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INTERNATIONAL REVIEW of the Red Cross

DEBATE

How does the involvement of a multinational peacekeeping force affect the classification of a situation?

Eric David and Ola Engdahl

The 'debate' section of the Review aims at contributing to the reflection on current ethical, legal, or practical controversies around humanitarian issues.

*In this issue of the Review, we invited two experts in international humanitarian law (IHL) and multinational peace operations – **Professor Eric David** and **Professor Ola Engdahl** – to debate on the way in which the involvement of a multinational force may affect the classification of a situation. This question is particularly relevant to establishing whether the situation amounts to an armed conflict or not and, if so, whether the conflict is international or non-international in nature. This in turn will determine the rights and obligations of each party, especially in a context in which multinational forces are increasingly likely to participate in the hostilities.*

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The question raised in this issue of the *Review* is all the more difficult in that it is extremely general and the answer is not codified in positive international law – but this also makes it that much more intriguing to consider! The question does not specify whether or not the multinational peacekeeping force is involved in the context of an armed conflict or whether it has been given a coercive mandate. Nor does it specify if it concerns a United Nations (UN) multinational peace force or one led by a regional organisation or by states. The conclusions of the present analysis mostly concern the multinational peace operations deployed or authorised by the UN Security Council.

We have construed the question as follows: when a multinational peacekeeping force is deployed in a country, how are we to qualify its relations with any forces opposing its action? If its confrontation with adverse forces amounts to an armed conflict and if that conflict is classified as international, can we consider that the situation of general unrest in the country as a whole has become an international armed conflict?

In our view, under international law as it stands today, the effect of the presence of a multinational peacekeeping force in a country on the classification of the situation in that country depends chiefly on the nature of the mandate conferred to the force. As multinational peacekeeping forces tend to be deployed in situations of serious unrest rather than in peaceful lands, two hypotheses have to be considered: either the multinational peacekeeping force does not have a coercive mandate under Chapter VII of the UN Charter and is a *peacekeeping force*, or it has been given such a mandate and is therefore a *peace-enforcement force*.

Multinational peacekeeping forces deployed without a Chapter VII-like coercive mandate

Most multinational peacekeeping forces established by the UN Security Council (to date over eighty[1]) are usually entrusted with overseeing a ceasefire; in the past twenty years they have also often been mandated to help restore the rule of law and respect for human rights in the countries in which they are deployed. These are not enforcement actions. The members of these *peacekeeping forces* are armed, it is true,

* The author wishes to thank M. Vaios Koutroulis, assisting professor at the Université Libre de Bruxelles (ULB), for his valuable observations.

1 For a list of these operations, see Eric David, *Droit des organisations internationales*, 22nd ed., Presses Universitaires de Bruxelles, 2012, para. 3.3.5.

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but only so that they can exercise their right to self-defence in the event of an attack or if they are prevented from discharging their mandate.[2]

Even if the multinational peacekeeping force is deployed in a situation akin to a non-international armed conflict, its role is essentially the same as that of a service tasked with ensuring respect for law and order; as such, it is not a party to the ongoing conflict and its presence will not internationalise the conflict as a whole. By way of comparison, Article 43(3) of Additional Protocol I to the 1949 Geneva Conventions contains the following significant provision: 'Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties.' Thus, unless it has a specific coercive mandate, the multinational peacekeeping force is not one of the forces in combat and its presence does not transform a situation of internal tension or disturbances into an armed conflict; even if the situation in the country is akin to an armed conflict, the presence of the multinational peacekeeping force does not internationalise the conflict because the force does not participate in it.

In some cases, however, clashes between the multinational peacekeeping force and one of the belligerents deteriorate to the point that they become a genuine armed conflict between the two sides, in that both engage in open hostilities and are subjects of public law that may appear to be 'parties to the conflict'[3]: the state or insurgents on one side, and the international organisation on the other. Thus, when the Rwandan armed forces captured and massacred ten Belgian soldiers from the UN Assistance Mission for Rwanda (UNAMIR) on 7 April 1994, it can be said that, for at least one morning (the time during which the Belgian soldiers were detained and massacred[4]), an international armed conflict existed between the UN and Rwanda.[5] This being the case, the UNAMIR commanding officer, Canadian General R. Dallaire, would have been well advised to bring this fact to the attention of the Rwandan authorities in order to make them aware of the extreme legal consequences of the clash, no matter how brief, between Rwanda and the UN. The International Criminal Tribunal for Rwanda was no better advised than General Dallaire, however, for it convicted Colonel Théoneste Bagosora, prime minister in the interim Rwandan government at the time, for his responsibility in the massacre on the grounds that he had violated Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II – that is, provisions applicable in a *non*-international armed conflict! This shows the extent to which the simple logic of our earlier observations is far from being shared by everyone.

And yet that is the logic underpinning the UN Secretary-General's Bulletin on 'Observance by United Nations forces of international humanitarian law',[6]

2 *Ibid*., para. 3.4.67.

3 For more on these points, see Eric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, paras. 1.68ff.

4 For further details on the case, see International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor* v. *Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva*, ICTR-98-41-T, Judgment and sentence (Trial Chamber I), 18 December 2008, paras. 18ff.

5 For more on this example, see E. David, above note 1, paras. 3.4.73ff.

6 United Nations, Secretary-General's Bulletin, UN. Doc. ST/SGB/1999/13, 6 August 1999 (hereinafter the Bulletin).

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certain sections of which would seem to conclude that a multinational peacekeeping force's armed opposition to another belligerent constitutes an armed conflict, even an international armed conflict. Indeed, under Section 1.1 of the Bulletin:

> the fundamental principles and rules of international humanitarian law set out in the Bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged . . . therein as combatants . . . They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

In other words, even if the role of the multinational peacekeeping force is, from some points of view, reminiscent of that of a service tasked with maintaining public order, the Bulletin nevertheless obliges it to comply with the rules of IHL, which, by definition, apply only in armed conflicts. Thus, although the presence of the multinational peacekeeping force does not legally transform the situation into an armed conflict, an external observer might be tempted to believe that it does so transform the situation, given the nature of the rules that the multinational peacekeeping force must respect.

