is different from conventional combat, and how we operate will determine the outcome more than traditional measures, like capture of terrain or attrition of enemy forces. We must avoid the trap of winning tactical victories – but suffering strategic defeats – by causing civilian casualties or excessive damage and thus alienating the people. While this is also a legal and a moral issue, it is an overarching operational issue – clear-eyed recognition that loss of popular support will be decisive to either side in this struggle.[67]

Although the restrictions were thus made primarily for operational reasons, a secondary effect was to impose certain uniform principles of targeting and thus increase legal interoperability.

It may be pointed out at this juncture that, although the questions that the involvement of an international organisation may raise for the application of IHL are outside the scope of this article, they could have important consequences for a 'maximalist' approach. If the international organisation in charge of a multinational operation should be considered a 'party to an armed conflict' in which the operation is involved, then a logical corollary would be that all the troops in that operation are bound by the IHL obligations of that organisation. This would mean that there

64 See Timothy P. Bullman, 'A dangerous guessing game disguised as an enlightened policy: United States laws of war obligations during military operations other than war', in *Military Law Review*, Vol. 159, 1999, p. 174.

65 ISAF Commander, Tactical Directive, 30 December 2008, available at: www.nato.int/isaf/docu/official_texts/Tactical_Directive_090114.pdf.

66 ISAF Commander, Tactical Directive, 6 July 2009, available at: www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf.

67 *Ibid*.

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would be a common level of obligations, although this level might fall below the obligations of some of the individual troop-contributing countries.[68]

The ICRC plays an important role in promoting a 'maximalist' approach, by actively encouraging the ratification of IHL treaties. For this purpose, it has *inter alia* drafted model instruments of ratification to IHL instruments. Potentially, processes undertaken by the ICRC with a view to strengthening or clarifying the law can also contribute to this objective. One example is the process that the ICRC has taken up pursuant to an invitation from the 31st International Conference of the Red Cross and Red Crescent to pursue further research, consultation, and discussion, in cooperation with states, as to how the law may be strengthened in regard to detention in non-international armed conflicts, and to propose a range of options and recommendations on this issue. In this context, the ICRC has organised a number of regional consultations with states. Even where the outcome of such processes are rejected by some states, such as in the case of the Interpretive Guidance, the process does contribute to better awareness of the different positions taken by states.

The second option for addressing legal interoperability is referred to here as the 'minimalist' approach. As the term suggests, its starting point is the exact opposite of the 'maximalist' approach. This starting point is that the common framework that applies to the multinational operation is no more restrictive than the obligations of the participant that is legally least constrained. Participating states can then indicate that their troops will apply stricter standards that reflect the IHL obligations of their state. Generally, such national restrictions or 'caveats' are indicated in the message from the national military authorities placing the troops at the disposal of the commander of the multinational operation, also referred to as the Transfer of Authority. Often they will refer to a particular rule in the Rules of Engagement of the operation, but this is not axiomatic.[69] Caveats are often criticised because they restrict the flexibility of the international commander. At first sight, they appear to be an obstacle to interoperability. Upon closer inspection, however, national caveats can be an important tool. They make it possible for a state to agree to an Operation Plan (OPLAN) and ROE that go beyond the legal framework that it considers as applying to its troops. This can be illustrated with the following example. As noted above, Germany initially did not consider that its participation in ISAF led it to become a party to an armed conflict. This did not prevent it from agreeing to the ISAF OPLAN and ROE, which provided for certain conduct that would only be legal during an armed conflict. This was made possible by the fact that Germany could submit caveats to that OPLAN and those ROE in respect of its

68 For a discussion on this issue, see M. Zwanenburg, above note 4. See also Ola Engdahl, 'Multinational peace operations forces involved in armed conflict: who are the parties?', in Kjetl Milutinovic Larsen, Camilla Guldahl, and Gro Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge University Press, Cambridge, 2012, pp. 233–271.

69 Within NATO, a caveat is defined as 'any limitation, restriction, or constraint by a nation on its military forces or civilian elements under NATO command and control or otherwise available to NATO, that does not permit NATO commanders to deploy and employ these assets fully in line with the approved operation plan. Note: A caveat may apply *inter alia* to freedom of movement within the joint operations area and/or to compliance with the approved rules of engagement.' See NSA, above note 6, p. 2-C-2.

