

Multinational Peace Operations in Armed Conflicts - Identifying the Party

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Institute for Human Rights Working Paper

No. 1/2017

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1. Introduction

In 2011 the North Atlantic Treaty Organisation (NATO) launched an air campaign against the government of Libya as a response to the violence that had broken out in the country earlier the same year. Through its resolution on 17 March, the United Nations Security Council (UNSC) established a no-fly zone over Libya in order to protect the civilian population. Acting under Chapter VII of the UN Charter the UNSC authorized “[...] Member States [...], acting nationally or through regional organisations or arrangements, to take all necessary measures to enforce compliance with the ban on flights [...]”.¹ At first, France, the United Kingdom and the United States enforced the no-fly zone; NATO took over the leadership at the end of March.² The multinational troops executed a number of air bombings against the troops of the Libyan government. There was now an armed conflict, but who was the party (or parties) fighting the Libyan troops: the troop-contributing countries, NATO or the United Nations (UN)? It is this question that this paper will examine. Which entity is to be regarded as a party to a conflict on the multinational side, in a situation where a peace operation is deployed against a state or an armed group. The three options that will be examined are the troop-contributing nation (TCN), the international organisation or some combination of the two. The two international organisations that will be discussed are the UN and NATO as these two are the most established actors when it comes to carrying out peace operations. The question is relevant because party status affects, *inter alia*, the material rules applicable in the conflict and the geographical scope of International Humanitarian Law (IHL). In addition to individual criminal responsibility for grave breaches of IHL, it is the party that shall be held accountable if its troops violate the rules of humanitarian law.³ The main IHL conventions were created with traditional inter-state wars in mind. A central

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¹ UNSC Res 1973 (17 March 2011) UN Doc. S/Res/1973, paras 6-8.

² NATO, 'Press Briefing on Libya' (31 March 2011) <http://www.nato.int/cps/en/natolive/opinions_71897.htm> accessed 28 June 2017.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, article 91.

concept of international humanitarian law is “party to an armed conflict”. However, the ‘party to an armed conflict’ is not always easy to identify.⁴ The conflicts of today are seldom fought between two opposing states. Instead, many present-day conflicts involve a multinational element, such as an international peace operation. An international organisation or one or more of the states engaging in the conflict can then feature as a party to the conflict. Nonetheless, it is still essential to identify the parties to an armed conflict, as it is a prerequisite for IHL to be able to fulfil its purpose – to protect the victims of war.

2. Multinational peace operations in armed conflicts

The basis for peace operations is the Collective Security System, which consists of the powers given to the UNSC by the UN Charter to maintain international peace and stability. In practice, the Collective Security System has been executed, *inter alia*, through the establishment of so-called peace operations. The term peace operation includes all types of peacekeeping and peace enforcing operations. A peacekeeping operation in the traditional sense was a UN operation which was based on the principles of approval from the warring parties, the impartiality of the peacekeepers and the use of force only for self-defence.⁵ The mandate of a peacekeeping operation is often to support the local authorities to ensure security and public safety, but also to support the establishment of democratic institutions, an independent justice system and to tackle the underlying reasons of the conflict.⁶ A peacekeeping operation can consist of military, police and civilian contingents. In contrast, a *peace enforcement* operation is deployed regardless of any approval from the warring parties. In a peace enforcement operation, the troops are not impartial, but often tasked to target a certain state army or armed group.⁷ When a peace operation is involved in an armed conflict, it becomes party to that conflict.

⁴ 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 2013) at 234.

⁵ Gary Wilson, *The United Nations and Collective Security* (Routledge 2014) at 128.

⁶ Ben F. Klappé, ‘The Law of International Peace Operations’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) at 611.

⁷ Wilson (n 5) at 146.

‘Peace operation’ is not mentioned in the UN Charter; the concept has evolved as a response to changing circumstances and has both a political and a legal meaning.⁸ According to White, peace operations are currently moving between the two poles, peacekeeping and peace enforcement. Peace operations often have elements of both. Depending how the military component in a peace operation is employed it may act as either a peacekeeper or a peace enforcer.⁹

3. Definition of ‘armed conflict’ and ‘party to an armed conflict’

The four Geneva Conventions (GC) of 1949 and their two Additional Protocols (AP) of 1977 are the main sources of IHL.¹⁰ The Geneva Conventions lack a definition on what an armed conflict is. The most commonly used definition has its origin in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and its *Tadić* case:

[...] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.¹¹

The two main elements in the definition are the sufficient organisation of the armed forces and a certain level of intensity of the violence. These two elements are now part of the so-called *Tadić* test, which is used for determining the existence of an armed

⁸ Wilson (n 5) at 117. International law does not define the terms ‘peace operation’, ‘peacekeeping’ or ‘peace enforcement’. The terms can be used in different ways and be mixed. In the UN terminology, the term ‘Peace Support Operation’ is also used. In this paper, the term ‘peace operation’ is used as an umbrella term that includes both peace keeping and peace enforcement operations. The terms ‘peace troops/forces’ or ‘multinational troops/forces’ are used for describing the armed forces that are part of a peace operation.

⁹ Nigel D. White, ‘Towards Integrated Peace Operations: The Evolution of Peacekeeping and Coalitions of the Willing’ in Marco Odello and Ryszard Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff 2011) at 23.