Such an observer might even consider that the presence of the multinational peacekeeping force constitutes an international armed conflict since Section 8 of the Bulletin provides that UN forces must 'treat' the members of the armed forces that they detain in compliance with the Third Geneva Convention on prisoners of war,[7] and since prisoner-of-war status applies only in international armed conflicts. That reasoning would be incorrect: 'treatment' is not equivalent to 'status', and it would therefore be excessive to construe the rule set out in Section 8 as proof that the presence of the multinational peacekeeping force internationalises the relationship of conflict between it and the party responsible for the persons arrested.

In conclusion, while the Secretary-General's Bulletin obliges multinational peacekeeping forces to apply the rules of IHL, that does not mean that the deployment of a multinational peacekeeping force without a coercive mandate in a situation of disturbances transforms that situation into an armed conflict or even an international armed conflict. This is confirmed by the United Nations Convention of 9 December 1994 on the Safety of United Nations and Associated Personnel. Article 2 of that Convention states that it does not apply to UN operations authorised by the Security Council as an enforcement action under Chapter VII of the UN Charter,[8] because such actions imply a situation of belligerency covered by

7 *Ibid*., Section 8: 'The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, *they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them mutatis mutandis*' (emphasis added).

8 Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999), Art. 2: 'This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.'

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IHL, which is not the case with operations conducted solely for the purpose of 'maintaining or restoring international peace and security'.[9] Any violent attack directed against the members of a non-belligerent force in such a case is therefore defined as a crime under international law.[10]

Multinational peacekeeping forces deployed with a Chapter VII-like coercive mandate

Since the UN Operation in the Congo in 1962 (ONUC), the Security Council has explicitly authorised UN multinational peacekeeping forces in about a dozen instances to use 'force' or 'any means' to meet their assigned objective: Bosnia and Herzegovina, Somalia and Mozambique in 1992; Rwanda in 1993; Sierra Leone and East Timor in 1999; the Democratic Republic of the Congo in 2000; Liberia in 2003; Côte d'Ivoire, Burundi and Sudan in 2004; and Lebanon in 2006.[11]

Those situations shared two main features: first, the multinational peacekeeping forces could use armed force to discharge their mission, and second, they could end up fighting either governmental forces or organised armed groups similar to a 'party to the conflict' within the meaning of Common Article 3 of the 1949 Geneva Conventions, and thereby find themselves in a situation of armed conflict governed by IHL.[12]

In such situations, the armed operations of multinational peacekeeping forces constitute an armed conflict for the reasons set out in the conclusion to the first part of this article: by stating that the 1994 Convention does not apply to enforcement actions by a multinational peacekeeping force acting under Chapter VII of the UN Charter, Article 2 of the Convention confirms that the situation is one in which the rules of ordinary criminal law criminalising murder, deliberate assault, the destruction of property, etc., *do not apply* – that is, an armed conflict, in which one can kill, wound, deprive of freedom or destroy, provided one does so in accordance with the law of armed conflicts, as Article 2(2) says.

Section 8 of the Secretary-General's Bulletin could lead to the same conclusion: by providing that the troops captured by a multinational peacekeeping force must be treated in conformity with the rules of the Third Geneva Convention, Section 8 suggests that the armed operations of a multinational peacekeeping force are akin to an international armed conflict. This would certainly be the case if the multinational peacekeeping force was empowered to take coercive action and ended up capturing members of the opposing forces. The Bulletin does not say, however, that the captured combatants *must* benefit from prisoner-of-war

9 *Ibid*., Art. 1(c)(i): '"United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control: (i) Where the operation is for the purpose of maintaining or restoring international peace and security. . .'.
10 *Ibid*., Art. 9.
11 For references and greater detail, see E. David, above note 1, paras 3.4.70ff.
12 E. David, above note 3, paras 1.74ff.

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status; it merely says that they must be treated with due regard for the Third Geneva Convention, while specifying that said treatment shall be 'without prejudice to their legal status'. The Bulletin therefore leaves open the question of the status of combatants captured by a UN force. The fact, however, that the multinational peacekeeping force has to treat captured combatants in accordance with the Third Geneva Convention would seem to indicate that, in the eyes of the UN Secretary-General, the Third Geneva Convention applies, if not in respect of the captured combatants' status, at least in respect of their treatment. The intervention of the multinational peacekeeping force would therefore constitute an international armed conflict.

However, the Bulletin does not settle the question of the captured combatants' legal status. Its silence on this issue is probably due to the fact that if the UN refused to grant such combatants prisoner-of-war status, their mere participation in the hostilities would become a criminal offence, and the UN has no legal authority to penalise criminal offences (except in the special case of the international criminal tribunals it has established for that purpose). The fact remains that the Bulletin's reference to the Third Geneva Convention tends to confirm that enforcement action by a multinational peacekeeping force is tantamount to an armed conflict. The nature of the mandate conferred on the multinational peacekeeping force would therefore appear to determine the legal classification of the conflict in which it is involved.

Internal or international armed conflict?

