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**The anatomy of the war crime of attacking peacekeepers
under international humanitarian law and international
criminal law**

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THE ANATOMY OF THE WAR CRIME
OF ATTACKING PEACEKEEPERS
UNDER INTERNATIONAL
HUMANITARIAN LAW AND
INTERNATIONAL CRIMINAL LAW

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Abstract

This thesis is concerned with the analysis of the war crime of attacking peacekeeping missions under international humanitarian law and international criminal law. The Rome Statute of the International Criminal Court criminalises “(...) *intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict*”. However, the exact scope of application of this war crime is unclear and controversial due to the overlap of three different fields of international law: international criminal law, international humanitarian law and United Nations law. These distinct bodies of law have their own principles, objectives and logic and might not necessarily be in perfect harmony with each other at this particular point. Major complexities linked to it include the definition of a peacekeeping mission in accordance with the Charter of the United Nations, the status of peacekeeping personnel and objects under international humanitarian law, and the scope of peacekeepers’ right to self-defence. The central research question that this thesis addresses is about the compatibility of this war crime with the system of international law. This is answered in the affirmative.

The contribution to knowledge that this thesis offers relates to critical studies on international criminal law, international humanitarian law and the United Nations system. The thesis clarifies the scope of application of the war crime of attacking personnel and objects involved in a peacekeeping mission in accordance with the United Nations Charter. This is the first comprehensive analysis of the overlap of legal regimes with respect to this war crime, which can assist courts in application of the rules relating to the protection of peacekeeping missions.

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1. Introduction

Peacekeeping is not a soldier's job, but often only a soldier can do it.

Dag Hammarskjöld, The Secretary-General of the United Nations.

Since the establishment of the first peacekeeping mission in 1948, United Nations peacekeeping has evolved into one of the key tools used by the international community to manage complex crises that pose a threat to international peace and security. Not only has United Nations peacekeeping grown in size but also it has become increasingly multi-dimensional and robust.¹ The growing complexity of these peace operations has been raising troublesome questions concerning their legal, political and military aspects including the use of force by peacekeepers, the applicability of international humanitarian law or the protection provided to personnel in peace operations. The issue of protection has become the object of increased international concern in the 1990s, as attacks on United Nations personnel have escalated. The adoption of the Convention on the Safety of United Nations and Associated Personnel in 1994 was a landmark treaty in this regard with its inclusion of criminalisation of such attacks and the principle of prosecute or extradite.² Subsequent to the Safety Convention (it entered into force in 1999) the Security Council has repeatedly condemned attacks on UN and associated personnel and called on States to prosecute persons responsible for such attacks and welcomed “the inclusion [of such attacks] as a war crime in the 1998 Rome Statute of the International Criminal Court”.³ Following that, the Special Court for Sierra Leone adopted an identical provision in its Statute⁴ and this court was also the first one to

¹ United Nations, Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations, Principles and Guidelines* (2008) 6
<http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> accessed 1 February 2014

² O Swaak-Goldman, ‘Peacekeeping Operations and the International Criminal Court’ in G L Beruto (ed), *Conference Paper: International Humanitarian Law, Human Rights and Peace Operations - 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4-6 September 2008* (The International Institute of Humanitarian Law 2008) 268, 270

³ Security Council Presidential Statement UN Doc. S/PRST/2000/4

⁴ Article 4(b) of the Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone (Freetown, 16 January 2002)

apply it.⁵ Protection of peacekeeping missions is currently at the heart of international debate particularly in the context of recent developments in international criminal jurisdictions.⁶

This thesis will focus on the protection provided to UN peacekeeping missions under the legal framework of international humanitarian law and international criminal law. The semantics of the proposed research title is not incidental. The study will primarily be concerned with the anatomy of the war crime of attacking personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations as this crime is coined in the Rome Statute of the International Criminal Court. The analysis will therefore entail a detailed examination of this offence by resolving it into constitutive elements and scrutinising their interdependence in the light of different legal regimes brought into play by the drafters of the Statute. Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute criminalise in international and non-international armed conflict respectively:

⁵ *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Judgment Case no. SCSL-04-15-T, Trial Judgment (2 March 2009) [hereinafter: *RUF Judgment*]

⁶ The developments include: 1) The adjudicated case before the International Criminal Tribunal for Rwanda, *The Prosecutor v. Theoneste Bagosora* (ICTR-98-41-T) Trial Judgment (18 December 2008), in which the accused was charged, among other crimes, with crimes against humanity and war crimes in relation to the killings of Belgian peacekeepers serving under the UN Mission to Rwanda. The ICTR Statute does not specifically criminalise ‘intentionally directing attacks’ against peacekeepers and the charges covering this offence were brought under other provisions of the Statute. 2) The adjudicated *RUF* case before the Special Court for Sierra Leone, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-T) Trial Judgment (2 March 2009), in which the war crime of attacking peacekeeping missions was applied for the first time. 3) Two cases in the situation in Darfur, Sudan before the International Criminal Court, *The Prosecutor v. Bahar Idriss Abu Garda* (ICC-02/05-02/09) and *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (ICC-02/05-03/09) which concerned the war crimes allegedly committed in 2007 during an attack against the African Union Mission in Sudan, a peacekeeping mission authorised in accordance with the United Nations Charter. Pre-Trial Chamber I declined to confirm the charges in the first case of Mr. Abu Garda (8 February 2010) but subsequently it decided unanimously to confirm the charges against Mr Banda and Mr Jerbo (7 March 2011), and committed them to trial. Proceedings against Saleh Mohammed Jerbo Jamus were terminated by Trial Chamber IV on 4 October 2013 after receiving evidence pointing towards his death. On 11 September 2014, Trial Chamber IV issued an arrest warrant against Abdallah Banda Abakaer Nourain and vacated the trial date previously scheduled to open on 18 November 2014. 4) Two cases before the International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Radovan Karadžić* (IT-95-5/18-I) and *The Prosecutor v. Radko Mladić* (IT-09-92), in which both accused are charged, *inter alia*, with ‘taking hostages, a violation of the laws or customs of war’, which included taking hostage of UN peacekeepers. The ICTY Statute does not contain any specific provisions dealing with the ‘intentionally directing attacks’ against peacekeepers and the attacks against peacekeepers during the Balkan conflict have been subsumed under other provisions of the Statute. The trial of Radovan Karadžić commenced on 26 October 2009 and the trial of Radko Mladić commenced on 16 May 2012. At the time of writing both are still ongoing.

*“(...) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”.*⁷

The central research question to be investigated is whether or not the war crime of attacking personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations is compatible with the system of international law. In its present form the crime seems to conflate three different fields of public international law: the international law of armed conflict (or international humanitarian law), international criminal law and UN law.⁸ These distinct bodies of law have their own principles, objectives, logic and dynamic that might not necessarily be in perfect harmony to each other at this particular point. Firstly, peacekeeping is an area of discourse where semantics are often confusing.⁹ The same terms are used to depict slightly or fundamentally different phenomena as much as different terms are applied to the same or closely related activities. There is no single universally accepted definition of “peacekeeping”; this concept covers a variety of actions and grouping disparate cases under this single header is the best example of a phenomenological confusion and conceptual overlap. The Rome Statute itself does not provide a definition of a “peacekeeping mission in accordance with the Charter of the United Nations”, nor do the Elements of Crimes thereto prove helpful in this regard. Secondly, the exact scope of this war crime is unclear and controversial. It is not settled to what extent and under what conditions personnel and objects involved in a peacekeeping mission are entitled to the same protection as civilians and civilian

⁷ See the Elements of Crime to Articles 8(2)(b)(iii) and 8(2)(e)(iii), according to which this offence consists of seven elements: (1) The perpetrator directed an attack; (2) the object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; (3) the perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack; (4) such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict; (5) the perpetrator was aware of the factual circumstances that established that protection; (6) the conduct took place in the context of and was associated with an international armed conflict; and (7) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

⁸ UN law includes in particular provisions of the Charter of United Nations relating to *jus ad bellum* and the peacekeeping mandates.

⁹ D Daniel, ‘Wandering Out of the Void? Conceptualizing Practicable Peace Enforcement’ in A Morrison, D Fraser, J Kiras (eds), *Peacekeeping with Muscle: The Use of Force in International Conflict Resolution* (Brown Book Company Ltd. 1997) 2

objects. Firstly, it is not clear why all peacekeepers and peacekeeping objects should be given civilian protection in light of the fact that peacekeeping operations usually involve military personnel appropriately equipped with weapons and other objects of inherently military nature. These characteristics do not seem to match a general understanding of the notion of “a civilian”. The reference to the international law of armed conflict in Articles 8(2)(b)(iii) and 8(2)(e)(iii) does not help to resolve this issue as the international humanitarian law treaties do not address the situation of an armed conflict involving the United Nations, nor have they been specially drafted to apply to UN forces.¹⁰ Peacekeeping missions do not fit neatly into personal categories of international humanitarian law, as this is governed by the primary distinction between combatants and civilians¹¹, whereas peacekeeping forces seem to possess characteristics of both. Only combatants are allowed to participate in hostilities and they themselves can be attacked at any time, whereas civilians are entitled to protection from direct attacks “unless and for such time as they take direct part in hostilities”.¹² It is common knowledge that peacekeepers can use force in self-defence and in the fulfilment of their mandate; it is contentious though, when and how they can use such force before forgoing protection from direct attacks. Using force in self-defence does not qualify as direct participation in hostilities, hence it does not deprive civilians of the protection from targeting. However, the notion of self-defence has been extended under UN law and encompasses not only individual self-defence but also “the defence of the mandate”.¹³ Such understanding of self-defence is different from its usual meaning under international humanitarian law and international criminal law. Which definition should therefore be applied in the context under scrutiny? An additional difficulty is the lack of a precise legal definition of the notion of direct participation in hostilities and there is much controversy concerning the application of this term in practice.¹⁴

¹⁰ M Cottier, ‘War Crimes – para. 2(b)(iii)’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article* (2nd edition, Beck 2008) 330, 335

¹¹ Articles 1, 2, 3 of the Regulations to the 1907 Hague Convention IV, Article 4 of the 1949 Geneva Convention III, Articles 43, 44, 50, 51 of the 1977 Additional Protocol I

¹² Article 51(3) of AP I. The formal status of a “combatant” applies only to international armed conflicts, however the principle of distinction between combatants (understood in generic sense) and civilians applies to non-international armed conflicts as well. These issues are extensively explained in Chapter 4

¹³ UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 1) para. 34-35

¹⁴ The issue has been debated at great length by legal experts from military, governmental and academic circles, from international organisations and NGOs, all participating in their private

Despite the profound importance of the effective protection of peacekeeping personnel and the legitimacy of criminal prosecutions of potential offenders, little direct attention has been given to the legal and practical ramifications of ambiguities surrounding the basic concepts and precepts of this war crime. The difficulties with determining a legal status of peacekeeping personnel and qualifications of their actions under international humanitarian law, especially those involving the use of force, might lead to a situation where such identifications would be dependant on the *ius ad bellum* considerations and lead to extending their protection from direct attacks just because they represent the international community and “fight” for the right cause. This contradicts the fundamental separation between *ius ad bellum* (law governing the right to use force in international relations) and *ius in bello* (the law governing the conduct of hostilities) and it essentially affects the principle of equality of belligerents under the latter regime. The qualification of the conflict and the legality and objective of the resort to force shall not affect the application of international humanitarian law, nor may it be used to interpret its rules, even in case of the global organisation charged with the maintenance of international peace and security.¹⁵

These are only some of the vexing issues, which although tackled in the literature separately, have not been comprehensively dealt with in relation to each other and in the context of contemporary warfare and criminalisation of attacks on peacekeeping missions. Nor have problems concerning the modalities and conditions associated with this war crime emerged in (international) criminal proceedings yet. However, not asking questions about tensions intrinsic to this offence does not mean that the problems can be altogether avoided. They remain more than just potential and they

capacity, convened by the International Committee of the Red Cross. After six years of expert discussions and research, the ICRC released in 2009 the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. However, the document does not necessarily reflect a unanimous or majority opinion of the participating experts and given the modalities of direct participation in hostilities and consequences of such activities, the guidelines seem to further complicate the understanding of the notion; see further: N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009)

¹⁵ Many scholars regard the separation of *jus ad bellum* and *jus in bello* as “absolute dogma” – see: L Doswald-Beck, ‘International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’ (1997) 37 (35) *IRRC* 53; Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2005) 144

will have direct and serious implications for criminal litigations against the perpetrators before the International Criminal Court or any other court. These are critical deficiencies that fly in the face of one of the tenets of criminal law – the principle of specificity, which requires that criminal rules prohibiting certain conducts shall be detailed and specific in their scope and purpose. Indeterminacy of this war crime leaves too much to chance and speculation. A lack of clarity of the applicable standards, ambiguity of rules and incongruousness of overlapping legal regimes can undermine the legal protection of peacekeeping missions, observance of international humanitarian law and legitimacy of criminal prosecutions in this context as well as legal security, predictability and respect for international criminal law in general. UN forces cannot find themselves in a legal no man’s land trying to resolve whether or not their actions undertaken in the fulfilment of the mandate will result in a change of their status from that of civilian to that of combatant and therefore deprive them of civilian protection. Such decisions must often be taken in a hostile environment and stressful conditions. Needless to say, the importance of such determination is particularly pressing also for the opposite warring party risking criminal responsibility for committing a war crime of attacking civilians. If it indeed is a crime to engage in combat with UN forces exercising their “extended” right to use force in self-defence, which in circumstances other than peacekeeping would be regarded as direct military action, this can have a dramatic impact on belligerents’ willingness to respect international humanitarian law principles. “Reciprocity, while not a legal requirement, is a practical necessity”.¹⁶

The problem of the incongruousness of overlapping international legal regimes should be seen in a wider context of fragmentation of international law. Fragmentation is a result of “the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice.”¹⁷ Increasing geographic and functional differentiation has become problematic since specialised legal systems develop comparatively independently

¹⁶ R Murphy, ‘United Nations Military Operations and International Humanitarian Law: What Rules Apply To Peacekeepers’, (2003) 14 (2) Criminal Law Forum 153, 189

¹⁷ International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission Finalised by Martti Koskenniemi A/CN.4/L.682 13 April 2006) para 7ff [hereinafter: ILC, *Fragmentation of International Law*]; A Fisher-Lescano, G Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 Mich. J. Int’l L. 999

from each other and often also ignorant of the general principles and practices of international law. Fragmentation of law has its substantive as well as institutional form and the result, as put in the Report of the International Law Commission (known also as *Koskenniemi Report* after Martti Koskenniemi, the Rapporteur), “is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law”.¹⁸ The same issue might be regulated differently by rules belonging to different specialised regimes as much as various institutions might apply the same rules differently owing to the “differences in the respective context, object and purposes, subsequent practice of parties and *travaux préparatoires*”.¹⁹ The plausibility of such conflicts is intensified given the horizontal structure of international law with few hierarchical relations between rules and rule-systems and the decentralised nature of international law making. Yet, international law is still a legal system and as a system it is not just a random collection of norms. There is a presumption against normative conflict and it is a task of diplomacy and adjudication to regulate or establish meaningful relationships between the norms to make international law a coherent whole.²⁰

The purpose of this research is to analyse critically the substance of the war crime of attacking UN peacekeeping missions in its relation to overlapping legal regimes in order either to challenge its theoretical underpinning as being incompatible with the system of international law or to provide more clarification to axiomatic uncertainties related to it. In the course of this analysis, the study examines the tensions between different legal rules and principles that arise due to the criminalisation of attacks against peacekeeping missions in the Rome Statute. This research looks into what the law is and how it ought to be interpreted trying to remove as much of unpredictability from the equation as possible. Clear interpretative guidelines are needed since confusing law cannot impose an enforceable standard of criminal conduct. Effective protection of UN personnel, legitimacy and fairness of criminal proceedings in this context require sound legal foundations and accepted, well-articulated legal standards.

¹⁸ International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (n 17) para. 8

¹⁹ *Ibid.* para. 12

²⁰ *Ibid.* para. 37

1.1. Research questions

In order to answer the central research question on the compatibility of the war crime of attacking personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations with the system of international law, four core clusters of research sub-questions will be considered:

- (1) What is “a peacekeeping mission in accordance with the Charter of the United Nations” in Articles 8(2)(b)(iii) and 8(2)(e)(iii)?
- (2) What is the scope of the right to self-defence in the context of peacekeeping? When and how should peacekeepers use force to protect themselves and to protect their mission and mandate before they forgo the civilian protection?
- (3) What rules of international humanitarian law apply to peacekeeping operations? What is the status of personnel and objects involved in a peacekeeping mission under international humanitarian law?
- (4) How should the notion of direct participation in hostilities be interpreted in the context of peacekeeping operations? What modalities govern the loss of protection against direct attack?

The first research sub-question aims at delineating the precise scope of protection in Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute. Given the lack of definitions in the Rome Statute with regard to this war crime and the fact that, as already signalled in the introductory section, the concept of peacekeeping is flexible and fluid, this study will investigate what “a peacekeeping mission in accordance with the Charter of the United Nations” actually denotes. In order to satisfy the international criminal law requirement of specificity, it is important to answer this question so as to be able to distinguish peacekeeping missions from other missions as well as between those which are in accordance with the UN Charter and those which are not. The research focuses mostly but not exclusively on United Nations peace operations. A structured consideration is given to regional peacekeeping missions insofar as they may be captured under the relevant provisions of the Rome Statute. The reason why the focus is narrowed is because United Nations peacekeeping raises questions common also to regional peacekeeping whilst the latter brings additional issues such as the relation of the United Nations to regional organisations, which are

beyond the scope of the central research question on the compatibility of the war crime with the system of international law. While the focus will be placed on UN peacekeeping missions, humanitarian assistance missions will also be referred to where appropriate.

The second research sub-question intends to identify the exact scope of the right to self-defence in a peacekeeping context and in relation to the definition of self-defence in a criminal law context. The third research sub-question concerns the applicability of international humanitarian law to peacekeeping operations. Under the Rome Statute personnel and objects involved in peacekeeping missions are granted the protection given to civilians and civilian objects under the international law of armed conflict. It is critical to examine the scope of applicability of IHL to peacekeeping operations and to investigate the status of such personnel and objects with the aim of explaining whether granting them civilian protection is compatible with the basic precepts of that law. Lastly, and in connection with the previous questions, the notion of direct participation in hostilities needs to be examined and applied to a peacekeeping context.

All these research sub-questions are designed to address the tensions and overlaps of different legal regimes involved in the criminalisation of attacks against peacekeeping missions under the Rome Statute of the International Criminal Court with the end goal of either upholding or challenging its compatibility with the system of international law.

The study will start by conducting a literature review to identify and evaluate existing contributions on the topic. The literature review will provide the background and perspective to the thesis and will help to sharpen the focus with regard to research sub-questions.

1.2. Literature review

This section on literature review aims to examine the current legal debate concerning the war crime of attacking peacekeeping personnel and objects. The ultimate goal is

to evaluate critically the major contributions as they apply to the research sub-questions formulated above, to identify gaps or areas of controversy and flaws in methodology, so to demonstrate the need for further research to be conducted with the proposed methods.

Although the prohibition of attacks against peacekeepers does not represent a new concept, the war crime of attacking peacekeeping missions has not yet been comprehensively discussed in the literature so to inform present thinking of all the modalities it involves. As the preliminary synopsis in the introductory part of the dissertation has already revealed, the subject-matter is increasingly complex and encompassing such critical points as applicability of international humanitarian law to peace operations, the scope of peacekeepers' right to self-defence, the use of force in peace operations, or the notion of direct participation in hostilities as a condition stripping civilians of protection against targeting. None of these issues appear, in and of themselves, to be settled or sufficiently clear, yet they emerge even more problematic when combined in the context of criminal prosecutions of the attacks on peacekeeping missions. This section does not aim to summarise ample literature on the issues like the use of force or self-defence in peace operations separately and in isolation, although relevant works will be referred to individually in the course of writing. This literature review seeks to synthesize and to evaluate the scholarship that attempts to take up all or at least some of these concerns and questions in the context of criminalisation of attacks on peacekeeping missions on the premise that, since necessarily embroiled together by the conditionality of the crime, these synergies present new and different dynamics, which responsively influence meanings and sharpen interpretations. It gives an account of what is known and established and what entitles to investigate further and with the proposed methods.

The review starts with the studies on the 1994 *Convention on the Safety of the United Nations and Associated Personnel* (referred to hereinafter as “the UN Safety Convention” or “the Safety Convention”) and then it moves on to the war crime of attacking peacekeeping personnel and objects under the Rome Statute of the International Criminal Court.²¹

²¹ The war crime of attacking peacekeeping personnel and objects in the Rome Statute of the ICC was subsequently repeated in the Statute of the SCSL in exactly the same wording, although its scope of

The UN Safety Convention was the first criminal law instrument intended to prevent and punish deliberate attacks on United Nations personnel.²² The law of armed conflict proved inadequate to protect UN forces performing traditional noncombat peacekeeping functions in situations where the UN was not itself a party to the conflict. Scholars emphasise this critical gap in international law that the treaty was meant to fill.²³ The UN Safety Convention also formed a normative basis for the war crime of attacking peacekeeping missions in Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the International Criminal Court²⁴, afterwards repeated in Article 4(b) of the Statute of the Special Court for Sierra Leone. Although the war crime bases upon the UN Safety Convention, the relevant articles in the Rome Statute and the Statute of the Special Court do not repeat the wording of the provisions of the Convention and the scopes of application of these legal instruments necessarily differ. In more recent literature on the legal protection of peacekeeping missions, the UN Safety Convention and the Rome Statute are often discussed in parallel, yet the operational relationship between them has not been given a proper attention. The present author believes that such analysis is important precisely because of the overlapping, still not coinciding scopes of application. Moreover, the purpose of this thesis is to analyse the war crime of attacking peacekeeping missions under the

application was limited to the specific conflict that occurred in the territory of Sierra Leone. The scholarly interpretations of the war crime focus mostly on the Rome Statute as the first and original source.

²² Convention on the Safety of United Nations and Associated Personnel was adopted by resolution 49/59 of the General Assembly dated 9 December 1994. The Convention entered into force on 15 January 1999, in accordance with article 27 which reads as follows: "1. This Convention shall enter into force thirty days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession." Status (as of 30.04.2012): Signatories: 43; Parties: 89.

²³ C Greenwood, 'Protection of Peacekeepers: The Legal Regime' (1996) 7 *Duke J. Comp. & Int'l L.*, 185, 186; E Bloom, 'Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel' (1995) 89 *Am. J. Int'l L.* 621; S Lepper, 'The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis' (1996) 18 *Hous. J. Int'l L.* 359, 370; M Arsanjani, *Convention on the Safety of United Nations and Associated Personnel*, United Nations Audiovisual Library of International Law <http://untreaty.un.org/cod/avl/pdf/ha/csunap/csunap_e.pdf> accessed 5 May 2012

²⁴ M Cottier (n 10), 330; K Dorman, *Elements of War Crimes under the Rome Statute of the International Criminal Law. Sources and Commentary* (ICRC/Cambridge University Press 2003) 154, 453; M Bothe, 'War Crimes' in A Cassese, P Gaeta, J Jones (eds), *The Rome Statute of the International Criminal Court: a commentary* (Oxford University Press 2002) 410-412; D Frank, 'Article 8(2)(b)(iii) – Attacking Personnel or Objects Involved in A Humanitarian Assistance or Peacekeeping Mission' in R Lee, H Friman (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers 2001) 145

existing normative framework of which the Safety Convention is a part. Additionally, the critique of the Convention points at some issues of a more general or axiomatic nature, which are equally or at least to a great extent relevant for the war crime under the Rome Statute.

1.2.1. The Convention on the Safety of United Nations and Associated Personnel

To start with a more general comment, it has been noted that the Convention was negotiated within the exceptionally short period of one year, which is unusual for a document of “some complexity and political sensitivity”.²⁵ The fast pace at which it was adopted might be at least partially explained by the fact that many of its provisions are modelled on other international instruments.²⁶ Bouvier suggests that it could have also been due to international pressure and because of the haste to respond to the increasing fatalities of UN personnel in peace operations, the final text is not free from ambiguities as there was simply no time to revise the disputed articles.²⁷ The studies on the Convention focus in particular on its scope of application and the combatant exception to it, which both proved to be, as the legislative history reveals, particularly difficult and controversial object of the negotiations from the very outset.²⁸ The scope of legal protection under the Convention is relevant from the perspective of comparing it to the protection of peacekeeping missions under the Rome Statute.

Operations covered by the UN Safety Convention

Article 1 provides definitions of “United Nations personnel”, “associated personnel” and “United Nations operation” for the purposes of the Convention. The Convention does not define peacekeeping *per se*, only mentions it in the preamble. The treaty is applicable only to operations established by the competent organ of the United

²⁵ E Bloom (n 23), 621; see also: A Bouvier, ‘Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis’ (1995) 35 (309) IRRC 638

²⁶ See especially the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents and the 1979 International Convention against Taking of Hostages.

²⁷ A Bouvier (n 25) 638

²⁸ Ibid, M Bourloyannis-Vrailas, ‘The Convention on the Safety of United Nations and Associated Personnel’ (1995) 44 Int’l & Comp. L.Q. 560, 563; E Bloom (n 23) 622; O Engdahl, ‘Protection of Personnel in Peace Operations’ (2005) 10 International Peacekeeping: The Yearbook of International Peace Operations 408, 413-414

Nations and conducted under its *authority and control*. This stipulation has been subject to different interpretations. Shraga points at the term *authority and control* used instead of “command and control”. Since the former phrase points at the political direction rather than operational command, which is normally indicated by the latter phrase, she doubts whether two phrases mean exactly the same.²⁹ Also Lepper argues that *authority and control* could be construed to mean political rather than operational control.³⁰ Sharp claims the opposite, that the Convention applies to operations under command and control of the UN exclusively, which means that the protective regime does not cover the operations authorised by the Security Council but carried out under the command and control of one or more states. He believes this essentially creates a gap in protection of personnel serving the United Nations, given that the UN does not have its own armed forces and must rely on military force of its Member States who may prefer *authorised* operations to *directed* and *controlled* ones.³¹ Secondly, the Convention covers only certain types of UN operations: those established for the purpose of maintaining or restoring international peace and security or those declared by the Security Council or the General Assembly as exceptionally risky for the safety of their personnel.³² The interpretations of this limitation offered by the scholarship vary as to whether only Chapter VII or also Chapter VI operations are covered. Bloom and Arsanjani suggest that since the maintenance of international peace and security is the primary task of the Security Council, all operations authorised by the Security Council under either chapter, both peacekeeping and peace-enforcement, would automatically be covered.³³ Operations authorised by the General Assembly exercising its subsidiary responsibility for maintenance of international peace and security would also be covered if explicitly mandated with this purpose.³⁴ Other writers find this view a bit problematic. Greenwood rejects such automaticity arguing that unless an operation

²⁹ D Shraga, ‘The United Nations as an Actor Bound by International Humanitarian Law’ (1998) 5(2) *International Peacekeeping* 64, 75

³⁰ S Lepper (n 23) 391

³¹ W Sharp, ‘Protecting the Avatars of International Peace and Security’ (1996) 7 *Duke J. Comp. & Int’l L.* 146

³² See Article 1(c)(i) and (ii) of the Safety Convention. The Secretariat and some States were not happy with this restriction on other operations. They felt that for political reasons, neither the Security Council nor the General Assembly would make such a declaration, nor would troop-contributing States agree, for domestic political reasons, to send their troops to locations and operations which the Organization publicly declares as risky; see further: M Arsanjani (n 23)

³³ E Bloom (n 23) 623; M Arsanjani (n 23)

³⁴ E Bloom (n 23) 623

has been established under Chapter VII of the UN Charter, the purpose to maintain or restore international peace and security is not instantly clear from the text of the resolution, hence the coverage of the Convention in those cases is questionable and could eventually be curtailed.³⁵ Likewise, Sharp claims that the Convention does not offer any protection to UN humanitarian operations authorised under Chapter VI unless the Security Council or the General Assembly has made a declaration of exceptional risk.³⁶ The issue of the exact scope of Article 1(c) remains vague and this is problematic given the exclusion clause in Article 2(2) which further limits the scope of application of the Convention.

Applicability of international humanitarian law and combatant exclusion clause

The exclusion clause in Article 2(2) stipulates that the Safety 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.”

The problem of delimiting the material scope of the Safety Convention through this combatant exception is directly related to the question of applicability of international humanitarian law to UN forces and operations conducted by them.³⁷ At the time when the Convention was negotiated this question was still not resolved and subject to opposing interpretations by the ICRC and the UN.³⁸ The prevailing view in the scholarship, however, was that the law of armed conflict would apply to situation in which UN forces were involved in hostilities as combatants.³⁹ As according to Bloom who was personally involved in the negotiations:

“The negotiators realized that it was necessary to have a clear separation between the new legal regime under the instrument being drafted and the Geneva Convention, so that UN and associated personnel and those who attack them would be covered under one regime or the other, but not both. One important reason for this was to avoid undermining the Geneva Conventions, which rely in part

³⁵ C Greenwood (n 23) 196

³⁶ W Sharp (n 31) 146-147

³⁷ A Bouvier (n 25) 638; M Bourloyannis-Vrailas (n 28) 566-567

³⁸ A Bouvier (n 25) 638

³⁹ See Resolutions of the Institute of International Law on the *Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged* (1971) 54-II *Annuaire de L'Institute de Droit International*, reprinted in W Sharp, *United Nations Peace Operations: collection of primary documents and readings governing the conduct of multilateral peace operations* (American Heritage Custom Pub. Group 1995)

for their effectiveness on all forces being treated equally. It was widely held that the new Convention should not criminalize attacks on UN forces engaged as combatants in an international armed conflict, as this could (by making the very act of waging war against the United Nations a criminal offense, and thus favouring one side over the other) lessen the willingness of opposing forces to adhere to the laws of war.⁴⁰

Despite these sound declarations of the clear separation of the two regimes, the adopted text of the exclusion clause in Article 2(2) is not entirely unambiguous and it is criticised in the scholarship precisely for not making the two regimes mutually exclusive.⁴¹ Further analysis reveals certain obscurities. Shraga points again at the term *authorised* in Article 2(2) as either covering only operations conducted under command and control of the UN or *all* operations authorised by the Security Council even if conducted under national command.⁴² Another issue raised is that not all Chapter VII enforcement operations are excluded from the Convention's coverage but only those in which UN forces are acting as combatants against organised armed forces and to which the law of international armed conflict applies.⁴³ Therefore, as Bloom concludes, use of force by personnel of Chapter VII enforcement missions does not by itself set aside the Convention's protective regime if an armed confrontation is incidental and does not turn into protracted hostilities against organised armed forces.⁴⁴ At the same time, while Chapter VII operations are most likely scenarios to involve UN forces in hostilities, such an outcome cannot be excluded in cases of operations falling under Chapter VI. Greenwood observes that in all "non-Chapter-VII" operations UN personnel can use force in self-defence, which has been interpreted very broadly by the United Nations not only to defend persons but also property and the mandate, and which might lead to sustained fighting that passes the threshold of an armed conflict. If one accepts that the Safety Convention covers Chapter VI missions (which brings us back to the definition of UN operations covered by the Convention), a simultaneous application of international humanitarian law and the Convention would take place.⁴⁵ Such a result would be confusing, dangerous and contrary to the declarations cited above: the act

⁴⁰ E Bloom (n 23) 625

⁴¹ C Greenwood (n 23) 196; W Sharp (n 31) 148; D Shraga, 'The Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law: A Decade Later' (2009) 39 *Israel Yearbook of Human Rights* 357, 358

⁴² D Shraga (n 29) 76

⁴³ M Bourloyannis-Vrailas (n 28) 567-568; E Bloom (n 23) 625

⁴⁴ E Bloom (n 23) 625

⁴⁵ C Greenwood (n 23) 198

of killing UN or associated personnel acting as combatants in course of fighting would be a legitimate act of war and a crime under the Safety Convention at the same time. Bloom acknowledges the overlap of the two legal regimes in the self-defence scenario, but surprisingly he does not regard it as a problem. On the contrary, he claims that this overlap was intentional so “to ensure that peacekeepers do not lose the benefits of the Convention simply because they respond in self-defence and fighting ensues”.⁴⁶ He argues that it was done also for the sake of domestic courts reviewing such self-defence cases. Having difficulties in deciding which regime is applicable the courts might otherwise conclude that such attacks are covered by international humanitarian law and not by the Safety Convention.⁴⁷ In response to these arguments Sharp cogently remarks that they are contrary to what Bloom has himself declared as the pursued aim of Article 2(2) to safeguard application of one regime only. Moreover, Bloom’s arguments acutely indicate the lack of clarity of Article 2(2), which might cause confusion and problems with its implementation.⁴⁸

The saving clause in Article 20 seems to even strengthen this plausible overlap as it recognises that the operation of the Safety Convention shall not affect the applicability of international humanitarian law and human rights standards. There are two major implications of this provision. As Bourloyannis-Vrailas notes, it confirms that the operation of the Convention does not absolve UN and associated personnel from respecting rules of international humanitarian law and human rights law. In turn, these two regimes also confer certain rights on UN and associated personnel independently from the operation of the Convention.⁴⁹ If persons protected under the Safety Convention find themselves in the area of conflict while performing non-combatant functions, they are also protected as civilians under international humanitarian law.⁵⁰ Bouvier also notes the overlap of the Convention and international humanitarian law and argues that it only strengthens the protection of

⁴⁶ E Bloom (n 23) 626

⁴⁷ Ibid 625-626

⁴⁸ W Sharp (n 31) 152

⁴⁹ M Bourloyannis-Vrailas (n 28) 583

⁵⁰ Ibid

UN personnel. According to him, the Convention must be seen as belonging to *ius ad bellum*, which absolutely prohibits attacks on UN forces, and not *ius in bello*.⁵¹

A further issue discussed in relation to the exclusion clause in Article 2(2) is the stipulation that if any of the personnel of the enforcement action are engaged as combatants against organised armed forces and that the law of international armed conflict applies to this UN operation, the Convention ceases to operate for all personnel of the operation concerned. This includes also those military units, which were not anyhow involved in fighting as well as civilian components. While discussing the rationale of this provision Bloom refers to the statement of the U.S. delegation, which claimed that it would help participants in an operation as much as the other warring party to identify a legal regime they fell under so to conform their conduct accordingly.⁵² Engdahl further explains that this solution chosen by the drafters is based upon the nature of IHL, which only draws a distinction between civilians and combatants and not between the parties to the conflict.⁵³ Lastly, with regard to the exclusion clause, Engdahl notes that it will be difficult to decide at what point in time personnel of a peacekeeping operation become combatants in armed conflict, nor when the Convention becomes operative again.⁵⁴ Also Lepper points at the difficulties with the precise location of the dividing line between non-combat and combat in the case of UN forces sent to restore order through the gradual application of armed force.⁵⁵ The exclusion clause of the Convention is very specifically set forth and it seems relevant to contrast it with the Rome Statute, as the latter does not contain any similar stipulation. The question would be about the consequence of the loss of protection of some peacekeepers for the rest of the personnel of the mission.

⁵¹ A Bouvier (n 25) 638

⁵² U.S. Statement in the UN General Assembly at the adoption of the Convention on 9 December 1994, UN Doc. A/49/PV.84 at 15 (cited after E Bloom (n 23) 626)

⁵³ O Engdahl, 'The legal status of United Nations and associated personnel in peace operations and the legal regime protecting them', in G L Beruto (ed), *Conference Paper: International Humanitarian Law, Human Rights and Peace Operations - 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4-6 September 2008* (The International Institute of Humanitarian Law 2008) 126, 129

⁵⁴ Ibid; O Engdahl (n 53), 129

⁵⁵ S Lepper (n 23), 409

Impact on international humanitarian law

A serious critique of the Safety Convention concerns a negative impact it could have on international humanitarian law. It is submitted that the Convention indirectly raises the threshold for the applicability of the 1949 Geneva Conventions to UN operations since this threshold is one of the conditions of the Safety Convention ceasing to apply and the natural tendency would be to try to keep its more favourable regime in operation as long as possible.⁵⁶ The borderline is obviously Common Article 2(1) of the 1949 Geneva Conventions. The reference to this article was not included in the text of the Safety Convention, despite explicit proposals of some delegations, as it was considered dubious in the light of the United Nations not being party to the Geneva Conventions. The International Committee of the Red Cross also explicitly opposed it.⁵⁷ Greenwood remarks, that in any case the threshold for the applicability of Geneva Conventions and customary norms to UN forces shall necessarily be the same as to national forces, especially in the light of the equality of all parties to a conflict under international humanitarian law and the saving clause of Article 20 of the Convention discussed above.⁵⁸ In this context Sharp points out though that if Common Article 2 represents a customary norm and should apply without modifications to UN forces, the absurd result could be that a mere declaration of the state of hostilities by organised armed forces would trigger the application of international humanitarian law.⁵⁹ He also adds that the level of intensity of the exchange of fire between UN forces and attackers is undefined and it does not take into account a defensive nature of the use of force by UN personnel.⁶⁰ Paradoxically, the combatant exception clause in Article 2(2) of the Safety Convention might encourage potential attackers to apply full force to ensure the legality of their actions.⁶¹ This discussion of the threshold for the applicability of IHL is relevant also from the perspective of the war crime of attacking peacekeeping missions under the Rome Statute and the arguments raised above should be given a close analytical look in the context of that treaty.

⁵⁶ C Greenwood (n 23) 186, 199ff; W Sharp (n 31) 149-150

⁵⁷ A Bouvier (n 25) 638; S Lepper (n 23) 403

⁵⁸ C Greenwood (n 23) 202

⁵⁹ W Sharp (n 31) 150

⁶⁰ Ibid

⁶¹ Ibid

Self-defence

Non-use of force except in self-defence is one of the core principles of peacekeeping and it distinguishes it from enforcement.⁶² If force is not used for any other purpose, UN personnel do not lose their protected status. There is, however, a debate as to the limits of self-defence, which is interpreted very broadly by the UN⁶³ so to include defence of the mandate and “resistance to attempts by forceful means to prevent the force from discharging its duties under the mandate of the Security Council”.⁶⁴ While not providing a definition of self-defence, Article 21 of the Safety Convention contains a saving clause to the effect that nothing in the Convention “shall be construed so as to derogate from the right to act in self-defence”.⁶⁵ The initial joint draft proposal by New Zealand and Ukraine also contained a saving clause on self-defence but as a right of UN military personnel acting in accordance with relevant rules of engagement.⁶⁶ Other proposals that were not eventually included in the text either referred to the concepts of proportionality and abuse of right. Article 21 in its final shape does not specify to whom it applies. Lepper openly describes it as “extremely unclear”.⁶⁷ Bourloyannis-Vrailas presumes that it relates to UN and associated personnel.⁶⁸ The alternative understanding of this saving clause, a more controversial and – as remarked by Bloom - the one that would have been rejected by most delegations, is that the right to self-defence is recognised for all parties to the conflict, and it can be exercised also against UN personnel.⁶⁹ While Bourloyannis-Vrailas criticises this provision for its vagueness, she admits that in any case UN or associated personnel have – as has any individual – the right to self-defence, although this right is differently defined for combatants and for civilians.⁷⁰ Bloom also stresses that this saving clause does not in any event run contrary to the basic

⁶² UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 1) 31ff

⁶³ C Greenwood (n 23), 197; D Shruga (n 41), 359 and footnote 4 thereto; D Shruga (n 27), 65 and footnote 6 thereto; for a general discussion of the evolution of the use of force in self-defence and defense of the mandate see: T Findlay, *The Use of Force in UN Peace Operations* (SIPRI Publications, Oxford University Press 2002)

⁶⁴ UN Doc. S/12611; UN Doc. S/24540.