¹⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287; Protocol 1 (n 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

¹¹ *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), para 70.

conflict.¹² It is important to note that, according to IHL, the existence of an armed conflict is dependent only on these two criteria; the parties to the conflict do not need to recognize the existence of a conflict for IHL to be applicable.¹³ The Geneva Conventions are also lacking an explicit definition on what a party to an armed conflict is. Article 43 (1) of the GC AP I describes the armed forces of a party:

The armed forces of a Party to a conflict consist of all organized 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 recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

It has been commented that the article extends its field of application to entities that are not states and the possibility that the UN could be party to an armed conflict is not excluded.¹⁴ The same Commentary establishes four criteria that must be fulfilled “effectively and in combination in the field” in order for an entity to directly participate in hostilities, that is, to become a party to the conflict. These criteria are:

- a) subordination to a "Party to the conflict" which represents a collective entity which is, at least in part, a subject of international law;
- b) an organization of a military character;
- c) a responsible command exercising effective control over the members of the organization;
- d) respect for the rules of international law applicable in armed conflict.¹⁵

According to Engdahl, this is an implicit definition of a party to an armed conflict.¹⁶ The GC AP I is applicable only in armed conflicts of an international character, but the same definition can also be used for non-international armed conflicts, as a corresponding implicit definition of the parties to a non-international armed conflict can be found in

¹² *Prosecutor v. Tadić*, (Trial Judgement) ICTY-94-1 (7 May 1997), para 562.

¹³ Richard D. Glick, ‘Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces’ (1995) 17 *Michigan Journal of International Law* 53, at 75; Engdahl (n 4) at 24.

¹⁴ Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987), at 507.

¹⁵ *Ibid* at 517.

¹⁶ Engdahl (n 4) at 245.

the Commentary of the GC Common article 3.¹⁷ What conclusions can be drawn when the four criteria are applied to peace operations?

3.1 Criterion a) subordination to a "Party to the conflict" which represents a collective entity which is, at least in part, a subject of international law

Peace operations are not legal persons in themselves. The criterion of legal personality is fulfilled because of the fact that peace operations are organs of entities that have international legal personality.¹⁸ States are the principal subjects of international law. The International Court of Justice (ICJ) in the *Reparations for Injuries* case found in 1949 that also international organisations can attain the status of subjects of international law.¹⁹ Peace operations led by the UN are generally considered its subsidiary organs.²⁰ In the case of NATO, this comes down to a case-by-case evaluation. Consequently, any peace operation subordinate to a state or an international organisation fulfils criterion a).

3.2 Criterion b) an organization of a military character

Peace operations are typically set up on a case-by-case basis and therefore the operations can be very different in their organisation. Some typical features can be made out, however, which can serve to establish whether a peace operation fulfils criterion b), *i.e.* whether it is an organisation of military character. In *Boškoski & Tarčulovski* the ICTY established five groups of criteria to indicate whether a non-

¹⁷ As a list of "convenient criteria" for determining the existence of a non-international armed conflict Pictet provides, among other things, the following: "That the Party [...] possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention [...] That the insurgents have an organization purporting to have the characteristics of a State [and] that the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war." Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary* (International Committee of the Red Cross 1952) at 36.

¹⁸ International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, UN Doc Supplement No. 10 A/56/10, chp.IV.E.1 ("ARSIWA"), article 4; ILC, Draft Articles on the Responsibility of International Organizations, with Commentaries, in Report on the Work of Its Sixty-Third Session, 26 April to 3 June and 4 July to 12 Aug. 2011, UN Doc A/66/10, Ch. V ("DARIO"), article 6. According to the above-mentioned articles, the conduct of an organ of a state or an international organization shall be considered an act of that state or international organization.

¹⁹ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Rep. 1949 (Apr. 11), p. 174.

²⁰ Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005) at 50.

governmental armed group was sufficiently organized to trigger the applicability of international humanitarian law.²¹ These are: the existence of a command structure, the ability to carry out operations in an organized manner, a level of logistics, a level of discipline and the ability to speak with one voice.

3.2.1 The existence of a command structure

Indicators for the existence of a command structure are, *inter alia*, that a general staff leads the peace operation on an operative level in a similar way in which national armed forces are led.

3.2.2 The ability to carry out operations in an organized manner

Peace forces clearly possess the ability to carry out operations in an organized manner. Already the mere size of some operations is a clear indicator of this fact. In July 2016 over 18 000 uniformed persons from different states were involved in the MONUSCO-operation.²² NATO has shown an even greater ability to carry out large-scale operations, at its peak, 130 000 persons from 51 states were involved in the ISAF-operation.²³ The host state territory is usually divided into different sectors and each sector is under the command of a national commander. This is also indicative of a high level of organisation.

3.2.3 The level of logistics

As a peace operation consists of elements from several different national armed forces, the logistics of a peace operation are usually more complex than the logistics of a military operation carried out by a single state. It is typical for a peace operation to use common emblems and symbols so that the different national contingents can be identified as a single unity. The UN beret and the white vehicles of the UN are widely known as common symbols of UN troops. The level of logistics and the use of common symbols are indicators of the level of organisation of the troops.