If the multinational peacekeeping force is established by the Security Council, it becomes a subsidiary organ of the latter and has the same legal personality as the UN. As the legal personality of the UN is separate from that of the state in which the multinational peacekeeping force is deployed, the hostilities between the multinational peacekeeping force and the forces it is fighting take the form of a clash between two distinct international legal personalities.[13]

Should a distinction be made between situations in which the forces opposing the multinational peacekeeping force are government troops and those in which they belong to a non-state armed group? If the opposing forces are government troops, the international character of the opposition is obvious, since the multinational peacekeeping force is the same as an international organisation – usually the UN – and the government troops are an organ of the state they represent. The answer is no different if the opposing forces are an organised armed group: that group may also claim to represent the state, a point which if not

13 See Vaios Koutroulis, *Les relations entre le jus contra bellum et le jus in bello: étanchéité absolue ou vases communicants?*, ULB thesis, 2011 (to be published by Bruylant), pp. 198–200 ; *idem*, 'International organizations involved in armed conflict: material and geographical scope of application of international humanitarian law', in *Proceedings of the 12th Bruges Colloquium, International Organisations' Involvement in Peace Operations: Applicable Legal framework and the Issue of Responsibility*, 20–21 October 2011, Collegium No. 42, Autumn 2012, College of Europe/ICRC, 2012, pp. 32–36.

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conceded would violate the principle of non-intervention[14] unless the Security Council or General Assembly has determined differently.[15] As a reminder, the principle of non-intervention does not distinguish between the government and the population: it prohibits intervention in the internal affairs of a 'state' without specifying whether the intervention is in favour of the government or in favour of an insurgent armed group.[16] Since the population is a constitutive element of the state, like the government, intervening against one in favour of the other means fighting against a constitutive element of the state, and thus against the state itself. This is why a confrontation between an international organisation and an insurgent armed group remains one between this organisation and the state to which the group belongs, and therefore an international armed conflict.

The last question is whether the international nature of the conflict is limited to the bilateral relations between the multinational peacekeeping force and the adverse party, or whether it spreads to the entire conflict, to the point that the relations of conflict between the local parties thereto (government and insurgents or organised armed groups between themselves) are also internationalised. Again, this type of situation is not codified and we can therefore do no more than extrapolate from the existing rules. In our view, it runs counter to the general spirit of IHL for combatants to be treated differently depending on whether they were captured by a foreign force – in this case, by a multinational peacekeeping force – or by a national force: discrimination of this kind would be incompatible with the spirit of the law, even though the matter was not regulated with this in mind.[17]

In addition, the now classic criterion for deeming that an internal armed conflict has been internationalised by a foreign intervention – overall control by the foreign state over one of the parties to the conflict[18] – can, of course, be transposed to a multinational peacekeeping force, but we know of no case in which a multinational peacekeeping force has exercised such control over a belligerent in an internal armed conflict. It would not be far-fetched, however, to imagine that such a situation could arise. It is a question of fact to be determined on a case-by-case basis. A significant precedent is the Vietnam War, in which the ICRC asked the parties to consider that, in view of the spread of the conflict, the hostilities be governed by all the rules of IHL.[19] The question nevertheless remains: from what moment on can a conflict be deemed sufficiently widespread to consider that it has been internationalised by external interventions? The law provides no response. It is left to the qualifying authority to find a reasonable answer.

14 See E. David, above note 3, para. 1.117a.
15 *Ibid.*
16 See GA Res. 2625 (XXV), 3rd principle.
17 Art. 12 of GC I; Art. 12 of GC II; Art. 16 of GC III; Art. 27 of GC IV; Preamble, para. 5, of Additional Protocol I; ICRC, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005, Rule 88. See also E. David, above note 3, para. 1.121.
18 *Ibid.*, para. 1.112.
19 *Ibid.*, para. 1.118.

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Conclusion

To sum up, for the reasons given above, the influence of a multinational peacekeeping force on the classification of a conflict would appear to depend on the mandate with which it has been entrusted. If that mandate is not coercive in nature, the multinational peacekeeping force plays a role that brings to mind that of the state's forces of law and order, even though, as a rule, the multinational peacekeeping force does not identify itself with such a force. It may however happen that, in the discharge of its mandate, the relationship between the multinational peacekeeping force and one of the parties reaches a level of open hostilities amounting to a genuine situation of armed conflict. In that case, the law of armed conflicts should apply. Certain provisions of the 1994 Convention and of the 1999 Secretary-General's Bulletin confirm that conclusion.

If the Security Council gives the multinational peacekeeping force a coercive mandate, the military operations conducted by that force are a form of armed conflict governed by IHL, provided that they consist in open hostilities between the multinational peacekeeping force and government troops or armed groups that are sufficiently well organised to be termed a 'party to the conflict'. Such a conflict can be classified as international in that it opposes clearly distinct legal personalities under international law.

Does such internationalisation encompass the relations of conflict between local belligerents? International positive law does not reply to the question, but it can be argued that this is indeed the case, either for humanitarian reasons of non-discrimination between captured combatants, or by application of the theory of overall control if the multinational peacekeeping force exercises such control over the belligerent it supports, in accordance with the criteria established in the case-law to evaluate the influence of intervention by a third state on the internationalisation of an internal armed conflict.

In conclusion, in the absence of a specific rule and of precedents for measuring the influence of the involvement of a multinational peacekeeping force in a conflict on the international status of that conflict as a whole, the question has to be resolved on a case-by-case basis by the players themselves or by a third party that can take account of the humanitarian requirements and factual elements, such as the extension of the conflict, for which positive law provides no form of measure. In our view, however, there is no doubt that the enforcement action of a multinational peacekeeping force in a state gives rise to conflict relations that are international in nature between that force and the party it is combating.