⁶⁵ According to Bourloyannis-Vrailas, both the brevity of this provision and the fact that self-defence was given a separate article reflects the fact that it was a highly contested issue during negotiations – see: M Bourloyannis-Vrailas (n 28), 586

⁶⁶ *Ibid*; S Lepper (n 23), 453

⁶⁷ S Lepper (n 23), 440

⁶⁸ M Bourloyannis-Vrailas (n 28), 586

⁶⁹ E Bloom (n 23), 630

⁷⁰ M Bourloyannis-Vrailas (n 28), 586-587

legal framework.⁷¹ In relation to international humanitarian law, Bloom notes that the use of force in self-defence by UN and associated personnel “in isolated cases, without sustained fighting” does not turn off the Convention’s coverage, as it does not result in engaging UN forces as combatants.⁷² According to Doria, it was understood during the negotiations of the Convention that armed incidents involving UN military personnel exercising their right to self-defence could not be considered “armed conflict” triggering the application of IHL.⁷³ Doria remarks that the concept of self-defence would be difficult to reconcile with the definition of an “armed conflict” as stipulated in Common Article 2 of the Geneva Conventions and further developed by the ad hoc Tribunals (*Tadic Jurisdiction decision*).⁷⁴ Shraga speaks of a so-called “double-key” test: the use of force – to quell disturbances, enforce law or in self-defence - would only trigger the applicability of IHL if the situation in the area of UN forces’ deployment has already been qualified as an armed conflict.⁷⁵ The limits of self-defence in the context of peacekeeping and criminalisation of attacks against peacekeeping missions are still open to the debate. The issue necessitates more attention and the present research aims at providing more clarification on the matter.

Type of armed conflicts covered by the UN Safety Convention

Another issue debated by scholars in reference to Article 2(2) concerns the plausible overlap with IHL with regard to the type of conflicts covered by this article. The exclusion clause explicitly talks of the law of *international* armed conflict. The commentators disagree on the interpretation of this provision. Greenwood, Lepper and Shraga states that it curtails the scope of application of the Safety Convention only in relation to international armed conflict, which necessarily implies that the Convention would continue to operate in the situation of internal armed conflict.⁷⁶ Lepper explains that the overlap was intentionally created as an exception to the general rule of separating the regimes in order to strengthen the level of protection of

⁷¹ E Bloom (n 23), 630

⁷² Ibid 625

⁷³ J Doria, ‘Attacks on UN and Regional Organisations Peacekeepers: Potential Legal Issues Before the International Criminal Court’ (2008) 5 Int’l Stud. J. 59

⁷⁴ Ibid

⁷⁵ D Shraga (n 41) 359

⁷⁶ C Greenwood (n 23) 199; S Lepper (n 23) 395; D Shraga (n 29) 76

personnel in internal armed conflicts.⁷⁷ It was emphasised during the negotiations that since there was no POW status in non-international armed conflicts, the legal protection of captured UN or associated personnel would be very poor, and for that reason the Convention should continue to operate.⁷⁸ Engdahl also acknowledges the overlap; at the same time however, he refers to the Secretary-General's Report of 2000 on the scope of legal protection under the Convention⁷⁹, which is confusing as the Report "clearly supported the interpretation that the regime of the Convention and that of international humanitarian law are mutually exclusive."⁸⁰ In this Report the Secretary-General concluded that it was not the nature or character of the conflict but the conduct of the members of UN peacekeeping operations which should determine the application of the UN Safety Convention or international humanitarian law. Engdahl notes that since individuals participating in non-international armed conflicts may be prosecuted under national law for acts which under the law of international armed conflict would be considered legitimate acts of war, an analogy can be drawn between criminalization of attacks on military personnel engaged in peace operations and participation in hostilities in a non-international armed conflict.⁸¹ Bouvier interprets this limitation of Article 2(2) differently submitting that if the UN intervenes in an internal armed conflict, it is not to help one of the parties but to implement the Security Council resolution in respect to all parties, hence the UN forces should be subject to the rules of international humanitarian law applicable to international armed conflict.⁸² In response to this argument Bourloyannis-Vrailas notes that there are situations where an enforcement action under Chapter VII is directed against a non-State entity and could not be governed by the law of international armed conflict. She does not conclude, however, why or why not such operation should be included in the Convention.⁸³

Prohibition of attacks and crimes covered by the UN Safety Convention

Article 7(1) of the Safety Convention prohibits the attacks on UN and associated personnel, their equipment and premises, as well as "any action that would prevent

⁷⁷ S Lepper (n 23) 395-396

⁷⁸ Ibid 395; O Engdahl (n 53) 130

⁷⁹ Report of the Secretary General, *Scope of legal Protection under the Convention on the Safety of United Nations and Associated Personnel*, UN Doc.A/55/637 (2000)

⁸⁰ O Engdahl (n 28) 414-415

⁸¹ Ibid 415

⁸² A Bouvier (n 25) 638

⁸³ M Bourloyannis-Vrailas (n 28), 586

them from discharging their mandate”. Article 9 lists the crimes covered by the Convention including murder, kidnapping or attack upon the official premises, as well as threats or any attempts to commit these crimes or participate as an accomplice. The crimes must be committed intentionally, which excludes negligence and also implies the attacker’s awareness of the victim’s association with the United Nations.⁸⁴ It is an interesting question whether the provisions of the Safety Convention, more detailed in respect of the attack and prohibited actions, can be used to interpret the relevant articles of the Rome Statute.

1.2.2. The Rome Statute of the International Criminal Court

The scholarship on the war crime of attacking peacekeeping personnel and objects under the Rome Statute of the International Criminal Court is not vast. The commentaries to the Rome Statute play a prominent role of standard reference sources and they feature in this section.⁸⁵ Written by eminent legal scholars and practitioners in the field of international criminal law, the commentaries give a detailed article-by-article analysis and, as far as necessary, an interpretation of the Statute and the “Elements of Crimes” in the light of the applicable law mentioned in Article 21 of the Statute. Another strength of the commentaries is that they often give account of the context in which provisions of the Rome Statute were adopted and in the light of the lack of an official record of informal meetings of the Rome Conference they prove an invaluable source of information on the drafting process or divergences of opinion among the delegations. These insights are complemented by journal literature, which tackles the war crime of attacking peacekeeping missions in the context of recent developments in international criminal jurisdictions. However, this review does not include the scholarship on the emerging jurisprudence of the SCSL, the ICC or other international criminal tribunals in relation to attacks on peacekeeping missions. This is done in the following chapters of the dissertation.

The commentaries are in agreement that Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute were inspired by the 1994 UN Safety Convention.⁸⁶ The 1996 *Draft*

⁸⁴ E Bloom (n 23) 628

⁸⁵ O Triffterer (n 10); R Lee, H Friman (n 24); K Dorman (n 24); A Cassese, P Gaeta, J Jones (n 24)

⁸⁶ M Cottier (n 10) 330; D Frank (n 24) 145; K Dorman (n 24) 154-159, 455; M Bothe (n 24) 410-412

Code of Crimes Against the Peace and Security of Mankind by the International Law Commission is also being mentioned in this context.⁸⁷ Cottier notes that the preparatory committees and the delegations at the Rome Conference initially intended to include attacks against peacekeeping missions as a “treaty-based crime”.⁸⁸ The debate over the content of the crime started only towards the end of the Conference and resulted in changing its qualification to a war crime. The scope of application was then extended to peacekeeping missions established in accordance with the UN Charter and humanitarian assistance missions.⁸⁹ Some commentators point out that Article 8(2)(b)(iii) does not criminalise any conduct which would not be already covered by the prohibitions of attacks on civilians and civilian objects in Articles 8(2)(b)(i) and (ii)⁹⁰ and therefore it may be questioned whether this provision is at all necessary.⁹¹ They admit though that it might still be helpful to explicitly criminalise attacks against peacekeeping missions as a serious crime of international concern, even at risk of detracting attention from the general protection of the civilian population and civilian objects.⁹² It has also been argued that this provision embodies customary international law.⁹³

Operations covered by the Rome Statute

It is noted that the war crime in fact addresses two different kinds of conduct: attacks against humanitarian assistance missions and attacks against peacekeeping

⁸⁷ Cottier points at Article 19 of the Code that criminalises attacks against United Nations and associated personnel.

Article 19: Crimes against United Nations and associated personnel

1. *The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:*

(a) *murder, kidnapping or other attack upon the person or liberty of any such personnel;*

(b) *violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.*

2. *This article 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.*

See further: M Cottier (n 10) 331

⁸⁸ See: Zutphen Draft U.N. Doc. A/AC.249/L.13, (1998)

⁸⁹ M Cottier (n 10) 330

⁹⁰ Ibid; D Frank (n 24) 145

⁹¹ M Bothe (n 24) 410

⁹² Ibid 411; see also: M Cottier (n 10) 330

⁹³ G Werle, *Principles of International Criminal Law* (T.M.C. Asser Press 2005) 380; see also: J-M Henckaert, L Doswald-Beck, *Customary International Humanitarian Law* (ICRC 2005) Rule 33

missions.⁹⁴ As already remarked, the Rome Statute and the Elements of Crimes thereto do not define these two types of operations. Cottier concludes that the negotiators at the Rome Conference apparently relied on the international standards and practices of humanitarian assistance and peacekeeping developed in the UN system.⁹⁵ In explaining the characteristics of peacekeeping operations the commentaries refer to UN publications including official documents such as the UN Secretary General's report *Agenda for Peace* and a *Supplement* to it, as well as the literature on the topic.⁹⁶ The core principles of peacekeeping: consent, impartiality and non-use of force except in self-defence are highlighted and on that basis traditional peacekeeping is being differentiated from enforcement.⁹⁷ The commentators note the practice of "robust" or "wider" peacekeeping missions but they do not proceed with the analysis as to whether personnel and objects of such peacekeeping missions are subsumed under the term "peacekeeping" in the Rome Statute.⁹⁸ With regard to the phrase "involved in [mission] in accordance with the Charter of United Nations" Cottier emphasises that it was intended to limit the scope of personal application to persons taking part in or otherwise associated with a mission in question, and not just present in the area or associated with the sending organisation.⁹⁹ By reference to the preparatory works he concludes that the negotiations at the Rome Conference concentrated on UN missions exclusively.¹⁰⁰ This all seems insufficient to precisely define the personal scope of protection of Articles 8(2)(b)(iii) and 8(2)(e)(iii). Firstly, the operational relationship between the UN Safety Convention and the Rome Statute has not been properly addressed, especially as to whether the Convention's definitions can be used to interpret "a peacekeeping mission in accordance with the Charter of the United Nations". To this end it would be useful to examine the preparatory works to investigate the circumstances in which the link to "treaty crime" was removed from the text of the Statute. Secondly, the commentators unorthodoxly focus on UN "traditional" peacekeeping operations while the question whether or not the provisions of the ICC

⁹⁴ K Dorman (n 24) 154

⁹⁵ M Cottier (n 10) 333

⁹⁶ Ibid 333-334 and footnotes thereto; K Dorman (n 24) 157; J Doria (n 73) 38-39; M Bangura, 'Prosecuting the Crime of Attack on Peacekeepers: A Prosecutor's Challenge' (2010) 23 *Leiden J. of Int'l L.* 168

⁹⁷ M Cottier (n 10) 333-334; J Doria (n 73) 38; M Bangura (n 96) 168

⁹⁸ M Cottier (n 10) 334; M Bangura (n 96) 173-174

⁹⁹ Ibid

¹⁰⁰ Ibid and footnote 235 thereto; see also: Zutphen Draft U.N. Doc. A/AC.249/L.13, (1998)

Statute cover also “robust” peacekeeping missions with the extended mandates on the use of force is still open to the debate. The present author considers it a major gap in the literature, which needs to be addressed. Lastly, the phrase “in accordance with the Charter of the United Nations” has not been properly analysed. It is not clear whether it should be interpreted in line with the UN Safety Convention and limit the scope of protection under the Rome Statute to peacekeeping missions established by a competent organ of the United Nations or cover also peacekeeping missions established by regional organisations.

Applicability of international humanitarian law and combatant exception

According to the commentaries to the Rome Statute the reference to the international law of armed conflict was made to address such situations where a peacekeeping mission becomes embroiled in an armed conflict and its personnel engage as combatants.¹⁰¹ When that happens, they lose protection against direct attacks. The commentators link this general condition to Article 2(2) of the UN Safety Convention, which in similar manner limits the scope of application of the Convention.¹⁰² Similarly to the Safety Convention, the problem of delimiting the material scope of the combatant exception under in Articles 8(2)(b)(iii) and 8(2)(e)(iii) is related to the question of applicability of international humanitarian law to United Nations forces. This seems to be a reoccurring and still not completely settled theme despite the issuing of *the Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law*.¹⁰³ Cottier notes that, while it may be assumed that if personnel of a peacekeeping mission engage as combatants they cannot benefit from a civilian protection, there is no equally simple inference of the entitlement to such civilian protection from non-involvement of UN peacekeeping forces in hostilities. Peace operations are relatively recent phenomenon

¹⁰¹ For general conditions for protection of civilians and civilian objects see Articles 51(3) and 52(2) of the AP I

¹⁰² K Dorman (n 24) 159; M Cottier (n 10) 335-336. For further analysis of the UN Safety Convention see the preceding section.

¹⁰³ As the Bulletin stipulates in Section 1.1, the fundamental principles of international humanitarian law that it encompasses are applicable to UN forces acting as combatants in situations of armed conflicts, to the extent and for the duration of their engagement. They are applicable in enforcement actions, or in peacekeeping operations when the use of law is permitted in self-defence. At the same time, the Bulletin states that it “does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status of non-combatants as long as they are entitled to the protection given to civilians under the international law of armed conflict”.

and UN forces do not fit neatly in the categories of international humanitarian law, which was drafted without taking into account the peculiarities of peacekeeping missions.¹⁰⁴ Shraga explicitly speaks of a dual character of military members of UN operations, being both “civilians” and “combatants” depending on the circumstances.¹⁰⁵ Having pointed at the challenges to the status of peacekeepers under IHL, Cottier still justifies granting them the rights and privileges of civilians by reference to the *Karadžić/Mladić* Indictment by the International Criminal Tribunal for the former Yugoslavia, which affirmed that peacekeeping personnel enjoyed the status of protected persons under the 1949 Geneva Conventions.¹⁰⁶ Why this indictment should form such a strong argument in favour of the civilian status Cottier does not explain.¹⁰⁷ Although the attempts to define the status of peacekeeping personnel are welcome, they have not exhausted the topic, which necessitates a further and more thorough analysis. As to the status of objects involved in peacekeeping operations, regrettably, none of the commentators discuss the conditions for granting them the protection of civilian objects. The present study intends to remedy these deficiencies.

Self-defence

Although peacekeeping missions are not authorised to use offensive force, they are still entitled to use force in self-defence. As already mentioned, self-defence is interpreted very broadly by the United Nations. Peacekeeping personnel can use force in individual self-defence and in defence of the mandate¹⁰⁸ and that varies depending on the tasks being included. The commentaries to the Rome Statute do not provide any actual guidance as to the impact the expansion of self-defence has on the scope of application of Articles 8(2)(b)(iii) and 8(2)(e)(iii). Similarly to the Safety Convention such identification is crucial for the issue of direct participation in hostilities and the loss of protection from direct attacks.¹⁰⁹ According to Cottier any determination of the entitlement of peacekeepers to the protection will largely

¹⁰⁴ M Cottier (n 10) 335

¹⁰⁵ D Shraga (n 41) 377

¹⁰⁶ ICTY, *The Prosecutor v. Karadžić and Mladić*, Case no. IT-95-5-I, Initial Indictment (24 July, 1995)

¹⁰⁷ M Cottier (n 10) 336

¹⁰⁸ UN, *United Nations Peacekeeping Operations Principles and Guidelines* (n 1) 31ff

¹⁰⁹ A Gadler, ‘The Protection of peacekeepers and International Criminal Law: Legal challenges and Broader Protection’ (2010) 11(6) *German Law Journal* 585, 597

depend on the circumstances of the use of force.¹¹⁰ However, such “I know when I see it” approach is far from being either adequate or satisfactory. Furthermore, the conditions of self-defence as delineated for relief and medical missions in the humanitarian law treaties differ from those applied to peacekeeping missions under UN law. Covering these two types of operations – humanitarian assistance and peacekeeping missions - by one and the same provision could mean that the standards for the entitlement to protection shall somehow be equated. If this is not the case, the particularly pressing question, which the commentaries do not tackle is how to explain unequal treatment of both types of missions and somehow disparate standards of civilian protection not justified by international humanitarian law.

Another issue tackled in the literature concerns measures that may be taken in self-defence. Cottier suggests that if a peacekeeping mission uses force in self-defence but to a degree that essentially equates to the offensive force, it would forgo the civilian protection.¹¹¹ He does not, however, discuss the threshold of such offensive force or the point in time when civilians become combatants. Doria also dwells on the issue of measures taken in self-defence and inquires whether under certain circumstances they may pass the boundaries of legitimate self-defence and make peacekeepers lawful targets.¹¹² He dismisses the intensity and the type of weapons used as criteria invalidating the protected status of UN forces or justifying the second right of self-defence of the initial attackers, provided that the conditions of proportionality and imminence are met.¹¹³ Although self-defence of medical or civil defence personnel is limited in the IHL treaties to the use of light weapons, the *1999 Secretary-General’s Bulletin* allows for the individual as well as collective self-defence of peacekeepers, which according to Doria is plausible to entail non-light weapons. In Doria’s opinion, a collective self-defence has already been accepted as a right under *ius in bello* and the fact of being forced to use non-light weapons to exercise self-defence and defence of those under the responsibility of peacekeepers should not deprive the latter of the protected status. Killing UN peacekeepers in such circumstances would qualify as an unlawful attack.¹¹⁴ Doria starts his analysis of

¹¹⁰ M Cottier (n 10) 336

¹¹¹ Ibid 336-337

¹¹² J Doria (n 73) 61

¹¹³ Ibid 61-62

¹¹⁴ Ibid 62-63

self-defence from the perspective of the Safety Convention and finishes with the reference to Article 31(1)(c) of the ICC Statute. Under this article of the Rome Statute, if reasonably exercised “against an imminent and unlawful use of force in a manner proportionate to the degree of danger” to defend oneself, another person, or property essential for survival or for accomplishing of a military mission, self-defence is one of the grounds excluding criminality.¹¹⁵ The disparity between limits of self-defence in the civilian and military contexts as well as under UN law and criminal law is signalled but not really addressed. In particular it is not discussed which definition of self-defence shall apply to peacekeepers.

Other commentators hesitate whether the defence of the mission’s mandate still amounts to self-defence under IHL.¹¹⁶ As an argument against equating the two concepts Gadler refers to *the ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* which gives as an example of legitimate self-defence not constituting direct participation in hostilities “the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers.”¹¹⁷ Such understanding of self-defence does not depart from its usual meaning under criminal law. Regrettably, the author does not discuss the ICRC Guidelines on direct participation in hostilities in any more detail, although it would be most relevant for delineating the scope of protection of peacekeepers as civilians.

Direct participation in hostilities

The use of force in self-defence by peacekeepers ties in with the paradigm of taking direct part in hostilities. Their civilian protection against direct attacks would definitely cease “for such time as they take direct part in hostilities”.¹¹⁸ Dorman basically repeats this phrase, which seems simple and sufficiently straightforward but in fact it does not envisage anything concrete. There is no precise legal definition of the notion of direct participation in hostilities and there is much controversy

¹¹⁵ Ibid 63

¹¹⁶ O Engdahl (n 28) 98, 103; A Gadler (n 109) 591

¹¹⁷ A Gadler (n 109) 591; see also: N Melzer (n 14) 61

¹¹⁸ Art. 51(3) of the Additional Protocol I

concerning application of this term in practice.¹¹⁹ Only one of the commentaries to the Rome Statute explicitly points at this grey area without, however, any further elaboration on the problem.¹²⁰ Although it is not expected that the commentators would come with a viable solution to the question of direct participation in hostilities as *obiter dicta*, it would be welcome if they at least try to locate the issue in a peacekeeping context, especially as it conditions the scope of protection of peacekeeping missions under the Rome Statute. Although it is likely to be the nub of the concern how to make the limitation in Articles 8(2)(b)(iii) and 8(2)(e)(iii) workable in practice, there is regrettably almost no mention in the commentaries¹²¹ of the heated debate concerning clarifying the notion of direct participation in hostilities. Similarly unresolved is the issue whether or not all personnel and objects involved in a peacekeeping mission would lose protection or only those factually involved in hostilities. This issue has been raised already in the preceding section on the UN Safety Convention. The need for clear standards as to the qualification of peacekeepers' actions in fulfilment of their mandate appears imperative and this thesis aspires to investigate it further.

Type of armed conflicts covered by the Rome Statute

The twin Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute prohibit intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter in international and non-international armed conflicts respectively. This comprehensive application in both types of armed conflict silences the discussion raised in relation to the UN Safety Convention. Both

¹¹⁹ The issue has been debated at great length by legal experts from military, governmental and academic circles, from international organisations and NGOs, all participating in their private capacity, convened by the International Committee of the Red Cross. After six years of expert discussions and research, the ICRC released in 2009 the "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law". However, the document does not necessarily reflect a unanimous or majority opinion of the participating experts and given the modalities of direct participation in hostilities and consequences of such activities, the guidelines seem to further complicate the understanding of the notion; See further: N Melzer (n 14); see also jurisprudence of the ICTY e.g. *The Prosecutor v. Zlatko Aleksovski* (IT-95-14/1), *Prosecutor v. Dragoljub Kunarac et al.* (IT-96-23 & 23/1), the ICTR e.g. *Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4-T), *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (ICTR-96-3-T) and the Israeli Supreme Court *Public Committee Against Torture in Israel v. Israel* (HCJ 769/02).

¹²⁰ M Cottier (n 10) 336

¹²¹ Gadler mentions the ICRC Interpretative Guidance On the Notion of Direct Participation in Hostilities in context of defining self-defence. She does not, however, discuss any further the modalities governing the loss of protection or practical dilemmas surrounding application of the concept; see: A Gadler (n 109); see also: N Melzer (n 14)

articles are formulated in exact the same way and there is no indication in the ICC Statute that this crime has different special constituent elements in an international or non-international armed conflict.¹²²

Meaning of the attack

The term “attack” is not defined in the Rome Statute or the Elements of Crimes but the commentators do not differ much in their interpretations. Dorman and Bourloyannis-Vrailas refer to Article 49(1) of the 1977 Additional Protocol I to the 1949 Geneva Conventions, which defines “attacks” as “acts of violence against the adversary, whether in offence or defence”¹²³. The concept of attack denotes the use of armed force to carry out a military operation during the course of armed conflict, hence the meaning of the terms “offence” and “defence” is independent from the one under the UN Charter and recourse to force.¹²⁴ Cottier also prefers a “strict Hague law interpretation” and argues that attacks against the person or liberty of civilians (including peacekeepers) can further be charged as grave breaches under Article 8(2)(a) of the Rome Statute.¹²⁵ If, however, the meaning of attack should go beyond this strict interpretation, it would still be preferable to limit it to certain specific offences as it is done in the case of the UN Safety Convention.¹²⁶ Werle favours this broader interpretation of the attack although still in line with the API.¹²⁷ Bothe refers to Article 9 of the UN Safety Convention arguing that since the word “attack” is used there in similar context, the war crime in the Rome Statute could be co-extensive to the list of offences in Article 9.¹²⁸ Referring to the preparatory works Dorman stresses that the Preparatory Committee refused to require that the attack must have a particular result as in the case of Articles 8(2)(b)(i) and 8(2)(b)(ii).¹²⁹ Bangura similarly concludes that a mere interference with the mission’s activities through any

¹²² K Dorman (n 24) 454; A Zimmermann, ‘War Crimes – para. 2(e)(iii)’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article* (2nd edition, Beck 2008) 494

¹²³ M Bourloyannis-Vrailas, ‘Crimes Against United Nations and Associated Personnel’ in K McDonald, O Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: Commentary* (Kluwer Law International 2000) 363

¹²⁴ K Dorman (n 24) 156

¹²⁵ M Cottier (n 10) 337

¹²⁶ Ibid 337-338

¹²⁷ G Werle (n 93) 382

¹²⁸ M Bothe (n 24) 410

¹²⁹ K Dorman (n24) 153-154

act of violence, irrespective of its consequences, is punishable.¹³⁰ The attack against personnel and objects involved in a humanitarian assistance or peacekeeping mission has to be carried out intentionally.¹³¹ This element of crime of attacking peacekeeping missions seems to be the least controversial. The bottom line of interpreting the notion of “attack” is the meaning given to this term under the 1977 Additional Protocol I and without the requirement of any material result or harmful impact.

Summary

The Convention on the Safety of the United Nations and Associated Personnel was welcomed as the new criminal law document specially tailored to protect peacekeeping personnel. It has also prepared ground for the war crime of attacking peacekeeping missions under the Rome Statute of the International Criminal Court. The protection of the UN Safety Convention is selective though and the treaty is not considered totally flawless in the eyes of the commentators. There are many questions raised in connection to its personal, material and temporal scope of application and only few answered. The war crime under the Rome Statute did not bring much clarification on these matters as it came with its own phrasing, conditionality and the scope of application, which all require interpretation.

The review of academic contributions about the criminalization of attacks on peacekeeping missions reveals that none of the research sub-questions has so far been properly addressed. Firstly, the personal scope of legal protection provided by Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute still needs to be analysed. In particular, the concept of “a peacekeeping mission in accordance with the Charter of the United Nations” requires a comprehensive interpretation especially in respect to “robust” peacekeeping missions and missions established by regional organisations. Secondly, the precise scope of peacekeepers right to use force in self-defence needs to be examined as one of the defining characteristics of peacekeeping (non-use of force except in self-defence) that distinguishes it from enforcement but also as a condition of their civilian protection. In this connection the scope of applicability of

¹³⁰ M Bangura (n 96) 177. Bangura refers to the pronouncement of the SCSL, which adopted the definition of attack in Art. 49(1) of API (RUF Judgment para. 220). The ICC followed this interpretation as well (Abu Garda Confirmation of Charges Decision, para. 65)

¹³¹ See: The Elements of Crimes to the Rome Statute

the international law of armed conflict to peacekeeping operations and in particular the status of peacekeeping personnel and objects as well as qualification of “the defence of the mandate” under this legal regime call for a thorough analysis.

Most contributions presented in this section are notable for their formal theoretical approach, which might be justified in the light of a relative newness of the war crime of attacking peacekeeping missions and scarceness of case law. The overlap of legal regimes is noted, but not examined. The commentators either subject substantive matters to conflicting interpretations or simply abandon them as controversial and leave to practitioners and judges to test. As apparent from the literature review, many concepts do not have fixed or monolithic meanings; they can be interpreted differently with different outcomes. Language is by its very nature ambiguous and its interpretation depends on a textual context. The normative context also impacts on the interpretation of concepts and rules, while the final application of law depends on factual circumstances. All the above necessitates the analysis of law to be done with care and on many levels. An exercise of spotting examples of certain concepts in different legal regimes is pointless if not accompanied by an in-depth systemic legal analysis and contextual sensitivity. Moreover, the concepts often are interrelated (e.g. use of force in self-defence v. direct participation in hostilities), hence a particular understanding of one issue necessarily influences an interpretation of another. It is also important to keep in mind that law as well as case law are constantly evolving.

Based on the presented background, the definition of the problem and the literature review, the present study will now move on to proposing a methodology for the study.

1.3. Methodology

“Methods are not simply techniques that can be used in obtaining facts about the social world, but are always used as part of a commitment to a theoretical perspective, even if this is not discussed explicitly in a research project.”¹³²

¹³² R Banakar, M Trawers (eds), *Theory and Method in socio-legal research* (Hart Publishing 2005) 19

This section performs two main functions. First, it aims at providing a theoretical framework that will guide the research and connect all its aspects. Second, it explains the research methods chosen to best answer the research questions through the proposed framework.

1.3.1. Theoretical framework

The broad theoretical perspective has already been implicated in the introductory part of this chapter at the level of problem statement and description of a normative background. Since the problem is always a function of its framework, it can be understood if its basic system is well articulated and understood. Theoretical framework adopted for this research builds upon the concepts of modern legal positivism and international legal process.

Legal Positivism

Legal positivism is a theory of law stemming originally from English jurists Jeremy Bentham and John Austin. Its principal postulate is that the existence and content of law depends on social facts and not on its merits, thereby advocating for a strict separation of issues of legal validity from questions of morality. Austin's command theory viewed law as commands from a sovereign, backed by a threat of sanction. This primary thesis on the criteria of legal validity has been modified over time. Most prominent philosophers of revisited positivism are Hans Kelsen and Herbert L.A. Hart. They regarded law as a normative and hierarchical system of rules and both contributed to the development of the rule-based approach to law.¹³³ Kelsen's most important input is his "pure theory of law" with the idea of "basic norm" (*Grundnorm*). Hart's theory builds upon a critique of his predecessors. Diverting from Austin's command theory, influenced by Kelsen, though rejecting several tenets of his theory too, Hart introduced the principle of rules of recognition.¹³⁴ Legal positivism has taken a variety of forms, yet the classic strand can roughly be recapitulated as constituted by three theoretical commitments: (i) the Social Fact

¹³³ H Hart, *The Concept of Law* (Oxford University Press 1988); H Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press 2001)

¹³⁴ B Brix, *A Dictionary of Legal Theory* (Oxford University Press 2004) 120-124

Thesis, (ii) the Conventionality Thesis, and (iii) the Separability Thesis.¹³⁵ Legal positivism postulates that the existence of law is a social fact independent from its merits. It emphasises the conventional nature of law, that it is a matter of what has been posited i.e. ordered, decided, practiced, tolerated, etc. (the word "positivism" itself derives from the Latin root *positus* which means to posit, postulate). Law is synonymous with positive norms that are norms made by the legislator or considered as common law or case law. Legal positivism sets up criteria for legal validity, which is the particular mode of existence of norms and includes provisions for making, changing and adjudicating law, i.e. law becomes valid through a social practice of recognition.¹³⁶ Rules derived from recognised sources and duly enacted are an "objective reality" which has to be distinguished from extra-legal arguments such as moral principles and political ideologies. Law is judged by the way in which it has been created. There is no inherent or necessary correlation between the validity conditions of law and ethics or morality. There is a clear distinction between the law "as it is" and the law "as it should be", *lex lata* and *lex ferenda*.¹³⁷

The crime of attacking peacekeeping missions has been presented in the introductory section as a theoretical construct conflating different branches of public international law and thereby rising troublesome questions as to its compatibility with the system of international law as a whole. Such formulation of the problem reflects certain theoretical presuppositions as to the nature and structure of international law. International law has been presented within a paradigm of a legal positivism as a social construct, which existence and content depends on social facts or processes, which has its acknowledged sources and participating subjects. International rules derive from either treaties or custom and are an emanation/embodiment of states' will.¹³⁸ The international legal system is relatively harmonized despite being composed of geographically and functionally specialized rule-complexes. A

¹³⁵ K Himma, 'Philosophy of Law', *Internet Encyclopedia of Philosophy* <<http://www.iep.utm.edu/law-phil/>>

¹³⁶ See: H Hart (n 133)

¹³⁷ B Brix (n 134); L Green, 'Legal Positivism', *The Stanford Encyclopedia of Philosophy* (Winter 2003 edition) <<http://plato.stanford.edu/entries/legal-positivism/>>; K Himma (n 135); B Simma, A Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: Positivist View' in S Ratner, A-M Slaughter (eds) 'Symposium on Method in International Law' (1999) 93 *Am. J. Int'l L.* (hereinafter: 'Symposium') 302, 304

¹³⁸ L Green (n 137); K Himma, 'Legal Positivism', in J Fieser, B Dowden (eds), *Internet Encyclopedia of Philosophy* <<http://www.iep.utm.edu/legalpos/>>

fragmented structure of international law has already been brought into perspective of this study in the introductory part.

Fragmentation of international law was under consideration of the United Nations International Law Commission, which aimed at preparing a study on specific aspects of this phenomenon “to assist international judges and practitioners in coping with the consequences of the diversification of international law”.¹³⁹ In 2006 the Commission completed its work and adopted the report containing 42 conclusions¹⁴⁰ and the analytical study on which these conclusions were based.¹⁴¹ As noted in the study, fragmentation of international law in itself is not a new occurrence. The geographic and functional differentiation is a characteristic of international modernity and globalisation. Paradoxically, increasing uniformization of social life has resulted in its increasing specialisation and fragmentation of social action and structure, which finds its reflection also in law on both national as well as international levels. New types of specialized law emerge to meet new technical and functional demands and they reflect the differing pursuits and preferences of actors in a pluralistic global society.¹⁴² As the International Law Commission remarks, functional fragmentation is “an incident of the diversity of the international social world - a quality that has always marked the international system, contrasting it to the (relatively) more homogenous domestic context” and although it presents new features and intensity now, “[it] is not too different from traditional fragmentation into more or less autonomous territorial regimes called ‘national legal systems’.”¹⁴³ For that reason, the Commission turned to the well-known legal interpretative techniques for dealing with normative collisions. A conceptual framework for analysis was provided by the 1969 Vienna Convention on the Law of Treaties (VCLT) on the premises that most of the new regimes claim their binding force from

¹³⁹ More information on the background of the Commission’s work available at: <http://untreaty.un.org/ilc/summaries/1_9.htm>

¹⁴⁰ *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* were adopted by the International Law Commission at its Fifty-eighth session in 2006 and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10) para. 251. The report appeared in Yearbook of the International Law Commission, 2006, vol. II, Part Two and is also available at: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf>

¹⁴¹ International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (n 17) para. 251

¹⁴² *Ibid.* para. 7ff

¹⁴³ *Ibid.* para. 17

and are understood by practitioners to be covered by the law of treaties,¹⁴⁴ and that international law's traditional "fragmentation" had already equipped practitioners with tools to manage normative clashes.¹⁴⁵

The present study notes the perspective taken by the International Law Commission on the issue of fragmentation of international law and it also applies the traditional legal reasoning and techniques throughout the research and analysis of the overlapping regimes. This is where legal positivism has its relevance for the study providing the overarching theoretical framework with three benefits to it. Firstly, it links separate legal regimes within a coherent system of public international law. Secondly, it offers an accurate account of the actual state of international law by separating legal norms from non-legal arguments, values and policies. Separating "hard law" from "soft law" is not an easy task given a fluid nature of international customary law. A norm has to undergo a process of crystallisation before reaching rank of customary law, and that happens not without controversies. Positivist approach can help to identify such not yet fully-fledged norms as well as factors facilitating or hampering the process of solidification of customary law. It also notes the distinction between actual sources of law on the one hand, and practices which only afford the evidence of the existence of rules on the other, such as academic writings, treaty-contracts or some judicial decisions. Lastly, legal positivism offers traditional interpretative legal tools to determine law and to approach normative conflicts if they arise between rules or rule-systems. The recognition of the distinctive normative character of law, the use of positivism's formal method for stocktaking of current state of international law on the subject matter and the application of traditional legal reasoning for determining the content and the relationships between the rules are good starting points of the inquiry. They might not, however, be sufficient to respond to the developments on the international scene, nor provides a satisfactory explanation of how the content of rules is determined and how international law is actually applied. Evolving dynamics of international law, the range of new actors and new forms of state participation call for broadening of the repertoire of legal methods and interpretative techniques. The International Law

¹⁴⁴ Ibid. The International Law Commission once prepared the Vienna Convention and thereby felt in a good position to examine international law's alleged fragmentation from that perspective.

¹⁴⁵ Ibid para. 20

Commission itself highlights both the continuing relevance of traditional techniques of legal reasoning and their limits in the resolution of conflicts produced in a situation of economic and technological complexity.¹⁴⁶ All branches of international law, all new legal regimes come with their own highly specialized objectives, ethos, principles and they are institutionally “programmed” to prioritize particular concerns over others.¹⁴⁷ In order to capture all these occurrences it might be necessary to adopt a different angle and look at the law in its context, examine “the environment” in which rules operate. While still distinguishing between norms and extra-legal facets such as values and policies, this research recognises that law does not operate in socio-political vacuum. Legal discourses, reflecting factors internally constructed by law, and social discourses, expressing institutional factors external to law, are interdependent and this interaction of practices and processes creates the context of legal decision-making.¹⁴⁸

With these remarks in mind the theoretical framework expands the positivistic perspective to accommodate the classic foundations with contemporary developments. As noted in the scholarship, modern legal positivism may cohabit with a range of other perspectives towards law.¹⁴⁹ Political or sociological approaches to law do not involve a denial of its distinctive normative character. As remarked by Schachter “[t]hey do recognize that law is not wholly autonomous; that it has causes and consequences; that it involves power and values; that it is an aspect of a larger social and political process.”¹⁵⁰ To this extent the positivistic paradigm adopted for the research is enriched with the perspective of the International Legal Process, which addresses the contextual concerns of legal-decision-making.

International Legal Process

International Legal Process views international law not as a mere rigid body of rules but as a process of decision-making. It has been best described as “a study of

¹⁴⁶ International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (n 17) para. 488

¹⁴⁷ Ibid. para. 15, 24

¹⁴⁸ R Banakar, M Travers (n 132) 22

¹⁴⁹ B Simma, A Paulus (n 137) 305; O Schachter, *International law in theory and practice* (Martinus Nijhoff 1991) 4; L Green (n 137)

¹⁵⁰ O Schachter (n 149) 4

international law in its actual operation”.¹⁵¹ Its main architects Abram Chayes, Thomas Ehrlich and Andreas F. Lowenfeld published in 1968 a series of case studies entitled *International Legal Process: Materials for an Introductory Course*, in which they sought to exemplify the role of law in the process of international policy decisions.¹⁵² They drew heavily upon the American Legal Process approach as Henry Hart and Albert Sacks had elaborated it in their unpublished at the time domestic casebook *The Legal Process*.¹⁵³

American Legal Process was developed not as a theory but rather as “a method of understanding, using and improving upon positivism.”¹⁵⁴ It tried to chart a middle course between legal formalism and legal realism, by emphasizing active role of legal institutions such as courts. It contested the formalist view that law could simply be mechanically applied by pointing out that any act of applying a rule would necessarily involve interpretation, clarification or addition. At the same time, however, the legal process approach eschewed advocated by legal realists conviction in the indeterminacy of law by postulating that law making in courts must be consistent with purposes of law and values of democratic society. Judicial decisions should be constrained by “reasoned elaboration” of principles and policies and thereby accessible to scrutiny by others.¹⁵⁵ In addition, American Legal Process drew attention to agency decisions as complementing legal backdrop of legislation and jurisprudence.¹⁵⁶ American Legal Process has been revisited in recent years and new postulates have been added in response to criticism about its normative deficit.¹⁵⁷ New Legal Process, known also as “new public law”, has been described by scholars as “continuing old legal process’s faith in institutions and the need for institutional decision makers to be purposive in decision making”¹⁵⁸ which should encompass “dynamic” interpretation based on normative content of the law.¹⁵⁹

¹⁵¹ M O’Connell, ‘International Legal Process’ in ‘Symposium’ (n 155) 334

¹⁵² H Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 Yale Law J. 2599ff

¹⁵³ Ibid; M. O’Connell (n 151) 335

¹⁵⁴ M O’Connell (n 151) 335

¹⁵⁵ Ibid 335-336

¹⁵⁶ Ibid 336

¹⁵⁷ Ibid 338

¹⁵⁸ Ibid

¹⁵⁹ H Koh, ‘Transnational Process’ (1996) 75 Neb. L. Rev. 181, 188

Starting from the premises of its domestic predecessor International Legal Process focuses primarily on the operation of international legal system and actual workings of international legal processes without taking a normative stand.¹⁶⁰ It has been less interested in the substantive complexity of international rules or society values as in how international law is actually used by the makers of foreign policy. Within this limited methodology International Legal Process theorists seek to elucidate formal and informal institutional decision-making processes taking place in a dynamic political environment.¹⁶¹ “How and how far do law, lawyers and legal institutions operate to affect the course of international affairs? What is the legal process by which interests are adjusted and decisions are reached on the international scene?” asks Chayes in the foreword to the case-materials on International Legal Process.¹⁶² Legal rules, rules of conduct are important elements of this process but there is much more left to complete it.¹⁶³ The term “process” suggests an ongoing interaction and continual change. Law does not exist on paper independent of human involvements. The authors emphasised also the role of international institutional context: “concepts are not self-defining. For adequate understanding of the norm we need to see also by what institutions and procedures it is brought to bear in particular cases.”¹⁶⁴ International Legal Process is regarded as an adjunct method to positivism due to its endeavours to clarify the role of positive norms in international affairs.¹⁶⁵ However, it breaks from the formalistic approach of limiting the analysis to the substantive rules alone by recognising the critical importance of context that includes institutions, legal actors and processes.