²¹ *Prosecutor v. Bošković & Tarčulovski* (Trial Judgement) IT-04-82-T (10 July 2008), paras 199-203.

²² UN Department of Public Information, 'UN Peacekeeping Operations Fact Sheet' (*United Nations webpage*, 30 June 2016) <<http://www.un.org/en/peacekeeping/documents/bnote0616.pdf>>, accessed 28 June 2017.

²³ NATO, 'NATO and Afghanistan' (*NATO webpage*, 13 October 2016) <http://www.nato.int/cps/en/natohq/topics_8189.htm#>, accessed 28 June 2017.

3.2.4 The level of discipline

Each peace operation has its own set of rules of engagement (ROE) and these serve as an indicator showing the level of discipline of the troops. The national authority usually bears responsibility for any disciplinary measures against troops in the peace operation and one should presume that the national armed forces have a functioning disciplinary system.

3.2.5 The ability to speak with one voice

The fact that peace operations in many cases have spokespersons and that some peace operations even have their own internet pages indicates an ability to speak with one voice.

In conclusion, a typical peace operation clearly fulfils the criteria laid down by the ICTY on the military organisation of an armed force.²⁴ Thus, it should be concluded that a typical peace operation fulfils criterion b), i.e. it is an organization of a military character.

3.3 Criterion c) a responsible command exercising effective control over the members of the organization

This criterion is the most central and the most complex part of the *Tadić* test when identifying the parties to an armed conflict. IHL lacks rules regarding the control over an armed force. However, the concepts of control under the law of international responsibility and military concepts of control may serve to establish indicators for control.

3.3.1 Control over armed forces and the law of international responsibility

A party to an armed conflict is responsible for the acts of its armed forces. Some scholars have argued that, by inference, the entity that is responsible for the acts of the troops

²⁴ Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 No. 891/892 *International Review of the Red Cross* 561 at 577.

should be regarded as a party to the armed conflict.²⁵ One way to find guidance on which entity should be identified as party to an armed conflict could therefore be to find out which entity is responsible for the acts of the troops. For an entity to be held responsible for the acts of an armed force, a certain level of control is required. International law seems to distinguish mainly between two levels of control: effective control and overall control.

3.3.1 Effective control

Effective control is a rather strict form of control and it describes a situation where the acts of an agent are directed and controlled by a state.²⁶ The notion of effective control was introduced by the *Military and Paramilitary Activities in and against Nicaragua* case.²⁷ The question was whether the acts of the contras in Nicaragua could be attributed to the United States and could the latter thus be held responsible for breaches of IHL committed by the contras. The ICJ found that the United States had taken part in the “planning, direction, support and execution of the operations”,²⁸ but it could not determine that the United States had “actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf”.²⁹ The ICJ further noted that: “For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.³⁰

The International Law Commission (ILC) presented in 2011 its draft articles on the responsibility of international organisations. Draft article 7 governs situations where a state places its agent or organ at the disposal of an international organisation:

²⁵ 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* (2012) 42 12th Bruges Colloquium 23 at 25-26. Engdahl (n 4) at 234 and Ferraro (n 24) at 588.

²⁶ ARSIWA (n 18), article 8 with commentaries.

²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Rep. 1986 (June 27), p. 14.

²⁸ *Ibid* para 86.

²⁹ *Ibid* para 109.

³⁰ *Ibid* para 115.

The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.³¹

According to the commentary of the article, this provision is applicable in situations where a military contingent is placed at the disposal of the UN in order to constitute a part of a peace operation. Effective control means “[...] the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organisation’s disposal”.³² The state still exercises disciplinary powers and criminal jurisdiction over its agents and organs placed at the disposal of the international organisation.

In contrast to the responsibility of states over (non-governmental) armed groups, the starting point for a study over the control over a peace operation is not whether a subject of international law controls it, as it is quite clear that a state or an international organisation controls the armed forces of a peace operation. Instead, the objective is to find out which entity is in control of these armed forces – the international organisation or the troop-contributing nation (TCN).³³ The European Commission for Democracy through Law (Venice Commission) has exemplified the matter with reference to the NATO-led KFOR (Kosovo Force) operation. According to the Venice Commission it was possible to attribute the conduct of individuals either to NATO or to the troop-contributing nation depending on which entity was exercising control over the specific act, for example where the KFOR Commander has given a national contingent a task to set up a roadblock at a specific location. The national commander cannot influence the decision, save by refusing to carry out the order. If the roadblock were located in a non-permitted area the responsibility over possible damages would be attributable to NATO as the KFOR Commander is an agent of the organisation. In contrast, if the soldiers started assaulting persons stopped at the roadblock, it would be more likely that the acts were to be attributed to the troop-contributing nation, as it would be the national commander who exercises control in the situation.³⁴

³¹ DARIO (n 18), article 7.

³² *Ibid* commentary for article 7 para 4.

³³ *Ibid* commentary for article 7, para 1.

³⁴ European Commission for Democracy through Law (Venice Commission) ‘Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms’ (11 October 2004) Opinion no. 280/2004 < [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDLAD\(2004\)033-e.>](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDLAD(2004)033-e.>) accessed 27 June 2017, footnote 26.