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A rebuttal to Eric David

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Multinational peacekeeping forces are often deployed in areas characterised by violence that sometimes even qualify as armed conflict, and there is always the risk of their becoming involved in the armed conflict in question. Some argue that peacekeeping forces can never become involved in armed conflicts, while others maintain that an armed conflict would, in such a case, be internationalised, irrespective of the nature of the opposing forces. Such assertions have primarily been based on two characteristics of peacekeeping forces. The first is the fact that such forces act under a UN mandate. When implementing a decision by the UN Security Council, the forces concerned are representatives of the international community and thus act on a higher moral ground than that of their opponents. According to them, if peacekeeping forces would become involved in an armed conflict anyway, they should be held to the highest possible standards, which are those rules applicable to international armed conflicts (IACs). The second characteristic concerns the multinational nature of a peacekeeping force. The involvement of a peacekeeping force in an armed conflict would bring such a strong international element to it that it would, in fact, become internationalised.

I contend in this article that a mandate from the UN Security Council only concerns the authority to use force, which belongs to the law known as *jus ad bellum*, while the determination of the classification of an involvement in an armed conflict is decided solely on the basis of *jus in bello* considerations, where the analysis is based on the facts on the ground. Furthermore, the article argues that one needs to identify each party to any particular situation and determine the nature of the conflict by examining all of the bilateral relationships between the particular parties. Finally, the effects of internationalising an armed conflict are discussed.

The mandates of peacekeeping operations

The classical peacekeeping operation lacks enforcement powers, and its members may only use force in self-defence. This may be contrasted with so-called 'peace

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enforcement operations', which are decided under Chapter VII of the UN Charter and include a right to use force to achieve a certain objective, and not only for reactive purposes. Irrespective of the nature of the mandate, consent of the host state is almost always received in some form and it is only in extreme situations, such as the Libya operation of 2011, that an operation is launched without the consent of the host state.[20] This does not mean that there is always the consent of other stakeholders within the territory of the state.

The practice of the UN Security Council has been geared towards a more common use of Chapter VII mandates authorising the use of 'all necessary measures' (or words to that effect) to fulfil certain parts of the mandate.[21] This practice increases the possibility of peacekeeping forces becoming involved in an armed conflict. The default position, however, is almost always a 'law enforcement' mode where the operation aims to assist the state in stabilising the country in question and creating conditions for peace. It is only in exceptional cases that peacekeeping operations become involved in armed conflicts. The International Security Assistance Force (ISAF) operation in Afghanistan and the new Intervention Brigade of the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) may be considered contemporary examples.

It should also be noted that the classical divide between peacekeeping and peace enforcement operations has become blurred. The UN, for example, in its 'Capstone Doctrine' has referred to the notion of 'robust peacekeeping', which includes enforcement powers as long as there is the consent of the host government.[22] Terms such as 'peacekeeping operations' and 'peace enforcement operations' lack clear legal definitions and can mean different things to different actors. The relevance of such terms may indeed be questioned from a legal point of view. For the purpose of this article, however, 'peacekeeping' will be used as a term of convenience denoting multinational operations based on a mandate from the UN Security Council regardless of whether such a mandate is grounded in Chapter VII.

Professor David attaches significant importance to the mandate as a criterion for establishing whether or not a particular peacekeeping force has become involved in an armed conflict. I argue that the nature of the mandate may affect the *probability* of becoming involved in such conflict, but in law, the authority to use force (*jus ad bellum*) does not affect the existence of an armed conflict (*jus in bello*). In the case of peacekeepers being authorised to use force only in self-defence, there is an argument that it would not have been the intention of the UN Security Council that the peacekeepers concerned would become involved in armed conflict. However, if a peacekeeping force is *de facto* drawn into an armed conflict, the

20 See SC Res. 1973, 17 March 2011. It should be noted that the consent of the state in which territory the operations is conducted is not necessary under Chapter VII of the UN Charter.

21 See, for example, SC Res. 1528, 27 February 2004, op. para. 8 (UNOCI in Côte d'Ivoire); SC Res. 1244, 10 June 1999, op. para. 7 (KFOR in Kosovo).

22 UN Department of Peacekeeping Operations and UN Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* ('Capstone Doctrine'), 2008, p. 34, available at: http://pbpu.unlb.org/pbps/library/capstone_doctrine_eng.pdf. The Capstone Doctrine is an internal UN document which 'sits at the highest–level of the current doctrine framework for United Nations peacekeeping': *ibid*., p. 9.

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mandate in itself could not prevent such an involvement.[23] The mandate of the Security Council does not provide instruction on whether forces are to participate in armed conflict. The fact that ISAF forces became involved in the armed conflict in Afghanistan was not stipulated in the mandate, and the UN Security Council has not found a need to change the mandate in accordance with that situation. The so-called 'Intervention Brigade' participating in the MONUSCO operation is indeed the first mandate in which the Security Council has provided a more explicit mandate to engage in armed conflict.[24] However, the existence of such an armed conflict would be based on the *actual conduct of the forces* on the ground and not simply on whether the Intervention Brigade is mandated to engage in armed conflict. In that particular operation, the forces would need to become involved in actual fighting with organised armed groups to be considered as participating in an armed conflict.

States and international organisations may show reluctance to recognise that peacekeeping forces have become involved in armed conflicts, but there does not seem to be any support in law that a special threshold applies to peacekeeping forces. The same criteria apply for determining when such forces become involved in an armed conflict as for any other armed forces. There may, however, be some support in *practice* to say that a higher threshold exists for peacekeeping forces.[25]

Professor David draws some support for his argument (that the nature of the mandate of a peacekeeping operation is important to establish whether the forces of such an operation have become involved in an armed conflict) from an analysis of the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter the Safety Convention). The Safety Convention obligates states parties to criminalise attacks against peacekeepers, but does not apply 'to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organised armed forces and to which the law of international armed conflict applies'.[26] The reference to Chapter VII may be explained by the fact that, during negotiations, delegates found that only operations decided under Chapter VII were likely to involve UN forces as combatants in IACs. It should not be regarded as evidence that a Chapter VII mandate is *required* for becoming involved in armed conflict.[27] The cumulative criteria clearly stipulate that the personnel concerned *also* need to be involved as combatants. The strength of IHL is that it applies based on an objective assessment of the facts on the ground, irrespective of the cause of the armed conflict.