Towards a pluralistic methodological approach

As stated in the introduction, this research seeks to analyse critically the substance of the war crime of attacking UN peacekeeping missions with the intention to clarify ambiguities surrounding its scope and basis concepts. To achieve this it has begun with establishing a working conceptual framework in international legal theory. While the legal positivism maintains primary importance throughout the remainder

¹⁶⁰ L Marks, ‘Process as Principle in International Law. Book Review’ (1970) 22 Stanford L. Rev. 1110, 1113ff

¹⁶¹ M O’Connell (n 151) 337

¹⁶² A Chayes, T Ehrlich, A Lowenfeld, *International Legal Process* (Little, Brown and Co. 1968) xi

¹⁶³ L Marks (n 160) 1116

¹⁶⁴ A Chayes, T Ehrlich, A Lowenfeld (n 162)

¹⁶⁵ M O’Connell (n 151) 349

of writing, it is supplemented with an additional theoretical perspective of International Legal Process, which fleshes out the importance of context and legal processes. *Process* methodology supplies a proper segue to proceed from the formal analysis of the content of norms (linguistic, logical) and their sources to the analysis of law in its actual operation in a socio-political context. It also brings the legal agents and institutions into focus, which is helpful in addressing the issue of inherent indeterminacy of law. Law is not self-defining¹⁶⁶ nor is there a single legislative will behind it, instead definitions and meanings are open to debate and bargaining. “Where the boundary of the law is to be drawn and how the content of legal rules are to be determined in order to decide a case is a matter of negotiation in legal practice.”¹⁶⁷ In particular, it is the role of judiciary to give substance to the rules and often implicitly fill normative gaps or manage conflicts. As recognised already by positivists, law application and law creation are continuous activities for every legal decision is partly determined by law and partly underdetermined¹⁶⁸:

“The higher norm cannot bind in every direction the act by which it is applied. There must always be more or less room for discretion, so that the higher norm in relation to the lower one can only have the character of a frame to be filled by this act”.¹⁶⁹

Legal positivism seeks to restrain judicial discretion by promoting interpretative tools such as those codified in the 1969 Vienna Convention on the Law of Treaties¹⁷⁰ or prescribed by legal principles such as *lex posterior derogate legi priori* or *lex specialis derogate legi generali*. The *process* methodology advances a more dynamic interpretation of norms and a more active search for meaning asserting that contextual considerations are properly operative in some legal decisions next to logical and linguistic ones. This research adopts a holistic interpretative approach according to which text, drafting history, context and participants of legal process, all provide the guideposts for a critical analysis of the war crime in question. In particular, this research turns to the international legal institutions, including international courts to contextualise the written law and assist answering the research questions in the situation when answers provided by the documentary research would

¹⁶⁶ A Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (Oxford University Press 1974) 101

¹⁶⁷ R Banakar, M Travers (n 132) 9

¹⁶⁸ L Green (n 137)

¹⁶⁹ H Kelsen, *Pure Theory of Law* (University of California Press 1967) 349

¹⁷⁰ Article 31 of the 1969 Vienna Convention on the Law of Treaties

prove unsatisfactory. According to the list of sources in Article 38 of the Statute of International Court of Justice decisions of international courts are only counted as “subsidiary means for the determinations of the rules of law”;¹⁷¹ nevertheless, their pronouncements as to the scope and content of law are highly appreciated.¹⁷²

The theoretical framework adopted for this research justifies turning to social science methods for data gathering. The inquiry employs qualitative techniques and addresses legal agents in the institutional settings. The respondents include legal officers of international courts and tribunals whose understanding of the substance of the war crime of attacking peacekeeping missions is critical for operation of this norm in criminal proceedings. The United Nations agencies shaping the peacekeeping mandates and administering peacekeeping missions are also considered since it is these practitioners’ perception of “what is law” that forms the basis for peacekeeping policies reflected in the Security Council mandates and rules of engagement that guide missions in the field.

1.3.2. Methods of data collection

The theoretical framework conditions the choice of research methods and enables to explain and understand the findings, “make sense” of the data and study a phenomenon in a systematic way. It plays an orientating and sensitising function in data collection.¹⁷³ The choice of methods presented in this chapter corresponds to the theoretical framework adopted in the study. The research is divided into two types: doctrinal or theoretical and empirical.

Doctrinal research

Doctrinal research provides a systematic exposition of the rules governing a particular legal category and the relationship between them. It fosters a more complete understanding of the conceptual basis of legal principles and of the combined effect of a range of rules and procedures that touch on a particular area of

¹⁷¹ Article 38 of the Statute of the International Court of Justice

¹⁷² B Simma, A Paulus (137) 307; A Cassese, *International Criminal Law* (2nd edition, Oxford University Press 2008) 4ff; L Moir, ‘Grave Breaches and Internal Armed Conflicts’ (2009) 7(4) *J. Int’l Criminal Justice* 763, 770

¹⁷³ T May, *Social Research. Issues, methods and process* (3rd edition, Open University Press 2001) 29

activity.¹⁷⁴ Methods of doctrinal research are primarily targeted at “black-letter law” systematising and clarifying law by a distinctive mode of analysis to authoritative texts.¹⁷⁵ One of the assumptions of a doctrinal research is that “the character of legal scholarship is derived from law itself”.¹⁷⁶

The positivistic approach guides the doctrinal research, which covers a documentary analysis of primary sources - legislation and jurisprudence, and secondary sources such as commentaries on the legislation and on case law, books and journal articles. The primary and secondary sources of the existing normative framework relating to peacekeeping and to the protection afforded to peacekeeping missions include international treaties, statutes and their *travaux préparatoires*, UN Security Council resolutions (mandates) and Secretary-General’s reports clarifying the mandates, reports of the Preparatory Committees of the Rome Conference, reports of the International Law Commission, national legislation, national military manuals, international and national jurisprudence, policy papers and scholarship on the subject. International Legal Process additionally informs to choice of the secondary sources. Emphasising the importance of the institutional context in which international law actually operates, it requires that attention be paid to the practice of the United Nations involving resolutions of its organs, policy documents on peacekeeping such as guidelines, handbooks and bulletins. Such non-binding instruments or documents belong to the special category called “soft law”, and although not “law” of themselves, they are important within the general framework of international legal development.¹⁷⁷ In the context under scrutiny they form a critical background for decision-making and legal processes concerning peace operations.

The doctrinal research gives a necessary point of reference for a field research and helps to identify those areas where law is not clear, scholarship divided and where certain issues will have to be settled in practice. In this sense, both types of research are complementary.

¹⁷⁴ T Hutchinson, *Researching and writing in law* (2nd edition, Thomson Legal &Regulatory Ltd. 2006) 70

¹⁷⁵ M McConville, W Hong Chui, *Research Methods for Law* (Edinburgh University Press 2010) 4

¹⁷⁶ E Rubin, ‘Law and the Methodology of Law’ (1997) 3 Wisconsin Law Review 525

¹⁷⁷ See general comments on functions of “soft law” in: M N Shaw, *International Law* (6th edition, Cambridge University Press 2008) 117

Empirical research

“Empirical study has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, successes, and illusions, in a way that no amount of library research or subtle thinking can match”¹⁷⁸

Empirical research approach consists in studying law in the broader social and political context with the use of a range of methods from other disciplines like social sciences and humanities.¹⁷⁹ The methods employed, either quantitative or qualitative, are capable to produce empirical evidence to answer research questions, decipher workings of legal and social processes and fill the gap between ‘law in books’ and ‘law in action’.¹⁸⁰ This study utilises one of the qualitative techniques for data-collection, an interview.

Interviewing in legal research is helpful to find out about the practical application of certain rules of law, or the internal structure of an institution, or for the purpose of learning the views of experts in respect to certain legislation.¹⁸¹ Semi-structured research interview, employed in this study, is not directed towards quantifying the issues being researched but rather towards providing new insights and awareness of the subject under discussion. It utilises specified questions but these questions do not restrict it. Clarification and elaboration on the answer given can be asked from a respondent, which is prejudicial to standardization and comparability, yet it allows sharpening the focus on specific matters.¹⁸² The outcomes often cannot be reduced to valid statistical compilation or be generalised, however, this is not the idea that underpin the qualitative research methodology. Instead it acknowledges that there is not one overriding reality, but that reality is situational and personal, and may vary between individuals and between situations.¹⁸³ It describes reality as experienced by the respondents, gives an insider-view of situation.¹⁸⁴

¹⁷⁸ J Getman, ‘Contributions of empirical data to legal research’ (1985) 35 *Journal of Legal Education* 489

¹⁷⁹ M McConville, W Hong Chui (n 175) 5

¹⁸⁰ *Ibid* 5-6

¹⁸¹ C Chatterjee, *Methods of research in law* (2nd edition, Old Bailey Press, 2000) 29

¹⁸² T May (n 173) 123

¹⁸³ T Hutchinson (n 174) 95

¹⁸⁴ *Ibid* 95-96

Since finding solutions to vague interpretation of Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the International Criminal Court has been left by the drafters of this treaty to the practitioners, this study intends to go beyond legal documentary analysis and it extends to empirical field research to analyse law *in situ*, functioning and being interpreted in different contexts by different legal actors. The fieldwork undertaken in the course of this research consisted in conducting interviews with different *participants of the legal process* to uncover how they actually understand law and reconcile inconsistencies, overlaps or gaps if any. The empirical field research included:

- interviews with policy and legal officers of the Office of Legal Affairs (OLA) and the Department of Peacekeeping Operations (DPKO) at the United Nations Headquarters (New York);
- interviews with the prosecutors and legal officers of the International Criminal Court, the Special Court for Sierra Leone, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (The Hague)

The first part of the field research was conducted during the internship in the Office of Legal Affairs, United Nations Headquarter in New York, which the author of this thesis undertook between October 2011 and March 2012. The second part of the field research was conducted during a two-weeks research trip to The Hague in November 2012.

The format of interviews had been approved in advance by the University of Westminster Research Ethics sub-Committee. The respondents were given a participant information sheet, which described the purpose of the research, and a consent form to sign. The responses were anonymous and given in private capacity. In sum 18 interviews with the legal practitioners were conducted, 15 of which were audio recorded. The interviews were semi-structured but the set of questions was prepared to start off the conversation and they largely corresponded, but were not limited, to the research sub-questions of this thesis. The interviews are referred to by number, the name of the institution and the date (month, year) they were conducted. It has to be noted though that due to the vast amount of material that was examined

in the process of thesis writing, not all interviews are explicitly referenced. Nevertheless, the fieldwork maintains its relevance for this study as it helped to sharpen the focus, guided further doctrinal research and very often upholds remarks and conclusions without being specifically mentioned.

Furthermore, it should be acknowledged that the fieldwork undertaken, especially the UN internship, provided the unique opportunity to access internal resources of the UN legal database and the library, and helped to understand the institutional and political context, which provided a necessary backdrop to the overall research.

1.4. Disposition of the thesis

This thesis consists of five chapters and is structured in the following way described below. The first chapter includes the introduction, literature review and methodology adopted for this research. The introductory component provides the background, defines the problem, the overall objective and the scope of the research and ends by formulating the research questions. The introduction is followed by a literature review, which examines existing scholarship on the subject matter and demonstrates the gaps that the proposed research is intended to fill. It provides a critical review of related work and its relevancy to the proposed research. The last section of Chapter 1 covers methodology and describes the frame of reference in terms of the theoretical and philosophical underpinnings of the research as well as the methods of data collection. It also deals with the ethics of empirical research. The main findings of the research undertaken (both doctrinal and empirical) are then presented in the next chapters, together with analysis of the significance of the results in terms of the thesis argument. Chapters 2-4 correspond to the legal issues covered by the research sub-questions. They overlap as the questions are interrelated: Chapter 2 discusses peacekeeping; Chapter 3 considers self-defence and the use of force in peace operations; Chapter 4 details the applicability of IHL to peacekeeping operations, the status of personnel and objects involved in a peacekeeping mission and the issue of direct participation in hostilities. The last Chapter 5 summarises the thesis and the research results and provides conclusions.

2. Peacekeeping

This chapter addresses the personal scope of legal protection under Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the International Criminal Court and it investigates what “a peacekeeping mission in accordance with the Charter of the United Nations” actually denotes by applying the customary rules on treaty interpretation codified in the 1969 Vienna Convention on the Law of Treaties (VCLT).

This chapter is divided into three major parts. The first part outlines the Vienna rules on treaty interpretation. The second part gives background on peacekeeping practices as it looks for an “ordinary meaning” or a definition of the term “peacekeeping mission”. For reasons explained in the introduction, the focus is narrowed to UN peacekeeping and the attention is given primarily, but not exclusively, to peacekeeping operations undertaken by or in co-operation with the United Nations since the end of the Second World War. The account of peacekeeping is only partly chronological. The study does not appraise every single UN peace operation deployed so far, instead it discusses the changing nature of these operations, the emergence and development of basic norms governing peacekeeping and it reviews some legal, political and military difficulties that the application of these norms has encountered. Based on the conclusions of the second part, the third section of the chapter provides an analysis of the full phrase “a peacekeeping mission in accordance with the Charter of the United Nations”. It investigates whether this phrase should be interpreted as covering UN peacekeeping missions exclusively or also regional peacekeeping missions.

The chapter concludes that although there is no single agreed definition of peacekeeping and that it has to be viewed as a *generic* term, with its precise content changing over time, there is a common understanding as to what it denotes by reference to the constitutional principles of peacekeeping. With regard to the phrase “in accordance with the Charter of the United Nations”, this should be understood as the compatibility with the Purposes and Principles of the United Nations in general, not just narrowly defined conformity with the specified powers or procedures. Thus a

peacekeeping mission established and run by a regional organisation would be covered by the protective regime of the Rome Statute provided that the Purposes and Principles of the UN Charter are respected and the conditions set out in its Chapter VIII are met.

2.1. Applying the rules on interpretation of the Vienna Convention on the Law of Treaties to the Rome Statute

Article 21 of the Rome Statute on applicable law

The Rome Statute does not contain a separate provision on the rules of legal interpretation that should be followed with regard to its text. However, it does contain Article 21 on applicable law, which outlines the legal sources to be applied by the Court and to some extent it tackles the interpretation of these sources:

Article 21 Applicable law

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The specification of legal sources upon which the Court may draw trying to resolve legal issues before it implies that the Statute itself may not always provide all answers. It directs the judges where to seek guidance and in what sequence.¹ They

¹ The hierarchy of sources set out in Article 21 of the Rome Statute has been criticised in the scholarship as ambiguous at odds with Article 38 of the ICJ Statute. See e.g. A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, (Oxford University Press 2002) 1076-1084; M Arsanjani, 'The Rome statute of the International Criminal Court', (1999) 93 Am. J. Int'l L. 22, 28-29; R Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' (2009) 12(3) New Criminal Law Review, 390-405

must first apply the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. The Elements of Crimes should be read alongside Article 9 of the Statute, which stipulates that they are to “assist the Court in the interpretation and application” of articles 6, 7 and 8. Besides the hierarchy of formal sources in paragraphs 1 and 2 of Article 21, its paragraph 3 seems to introduce a substantial hierarchy of norms, which should further guide the application and interpretation of law.² As an international treaty the Rome Statute comes within the remit of the rules on interpretation contained in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which has been confirmed by the ICC Appeals Chamber in recent case law. According to the Appeals Chamber’s ruling, the interpretation of the Statute of the Court should be guided by the 1969 Vienna Convention on the Law of Treaties.³

The 1969 Vienna Convention on the Law of the Treaties

The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties in Vienna.⁴ The text of the Convention based on the draft articles prepared by the International Law Commission.⁵ The Convention entered into force on 27 January 1980, in accordance with its Article 84(1). As of January 2014 it has been ratified by 113 states.⁶

² A Cassese, P Gaeta, J R W D Jones (n 1) 1079-1080

³ See e.g. *Situation in the Democratic Republic of the Congo* (ICC-01/04), Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 33 ff; see also W Schabas, *An Introduction to the International Criminal Court* (4th ed. Cambridge University Press 2010) 206-212.

⁴ The Conference was convened pursuant to General Assembly resolutions 2166 (XXI) 1 of 5 December 1966 and 2287 (XXII) 2 of 6 December 1967. The Conference held two sessions, both at the Neue Hofburg in Vienna, the first session from 26 March to 24 May 1968 and the second session from 9 April to 22 May 1969

⁵ The International Law Commission was established by the General Assembly of the United Nations in 1947 in accordance with Article 13 of the Charter of the United Nations to fulfil its mandate “to initiate studies and make recommendations for the purpose of (...) encouraging the progressive development of international law and its codification”. Hence, Article 1(1) of the ILC Statute provides that the “Commission shall have for its object the promotion of the progressive development of international law and its codification.” The Commission is composed of legal experts from different legal systems throughout the world. The main work on the draft articles on treaty interpretation was undertaken at two sessions in 1964 and 1966 although research and preparations had started much earlier. James Brierly, Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock were the four special rapporteurs on the topic

⁶ <http://treaties.un.org>

The 1969 VCLT rules of interpretation are regarded as general customary law and its application by the International Court of Justice is “virtually axiomatic”.⁷ The ICJ is not the only international court which applies them; they are also applied, for instance, in the World Trade Organization (WTO) and by the European Court of Human Rights (ECtHR)⁸ as well as by arbitral bodies established under the auspices of the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration, and also those set up under the North American Free Trade Agreement.⁹ Articles 31 and 32 of the VCLT dealing with the general rule of interpretation and supplementary means of interpretation are of relevance from the point of view of the present analysis. They read as follows:

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of the treaty shall comprise, in addition to the text, including preamble and annexes:
 - a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c) any relevant rules of international law applicable between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

⁷ R Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 15-16; see for example: *Avena and other Mexican Nationals (Mexico v. United States of America)* [2004] *ICJ Reports* 37-38, para. 83: “ The Court now addresses the question of the proper interpretation of the expression ‘without delay’ in the light of the arguments put to it by the Parties. The Court begins by noting that the precise meaning of ‘without delay’, as it is to be understood in Article 36, paragraph 1(b), is not defined in the Convention [on Consular Relations]. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.” [emphasis added]

⁸ The application of the VCLT rules by the ECtHR is sometimes controversial as the Court has developed a doctrine of dynamic treaty interpretation which does not always follow the classical rules on interpretation; see on this subject G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) and M Fitzmaurice, ‘Dynamic Interpretation’ (2008) *The Hague Yearbook of International Law*

⁹ R Gardiner (n 7) 18

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a) Leaves the meaning ambiguous or obscure; or
- b) Leads to a result which is manifestly absurd or unreasonable.

The successive paragraphs of Article 31 seem to be laying down a hierarchical order for the application of the various elements of interpretation in this article. However, as explained by the International Law Commission in its Commentary on the draft articles, a set of rules on interpretation provided in Article 31 is not necessarily to be applied as a step-by-step formula in every case, nor should these rules be taken to bits and examined in isolation:

“The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled “General rule of interpretation” in the singular, not “General rules” in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.”¹⁰

This “crucible” approach allows or even advises certain flexibility in application of the rules. Although they are arranged to an inherent sequential logic, they are not meant to be purely mechanically employed in all cases and always consecutively. Instead, these rules instruct interpreters what elements to take into account (text, preamble, annexes, related agreements, preparatory work, etc.) and to a certain extent how to handle these materials.¹¹

¹⁰ United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF.39/11/Add.2, *Yearbook of the International Law Commission. Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly* A/CN.4/SER.A/1966/Add.1 vol. II, 219-20, para. 8. The Commentary supplemented the draft articles considered at the Vienna Conference in 1969 as a starting point for preparation and adoption of the Vienna Convention. Draft article 27 in the above-cited fragment became later Article 31 in the Convention. (see: R Gardiner (n 7) footnote 16 at 9)

¹¹ R Gardiner (n 7) 9

The first principle to be applied while interpreting a treaty is the principle of “good faith and ordinary meaning”. While the text of the treaty takes primacy as the authentic expression of the agreement of the parties, the treaty has to be read as a whole. The ordinary meaning should, therefore, be construed in the context of the whole treaty and in the light of its object and purpose.¹² Article 31 points at the context of the treaty, which covers the text of the treaty itself, its preamble and annexes, and any agreement or instrument relating to the treaty and drafted in connection with its conclusion. Additionally, any subsequent agreement concerning the interpretation of the treaty or any subsequent practice, “which establishes the agreement of the parties regarding its interpretation” shall be considered together with the context. Article 32 provides supplementary means of interpretation to corroborate the meaning established through application of Article 31 or if the latter proved insufficient, to determine such meaning. The language of Article 32 is not mandatory stating that supplementary means of interpretation are the ones to which recourse “may” be had, nor are they listed exclusively. The role of Article 32 is supportive, yet as the Commission explained in its Commentary on the final version of the draft articles, Articles 31 and 32 (draft articles 27 and 28) should operate in conjunction if necessary:

“Accordingly, the Commission was of the opinion that the distinction made in articles 27 and 28 between authentic and supplementary means of interpretation is both justified and desirable. At the same time, it pointed out that the provisions of article 28 by no means have the effect of drawing a rigid line between the “supplementary” means of interpretation and the means included in article 27. The fact that article 28 admits recourse to the supplementary means for the purpose of “confirming” the meaning resulting from the application of article 27 establishes a general link between the two articles and maintains the unity of the process of interpretation.”¹³

A legal operation of treaty interpretation should combine various elements and means of interpretation as they may be present in the case and evaluate them together, while refraining from drawing a firm conclusion based on particular elements before the process has been completed.¹⁴ As remarked by one scholar, “the

¹² I Brownlie, *Principles of Public International Law* (Oxford University Press 2008) 633

¹³ United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF.39/11/Add.2, *Yearbook of the International Law Commission. Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly* A/CN.4/SER.A/1966/Add.1 vol. II, 220, para.10

¹⁴ R Gardiner (n 7) 30

interpretation may require going round the circle more than once if a factor presents itself under an element of the rules later in the list and which appears to outweigh one already taken up”.¹⁵

Application of the rules on treaty interpretation

In applying the Vienna rules to interpret the phrase “a peacekeeping mission in accordance with the Charter of the United Nations” this study will first look at the language of the relevant provisions of the Rome Statute and ordinary meanings of the terms in their context; it will seek any definitions (special meanings); examine the legislative history of the provisions and check subsequent practice for accepted interpretations. Bearing in mind the unity of the process of interpretation, no definite conclusion should be reached before the process has been completed.

As already discussed in the literature review, the Rome Statute does not mention “a peacekeeping mission in accordance with the Charter of the United Nations” in any other provision than Articles 8(2)(b)(iii) and 8(2)(e)(iii) while these articles do not define it. Neither can this term be found in any other legal texts of the International Criminal Court, such as Elements of Crimes, Rules of Procedure and Evidence, Regulations of the Court and Regulations of the Registry, which according to Article 31(2) of the VCLT would constitute “the context” for the purpose of the interpretation of the treaty. A reading of the phrase “a peacekeeping mission in accordance with the Charter of the United Nations” should be made by reference to the “ordinary meaning” of the terms used. Particular words and phrases should be given their normal and natural meaning in the context in which they occur. The next section examines UN peacekeeping practice to date in order to determine the “ordinary meaning” of a “peacekeeping mission”.

2.2. The origins of peacekeeping and its evolution

Peacekeeping is not a post-Second-War phenomenon or a unique invention of the United Nations although it is now commonly associated with the UN system of international peace and security. Collective actions at the international level designed

¹⁵ Ibid

to contain conflicts and to keep peace were commenced long before the United Nations was established.¹⁶ Some authors trace the historical origins of peace operations back to the conference and congress systems of nineteenth century, as well as the collective security activities of the League of Nations.¹⁷ “Peacekeeping” undertaken by the League of Nations included the supervision of the international administration of the Germany’s Saarland, establishing of the League’s protection over the free city of Danzig, the supervision of the variety of post-war plebiscites as well as international mediation.¹⁸ The United Nations was created after the Second World War from the ashes of the League of Nations and with the firm resolution to perform better. The “emphasis on the change rather than continuity with what had gone before” is one of the reasons why peacekeeping has been commonly seen as a post-1945 mechanism established to regulate the international security system, and qualitatively different from previous endeavours.¹⁹

United Nations peacekeeping was developed during the Cold War when due to the ideological differences the Security Council was unable to perform collective security actions.²⁰ Peacekeeping became therefore an alternative to the collective security.²¹ UN peacekeeping history is officially said to have begun in 1948 with the United Nations Truce Supervision Organization in the Middle East²² although some authors²³ point at even earlier UN attempts, which were in line with the League of Nations’ peace observation and inquiry experience - a fact-finding mission in Greece in 1947²⁴ and a truce-observation mission in Indonesia in the same year²⁵. The first

¹⁶ N MacQueen, *Peacekeeping and the International System* (Routledge 2006) viii; P F Diehl, *Peace Operations* (Polity Press 2008) 28ff

¹⁷ A J Bellamy, P D Williams, *Understanding Peacekeeping* (2nd ed., Polity Press 2010) 7

¹⁸ *Ibid* 79-80

¹⁹ N MacQueen (n 16) viii; Diehl P F (n 16) 12

²⁰ M Bothe, ‘Peace-keeping’ in B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn. Oxford University Press 2002) 661; C Peck, *The United Nations as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflict* (Kluwer Law International 1996) 2; N MacQueen, (n 16) 12

²¹ H McCoubrey, N D White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth Pub. 1996) 2-3, 11-12; J F Murphy, ‘Force and Arms’ in O Schachter, C C Joyner (eds), *United Nations Legal Order* (Cambridge University Press 1995) 292

²² <http://www.un.org/en/peacekeeping/missions/unto/>

²³ P F Diehl P F (n 16) 40-41

²⁴ United Nations Commission for the Investigation of Greek Frontier Incidents was established on 19 December 1946 to conduct an investigation in Greece, Albania, Bulgaria and Yugoslavia to discover the causes and nature of alleged border violations. The Commission was terminated on 15 September 1947. See: The Repertoire of the Practice of the Security Council available at: <http://www.un.org/en/sc/repertoire/subsidiary_organ/commissions_and_investigations.shtml>

missions were composed of unarmed military observers tasked to monitor the ceasefire and report violations.²⁶

The first armed peacekeeping mission, the United Nations Emergency Force, was established in 1956 in response to the Suez Crisis. The mission was formed under the authority of the General Assembly and tasked to “secure and supervise the cessation of hostilities, including the withdrawal of the armed forces of France, Israel and the United Kingdom from Egyptian territory and, after the withdrawal, to serve as a buffer between the Egyptian and Israeli forces and to provide impartial supervision of the ceasefire.”²⁷ The UN Secretary-General Dag Hammarskjöld and Canadian Foreign Minister Lester B. Pearson played prominent roles in developing plans for and organisation of the UNEF.²⁸ As a result of the Anglo-French veto in the Security Council the discussion on the urgency of establishing an international force to manage the Suez crisis was moved to the General Assembly Emergency Session, which adopted a resolution in favour of such force.²⁹ The UN Secretary-General elaborated on the characteristics of the UNEF in his Report of 1956 preceding the deployment of the Force and in the 1958 *Summary Study of the experience derived from the establishment and operation of the Force*, which consequently became the defining legal principles of UN peacekeeping in the coming decades.³⁰ The Emergency International United Nations Force was set up “on the basis of principles reflected in the constitution of the United Nations itself”;³¹ it was of a temporary nature and the length of its assignment was to be determined by the needs arising out of the conflict.³² The operation did not constitute an enforcement action against a UN Member State and there was no invocation of Chapter VII of the UN Charter. What followed from this was that such operation could only be carried out with the consent

²⁵ UN Consular Commission in Batavia (now Jakarta) was established on 1 September 1947 to report on the situation in the Republic of Indonesia and observing of the ceasefire between armed forces of the Netherlands and Indonesia. The Commission ceased to function after 14 March 1951. See: The Repertoire of the Practice of the Security Council available at:

<http://www.un.org/en/sc/repertoire/subsidiary_organ/commissions_and_investigations.shtml>

²⁶ See UN Military Observer Group in India and Pakistan (UNMOGIP)

²⁷ <http://www.un.org/en/peacekeeping/missions/past/unef1mandate.html>

²⁸ N MacQueen (n 16) viii; Diehl P F (n 16) 71-72

²⁹ Uniting for Peace Procedure

³⁰ N MacQueen (n 16) viii; Diehl P F (n 16) 75

³¹ *Second and final report of the Secretary-General on the plan for an emergency international United Nations force requested in resolution 998 (ES-I), adopted by the General Assembly on 4 November 1956* (6 November 1956) UN Doc. A/3302 paras. 4a, 5 [hereinafter: *Second and final report of the Secretary-General 1956*]

³² *Ibid* para. 8

and the cooperation of the parties to the conflict and that peacekeepers, although armed, could only use force in self-defence and not to pursue any military objectives or to control the territory in which they were stationed.³³ The Secretary-General advocated the prohibition against any initiative in the use of armed force and drew a clear distinction between self-defence and offensive action.³⁴ The Force was supposed to have freedom of movement within its area of operations and only such rights which were necessary for the fulfilment of its functions in cooperation with local authorities.³⁵ As also stressed by the Secretary-General, there was no intent in the establishment of the Force to influence the military and political balance in the conflict or to enforce any specific political solution. In line with these principles, which could be subsumed under the captions of voluntarism, neutrality and non-enforcement, the UNEF I was pulled out in May-June 1967 after the Egyptian Government withdrew its consent.

Basing on first peacekeeping experiences the Secretary-General advised that a United Nations operation must be separate and distinct from the activities undertaken by local authorities, which precluded any competitive or joint operations with the host government. That was justified by the need to avoid a risk of getting involved in differences with local authorities or in internal conflicts. Non-involvement in situations of an essentially internal nature was backed by a reference to the Charter principle of non-interference.³⁶

The first significant departure from the UNEF norms came pretty soon during the UN Operation in Congo (ONUC). It began in 1960 and lasted till 1964.³⁷ ONUC was established to help the newly independent Congo, a former Belgian colony, to ensure the political independence and territorial integrity, to restore and maintain law and order throughout the country, and to supervise the withdrawal of Belgian forces. The United Nations Operation in the Congo differed from other peacekeeping operations

³³ *Reports to the General Assembly by the Secretary General* (4 November 1956) UN Doc. A/3289 and *Second and final report of the Secretary-General 1956* (n 31); *Report of the Secretary General: Summary Study of the experience derived from the establishment and operation of the Force* (9 October 1958) UN Doc. A/3943 [hereinafter: *Report of the Secretary General: Summary Study 1958*]

³⁴ *Report of the Secretary General: Summary Study 1958* (n 33) para. 179

³⁵ *Second and final report of the Secretary-General 1956* (n 31) para 12; *Report of the Secretary General: Summary Study 1958* (n 33) para. 164

³⁶ *Report of the Secretary General: Summary Study 1958* (n 33) para. 165

³⁷ P F Diehl (n 16) 45, 80; N MacQueen (n 16) viii

launched during the Cold War in terms of complex responsibilities that it had to assume, the vast area of deployment and the big number of troops involved.³⁸ Another difference related to the circumstances in which it was dispatched – in the middle of a civil war with no ceasefire agreement to rely upon. ONUC set a precedent that United Nations forces could intervene in intrastate conflict and could be mandated with more complex tasks than ceasefire monitoring but it also subverted a clear division between peacekeeping and enforcement.³⁹

Apart from setting precedents, both UNEF I and ONUC brought about a major financial and constitutional crisis in the United Nations. It was assumed that the costs of peacekeeping forces constituted the expenses of the Organization within the meaning of Article 17 of the UN Charter and therefore they should be covered by obligatory contributions from Member States. The General Assembly did not include these costs in the regular budget but it established a different financing procedure with a different apportioning key.⁴⁰ This was heavily criticised on both legal and political grounds. Certain states refused to pay their contributions justifying that the peacekeeping operations in the Middle East and in the Congo were established by a wrong organ of the United Nations and in violation of the provisions of the Charter, and therefore, the costs incurred were not legitimate expenses of the Organization.⁴¹ Unable to resolve the dispute the General Assembly asked the International Court of Justice to advise on the matter. The Court's Advisory Opinion delivered in 1962 proved to be particularly important as it clarified few legal issues related to peacekeeping, including its legal basis, which is discussed below.

2.2.1. The legal basis of peacekeeping

Peacekeeping is not explicitly mentioned in the United Nations Charter, however, the broad mandate of Article 1, which states the purposes of the Organization, seems to provide the constitutional basis for peacekeeping operations. The Article 1 reads as follows:

³⁸ <http://www.un.org/Depts/DPKO/Missions/onucB.htm>

³⁹ P F Diehl (n 16) 46-47, 92; N MacQueen (n 16) viii

⁴⁰ M Bothe (n 20) 689

⁴¹ J F Hogg, 'Peace-keeping Costs and Charter Obligations - Implications of the International Court of Justice Decision on Certain Expenses of the United Nations' (1962), 62 Columbia Law Review, 1230

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

In the Advisory Opinion on *Certain Expenses of the United Nations* the International Court of Justice confirmed the constitutionality of the UN peacekeeping operations UNEF I and ONUC, which were, according to the Court's majority, launched in execution of the purposes of the United Nations. It ruled that:

“ (...) when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such an action is not ultra vires of the Organization”⁴²

The Court also considered the alleged exclusive authority of the Security Council in matters of maintenance of international peace and security. It first referred to Article 24, which states that the Security Council has primary responsibility for the maintenance of international peace and security without indicating, however, that it is of an exclusive character. Next, according to Article 14 and in line with language of Article 10 the General Assembly has the power to recommend measures in the area of maintenance of international peace and security. Based on these considerations, the Court took the position that unless there was a specific prohibition, the General Assembly was authorised to undertake any measures with respect to maintaining peace. Such prohibition was found in Article 12, which states that the General Assembly could not make recommendations concerning any dispute or situation in relation to which the Security Council was exercising its functions, unless at the request from the Security Council. Similarly, Article 11(2) requires that the General Assembly should refer to the Security Council whenever “such action as is solely within the province of the Security Council” is needed. The Court interpreted such actions to be enforcement measures under Chapter VII of the Charter. It then found that the UNEF and ONUC operations were not Chapter VII enforcement actions within the meaning of that definition, as they were not directed against any Member State, there was therefore no prohibition for the General

⁴² *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 168

Assembly to act.⁴³ Accordingly, the Court concluded that the cost of the ONUC and UNEF operations constituted the expenses of the United Nations, which the General Assembly was entitled to apportion among Member States in line with Article 17(2) of the UN Charter.

Taking the ICJ Advisory Opinion and the UN Charter as a main point of reference, the constitutional framework of peacekeeping can be described in more detail. The Court did not specify articles of the Charter that could provide the legal basis for peacekeeping operations, yet such basis can be found in powers implied in Chapters VI, VII and VIII of the Charter. It is commonly said that peacekeeping operations fall between Chapter VI (peaceful settlement of dispute) and VII (enforcement) of the Charter and therefore the term “Chapter VI and a Half” is being used.⁴⁴ Chapter VI confers powers on the Security Council to investigate and mediate disputes between states, especially those likely to endanger the maintenance of international peace and security. Chapter VII authorises the Security Council to take action with respect to threats to the peace, breaches of the peace or acts of aggression. It empowers the Council to use measures “not involving the use of armed force” like economic or diplomatic sanctions and if they fall short, also measures involving use of armed force. Chapter VIII discusses regional arrangements for dealing with matters relating to the maintenance of peace and security either through pacific settlements of dispute or enforcement action under the authority of the Security Council. This chapter can be seen as the legal basis for regional peacekeeping and involvement of regional arrangements and agencies on condition that such activities are consistent with the Purposes and Principles of the United Nations.

The Trial Chamber of the Special Court of Sierra Leone also pointed at Chapters VI and VII of the UN Charter as providing the legal basis for peacekeeping; it noted though that since peacekeeping missions are deployed with the consent of the parties their legitimacy is of no practical significance.⁴⁵

⁴³ Ibid 177

⁴⁴ M Shaw, *International Law* (Cambridge University Press 2008) 1225; T Franck, *Recourse to Force* (Cambridge University Press 2002) 39

⁴⁵ RUF Judgment para 222, the Court noted though that in practice, the Security Council never referred to Chapter VI in its resolutions establishing peacekeeping forces. See also: B Simma (188) paras. 84, 86; M Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff

According to the United Nations itself, its peacekeeping operations have traditionally been associated with Chapter VI of the UN Charter, although it has never been invoked.⁴⁶ The *United Nations Operations Principles and Guidelines*, an internal publication of Department of Peacekeeping Operation and Department of Field Support, so called *Capstone Doctrine*, states that while the Security Council does not need to refer to a specific chapter of the UN Charter when passing a resolution authorising the deployment of a peacekeeping operation, it has adopted the practice of invoking Chapter VII when setting up peacekeeping operations in volatile (dangerous and unstable) post-conflict settings.⁴⁷ What distinguishes such peacekeeping operation with Chapter VII elements from an enforcement action authorised under Chapter VII is that the former is not directed against a state which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. This is a clear demarcation line drawn by the ICJ in *Certain Expenses of the United Nations* Advisory Opinion referred above. Robustness of a peacekeeping operation seems to be a secondary issue as long as such operation respects the principles of state sovereignty and non-intervention. An enforcement action is a legitimate and recognised exception to these principles.⁴⁸ The Court failed to differentiate from the perspective of the use of coercive force between the two forms of peacekeeping operations under review. It stressed that both operations were of a consensual nature hence they did not amount to enforcement.

As already said, peacekeeping operations are usually created by a resolution of the Security Council exercising its primary responsibility to maintain international peace and security. As happened in the past, peacekeeping missions might also be established by the General Assembly assuming a secondary role in the area of international peace and security. In line with powers specified in the UN Charter, the Security Council or the General Assembly can establish a subsidiary organ necessary

Publishers 2005) 11-12; A. Orakhelashvili, 'The Legal Basis of the United Nations Peace-keeping Operations' (2003) 43 *Virginia Journal of International Law* 485, 486

⁴⁶ United Nations, Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations, Principles and Guidelines* (Capstone Doctrine 2008) 13-14 <http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> [hereinafter: UN, *United Nations Peacekeeping Operations, Principles and Guidelines*]

⁴⁷ Ibid

⁴⁸ N Tsagourias, N D White, *Collective Security. Theory, Law and Practice* (Cambridge University Press 2013) 250-251

for the performance of its functions.⁴⁹ Accordingly, a UN peacekeeping mission is considered to be such a subsidiary organ of the United Nations.⁵⁰ The Secretary General is also entrusted by the UN Charter with functions in the area of maintenance of international peace and security, and as the chief administrative officer of the Organization he is responsible for a proper functioning of a peacekeeping operation.⁵¹

2.2.2. Peacekeeping – conceptualisation and typologies

Since its inception United Nations peacekeeping has evolved significantly. There have been many valuable contributions in the literature documenting the history of peacekeeping, case studies, as well as many attempts to systematise different types of peace operations focusing on theoretical as well as practical aspects.