3.3.2 Overall control

Overall control is a less strict form of control than effective control. It was initially introduced by the Tadić Appeals Chamber.³⁵ The problem in front of the ICTY was to determine whether the Bosnian Serb army of Republika Srpska (VRS) was an independent armed force or under the control of the Serbian Army (JNA/VJ). If the VRS was under the control of the Serbian Army, the armed conflict in Bosnia would be an international armed conflict falling under the jurisdiction of the ICTY. According to the ICTY Appeals Chamber, the matter should be settled by the use of the overall control test:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.³⁶

Under the overall control test a state would be responsible for the activities of a group “whether or not each of them was specifically imposed, requested or directed by the State”.³⁷ Therefore, going back to the above-mentioned *Nicaragua* case, the control that the United States had over the contras could probably have been described as overall control.

3.3.3 Ultimate authority and control

In the case *Behrami and Saramati* the European Court of Human Rights (ECtHR) decided on the admissibility of the case by examining whether it could rule on two complaints regarding acts carried out in the context of the KFOR operation during 2000 and 2001. KFOR was authorized by the UN Security Council resolution 1244 with the mandate of, inter alia:

[d]eterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, [...] demilitarizing the Kosovo Liberation Army (KLA), [...] ensuring public safety and order until the international civil presence can take responsibility for

³⁵ *Prosecutor v. Tadić*, (Appeals Judgement) ICTY-94-1 (15 July 1999), paras 115-145.

³⁶ *Ibid* para 131.

³⁷ *Ibid* para 131; para 122.

this task, [and] supervising demining until the international civil presence can, as appropriate, take over responsibility for this task [...].³⁸

The *Behrami* case was about a cluster bomb injuring young boys playing in an area belonging to the French sector of KFOR. The *Saramati* case was about the alleged unlawful detention of the applicant by UNMIK police officers. The two cases were combined, as the ECtHR had to first decide upon its jurisdiction in the case as its jurisdiction only extends to acts attributable to states parties to the European Convention on Human Rights, but not to acts attributable to the UN or NATO. For *Behrami*, the Court ruled that the supervision of demining had been the responsibility of UNMIK. UNMIK was a subsidiary organ of the UN and the act should therefore be attributed to the UN.³⁹ In the *Saramati* case, the Court ruled that KFOR had been responsible for issuing the detention order.⁴⁰ The Court found the act of the KFOR troops to be attributable to the UN. The reasons for this decision was that the UN could have exercised operational control over the international military presence in Kosovo, but chose to delegate this control to NATO. According to the Court, the UN did not exercise direct control over the conduct of KFOR, although the KFOR leadership was required to report to the UNSC on a regular basis.⁴¹ The ECtHR found that UNSC had “ultimate authority and control” over the conduct of KFOR and thus the actions were in principle attributable to the UN.⁴² It thus seems that the ECtHR introduced yet another level of control different from both effective and overall control, namely the level of ultimate authority and control.⁴³

3.3.4 *The relationship between the three levels of control*

As the three mentioned levels of control have their origin in the case law of three different international courts, they do not form a legally clear hierarchy when it comes to the strictness of the required level of control. However, for the sake of illustrating

³⁸ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244, para 9. In the same resolution, the United Nations Interim Administration Mission in Kosovo (UNMIK) was established, see *Ibid* para 10.

³⁹ *Behrami and Behrami v. France; Saramati v. France, Germany and Norway* App No 71412/01 and 78166/01 (2 May 2007) (“*Behrami and Saramati*”), para 127.

⁴⁰ *Ibid*.

⁴¹ *Ibid* para 134.

⁴² *Ibid* paras 140-141.

⁴³ See Kjetil Mujezinović Larsen, ‘Attribution of Conduct in Peace Operations: The “Ultimate Authority and Control” Test’ (2008) 19 EJIL 509 at 512-22 for a discussion on the notions of ‘ultimate authority and control’ and ‘overall authority’.

their differences, it is possible to form some sort of hierarchy based on the level of control that is demanded to fulfil the requirements of a certain control test. In other words, this could be called the “strictness” of the control-test. A strict test requires that the entity is in near total control of the act of its subject, while a less strict test requires only partial control over the subject. In a hierarchy “ultimate authority and control” would arguably be the least strict form of control. Whereas “ultimate authority and control” is a less strict form of control than “overall control”, the latter is on its part a less strict form of control than “effective control”. “Effective control” would hereby be the strictest form of control.

Scholars have criticized especially the arguments in the *Saramati* case. In its decision, the ECtHR referred to the internal rules of the UN in order to decide upon the question of attribution, when some argue that it should have based its decision on the rules of international responsibility.⁴⁴ Some scholars have argued that in order to be held responsible over the conduct of KFOR, the UN should have exercised effective control.⁴⁵ This would have been consistent with the ICJ test of effective control presented in the Nicaragua case. The *Behrami and Saramati* case can now be said to follow the argument of the ICTY regarding overall control or even go as far as creating yet another category of control.

It is important to keep in mind that the ECtHR deals with complaints on alleged human rights violations, but does not apply international humanitarian law. For this reason, the *Behrami and Saramati* decision might not be directly applicable in the humanitarian law discussion on how to identify a party to an armed conflict, but it supports the idea of linking control with responsibility.