23 On the relationship between the mandate of peacekeeping operations and the status of peacekeeping forces under international humanitarian law, see Ola Engdahl, 'Prosecution of attacks against peacekeepers in international courts and tribunals', in *Military Law and Law of War Review*, Vol. 51, No. 2, 2012, p. 249.

24 SC Res. 2098, 28 March 2013.

25 Christopher Greenwood, 'International humanitarian law and United Nations military operations', in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 24.

26 Safety Convention, above note 8, Art. 2.

27 See Steven J. Lepper, 'The legal status of military personnel in United Nations peace operations: one delegate's analysis', in *Houston Journal of International Law*, Vol. 18, 1996, p. 398.

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The application of IHL is thus not dependent on whether a state has wrongfully attacked another state, or armed groups have attacked governmental forces in contravention of national law – or on the nature of the mandate of peacekeeping troops.

The multinational character of peacekeeping operations

An IAC is often defined as the resort to armed force between two or more states. A non-international armed conflict (NIAC) has been identified as 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.[28] The existence of an IAC does not require the same intensity of armed violence as the existence of a NIAC. The identification of the parties to an armed conflict is therefore essential for establishing not only the nature of the conflict, but also its very existence. Identifying the parties to an armed conflict involving a multinational peacekeeping force requires a deconstruction of the multinational operation in order to analyse its components and the possible parties (on the multinational side) to the armed conflict. An internationalised armed conflict does not denote a third category of conflict, but rather that a NIAC is transformed into an IAC through the involvement of an external actor.

Becoming a party to an armed conflict would largely seem to depend on a condition of command over the armed forces. In IACs, Article 43(1) of Additional Protocol I to the Geneva Conventions states:

> The armed forces of a Party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party.

The Commentaries indirectly define a party to an IAC when stating that such forces must, *inter alia*, be subordinate 'to a "Party to the conflict" which represents a collective entity which is, at least in part, a subject of international law'.[29] This would appear to include intergovernmental organisations such as the UN, NATO and the EU. That these organisations are capable of becoming parties to an IAC is also supported in the literature and, at least implicitly, by recent international instruments such as the Safety Convention and the ICC Statute.[30]

28 See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor* v. *Tadić*, Case IT-94-1-AR72, Appeal on Jurisdiction, 2 October 1995, para. 70.

29 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1681.

30 See for example Derek W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice*, Stevens & Sons, London, 1964, pp. 493–516; Finn Seyersted, *United Nations Forces in the Law of Peace and War*, A. W. Sijthoff, Leiden, 1966, pp. 23–26 and 197–220; Brian D. Tittemore, 'Belligerents in blue helmets: applying international humanitarian law to United Nations peace operations', in *Stanford Journal of International Law*, Vol. 33, 1997, p. 109; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Katholieke Universiteit Leuven, 2009, p. 534; Safety Convention, above note 8, Art. 2; Rome Statute of the

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A NIAC may transform into an IAC if a foreign state, or possibly an international organisation, exercises necessary control over the armed groups involved. When the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case needed to determine the parties to the armed conflict, in order to classify the conflict as an IAC or a NIAC, it took as a point of departure Article 4 of the Third Geneva Convention, according to which militias and organised armed groups are to be regarded as legitimate combatants if they belong to a party to an armed conflict. Even though Article 4(A)(2) concerned the criteria for granting prisoner-of-war status, the ICTY found as a logical consequence that if armed groups *belonged* to a state party to the conflict (other than the one they were fighting against), the conflict would become international.[31]

In multinational operations based on a UN mandate, troop-contributing states put their military forces at the disposal of the UN or any other organisation, and operational control of those forces is generally exercised by that organisation. In operational matters, there is a presumption that the organisation leading the operation exercises control over the military forces involved. The principle of unity of command in multinational operations has repeatedly been mentioned as a necessary condition for successful operations. There is thus some support for the position that the organisation exercising control over the troops in a multinational peacekeeping operation could be regarded as a party to the armed conflict if the military forces became involved in such a conflict. It naturally follows that the operation itself (such as ISAF or MONUSCO) is not capable of becoming a party to an armed conflict, since it does not possess the necessary independence from the subjects of international law of either troop-contributing states or the involved organisations.[32]

Professor David interprets the UN Secretary-General's Bulletin as an instrument indicating that the involvement of UN forces would internationalise an armed conflict, irrespective of the character of the opponent. Some parts of the Bulletin are however considered by some as containing doctrine and obligations that go beyond treaty or customary law.[33] Caution should therefore be exercised when interpreting the different sections. When Section 8 of the Bulletin, in relation to the treatment of detainees, accords the protection of the Third Geneva Convention to all

International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc A/CONF.183/9, Arts. 8(2)(b)(iii) and 8(2)(e)(iii).

31 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para 92. The ICTY employed a test of 'overall control' over the armed group, a test which the International Court of Justice (ICJ) in the genocide case criticised as a criterion for establishing state responsibility but did not rule out as a test for determining the nature of an armed conflict. See ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, para. 404.

32 For a more thorough discussion, see Ola Engdahl, 'Multinational peace operations forces involved in armed conflict: who are the parties?', in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge University Press, Cambridge, 2012. Professor David seems to share the same view.

33 See for example the Commentary on the Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, in Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations*, Oxford University Press, Oxford, 2010, pp. 198–201.