Chronological approach

Some commentators consider peacekeeping from a historical perspective and categorise peace operations chronologically distinguishing several phases of their evolution or so-called “generations” or “periods” of peacekeeping.⁵² Similarly, the United Nations Department of Peacekeeping Operations (DPKO) breaks the history of peacekeeping into three chronological phases following the changes in the political landscape: “The early years”, “Post Cold-War surge” and “The present”.⁵³ The initial phase covered the Cold War period and included as diverse operations as the first missions ever deployed and composed of unarmed military observers simply

⁴⁹ For powers of the Security Council see the Charter of the United Nations: art 29 enabling the SC to establish subsidiary organs necessary for the performance of its functions, in conjunction with Art. 36(1), art. 39, art. 40, art. 41 or 42; for the powers of the General Assembly see: Art. 22 empowering the GA to establish subsidiary organs necessary for the performance of its functions, in conjunction with Art. 10, art. 11 or 14 and *Uniting for Peace* Resolution GA Res. 377(V) (1950)

⁵⁰ Art. 7 of the Charter of the United Nations

⁵¹ Art. 97 of the Charter of the United Nations – executive functions include any kind of activity necessary to give effect to the decisions of the GA or the SC; Art 98 – delegated powers and functions, entrusted to him by the GA and SC, the delegation of powers is not subject to any special condition; Art. 99 – reporting competencies – on situation likely to endanger international peace and security

⁵² See especially: H Wiseman, ‘The United Nations and International Peacekeeping: A Comparative Analysis’ in UNITAR *The United Nations and the Maintenance of International Peace and Security* (Martinus Nijhoff 1987) 263; M Goulding, ‘The Evolution of United Nations Peacekeeping’ (1993) 69 (3) *International Affairs* 451; J Mackinlay, J Chopra, ‘Second Generation Multinational Operation’ (1992) 15(3) *Washington Quarterly* 113; C Peck (n 20) 2

⁵³ <http://www.un.org/en/peacekeeping/operations/history.shtml>

monitoring ceasefires⁵⁴, the earliest armed peacekeeping operation UNEF I, or the large-scale robust and controversial operation of the UN in the Congo (ONUC).⁵⁵ The second phase started with the end of the Cold War and the change in the global strategic context. United Nations peacekeeping needed to adjust to the new political environment and changing nature of conflicts. It expanded the spectrum of its activities beyond monitoring of implementation of peace agreements *between* states and evolved into multidimensional enterprises addressing conflicts *within* states. The new tasks entrusted in peacekeepers included humanitarian assistance, disarmament, demobilization and reintegration of former combatants, de-mining, security and justice sectors reforms, electoral assistance, human rights monitoring etc. The DPKO points at the three characteristics of the post-Cold War period: a rapid increase in the number of peacekeeping operations, followed by failures of three high-profile missions in the former Yugoslavia, Rwanda and Somalia, and the process of reassessment, self-reflection and reform triggered by these setbacks.⁵⁶ The third phase encompasses the last few years and is described as a “consolidation phase” in which the UN peacekeeping continues to face high expectations and pursue a broad range of complex operational tasks both military, such as protection of civilians, and non-military involving civilian experts in the rule of law, human rights or gender.⁵⁷ The name of this phase is qualitatively different from the two previous phases, yet the DPKO does not pursue any further analysis but approaches it rather descriptively.

This chronological categorisation as a way to conceptualise peacekeeping is a bit confusing since each of these three chronological phase witnessed different, often quite dissimilar types of peace operations and the phases do not coincide with functional typology e.g. unarmed or lightly armed military observer missions characteristic for the “first generation of peacekeeping” have continued to be deployed later on.⁵⁸ Situating peacekeeping against a background of global politics can be helpful though as it points at the close relationship between the peacekeeping

⁵⁴ See: the UN Truce Supervision Organization (UNTSO) and the UN Military Observer Group in India and Pakistan (UNMOGIP).

⁵⁵ <http://www.un.org/en/peacekeeping/operations/early.shtml>

⁵⁶ <http://www.un.org/en/peacekeeping/operations/surge.shtml>

⁵⁷ <http://www.un.org/en/peacekeeping/operations/present.shtml>

⁵⁸ See e.g.: UNFICYP in Cyprus (1964 – present), UNMEE in Ethiopia and Eritrea (2000-2008)

practice and processes in the international system.⁵⁹ Transformation of this system has brought about the changes in peacekeeping aims and functions.

Functional approach

Another approach to conceptualising peacekeeping, commonly taken in UN publications, is to situate peacekeeping among a broader spectrum of mechanisms of maintaining international peace and security⁶⁰ and to list tasks that peacekeepers can be mandated to fulfil.⁶¹ This tactic is applied in the already mentioned *Capstone Doctrine*. The document focuses primarily on peacekeeping but it also discusses conflict prevention, peacemaking, peace enforcement and peacebuilding. It remarks that peace operations undertaken by the United Nations and other international actors to maintain international peace and security usually encompass more than one type of activity and the boundaries between them have become blurred.⁶² They are mutually reinforcing and if carried out in combination, they can provide a comprehensive response to the root causes of crises that have threatened international peace and security.⁶³ *Capstone Doctrine* notes that the range of tasks assigned to United Nations peacekeeping operations has expanded significantly since the beginning of peacekeeping practice and based on the categorisation of tasks and responsibilities it differentiates between “traditional observer missions” or “traditional peacekeeping” and “multi-dimensional peacekeeping missions”.⁶⁴ Importantly, *Capstone Doctrine* analyses also the reasons of this differentiation taking account of shifting patterns of conflict, changes in political and strategic context and different goals of these two types of peacekeeping operations. Despite different settings, goals and functions that “traditional” and “multi-dimensional” peacekeeping missions are supposed to fulfil, *Capstone Doctrine* still adheres to three basic principles that characterised the first “traditional” peacekeeping missions and continue to serve United Nations peacekeeping.

⁵⁹ Interview no. 4 (UN February 2012), Interview no. 6 (UN March 2012)

⁶⁰ <http://www.un.org/en/peacekeeping/operations/peace.shtml>; *United Nations Peacekeeping Operations, Principles and Guidelines* (n 46) 17ff

⁶¹ Handbook on United Nations Multidimensional Peacekeeping Operations 1ff

⁶² *United Nations Peacekeeping Operations, Principles and Guidelines* (n 46) 17-18

⁶³ *Ibid* 20

⁶⁴ *Ibid* 20-22

Quite a few peacekeeping typologies have been proposed by scholars based on different variables including changing functions and tasks of deployed missions, the use of force, or participating actors. Numerous theoretical approaches and a lack of scholarly agreement regarding the conceptualisation of peacekeeping mirror its fluid and adaptive nature. By way of example, an early analysis by Wiseman divides peacekeeping operations into two general types based on different functions assigned: peace observation operations tasked to observe, investigate and report on the compliance of the parties to a cease-fire; and force-level missions (called by the author “peacekeeping itself”) constituting “the interposition of military forces between belligerents to ensure the maintenance of a cease-fire and such other matters as detailed in a mandate”.⁶⁵ Also Goulding proposes a functional taxonomy of peacekeeping but much more expanded: preventive deployment, traditional peacekeeping, operations supporting implementation of a comprehensive settlement, operations to protect the delivery of humanitarian relief supplies, and the last two types arguably not peacekeeping at all as they are likely to involve enforcement and peacemaking - operations deployed in failed states and ceasefire enforcement.⁶⁶ Durch on the other hand reduces peace operations (he uses this general term) to four basic types noting the descending consent and the ascending amount and intensity of force required by each subsequent type: traditional peacekeeping, multi-dimensional peace operations, humanitarian intervention and peace enforcement.⁶⁷ Findlay also employs an umbrella term “peace operations” and he explains that it covers all UN missions involving military personnel. He then groups such missions into three main categories with consent and use of force as main variables: peacekeeping (with two sub-groups of traditional and expanded peacekeeping), peace enforcement and enforcement.⁶⁸ Bellamy and Williams propose as many as seven different types of peace operations based on different goals or “intended ends” that these operations hope to achieve rather than the means that they employ: preventive deployments,

⁶⁵ H Wiseman (n 52) 263-4

⁶⁶ M Goulding (n 52) 451

⁶⁷ W J Durch, ‘Keeping the Peace: Politics and Lessons of the 1990s’ in W J Durch (ed) *UN Peacekeeping, American Policy, and the Uncivil Wars of the 1990s* (The Henry L Stimson Center, St Martin’s Press 1996) 3-7

⁶⁸ T Findlay, *The Use of Force in UN Peace Operations* (SIPRI Publications, Oxford University Press 2002) 3-7

traditional peacekeeping, wider peacekeeping, peace enforcement, assisting transitions, transitional administrations and peace support operations.⁶⁹

Common denominator – “traditional peacekeeping”

What most such typologies as the ones listed above share in common is the category of traditional peacekeeping, which seems to be a starting point for all other types of peace operations. Although there is no agreement as to a definition of traditional peacekeeping or its constitutive activities, the historic origins and underlying assumptions and principles are rather undisputable.⁷⁰ As already mentioned, the UN Emergency Force (UNEF I) contributed most significantly to the articulation of the key concepts of UN (traditional) peacekeeping which are premised on consent, impartiality and non-use of force except in self-defence.⁷¹ The so-called “holy trinity” provides a conceptual point of departure for all peacekeeping operations. At the same time, however, changing realities on the ground and new political requirements reveal its limitations and question its utility as a constitutional basis for peacekeeping.⁷² Different conditions with which peacekeepers were confronted made it difficult to stick to the three principles in their original form, which is discussed in the following sections.

2.2.3. A quest for an official United Nations definition of peacekeeping

Defining “peacekeeping” is not an easy task since the concept was not conceived as a part of a well-considered theoretical framework or a coherent doctrine. Peacekeeping was born in practice or rather the term “peacekeeping” was invented after the practice had already begun.⁷³ As apparent from the preceding section, peacekeeping history is very much case driven and therefore defying a simple definition as it

⁶⁹ A J Bellamy, P D Williams (n 17) 7-9

⁷⁰ M Goulding (n 52) 451; P Diehl, *International Peacekeeping* (John Hopkins University Press 1994) 13; A J Bellamy, P D Williams (n 17) 173

⁷¹ *Second and final report of the Secretary-General 1956* (n 31)

⁷² N Tsagourias, ‘Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension (2007) 11(3) *Journal of Conflict and Security Studies*, 465; A J Bellamy, P D Williams (n 17) 173

⁷³ T Findlay (n 68) 4; W J Durch, M L England, *Purposes of Peace Operations* New York: New York University, Center on International Cooperation, March 2009. 9pp available at <<http://cic.nyu.edu/Lead%20Page%20PDF/purposesofpeace.pdf>>

“developed too many variations for the one term to retain a conceptual clarity”.⁷⁴ This is additionally complicated by the fact that peacekeeping or peace operations are not mentioned in the UN Charter and the Organization itself was for years disinclined to define them probably because “to define peace-keeping was to impose a strait-jacket on a concept whose flexibility made it the most pragmatic instrument at the disposal of the world organization”.⁷⁵ Definitions are powerful and consequential as they include and legitimize certain activities or behaviour while excluding and rejecting other, hence it is not surprising that the world political organisation has been avoiding such “politically charged question” as the one of defining peacekeeping. Additional difficulty arises when definitions involve negotiations and the agreement is to be reached by many actors/participants having different interests, values and expectations, which is true for a global organisation as diverse as the United Nations.

The Special Committee on Peacekeeping Operations

The first such effort was made in 1965 when the UN General Assembly established the intergovernmental Special Committee on Peacekeeping Operations “to undertake as soon as possible a comprehensive review of the whole question of peacekeeping operations in all their aspects”.⁷⁶ In 1977 the Committee produced *Draft articles of guidelines for further United Nations peace-keeping operations under the authority of the Security Council and in accordance with the Charter of the United Nations*.⁷⁷ The final version has never been adopted due to political disagreement in the Special Committee regarding the question of the distribution of powers between the Security

⁷⁴ R Chandra Thakur, A Schnabel, *United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement* (United Nations University Press 2001) 9

⁷⁵ As remarked by Shashi Tharoor, the Special Assistant to the Under-Secretary-General for Special Political Affairs/Peacekeeping Operations in 1989-1996 “peacekeeping was an activity that the United Nations had always been politically reluctant to define”. S Tharoor, ‘The Changing Face of Peace-keeping and Peace-enforcement’ (1995) Vol. 19 Fordham International Law Journal 408, 414

⁷⁶ GA Res. 2006, para XIX (18 February, 1965); The Special Committee reports to the General Assembly on its work through the Fourth Committee (Special Political and Decolonization) and is comprised of 147 Member States, mostly past or current contributors to peacekeeping operations. 14 other Member States, intergovernmental organisations and entities, including the African Union, the European Community, the Organization of Islamic Cooperation, the International Committee of the Red Cross (ICRC) and the International Criminal Police Organization (Interpol), participate as observers, see: <http://www.un.org/en/peacekeeping/ctte/CTTEE>;

See also: W J Durch (ed), *Twenty-First-Century Peace Operations* (US Institute of Peace 2006) 5; M Zwanenburg (n 45) 11

⁷⁷ *Report of the Special Committee on Peacekeeping Operations, eleventh report of the working group of 2 December 1977* (1977) UN Doc. A/32/394. Ann.2, Appendix I

Council and the Secretary-General.⁷⁸ Apart from discussing the authority of the Security Council and responsibilities of the Secretary-General, the guidelines contain other general rules for institutional set-up and composition of UN peacekeeping forces, freedom of movement and financial matters. Although there is no definition of peacekeeping in the draft guidelines, Article 9 describes most basic principles which should govern the forces' conducts, and these are: a full co-operation with the parties concerned, especially a host government, and a complete objectivity.

Even though no progress has been made regarding the official codification of guidelines for all future cases, the Committee remains the only United Nations mandated forum to review comprehensively the issue of peacekeeping operations and make recommendations. It continues its efforts for such a review; it examines the implementation of its proposals and considers any new proposals so as to enhance the capacity of the United Nations to fulfil its responsibilities in this field.⁷⁹ It has achieved consensus on the number of principles such as the strict observance of the Purposes and Principles of the UN Charter, the respect for the principles of the sovereignty, territorial integrity and political independence of states and non-intervention in matters within the domestic jurisdiction of any state.⁸⁰ The Special Committee always emphasises in its reports that the basic principles of peacekeeping, consent of the parties, impartiality and non-use of force except in self-defence (with a later addition of the defence of a mandate), are essential to its success.⁸¹

Parallel to the work of the Committee the Secretary-General has also been involved in the process of providing general guidance for peacekeeping operations and contributed with a draft model status of forces agreement, a draft model agreement

⁷⁸ R C R Siekman, 'The Codification of General Principles for United Nations Peace-keeping Operations' (1988) Vol. 35 No. 3 Netherlands International Law Review. See alternative versions of Article 1(1) and Article 6, concerning the direction of the UN peacekeeping force

⁷⁹ United Nations General Assembly, Fifty-seventh session, Agenda item 78

Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations (28 March 2003) UN Doc. A/57/767

⁸⁰ See: Reports of the Special Committee on Peacekeeping Operations available at:

<<http://www.un.org/en/peacekeeping/ctte/CTTEE.htm>>

⁸¹ <http://www.un.org/en/peacekeeping/ctte/spcmt_rep.htm>

with participating states, training manuals and standard operating procedures for peacekeeping missions.⁸²

An Agenda for Peace and the Supplement

The first official UN document that attempted to define peacekeeping was a report written in 1992 by the Secretary General Boutros Boutros-Ghali.⁸³ *An Agenda for Peace* was produced at a request of the UN Security Council for an “analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peace-keeping.”⁸⁴ Part II of *An Agenda for Peace* provides definitions of the core and integrally related activities of the United Nations in the field of maintenance of the international peace and security: preventive diplomacy, peacemaking and peacekeeping. Peacekeeping is thus defined as:

“(…) the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.”⁸⁵

The significance of this definition lies in the conceptualisation of peacekeeping as one of the ways in which a third party, the UN, may play a role in resolving conflicts.⁸⁶ It shows the flexibility of the concept, but also its ambiguity.⁸⁷ Elsewhere in the Report we read that through peacekeeping the Organization is able to assist in implementing agreements achieved by peacemakers after the fighting as been halted.⁸⁸ This stipulation reflects the realities of that time – peacekeeping missions were deployed when the hostilities ceased and their main purpose was to help the parties to keep the ceasefire. The Report calls peacekeeping the invention of the United Nations that brought stability to many regions in the world.⁸⁹ It admits that

⁸² M Bothe (n 20) 662

⁸³ *Agenda for Peace* (17 June 1992) UN Doc. A/47/277-S/24111

⁸⁴ Statement of the Security Council of 31 January 1992, UN Doc. S/23500

⁸⁵ *Agenda for Peace* (n 83), para. 20

⁸⁶ A J Bellamy, P D Williams (n 17) 17

⁸⁷ M Katayanagi, *Human Rights Functions of United Peacekeeping Operations* (Martinus Nijhoff Publishers 2002) 49

⁸⁸ *Agenda for Peace* (n 83), para. 15

⁸⁹ *Ibid* para. 46

the nature of peacekeeping evolved rapidly in recent years and that its established principles and practices as well as the composition of the peacekeeping operations had to be adapted to new demands.⁹⁰ The Report does not proceed into a discussion about the principles underpinning peacekeeping though. Only consent is briefly pointed out in the definition cited above and preceded with the word “hitherto” which suggests that the condition of obtaining the consent of the parties might not be a prerequisite anymore. This implication could have been, again, influenced by the realities of that time. The United Nations became involved in intra-state conflicts where there was often no legitimate government to obtain a consent from, negotiations with leaders of factions could have been regarded as an act of their recognition and were therefore avoided and even if consent was eventually obtained, the consenting parties did not have enough control to make it effective.⁹¹ Impartiality is mentioned in *An Agenda for Peace* but only in the context of humanitarian assistance⁹² and the Organization reacting impartially in crisis situations.⁹³ The use of force is discussed in relation to the collective security measures and measures provided in Chapter VII. Thus, it might be assumed that the peacekeeping principles were not called into question at the time of issuing *An Agenda for Peace* and there was no need yet to give a careful consideration to their precise meaning. Such a need arose 3 year later.

In the *Supplement to an Agenda for Peace*, which was issued in 1995, the Secretary General elaborated more on the principles of United Nations peacekeeping. He admitted that due the developments in global politics peacekeeping underwent major quantitative and qualitative changes; it became more complex, involving the whole range of military and civilian matters, more expensive and dangerous.⁹⁴ He acknowledged that United Nations peacekeeping started being practiced in wholly new conditions of ongoing hostilities in intra-state conflicts, where there was no agreement between the warring parties on which a peacekeeping mandate could be based. Peacekeeping forces were often confronted not by regular armies but by little disciplined and hardly structured militias in the situation of humanitarian emergency,

⁹⁰ Ibid para. 50-52

⁹¹ M Katayanagi M (n 87) 49-50

⁹² *Agenda for Peace* (n 83) para. 29-30

⁹³ Ibid para. 83

⁹⁴ *Supplement to an Agenda for Peace* (25 January 1995) A/50/60 S/1995/1, para. 15

the collapse of state institutions and a breakdown of law and order.⁹⁵ The Secretary General stressed that such new operations remained “neutral and impartial between the warring parties” and their humanitarian mandate was strengthened by the Chapter VII authorisation to use force for limited and local purposes only and not “to stop the aggressor” or “to impose a cessation of hostilities”.⁹⁶ The *Supplement* explicitly spells out the basic principles on which these new peacekeeping operations remained to be based⁹⁷: the consent of the parties, impartiality and non-use of force except in self-defence; at the same time, however, it highlights few aspects of peacekeeping mandates that made it difficult for peacekeeping operations to stick to these principles. Protecting humanitarian operations during continuing warfare or protecting civilian populations in safe areas required the use of force and much stronger military capabilities that were made available, and which could not be reconciled with existing mandates based the consent of the parties, impartiality and non-use of force.⁹⁸ With regard to the last principle, the *Supplement* emphasises that “peace-keeping and the use of force (other than in self-defence) should be seen as alternative techniques and not as adjacent points on a continuum permitting easy transition from one to the other”⁹⁹, which can be interpreted as upholding a demarcation line between peacekeeping and enforcement. Importantly, the validity of the consent requirement was reaffirmed even before the *Supplement*, in the report of the Secretary General to the 48th session of the General Assembly on 14 March 1994 the definition of peacekeeping from *An Agenda for Peace* was repeated but without the word “hitherto”.¹⁰⁰

The Brahimi Report

Following these two documents a comprehensive evaluation of peacekeeping practice was made in 2000 in the *Report of the Panel on United Nations Peace Operations*, commonly called the *Brahimi Report* after the chairman of the panel

⁹⁵ Ibid para. 12-13

⁹⁶ Ibid para. 19 ff

⁹⁷ Ibid para. 33

⁹⁸ Ibid 34-35.

⁹⁹ Ibid para. 36.

¹⁰⁰ *Improving capacity of the United Nations peacekeeping*, UN Doc. A/48/403-S/26450 not available on the UN website; see also: M Katayanagi (n 87) 50

Lakhdar Brahimi.¹⁰¹ The panel was convened by the UN Secretary-General Kofi Annan ahead of the upcoming Millennium Summit in 2000 and tasked with reviewing of United Nations peace and security activities and recommending improvements. The *Brahimi Report* introduced a new terminology of “peace operations” and described them as entailing three principal activities namely: conflict prevention and peacemaking; peacekeeping; and peace-building.¹⁰² It defines peacekeeping as:

“(…) a 50-year-old enterprise that has evolved rapidly in the past decade from a traditional, primarily military model of observing ceasefires and force separations after inter-State wars, to incorporate a complex model of many elements, military and civilian, working together to build peace in the dangerous aftermath of civil wars.”¹⁰³

This characterisation notes the evolution of peacekeeping and the new practice of much more complex peacekeeping operations being established in response to the new type of conflicts. It highlights their mixed military-civilian composition and a peace-building dimension. The *Report* sustains that peacekeeping remained based on “bedrock principles” of consent of the local parties, impartiality and the use of force only in self-defence¹⁰⁴ but calls for a robust doctrine and realistic mandates. The three principles are discussed in context of modern peace operations dealing with civil strife, intra-state or transnational conflicts, which reveals a modified understanding of what they entail. It is noted that consent might be manipulated by local parties or the local factions might split into new formations not contemplated in the peace agreement to which consent was given.¹⁰⁵ As regards the use of force, the *Report* stresses that once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully, which means that:

“(…) United Nations military units must be capable of defending themselves, other mission components and the mission’s mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect and, in particularly

¹⁰¹ *Report of the Panel on United Nations Peace Operations* (October 2000) UN. Doc. A/55/305-S/2000/809, available at http://www.un.org/peace/reports/peace_operations/ [hereinafter: *Brahimi Report*]

¹⁰² *Ibid* para. 10

¹⁰³ *Ibid* para. 12

¹⁰⁴ *Ibid* para. 48

¹⁰⁵ *Ibid* para. 48

dangerous situations, should not force United Nations contingents to cede the initiative to their attackers.”¹⁰⁶

This represents a qualitative change in the understanding of what the principle of “non-use of force except in self-defence” is supposed to denote. If we look back at the 1958 *Summary Study* of UNEF, it advises that the right to personal self-defence should be exercised only under strictly defined conditions and never on peacekeepers’ own initiative.¹⁰⁷ According to the *Brahimi Report*, self-defence apparently comprises personal self-defence, the defence of mission components (presumably units, vehicles, equipment etc.) and the defence of the mandate. The third component is a novelty but it is not explained any further. The argument could be made that such formulation gives peacekeeping forces a sort of a *carte blanche* to use force “to defend the mandate” disregarding of what is being stipulated in the mandate. The cited fragment also advocates taking over the initiative to pro-actively use force and in a sufficient enough manner to quell the attack directed at United Nations troops or at people under their protection, the latter case supposedly being subsumed under “the defence of the mandate” header.

Having discussed the challenges that the consent and the use of force have encountered, the *Report* moves on to the impartiality requirement. It states that for the new type of operations that are discussed the impartiality must mean:

“(…) adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement. In some cases, local parties consist not of moral equals but of obvious aggressors and victims, and peacekeepers may not only be operationally justified in using force but morally compelled to do so.”¹⁰⁸

This fragment represents a reconceptualization of the principle of impartiality, which was triggered by the UN’s failures in Rwanda and Srebrenica. The new approach

¹⁰⁶ Ibid para. 49

¹⁰⁷ *Report of the Secretary General: Summary Study 1958* (n 33) para. 179: “(…) A reasonable definition seems to have been established in the case of UNEF, where the rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions. The basic element involved is clearly the prohibition against any initiative in the use of armed force.”

¹⁰⁸ *Brahimi Report* (n 101) para. 50

makes a clear distinction between impartiality and neutrality and condemns the latter. The limits of impartiality are to be defined by reference to moral considerations and the ability to distinguish a victim from an aggressor. It is a major departure from the meaning of impartiality as understood in the beginning of peacekeeping practice, which advocated the equal treatment of all parties based on the assumption that the belligerents have the political will to resolve the conflict (peacefully). As stipulated in the context of the UNEF I experience, peacekeepers would not favour any party in the conflict and their deployment should not be militarily advantageous or disadvantageous to any side.¹⁰⁹ If now missions are tasked to protect civilians, to explicitly or implicitly support government forces over rebel groups, such actions undoubtedly influence a politico-military power balance in the conflict.

These three policy papers were written to review the current practice in the field of international peace and security and to offer a comprehensive and persuasive argument justifying the policy recommendations. They were intended to serve as a decision-making tool informing the target audience, that is the decision-making organs of the UN especially the Security Council, and calling for action. They describe the reality but also try to generate one. It is important to understand their applied nature and value-driven arguments that differentiate them from traditional academia which focuses on building knowledge on specific topics but is not driven to search for practical and implementable outcomes of undertaken analyses. Policy papers also differ from other publications or non-papers on peacekeeping released by various UN departments and agencies as they do not necessarily share the same problem-solution perspective. Many such publications serve informative purposes of providing an overview or a general background to certain issues relating to peacekeeping or a specific analysis of causes and patterns, but they do not suggest any course of action to address identified problems. Since they are produced in a highly politicised environment their data presentation and analysis might be influenced by the political context.

¹⁰⁹ *Second and final report of the Secretary-General 1956* (n 31)

Capstone Doctrine

One of such UN publications is the already mentioned *Capstone Doctrine (United Nations Peacekeeping Operations: Principles and Guidelines)*, an internal DPKO/DFS document, which represents “the highest-level of the current doctrine framework for United Nations peacekeeping”.¹¹⁰ Drawing on the past sixty years of United Nations peacekeeping practice, landmark reports of the Secretary-General, legislative responses, the *Brahimi Report* as well as resolutions and statements of the principal organs of the United Nations, *Capstone Doctrine* contemplates the contemporary UN peacekeeping operations, their basic principles, advantages and limitations. It intends to help guide the planning and conduct of United Nations peacekeeping operations and any materials issued by DPKO/DFS should be in conformity with the principles and concepts referred to in this guidance document.¹¹¹

Capstone Doctrine describes peacekeeping as:

“a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace.”¹¹²

The first sentence of this definition is very broad and hypothetically it could cover any type of action undertaken to assist in implementing peace agreements, provided that hostilities have stopped. The history of peacekeeping operations proves, however, that the requirement of the cessation of hostilities has not always been met. In the *Supplement to An Agenda for Peace* the Secretary-General Boutros Boutros-Ghali noted the fact of deploying peacekeeping missions in the situation of ongoing hostilities.¹¹³ The second part of the definition points at the evolution that peacekeeping has undergone over the years to become a “complex model of many elements”, which in itself does not conceptualise much. Since *Capstone Doctrine* provides definitions of other four “peace and security activities”, it could be possible to state what peacekeeping is not rather than what it is. Yet, it might still be of little guidance as these activities are said to overlap, they rarely occur in a linear sequence

¹¹⁰ UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 46) 9

¹¹¹ *Ibid* 8-10

¹¹² *Ibid* 18

¹¹³ See: *Supplement* (n 94) para. 19

and the boundaries between them have become increasingly blurred.¹¹⁴ One problematic instance of such grey areas concerns the blurring boundaries between “robust” peacekeeping and peace enforcement especially regarding the use of force, although as stressed by the DPKO there are still important differences between the two. While robust peacekeeping involves the use of force at the tactical level, this happens with the consent of the host state and/or the main parties to the conflict. Peace enforcement, on the contrary, involves the use of force at the strategic or international level to restore international peace and security in situations where the Security Council has determined the existence of a threat to the peace, a breach of the peace or an act of aggression. Such use of force authorised by the Security Council is an exception to the prohibition under Article 2(4) of the UN Charter.¹¹⁵

Capstone Doctrine discusses also the three basic principles of UN peacekeeping and their interdependence. It acknowledges the evolution of peacekeeping practice and maintains the continuous relevance of the traditional principles, albeit in their modified understanding as introduced in the *Brahimi Report*. United Nations operations are always deployed with the consent of the main parties to the conflict, which is necessary to carry out their mandated tasks and prevents them from being drawn towards enforcement. They are impartial in their dealings with the parties and must implement the mandate without favour or prejudice to any of them. Impartiality is critical for maintaining the consent and cooperation, but the even-handedness towards the parties must not be confused with neutrality or inactivity. The principle of non-use of force except in self-defence has been extended to include defence of the mandate, but as explained above the use of force is allowed only at the tactical level and does not make peacekeeping an enforcement tool.¹¹⁶

As the review of the UN documents above shows, the Organization has not endorsed one single and authoritative definition of peacekeeping. What can authoritatively be concluded, however, is that peacekeeping must be distinguished from enforcement action or peace enforcement depending on a nomenclature used. This distinction was

¹¹⁴ <http://www.un.org/en/peacekeeping/operations/peace.shtml>; UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 46) 17ff

¹¹⁵ *Ibid* 18ff (The issue on the use of force as explained in *Capstone Doctrine* is further discussed in details in the following chapters)

¹¹⁶ *Ibid* 31-35

stressed early on by the ICJ in its Advisory Opinion on *Certain Expenses of the United Nations*. Peacekeeping is NOT (peace) enforcement because it does not involve “preventive or enforcement measures” under Chapter VII of the UN Charter against a state with the aim of overcoming its will. Even if robust force is used at the tactical level in self-defence and defence of the mandate, it is not the primary aim of the peacekeeping mission but only incidental thereto.¹¹⁷ Peacekeeping should strictly observe the Purposes and Principles of the UN Charter that is the principles of sovereignty, territorial integrity and political independence of states and non-intervention in matters that are essentially within their domestic jurisdiction.¹¹⁸ The peacekeeping principles of consent, impartiality and non-use of force except in self-defence and defence of the mandate secure that the Charter’s Purposes and Principles are respected and that peacekeeping is distinguished from (peace) enforcement.

At this juncture, a comment should be made about the relationship between neutrality and impartiality. The shift from neutrality to impartiality understood as operational terms has been documented in the analysis above. At the operational level, peacekeeping operations are not neutral because they can use force in self-defence and defence of the mandate, but this is allowed only in the execution of the mandate and without favour or prejudice to any of the parties. In that sense, peacekeeping missions are impartial in their dealings with the parties as they treat them equally in material terms and in relation to the operation’s mandate. Given that peacekeeping operations do not aim to impose a political solution against states’ will or enforce peace they are apolitical or *neutral* in character. This is not to say that they have no political agenda. This agenda, however, is informed by values and principles shared by the whole international community such as respect for rule of law, human rights, peace and self-determination.¹¹⁹

By way of contrast, (peace) enforcement is an exception to the prohibition on the use of force in Article 2(4) of the UN Charter. It does not require consent of any state and it designates a state culpable for a threat to the peace, a breach of the peace or an act of aggression. (Peace) enforcement is neither neutral nor impartial and it uses

¹¹⁷ N Tsagourias (n 72) 472

¹¹⁸ United Nations, *Report of the Special Committee on Peacekeeping Operations* (2012), UN. Doc. A/66/19 para. 24

¹¹⁹ N Tsagourias (n 72) 480-481

force against a culpable state to impose a political solution or enforce peace.¹²⁰ Neutrality is incompatible with the concept of collective security. All UN Member States have to comply with the decisions of the Security Council exercising its collective security functions and assist it in carrying out its decisions.¹²¹

2.3. “A peacekeeping mission in accordance with the Charter of the United Nations”

The preceding part of this chapter has provided an overview of the historical development of peacekeeping, evolution of different types of peace operations, various attempts to conceptualise and define peacekeeping and its relationship to global politics. It has demonstrated that peace operations do not constitute a homogenous category nor is there any official definition of the phenomenon. There is, however, a universal agreement that peacekeeping has to be distinguished from (peace) enforcement and that the constitutional principles of consent of the parties to a conflict, impartiality and use of force only in self-defence and defence of the mandate are critical to making this distinction.¹²²

With these conclusions in mind, the study will now proceed with the analysis of the phrase “a peacekeeping mission in accordance with the Charter of the United Nations” as stipulated in Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute.

2.3.1. The General Rule – Ordinary meaning and Context

Ordinary meaning

A reading of the phrase “a peacekeeping mission in accordance with the Charter of the United Nations” by reference to the “ordinary meaning” might prove a bit problematic. As the introductory part of this chapter has demonstrated, it is difficult to identify one ordinary meaning of peacekeeping given the number of concepts and

¹²⁰ Ibid, 471

¹²¹ Art. 24 and Art. 25 of the Charter of the United Nations

¹²² The question on the constitutional principles of peacekeeping and their role was put to all respondents and virtually all of them confirmed the continuing relevance of consent, impartiality and non-use of force except in self-defence as characteristics that distinguish peacekeeping for enforcement action

classifications that have been used so far to explain it. Should UN documents and publications, ordinary dictionaries, or scholarship on the subject matter be primary sources in search for the “ordinary meaning”? Different types of peace operations have been identified based on theoretical and practical developments in the UN-peacekeeping machinery and no official definition of peacekeeping has been proposed by the Organization yet. The United Nations seems disinclined to take far-reaching fundamental decisions of drawing up precise parameters for all-future cases of peacekeeping missions given how evolutionary and revolutionary the peacekeeping practice has proved to be. The landmark reports issued by the Secretaries-General or commissioned by them confirm an evolutionary and fluid nature of peacekeeping. Other UN publications, especially internal documents like *Capstone Doctrine*, raise questions as to their own legal status and a binding force before raising concerns about the utility of the definitions they provide. Choosing one definition from those proposed by scholarship or dictionaries would be arbitrary and based on individual preferences. By way of example, three leading English dictionaries define peacekeeping as:

- the active maintenance of a truce between nations or communities, especially by an international military force (Oxford Dictionary)
- the activity of preventing war and violence, especially using armed forces not involved in a disagreement to prevent fighting (Cambridge dictionary)
- the preserving of peace; especially: international enforcement and supervision of a truce between hostile states or communities. (Merriam-Webster Dictionary).

Based on the preceding section on the history of peacekeeping it is difficult to admit that these definitions grasp the nature of peacekeeping. None of them distinguishes peacekeeping unequivocally and unambiguously from enforcement action, and one seems to even link the two (international enforcement).

Functional meaning

The unsuitability of these exemplary dictionary definitions might suggest that there is no single “ordinary” meaning of “peacekeeping”, but rather its meaning is

“functional” in a sense of a meaning being appropriate to the subject matter¹²³, public international law or UN law more specifically. Such assumption would warrant relying first on more specialist sources like UN documents while searching for a meaning of “a peacekeeping mission in accordance with the Charter of the United Nations”. Additionally, the degree of specialism in the term being interpreted would presuppose that the meaning must be ordinary for someone reasonably knowledgeable in that subject (international lawyer, diplomat, international law scholar etc.).¹²⁴ The “functional” meaning is not to be equated with the “special meaning” to which Article 31(4) of the VCLT refers. The former is the meaning ascribed to a term in a particular field of human activity, it is ordinary or common in a particular context. The latter is the meaning agreed by the parties which differs from a common, ordinary meaning of a term. Assigning a special meaning requires an apparent indication that the term is to be construed differently from what would normally be expected.¹²⁵ Neither the Rome Statute nor any related documents contain any indication that the term “a peacekeeping mission in accordance with the Charter of the United Nations” should be assigned a special meaning.

A generic term?

As has already been remarked, UN peacekeeping practice has changed over time and so have the definitions of it. Peacekeeping keeps evolving in response to the changing political conditions and humanitarian needs on the ground. Such characterisation suggests that “peacekeeping” might be a “generic term” which, as explained by the ICJ in *Aegean Sea Continental Shelf (Greece v. Turkey 1978)* case, is a term being continuously applied and keeping pace with the development of law. In that case the Court had to decide whether the term “territorial status” used in a Greek reservation in its accession to the 1928 *General Act for Pacific Settlement of International Disputes*, which would be applicable to the dispute in question, would extend over continental shelf given that the treaty was concluded before the concept of continental shelf had become known. The Court ruled that a “territorial status” was a “generic term” which content would change through time:

¹²³ R Gardiner (n 7) 166-167

¹²⁴ Ibid. 173-174

¹²⁵ Ibid. 291

“Once it is established that the expression “the territorial status of Greece” was used in Greece’s instrument of accession as a generic term denoting any matters properly to be considered as comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to expression by the law in force at any given time.”¹²⁶

Admitting that peacekeeping is a generic term would mean that the determination of its content needs to be made on a case-by-case basis against the background of the current state of international law and peacekeeping practice.

Contextual assessment

The term “peacekeeping mission” forms only a part of the phrase under scrutiny hence reading it in its immediate surrounding is the first contextual assessment to be made. A “peacekeeping mission” is qualified by its immediate modifier “in accordance with the Charter of the United Nations”. This provides a direct link to the United Nations system and excludes any such mission that is not “in accordance with” the UN Charter. Some controversies might, however, arise with regard to the interpretation of this qualifier. Does it relate to substantive or procedural conditions (or both) in the UN Charter for the establishment and/or functioning of a peacekeeping mission? Does the Rome Statute cover United Nations peacekeeping missions only, i.e. peacekeeping missions established by the Security Council or the General Assembly and operating under United Nations command and control or also other peacekeeping missions established and run by regional organisations? Depending on a reading of the phrase “in accordance with the Charter of the United Nations” the latter type of missions can either be included or excluded from the protection of the ICC Statute.

An ordinary reading of the phrase does not (immediately) suggest that the qualifier relates to United Nations peacekeeping missions exclusively. It rather requires some kind of compatibility with the UN Charter. Although not foreseen by the drafters of the Charter, peacekeeping has become one of the tools used by the United Nations in the fulfilment of its primary mission of maintaining international peace and security, and as such it must be in conformity with the UN Charter. As the history of

¹²⁶ *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Reports [1978] 3

peacekeeping illustrates, there has been no single procedure for establishing peacekeeping missions; they have been set up by both the Security Council and the General Assembly and they have operated under their authority and control.¹²⁷ At the same time, Chapter VIII of the UN Charter provides for the possibility of regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security, which implies that the establishment of a peacekeeping operation is not necessarily confined to the United Nations so long as the caveats in Chapter VIII are met. The authority of the Security Council over such regional arrangements and agencies is required only if it decides to utilize them for enforcement action. *A contrario*, since peacekeeping operations are distinct from enforcement actions, they could operate under the authority and control of regional organisations.

The context of the treaty can provide more guidance as to the exact scope of the phrase “in accordance with the Charter of the United Nations”. The Vienna rules define “context” broadly as encompassing the whole text of the treaty, preamble, annexes and related documents. This directs the interpreter to look outside the immediate setting of surrounding provisions and search for other provisions on similar matters or using similar wording. The use of the wider context provides also a link to the further element in the first paragraph of the general rule in Article 31, “the object and purpose” as they are more apparent if the broader perspective is used.¹²⁸ Neither the text of the Rome Statute nor any related document as specified in Article 31(2) of the VCLT contemplates the phrase “in accordance with the Charter of the United Nations” in any more detail. Nor is this qualifier in any of these documents repeated. There is only one instance of a similar phrase used in the Rome Statute in Article 5, which lists crimes within the jurisdiction of the Court.¹²⁹ Since no

¹²⁷ See Articles 7(2), 22 and 29 of the Charter of the United Nations for establishment of subsidiary organs

¹²⁸ R Gardiner (n 7) 177-178

¹²⁹ Article 5 of the Rome Statute -Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

provision defining the crime of aggression and setting out the conditions for the exercise of the Court's jurisdiction was agreed at the time of adoption of the Statute, paragraph 2 of Article 5 requires that once such provision is adopted it must be "consistent with the relevant provisions of the Charter of the United Nations". The Statute does not specify which provisions of the UN Charter are meant here, but they should naturally relate to the role of the Security Council as regards the crime of aggression. The relationship between the ICC and the Security Council in this connection needs to be clarified.¹³⁰

The relationship between the International Criminal Court and the United Nations

Although the clause indicating the accordance with the Charter of the United Nations does not appear anywhere else in the Statute, there are other mentions of the Charter of the United Nations or the United Nations itself. It is important to examine those instances as they evidence the relation of the Rome Statute to the United Nations system, which might aid the process of interpretation.