3.3.5 Control over armed forces and the military doctrine

Along with the rules of state responsibility, also military doctrine may give some indication of how control can be established. Military activities can be divided into three levels: strategic, operational and tactical. The *strategic* level is where the entire armed forces are directed and coordinated; at this level the military interacts with political organs both nationally and internationally. On the *operational* level, the armed forces are directed in order to achieve the strategic goals on a certain theatre of war through planning, organising and implementing of military campaigns and large operations. On

⁴⁴ Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati cases’ (2008) 8 *Human Rights Law Review* 151 at 165.

⁴⁵ *Ibid* at 166.

the *tactical* level, the troops are directed with the aim of achieving the operational goals in a local area.

Command and control (C2) is a central concept in the military doctrine. It can be defined as “[...] the exercise of authority and direction by a properly designated commanding officer over assigned and attached forces in the accomplishment of the mission”.⁴⁶ *Command* is to be understood as “the authority vested in an individual of the armed forces for the direction, coordination, and control of military forces”, and *control* as the “[...] authority exercised by a commander over part of the activities of subordinate organizations, or other organizations not normally under his command, that encompasses the responsibility for implementing orders or directives”.⁴⁷ In simplified terms, *command* can be described as the authority of an individual to give orders to a certain group, while *control* can be described as the obligation of that group to obey the same individual - its commander. Command and control also exist on the three levels (strategic, operational and tactical) of military activities.

The structures of peace operations vary a great deal but once again, some general features can be made out. A peace operation is established through a resolution of the UNSC where the mandate of the operation is given as well as the potential authorization to use force. The UNSC gives the operation its legal authorization and top-level political and strategic directions. The operation itself can be carried out under the auspices of the UN itself or the UN can authorize a state or an international organisation to carry out the operation. For this paper it is interesting to examine those situations where the UN carries out the operation by itself and those situations where the task is delegated to NATO. The command structure differs not only between the two organizations but there is also an internal variance between operations within the same organisation.

The troops in a peace operation are not fully under the control of the international organisation. The troop-contributing countries continue to exercise some control over disciplinary matters, hold the exclusive criminal jurisdiction and maintain the right to withdraw their troops from the operation. States can even place some restrictions on the use of their troops and these restrictions are binding upon the commander of the

⁴⁶ Civil-Military Cooperation Centre of Excellence (CCOE), ‘Informal Interorganizational Military Glossary of Abbreviations, Terms and Definitions Related to Conflict Prevention (CP) and Defence and Related Security Capacity Building (DCB)’ (13 February 2015) <<http://www.cimic-coe.org/wp-content/uploads/2014/06/NATO-EU-UN-glossary-on-DCB-and-CP.pdf>> accessed 28 June 2017.

⁴⁷ *Ibid.*

force.⁴⁸ In a multinational military operation, it is often the operational command and/or control that is transferred from the TCN to the international organisation.

The standpoint of the UN is that the organisation has exclusive control over national contingents placed at its disposal and that peace operations constitute a subsidiary organ of the UN.⁴⁹ NATO does not claim that its operations would be its subsidiary organs; in a NATO operation the TCN usually has a larger role in the decision-making on an operational level than in UN operations. It is fully possible that in a certain operation the command and control exercised by NATO and the TCNs is inseparable and neither can be said to have exclusive command and control. For this reason, the operational command and control in a NATO operation should be decided upon on a case-by-case basis. Engdahl makes an interesting observation regarding the NATO air operation *Unified Protector* in Libya. He points out that states seem to be more involved on all levels of decision-making when it comes to air operations compared to traditional ground operations.⁵⁰ This could lead to the conclusion that certain types of NATO operations, such as air operations, both NATO and the states could be regarded as parties. On the other hand, in more traditional ground operations where states are not as involved in the decision-making, it could be found that only NATO or a leading TCN could be regarded as a party.

3.3.6 Combining the concepts of control for the needs of IHL

A way of combining the control tests of international responsibility and the military hierarchy of levels would be to apply the ECtHR's "ultimate authority and control" on the strategic level, the ICTY "overall control" on the operational level and the ICJ "effective control" on the tactical level. Which of these tests is then the most suitable for identifying the party to an armed conflict? As mentioned earlier, the 'ultimate authority and control' test was not used in a humanitarian law setting, but for determining jurisdiction and admissibility under the European Convention on Human Rights. In the IHL case-law only the tests of overall control and effective control have been considered relevant so far. The ultimate authority and control test would arguably be an easy solution to the problem of identifying the party on the multinational side of an armed conflict. If applied in a similar manner as the ECtHR this would mean that all peace operations authorized by the UNSC would be regarded as organs of the UN and

⁴⁸ Engdahl (n 4) at 237.

⁴⁹ UN Secretariat, 'Responsibility of International Organizations: Comments and Observations Received from International Organizations' 56th session (25 June 2004) UN Doc A/CN.4/545 at 28.

⁵⁰ Engdahl (n 4) at 262.

thus the UN would be the only party on the multinational side. The ultimate authority and control test does not require that the party is in fact in control of its troops, which makes the test ill-fitted with definition of “party to an armed conflict”. For this reason, this paper does not consider the ultimate authority and control test as a suitable tool for identifying the party on the multinational side. The two remaining options are then the effective control test and the overall control test.