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detainees regardless of the nature of the conflict, this may not necessarily be taken as evidence that it is the view of the Secretary-General that the operations of a multinational peacekeeping force would constitute an IAC. It simply means that the provisions of that Convention should be applied *mutatis mutandis* to detained persons.[34]

The classification of a conflict involving multinational peacekeeping forces is instead primarily decided on the classification of the opponent. This may be illustrated by two contemporary examples. First, in the Afghan context, ISAF forces are involved in an armed conflict with insurgent forces. Possible parties on the multinational side are the troop-contributing states, NATO and the UN. These intergovernmental organisations can hardly be regarded as being non-state actors in relation to the classification of an armed conflict, notwithstanding that they are not parties to the Geneva Conventions. Where an armed conflict occurs between a troop-contributing state on the one hand and insurgents (that is, organised armed groups) on the other, it would be classified as a NIAC. If some, or all, of the troop-contributing states are involved in armed conflict with insurgents, there would be more than one armed conflict. These conflicts would all be characterised as NIACs due to the nature of the parties involved. If NATO, or the UN, were to be characterised as a party to such armed conflicts, then there would be one single conflict between the particular organisation and the insurgents. It would, however, still be a NIAC, since the opponents, in the case of Afghanistan, are a non-state actor.

The Libya conflict would be regarded as an IAC irrespective of whether the party, or parties, to it were the troop-contributing states or NATO, or the UN, since the armed conflict was conducted against the Libyan government. At the same time as this IAC was taking place, there also existed a NIAC between the Libyan government and the armed groups (at least from the point at which they became sufficiently organised). One could furthermore consider a situation in which the multinational force would also have become involved in an armed conflict with the armed groups. The mandate was to protect civilians and did not preclude attacks against forces other than the governmental ones that would attack the civilian population. In such a case, the multinational forces would simultaneously have been involved in a NIAC with the organised armed groups and in an IAC with the Libyan governmental forces. It may also be noted that if the multinational forces continued to be involved in an armed conflict with the opposition groups, even after the fall of the government, that particular armed conflict could have developed into an IAC, where the former opposition forces instead would constitute the new governmental forces. Exactly when this change in status of the opposition forces occurs may be difficult to define, but there is possibly a presumption of continuity that the government remains the representative of the state until it is established that a change has occurred.

34 See Marten Zwanenburg, 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: a pyrrhic victory?', in *Military Law & Law of War Review*, Vol. 39, 2000, pp. 25–26.

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The consequences of internationalising an armed conflict when peacekeeping forces become involved

The need to distinguish between categories of armed conflicts has gradually become less important because of the development of customary law, through which large parts of the law applicable in IACs are arguably also applicable in NIACs.[35] However, in NIACs, one must also consider the impact of national criminal law. States have so far not been willing to endow members of organised armed groups with the combatant privilege, applicable in IACs, of not being prosecuted for legitimate acts of war. Notwithstanding compliance with IHL, members of organised armed groups participating in NIACs may still be prosecuted under national criminal law. The Safety Convention should also be interpreted against this background. As we have said earlier, the obligation of states parties to criminalise attacks against peacekeepers under that Convention does not apply to situations where UN forces 'are engaged as combatants against organised armed forces and to which the law of international armed conflict applies'. The exception is limited to IACs, which means that the Convention continues to apply in NIACs and that it is a crime to attack peacekeeping forces in a NIAC, even if they are participating in the hostilities. This may be regarded as a reflection of the relationship between national criminal law and IHL in NIACs. Even legitimate acts under IHL may be prosecuted under national criminal law – which the Safety Convention would seem to recognise.[36]

Furthermore, under the applicable Status-of-Forces Agreement (SOFA), it is usually incumbent on the government of the host state to criminalise attacks against invited peacekeeping forces.[37] If the involvement of peacekeeping forces in a NIAC between government forces and insurgents automatically internationalised the armed conflict between them and the insurgents, thereby rendering the rules of IAC applicable to the conflict, attacking peacekeeping forces could no longer be a criminal offence under national law. The host state would need to change its national criminal laws in relation to the peacekeeping forces to legitimise attacks against these forces as long as such attacks were in accordance with the laws of IACs. It would, however, follow from this argument that the host state would not need to change its criminal laws for attacks on its own military forces. That would create a situation whereby attacks against peacekeeping forces would not be considered criminal acts (if complying with applicable IHL), while similar attacks against host

35 See J.-M. Henckaerts and L. Doswald-Beck (eds), above note 17.

36 However, the duty of states parties to the Safety Convention to prosecute or extradite suspected perpetrators may run counter to the obligation of states to grant the broadest possibly amnesty to persons involved in the armed conflict, enshrined in Art. 6(5) of Additional Protocol II to the Geneva Conventions.

37 Art. 45 of the Model SOFA states: 'The Government shall ensure the prosecution of persons subject to its criminal jurisdiction who are accused of acts in relation to the United Nations peace-keeping operation or its members which, if committed in relation to the forces of the Government, would have rendered such acts liable to prosecution'. See Model Status-of-Forces Agreement for peacekeeping operations, Report of the Secretary-General, UN Doc. A/45/594, 9 October 1990.

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state forces would still be punishable under national criminal law. If nothing else, it would certainly have a negative effect on future troop contributions.

The question also arises as to whether the involvement of a multinational force internationalises the conflict as a whole, including the relationship between insurgents and the host state. Professor David finds that this type of situation is not codified, but that an extrapolation of existing rules leads to the conclusion that it would run counter to the general spirit of IHL to treat combatants differently depending on which force they were captured by. A counter-argument, based on the bilateral relations between each party, would instead hold that it is possible that more than one conflict exists in the same area. While it may lead to factual difficulties, it would not seem to be a complicated legal issue. An invited foreign force helping the state to defeat armed groups on its territory may lead to the existence of at least two or more armed conflicts. While IHL may not explicitly codify such a situation, an analysis of the different parties and of the bilateral relations would seem to be a sound application of IHL and well within the codified law.