The Preamble of the Rome Statute reaffirms the Purposes and Principles of the UN Charter and it emphasises the relationship of the International Criminal Court with the United Nations system.¹³¹ This relationship is one of the constitutional characteristics of the Court since its function is intrinsically linked to the purposes of the United Nations, especially to the maintenance and restoration of international peace and security. Commentators point at the preventive role of the Court in this regard - the establishment of the Court can deter potential criminals from committing crimes that threaten "the peace, security and the well-being of the world";¹³² and a more direct role – trying and punishing those who committed such crimes will

¹³⁰ G Werle, *Principles of International Criminal Law* (T.M.C. Asser Press 2005) 400-401; H von Hebel and D Robinson at 81-85 in R S Lee, H Friman (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers 2001); A Zimmerman at 103-106, in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* (2nd edition, Beck 2008)

¹³¹ "Recognizing that such grave crimes threaten the peace, security and well being of the world, (...) Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, (...)

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole" (emphasis in the original) Preamble of the Rome Statute of the International Court.

¹³² See the Preamble of the Rome Statute, para. 3

contribute to the process of reconciliation and restoration of peace.¹³³ The ICC Statute recognises distinctive roles for the UN principal organs to be exercised in this process, with the most important power of the UN Security Council to refer potential prosecutions to the Court in situations outside the Court's treaty-based territorial and nationality jurisdiction.¹³⁴ In 2004 the ICC and the UN concluded the Negotiated Relationship Agreement in accordance with Article 2 of the Statute and the General Assembly Resolution 58/79 of 9 December 2003. The Agreement affirms the independence of the Court while establishing the legal foundation for cooperation within the respective mandates of the ICC and the UN and regulating the working relationship between these two organisations.¹³⁵ The Preamble of the Agreement also refers to the Purposes and Principles of the Charter of the United Nations and recalls that the Rome Statute of the International Criminal Court reaffirms them as well.

It should be stressed, however, that the International Criminal Court is organically (institutionally, formally) separated from the United Nations. It is not formally bound by the rules of the Charter, although as stated in its Preamble it "reaffirms the Purposes and Principles of the Charter". It is not institutionally connected to the principal organs of the UN or financed from the regular budget of the Organization (although funds may be provided by the UN on the basis of the Article 115 of the ICC Statute). The election of the members of the Court's organs is an exclusive prerogative of the State Parties.¹³⁶

This account of the relationship of the Court with the United Nations system entails that the provisions of the Rome Statute must be consistent with the substantive norms of the Charter including its Principles and Purposes. Therefore, the UN Charter might be helpful in interpreting the Statute's provisions including Articles 8(2)(b)(iii) and 8(2)(e)(iii), which is discussed further below.

¹³³ A Cassese, P Gaeta, J R W D Jones (n 1) 221-222

¹³⁴ See Article 13(b) of the Rome Statute

¹³⁵ Following negotiations the UN and the ICC agreed upon a text of the Relationship Agreement on 7 June 2004. The Agreement was approved by the ICC Assembly of States Parties in The Hague, The Netherlands on 7 September 2004 and by the UN General Assembly at the close of its 58th session, on 13 September 2004. The agreement concerns, *inter alia*, reciprocal representation (article 4), exchange of information (article 5), reports to the UN (article 6), proposal from the Court for items for consideration at the United Nations (article 7), personal arrangements (article 8), administrative cooperation (article 9), services and facilities (article 10), access to the United Nations Headquarters (article 11), laissez-passer (article 12) and financial matters (article 13)

¹³⁶ See: A Cassese, P Gaeta, J R W D Jones (n 1) 221 (the whole Chapter 4.3)

2.3.2. Article 31(3)(c) of the Vienna Convention on the Law of Treaties and “systemic integration”

Looking beyond the immediate context of the Statute, a similar clause “in accordance with the Charter of the United Nations” can also be found in few other international treaties including the UN Charter, the Statute of the International Court of Justice and the Convention on the Safety of United Nations and Associated Personnel.¹³⁷ Giving references to similar clauses from outside the context of the treaty moves the interpretation into the ambit of Article 31(3)(c) of the VCLT, which requires the interpreter to take into account together with the context “any relevant rules of international law applicable in the relations between the parties”. As a part of the “general rule” recourse to relevant international law is a mandatory part of the process of interpretation and may perform following functions:

- 1) resolve time issues;
- 2) fill *lacuna* in the treaty by reference to general international law;
- 3) draw guidance from parallel treaties;
- 4) resolve conflicting obligations under different treaties ;
- 5) take account of the development of international law.¹³⁸

“Drawing guidance” on the meaning of the clause “in accordance with the Charter of the United Nations” could justify the reference to other international law instruments including the UN Charter. The UN Charter would seem especially relevant in this respect given the ICC’s support to the Purposes and Principles of the United Nations as discussed above. What needs to be analysed first, however, is the scope of application of Article 31(3)(c).

The formulation of Article 31(3)(c) raises three issues concerning its operationalization. The first one relates to the meaning of the phrase “any relevant rules of international law” with the key questions what is “relevant”: the same subject matter or applicability to the situation in question; and what is meant by “rules of international law”: customary law, general principles and/or treaties? The second issue concerns the scope of limitation in Article 31(3)(c) to rules applicable in

¹³⁷ See especially Articles 2(2), 7(2), 25 also 24(2), 62(4) and 76 of the Charter of the United Nations

¹³⁸ R Gardiner (n 7) 260

the relations between “the parties”, which could be differently construed as denoting only the parties to the dispute or all parties to the multilateral treaty being interpreted. The third consideration which arises in the particular context of this sub-paragraph of Article 31 is linked to what is commonly characterized as “inter-temporal law”: what is the critical date for the rules to be taken into account - the date of the conclusion of the treaty or the date on which the dispute arises?

The International Law Commission has been criticized that the formulation of Article 31(3)(c) provides little guidance on how it is to be used.¹³⁹ Academic studies have analysed this sub-paragraph using the very Vienna rules on treaty interpretation of which it is a part. The textual and contextual examinations have led to several conclusions:

- 1) the provision refers to “rules” of international law firmly established as rules and not just broader principles or “soft law”;
- 2) “relevant rules” are those which can assist the interpretation and direct the quest for the meaning of a treaty provision and not necessarily those which generally apply to the circumstances of the dispute;
- 3) the provision applies to “international law” in general and that includes all acknowledged sources of international law with Article 38 of the Statute of the International Court of Justice providing one of the most widely used reference in this context;
- 4) it is not instantly clear which “parties” are covered by the provision, however, practice and academic writing tend to read it as referring to all the parties to the treaty, so that any subsequent interpretation of the treaty’s provisions would put consistent obligations on all the parties to it;
- 5) the sub-paragraph does not tackle the issue of inter-temporality.¹⁴⁰

With regard to the last point the lack of any reference to inter-temporal law is conspicuous given that some rules were already pronounced in judicial practice at the

¹³⁹ As Judge Weeramantry remarked in his separate opinion in the *Gabkikovo-Nagymaros* case, the sub-paragraph “scarcely covers this aspect with the degree of clarity requisite to so important a matter”, *Gabikovo-Nagymaros Project* (Hungary v Slovakia) ICJ Rep 1997, 7 at 114; see also H Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989 Part Three’ (1991) 62(1) *British Yearbook of International Law* 1, 58

¹⁴⁰ C McLachlan, ‘The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention’ (2005) vol.54 *ICLQ* 290-291; R Gardiner (n 7) 260-275

time. Preparatory work shows that inter-temporality was in fact discussed by the ILC. The first draft was based on the well-established rule articulated in the *Island of Palmas* case¹⁴¹ and accordingly it included two provisions relating to interpretation and application of a treaty. It proposed that a treaty should be interpreted “in the light of the law in force at the time when the treaty was drawn up” and its application should be governed “by the rules of international law in force at the time when the treaty is applied”.¹⁴² After much debate the draft was amended and all references to time factors were deleted. As explained by the Commission the correct application of the temporal element should instead be covered by interpretation “in good faith”.¹⁴³

The International Law Commission has returned to the subject of treaty interpretation on few occasions, recently when dealing with two other related topics “Fragmentation of international law” and “Treaties over time”.¹⁴⁴ As the organ that once prepared the VCLT, it has been in a privileged position to further elaborate on the Vienna rules taking account of subsequent practice and development of international law and indeed it has offered more guidance on the application of custom, general principles of law and other treaty rules as well as the issue of inter-temporality.¹⁴⁵ Article 31(3)(c) has also been considered by the ILC as embodying the principle of “systemic integration” which states that international obligations

¹⁴¹ The Island of Palmas Case (US v. Netherlands), Permanent Court of Arbitration (1928) 2 U.N. Rep. Int'l Arbitral Awards 829. The case concerned a territorial sovereignty over the island Palmas claimed by both US and the Netherlands. The question before the arbitrator was whether a territory belonged to the first discoverer (Spain, who ceded it to the US), even if they did not exercise authority over it, or to the state, which actually exercised sovereignty over it (the Netherlands). Judge Max Huber ruled that it was not sufficient to establish that a title had been validly acquired at a specific moment, but it must be shown that sovereignty had been held continuously and existed at the moment critical to the decision of the dispute. The relevant passage goes as follows:

“(…) a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. (...) As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law” (at 845)

¹⁴² Yearbook of ILC [1964], vol II, 8-9

¹⁴³ Ibid para 16. See also R Gardiner (n 7) 256-259

¹⁴⁴ At its sixtieth session (2008), the Commission decided to include the topic “Treaties over time” in its programme of work and to establish a Study Group. It has continued working on the topic since 2008 presenting some preliminary conclusions in the ILC Reports of 2011 and 2012.

¹⁴⁵ ILC Report on the work of its Fifty-eighth Session (2006), General Assembly, Official Records, Sixty-first Session, Supplement No 10 (A/61/10) paras. 17-23, 413-416

should be interpreted by reference to their normative environment (“system”).¹⁴⁶ The Commission stressed that the importance of taking account of the normative context under Article 31(3)(c) in the interpretation process “lies in its performance of a systemic function in the international legal order, linking specialized parts to each other and to universal principles”.¹⁴⁷ The Commission remarked that certain rules might appear to be compatible or in conflict depending on the way they are interpreted. Normative conflicts can be resolved through interpretation or, on the contrary, they are likely to emerge as a result of it.¹⁴⁸ It follows that while searching for meaning of the interpreted terms it seems appropriate to refer to their normative environment that should include materials relevant from the perspective of their contribution to a more general objective of the “systemic coherence”.¹⁴⁹

Judicial practice both on national as well as on international level proves that using provisions of treaties other than the one being applied to assist treaty interpretation is so common and accepted that hardly ever a justification by reference to the VCLT is given.¹⁵⁰ The same or similar terms may help to identify the ordinary meaning of the term or word in question by reference to its use in another treaty context. It should be kept in mind though that the interpretation of identical or similar provisions of different treaties might not be the same outside their own treaty context given other elements of the general rule of interpretation, *inter alia*, context, object and purpose or subsequent practice. Therefore, the treaty interpretation by reference to other “relevant rules” should not mean transferring the provisions under consideration within the scope and context of these other rules.¹⁵¹

¹⁴⁶ C McLachlan (n 140) 279-320; International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi) UN Doc. A/CN.4/L.682 (13 April 2006) Section F [hereinafter: ILC, *Fragmentation of International Law*]

¹⁴⁷ Ibid. para 473

¹⁴⁸ Ibid. para. 412

¹⁴⁹ Ibid. para. 419

¹⁵⁰ R Gardiner (n 7) 282; C McLachlan (n 140) 283

¹⁵¹ See *The MOX Plant Case (Ireland v. United Kingdom)* (ITLOS) Judgment of 3 December 2001, para. 51; see also A Orakhelashvili, “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights” (2003) 14 EJIL 529 at 537: “(...) the purpose of interpreting by reference to ‘relevant rules’ is, normally, not to deter the provisions being interpreted to the scope and effect of those ‘relevant rules’, but to clarify the content of the former by referring to the latter. ‘Relevant rules’ may not, generally speaking, override or limit the scope or effect of a provision (...)”.

Given that neither the Rome Statute nor any related documents provide guidance on the meaning of the phrase “peacekeeping mission in accordance with the Charter of the United Nations”, recourse can be made to relevant treaty law in line with Article 21(1)(b) of the Rome Statute and Article 31(3)(c) of the VCLT. Accordingly, the study turns to the Charter of the United Nations to seek guidance on the interpretation of the phrase in issue. In the light of the relationship between the ICC and the UN system and the fact that virtually all states are parties to the UN Charter this recourse promises to satisfy the systemic requirement of coherence and meaningfulness.

The Charter of the United Nations

There are several provisions in the Charter of the United Nations which contain similar clauses, for example: “in accordance with the present Charter” in Articles 2(2), 2(5), 7(2) and 25, “in accordance with the Purposes and Principles of the United Nations” in Article 24(2) or “in accordance with the rules prescribed by the United Nations” in Article 62(4). These formulations slightly differ among themselves, which invites the question whether they all mean exactly the same. Examining the practice of the Organization in relation to the articles containing these qualifying clauses can throw light on issues of application and interpretation which have arisen in practice. A survey of such practice can be found in the Repertory of Practice of United Nations Organs, “a legal publication containing analytical studies of the decisions of the principal organs of the United Nations under each of the Articles of the Charter of the United Nations”.¹⁵²

The analysis starts with Article 2 of the UN Charter. It lists the Principles, which the Organization and its Members should follow in pursuit of the Purposes stated in Article 1. The United Nations organs have been relying either on the Purposes and Principles of the Charter as a whole, or on particular provisions from Article 1 or Article 2 as a basis for dealing with a wide variety of issues. The general features of that practice prove that the functions of the principal organs of the United Nations are explicitly related to the Purposes and Principles of the United Nations.

¹⁵² <http://www.un.org/law/repertory/>

Article 2(2) provides that Members are to “fulfil in good faith the obligations assumed by them in accordance with the present Charter”. The importance of this principle is underscored by the fact that it is also enshrined in the Preamble to the Charter of the United Nations.¹⁵³ The decisions of the UN organs in relation to this provision have focused on the principle of good faith, rather than on a precise scope of the phrase “obligations assumed by them in accordance with the present Charter”, i.e. whether the obligations are those explicitly mentioned in the Charter or more generally those likely to arise in relations to the Purposes and Principles of the United Nations.¹⁵⁴ In this context, the commentators invoke Article 26 of the VCLT which confirms the customary rule of *pacta sunt servanda* as the fundamental principle of the law of treaties, and which has been interpreted as clearly ordering to perform a treaty not only in accordance with its letter but also its object and purpose.¹⁵⁵ The principle of good faith has been repeated in Article 31 of the VCLT in the context of treaty interpretation. In the same vein the text of Article 2(2) of the UN Charter is open to a broad purpose-oriented interpretation so to cover all obligations under international law including those not explicitly mentioned in the Charter but otherwise compatible with it and serving the community objectives agreed by Member States.¹⁵⁶ Theoretically, the interpretation could be pushed even further to encompass “the whole of public international law, in so far as it is not amended by the UN Charter”.¹⁵⁷

Article 7 concerns the principal organs of the United Nations. Paragraph 2 of this Article gives general authority to establish subsidiary organs “in accordance with the present Charter”. It does not stipulate, however, who is specifically authorised to

¹⁵³ The Preamble reads as follows: “We the People of the United Nations determined (...) to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, ...”

¹⁵⁴ See the UN Repertory of Practice and Supplements 1-10 (1945-2009) available at: <http://www.un.org/law/repertory/>

¹⁵⁵ United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF.39/11/Add.2, *Yearbook of the International Law Commission. Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly A/CN.4/SER.A/1966/Add.1* vol. II, 211, para. 1, 4; B Simma (n 20) 65. It should be noted at this point, that although the UN Charter pre-dates the VCLT, the provisions of the latter are considered customary law and therefore applicable to the UN Charter as well

¹⁵⁶ The Commentary of the Charter of the United Nations draws attention to the objective community-oriented nature of the principle of good faith in the UN law, evident from the formulation of Article 2(2). See: B Simma (n 20) 95-96

¹⁵⁷ *Ibid.* 65

create such subsidiary organs. More guidance is provided in other articles of the Charter: Article 22 grants the General Assembly an express authority to set up “such subsidiary organs as it deems necessary for the performance of its functions”, while Article 29 grants identical powers to the Security Council. In the light of this further specification, the phrase “in accordance with the present Charter” in Article 7 refers to the express powers granted by other provisions of the Charter. It can be argued though that the meaning of the clause is not exhausted by these specific powers to establish subsidiary organs stipulated elsewhere in the Charter. Creating such organs and endowing them with certain functions should rather be generally governed by the law of the Charter and be oriented towards facilitating the fulfilment of the goals of the Organization.

Article 24 deals with functions and powers of the Security Council and it defines the limits of these powers. By virtue of this Article, UN Members “confer” their responsibility for the maintenance of international peace and security on the Security Council and agree that in carrying out these duties the Council “acts on their behalf”. Paragraph 2 of Article 24 stipulates that in discharging its duties the Security Council must act “in accordance with the Purposes and Principles of the United Nations” and that the specific powers granted to it for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. The mention of specific powers triggered a discussion whether the Council’s powers are limited to those in the enumerated Chapters only or also such other powers which are consistent with the Purposes and Principles of the UN Charter and necessary for fulfilment of the Council’s duties.¹⁵⁸ The analytical summary of UN practice in the Repertory and its Supplements suggests that the broader interpretation has been generally accepted and Article 24 is viewed as endowing the Security Council also with implied powers going beyond those specifically listed.¹⁵⁹ Similarly, the International Court of Justice in its Advisory Opinion on Namibia ruled that the reference in Article 24(2) to the specific powers of the Council under certain Chapters of the UN Charter did not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1

¹⁵⁸ L M Goodrich, E Hambro, A P Simons (eds), *Charter of the United Nations. Commentary and Documents* (Columbia University Press 3rd ed. 1969) 204

¹⁵⁹ Supplement to the UN Repertory of Practice, No 3 (1959 - 1966), Supplement No 5 (1970 - 1978)

of that Article.¹⁶⁰ Nonetheless, the powers of the Security Council are not unlimited as they are controlled by the Purposes and Principles of the United Nations. The clause used in Article 24(2) is slightly different as it refers to specific stipulations in Articles 1 and 2 of the Charter, not the Charter in general. Yet, this specific reference to the Purposes and Principles still allows a liberal interpretation of the clause that would be in line with the theory of implied powers explained above. Acting “in accordance with the Purposes and Principles of the United Nations” does not need to be confined to specific powers and activities included in the Charter and may well cover such powers and actions not envisaged by the drafters of the Charter but otherwise consistent with Articles 1 and 2.

Next in line Article 25 states that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter. It should be read in conjunction with Article 24 and Article 2(5). The obligations taken on by Member States under Article 25 are the consequence of the authority conferred by them on the Security Council by virtue of the preceding Article 24 and in line with two complementary principles in Article 2(5). The last article requests Member States to assist the United Nations in implementation of any action taken “in accordance with the present Charter” and to refrain from giving assistance to a state, against which the United Nations takes preventive measures. In practice “any action” in Article 2(5) has been given a broad application not limited to an “action” in Article 11(2) or preventive or enforcement measures in Articles 40, 41 and 42 of the Charter. The text of Article 25 contains no indication of the type of decisions to which it relates; however, the leading broad interpretation based on practice indicated in the Repertory is that under Article 25 the Council might take various decisions of a binding nature, either in the exercise of its general or specific functions and powers. In the Advisory Opinion on Namibia the ICJ dismissed the contention that Article 25 applied only to enforcement measures adopted under Chapter VII of the Charter and stressed that it applied to all decisions of the Security Council adopted “in accordance with the Charter”. The Court analysed the Security Council resolutions concerning Namibia and ruled that they “were adopted in conformity

¹⁶⁰ *Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, para. 87-116; see also Supplement to the UN Repertory of Practice, No 5 (1970-1978)

with the Purposes and Principles of the Charter and in accordance with its Articles 24 and 25” and consequently “binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.”¹⁶¹ This ruling clarifies also the clause “in accordance with the present Charter”. On the face of the formulation of Article 25, one could argue that the phrase “in accordance with the present Charter” relates either to the manner in which Members States should accept and carry out decisions of the Security Council or the manner in which the Council should make such decisions. The Dumbarton Oaks draft article contained the same clause but it was slightly differently phrased, which fuelled discussions at the San Francisco Conference about the intended meaning of the clause. Article 25 was then redrafted so “to make it clear that the Members were obligated to carry only those decisions of the Council that were legally mandatory”.¹⁶² The International Court of Justice confirmed this interpretation adding that “accordance with the Charter” involves the “conformity with the Purposes and Principles of the Charter”.¹⁶³ The leading commentary of the UN Charter draws attention to the potential perils of this interpretation arguing that it could weaken the general obligation of UN Members under Articles 2(5) and 25 to comply with the decision of the Security Council. If the phrase “in accordance with the present Charter” relates to the decisions of the Council, it could implicitly give Member States a discretionary right to examine such decisions and comply only with those, which they find to be in conformity with the Charter. Such an ultimate right to review the Security Council’s decisions by each Member State would undoubtedly undermine the Council’s authority. If, however, the clause “in accordance with the present Charter” is still to be understood as linked to the Security Council’s decisions, it should be read in a formal sense as implying conformity with the procedures of decision-making provided for in the Charter rather than a conformity with the substantial law of the Charter which is worded in an open language and necessarily involves making value-judgments.¹⁶⁴ This is a very narrow reading of the clause in question, which is not corroborated by the practice of the UN organs nor judicial decisions in respect to the interpretation of the Charter.

¹⁶¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) [1971] 1971 I.C.J. Reports 16, para. 115 [hereinafter: *Namibia Advisory Opinion* (ICJ 1971)]

¹⁶² L M Goodrich, E Hambro, A P Simons (eds) (n 158) 208

¹⁶³ *Namibia Advisory Opinion* (ICJ 1971) (n 161) para. 115

¹⁶⁴ B Simma (n 20) 459-460

The Statute of the International Court of Justice

The phrase “in accordance with the Charter of the United Nations” appears also in the Statute of the International Court of Justice, which is a principal judicial organ of the United Nations. The Statute of the Court forms an integral part of the UN Charter and all Members of the United Nations are *ipso facto* parties to the Statute of the ICJ.¹⁶⁵ Article 96 paragraph 1 of the UN Charter authorises the General Assembly and the Security Council to request from the Court an advisory opinion on any legal question. According to paragraph 2 of this Article other UN organs and specialized agencies may also ask the Court to give an advisory opinion on legal questions arising within the ambit of their activities if they are at any time so authorised by the General Assembly. In line with this, Article 65(1) of the Statute of the Court explicitly provides for its advisory jurisdiction:

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

It is important to note that this article differentiates between authorisation “by the Charter” and “in accordance” with it, which follows the distinction made in Article 96 of the Charter. Based on these provisions authority to request advisory opinions from the Court can be either direct or indirect. The Security Council and the General Assembly are directly and expressly authorised “by the Charter”, which is the narrow interpretation of the condition of conformity with the Charter, while other organs and agencies may be authorised by the General Assembly “in accordance with the Charter”. Neither the Charter nor the Statute specify further which organs and agencies can apply for the authorisation leaving this matter to be clarified in practice of the Organization. Thus “in accordance with the Charter” also in this case has a broader meaning not limited to specific provisions of the Charter but requiring the consistency with the law of the Charter as a whole.

Based on the analyses of the relevant articles of the UN Charter a conclusion can be drawn that the clause “in accordance with the Charter of the United Nations” has

¹⁶⁵ See Articles 92 and 93 of the Charter of the United Nations

been interpreted and applied by UN organs and the International Court of Justice broadly as requiring conformity with the Purposes and Principles of the United Nations enshrined in the Charter, and not only conformity with the specific powers or procedures specified in the Charter. The “Purposes” are binding on the Organization, all its principal and subsidiary organs and agencies. They direct the activities of the Organization as well as indicate limitations within which these activities should proceed. The “Principles” impose direct legal obligations on Member States and the Organization itself, some of which are further developed in other provisions of the UN Charter. The systemic reading of the clause “in accordance with the Charter” suggests that, unless done by more concrete provisions of the Charter, actions or obligations qualified by this clause must be interpreted in the light of the Purposes and Principles stated in Article 1 and 2. The interpretation of this clause should also allow the inclusion of the new tasks and procedures as a result of changing circumstances to which the United Nations must adapt in order to fulfil its mission.¹⁶⁶ Although not foreseen by the drafters of the Charter, peacekeeping has become one of the tools used by the United Nations in the fulfilment of its primary mission of maintaining international peace and security, and as such it must be in conformity with the Principles and Purposes of the Organization and also with powers and procedures expressly provided for in the Charter. At the same time, however, the establishment or performance of peacekeeping operations does not need to be limited to these powers or procedures specifically stipulated in the Charter as long as they are compatible with the law of the Charter in general. This conclusion justifies including in the category of peacekeeping missions “in accordance with the Charter of the United Nations” also regional peacekeeping operations provided that they and their activities “are consistent with the Purposes and Principles of the United Nations” as stipulated in Article 52 of Chapter VIII of the UN Charter. This Article also states that Members should utilise regional arrangements and agencies for dealing with such matters relating to the maintenance of international peace and security as appropriate for regional action and that they should make every effort to achieve pacific settlement of local disputes through such

¹⁶⁶ The Commentary to the Charter of the United Nations stresses the need for an evolutionary dynamic interpretation to accommodate such developments as for example peacekeeping operations. B Simma (n 20) 16-17

regional action before referring them to the Security Council.¹⁶⁷ Accordingly, regional peacekeeping does not require an authorisation from the Security Council if it meets the above conditions. On the contrary and as stipulated in the following Article 53, any enforcement action under regional arrangements or by regional agencies must be authorised by the Security Council.¹⁶⁸

Another document reviewed in this section *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* contains the same clause “in accordance with the Charter of the United Nations” in its very title. *The Declaration on Principles of International Law* is a good example of a development of principles found in the UN Charter.¹⁶⁹ The President of the General Assembly at the time described the adoption of *the Declaration* as “the culmination of many years of effort for the progressive development and codification of the concepts from which basic principles of the Charter are derived.”¹⁷⁰ *The Declaration* is regarded not only as an authoritative interpretation of the Principles in Article 2 of the Charter, but also as their extension and further development, which proves that the law of the Charter should be interpreted broadly.¹⁷¹

The Convention on the Safety of United Nations and Associated Personnel

The 1994 Convention on the Safety of United Nations and Associated Personnel also seems a “relevant” source that could provide some interpretative guidance on the meaning of the phrase “a peacekeeping mission in accordance with the Charter of the United Nations” since it deals with the same subject matter as the war crime of attacking peacekeeping missions under the Rome Statute.¹⁷² The Convention uses a

¹⁶⁷ Art. 52 of the Charter of the United Nations

¹⁶⁸ Art. 53 of the Charter of the United Nations

¹⁶⁹ *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* was adopted by the General Assembly on 24 October 1970 (resolution 26/25 (XXV)), during a commemorative session to celebrate the twenty-fifth anniversary of the United Nations (A/PV.1883)

¹⁷⁰ <http://untreaty.un.org/cod/avl/ha/dpilfrscun/dpilfrscun.html>

¹⁷¹ B Simma (n 20) 64-65

¹⁷² See the section on literature review; also: M Cottier, ‘War Crimes – para. 2(b)(iii)’ in O Triffterer (n 130) 330; D Frank, ‘Article 8(2)(b)(iii) – Attacking Personnel or Objects Involved in A Humanitarian Assistance or Peacekeeping Mission’ in R Lee, H Friman (n 130) 145; K Dorman, *Elements of War Crimes under the Rome Statute of the International Criminal Law. Sources and Commentary* (ICRC/Cambridge University Press 2003) 154-159, 455; M Bothe, ‘War Crimes’ in A Cassese, P Gaeta, J Jones (n 1) 410-412

similar formulation twice, in the Preamble and in Article 1 that deals with the definitions. The Preamble recognises that “United Nations operations are conducted in the common interest of the international community and in accordance with the Principles and Purposes of the Charter of the United Nations”. This paragraph acknowledges a community-oriented nature of United Nations operations and the way they are conducted which is consistent with the Principles and Purposes of the Organization. It speaks about the UN operations broadly as it does not limit them to peacekeeping operations. It should be assumed though that they are covered by the term since elsewhere the Preamble refers to peacekeeping among other types of UN operations: preventive diplomacy, peacemaking, peacebuilding, humanitarian and other operations.

Article 1(c) provides a more precise definition of the “United Nations operation”, yet again not “a peacekeeping operation” *per se*. For the purpose of the Convention, the “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”. On the face of this formulation the clause “in accordance with the Charter of the United Nations” seems to be linked to the establishment of the operation and not to the condition that the operation must be conducted under UN authority and control. The stipulation in this paragraph excludes regional (peacekeeping) operations from the protective scope of the Convention since only those established by “the competent organ of the United Nations” and conducted under UN authority and control are covered. As it can be deduced from further specifications in paragraphs 1(c)(i) and 1(c)(ii) the Security Council and the General Assembly are competent to establish United Nations operation.¹⁷³ In the context of the establishment of UN operations a reference could be made to Article 7(2) of the UN Charter and the establishment of subsidiary organs by the Security Council and the General Assembly. The requirement of the conformity with the Charter of the United Nations could be read similarly to the identical clause in that Article as denoting not only specific powers to establish such

¹⁷³ Art. 1(c)(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or 1(c)(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;

operations but more generally as the compliance with the law of the Charter and orientation towards the fulfilment of the goals of the Organization.

This itemized reading of the UN Safety Convention confirms the broad interpretation of the clause “in accordance with the Charter of the United Nations” suggested by the analysis of the relevant provisions of the UN Charter. If, however, the Convention was used more generally to guide the interpretation of the personal scope of protection of Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute, the conclusions drawn would be quite different. As already mentioned, the Convention is considered to have inspired the inclusion of the criminalisation of attacks against peacekeeping missions in the Rome Statute. As also already explained, the Convention is applicable only to operations established by the Security Council or the General Assembly and conducted under their authority and control. The provisions of the Rome Statute are not that comprehensive and speak only of “a peacekeeping mission in accordance with the Charter of the United Nations”. Whether the war crime under the Rome Statute should be read alongside more detailed provisions of the Convention can be answered by a reference to the preparatory work on the Statute.

2.3.3. Preparatory work

According to Article 32 of the VCLT the preparatory work and the circumstances of the conclusion of the treaty are supplementary means of the treaty interpretation. Recourse to supplementary means is not mandatory; yet invoking the preparatory work is frequently and quite naturally used to aid the interpretative process. The rule in Article 32 is in itself very flexible as it is based on a subjective consideration whether the meaning arrived at by the application of the general rule is clear enough or still ambiguous.

Recourse to preparatory work of the Rome Statute is helpful in this part of the analysis in order to establish links between Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the

Statute and the UN Safety Convention and discover the meaning the Rome Conference was intended to give to the war crime under the Statute.¹⁷⁴

Drafting of the Rome Statute

The Rome Statute was adopted on 17 July 1998 following a month of negotiations at *the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*. The drafting history of the Statute is, however, much longer than that; it spans for a half a century and is closely associated with the workings of the International Law Commission. The Commission worked simultaneously on the draft statute of the international criminal court and the draft *Code of Crimes Against the Peace and Security of Mankind*, both of which played an important role in the preparation of the Rome Statute of the ICC.¹⁷⁵ In 1994 the United Nations General Assembly set up an Ad Hoc Committee to review the major substantive and procedural issues arising out of the draft statute prepared by the ILC and to continue working towards the establishment of an international criminal court. These efforts were later taken over by the Preparatory Committee on the Establishment of the ICC, which was tasked with preparing a consolidated draft text of the statute.¹⁷⁶ The General Assembly, in its resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalising and adopting a convention on the establishment of an international criminal court. Between 1996 and 1998 the UN Preparatory Committee held several sessions and informal inter-sessional meetings. A consolidated draft, which was prepared during one of such meetings in Zutphen in the Netherlands in the beginning of 1998¹⁷⁷ and then reworked during the final session of the Preparatory Committee, served as a basis for negotiations at the Rome Conference. The Rome Conference took place from 15 June to 17 July 1998 in Rome, Italy, with 160 national delegations participating in the negotiations and a range of international and non-governmental organisations contributing to these discussions. After a month of intense negotiations, the Rome Statute was adopted with 120 states voting in favour

¹⁷⁴ The preparatory works of the Rome Conference (the minutes and reports) are available at the UN website: <http://legal.un.org/icc/docs.htm>

¹⁷⁵ The final version of the draft statute of the international criminal court was submitted to the General Assembly for consideration in 1994. It focused mostly on procedural and organisational matters leaving a part on a substantive law for the Code, which was finished two year later in 1996

¹⁷⁶ See the General Assembly's resolution 50/46 of 11 December 1995 to set up a preparatory committee for the establishment of an international criminal court

¹⁷⁷ So called "Zutphen draft" (U.N. doc. A/AC.249/1998/L.13)

of it, 21 abstentions and with seven states voting against the treaty (including the United States, Israel, China and Iraq). The treaty entered into force on 1 July 2002 after being ratified by 60 states.¹⁷⁸

The starting point for deliberations at the Conference was the draft statute transmitted by the Preparatory Committee.¹⁷⁹ The draft contained crimes against United Nations and associated personnel, crimes of terrorism and crimes involving the illicit traffic in narcotic drugs and psychotropic substances, all three listed separately from “core crimes” and referred to in the following discussions as “treaty crimes”. This section of the draft statute was accompanied by a note stating that the Court's jurisdiction with regard to these crimes would only apply to States-parties to the Statute which have accepted the jurisdiction of the Court with respect to those crimes, and a footnote explaining that:

“The Preparatory Committee considered the following three crimes (crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances) without prejudice to a final decision on their inclusion in the Statute. The Preparatory Committee also discussed these three crimes only in a general manner and did not have time to examine them as thoroughly as the other crimes.”

With the above caveats in mind the crime against United Nations and associated personnel was given a following definition:

The crime against United Nations and associated personnel

1. For the purpose of the present Statute, “crimes against United Nations and associated personnel” mean any of the following acts [when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view of preventing or impeding that operation from fulfilling its mandate]:

¹⁷⁸ For more detailed history of the creation of the International Criminal Court and the drafting history of the Rome Statute see generally: C Bassiouni, *The Statute of the International Criminal Court; a Documentary History* (1998, Transnational Publishers); C Bassiouni, “Negotiating the Treaty of Rome on the Establishment of an International Criminal Court” (1999) 32 *Cornell International Law Journal*; A Bos, “From the International Law Commission to the Rome Conference (1994-1998), in A Cassese, P Gaeta and J Jones (eds) (n 1) 35-64; W Schabas (n 3) 1-22; see also the *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*

¹⁷⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court Doc. A/CONF.183/ incorporating documents A/CONF.183/2/Add.1 of 14 April 1998, Add.1/Corr.1 of 26 May 1998 and Add.2/Rev.1 of 15 April 1998

- (a) murder, kidnapping or any attack upon the person or liberty of any such personnel;
 - (b) violent attack upon the official premise, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.
2. This article 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.

The title and formulation of this draft article follow the provisions of the UN Safety Convention, especially the draft paragraph 2 repeats the exact wording of the exclusion clause from Article 2(2) of the Convention. Although the Convention itself is not referred to, in contrast to two other “treaty crimes” which explicitly mention other international law instruments on the subject matter, the normative basis it provided was implied and accepted. The representative of the UN Secretary-General commenting on the threshold in this draft article noted that “making the criminalisation of attacks against United Nations personnel conditional on their systematic character and large-scale occurrence would be inconsistent with the definition of the crime established in the 1994 Convention, and hardly ever appropriate in the circumstances of peacekeeping”.¹⁸⁰ His statement suggests that the Convention was the main point of reference, at least in the beginning of the Conference.

In accordance with the Rules of Procedure, which were adopted at the 1st plenary meeting on 15 June 1998, the Conference established the Committee of the Whole and entrusted it with considering the draft statute prepared by the Preparatory Committee.¹⁸¹ The Conference established also the Drafting Committee and assigned it with coordination and refining of the drafting of all texts referred to it (without reopening substantive discussion on any matter or altering the substance) and reporting to the Conference or to the Committee of the Whole as appropriate.¹⁸² The negotiations were intense and conducted under time-pressure. There was little careful examination of individual words and their exact meanings with more of an overall

¹⁸⁰ 8th Plenary meeting, 18 June 1998 A/CONF.183/SR.8, para. 88 at 120

¹⁸¹ Rules of Procedure (Doc. A/CONF. 183/6) were adopted by the Conference at its 1st plenary meeting, on 15 June 1998. Rule 48. Committee of the Whole:
The Conference shall establish a Committee of the Whole. Its Bureau shall consist of a Chairman, three Vice-Chairmen and a Rapporteur

¹⁸² See Rules of Procedure of the Conference: Rule 49 on Drafting Committee

approach.¹⁸³ With regard to the definition of the crime against United Nations and associated personnel the issue was fundamentally one of principle between those delegates who wanted a treaty-based crime and those who did not.¹⁸⁴ For the former group, the wish was to cover operations within the definition of Article 1(c) of the Convention on the Safety of United Nations and Associated Personnel. However, there was in the background the question of the relationship with the United Nations and in particular the Security Council. If the exact wording of Article 1(c) was followed, this would require the mission to be “established by the competent organ of the United Nations”. The intention therefore was to widen the scope to peacekeeping (and humanitarian assistance) missions established by other bodies, but still “in accordance with the Charter of the United Nations” in the words of Article 1(c). The key words, “conducted under United Nations authority and control”, were omitted already at the stage of the final draft of the Preparatory Committee.¹⁸⁵

The earliest proposal to change the wording and qualification of the crime against United Nations and associated personnel was made by the Spanish delegation in the first days of the Conference. It was proposed to move the crime to the part entitled “War crimes” by inserting in the appropriate place in sections dealing with “other serious violations of the laws and custom” applicable in international and non-international armed conflict respectively the following provision:

“Intentionally directing attacks against United Nations or associated personnel or against United Nations installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter.”¹⁸⁶

The Spanish proposal of the draft article was much shorter and it did not contain any threshold or a combatant exclusion clause. With regard to the lack of the threshold it might be explained by a parallel discussion on a general threshold to be established for all war crimes. The proposal merged the attacks upon the person of UN and associated personnel and the attacks upon their equipment into a single paragraph. It kept the wording “United Nations and associated personnel”, which left the question

¹⁸³ An informal interview with a member of one of the national delegations (London, April 2013)

¹⁸⁴ See: the records of the plenary sessions and sessions of the Committee of the Whole

¹⁸⁵ An informal interview with a member of one of the national delegations (London, April 2013)

¹⁸⁶ Spanish proposal regarding Article 5, Doc. A/CONF.183/C.1/L.1 [Original: Spanish, 17 June 1998]

open whether it should be interpreted in line with the UN Safety Convention; at the same time however, it replaced “United Nations operation” with “a humanitarian assistance or peacekeeping mission in accordance with the Charter”, which widened the scope of protection.

