Application of IHL to Peace Operations

Prof.dr. T.D. Gill
University of Amsterdam & Netherlands Defence Academy
Outline

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Nature, Function and Legal Basis

• Peace Operations are operations mandated by the UN Security Council, or by a competent regional organization acting in conformity with the UN Charter, to (assist in) maintain(ing) and restore(ing) international peace and security.

• Their legal basis lies in the UN Charter, in customary law and in the case of consensual peace operations, in host State consent.

• Their function can vary with the mandate and include tasks ranging from war-fighting to humanitarian assistance.
Types of Peace Operations

- Enforcement Operations mandated by the UNSC under Ch. VII UNC to restore international peace and security as a response to a breach of or serious threat to the peace (these are not “Peace Operations” as usually understood). e.g. Korea, Desert Storm, Libya

- Peace Enforcement Operations mandated by the UNSC under Ch. VII UNC to provide a stable environment and (sometimes) to assist a government in restoring its authority, e.g. UNIFET, IFOR, KFOR, MNFI, ISAF, MONUSCO

- Peacekeeping, Peace Making and Peace Building Operations to assist in maintaining or promoting a peace agreement, assisting in DDR, POC, maintenance of law and order, security sector reform, organization of elections, etc. e.g., UNAMID, UNMISS, UNIFIL, UNFICYP
Threshold of Applicability IHL

• The threshold of applicability of IHL is dependent on the facts on the ground. (Is there an armed conflict to which the UN (mandated) force is a party?
• The mandate is indicative, but not determinative in this respect.
• Threshold IAC is laid down in CA 2 Geneva Conventions
• Threshold NIAC is to be found in customary law (Tadic decision criteria).
• Even if there is an ongoing armed conflict, IHL will only apply to the mission if the mission is party to the conflict.
IHL in Enforcement Operations

• In Enforcement Operations such as the Korean and Gulf Conflicts, there is an IAC to which the mandated force is a party. These are not “peace operations”.

• Hence, IHL is applicable to all the States which are parties to the conflict (the States actively participating in the mission and the State(s) against which the mission is directed).

• The UN as mandating authority is not a party to the conflict, unless it is directly in control of the Mandated Force, which is not normally the case in such operations.

• To date, such operations have been under the command of a “lead nation” (USA in Korea and Gulf) or a designated organization (NATO in Libya).
IHL in Peace Enforcement Operations

• Given the function of peace enforcement operations, they may or may not constitute participation in an armed conflict.

• The mandate will usually give a clear indication if this is the case (e.g. UNSC resolutions mandating ISAF to use all necessary means to assist the Afghan Govt. to restore its authority over the entire territory against the Taliban and associated armed groups).

• Nevertheless, the determining factor is whether the mission is party to an armed conflict (usually a NIAC if this is the case).
IHL in Peace(keeping) Operations

• The mandates and function of most Peace Operations do not include participation of the Peacekeeping Force in an armed conflict.

• The bedrock principles of UN Peacekeeping are consent of the parties, impartiality and limited use of force. The presumption is that the peacekeeping force is not party to any armed conflict which may be or has been in progress.

• Nevertheless, in some occasions, the presence of these conditions is lacking and Peacekeeping Missions can become parties to an armed conflict if force is used against an organized adversary on a reasonably intensive and/or protracted basis. E.g. MONUC, UNOCI
Sources of Application of IHL

• All Troop Contributing Nations (TCNs) are bound to the IHL treaties to which they are parties.
• Customary IHL binds both the TCNs and the UN (and organizations such as the AU) as subjects of international law.
• Internal UN law (S.G. Bulletin 1999) is binding on the TCNs in non-enforcement missions as UN administrative regulations to which they have acceded.
Status of Participating Troops under IHL (1)

• In all situations in which a UN (mandated) force is party to an IAC, the troops participating in the mission have combatant status.

• In situations where a UN (mandated) force is party to a NIAC, they will have the status of “fighters” and often will operate alongside governmental forces (e.g. Afghanistan) and normally enjoy full immunity from local jurisdiction.
Status of Peacekeeping Forces

• Barring participation as parties to an armed conflict, UN (mandated) peacekeeping forces are protected civilians in IHL terms.

• This is regulated both in treaty law (1994 Safety Convention, Art. 8:2: e: iii Rome Statute ICC and customary law (Rule 33 ICRC CIHL Study).

• UN Peacekeepers normally enjoy complete immunity from local jurisdiction on the basis of agreement with the Host State. In the absence of agreement, they enjoy functional immunity as a matter of customary international law. The UN as an organization enjoys immunity from local jurisdiction.
Use of Force in Self-Defence and Defence of the Mandate and IHL

UN Peacekeeping Forces are normally mandated to use force in self-defence and armed attempts to interfere with the lawful discharge of the mandate.

This does not automatically signify that a use of force in such situations constitutes participation as a party to an armed conflict.

Only if the conditions laid down in IHL (level of organizied resistance, intensity and duration) are met does such use of force constitute participation and consequent loss of protection.
Summary

- IHL applies *ipso facto* to Enforcement Operations. These constitute IACs in IHL terms.
- IHL will apply to Peace Enforcement Operations conducted by UN (mandated) forces to the extent the conditions for participation as a party are met. The relevant regime will normally be that of a NIAC.
- IHL will not, in principle, apply to peacekeeping and other consensual peace operations- except if impartiality breaks down and the use of force in defence of the mandate rises to the level of participation in a NIAC, resulting in loss of protected status.