Conclusion

To sum up, it is high time to treat peacekeeping forces on the same terms as any other force from a *jus in bello* perspective: in the absence of any contrary evidence, IHL applies to peacekeeping forces in the same manner as it does to any other force. The involvement of a multinational peacekeeping force in an armed conflict will bring to it a strong international element. The nature of the armed conflict, however, will only change based on the classification of the parties and the facts on the ground. On the 'multinational side', the parties may either be the international organisations included in the chain of command or the troop-contributing states. The force itself would not possess the necessary independence from the organisations or states involved. This article has held that an analysis of control over troops carries great weight when determining the parties to the conflict. The character of the conflict, or conflicts, is decided based upon each bilateral relation between the parties.

Even though IHL is based on an equal application of its rules to all the parties to the armed conflict, the role of national criminal law in NIACs will tip the scale in favour of government forces, as it will be a crime under national law to attack such forces. Host states are under an obligation to criminalise attacks against peacekeeping forces both under applicable SOFAs and under the Safety Convention. This obligation applies also in relation to attacks by members of organised armed groups involved in a NIAC with peacekeeping forces.

The mandate of peacekeeping forces does not affect the classification of an armed conflict, and such forces, whether they represent each troop-contributing state or an intergovernmental organisation, are on the same footing as governmental forces involved in an armed conflict against non-state actors. If peacekeeping forces were to be involved in an armed conflict against governmental forces, hitherto an exceptional situation, the conflict would instead be characterised as an IAC.

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A reply to Ola Engdahl

Eric David

The question raised by the ICRC serves as a basis for a debate between Dr Ola Engdahl and the author of this text.

On closer examination, Dr Engdahl's analysis reveals not so much disagreement as a certain misunderstanding, mainly on the influence of the mandate of a multilateral peacekeeping force on the application of IHL to that force; the role played by the 1994 Convention in the analysis of the application of IHL to multilateral peacekeeping forces; the application of a non-fragmented IHL to a multilateral peacekeeping force's intervention; and the international nature of the conflict in which a multilateral peacekeeping force is participating. Let us take a look at the differences in interpretation with regard to these matters between Dr Engdahl and the current author.

The influence of a multilateral peacekeeping force's mandate on the application of IHL to its action

Dr Engdahl writes:

> Professor David attaches significant importance to the mandate as a criterion for establishing whether or not a particular peacekeeping force has become involved in an armed conflict. I argue that the nature of the mandate may affect the *probability* of becoming involved in such conflict, but in law, the authority to use force (*jus ad bellum*) does not affect the existence of an armed conflict (*jus in bello*).

This author agrees. However, this author did not claim that the force's mandate would determine whether or not a conflict existed. Rather, a purely methodological distinction between two possible situations was drawn: that where the multilateral peacekeeping force being deployed does not have a coercive mandate, and that where it does. A presentation chiefly for instructive purposes does not necessarily call for the setting out of substantive arguments, but these two hypothetical situations shed light on the influence which the mandate given to a force by the Security Council can have on the application of IHL to the multilateral peacekeeping force's action. Several caveats are, however, necessary.

First, the point at issue is not codified by international law. It can therefore be debated only on the basis of theoretical inferences drawn from the reasoning of positive law and on the basis of practice, case law and doctrine. This is the purpose of this exercise.

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Second, in theory an armed conflict exists when there is an armed confrontation between two belligerent 'parties'; while a multilateral peacekeeping force with a coercive mandate can be deployed in a state's territory without this giving rise to armed violence, any deployment of such a force in a state remains 'an intervention of members of armed forces', and as the Commentary on Common Article 2 of the Geneva Conventions states:

> Any difference arising between two States and leading to the *intervention of armed forces* is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. (Emphasis added.)

Of course, the deploying of a multilateral peacekeeping force in a state's territory does not amount to a 'difference' arising between states, but whether one likes it or not, it is an 'intervention … of armed forces', and even if they do not necessarily make any use of their weapons, the possibility that they might be employed cannot be ruled out completely. If this did happen, there would be victims, and it is plain that they would then come under the protection of IHL. The reasoning underpinning the commentary on Common Article 2 quoted above can therefore be transposed, *mutatis mutandis*, to the deploying of a multinational peacekeeping force in a state's territory.

Third, conversely, a multilateral peacekeeping force without a coercive mandate may be deployed in a state's territory and may include armed forces without this 'intervention … of armed forces' constituting an armed conflict entailing the application of IHL. IHL does not apply in this case because the multilateral peacekeeping force's mandate is not that of a coercive intervention allowing it to use force against a state or non-state 'party'. If, in this situation, a multilateral peacekeeping force has to use force, it may do so only against ordinary criminals, but not against a government or insurgent authority or against an organised armed group within the meaning of IHL. If such a case were to arise, the multilateral peacekeeping force would be faced with clashes constituting an armed conflict (see, for example, the above mentioned case of UNAMIR). IHL would then apply immediately to such clashes. This author endorses Dr Engdahl's view that the application of IHL is based 'on an objective assessment of the facts on the ground'.[38] Nevertheless, *a priori*, IHL is not supposed to apply to the deployment of a multilateral peacekeeping force without a coercive mandate.

This shows that, to a great extent, the multilateral peacekeeping force's mandate has a bearing *a priori* on the application or otherwise of IHL

38 See, in connection to this, Jacob Kellenberger, 'Keynote address', in Gian Luca Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations*, International Institute of Humanitarian Law/ICRC, 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4–6 September 2008, p. 33.

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to the force, but without prejudice to the possible application of IHL in situations where it should not normally apply owing to the non-coercive nature of the force's mandate.