At the meeting of the Committee of the Whole, Spain commented on its proposal that it aimed at expanding the number of persons legally protected against attacks, while at the same time it was important to comply with the terms of the Geneva Conventions and with customary law as it emerged, *inter alia*, from certain provisions of Additional Protocol I.¹⁸⁷

“By proposing to expand the scope of protection to attacks against United Nations or associated personnel or against United Nations installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, Spain was proposing to expand what might be described in modern humanitarian law as the “protection of protectors”. Such protection should be provided in relation to both international and non-international armed conflict.”¹⁸⁸

This clearly articulated intention to widen the scope of protection was questioned by the delegation of the United Kingdom of Great Britain and Northern Ireland, which pointed out that “the proposal might have the effect of diverting protection already given under the Geneva Conventions to United Nations personnel, who would not be party to a conflict and would therefore be protected persons”.¹⁸⁹ Another question that arose was whether protection should be limited to United Nations personnel only.¹⁹⁰ While prone to create tensions with international humanitarian law, the change of legal qualification of the attacks on UN personnel from a treaty-crime to a war crime could help to avert other problems. The delegation of New Zealand remarked that the inclusion of a treaty-based crime would require the establishment of a special regime for treaty-based crimes, whereas the Spanish proposal of

¹⁸⁷ Summary records of the meetings of the Committee of the Whole: 4th meeting, 17 June 1998 (A/CONF.183/C.1/SR.4) Conference Records Vol. II, para. 68 at 161

¹⁸⁸ Ibid

¹⁸⁹ Summary records of the meetings of the Committee of the Whole: 5th meeting, 18 June 1998, A/CONF.183/C.1/SR.5, para. 41 at 164

¹⁹⁰ Ibid; See also the statement of Costa Rica for similar objections, 6th meeting, 18 June 1998, A/CONF.183/C.1/SR.6 para. 82 at 175

including the provision on attacks against United Nations personnel in the war crimes section would avoid that problem.¹⁹¹

The Spanish proposal was taken into account in the documents submitted by the Bureau of the Committee of the Whole. The Bureau's discussion paper contained different options of Article 5 on crimes within the jurisdiction of the Court.¹⁹² The delegations could opt either for the inclusion of the treaty crimes against United Nations and associated personnel, or alternatively for the inclusion of a war crime of intentionally directing attacks on United Nations personnel in international and non-international armed conflicts. In both cases no text of the article was proposed and drafting of the crime was subject to further discussion. It is interesting to note that the optional war crime of attacks against UN personnel was inserted immediately after the provision on *intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions* as its paragraph *bis*. This immediate context might suggest the type of (special) protection that UN personnel were considered to be entitled to.

During the debate that followed the Bureau's discussion paper some delegations opposed the inclusion of treaty crimes (including the crimes against UN personnel) at all or at least at that point in time leaving the question open for a future review conference. They drew attention to a different character of treaty crimes, which could not be equated with the fundamental nature of core crimes, and pointed at major complications that might arise in defining jurisdiction over them.¹⁹³ With regard to the second option of covering attacks on UN personnel by the war crimes regime, one delegation (China) opposed assimilating of the attacks on UN personnel to a war crime. It argued that since peacekeeping personnel could be regarded as combatants

¹⁹¹ Summary records of the meetings of the Committee of the Whole: 6th meeting, 18 June 1998, A/CONF.183/C.1/SR.6, para. 124 at 178; see also the statement of Italy, para. 136 at 178

¹⁹² Doc. A/CONF.183/C.1/L.53, [Original: English, 6 July 1998]

¹⁹³ Summary records of the meetings of the Committee of the Whole: see records from sessions 25th to 28th, 8 July 1998

and other personnel as civilians, the Statute already covered both groups and the paragraph on United Nations personnel could therefore be deleted.¹⁹⁴

The second document of the Bureau, the Proposal, was based on the above mentioned discussion paper but adjusted in the light of discussions (also informal) that followed.¹⁹⁵ It still contained different options of crimes within the jurisdiction of the Court and certain provisions required further drafting. It stated that the crime of aggression and one or more of treaty crimes (terrorism, drug trafficking and the crimes against United Nations personnel) might be inserted in the draft Statute if generally accepted provisions were developed by interested delegations; otherwise the Bureau proposed that the interest in addressing these crimes be reflected in some other manner, for example, by a Protocol or a review conference. In the part on war crimes, in the sections on “other serious violations of the laws and customs applicable in international armed conflict (or in armed conflicts not of an international character), within the established framework of international law”, the Proposal included:

“Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict.”¹⁹⁶

This draft article, although still substantially based on the Spanish proposal, underwent significant redrafting. The words “United Nations and associated personnel” were replaced by “personnel (...) involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations” and thereby the last indirect reference to the UN Safety Convention was removed. The new addition is a combatant exception in the second part of the article, which also differs from the one in the UN Safety Convention. Personnel and objects involved in a humanitarian assistance or peacekeeping mission must not be attacked “as long as they are entitled to the protection given to civilians or civilian objects under the law

¹⁹⁴ Summary records of the meetings of the Committee of the Whole: 25th meeting, 8 July 1998, A/CONF.183/C.1/SR.25 (Agenda Item 11 continued Discussion paper prepared by the Bureau A/CONF.183/C.1/L.53) para 35 at 270

¹⁹⁵ Doc. A/CONF.183/C.1/L.59 [Original: English, 10 July 1998], incorporating document A/CONF.183/C.1/L.59/Corr. 1 of 11 July 1998

¹⁹⁶ Ibid

of armed conflict”. The reference to civilian protection is backed up by locating this provision after the prohibition of attacks against “the civilian population as such or against individual civilians not taking direct part in hostilities” and against civilian objects which are not military objectives, as a sub-paragraph to this prohibition. There is no consistency in this approach in the case of armed conflicts not of an international character though. The identical provision on humanitarian assistance and peacekeeping missions in this section comes as a sub-paragraph *bis* to the prohibition of “intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions” and not the prohibition of attacks against the civilian population.

The inclusion of crimes against peacekeeping missions in the war crime section was explicitly welcomed by few delegations. The Spanish delegation noted that, “the current wording was broad enough to cover humanitarian assistance or peacekeeping missions organised in a regional context in accordance with the Charter of the United Nations”.¹⁹⁷ This remark on the wider scope of protection was not questioned or contradicted in the course of discussion by any delegation. These two provisions were repeated in the final draft by the Committee of the Whole¹⁹⁸ and then in the Statute of the International Criminal Court adopted by the Conference on 17 July 1998.¹⁹⁹

On the basis of all these preparatory materials the conclusion can be drawn that the changes which the treaty crime against United Nations and associated personnel underwent in the course of negotiations and which distanced it from the wording and scope of the UN Safety Convention and transformed into the war crime of attacking personnel and objects involved in a humanitarian assistance or peacekeeping mission were intentional. It was a result of a growing understanding of the nature of the offence and of a growing consensus as to the extent of protection that the drafters of the Rome Statute wanted to give to humanitarian and international peacekeeping

¹⁹⁷ Summary records of the meetings of the Committee of the Whole: 34th meeting, 13 July 1998, A/CONF.183/C.1/SR.34, Spain, para. 33 at 329 and Brazil, para. 93 at 333

¹⁹⁸ DOCUMENT A/CONF.183/8

¹⁹⁹ There was a minor correction: the reference to “the law of armed conflict” was replaced by “the international law of armed conflict”.

personnel. It can be concluded that the intention was to widen the scope of protection beyond the coverage of the UN Safety Convention so to include humanitarian assistance and peacekeeping missions organised in a regional context.

2.3.4. Judicial Practice

In line with Article 31(3)(b) of the VCLT this section moves on to the practice in the application of the rules in question and will analyse the jurisprudence of the international courts on the issue of attacks against peacekeeping missions.

The Special Court for Sierra Leone

The first jurisprudence on the war crime of attacking personnel and objects involved in a humanitarian assistance or peacekeeping mission comes from the Special Court for Sierra Leone. The case before the Court, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* dealt with crimes committed during the Sierra Leone Civil War, including the attacks against UNAMSIL peacekeepers that took place in 2000.²⁰⁰ In the part of the judgment dealing with the applicable law, the Chamber specifically addressed the nature and scope of this offence. It noted the lack of jurisprudence defining a “peacekeeping mission in accordance with the Charter of the United Nations” or any reference to peacekeeping missions in the Charter itself. It acknowledged that the concept of peacekeeping developed through practice as a means of achieving the goals of maintenance of international peace and security and that it was used by the United Nations for 60 years.²⁰¹ It discussed how peacekeeping missions were created and what their legal basis was. In this context the Chamber pointed at the resolutions of the Security Council formally establishing such missions and expressed the view that the legal basis for their establishment should fall either within Chapter VI or Chapter VI in conjunction with Chapter VII. It did not mention Chapter VIII, which leaves the question open whether in the view of this Court regional peacekeeping operations would come within the remit of “a peacekeeping mission in accordance with the Charter of the United Nations”. In relation to Chapter VII the Chamber recognised peacekeeping missions with robust mandates deployed

²⁰⁰ *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Judgment Case no. SCSL-04-15-T, Trial Judgment (2 March 2009) [hereinafter: *RUF Judgment*]

²⁰¹ *Ibid* para. 221

in difficult and unstable situations of internal armed conflicts and multidimensional operations with extremely broad mandates including civilian administration.²⁰² It is not clear whether these two types are mutually exclusive. Next, the Chamber quoted two definitions from UN publications as being illustrative of the way in which the matter was approached by the United Nations over the years, without however discussing these definitions.²⁰³ It then moved on to the basic principles of consent, impartiality and non-use of force except in self-defence and defence of the mandate, and by reference to UN publications and scholarship it described them as “widely understood as the necessary foundation for a peacekeeping operation”.²⁰⁴ Importantly, the Chamber dwelled a bit on the content of these principles.

With regard to the consent, the Chamber noted the practice of deploying a peacekeeping force with the consent of the main parties to the conflict. In non-international armed conflicts the consent was supposed to be sought from the warring parties not to meet the legal requirement for it but to ensure the effectiveness of the operation.²⁰⁵ Concerning the impartiality principle, the Chamber seems to have acknowledged the redefinition of this principle as it noted that impartiality should not be confused with neutrality. The reference is given to the *Brahimi Report* and its stipulation that the impartiality must involve “the adherence to the principles of the Charter and the objectives of a mandate”, and to *Capstone Doctrine* which further explains that the mission “should not condone actions by the parties that violate the undertakings of the peace process or international norms and principles”.²⁰⁶ Apart from citing these UN sources the Chamber did not clarify its understanding of what the developments concerning the impartiality principle would necessarily entail, e.g. whether robust mandates have any bearing on impartiality or how peacekeeping forces should react to the violations of peace agreements or international norms. These two questions seem especially relevant if considered in the light of the third principle of non-use of force except in self-defence. This principle will be discussed

²⁰² Ibid para. 223

²⁰³ These are: United Nations, *The Blue Helmets: A Review of United Nations Peacekeeping* (2ed. United Nations 1990) 4; and UN, *United Nations Peacekeeping Operations: Principles and Guidelines* (n 46) 14. See *RUF Judgment* (n 200) para. 224

²⁰⁴ *RUF Judgment* (n 200) para. 225

²⁰⁵ Ibid para. 226

²⁰⁶ Ibid para. 227; *Brahimi Report* (n 101) para. 50; UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 46) 33

in more detail in the following chapter, it is important though to take notice of the addition to this principle, the defence of a mandate, as acknowledged by the Court.

Next, the Court referred to the Convention on the Safety of United Nations and Associated Personnel. It noted that the Convention does not define a peacekeeping mission, but rather a “United Nations operation” and quoted this definition.²⁰⁷ Since the Court did not comment on this reference in any way, it is not clear how this definition should relate to “a peacekeeping mission in accordance with the Charter of the United Nations” under the Statute. Interestingly though, while applying law to the facts of the case, the Chamber ruled:

“The Chamber is satisfied, recalling the establishment of the UNAMSIL mission by the Security Council, that it was a peacekeeping mission in accordance with the Charter of the United Nations.”²⁰⁸

This short paragraph seems to confine the condition of “accordance with the UN Charter” to the circumstances of the establishment of a peacekeeping mission and implies that the requirement is a formalistic one of being lawfully established by the competent organ of the UN.²⁰⁹ This suggests that the Court might have relied on the UN Safety Convention to interpret this element of the crime in a way that would exclude regional operations not established by the competent organ of the UN from the protective regime of Article 4(b) of its Statute. As mentioned above, the Court pointed at Chapter VI and VII of the UN Charter, but not Chapter VIII, as a legal basis for the establishment of peacekeeping missions. Additionally, in the part VI of the Judgment, Factual and Legal Findings, Section 11 on attacks on UNAMSIL personnel, in a passage relating to the attacks on the ZAMBATT forces forming UNAMSIL mission, the Chamber provided a short explanation in the footnote 3455 which seems to limit the scope of protection of Article 4(b) to UN peacekeeping missions only. In this footnote the Court mentioned the fact that the attacked ZAMBATT peacekeepers were fighting together with a unit of NIBATT troops, few of which were killed in the incident. However, the Chamber made no findings in relation to the attacks on NIBATT since in its view it was not established that these

²⁰⁷ *RUF Judgment* (n 200) para. 229

²⁰⁸ *Ibid* para. 1888 (The UNAMSIL was established by the resolution 1270 (22 October 1999) of the Security Council)

²⁰⁹ S Sivakumaran, ‘War Crimes before the Special Court for Sierra Leone’ (2010) 8(4) *Journal of International Criminal Justice* 1009

NIBATT forces had in fact been members of the UNAMSIL mission. The Chamber noted that ECOMOG forces had remained deployed in Sierra Leone until May 2000 and certain ECOMOG units had been transferred or seconded to UNAMSIL.²¹⁰ It remarked:

“As the status of personnel as members of a peacekeeping mission established in accordance with the UN Charter is an element of the offence under Count 15, the Chamber finds that there is reasonable doubt as to whether this element is proven in respect of the NIBATT troops.”²¹¹

This short passage seems to suggest that the condition of being “in accordance with the UN Charter” is only met by peacekeeping missions established by the UN and not by a regional organisation. However, the language used by the Chamber is not explicit, hence it cannot be categorically assumed that it meant to restrict the scope of protection under Article 4(b) of the Statute.

The last general issue raised by the Chamber in relation to the defining features of peacekeeping missions is that it “should be understood as distinct from enforcement actions authorised by the Security Council under Chapter VII.”²¹² In contrast to peacekeeping, the consent of the states concerned is not required for enforcement actions since they are based on the Council’s binding authority granted to it by Article 42 of the Charter. The Court also noted the type of peacekeeping missions with robust mandates and established under Chapter VII, and acknowledged that the right of self-defence for peacekeeping missions nowadays includes defence of the mandate.

Having identified the criteria of what constitutes a peacekeeping mission protected under the Statute, the Chamber applied them to the facts of the case. As already mentioned, it ruled that the UNAMSIL mission established by the Security Council

²¹⁰ The Economic Community of West African States Monitoring Group (ECOMOG) was a West African multilateral armed force established by the Economic Community of West African States (ECOWAS) in 1990 to intervene in the civil war in Liberia (1989–96). ECOMOG represented a regional security initiative generally recognised as a peacekeeping mission, although there were controversies as to the extent it used force. For a comprehensive account of the involvement of ECOMOG in Liberia and Sierra Leone see e.g. A Adebajo, *Liberia's Civil War: Nigeria, ECOMOG, and Regional Security in West Africa* (The International Peace Academy, Lynne Rienner Publishers, Inc. 2002)

²¹¹ *RUF Judgment* (n 200) fn 3544 corresponding to para. 1843

²¹² *Ibid* para. 230

was “a peacekeeping mission in accordance with the Charter of the United Nations”.²¹³ It recalled the Lomé Peace Agreement of 1999 between the Government of Sierra Leone and the Revolutionary United Front that stipulated the creation of “a neutral peacekeeping force” to *i.a.* disarm all fighters belonging to other paramilitary groups and the subsequent cooperation of UNAMSIL with the Government and the RUF in the fulfilment of its mandate. Pursuant to Chapter VII of the UN Charter, in the discharge of its mandate UNAMSIL was authorised to “take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence”²¹⁴ and to perform other additional duties.²¹⁵ UNAMSIL peacekeepers were only lightly armed and they did not, according to the Court, possess the military capacity to cause significant damage to the RUF in open combat. They were also instructed to use minimum force and only in order to protect their own lives when threatened.²¹⁶ Regrettably, the Court did not contrast or discuss the instructions on the minimum use of force with the authorisation to “take the necessary action to (...) afford protection to civilians under imminent threat of physical violence”, the latter one likely to involve the use of force beyond personal self-defence.

The International Criminal Court

The case against Bahar Idriss Abu Garda was the first case before the International Criminal Court in relation to the crime of attacking peacekeeping personnel and objects.²¹⁷ Abu Garda was charged with three war crimes – murder, attacks against a peacekeeping mission and pillaging – allegedly committed when rebels under his command attacked on 29 September 2007 the Haskanita camp in South Darfur, Sudan, where the African Union peacekeeping mission (AMIS) was stationing. The attack took place in the context of an ongoing armed conflict not of international character. While the ICC Pre-Trial Chamber refused to confirm the charges for the lack of evidence and thus the case did not go to trial, the Confirmation of Charges

²¹³ Ibid para. 1888

²¹⁴ UN SC Res. 1270, 22 October 1999, para. 14

²¹⁵ *RUF Judgment* (n 200) paras. 1749-1751

²¹⁶ Ibid paras. 1759-1760

²¹⁷ *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09

Decision discussed the scope of application of the war crime.²¹⁸ The legal interpretation of the elements of the crime provided in this Decision was later reiterated by the Pre-Trial Chamber in the case against Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus concerning the same attack on AMIS peacekeeping mission in Haskanita, which is committed to trial.²¹⁹

The ICC Pre-Trial Chamber observed, similarly to the SCSL, that the UN Charter does not define “peacekeeping” or anyhow refers to it and that peacekeeping developed out of practical experience.²²⁰ It noted the conceptual and operational evolution of peacekeeping, which “defies simple definition” and which continues to evolve to meet new challenges and political realities.²²¹ In contrast to the SCSL, the ICC Chamber did not point at either Chapter VI or Chapter VII of the UN Charter as a legal basis of peacekeeping, which however should not be read as a denial of the existence of such a basis but rather the absence of a specific one in the Charter. Having acknowledged that peacekeeping missions are not static and that their features may vary depending on the context, the Chamber focused on three basic principles that would determine whether a given mission constitutes a peacekeeping mission: consent of the parties, impartiality, and non-use of force except in self-defence.²²² The ICC Chamber discussed these principles in a manner similar to the Special Court and by reference to the RUF jurisprudence. It also referred a lot to “soft law” on peacekeeping, the UN reports such as the *Supplement to an Agenda for Peace* or the *Brahimi Report*, or UN publications like *Capstone Doctrine*. Based on these sources the Chamber noted that the consent must be obtained from the Host-state, as this stems from Article 2(7) of the UN Charter, and it should be sought also from other warring parties in a non-international armed conflict so to facilitate the

²¹⁸ *Decision on the Confirmation of Charges in the case of The Prosecutor v. Bahar Idriss Abu Garda* (8 February 2010) Case No. ICC-02/05-02/09 [hereinafter: *Decision on the Confirmation of Charges in Abu Garda case*]

²¹⁹ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, *Decision on the Confirmation of Charges in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (7 March 2011) ICC-02/05-03/09-121-Corr-Red. The charges in this joint case were confirmed and the case was committed to trial. Proceedings against Saleh Mohammed Jerbo Jamus were later terminated by Trial Chamber IV after receiving evidence pointing towards his death. On 11 September 2014, Trial Chamber IV issued an arrest warrant against Abdallah Banda Abakaer Nourain and vacated the trial date previously scheduled to open on 18 November 2014

²²⁰ *Decision on the Confirmation of Charges in Abu Garda case* (n 218), para. 69

²²¹ *Ibid* para. 70

²²² *Ibid* para. 71

mission.²²³ The impartiality must not be confused with the neutrality or inactivity.²²⁴ Lastly, using force only in self-defence distinguishes peacekeeping from peace-enforcement missions authorised by the Security Council under Chapter VII to use force beyond self-defence in order to achieve their objectives. In this context the Chamber referred also to the Convention on the Safety of United Nations and Associated Personnel and its combatant exclusion clause to back up this distinction.²²⁵ It is worth noting that the Chamber did not mention the defence of the mandate, in contrast to the Special Court. As regards the phrase “in accordance with the Charter of the United Nations”, the Chamber stated that this is not equal to a requirement that a peacekeeping mission is established by the United Nations only, which diverts from the jurisprudence of the SCSL as discussed in the preceding section. The ICC Chamber explained that the phrase should rather be understood “to encompass also missions that are otherwise foreseen by the UN Charter”²²⁶ and based this conclusion on Article 52(1) of the UN Charter, which allows the existence of regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security. By reference to the Commentary to the Charter of the United Nations the Chamber explained the term “arrangements or agencies” as meaning “a union of States or an international organization based upon a collective treaty or a constitution and consistent with the Purposes and Principles of the United Nations, whose primary task is the maintenance of peace and security under the control and within the framework of the United Nations.”²²⁷ The activities of such regional arrangements or agencies must be consistent with the Purposes and Principles of the United Nations and they must not involve enforcement unless with the authorisation of the Security Council.²²⁸

In making an assessment whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations the Chamber was guided by the three principles of peacekeeping as explained above. It considered the agreement with the Government of Sudan and two militias active in the conflict and was satisfied that the consent of the parties as to the deployment of the mission had been obtained. It

²²³ Ibid para. 72

²²⁴ Ibid para. 73

²²⁵ Ibid para. 74

²²⁶ Ibid para. 75

²²⁷ Ibid para. 76; see also B Simma (n 20) 699

²²⁸ Ibid para. 76

analysed the mandate of the mission and other evidence so to conclude that the requirements on impartiality and non-use of force except in self-defence had been met. Based on these considerations it ruled that AMIS was a peacekeeping mission. It then moved on to the qualification of “a peacekeeping mission in accordance with the Charter of the United Nations”. The Chamber noted that the African Union is a regional agency within the meaning of Article 52 of the UN Charter and that its mission AMIS was in compliance with the provisions of Chapter VIII.²²⁹ The AMIS mandate was a peacekeeping mandate and despite provisions on civilian protection, it did not extend to peace-enforcement or disarmament. Furthermore, the Chamber noted that the African Union’s mission in Darfur was endorsed by the UN Security Council, notably in resolutions 1556 and 1564 (2004).²³⁰ Given this specification on disarmament it could be argued that missions with mandates containing such provisions would not fall within the meaning of “a peacekeeping mission in accordance with the UN Charter”. That would contradict the ruling of the SCSL, which considered the UNAMSIL to be a peacekeeping mission despite it being mandated to assist the Government of Sierra Leone in the implementation of the disarmament, demobilization and reintegration plan.

The above analysis of the first jurisprudence in relation to the phrase “a peacekeeping mission in accordance with the Charter of the United Nations” as stipulated in Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute allow to draw the following conclusions. Firstly, both the Special Court for Sierra Leone and the International Criminal Court were in agreement that a definition of a peacekeeping mission has to be construed by reference to the traditional principles of consent, impartiality and non-use of force except in self-defence. These characteristics clearly distinguish peacekeeping from (peace) enforcement which is governed by different rules. The content of peacekeeping principles has evolved over time in response to the changing nature of conflicts and different roles assigned to peacekeepers. Accordingly, the category of peacekeeping operations encompasses different types of missions nowadays: traditional monitoring missions, multidimensional as well as “robust” operations where use of force is allowed to defend a peacekeeping mandate. What the Courts seem to disagree on is whether “a peacekeeping mission in

²²⁹ Ibid paras. 120-121, 124

²³⁰ Ibid paras. 122-123

accordance with the Charter of the United Nations” covers also regional peacekeeping operations. The SCSL appears to limit the protection to missions established by the United Nations whilst the ICC firmly extends the protective regime of Articles 8(2)(b)(iii) and 8(2)(e)(iii) over regional arrangements which are in accordance with the Purposes and Principle of the UN Charter.

The third remark concerns the sources that both the SCSL and the ICC relied on when arriving to the above conclusions. It has to be noted that both Courts drew upon a range of non-binding instruments such as UN publications, reports of the UN Secretary-General as well as academic writings, to assist them in defining the elements of the crime. The reliance on “soft law” principles, especially those articulated in UN documents, proves the importance of the institutional context and processes in which legal rules operate. Despite their political provenance UN guidelines on peacekeeping have been used to define normative standards of behaviour and to assess conformity with international law. By reference to the adopted methodological perspective of International Legal Process it can be argued that international law now comprises a complex blend of customary, positive, and soft law and that judicial decision-makers not always abide by the positivist, binary (in a sense of legal and non-legal) approach to the sources of international law. Instead, they utilise variety of instruments across the continuum of formal legality to present the full picture of expectations of appropriate behaviour.²³¹

2.4. Discussion and conclusions

The primary aim of this chapter was to analyse the personal scope of legal protection under Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute to investigate what kind of missions are covered by the phrase “a peacekeeping mission in accordance with the Charter of the United Nations” and to provide some interpretative guideposts. The question that could be asked at the very outset is whether the concept of a peacekeeping mission indeed needs to be precisely defined. The background

²³¹ For a discussion on the role of non-binding norms and the use of “soft law” in the international legal system see e.g.: D Shelton (ed), *Commitment and Compliance, The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2000); P Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *American Journal of International Law* 413; G M Danilenko, *Law-making in the International Community* (Martinus Nijhoff Publishers 1993)

section on peacekeeping discussed numerous typologies and conceptualisations of the phenomenon to prove the dynamic and evolving nature of peacekeeping. International jurisprudence has accepted the existence of *generic* terms with their contents changing over time and responding to the continuous application and development of law. Therefore, the functional meaning of peacekeeping or a peacekeeping mission could be assigned by courts on a case-by-case basis following the evolution of law and practice at any given time. Such a solution is possible although not desirable in the realm of international criminal law, which is governed by the principle of specificity. This deficiency can, however, be remedied and the *generic* term somehow kept within certain boundaries by a reference to the commonly accepted characteristics of peacekeeping missions and these are the principles of consent, impartiality and non-use of force except in self defence. These principles were derived from the experiences of traditional observer peacekeeping missions and they are rooted in the Purposes and Principles of the UN Charter. They are in line with the principles of sovereignty, territorial integrity and political independence of states and non-intervention in matters that are essentially within their domestic jurisdiction. They also underline a conceptual and constitutional distinction between peacekeeping and (peace) enforcement. The clear demarcation line between the two types of operations was drawn by the ICJ in *Certain Expenses of the United Nations* Advisory Opinion (1962) and still stands despite the evolution and transformation that peacekeeping has undergone. Peacekeeping is conceptually different from (peace) enforcement because it does not involve “preventive or enforcement measures” under Chapter VII of the UN Charter against a state, even if robust force is used at the tactical level to defend a mandate. Enforcement action, on the other hand, is an exception to the prohibition on the use of force in Article 2(4) of the UN Charter, it does not require consent of any state and it uses force against a culpable state to enforce peace or impose a political solution.

Traditional peacekeeping principles are said to continue to apply despite the evolution of peacekeeping, which moved beyond traditional cease-fire monitoring. However, they do not apply in their original form, and as with peacekeeping, they have proved to be flexible and adaptive concepts. The first jurisprudence on the issue coming from the SCSL and the ICC admitted, to some extent, the re-definition of

these principles. The flexibility of the constitutional principles of peacekeeping raises certain tensions.

For example, the principle of consent has its origins in the early UN peacekeeping practice of deploying missions in inter-state conflicts. The United Nations was dealing with two or more sovereign states who needed to consent to the measure to deprive the action of enforcement character. The changing nature of conflicts and the new circumstances of internal strife with which peacekeepers were confronted have influenced the understanding of the consent requirement. As stipulated in the United Nations reports and as stated by the SCSL and the ICC, in a non-international armed conflict the consent must be obtained from the host-state, whereas the consent from local factions-parties to such conflict should be sought as a practical measure to facilitate the operation of the mission, not out of a legal obligation. This approach seems sound, as non-state actors do not have a standing equal to states under international law, although members of armed (opposition) groups can claim few rights under international humanitarian law if they satisfy conditions laid down in IHL treaties. The traditional position of international law admits the existence of the right of the recognised government to invite foreign forces to assist it in combatting rebels. The ICJ referred to this principle in its *Nicaragua* decision:

“(...) the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request of assistance made by an opposition group in another State (...). Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition”²³²

However, what needs to be assessed from a legal point of view is the power of a government, which has lost authority and effective control in ongoing civil war and may therefore not be seen as representing the whole country/nation anymore. Although there is a strong inclination in international law in favour of established governments,²³³ the interplay of the principle of non-intervention and the right to self-determination should be given some attention here. The prohibition of the use of

²³² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986], ICJ Reports 1986, 14, para. 246

²³³ N Tsagourias (n 72) 475

force was enshrined in the UN Charter also to protect the right of a state and its people to solve a civil war without any military intervention from outside.²³⁴ On this basis some authors argue that the consent of the rebel faction or factions would still be necessary to establish a peacekeeping force in the traditional sense.²³⁵ The consent of a government, which has lost control over the country, or which itself is responsible for gross violations of human rights, may affect the principle of impartiality.

The principle of impartiality also dates back to the early peacekeeping missions and the realities of that time and, similarly to the principle of consent, has also undergone some modifications since then. As underlined in the preceding sections, impartiality does not mean neutrality in the sense of inactivity or treating the parties as moral equals – bitter lessons learned from the former Yugoslavia and Rwanda. Impartiality now refers to the way the mandate should be implemented by a peacekeeping mission at the operational level. A mission must rigorously execute the mandate without favour or prejudice to any party.²³⁶ This interpretation has been confirmed by the SCSL and the ICC seized on attacks on peacekeeping missions and it corroborates a shift that has been made from the impartiality of the mandate to impartiality of the implementation of the mandate. At the same time some authors argue that peacekeeping missions are still *apolitical* or *neutral* in character in the sense that they do not aim to enforce peace or a political solution through the use of coercive force on a strategic level.²³⁷ Others contest this *apolitical* label, pointing out the fact that many stipulations in the mandates are overtly in favour of one party (almost always a host-government) and precisely tailored to influence the military and political balance of the conflict and to support its specific outcome.²³⁸ They draw a direct link between the impartiality of the mandate and its implementation: if a mandate itself is partial, its implementation on the ground will reflect that.²³⁹ In response to this argument, it is submitted that as long as peacekeeping political

²³⁴ See: O Schachter, 'The Right of States to Use Armed Force' (1962) 82 (1983/84) Michigan Law Review 1641

²³⁵ C Walter, 'Security Council Control over Regional Action' (1997) Max Planck Yearbook of United Nations Law) 173-174

²³⁶ UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 46) 33

²³⁷ N Tsagourias (n 72) 480-481

²³⁸ J Boulden, 'Mandates Matter: An Exploration of Impartiality in United Nations Operations' (2005) 11 Global Governance 147-160

²³⁹ *Ibid* 150 -153

agenda is informed by the Purposes and Principles of the United Nations Charter, which are shared in common by the whole international community, the impartiality requirement is satisfied.

Another aspect of the impartiality principle as currently understood and applied, which raises difficulties, concerns integrated missions or the so-called integration of UN humanitarian space. As elaborated in the preceding sections, peacekeeping missions contemporarily deployed are of a multidimensional character and comprised of different components: military, police and civilian. Many humanitarian NGOs, including the International Committee of the Red Cross, have been raising concerns regarding UN integration arguing that it blurs the distinction between humanitarian, political and military action and subjects humanitarian priorities to political and military objectives.²⁴⁰ The understanding of impartiality and neutrality on which humanitarian work is based is distinct from the way these terms are applied by the United Nations and there is a risk that the actions of the UN mission political or military component influences the way humanitarian actors are being perceived and treated.

With regard to the phrase “in accordance with the Charter of the United Nations”, the systemic interpretation of it supported by ICC jurisprudence justifies the conclusion that it requires the compatibility with the Purposes and Principles of the United Nations in general, not just narrowly defined conformity with the specified powers or procedures. Hence it allows the inclusion of new activities and practices not expressly stipulated in the Charter. In the context of peacekeeping missions this clause should be interpreted broadly as encompassing not only missions established and operated by the UN in line with powers of the Security Council and the General Assembly, but also other peacekeeping missions set up and run by regional organisations provided that they are compatible with the law of the Charter. Also the analysis of the preparatory works confirms that the intention of the Rome Conference was to widen the scope of protection beyond UN peacekeeping missions so as to cover humanitarian assistance and peacekeeping missions organised in a regional

²⁴⁰ V Metcalfe, A Giffen, S Elhwary, *UN Integration and Humanitarian Space. An Independent Study Commissioned by the UN Integration Steering Group* (Stimson Center, Humanitarian Policy Group Overseas Development Institute 2011); M Studer, ‘The ICRC and civil-military relations in armed conflict’ (2001) 842 *International Review of the Red Cross* 83

context. Although the crime of attacking peacekeeping missions was based on the UN Safety Convention in the beginning of the negotiations, this link was then intentionally removed, precisely to widen the scope of protection. Therefore the UN Safety Convention should not be used to interpret the scope of application of Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the International Criminal Court.

3. Self-defence and the use of force

The preceding chapter examined the personal scope of legal protection under Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute and investigated what “a peacekeeping mission in accordance with the Charter of the United Nations” actually denotes. It concluded that despite the lack of a universally accepted definition of peacekeeping, there is a shared understanding of the constitutive characteristics of the phenomenon and these are: the consent of the parties to the conflict to the presence/deployment of a mission, impartiality and non-use of force except in self-defence. In the course of analysis it was noted that these principles have evolved since their inception in response to the changing nature of conflicts and increasing demands placed on peacekeeping.

The present chapter will focus in more detail on the third principle of non-use of force except in self-defence which, as already indicated, has also been redefined under UN law. From the perspective of this research it is important to pursue this analysis for two principal reasons. Firstly, as a defining principle of peacekeeping its precise meaning will help to further delineate the personal scope of legal protection under Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute. Secondly, given that using force only in self-defence conditions the civilian protection granted to peacekeepers, the exact meaning and temporal dimension of self-defence in peacekeeping is vital to define the material scope of application of the war crime in question. If they use force beyond self-defence in the situation of armed conflict, they lose protection from direct attacks. The growing body of literature argues that self-defence in a peacekeeping context departs from its usual legal meaning and it includes “the defence of the mandate”.¹ This conclusion was also reached by the SCSL in the RUF case discussed in the previous chapter, but the court did not go into detailed analysis to support this pronouncement. The present chapter will address this

¹ See e.g. K Cox, ‘Beyond Self-defence: United Nations Peacekeeping Operations and the Use of Force’ (1999) 27(2) *Denver Journal of International Law and Policy*, 239; T Findlay, *The Use of Force in UN Peace Operations* (SIPRI Publications, Oxford University Press 2002); T D Gill, D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2012) 150; N D White, ‘Peacekeeping or war-fighting’ in: C Henderson, N D White, *Research Handbook on International Conflict and Security Law : Jus Ad Bellum, Jus in Bello and Jus Post Bellum* (Edward Edward Publishing Ltd 2013) 572

matter. Firstly, the broad legal framework of the use of force in self-defence will be explained. Then the study will move to the right to self-defence in a peacekeeping context to investigate whether or not the extension of this right has indeed occurred. The analysis will proceed on three different, albeit interconnected, levels of UN peacekeeping practice: the Security Council resolutions establishing peacekeeping operations, UN military doctrine on the use of force, and the UN rules of engagement which regulate the use of force on a tactical level. As in the preceding chapters, and for reasons explained in the introduction of the thesis, the focus is narrowed to UN peacekeeping missions noting, where relevant, issues relating to regional peacekeeping. It will be concluded that no extension of the right to self-defence has in fact occurred. Individual self-defence is still exercised within limits prescribed by national laws of the troop contributing states, while “the defence of the mandate” shall rather be regarded as an extension of a political principle governing the use of force by peacekeepers and as a distinct right based on a different legal basis.

3.1. Different types of self-defence and different legal bases

Generally speaking, the right to self-defence is a legal justification for the use of force. It can be considered on two principal levels – on a state level from the perspective of public international law and on an individual level from the perspective of criminal law. The use of force by states is governed by *jus ad bellum* based on customary law and the UN Charter. Article 2(4) of the UN Charter contains a general prohibition on the use of force in international relations² and reads as follows:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

There are only two exceptions to this prohibition: the use of force by states authorised by the Security Council or in self-defence exercised by states individually

² For a general discussion see e.g.: N Tsaourias, ‘The prohibition of threats of force’ in C Henderson, N D White (n 1) 67-88 and M E O’Connell, ‘The prohibition of the use of force’ in C Henderson, N D White (n 1) 89-119

or collectively in response to an armed attack. The right of self-defence is enshrined in Article 51 of the UN Charter:

Nothing in the present Charter shall impair the inherent right of collective or individual self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The major focus of this chapter is on the right to self-defence as a justification to use force by individuals. For the purpose of this research national self-defence will be referred only cursorily where appropriate.

The use of force by individuals in peacetime is allowed in three instances: in the exercise of law enforcement authority, in self-defence, and to accomplish operations or missions specifically authorised by a higher national or international authority such as the UN Security Council.³ The right to personal/individual self-defence is well recognised in all legal systems around the world, although its scope is differently defined in different national criminal laws.⁴ During armed conflict the use of force is primarily regulated by international humanitarian law and applicable human rights law, nevertheless, the right of self-defence continues to apply.⁵ The next section will consider different categories of self-defence exercised by individuals in different circumstances.

3.1.1. Self-defence in a criminal law context

In general, the right to personal self-defence derives from the inherent right of every human being to defend oneself against an illegal or unauthorised attack. It used to be explained by a reference to the law of nature. Blackstone, for example, affirmed that

³ International Committee of the Red Cross Report, *Violence and the Use of Force* (ICRC 2011) 7ff.

⁴ *Sanremo Handbook* (International Institute of Humanitarian Law 2009) 3; H F R Boddens-Hosang, 'Personal self-defence and its relationship to rules of engagement' in: T D Gill, D Fleck (eds) (n 1) 429

⁵ *Sanremo Handbook* (n 4) 4

the right to “self-defense (...) is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.”⁶

In a domestic criminal law context, self-defence is seen as an exception to the state monopoly to use force through the law enforcement mechanisms and as such it is one of the available defences to crimes committed by use of force. A person may also use such force as is reasonable in the circumstances for the purpose of defence of another, defence of property or in the prevention of crime or the apprehension of offenders. If acting reasonably and in good faith to defend themselves, their family or their property, they would not be prosecuted for such action.⁷

The right of self-defence is premised upon the principles of necessity and proportionality. The necessity test would include the proof of the necessity to defend oneself at all, as opposed to other courses of action (reconciliation, retreat etc.); and the proof of the necessity to employ the particular means, such as the use of force among other means available at the time.⁸ The proportionality test would assess whether the response matched the threat posed, whether the force used, e.g. the use of weapons, was reasonable in the given circumstances. The point of departure in assessing the necessity and proportionality of the force used is what a reasonable person would have done in the situation under consideration i.e. whether, on the basis of the facts, a reasonable person would regard such use of force as reasonable or excessive. These principles are differently interpreted depending on specific circumstances e.g. the use of firearms in self-defence in a civilian setting would be less common and probably less likely to be considered reasonable than in a military context.⁹ Similarly, a reference to the judgment of a “reasonable person” in peacetime would be different than in armed conflict or if self-defence is exercised by a trained military. The necessity test will not be met if a defender is at fault i.e. if the attack was provoked or if a defender knowingly, willingly and unnecessarily sought out for specific situations that ultimately led to the use of force in self-defence.¹⁰

⁶ W Blackstone, *Commentaries on the Laws of England (1765-1769)*, Book 3 Chapter 1 “Of the Redress of Private Wrongs by the Mere Act of the Parties”, available at <<http://www.lonang.com/exlibris/blackstone/bla-301.htm#fn4u>>; See also J J Merriam, ‘Natural Law and Self-Defense’ (2010) vol. 206 *Military Law Review* 43, 70

⁷ See e.g. Section 76 of the UK Criminal Justice and Immigration Act 2008;

⁸ H F R Boddens-Hosang (n 4) 430-431

⁹ Ibid 430-431

¹⁰ Ibid 431-433

Also these conditions would be assessed differently depending on a context, civilian or military. In the latter case, it might be less likely to be able to avoid risky confrontational situations or a retreat might be incompatible with the objectives of a military operation.