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own troops.[70] The 'minimalist' approach will provide less clarity concerning the applicable legal framework than the 'maximalist' approach. The use of caveats leads to a patchwork of legal regimes and requires the international commander to maintain a matrix of national caveats to avoid inadvertently not taking them into account. For troops in the field confronted with troops from another state that are unable to assist them because of a national caveat, this may be very unsatisfactory, but it may be unavoidable. As Geoffrey S. Corn states:

> unless common understandings of key targeting principles and common standards of weapon permissibility are developed for coalition operations, the era of the 'national caveat' is unlikely to abate. This may ultimately be unavoidable, and has not been debilitating to date. However, even an adoption of minimum standards accompanied by acknowledgment that national authorities take precedence of coalition directives would add more certainty to these operations than currently exists.[71]

In the 'minimalist' approach, it is vital that there is a good understanding of the positions of the different participants in the multinational operation, particularly for the international commander and his or her legal adviser.[72] Such awareness is similarly important for troop-contributing states. This will enable them to determine which kinds of cooperation with the other participating states entail legal risks for the states and their military personnel, and how to address those risks. Awareness of the partner's legal positions will generally be greater between partners that cooperate on a frequent basis, such as partners in a military alliance. Not only will these states cooperate in operations more frequently, but they will also often be involved in common training as well as in the development of common doctrine. In addition, they will generally have experience with developing common ROE. This is a driver of convergence of legal principle, or at least an important forum in which practical ways to address differences of legal principle can be discussed.[73]

Concluding remarks

This article has described some of the challenges raised by multinational operations from a legal perspective, focusing specifically on IHL. Such challenges are the result

70 As caveats are classified, it is not possible to cite them here. For an illustration of the use of caveats in practice, see Susanne Koelbl and Alexander Zsandar, 'Not licensed to kill: German Special Forces in Afghanistan let Taliban commander escape', in *Der Spiegel Online*, 19 May 2008, available at: www.spiegel.de/international/world/not-licensed-to-kill-german-special-forces-in-afghanistan-let-taliban-commander-escape-a-554033.html.

71 Geoffrey Corn, 'Multinational operations, unity of effort, and the Law of Armed Conflict', HPCR Working Paper series, 2009, pp. 25–26, available at: http://reliefweb.int/sites/reliefweb.int/files/resources/84B588812CF91A754925762E00194C41-Harvard_May2009.pdf.

72 Neil Brown, 'Issues arising from Coalition operations: an operational lawyer's perspective', in Fred Borch and Paul Wilson (eds.), *International Law and the War On Terror, U.S. Naval War College International Law Studies*, Vol. 79, 2003, p. 231.

73 Dale G. Stephens, 'Coalition warfare – challenges and opportunities', in *Israel Yearbook on Human Rights*, Vol. 36, 2006, pp. 17 and 21.

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of different levels of ratification of IHL treaties, of divergent interpretations of shared obligations, and of the fact that each state makes its own determination of whether or not there is an armed conflict and whether or not the state is a party to it. These challenges are further compounded by other thorny questions that have not been discussed here, such as diverging views on the relationship between IHL and human rights. Against this background, it could almost seem surprising that there are so many multinational operations and that generally they appear to function effectively. That this is nevertheless the case is a testament to the methods that states have developed to ensure 'legal interoperability' in multinational operations.

Some of these methods are aimed at separating the spheres of action of different participants in a multinational operation, such as assigning each participating state its own Area of Responsibility. They attempt to avoid or at least limit situations where legal interoperability is required. For cases where it is not possible or desirable to avoid cooperation, states have broadly developed two approaches for fostering legal interoperability. The first is the 'maximalist' approach, and consists of the states participating in a multinational operation agreeing on a common framework for that operation that is broad enough to accommodate the obligations of all participants. The second one is the 'minimalist' approach, which consists of states agreeing on a 'lowest common denominator' legal framework to which individual states can make caveats to ensure they respect their own IHL obligations. In practice, states in multinational operations do not make a choice between the two approaches; rather, they make use of a combination of the two approaches. In ISAF this is illustrated by the use of national caveats on the one hand, and the issuing of strict targeting directives on the other.

Before thought can be given in a multinational operation to managing legal differences and thereby ensuring legal interoperability, it is vital to establish that there are such differences. It is therefore important for legal advisers involved to be aware of the legal obligations of the states involved in the operation as well as of how they interpret these obligations. This will be easier in the case of operations carried out by states that routinely cooperate, such NATO-led operations. It will present more challenges in operations where states which cooperate have little or no shared history in military operations, such as is more often the case in UN-led operations.

Where differences have been identified, the combination of approaches to ensuring legal interoperability described above can be highly effective. Despite its complexity, effective legal interoperability in multinational operations is common.[74] This means that differences in legal regimes applicable to different states do not lead to violations of one of those regimes. There is still room for improvement, however; it is submitted that two important prongs of such improvement would be creating better awareness of legal differences between states

74 *Ibid.*, p. 20.

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and placing more emphasis on the 'maximalist' approach in dealing with such differences.

Ultimately, ensuring legal interoperability in multinational operations is a shared concern of all those who wish to see IHL respected. This is because a lack of such legal interoperability leads to legal uncertainty, and '[l]egal uncertainty, it hardly needs to be said, could ultimately impinge upon the protection afforded by IHL to the victims of armed conflicts'.[75]

75 ICRC, Challenges Report, above note 2, p. 33.

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