The role played by the 1994 Convention in the application of IHL to multinational peacekeeping forces

Dr Engdahl then describes the purpose of the 1994 Convention and concludes by saying that:

> The strength of IHL is that it applies based on an objective assessment of the facts on the ground, irrespective of the cause of the armed conflict. The application of IHL is thus not dependent on whether a state has wrongfully attacked another state, or armed groups have attacked governmental forces in contravention of national law – or on the nature of the mandate of peacekeeping troops.

This author agrees, except for the end of the sentence, which states that the nature of the mandate has no bearing on the application of IHL. We have just seen why *a priori* this mandate can in fact influence the application or otherwise of IHL. The 1994 Convention confirms this.

Some parts of IHL apply to some conflicts

Dr Engdahl says the following about the involvement of a multinational force in an armed conflict:

> Professor David finds that this type of situation is not codified, but that an extrapolation of existing rules leads to the conclusion that it would run counter to the general spirit of IHL to treat combatants differently depending on which force they were captured by. A counter-argument, based on the bilateral relations between each party, would instead hold that it is possible that more than one conflict exists in the same area. While it may lead to factual difficulties, it would not seem to be a complicated legal issue.

I maintain that, since this type of situation is not codified, IHL should be applied as one single body of rules, rather than as rules which, in respect of the same armed act, would vary according to the status of those performing it; for example, in a civil war where foreign intervention took place, a captured combatant would be a prisoner of war or an ordinary criminal depending on whether he fell into the hands of a foreign or a national force. That would amount to unjust discrimination and would complicate the situation. The factual difficulties to which Dr Engdahl alludes in the passage quoted above would be bound to lead to legal complications. The French physicist Etienne Klein, director of the French National Centre for Scientific Research (CNRS) once said in an interview on the radio: 'facts are the crude ingredient of science'. The same goes for law: facts are also its raw material.

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The international nature of an armed conflict between a multinational peacekeeping force and an organised armed group

Dr Engdahl holds that an armed conflict between an international organisation and state armed forces is an IAC, but that an armed conflict between an international organisation and a group of insurgents is a NIAC. This is where the current author disagrees most radically with Dr Engdahl, who writes with regard to the conflict in Afghanistan: 'Where an armed conflict occurs between a troop-contributing state on the one hand and insurgents (that is, organised armed groups) on the other, it would be classified as a NIAC.' If NATO or the UN were to fight against insurgents, he adds: 'It would, however, still be a NIAC, since the opponents, in the case of Afghanistan, are a non-state actor.' In other words, any clash between a foreign state or an international organisation and an organised armed group or insurgents would not be international because the armed group or insurgents are a 'non-state actor'.

This contention is rather unconvincing. First, the way in which Dr Engdahl's text seems to define a NIAC is not consistent with the determination of the material field of application of Article 1(1) of Additional Protocol II, which concerns only 'armed conflicts … which take place in the territory of a High Contracting Party between *its* armed forces and dissident armed forces or other organized armed groups' (emphasis added). It is significant to note that this text does not mention the armed opposition of a third state's armed forces to another state's insurgents. Of course, this does not mean that NIACs are confined to those conflicts covered by this text – but what, then, would be the source text defining the armed opposition of a state or international organisation to a *foreign*, non-state group as a NIAC? Dr Engdahl is silent on this matter, and the author does not know of such a text either. We are therefore still left with a situation in which two belligerent parties are foreign to one another. Defining this situation as a NIAC is tantamount to disregarding this legal, political and geographical foreignness of the parties and to identifying the state with its government.

Second, a state is generally defined as comprising four elements: territory, population, government and independence. But if the population fights against its government, can it be dissociated from the state? Article 1 of the Draft Declaration on Rights and Duties of States (International Law Commission (ILC), 1949) reads: 'Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.'[39] In speaking of the 'state's' free choice of its own form of government, the ILC showed that a government could not be identified with a state unless it had been 'freely' chosen by that state and therefore, in democratic states, by its population. This is no longer the case when the population is opposed to its government. In this situation, what grounds are there for saying that the state would be better represented by its government than by a section of its population, and that the conflict setting the population or part of it against a third state or an

39 GA. Res 375 (IV), 6 December 1949, annex.

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international organisation would be a NIAC – in other words, an internal conflict or a civil war? Such a conclusion borders on the absurd given that the belligerent parties are foreign to one another in legal, political and geographical terms.

Would it be nevertheless possible to base such a position on the non-state nature of the group representing a section of the population? For that, the disputed government would have to be able to show that it could lay a better claim to constituting the state than the section of the population opposing it. This might be the case if the government had been recognised by a legal authority such as the Security Council. Failing this, the government side is no more of a 'state' than the opposing party. This demonstrates the unpersuasive character of the argument based on the fact that the organised group is a 'non-state actor'. The group in question is indeed a non-state actor, but so is the government, because it is disputed. The only objective criterion still left is the fact that the organised armed group and the opposing belligerent party (a state or an international organisation) are foreign to one another. In the author's opinion, the international nature of the conflict is due to this foreignness.

In this type of debate, the only people who will be convinced are those who wish to be persuaded. Whatever side is taken, legal truth will remain relative. Remember the fable of the bat who falls into some weasels' nests and who does not want to be eaten alive: when she lands in the nest of weasels which are foes of rats, she says, 'I'm a bird, look at my wings'; and when she lands in the nest of some other weasels who hate birds, she cries, 'I'm a mouse, long live the rats!' In the words of La Fontaine (in *The Bat and the Two Weasels*), 'The bat by such adroit replying, twice saved herself from dying.' The author knows that his life is not at stake, but Einstein would not contradict me when I say that everything is relative in law and physics. . .

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