The effective control test does not seem appropriate for identifying a party as it describes the control over a certain conduct on the tactical level. As in the example provided by the Venice Commission regarding attribution of responsibility in the context of KFOR, tactical control can vary from day to day between organs of different entities. In some peace operations soldiers from different TCNs form a single, unified troop. The unsuitability of the effective control test for identifying the party of an armed conflict in such a situation may become clear by looking at a practical example. Imagine a situation where a battalion consists of Irish, Finnish and Estonian nationals.⁵¹ The battalion commander is Irish and he gives an order to a Finnish company commander, who then passes over the same order to an Estonian platoon that has been attached to the Finnish company. If the effective control test were used for identifying the party in a similar situation as the one described above, there would be no way an adversary would know which entity is a party to the conflict at a certain time. Because of the rather high threshold for responsibility of the effective control test it would render it extremely difficult to establish responsibility.

The opinion of this author is that for the purposes of international humanitarian law, status as a party to an armed conflict must be something permanent; it cannot change on a daily basis. This is an argument for the need to separate between the questions of who exercises the required level of control for identifying a party to an armed conflict and the question of who exercises the required level of control for the purposes of international responsibility. The overall control test is therefore more suitable for identifying a party to the armed conflict because of functional reasons and because it better fulfils the criteria of predictability of law.⁵² When the other three criteria, subject of international law, organisation of military character and the ability to respect the rules of international humanitarian law, are fulfilled, the entity that exercises overall

⁵¹ Since May 2015 the UNIFIL operation in Lebanon has an Irish-Finnish battalion with an Estonian platoon. Even though the UNIFIL forces are not in an armed conflict as the intensity requirement is not met, this situation serves as a good example of the structure of a multinational battalion that could find itself in an armed conflict in the context of a peace operation. Finnish Defence Forces, *Libanon UNIFIL* (webpage of the Finnish Defence Forces) <<http://puolustusvoimat.fi/web/kansainvalinen-kriisinhallinta/libanon-unifil>> accessed 28 June 2017.

⁵² Engdahl (n 4) at 255.

control would thus be identified as a party and the entity exercising effective control over a specific act would be held responsible for the act. In an UN-led operation, this would mean that the UN is party and *prima facie* responsible for violations. The responsibility over a violation would still be attributed to the TCN if it could be shown that it *de facto* exercised effective control over the specific conduct. However, this would not affect the status of the UN as a party to the conflict.

Both in operations led by the UN and NATO the TCNs transfer some control over their troops to the international organisation while keeping some control to themselves. Because of the transfer of command/control to the commander of the multinational troops, the troops become in part an organ of the international organisation. Even though the legal basis for NATO operations is similar to those of the UN, there seems to be an understanding that NATO is not usually given exclusive control over the operation, but shares the control with the TCNs. NATO is thus given a lesser form of control over the troops placed at its disposal compared to the UN. For this reason, it cannot be shown which entity is in charge of which action separately. Because of this, both NATO and the TCNs can exercise overall control over the same troops and thus, arguably, simultaneously be parties to the same conflict.⁵³

3.4 Criterion d) respect for the rules of international humanitarian law

The indicators of an ability to respect the rules of IHL are “disciplinary rules and mechanisms; proper training; and the existence of internal regulations and whether these are effectively disseminated to members”.⁵⁴ For armed forces to ensure the respect for IHL, an internal disciplinary system is required.⁵⁵ Multinational peace operations do not usually have a disciplinary system of their own, but instead leave disciplinary matters to the participating states. International organisations will therefore need to trust the states to enforce compliance with international humanitarian law.⁵⁶

Both the UN and NATO stress the importance of their peace operations to follow the rules of IHL. All military personnel are expected to be familiar with the rules and

⁵³ Engdahl (n 4) at 262. See also Ferraro (n 24) at 593.

⁵⁴ *Boškoski & Tarčulovski* (n 21) para 202.

⁵⁵ Sandoz, Swinarski and Zimmerman (n 14) at 514.

⁵⁶ Christopher Greenwood, *Essays on War in International Law* (Cameron May 2006) at 93.

instruments of international humanitarian law.⁵⁷ NATO sees itself as a model for compliance with IHL and presumes that all member states follow this strive.⁵⁸ Thus, it can be concluded that the UN and NATO as a minimum show an *ability* to respect the rules of international humanitarian law and consequently fulfil criterion d) of the definition.

4. Who are the parties then?

4.1 The troop-contributing nations

Both states and international organizations are able to fulfill criteria a, b and d. The decisive factor when identifying the parties is identifying the entity that fulfils criterion c. This identification needs to be done on a case-by-case basis. This chapter will be discussing the three different options for which entity or entities should be considered a party to an armed conflict. The focus here is on which of the three options would be best compatible with the purpose of IHL.