Some states apply a narrow restrictive definition of self-defence while other legally extend this right also over the defence of third persons. In the latter case, some additional limitations might apply though, such as a (close) relationship to a person attacked, near proximity of an incident or the necessity to provide the aid. It is less common under national statutes to recognise the defence of property as a part of personal self-defence and allow the use of deadly force, although it may constitute a complete defence for criminal liability for any loss or injury committed through the use of force.¹¹

3.1.2. Self-defence in a military/operational context

The right to personal self-defence against an unlawful attack is a fundamental right of every individual applicable in both peacetime and during armed conflict. In armed conflict the monopoly to use force belongs to combatants. Civilians are forbidden to directly participate in hostilities; if they refrain from doing so, they are legally protected from direct attacks.¹² They can, however, defend themselves against violence prohibited by IHL e.g. civilians can forcibly defend themselves against marauding soldiers. Such use of force in individual self-defence does not amount to direct participation in hostilities and they do not lose their protected civilian status.¹³ With regard to military servicemen, personal self-defence as a criminal law defence is not so easily transposed into the circumstances of operational deployment in the sense that it has to be kept distinct from the use of force by them as combatants for mission accomplishment. The parameters of the use of force in self-defence are generally incompatible with objectives and necessities of a military operation and although self-defence applies in individual cases, it does not constitute a proper legal

¹¹ C Elliott, Frances Quinn, *Criminal Law*, (9th ed. Pearson 2012) 364-376.

¹² Art. 51(3) of the Additional Protocol I

¹³ N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 61

basis for a military mission as such.¹⁴ Military personnel can still exercise this right especially when attacked in their private capacity or in a form of unit self-defence as discussed further below. However, if they resort to force to carry out their mission, the lawfulness of their actions must be based on a different legal basis i.e. the right to individual self-defence does not authorise military personnel to use force to fulfil their military or political mandate.¹⁵ In scenarios other than self-defence the use of force to accomplish an assigned military mission or in general to conduct combat operations is governed by other relevant national and international law, such as an international mandate of the Security Council or the law of armed conflict. The circumstances and limitations under which the force can be used by military personnel are delineated in the rules of engagement (ROE) issued by the competent authorities.¹⁶ Self-defence and rules of engagement operate independently from each other, especially the latter cannot trump or subjugate the inherent right of all individuals to defend themselves.¹⁷ The scope of the right of self-defence always depends on national criminal laws and the principles of necessity and proportionality. The third condition of immediacy, intuitively implicit in the necessity requirement, is stressed in the military setting by reference to the *Caroline* principles.¹⁸

The case of a steamer *Caroline* from 1837 provided the basic rules for exercising the right of self-defence in a military context. The dispute arose between the United Kingdom and the United States over the destruction of the American vessel in the context of the rebellion against British rule in Canada. The American private steamboat, *Caroline*, was used by rebels to supply arms and manpower over the border to Canada. The British government unsuccessfully sought assistance on this matter from the American government and eventually in 1837 a British military warship entered the U.S. territory and destroyed the vessel. The United States strongly objected to the use of force within its territory by the British military, while the UK argued that its action was justified under the right of self-defence. The

¹⁴ *Sanremo Handbook* (n 4) 3-4

¹⁵ H F R Boddens-Hosang (n 4) 443

¹⁶ See section 3.1.4 on Rules of engagement.

¹⁷ D Stephens, 'Rules of Engagement and the Concept of Unit Self Defense' (1998) 45 *Naval Law Review* 126, 126; *Sanremo Handbook* (n 4), 4, 24-25; H F R Boddens-Hosang (n 4) 413; *NATO Legal Deskbook* (2nd ed 2010), 256, 259

¹⁸ *Caroline* principles are generally applied to states exercising the right to self-defence, however they seem to be utilized also in relation to unit self-defence, which see e.g.: D Stephens (n 17) 126, 133; Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2005) 221

Caroline principles were coined in the diplomatic correspondence between the British and American authorities following the events. The U.S. Secretary of State, Daniel Webster, accepted the existence of the right of self-defence which attached to “nations as well as individuals” but demanded that Britain demonstrate a:

“necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for [Britain] to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self defense, must be limited by that necessity and kept clearly within it.”¹⁹

The *Caroline* test has been of lasting relevance ever since and it continues to apply in the context of military operations, which are discussed below.

Unit self-defence

Unit self-defence is the right (or according to military doctrines of some states – an obligation²⁰) of a commander to take all necessary measures to defend his unit against an attack (generally referred to as a hostile act) or an imminent attack (or a hostile intent).²¹ Subject to necessity and proportionality test the unit self-defence can be exercised as long as a hostile act or intent continues²² and regardless of the source of the threat: armed forces, non-state armed groups, or individual actors.²³ Unit self-defence is particularly important during peacetime when international humanitarian law does not apply and soldiers do not act as combatants, hence they have no authority to target enemy forces. Consequently, the right of unit self-defence is of less practical relevance in armed conflict when combatants are entitled to use force to engage enemy combatants and this authority is rooted in international humanitarian law and not limited to situations of self-defence. Nevertheless, unit

¹⁹ British & Foreign State Papers, Vol. XXX 193 (1841-1842), cited after: D Stephens (n 17) 126, 133

²⁰ In the United States military, unit self-defence is considered both an authority and obligation to use all necessary means available and to take all appropriate actions in unit self-defence in accordance with the Standing ROE, see: US Standing Rules of Engagement 2000

²¹ *Sanremo Handbook* (n 4) 3; J. Ashley Roach, ‘Rules of Engagement’ (1983) 14 SYRACUSE J. INT’L L. & COM. 865, 870

²² *Sanremo Handbook* (n 4) 4

²³ Ch P Trumbull IV, ‘The Basis of Unit Self-defence and Implications for the Use of Force’ (2012) Vol. 23 Duke Journal of Comparative & International Law, 130; H F R Boddens-Hosang, ‘Force protection, unit self-defence, and extended self-defence’ in T D Gill and D Fleck (n 1), 420, 426

self-defence might still be applicable in armed conflict e.g. in situations where military units are attacked by non-combatants²⁴

Unit self-defence is generally accepted as fundamental to all international military codes and rules of engagement.²⁵ Equally to personal self-defence it is considered “an inherent right and not dependent or contingent on a mandate or mission.”²⁶ Unit self-defence applies exclusively to military units regardless of their size and nature as long as they operate as a single organic whole.²⁷ It usually does not apply to the protection of non-military personnel and property or to the protection of foreign forces.²⁸ *Sanremo Handbook on Rules of Engagement* (2009) states though that unit self-defence may be extended to units and individuals from other nations if authorised by the applicable ROE, which is the case of NATO.²⁹ Arguably however, such extension would derive the authorisation to use force from the rules of engagement themselves rather than from the right of self-defence in its form of unit self-defence.

Although the right to unit self-defence is generally recognised, there is little discussion in the literature as to the source of this right. Contributions are divided considering unit self-defence either as a distinct individual right based on customary international law or as a subset of national self-defence. Dinstein claims that all forms of self-defence including unit self-defence, which he calls on-the-spot reaction, are emanations of national self-defence since “[t]here is quantitative but not qualitative difference between a single unit responding to an armed attack and the entire military doing so”.³⁰ Accordingly, counter-force used by military units in response to an armed attack is always a manifestation of national self-defence deriving its legitimacy from Article 51 of the UN Charter and customary international law. Such response is therefore exercised by the state even if a

²⁴ Ch P Trumbull IV (n 23) 122 (footnote 7)

²⁵ D Stephens (n 17); D Fleck (ed), *The Handbook of the Law of Visiting Forces* (Oxford University Press 2001) 546; *Sanremo Handbook* (n 4) 3-4; *NATO Legal Deskbook* (n 17) 259

²⁶ H F R Boddens-Hosang (n 23) 420, 426. See also NATO ROE (2003)

²⁷ *Ibid* 420, 420

²⁸ Ch P Trumbull IV (n 23) 121, 124; R J Grunawalt, ‘The JCS Standing Rules of Engagement: A Judge Advocate’s Primer’ (1997) 42 *Air Force Law Review* 245, 252

²⁹ *Sanremo Handbook* (n 4) 3

³⁰ Y Dinstein (n 18) 220

particular action is conducted by a single military unit.³¹ Other authors oppose this interpretation arguing that the right of unit self defence has a legal standing independent of national self-defence. Unit self-defence is a distinct right of customary international law and its status has been corroborated by state practice and *opinio juris*.³² Military manuals and rules of engagement, where the concept of unit self-defence is principally found, characterize it as a “right” and sometimes also an “obligation” which is indicative of it being grounded in law rather than in the policy preferences of individual states.³³ In contrast, and as Dinstein himself admits, national self-defence is a right but not a duty. There is no rule of international law laying down an obligation for states to exercise self-defence; it is in fact a matter of political preferences and considerations of individual states.³⁴ States have the full right to defend themselves upon an armed attack, but they might choose not to do it for whatever reason. Unit self-defence permits to take action to repel an attack or imminent attack but such action must be necessary and proportional, temporally interwoven with the event that has triggered it and directed at the source of the attack or threat.³⁵ For example, it would not be justified to rely on unit self-defence after much (undue) time lapse (even few days might be excessive for on-the-spot reaction), or to attack an entity other than that immediately responsible for the attack, or to take preventive actions to rule out future threats.³⁶ The immediacy of the response in unit self-defence has to comply with the standards set by the *Caroline* incident. The immediacy condition is less compelling in exercising national self-defence, and as international practice shows, states do not always act “instantly and without deliberation” when responding to an armed attack.³⁷ Moreover, the measures taken in national self-defence need not to be locally limited to the immediate area of the attack but might be directed at military objectives which did not physically conducted attack themselves, provided that it can be reasonably expected that the

³¹ Ibid (n 20) 220

³² See articles by Dale Stephens (n 8) and Ch P Trumbull IV (n 23)

³³ Ch P Trumbull IV (n 23) 134

³⁴ Y Dinstein (n 18) 178-179

³⁵ Ch P Trumbull IV (n 23) 131

³⁶ Ibid 131

³⁷ E.g. the Security Council authorised the use of “all necessary means” in response to the invasion of Kuwait by Iraq on 2 August 1990 only four months later on 29 November 1990 (SC Res. 678 (1990)); the United States invoked the right to self-defence under Article 51 of the UN Charter and responded militarily to the September 11 attacks only on October 7 (UN Doc. S/2001/947, October 7, 2011)

attacks will continue from there.³⁸ These qualitative not just quantitative differences in scopes of the responses in unit self-defence and national self-defence justify the argument that unit self-defence is a distinct right not dependant on parameters of national self-defence.

Extended self-defence

Extended self-defence is a concept utilized by the North Atlantic Treaty Organization (NATO).³⁹ A definition of extended self-defence in NATO unclassified ROE from 2003 provides that:

“In keeping with the principles of the Alliance, within the general concept of self-defence, NATO/NATO-led forces and personnel also have the right to take appropriate measures, including the use of necessary and proportional force to defend other NATO/NATO-led forces and personnel from attack or imminent attack.”⁴⁰

Extended self-defence goes beyond unit self-defence as it allows protecting other units of other national forces of NATO members. Arguably, it should not be qualified as self-defence despite its name, unless these different national forces still somehow operate as an “organic whole” and the response to an attack is legitimate under national laws. Because national laws differ as to the extent of the right of self-defence, the reactions of multinational forces will not always be consistent as to where the right to use force in self-defence ends and the use of force to accomplish a mission as authorised by the mission ROE starts. If such differences exist, the mission’s ROE should not be interpreted as limiting the inherent right of self-defence.⁴¹ The meaning of the word “forces” would also have to be clarified in such multinational operations, i.e. whether or not it applies to civilians operating as integral members of a troop contributing nation’s commitment.⁴² On a different level, the concept of extended self-defence is linked to the principles of the alliance rather than to personal/unit self-defence *per se*. Given the nature of the NATO as a collective defence organisation, the protection/defence of other friendly forces could

³⁸ O Schachter, *International law in theory and practice* (Martinus Nijhoff 1991) 154; Ch P Trumbull IV (n 23) 132

³⁹ *NATO Legal Deskbook* (n 17) 259

⁴⁰ *NATO ROE* (2003) 4

⁴¹ See also: *NATO ROE* (2003) A-1: “International law and national law govern the lawful limits for the use of force in military operations. ROE never limit the right of self-defence, but provide political, legal and policy direction for the conduct of military operations.”

⁴² *NATO Legal Deskbook* (n 17) 259

be subsumed under the concept of collective self-defence grounded in the UN Charter and customary law.

3.1.3. Self-defence in the Rome Statute

Self-defence is a legitimate defence under international criminal law as well. The Rome Statute of the International Criminal Court is the first treaty that (partially) codifies available defences in Articles 31, 32 and 33. Article 31(1)(c) reads as follows:

Article 31 Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph

Article 31(1)(c) of the ICC Statute sets forth two conditions which must be met to claim this defence: (a) the act must be in response to “an imminent and unlawful use of force”; in response to an attack on a “protected” person or property; (b) the act in self-defence must be “proportionate to the degree of danger”. These conditions are common in national criminal laws that deal with the use of force and there will be no shortage of guidance for the Court. The inclusion of property was proposed by the United States and Israel during the Rome Conference and was not accepted without controversy.⁴³ In its final shape, the defence of property is confined to the cases of war crimes; additionally, property defended must be essential for the survival of the person or another person or essential for accomplishing a military mission. Upon ratification Belgium appended a declaration stating that it considered that Article 31(1)(c) could only be applied and interpreted “having regard to rules of

⁴³ W Schabas, *An Introduction to the International Criminal Court* (4th ed. Cambridge University Press 2010) 241

international humanitarian law which may not be derogated from”.⁴⁴ This definition, while extensive, still meets the limits acceptable by some national laws. Furthermore, the Rome Statute distinguishes between collective and individual self-defence. Participation in defensive operations does not in itself exclude criminal responsibility; any actions in self-defence must remain within the limits defined in this article.

The issue of self-defence as a defence in international criminal law was discussed by the International Criminal Tribunal for the former Yugoslavia in *Kordic and Cerkez* case (2001). The Trial Chamber noted that the Statute of the International Tribunal did not provide for self-defence as a ground for excluding criminal responsibility; however, it observed that ‘defences’ form part of the general principles of criminal law and, as such, they must be taken into account by the court. It broadly defined the notion of ‘self-defence’ as:

“(…) providing a defence to a person who acts to defend or protect himself or his property (or another person or person’s property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.”⁴⁵

The Chamber recognised that the right of self-defence is preserved in the domestic law of every state and also included in the Rome Statute of the International Criminal Court and may be regarded as constituting a rule of customary international law.⁴⁶ The Chamber briefly discussed the notion of self-defence as a criminal law defence in relation to the question whether defensive action or self-defence may amount to a ground for excluding criminal responsibility for the commission of serious violations of international humanitarian law. It noted that although any argument raising self-defence must be assessed on its own facts and in the specific circumstances relating to the charges, military operations in self-defence do not provide a justification for serious violations of international humanitarian law.⁴⁷

⁴⁴ Ibid 242

⁴⁵ *The Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Judgment (26 February, 2001) para. 449

⁴⁶ Ibid para. 451

⁴⁷ Ibid paras. 448-452

Whether the definition of self-defence in Article 31(1)(c) of the Rome Statute can be applied to actions of peacekeepers is questionable. Since defences codified under the Statute are available to the perpetrators of international crimes included in the Statute, it seems that peacekeepers would have to first commit one of such crimes and then claim that their actions were taken in self-defence.

3.1.4. Rules of engagement

The use of force during armed conflict is governed by international humanitarian law and relevant human rights law. Within this legal framework, national law and policy may further regulate the use of force in certain operations or situations. These regulations come in the form of rules of engagement (ROE). ROE are used for all military operations and they provide authorisation for and/or limits on, among other things, the degree of force and the circumstances and manner in which the military can use it to accomplish the mission.⁴⁸ ROE are classified, at least for the duration of the mission. Accordingly, this section draws primarily on de-classified ROE or standard ROE (USA, NATO, UN etc.), the *Sanremo Handbook on Rules of Engagement* (2009) and academic writings.

ROE are issued by a national or international command authority for a particular mission in line with exacting politico-legal imperatives and in a direct relationship to the overarching purpose of the mission.⁴⁹ The parameters of the use of force are therefore always mission-specific as they take into account the particular mission objectives, contemporary political and diplomatic priorities and national and international laws. With regard to legal factors, some national laws may restrict the use of (deadly) force when protecting others or defending property. States might also have different international treaty obligations, the extent of which will tailor the employment of certain specific military capabilities. Finally, states might have different views on the authority and responsibility of commanders. The bottom line is customary international law, which applies to all states and all operations. At the

⁴⁸ *Sanremo Handbook* (n 4), 1-2

⁴⁹ M D Maxwell, 'Individual Self-Defense and the Rules of Engagement: Are the Two Mutually Exclusive?' (2002) 41 (1-2) *The Military Law and the Law of War Review* 39, 42; D Stephens (n 17) 126

international strategic level, the use of force is generally authorised in accordance with the UN Charter (pursuant to the right of self-defence, or authorisation of the Security Council). ROE might restrict the use of force below what is allowed by national and international law due to political considerations, e.g. some targets might be considered too controversial to attack even though they are valid military objectives.⁵⁰ What ROE cannot, however, restrict is the inherent individual right to self-defence. The objectives and the extent of force that might be used to achieve them will change from mission to mission, but individual self-defence remains constant.⁵¹ Logically, the use of force in self-defence should not be included in rules of engagement; however, military doctrines of some states (e.g. U.S. Standing ROE) still cover the use of force in self-defence scenarios. This might be a source of confusion regarding a distinction between the amount of force that military personnel can use for mission accomplishment and the amount of force they can use to defend themselves. Blending the two in one document creates the appearance that the entire spectrum of the use of force is contained within ROE, and that the right to self-defence is a subset of ROE.⁵²

ROE appear in a variety of forms in national military doctrines such as executive orders, deployment orders, operational plans, or standing directives. Some states like USA or Australia regard them as lawful commands and soldiers who disobey them are liable to court martial, while other states like Canada or New Zealand regard them simply as guidelines to military forces.⁵³ ROE do not assign specific missions or tasks, which are assigned through operations orders, nor give tactical instructions.⁵⁴

Rules of engagement in multinational operations

Given all the variables discussed above, drafting ROE for multinational operations is particularly challenging. The right to use force to achieve military or political objectives in such operations originates from the mandate of an international authority establishing them (e.g. the Security Council in case of UN operations or

⁵⁰ M D Maxwell (n 49) 43

⁵¹ Ibid 45

⁵² See examples discussed in M D Maxwell (n 49) 47-48

⁵³ T Findlay (n 1) 371

⁵⁴ *Sanremo Handbook* (n 4) 1-2

regional organisations in cases of regional peacekeeping).⁵⁵ The authorisation to use force might be explicit or implied in the tasks mandated to perform and the language of the mandate. This authorisation will have to be then filtered down to the level of national contingents and fulfilled in accordance with international obligations and national laws of contributing states, which is where major frictions occur. ROE issued for a multinational operation do not trump national ROE and as a result such missions operate according to the dual-key rule: each contingent operates under its own national ROE that reflect domestic legal and political constraints and additionally is issued with ‘international’ ROE.⁵⁶ While the attempts are made to address the divergences between the two, this happens through negotiations rather than finding the lowest common denominator. Any legal or policy differences among troop contributing countries need to be identified and factored into the planning and conduct of operations so that participating nations would operate under coherent ROE arrangements. However, contradictions inevitably occur. Accordingly, some nations may issue restrictions or amplifying instructions to supplement ROE for multinational operations. Such contradictions sometimes mean that a contingent may not be able to perform tasks assigned to it. Consensus on each measure is not critical, however, sharing ROE information with the multinational force commander is critical.⁵⁷

In case of current United Nations operations, mission-specific ROE are drafted by the Military Staff of DPKO in accordance with the UN Model ROE and the mandate of the UN mission. The draft is then reviewed and approved by the Under Secretary-General for Peacekeeping Operations on the advice of the Military Adviser of DPKO, the Office of Legal Affairs and the Head of Mission. Such ROE would reflect the military objectives of a peacekeeping operation as set out in the relevant Security Council resolutions and, if appropriate, any recommendations made in the Secretary-General’s relevant reports. ROE assist the Force Commander in implementing the military objectives of a peacekeeping mandate. He may review ROE, in consultation with the Head of Mission, and recommend any change to

⁵⁵ H F R Boddens-Hosang (n 23) 416

⁵⁶ D Stephens, ‘The lawful use of force by peacekeeping forces: the tactical imperative’ (2005) 12(2) *International Peacekeeping* 157,164

⁵⁷ *Sanremo Handbook* (n 4), v, 2

UNHQ. If such recommendation is agreed, the Under-Secretary-General for Peacekeeping Operations issues a formal change or amendment to ROE.⁵⁸

Such UN-issued ROE will help to synchronize actions of national contingents participating in a UN operation; however, as already stated, they do not supersede national ROE. States contributing forces to a mission use their own command and control structures and ROE.⁵⁹ Legal responsibilities and authorities of national contingents pursuant to their own domestic law follow them into a mission area, which is acknowledged through specific agreements made with the UN prior to national force participation in an operation.⁶⁰ The issue of the UN authority at the tactical level is examined in more detail in the following section.

3.2. Self-defence in a peacekeeping context

Having set the background on the use of force in self-defence in civilian and military contexts and the use of force for mission accomplishment as regulated by ROE, which will be the main point of reference for the remainder of this chapter, the study will now move to an analysis of self-defence in the realm of peacekeeping.

The peacekeeping principle of non-use of force except in self-defence, as much as peacekeeping, are by-products of a dysfunctional collective security system in the Cold War era when enforcement measures could not be agreed upon.⁶¹ In this light the principle should be considered on both state and individual-level. On a macro-level, non-use of force and two other core principles were essential to emphasise the difference between peacekeeping and enforcement and to honour state sovereignty and comply with the principle of non-interference in domestic affairs. As explained in the proceeding chapter, peacekeeping was originally regarded as a provisional measure that should not prejudice an outcome to a dispute or distort a political and

⁵⁸ Major General Tim Ford (Retd), Commanding United Nations Peacekeeping Operations. A Course Produced by The United Nations Institute for Training and Research, Programme of Correspondence Instruction; Series Editor: Harvey J. Langholtz (UNITAR POCI 2004) 235

⁵⁹ B Cathcart, 'Command and control' in D Fleck, T D Gill (eds) *The Handbook of the International law of military operations* (Oxford University Press 2010) 235

⁶⁰ F Rawski, 'To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations' (2002) 18 Connecticut Journal of International Law 103, 108

⁶¹ For a discussion and references see: Chapter 2 Section 2.2.

military balance in a conflict. A peacekeeping mission had neither a designated enemy nor any military goals to achieve. What follows from this presupposition is that on a micro-level the force could only be used in self-defence and not to achieve any military objective or to defeat any party.⁶² Peacekeepers had the right to defend themselves but they were not permitted to use force on their own initiative so to avoid getting involved in the conflict as this could jeopardise impartiality of the mission and consent of the parties. The differentiation of peacekeeping at its inception from an enforcement action was based on sound political, legal and practical reasoning, which still cannot be overstated. Apart from their vital political importance, the core characteristics of peacekeeping seem to be regarded as having become legal principles, which can be inferred from the way the United Nations is struggling to operate within the self-imposed limits of consent, impartiality and non-use of force except in self-defence. Rather than doing away with these principles in the changed geo-political setting, they have been redefined to meet new political and operational demands of the post-Cold War era. The first expansion in the use of force happened already in 1973 when the concept of the defence of the mission was coined, although not much used until the end of the Cold War. Since 1990s the use of (coercive) force has been so justified. The scholarship on the topic highlights the complexity and controversy of this addition to the use of force in peacekeeping.⁶³ The commentators argue that the definition of self-defence under UN law differs from its usual legal meaning, that it has been extended to cover the use of force not only to defend oneself but also to effectively carry out peacekeeping mandates without the need to resort to enforcement measures.⁶⁴ This section will analyse the extent to which peacekeeping missions can use force in self-defence and defence of the mandate to prove that such an extension has indeed occurred on the political level of peacekeeping as an extension of one of its defining principles on the use of force, but not on a micro-individual level as an extension of peacekeepers' right to personal self-defence. It will be argued that the category of peacekeeping operations encompasses "traditional" missions where force is used in self-defence only as well

⁶² *Report of the Secretary General: Summary Study of the experience derived from the establishment and operation of the Force* (9 October 1958) UN Doc. A/3943 [hereinafter: *Report of the Secretary General: Summary Study 1958*]

⁶³ See references in *supra* note 1

⁶⁴ O Schachter, 'Authorized Use of Force by the United Nations and Regional Organizations' in L F Damrosch, D J Scheffer (eds) *Law and Force in the New International Legal Order* (Boulder, Westview Press, 1991) 84; K Cox (n 1) 239ff

as “robust” operations where force is used also to “defend the mandate”. The latter use of force does not transform a peacekeeping operation into an enforcement action since military force is used at the tactical level only and is not directed against a host-state, whose consent is still secured. At the same time it will be proven in this section that the scope of the right to personal self-defence and unit self-defence in a peacekeeping context does not depart from its usual legal meaning as described in the background section. The right to self-defence is still exercised within the limits of national laws of states participating in peacekeeping operations. To arrive at these conclusions, the use of force in self-defence and defence of the mandate will be carefully analysed from three interrelated perspectives: the practice of the Security Council’s authorisations, doctrinal justifications and rules of engagement, which regulate the use of force on a tactical level.

3.2.1. Defence of the mandate

The emergence of “defence of the mission/defence of the mandate”

Although very narrowly delineated by Hammarskjöld in *the Summary Study* of the UNEF experience, the concept of self-defence was from the beginning prone to different interpretations. As the Secretary-General noted himself, “[t]here will always remain, of course, a certain margin of freedom for judgement, as, for example, on the extent and nature of the arming of the units and of their right to self-defence.”⁶⁵ With the exception of the ONUC mission in the Congo in 1960s,⁶⁶ the strict parameters of using force only in self-defence were generally applied in the following missions. The change came along with two missions, in Cyprus and Lebanon, which witnessed the expansion of the rule of non-use of force except in self-defence to encompass “a much wider variety of possibilities, known collectively as ‘defence of the mission’.”⁶⁷

⁶⁵ *Report of the Secretary General: Summary Study 1958* (n 62) para. 187.

⁶⁶ ONUC began as a peacekeeping mission, but it was not able to halt the civil war whilst being limited to the use force only in personal self-defence. The revised mandate authorised the use of force beyond self-defence as a last resort to prevent civil war.

⁶⁷ T Findlay (n 1) 87

UNFICYP (1964-present)

The United Nations Force in Cyprus (UNFICYP) was established in 1964 in the civil war between the Greek and Turkish communities on Cyprus.⁶⁸ The resolution setting up the mission did not contain any guidelines on the use of force; they were provided a month later in the Secretary-General's aide-memoire and drew heavily on the ONUC's Operations Directive no. 6 of 28 October 1960.⁶⁹ The memorandum contains general principles for the function and operation of the Force, principles of self-defence and protection against individual or organised attack, and arrangements concerning cease-fire agreements. The first hint at the circumstances in which the force might be used appears under the header "Guiding principles":

10. The troops of the Force carry arms which, however, are to be employed only for self-defence, should this become necessary in the discharge of its function, in the interest of preserving international peace and security, of seeking to prevent a recurrence of fighting, and contributing to the maintenance and restoration of law and order and a return to normal conditions.

Using arms in self-defence in the "discharge of its function" is the first move away from the static scenario of a peacekeeping mission simply reacting in self-defence to an armed attack on themselves or the positions they occupy. This change is further elaborated in the section "Principles of self-defence". At the outset, however, taking initiative in the use of armed force by peacekeepers is explicitly ruled out. The use of armed force is permissible only in self-defence, which is defined in paragraph 16 as including:

- (a) the defence of United posts, premises and vehicles under armed attack;
- (b) the support of other personnel of UNFICYP under armed attack.⁷⁰

This definition does not really depart from a classic understanding of self-defence in a military context. The second sub-paragraph might be regarded as innovative in a sense that the general category of "other personnel" can well include civilian personnel, which is so clarified in paragraph 18(d) (see further below). Yet, given that they are all personnel of UNFICYP, members of one peacekeeping mission, the

⁶⁸ SC Res. 186 (4 March 1964)

⁶⁹ Cited in T Findlay (n 1) see Appendix 2 at 412

⁷⁰ United Nations, *Note by Secretary-General concerning certain aspects of the function and operation of the United Nations Peacekeeping Force in Cyprus* (11 April 1964) UN Doc S/5653 para. 16

extension (of protection) might be justified. The following paragraphs of the same section “Principles of self-defence” are the crux of the matter and the reason why the commentators and the UN itself⁷¹ talk about the expansion of the self-defence concept:

17. No action is to be taken by the troops of UNFICYP which is likely to bring them into direct conflict with either community in Cyprus, except in the following circumstances:

- (a) where members of the Force are compelled to act in self-defence;
- (b) where the safety of the Force or of members of it is in jeopardy;
- (c) where specific arrangements accepted by both communities have been, or in the opinion of the commander on the spot are about to be, violated, thus risking a recurrence of fighting or endangering law and order.

18. When acting in self-defence, the principle of minimum force shall always be applied, and armed force will be used only when all peaceful means of persuasion have failed. The decision as to when force may be used under these circumstances rests with the commander on the spot whose main concern will be to distinguish between an incident which does not require fire to be opened and those situations in which troops may be authorised to use force. Examples in which troops may be so authorised are:

- (a) attempts by force to compel them to withdraw from a position which they occupy under orders from their commanders, or to infiltrate or envelop such positions as are deemed necessary by their commanders for them to hold, thus jeopardizing their safety;
- (b) attempts by force to disarm them;
- (c) attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders; and
- (d) violation by force of UN posts, premises and vehicles and attempts to arrest or abduct UN personnel, civil or military.⁷²

(...)

Protection against individual or organised attack

20. (...) If, despite these warnings, attempts are made to attack, envelop or infiltrate UNFICYP positions, thus jeopardizing the safety of troops in the area, they will defend themselves and their positions by restricting and driving off the attackers with minimum force.⁷³

⁷¹ The UN *General Guidelines for Peace-keeping Operations* (1995) note that: ‘This is a broad conception of “self-defence” which might be interpreted as entitling United Nations personnel to open fire in a wide variety of situations’; United Nations, Department of Peace-keeping Operations, *General Guidelines for Peace-keeping Operations* (October 1995) UN Doc. 95-38147, 20, cited after T Findlay (n 1) 100-101

⁷² United Nations, *Note by Secretary-General concerning certain aspects of the function and operation of the United Nations Peacekeeping Force in Cyprus* (n 70)

⁷³ Ibid

Heralded as an expansion of the notion of self-defence⁷⁴, this fragment might also be interpreted differently. A careful and systemic reading of all above cited paragraphs suggests that rather than substantially expanding the definition of self-defence, the Secretary-General's Note lists possible circumstances which might lead to or involve self-defence scenarios, including preventing peacekeepers from being disarmed and their posts and installations from being besieged.

It is not (instantly) clear what is meant by "direct conflict" with communities or "action" in paragraph 17. Among three examples, which could potentially result in such "direct conflict", the use of force is allowed only in the first one – acts in self-defence, and this is due to the restrictive stipulation in paragraph 16 as already discussed. Arguably, actions taken in the circumstances specified in point (b) could come close to the anticipatory form of self-defence. Regarding point (c), the troops of UNFICYP could take "action" if "specific arrangements have been, or are about to be, violated". Nothing in the sub-paragraph suggests though, that the troops are allowed to use force in such instances. It is not subsumed under self-defence which allows such use but listed separately as an alternative.

Paragraph 18 speaks about the minimum force to be used when acting in self-defence and after all peaceful means of persuasion have failed. A decision on the course of action was to be taken by a commander on the spot, but a non-exhaustive list of examples justifying the use of armed force in self-defence was provided. This was the first time the Secretary-General publicly explained the range of situations in which UN peacekeepers were authorised to use force in self-defence.⁷⁵ It should again be read in line with paragraph 16 on self-defence in response to an armed attack. Accordingly, all these instances listed would have to amount to such attack. Whether or not that expanded the self-defence norm is disputable. What it undoubtedly did though, was to indicate that the peacekeeping mission/force could adopt a more active posture without moving to combat (a middle ground between UNEF I and ONUC). Indeed, it was a change in initial and still quite common perception of peacekeeping as a static cease-fire monitoring business. As remarked

⁷⁴ M Goulding, 'The Evolution of United Nations Peacekeeping' (1993) 69 (3) *International Affairs* 451, 455

⁷⁵ T Findlay (n 1) 93

by Moskos, these guidelines rest on the assumption that peacekeepers might pursue more dynamic activities which obviously increase the likelihood of force being used in self-defence while on duty.⁷⁶ Self-defence would be situation-specific and not necessarily limited to defence against an unprovoked attack.⁷⁷ Whether carrying out “responsibilities as ordered by the commanders” could be regarded as provoking situations that might lead to the use of armed force is again disputable. The memorandum tries to limit any such possibility of provocation by prohibiting taking initiative in the use of force or taking actions that might bring peacekeepers into a “direct conflict” with the communities, as already discussed, and also by upholding the requirement of utilising peaceful means, issuing warnings and finally using only minimum force as a last resort. Overall, the new guidelines allowed for a more independent and less passive posture of peacekeepers than in the past.⁷⁸

The UN Emergency Force II (1973–79)

A second UN peacekeeping mission regarded as having expanded the use of force concept is the United Nations Emergency Force II (UNEF II).⁷⁹ It was established in October 1973 in accordance with United Nations Security Council Resolution 340 (1973) and operated till July 1979. UNEF II was mandated to supervise the ceasefire between Egyptian and Israeli forces at the end of Yom Kippur War and to control the buffer zones established under peace agreements. Given this mandate, UNEF II was designed as a standard cease-fire monitoring mission and in practice proved to be a fairly traditional peacekeeping operation; yet, the use of force guidelines issued by the Secretary-General Kurt Waldheim moved a step further than troubled UNFICYP and introduced a “defence of the mission”. Paragraph 4 of his Report to the Security Council stipulates as follows:

(d) The Force will be provided with weapons of a defensive character only. It shall not use force except in self-defence. Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council. The Force will proceed on the assumption that the parties to the conflict will take all necessary steps for compliance with the decisions of the Security Council.

⁷⁶ C C Jr Moskos, *Peace Soldiers: The Sociology of a United Nations Military Force* (University of Chicago Press: Chicago, Ill. and London, 1976) 87-88

⁷⁷ *Ibid*

⁷⁸ T Findlay (n 1) 93

⁷⁹ *Ibid* 99

(e) In performing its functions, the Force will act with complete impartiality and will avoid actions which could prejudice the rights, claims or positions of the parties concerned which in way affect the implementation of operative paragraph 1 of resolution 340 (1973) and operative paragraph 1 of resolution 339 (1973).⁸⁰

As apparent, sub-paragraph (d) patterns U Thant's guidelines for UNFICYP although with some important changes. It explicitly states that force shall be used only in self-defence but that self-defence includes resistance to attempts by forceful means to prevent the mission from discharging its duties as mandated by the Security Council. Previously force was authorised to defend the "responsibilities" or the "positions" of the mission as ordered by the force commander, whereas here "the authority of the Security Council itself was invoked to raise matters to a higher plane."⁸¹ This move 'upwards' allowed more room and flexibility for action; however, in doing so, the Force was supposed to remain impartial and avoid pursuing any agenda that could prejudice the rights or claims of the parties. Making a direct link between the use of force by peacekeepers and the Security Council might have also been necessary to provide a legal basis for expanding the concept of the use of force in peacekeeping, even if it was masked as self-defence.

This new notion, named "defence of the mission" or "defence of the mandate" was approved by the Security Council and copied by all subsequent UN peacekeeping operations.⁸² It has triggered much debate in the United Nations itself and in academic circles about its precise meaning and consequences it might produce.⁸³ Defence of the mandate has been generally regarded as giving peacekeepers a much stronger basis to react to interference but also, and paradoxically, making the application of self-defence more hazardous and more difficult.⁸⁴ It has been argued that defence of the mission does not differ from peace enforcement as the force might simply be used to impose a decision of the Security Council on a warring party

⁸⁰ *Report of the Secretary-General on the implementation of Security Council resolution 340 (1973)* (27 October 1973) UN Doc. S/11052/Rev. 1

⁸¹ T Findlay (n 1) 100

⁸² *Ibid* 102

⁸³ M Goulding (n 74) 455; T Findlay (n 1) 100-101

⁸⁴ *The United Nations General Guidelines for Peace-keeping Operations* of 1995 note that: "This is a broad conception of "self-defence" which might be interpreted as entitling United Nations personnel to open fire in a wide variety of situations', UN DPKO *General Guidelines for Peace-keeping Operations* (n 71) 20.

or parties.⁸⁵ Moskos hints at the calculations to go around the ban on initiating fire towards fulfilment of the mission:

“While fire cannot be initiated under any circumstances by UN troops, such troops can be ordered to perform missions which may draw fire. In that event, return fire may be allowable. (...) If the mission is to be pursued, however, the peacekeeping commander must seek to maneuver his men initially into a tactically defensive posture from which armed self-defence then becomes permissible (...) Calculations become very fine indeed when trying to determine what are the outer boundaries to which a peacekeeping mission can be pushed without [provoking] attack.”⁸⁶

With this remark in mind the plausibility of unprovoked attacks appears even more evident than in case of UNFICYP. In UNFICYP, the use of force guidelines allowed the mission to take a more independent and more dynamic course of action; however, they did not seem to cross the Rubicon as in no context, either civilian or military, does self-defence require to adopt a totally passive posture in order to be able to justify the use of force to preserve oneself. If individuals go around their usual legitimate business in good faith, this criminal law defence should still be available to them. While the legitimacy is provided by the Security Council resolution, the issue of good faith seems problematic in the light of Moskos’ observations; the line will always be a fine one to draw and case-specific. The Secretary-General’s Report, unchallenged by the Security Council, gave the green light to forceful reactions to forceful attempts to prevent the peacekeeping mission from fulfilling its mandate. The defence of the tasks/duties as mandated by the Security Council would presumably be allowed also when lives of peacekeepers were not put in immediate danger but only their mission sabotaged. The question whether the new concept has in fact expanded the meaning of self-defence, and more importantly, whether it is even possible to change/modify the meaning of the inherent right to self-defence is an important one to ask. The alternative reading points at the expansion of the general doctrine on the use of force in peacekeeping and the new distinct right to defend the mandate, even if introduced/promulgated through the backdoor of self-defence.