When states place their troops at the disposal of a multinational peace operation, they often deny that they would be parties to an armed conflict. Illustrative of the different opinions regarding a state's participation in an armed conflict is the research made by the Swedish Armed Forces and referred to by Engdahl. The aim of the research was to find out the opinion of some TCN's participating in the ISAF operation on the following questions: did there exist an armed conflict in Afghanistan and if a conflict did exist, which entity was to be regarded as a party to this conflict.⁵⁹

The results were varying and show the confusion of the situation. All states agreed that there existed a non-international armed conflict between the Taliban's and the Afghan

⁵⁷ UN Secretary-General (UNSG) 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law' UN Doc ST/SGB/1999/13, section 3: "The United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments [the general conventions applicable to the conduct of military personnel]".

⁵⁸ Peter M. Olson, 'A NATO Perspective on Applicability and Application of IHL to Multinational Forces' (2013) 95 No. 891/892 *International Review of the Red Cross* 653 at 654. "Fortunately, NATO has to date not had to face serious legal questions relating to the allocation of responsibility for alleged violations of IHL. This fact is far from accidental, however, and reflects the seriousness with which the Organisation, its member states and NATO operating partners take their responsibility to comply fully with their obligations under IHL". *Ibid* at 657.

⁵⁹ Engdahl (n 3) at 234-37.

authorities. Norway and Denmark regarded themselves as parties to an armed conflict, while, *inter alia*, Sweden and Germany did not regard themselves as parties to an armed conflict. The latter two were not *de facto* actively participating in hostilities. In general, some states seemed to argue that an armed conflict would only exist in some parts of Afghanistan and that the question of being a party to the conflict should be decided separately for all TCN's. This seems incompatible with the rules on the geographical scope of international humanitarian law.⁶⁰ Nonetheless, several states appeared to hold the opinion that only part of the ISAF operation was party to an armed conflict. The British, Danish and Canadian contingents were actively participating in hostilities in the southern parts of Afghanistan. The hostilities in the south clearly fulfilled the requirement of intensity, thus making IHL applicable. At the same time, Finnish and Swedish troops were placed in the notably calmer northern parts of Afghanistan, where the hostilities did not clearly fulfil the intensity requirement. Engdahl notes that ISAF consisted of troops from 48 states under a unified command. The states had agreed on transferring some authority over their troops to NATO and for this reason, it is not necessarily possible to separate between the contingents of different states.⁶¹ Subsequently, if it is not possible to separate between contingents, then it should not be possible for one contingent to be in an armed conflict while another is not.

The question of whether a state participating in a multinational peace operation can be regarded as a party to an armed conflict is a politicised question. This does not, however, change the circumstance that the existence of an armed conflict is based on the factual situation. The application of IHL is not dependent on the acknowledgment by a state that an armed conflict exists.⁶²

This gives rise to quite a few questions that deserve a closer look. One of the more material questions is which set of IHL rules are to be applied in the conflict? If the state is regarded as the party to the conflict, it should naturally follow the obligations that it has undertaken by acceding to IHL conventions. Then again, if the international organisation is to be regarded as the party to the conflict it should be bound by the customary rules of IHL, but the participating states are still under an obligation to ensure

⁶⁰ *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (n 13), para 70: "[...] international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there".

⁶¹ Engdahl (n 3) at 254.

⁶² " [...] the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, *even if the state of war is not recognized by one of them.*" Geneva Conventions of 1949 I-IV (n 12), article 2 (emphasis added).

that their troops respect the obligations of the state.⁶³ Another question is the geographical scope of international humanitarian law. If a state is identified as a party to the conflict, can the whole of its territory be a scene for acts of war? If Finland participates in a NATO-led peace operation and becomes a party to an armed conflict, can attacks be launched against all Finnish military objects on the territory of Finland?

4.2 The international organisation

The main problem with regarding international organisations as parties to armed conflicts is the dual nature of troops in international peace operations. Because of the fact that the international organisation is given a limited form of command and control over the troops, the troops will in many cases be simultaneously an organ of both the international organisation and the state that provides the troops. To identify an international organisation as the party to an armed conflict gives rise to many unanswered questions, even though it is, legally speaking, possible for an international organisation to be party to an armed conflict. As with states as parties to armed conflicts, also here the question of geographical scope of IHL is relevant. An international organisation does not have a territory of its own. If the international organisation is identified as the party, which is then the territory on which it is lawful to conduct hostilities? Should the territories of member states of the organisation be regarded as the territory of that international organisation? Also, if the same international organisation has peace operations in different states, are also these other multinational troops to be considered parties to the conflict? The answers to these questions do not fall under the scope of this paper, as they touch upon the subject of the nature of international organisations.

There is also the risk that if an international organisation is seen as the exclusive party to the conflict on the multinational side, the troop-contributing states could avoid their responsibility for possible violations of international humanitarian law and that the parties to the conflict would not be conducting hostilities on equal terms.

4.3 Shared partyship

A third possibility would be a form of shared partyship as advocated by the International Committee of the Red Cross (ICRC). The view of the ICRC seems to be that in NATO-led

⁶³ "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". Geneva Conventions of 1949 I-IV (n 12), article 1.

operations both NATO and the TCNs are considered parties to the armed conflict that the multinational troops are involved in.⁶⁴ This is an interesting thought, but it is rather unclear how this shared partyship would look in practice. Naturally, the same questions that were presented for states and international organisations as parties would need an answer also in the case of shared partyship.

In the field of international responsibility for wrongful acts, there is a discussion on whether one act can be attributed to two or more entities at the same time.⁶⁵ This would be the case in situations when two or more entities are exercising effective control together and this control is indivisible or in situations where two or more entities have committed the act together.⁶⁶ According to international case law, each entity is responsible for acts over which it has exercised effective control, as long as the roles of the different entities can be separated or the perpetrator of each act can be identified.⁶⁷ Some commentators have argued that this shared responsibility stems from the dual nature of the peace forces as organs of both the international organisation and the state. The argument would then be that the fact that a state is exercising exclusive criminal jurisdiction would be the legal ground for the responsibility of the state. Tsagourias notes that criminal or disciplinary jurisdiction does not imply that the state exercised control over the act at the time when it was committed.⁶⁸ A state's failure to prosecute the wrongful act that its organ or agent has committed, does not make the state responsible for the act itself, but it makes the state responsible for a failure to prosecute

⁶⁴ International Committee of the Red Cross (ICRC), 'International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8-10 December 2015: International Humanitarian Law and the challenges of contemporary armed conflicts. Report' (October 2015) EN 32IC/15/11 at 24. See also Ferraro (n 24) at 594-5.

⁶⁵ Larsen (n 43) at 517.

⁶⁶ Nicholas Tsagourias, 'The Responsibility of International Organisations for Military Missions' in Marco Odello and Ryszard Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff 2011) at 253.

⁶⁷ *Saddam Hussein v. Albania et al.* App No. 23276/04 (14 March 2004) ECtHR 2004: "The Court considers these jurisdiction arguments to be based on submissions which are not substantiated. [...] The applicant did not address each respondent State's role and responsibilities or the division of labour/power between them and the US. He did not refer to the fact or extent of the military responsibility of each Division for the zones assigned to them. He did not detail the relevant command structures between the US and non-US forces except to refer to the overall Commander of coalition forces who was at all relevant times a US General. Finally, and importantly, he did not indicate which respondent State (other than the US) had any (and, if so, what) influence or involvement in his impugned arrest, detention and handover."

⁶⁸ Tsagourias (n 66) at 255. See also *Behrami and Saramati* (n 39), para 139: "The Court is not persuaded that TCN involvement, either actual or structural, was incompatible with the effectiveness (including the unity) of NATO's operational command. The Court does not find any suggestion or evidence of any actual TCN orders concerning, or interference in, the present operational (detention) matter".

the act. In a specific situation, the international organisation could be held responsible for the violation itself, as it took place under its effective control, and the state would be held responsible for not prosecuting the perpetrator.⁶⁹

Even though a state and an international organisation can have a shared responsibility over a certain violation committed in the context of a multinational peace operation, the responsibility does not necessarily mean that both entities would be parties to the armed conflict. There is still a reason to separate between the two questions of who is responsible for a certain conduct and who is a party to the armed conflict. The entity that is identified as a party to the conflict should naturally be presumed to be responsible for the acts of the troops. As shown above, this paper argues for the overall control test to be applied to identifying the party. The effective control test should be applied for attributing conduct to a state or international organisation if there is a reason to believe that the entity exercising overall control (and thus identified as the party to the conflict and consequently *prima facie* responsible) did not also exercise effective control.

5. Conclusions

Identifying the party behind an international peace operation is a complex matter dependent on both fact and law.⁷⁰ The paper concludes that an international organisation can be party to an armed conflict where a multinational peace force is one of the armed forces in the conflict. Four criteria need to be fulfilled for an entity to become party to an armed conflict. These are 1) international legal personality; 2) a level of organisation; 3) a responsible commander that exercises control and 4) the ability to respect the rules of IHL. Multinational operations of the UN and NATO were found to fulfil these criteria and consequently it was concluded that they could be identified as parties to armed conflicts.

Of the four criteria, the third one was the most complex and challenging to define. At the same time, this third criterion was the most crucial when identifying the party to the armed conflict. Because there is a lack of rules on the needed level of control in IHL sources, analogies were made to the law of international responsibility and military

⁶⁹ Tsagourias (n 66) at 255-6.

⁷⁰ Jann K. Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in Terry D. Gill and Dieter Fleck (eds), *The Handbook of International Law of Military Operations* (Oxford University Press 2010) at 53.

doctrine. As case law is fragmented, it makes the finding of an adequate control test challenging.

The conclusion of this paper is that the overall control test is better suited for the purposes of international humanitarian law. Based on this conclusion it was shown that the command and control structure in UN-led operations is such that the UN should be presumed to be the party in a conflict where a UN peace operation is in an armed conflict with a state or an armed group. Regarding NATO, it was found that because of the control structure, both NATO and the troop-contributing nations can fulfil the criterion of control and thus both entities could be identified as parties to an armed conflict.

The paper further discussed three different scenarios of identifying the party: the international organisation, the TCN or shared partyship. Instead of conclusiveness, all scenarios gave rise to further uncertainties. In armed conflicts where a multinational peace operation is fighting against a state or a non-governmental armed group, the identification of the party to the conflict is all but easy. Yet, to identify the parties is of utmost importance for international humanitarian law to fulfil its purpose. The limited attention that the question has received is visible in the many open questions that still remain.