⁸⁵ E.g. N D White: ‘Allowing a force to take positive action in defence of its purpose is no different from allowing them to enforce it’ in N D White, *The United Nations and the Maintenance of International Peace and Security* (Manchester University Press: New York, 1990) 201

⁸⁶ C C Jr Moskos (n 76) 131-132

“Defence of the mandate” in the Security Council resolutions

No follow-up explanation of what the defence of a peacekeeping mission/mandate means in practice was given after UNEF II, nor was it put into use and its boundaries tested for the next twenty years. It was not until the end of the Cold War when the defence of the mission was called into question in mid-1990s, primarily in Bosnia and Somalia. The application of the defence of the mandate concept went in pair with blurring of the traditional distinction between peacekeeping and enforcement actions. Peacekeeping missions were deployed without consent or cooperation of the parties, who sometimes could not even be clearly defined, and in the absence of an effective ceasefire. The increasingly complex and hostile environments brought about new challenging tasks such as securing freedom of movement, delivery of humanitarian assistance, disarmament, protection of safe areas or protection of civilians. These tasks tested the established practices of peacekeeping especially the circumstances in which peacekeepers could open fire.⁸⁷ The Security Council resolutions were ambiguous and the ‘defence of the mandate’ principle was implemented inconsistently within and between the missions.⁸⁸ Discrepancies related to Chapter VII authorisations to use of force in self-defence and mandating peacekeeping forces to perform tasks which could have required more proactive use of force than just in self-defence. For example, as the situation deteriorated in Bosnia and Herzegovina in 1993, the Security Council acting under Chapter VII of the UN Charter proclaimed six “safe areas”, which aimed at protecting the civilian population, and decided to “ensure full respect for these areas”.⁸⁹ While refraining from explicitly mandating UNPROFOR to use force to protect the safe areas, the Security Council acting under Chapter VII of the Charter of the United Nations decided to:

5. (...) extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), *to deter attacks against the safe areas*, to monitor the cease-fire, *to promote the withdrawal of military or paramilitary units* other than those of the Government of the Republic of Bosnia and Herzegovina and *to occupy some key points on the ground*, in addition to

⁸⁷ B Boutros-Ghali, ‘Empowering the United Nations’ in S Kinkoch-Pichat *A UN ‘Legion’ Between Utopia and Reality* (Frank Cass 2004) 93

⁸⁸ T Findlay (n 1) 121

⁸⁹ SC Res. 819 (16 April 1993), Sec Res. 824 (6 May 1993), SC Res. 836 (4 June 1993) para. 4

participating in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992) of 14 September 1992,⁹⁰

It also authorised UNPROFOR

9. (...) in addition to the mandate defined in resolutions 770 (1992) of 13 August 1992 and 776 (1992), in carrying out the mandate defined in paragraph 5 above, ***acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas, by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.***⁹¹

Later the UNPROFOR was authorised also under Chapter VII:

“(...) in carrying out its mandate in the Republic of Croatia, ***acting in self-defence, to take the necessary measures including the use of force,*** to ensure its security and freedom of movement”⁹²

In Rwanda in 1994, however, the Security Council did not refer to Chapter VII or explicitly authorised UNAMIR to use force in self-defence recognising that:

“UNAMIR may be required to take action in self-defence against persons or groups who threaten protected sites and populations, United Nations and other humanitarian personnel or the means of delivery and distribution of humanitarian relief”⁹³

Logically, acting in self-defence, even if it includes the use of (armed) force, should not require authorisation under Chapter VII as it is an inherent right of every individual to defend oneself. If the right to self-defence had indeed been expanded under UN law to include the defence of the mandate without changing the nature of a peacekeeping operation, it should not have required authorisation under Chapter VII either. Such authorisation is normally reserved for enforcement, unless we assume that the reference to Chapter VII was in fact linked to the establishment of the peacekeeping operation. As the above cited resolutions show, the Security Council was responding in improvised fashion to events on the ground entrusting peacekeepers with dangerous tasks under mixed Chapter VI and Chapter VII authorisations, contradictory calling for the taking of ‘all necessary measures’ while

⁹⁰ SC Res. 836 (4 June 1993) para. 5 (emphasis added)

⁹¹ Ibid para. 9 (emphasis added)

⁹² SC Res. 871 (4 October 1993) para 9

⁹³ SC Res. 918 (17 May 1994) para 4; SC Res. 925 (8 June 1994) para 5

restricting the use of force to self-defence.⁹⁴ The restrictive mandates stipulated that peacekeepers defending safe areas, freedom of movement or delivery of humanitarian assistance, could use force only to reply to attacks. This implies that if they themselves were not directly threatened by attacks, they should decline to act. In reality attacks on the safe areas were unlikely to be deterred only by the use of force in self-defence.⁹⁵ Various contingents of UNPROFOR sometimes intentionally positioned themselves in the line of fire when Serb forces bombarded Bosnian towns, so that they could legally return fire as a form of self-defence to protect the civilian population.⁹⁶ Such actions in self-defence can become, in strategy and tactics, indistinguishable from a standard military campaign, and in the case of UNPROFOR, they unintentionally amounted to interfering in a war by depriving one party of a strategic outcome of the seizure of few urban areas without that party's consent.⁹⁷ It has to be admitted that in such circumstances controlling the continuum of violence and reactions of those engaged is very difficult and drawing a difference between actions in self-defence and beyond is likely to be tactically indistinguishable.

The United Nations struggled within these self-imposed limits on the use of force in peacekeeping trying to achieve mission's humanitarian and protective goals as by-products of acting in self-defence. In violent conflicts these challenging tasks demanded more than just reactive posture to which self-defence with minor modifications would still be limited. The failures in Somalia, Rwanda and Srebrenica, especially the failure to prevent genocide, led to a re-evaluation of the principle of using force only in self-defence. The Security Council seemed to have recognised that complex political tasks can only be achieved in secure environment and started to follow a practice of providing clearer mandates including, where necessary, an authorisation to use force under Chapter VII in specifically defined circumstances.⁹⁸ The phrase "all necessary means" or "all necessary measures" has

⁹⁴ E.g. Between February 1992 and December 1995 the Security Council issued 32 resolutions relating to UNPROFOR's role in Croatia and Bosnia; United Nations, *The Blue Helmets: A Review of United Nations Peace-keeping*, (3rd edn UN Department of Public Information: New York, 1996), 744, 750; See also T Findlay (n 1) 263-265

⁹⁵ T Findlay (n 1) 265

⁹⁶ V K Holt and T C Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations* (The Henry L Stimson Center 2006) 183

⁹⁷ T Findlay (n 1) 229

⁹⁸ N Blokker, N Schrijver (eds), *The Security Council and the Use of Force. Theory and Reality - A Need for Change?* (Martinus Nijhoff Publishers 2005) 96

become a shibboleth of the use of force beyond self-defence.⁹⁹ An example of this new practice of the Security Council was the United Nations Mission in Sierra Leone (UNAMSIL), which was the first peacekeeping mission explicitly mandated to protect civilians. UNAMSIL was established by the Security Council in October 1999 i.a. to monitor implementation of the Lomé Peace Agreement; to assist the Government of Sierra Leone in the implementation of the disarmament, demobilization and reintegration plan; to provide support to the elections; to facilitate the delivery of humanitarian assistance.¹⁰⁰ Additionally, the mission acquired a Chapter VII authorisation to “take the necessary action” in the discharge of its mandate:

14 (...) to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG;¹⁰¹

Another example was the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) primarily set up to ensure the compliance with the Lusaka Ceasefire Agreement. In this case the Security Council acting under Chapter VII decided that MONUC:

8. (...) may take the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities, to protect United Nations and co-located JMC personnel, facilities, installations and equipment, ensure the security and freedom of movement of its personnel, and protect civilians under imminent threat of physical violence;¹⁰²

Effectively, the use of force has been authorised in consensual peacekeeping operations to fulfil certain aspect of their mandates, e.g. to protect civilians under imminent threat of violence. The concept of the defence of the mandate/mission has not only been upheld but also given some teeth in the form of a Chapter VII authorisation. For example, in the case of East Timor, the United Nations Transitional Administration in East Timor (UNTAET) was created under Chapter

⁹⁹ Interview no. 3 (UN February 2012); Interview no. 5 (UN February 2012); Interview no. 7 (UN February 2012); Interview no. 9 (UN March 2012); Interview no. 10 (UN March 2012)

¹⁰⁰ SC Res. 1270 (22 October 1999)

¹⁰¹ Ibid

¹⁰² Ibid

VII and explicitly authorised “to take all necessary measures to fulfil its mandate”.¹⁰³ The United Nations Mission of Support in East Timor (UNMISET), which replaced UNTAET, was authorised under Chapter VII “to take necessary actions, for the duration of its mandate, to fulfil its mandate.”¹⁰⁴ Similarly, the United Nations Operations in Côte d’Ivoire (UNOCI) was authorised under Chapter VII “to use all necessary means to carry out its mandate, within its capabilities and its areas of deployment”.¹⁰⁵

In “robust” missions acting in self-defence and beyond to fulfil the mandate can happen to be increasingly intertwined. From the perspective of mission accomplishment it might not be so important to disentangle the precise role of the use of force. If kept within limits of the mandate’s objectives, the use of force is legitimate at the international level since it finds its legal basis either in the inherent right of self-defence or a binding decision of the Security Council adopted under Chapter VII of the UN Charter. In order to define more precisely the boundaries of the use of force in self-defence and defence of the mandate, the study moves on to an analysis of how the practice of the Security Council’s authorisations to use force has been supported by a military doctrine and translated into rules of engagement.

3.2.2. Is there a United Nations military doctrine?

The practice of the Security Council of explicitly or implicitly authorising the use of force beyond self-defence to fulfil the mandate has not been accompanied by a coherent military doctrine. A military doctrine is the compilation of experience and belief about “the best way to conduct military affairs.”¹⁰⁶ A doctrine generally directs the action by providing a common frame of reference across the military rather than a set of fixed rules. *NATO glossary* of 2013 defines a doctrine as “fundamental principles by which the military forces guide their actions in support of objectives. It is authoritative but requires judgement in application”.¹⁰⁷ The United Nations

¹⁰³ SC Res. 1272 (25 October 1999), para. 4

¹⁰⁴ SC Res. 1410 (17 May 2002), para. 6

¹⁰⁵ SC Res. 1528 (27 February 2004), para. 8

¹⁰⁶ D Drew, Donald Snow ‘What Is Military Doctrine?’ in *Making Strategy: An Introduction to National Security Processes and Problems* (Air University Press Maxwell Air Force Base 1988) 163

¹⁰⁷ *The NATO glossary of terms and definitions* AAP-6 (2013); definition of a “doctrine” is dated on 01 Mar 1973

engaged in peacekeeping without a proper doctrinal background on the use of force. The distinction between Chapter VI peaceful measures and Chapter VII enforcement actions was widely understood and Hammarskjöld's *Summary Study* with its pioneering conceptualisation of the principles of traditional peacekeeping - consent, impartiality and the use of force only in self-defence - remained the conventional wisdom. The Security Council resolutions never offered any guidance on the use of force. They were repeating the standard wording about self-defence and later the defence of the mission and leaving the details for the Secretary General to address in background reports. For years there was no model ROE on which missions could rely nor any official UN training manuals to guide potential troop contributors.¹⁰⁸ The reasons for this state of affairs were few. Peacekeeping was first born in practice and its theoretical framework was built based on these practical experiences; even though rudimentary, it proved supportable for many years. It was only in the 1990s when the quantitative growth in activity and its qualitative evolution, especially in the realm of the use of force, outstripped the doctrinal justifications. The reflection first came after major failures revealing the limitations of the instrument in use. Nevertheless, the UN chose to approach the matter pragmatically rather than dogmatically. Since the 1992 *Agenda for Peace* few other reports were issued by successive Secretaries-General and commissioned groups of experts, as well as internal manuals, all of which obviously advanced the debate but more in a form of lessons learned rather than a comprehensive doctrine. The peacekeeping practice seems to be always one step ahead of the peacekeeping theory. The difficulties in conceptualising peacekeeping are caused not only by the fast-paced reality on the ground but are also compounded by highly politically divisive issues of what ultimately is to be achieved through peacekeeping and how. As an instrument of the multilateral political organisation peacekeeping functions in a realm of partial control and competing priorities, which also makes it incapable of being used to conduct offensive military operations.¹⁰⁹ For these reasons UN Member States were always reluctant to agree on a military doctrine, although few such attempts were made.

¹⁰⁸ T Findlay (n 1) 121

¹⁰⁹ W J Durch, M L England, *Purposes of Peace Operations* (New York University, Center on International Cooperation, 2009) 9 available at <<http://cic.nyu.edu/Lead%20Page%20PDF/purposesofpeace.pdf>>

In 1995 the UN published *The General Guidelines for Peace-keeping Operations* designed for training purposes.¹¹⁰ Despite the developments in Bosnia and Somalia in the background, the *General Guidelines* were restricted to “traditional peacekeeping” and did not try to introduce any wider concept of the use of force. The document discusses the use of force in self-defence explaining that:

“The peace-keeper’s right to self-defence does not end with the defence of his/her own life. It includes defending one’s comrades and any persons entrusted in one’s care, as well as defending one’s post, convoy, vehicle, or rifle. Each peace-keeping operation is expected to function as a single, integrated unit and an attack on any one of its members or subunits engages the right to self-defence of the operation as a whole.”¹¹¹

This is an important clarification, akin to the definition of unit self-defence in a military context. Although it does not mention a protection/defence of civilian components, it views a peacekeeping operation as a single integrated whole, which leaves space for a future concept of integrated multidimensional missions. A protection of “any persons entrusted in one’s care” similarly provides such a possibility and is potentially open-ended. The *General Guidelines* refer also to the concept of the defence of the mandate introduced in 1973 but fail to operationalise its precise meaning. Instead, the document observes that in practice the commanders were reluctant to use their authority to defend peacekeeping mandates fearing the loss of consent and cooperation of the parties to a conflict.¹¹² At the strategic level, the *General Guidelines* maintain the traditional divide between peacekeeping and enforcement repeating after the *Supplement to an Agenda for Peace* that “peace-keeping and the use of force (other than in self-defence) should be seen as alternative techniques and not as adjacent points on a continuum. There is no easy transition from one to the other”.¹¹³ At the tactical level, the *General Guidelines* do not address the fact that different contingents of a peacekeeping operation use different ROE, which differently delineate the parameter of the use of force, bitter lesson from Somalia where participating contingents were unfamiliar of each other’s ROE and could not react in a concerted manner.¹¹⁴

¹¹⁰ UN DPKO *General Guidelines for Peace-keeping Operations* (n 71)

¹¹¹ *Ibid* 20

¹¹² *Ibid*

¹¹³ *Ibid* 21-22

¹¹⁴ T Findlay (n 1) 214

Next in line, the *Brahimi Report* (2000),¹¹⁵ an unprecedented examination and critical review of peacekeeping practice came up with many recommendations on reforms to enhance military effectiveness, planning and support, rapid deployment and the use of force. It tackled many dilemmas that peace operations were confronted with and the principles it laid down remain central to modern peacekeeping.¹¹⁶ It advocated more robust ROE, focused on capabilities and effectiveness of the missions to defend themselves and their mandates but failed to offer a new comprehensive military doctrine for peacekeeping operations.

In 2003 the UN Peacekeeping Best Practices Unit published a *Handbook on United Nations Multidimensional Peacekeeping Operations*. The *Handbook* was intended to serve as an introduction to the different components of multidimensional peacekeeping operations. In the section on a military component it points out the fact that although armed forces of states operate under national doctrines, their actions in UN peacekeeping operations are governed by certain principles including the appropriate use of force.¹¹⁷ Military forces under UN command would not usually be required to use force beyond that necessary for self-defence which is defined as the right to protect oneself, other UN personnel, UN property and any other persons under UN protection.¹¹⁸ This definition, even if broad enough to include the defence of property, does not trespass the limits set by national laws. The *Handbook* notes that the use of force by the military component will depend on the mandate and rules of engagement. It admits that the force may be used beyond self-defence, which would have to be authorised by the Security Council and then specified by rules of engagement for a particular peacekeeping operation.¹¹⁹

The closest the UN has ever got to a doctrine was in 2008 when “*United Nations Peacekeeping Operations: Principles and Guidelines*” were released. Whether or not

¹¹⁵ *Report of the Panel on United Nations Peace Operations (Brahimi Report, October 2000)*, UN Doc. A/55/305-S/2000/809 available at http://www.un.org/peace/reports/peace_operations/> Chapter II para. 10

¹¹⁶ Department of Peacekeeping Operations and Department of Field Support, *A New Partnership Agenda - Charting a New Horizon for UN Peacekeeping* (UN 2009), iii

¹¹⁷ UN Peacekeeping Best Practices Unit, *The Handbook on United Nations Multidimensional Peacekeeping Operations* (UN 2003), 55

¹¹⁸ *Ibid* 57

¹¹⁹ *Ibid*

Principles and Guidelines constitute a military doctrine is disputable. It should be noted that although commonly referred to as *Capstone Doctrine*, they are not officially titled as such. They were published as an internal document of DPKO/DFS, which weakens their significance and authority. While announced as the guidance document sitting “at the highest-level of the current doctrine framework for United Nations peacekeeping”, they were at the same time introduced with a caveat that they do not seek to override national military doctrines of individual Member States participating in peacekeeping operations.¹²⁰ *Principles and Guidelines* reflect the multi-dimensional nature of contemporary United Nations peacekeeping operations and accordingly, they cover the entire spectrum of peacekeeping activities of which the use of force is only one component. Building upon lessons learned and the accumulated institutional knowledge, including the analysis contained in the *Brahimi Report* and other existing sources, *Capstone Doctrine* presents a codification rather than a transformative agenda. It restates and clarifies the basic principles that should guide the planning and conduct of peacekeeping operations, remarking though that specific application of these principles will require judgement and will vary according to the situation on the ground.¹²¹ The holy trinity of peacekeeping: consent, impartiality and non-use of force except in self-defence and defence of the mandate, is reaffirmed and provided with a contemporary understanding of how it should be employed in practice. With regard to the principle of non-use of force, the document re-interprets it to apply to the strategic level as a non-use of enforcement. Peacekeeping should remain a consent-based and non-aggressive activity at the strategic and international level, meant to support a peace process and not to enforce it. Peacekeeping operations might, however, take a robust form at the tactical level, precisely to support this peace process, to defend the mission and the mandate from spoilers and criminals. Its core business is to create a secure and stable environment to facilitate the political process. Within this context the primary distinction between peace enforcement and robust peacekeeping is thus about the objectives of the use of force and less about how much force is being used, although certain caveats are

¹²⁰ United Nations, Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations, Principles and Guidelines* (Capstone Doctrine 2008) 13-14 <http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> [hereinafter: UN, *United Nations Peacekeeping Operations, Principles and Guidelines*]

¹²¹ Ibid

stipulated.¹²² The use of force at the tactical level requires the authorisation of the Security Council, “if acting in self-defense and defense of the mandate”.¹²³ The reference to the authority of the Security Council in context of self-defensive use of force is surprising though, as the right to self-defence, as extensively analysed in the background section of this chapter, exists regardless of such authorisations. However, as also discussed in the proceeding part, it can be interpreted that the defence of mission personnel and defence of the mandate are very often interlocked hence using them together in one commonly repeated phrase. Since *Capstone Doctrine* does not provide its own definition of self-defence, a conclusion might be drawn that it does not seek to supersede the definitions provided in preceding UN documents, which do not depart from the standard meaning. With regard to the defence of the mandate, it is said that the “robust” mandates would authorise to “use all necessary means” against criminal gangs and spoilers “to deter forceful attempts to disrupt the political process, to protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order”.¹²⁴ The doctrine allows for the proactive use of force in defence of the mandate; at the same time however, it places certain restrictions such as exhaustion of other means of persuasion and restraint in using force.

“The ultimate aim of the use of force is to influence and deter spoilers working against the peace process or seeking to harm civilians; and not to seek their military defeat. The use of force by a United Nations peacekeeping operation should always be calibrated in a precise, proportional and appropriate manner, within the principle of the minimum force necessary to achieve the desired effect, while sustaining consent for the mission and its mandate. In its use of force, a United Nations peacekeeping operation should always be mindful of the need for an early de-escalation of violence and a return to non-violent means of persuasion.”¹²⁵

This is an important pronouncement on the objective of the use of force, which in peacekeeping is governed by a different logic than in a standard warfare. Peacekeeping operations do not aim at militarily defeating any enemy because there is no enemy designated at the strategic level who would be a legitimate target of

¹²² C de Coning, J Detzel, P Hojem, ‘UN Peacekeeping Operations Capstone Doctrine. Report of the TFP Oslo Doctrine Seminar 14 & 15 May 2008, Oslo, Norway’ (2008) No.14 Norwegian Institute of International Affairs, NUPI Report Security in Practice 4

¹²³ UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 120) 34

¹²⁴ *Ibid*

¹²⁵ *Ibid*

lethal force at all times. The principle of “the minimum force necessary to achieve a desired effect” runs contrary to the standard practice of a regular army to apply maximum force it is capable of applying. This fundamental repurposing of how to apply military force is spurred by the clear intention to keep peacekeeping separate from war-fighting. The commentators remain doubtful though as to whether *Capstone’s* distinction between the use of force at the tactical and strategic level is tenable in the real world.¹²⁶ Even the use of force at the lowest tactical level of deployment might have unforeseen political implications on a strategic plane. Another difficulty is to differentiate between plain criminal gangs and militias with political agenda linked to one of the parties to the conflict, or even to the host government, the problem that MONUC had to face.¹²⁷ If a peacekeeping mission is confronted with the latter type, and especially in the situation where such groups systematically target the civilian population, not defeating them through military force might effectually mean failing to fulfil the protective mandate. A third challenge is to be able to respond in a unified and concerted way. Peacekeeping forces are composed of different national contingents trained in different military cultures, with diverse fighting capabilities and battle experience, and which accordingly reply differently to threats and attacks.¹²⁸ The last and maybe the primary challenge is to generally safeguard that trained military would react according to a different logic they are familiar with - the one of persuasion, minimum use of force and de-escalation.

In the light of the above review, the 2008 *Principles and Guidelines* seem to come close to a doctrine, even if not officially endorsed, as they offer a general framework to guide the operations and basic principles to govern the use of force. They give the green light to the use of force upon the authorisation of the Security Council to defend a peacekeeping mandate at the tactical level albeit in calibrated and limited manner; yet apart from these instructions, they do not operationalise the “defence of the mandate” concept. They do not go into details of military tactics, techniques and procedures, as this is not a job of a doctrine to give exact clarifications of the different levels of force to be used in various circumstances. These matters are

¹²⁶ C de Coning, J Detzel, P Hojem (n 122) 4

¹²⁷ S Ahmed, P Keeting, U Solinas ‘Shaping the future of UN peace operations: is there a doctrine in the house?’ (2007) Vol. 20 No. 1 Cambridge Review of International Affairs, 11-28

¹²⁸ Ibid 26

regulated by rules of engagement for the military and directives on the use of force for the police components and *Capstone Doctrine* explicitly states that they remain the prerogative of individual Member States.¹²⁹ The use of force at the tactical level, precisely where ROE are applied, is thus the cutting edge in this discussion. The Security Council resolutions authorising the use of force in self-defence and defence of the mandate do not operationalize such uses. The UN peacekeeping doctrine excludes the use of force at the strategic level; at the same time however, it does not provide any specific parameters of the use of force at the tactical level, only general principles and guidelines. Effectually, everything boils down to rules of engagement. Given that applying force is restricted in peacekeeping operations, rules of engagement seem even more critical as they would have to be subject to a different logic than the military is normally subject to in war. The next section will look at the unclassified UN Model ROE to investigate any possible extension of the right to self-defence on this last tactical level of a peacekeeping operation.

3.2.3. The United Nations Model Rules of Engagement

Rules of engagement are critical in planning of any military operation. The United Nations have always used rules of engagement to regulate the use of force in its peace operations, although they have not always been named as such and knowledge of them was often limited to the military.¹³⁰ In late 1990s the UN Secretariat, DPKO and OLA engaged in consultations with UN Member States and the ICRC to come up with model ROE to help the UN quickly produce mission-specific ROE for future missions and for training purposes.¹³¹ Due to prolonging process of consultations and fundamental disagreements over the content, the Secretary-General announced in 2002 *Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations*¹³² (thereafter *UN Guidelines for ROE*) as a working document subject to periodic review, which would be used provisionally by the military planning staff of the DPKO. The document is intended to safeguard that

¹²⁹ UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 120) 9-10

¹³⁰ T Findlay (n 1) 368

¹³¹ *Ibid* 347-348

¹³² United Nations, Department of Peace-keeping Operations, Military Division, *Guidelines for the development of rules of engagement (ROE) for United Nations peacekeeping operations* (May 2002) UN Doc. MD/FGS/0220.0001 as reprinted in Findlay Appendix 3.

the use of force by UN armed military personnel is undertaken in accordance with the Purposes of the Charter of the United Nations, the Security Council mandate, and the relevant principles of international law including international humanitarian law.¹³³ The doubts might be cast though on the authority of this “working document” and given the classified nature of operation-specific ROE, it is also difficult to assess its impact since it was announced.

A basic format of ROE as provided in the *UN Guidelines for ROE* contains the outline of the mandate, a list of numbered ROE, definitions, supporting directions and procedures, and weapon states. Sample ROE attached to ROE Guidelines spells out under “Execution of ROE” header basic principles applicable to peacekeeping operations including *inter alia* the duty to warn and challenge; to try alternatives to the use of force; the principle of minimum and proportional force; military necessity; avoidance of collateral damage; the principle of self-defence. Despite the restrictions on the use of force, UN military are not expected to be as reactive as they have traditionally been - the guidelines stipulate that that a greater degree of force can be used to pre-empt escalation in order to minimise the cost in terms of UN casualties and civilian casualties.¹³⁴ With respect to self-defence the *UN Guidelines for ROE* clearly enunciate in the introductory part that any UN guidelines/directive(s) in no way restricts an individual’s inherent right to act in self-defence. The principle of self-defence is further explained in Sample ROE as follows:

Self-Defence

- (a) Nothing in these ROE negates a Commander’s right and obligation to take all necessary and appropriate action for self-defence. All personnel may exercise the inherent right of self-defence.
- (b) Pre-emptive self-defence against an anticipated attack must be supported by credible evidence or information that justifies a reasonable belief that hostile units or persons are about to attack.
- (c) Self-defence against a hostile force(s) may be exercised by individuals or by individual units that are under attack or in danger of being attacked, as well as by other UN forces that are able to assist those individuals or individual units. Potentially hostile forces which are beyond the range of their known weapon systems or which are not closing on friendly forces are not to be attacked without

¹³³ United Nations, Department of Peace-keeping Operations, Military Division, *Guidelines for the development of rules of engagement (ROE) for United Nations peacekeeping operations* (November 2000) UN Doc. MPS/981, Introduction para. 1

¹³⁴ See T Findlay (n 1) 348-349

authority from a superior commander or clear and credible evidence or information that justifies a reasonable belief that a hostile act from those forces is imminent.¹³⁵

Definitions annexed to Sample ROE stipulate the following:

Self-defence - is the use of such necessary and reasonable force, including deadly force, by an individual or unit in order to protect oneself, one's unit and all UN personnel against a hostile act or hostile intent.

In the earlier version of *UN Guidelines for ROE* from 2000 this definition is accompanied by the following explanation:

The definition of self-defence has deliberately been restricted. As such it does not reflect the broad definition of self-defence which has prevailed in recent years and pursuant to which, self-defence included, as relevant, the protection of other international personnel. The definition will have to be addressed, on a case by case basis, to ensure that it is consistent with the mandate of the operation concerned as set out in the relevant Security Council Resolutions.¹³⁶

As apparent, this definition does not depart from the usual meaning of self-defence in national criminal laws. It does recognise the military context of peacekeeping operations and is adjusted accordingly to include in its core the unit self-defence. The possible variations that occur in national laws concern the extent to which self-defence encompasses the defence of others and whether or not it includes also the defence of property. With respect to the first issue, the definition speaks of defending "all UN personnel", who in annexed *Definitions* are defined as all members of UN peacekeeping operation (including locally recruited personnel whilst on duty), UN officials and experts on mission on official visits. This does not necessarily represent any extension of the personal scope of self-defence given the peacekeeping context. "Unit" is a generic term in a sense that its exact qualitative and quantitative denotation might vary depending on the circumstances and is only limited by the requirement that a "unit" must operate as one organic whole. As already discussed, a peacekeeping mission is currently composed of different components – military, police and civilian – but still considered to operate as one organic whole. A potential

¹³⁵ *Sample ROE* as most recently provided in the *United Nations Infantry Battalion Manual Volume II*, Annex C, Department of Peacekeeping Operations/Department of Field Support (August 2012)

¹³⁶ United Nations, Department of Peace-keeping Operations, Military Division, *Guidelines for the development of rules of engagement (ROE) for United Nations peacekeeping operations* (n 133), *Definitions to ROE Guidelines - Attachment 2: Annex B – 2*

danger of extending the right to use force in defence of all UN mission personnel spread throughout the country is arguable minimal as unit self-defence has to conform to the constraints of the *Caroline* principles and therefore will be always limited in time and space. Any further extension over “other international personnel”¹³⁷ will have to be supported by a peacekeeping mandate, which suggests that its legal basis would be found in the authorisation of the Security Council, rather than in the inherent right of self-defence itself. The defence of property is not included in the UN definition; however, there is a reference to it in the numbered ROE (explained further below).

The *UN Guidelines for ROE* contain a Master List of Numbered ROE, where a reference to self-defence can also be found. The list comprises the rules from which specific ROE should be selected for future peacekeeping operations. It is not meant to be exhaustive and might be subject to adjustments. The rules are grouped in four sets: Use of Force (Rule 1), Use of Weapons System (Rule 2), Authority to Carry Weapons (Rule 3), Reaction to Civil Action/Unrest (Rule 4). They permit UN armed military personnel to use force, if so authorised, in certain specified circumstances and in varying degrees, and with a caveat that the principle of the minimum necessary force is to be observed at all times. The first cluster of rules entitled “Use of Force” encompasses different contingencies that have confronted UN peacekeeping operations so far. The use of force in personal self-defence appears among other uses of force and is not singled out with any ‘self-defence’ header:

1.1. Use of force, up to, and including deadly force, to defend oneself and other UN personnel against a hostile act or a hostile intent is authorised.

1.2. Use of force, up to, and including deadly force, to defend other international personnel against a hostile act or a hostile intent is authorised.

¹³⁷ The definition of “other international personnel” is as follows:

Other International Personnel - personnel belonging to international agencies associated in the fulfilment of its mandate, and other individuals or groups formally and specifically designated by the SRSG in consultation with the UN HQ, including:

(a) Members of organisations operating with the authority of the UN Security Council (SC) or General Assembly (GA);

(b) Members of authorised charitable, humanitarian or monitoring organisations;

(c) Other individuals or groups specifically designated by the Special Representative of the Secretary General (SRSG). United Nations, Department of Peace-keeping Operations, Military Division, *Guidelines for the development of rules of engagement (ROE) for United Nations peacekeeping operations* (n 133) *Definitions - ROE Guidelines - Attachment 2: Annex B – 3*

As the footnote to the second rule explains, it can only be included to rule 1.1 if consistent with the mandate of a UN peacekeeping operation, which is in line with the restricted definition of self-defence in annexed *Definitions*. The following rules authorise the use of force, up to and including deadly force, to resist attempts to abduct or detain oneself and other UN personnel (again with the option of other international personnel to be added if consistent with the mandate); to protect United Nations' installations, areas or goods, designated by the Head of the Mission in consultation with the Force Commander, against a hostile act (or additionally key installations, areas or goods if so mandated); to defend any civilian person who is in need of protection against a hostile act or hostile intent, when competent local authorities are not in a position to render immediate assistance; finally, the use of force is authorised against any person and/or group that limits or intends to limit freedom of movement. With respect to the last two, the protection of civilians and ensuring freedom of movement, a permission to use force should be sought from the immediate superior commander when and where possible. Additionally, the use of force, excluding deadly force, is authorised to prevent the escape of any detained person, pending hand-over to appropriate civilian authorities. Arguably, the attempts to abduct or detain UN personnel are just instances of hostile acts against which self-defence can be lawfully exercised. Similarly, the protection of UN property can come within the remit of self-defence, as common in national laws of many states. Other examples of the uses of force are distinct from self-defence though, as their legal basis is derived from the authorisation in a peacekeeping mandate. This is the only logical conclusion that can be drawn from the caveats that the inclusion of these rules in ROE would need to be specifically authorised by the Security Council or that the permission to use force should be sought from a commander. *A contrario*, if such authorisation or permission were not granted, the use of force in such instances would be illegal. Given that UN ROE in no way limit the inherent right to self-defence, as explicitly stated, these rules cannot be subsumed under self-defence.

The earlier draft version of *UN Guidelines for ROE* dated 2000 include one more rule which authorises the use of force, up to and including deadly force, “to resist armed/forceful attempts to prevent peacekeepers from discharging their duties”, again with a caveat that this rule can only be included in ROE of a particular UN

peacekeeping operations if specifically authorised by the Security Council Resolution. This wording mirrors the classic defence of the mission/mandate concept as introduced in 1973. Although this rule was dropped in amended *UN Guidelines for ROE* of 2002,¹³⁸ it can serve as an indication that the “defence of the mandate” was seen as quite distinct from self-defence and requiring a specific authorisation of the Security Council. Interestingly, Sample ROE of this amended version contain a rule “Use of Force Beyond Self-Defence” applicable in certain specifically stipulated circumstances upon authorisation of the Security Council. Whether this is where the defence of the mandate has been encrypted is open to speculation. As noted by Findlay this rule ensures that if the Security Council decides, for example, that violations of a ceasefire are to be responded to with deadly force, or that force is to be used to stop widespread human rights abuses, such elements can be readily accommodated in the UN peacekeeping ROE template.¹³⁹

The analysis of the UN Model Rules of Engagement allows concluding that no meaningful extension of the right to self-defence has occurred at this last tactical level of the use of force. The UN Model ROE restate that the right to self-defence is an individual’s inherent right and cannot be restricted. The definition of self-defence that they provide takes into account a peacekeeping context; however, it does not depart from the usual legal meaning of personal and unit self-defence under national criminal laws. The defence of “United Nations’ installations, areas or goods” can also be accommodated within the limits of self-defence without the need to claim any extraordinary extension of this right since national laws of many states allow for the defence of property as well. The UN Model ROE include other uses of force e.g. to protect the freedom of movement or civilian persons, which the peacekeepers might be authorised to employ if so mandated by the Security Council. It has to be noted though that such uses are quite distinct from self-defence and founded on a different legal basis, that is the resolution of the Security Council.

While UN ROE issued for peacekeeping operations delineate the use of force by UN armed military personnel in accordance with the Purposes of the UN Charter, the

¹³⁸ United Nations, Department of Peace-keeping Operations, Military Division, *Guidelines for the development of rules of engagement (ROE) for United Nations peace-keeping operations* (n 132), as reprinted in T Findlay (n 1) Appendix 3

¹³⁹ T Findlay (n 1) 350

Security Council mandate and the relevant principles of international law, their role seem to be only supportive or complementary. They might guide the troop contributing countries and try to harmonise the actions of national contingents; however, they do not trump national ROE. Given the dual-key rule, the definition of self-defence in UN ROE might not be given full effect regarding the defence of UN goods and installations if national laws of contributing states do not allow using deadly force to defend property. Also, national ROE might differently define certain terms such as a “hostile act” or “hostile intent”, and accordingly have a different threshold for an aggressive reaction than the one stipulated in UN ROE. Differing national laws and political views might produce inconsistencies as to the moment in which the right to self-defence ends and the use of force to accomplish the mission in accordance with rules of engagement begins. This has been happening in practice and the so-called “phone home” syndrome, when participating contingents seek domestic legal guidance with respect to issues concerning the use of force so to ensure the compatibility of their actions domestic legal standards, is an acknowledged fact.¹⁴⁰

3.3. Discussion and conclusions

This Chapter discussed the right to self-defence as it applies in different contexts and the peacekeeping principle of non-use of force except in self-defence. The detailed analysis of the peacekeeping doctrine and practice shows that the principle of non-use of force except in self-defence has been redefined on the political and doctrinal level to include the defence of the peacekeeping mandate. The use of force to defend the mandate must be seen as a concept distinct from self-defence as it is based on a different legal fount namely the resolution of the Security Council. The introduction of this new concept expanded the category of peacekeeping operations to include “robust” missions but it did not expand the legal meaning of the right to self-defence as it applies in a peacekeeping context. Any assumptions as to such extension of the right to self-defence have to be rejected as totally inaccurate. Meticulous analysis of three different levels of UN peacekeeping practice corroborates that the right to personal and unit self-defence is still being defined and exercised within the limits

¹⁴⁰ D Stephens (n 56) 160

prescribed by national laws. A few observations have to be made in this connection. The operational context of peacekeeping deployments necessarily impact on the circumstances in which self-defence is being exercised in the sense that self-defence and defence of the mandate are often interwoven, which is also due to the fact that the latter has not been properly operationalized. While soldiers might have an ingrained sense of what constitutes self-defence, “the defence of the mission” proves more difficult to comprehend especially as “the mission” itself is often unclear.¹⁴¹ The use of force “to defend the mandate” has remained problematic ever since it was first proclaimed as a right. It is potentially open-ended and could, if not properly regulated, lead to uncontrolled escalation and turn peacekeeping into (peace) enforcement. That seems especially plausible if the mandate includes such tasks as the enforced or protected delivery of humanitarian assistance, the protection of civilians at risk or the disarmament and demobilisation of armed forces. The risk seems even greater if the mission is established by the Security Council acting under Chapter VII and is authorised to “use all necessary means” to perform mandated tasks.

With regard to Chapter VII authorised missions there seems to be a dissonance between different levels of UN peacekeeping practice on the use of force. The Security Council resolutions adopted under Chapter VII, authorising “all necessary means” to fulfil peacekeeping mandates, are not accompanied by equally robust measures at the tactical level. The UN Model ROE qualify the use of force in peacekeeping operations with caveats such as the duty to warn, to try non-forceful alternatives and the principle of minimum and proportional force. What is, however, even more important is that UN-issued ROE do not reflect the authority of binding Security Council resolutions which establish the particular mission, as they do not have a similarly obligatory nature and by no means derogate nationally-issued ROE of the troop contributing states.

That leads us to another observation with regard to self-defence specifically and with regard to the authority of the Security Council at the tactical level of peacekeeping more generally. It seems justified to argue that whatever the definition of the right to

¹⁴¹ T Findlay (n 1) 358

self-defence under UN law, it might be of no relevance in peacekeeping practice as the implementation of peacekeeping mandates can only take place in accordance with national laws and national doctrines. This is a fact of practice and also acknowledged at the level of UN doctrine and UN agreements with participating states. If national law delineates stricter parameters for the use of force in self-defence, they will have decisive application in shaping the posture of the national contingent unless international standards could be incorporated into national law. This is a consequence of the positivist approach to international law and the basic conceptions of the international legal order. States are principal subjects of the international legal system and in accordance with the PCIJ *Lotus* case's famous pronouncement: "restrictions upon the independence of States cannot (...) be presumed". Although there is no doubt about the capacity of the Security Council to adopt binding resolutions at the strategic international level and the obligation of UN Member States to give effect to them, this can happen only through application of their national laws and in accordance with their international obligations. Accordingly the implementation of the will of the Security Council might face considerable constraints.

The Security Council resolutions establishing peacekeeping operations are not specific enough to prompt any changes as to, for example, the way the right to self-defence is defined by Member States, even though the Security Council theoretically possess such power. Tactically focused ROE have this level of specificity, yet the legal authority of UN-issued ROE is far from settled and any argument that they represent legal instruments in their own right, that could have a substantive legal impact from a domestic legal perspective, can hardly be supported. Apparently, the UN legal authority to bind national contingents to use force at the tactical level is largely constrained by national laws, a fact to which the majority of peacekeeping scholarship seems to be oblivious.¹⁴² The next chapter will explore the issue of the Security Council legal authority in more detail in the context of applicability of international humanitarian law to peacekeeping operations.

¹⁴² See interesting remarks about this chasm by D Stephens (n 56) 157

Since the defence of the mandate can be claimed to exist as a right deriving its legal basis from the binding resolution of the Security Council but distinct from self-defence, that has a critical impact on the scope of protection of peacekeepers under IHL and consequently under the Rome Statute. If, in the situation of armed conflict, they use force beyond self-defence to defend their mandate, such actions might deprive them of civilian protection and make them legitimate targets. The next chapter will examine this issue in more detail.

4. The applicability of international humanitarian law to peacekeeping operations

The last chapter of this thesis examines the applicability of international humanitarian law to peacekeeping operations. Again, the focus is narrowed to UN peacekeeping operations noting, where relevant, issues relating to regional peacekeeping. The question of applicability of IHL is discussed from two angles – from the perspective of the troop contributing states and also that of the United Nations. The chapter starts with the analysis of the command and control structure in UN peacekeeping operations to conclude that the extent of the states' control over their contributed contingents is greater than is generally acknowledged by commentators. This complements the findings of the previous chapter with regard to the applicable national laws that regulate the right to self-defence. The chapter then moves on to the applicability of IHL and reports that it binds both the United Nations and troop-contributing states. The following sections examine the status of peacekeepers under IHL and the material scope of application of Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute in relation to tasks that peacekeepers are mandated to perform. The chapter concludes that peacekeeping personnel shall be considered civilians under IHL and are entitled to protection unless and for such time as they take direct part in hostilities. The peacekeeping constitutive principles as well as the law of neutrality in war prove helpful in making this determination. In the light of the principle of equal applicability of IHL, the fact that they are involved in a peacekeeping mission is irrelevant for the evaluation of their participation in hostilities. A logical conclusion is that some tasks that peacekeepers are mandated to perform might qualify as direct participation in hostilities and hence deprive them of civilian protection. The last section of this chapter discusses the relationship between the *jus ad bellum* authorisation of the Security Council to fulfil the peacekeeping mandate and *jus in bello* qualification of the mandated tasks. It also discusses powers the Security Council could employ to extend the protection of peacekeepers beyond that currently available to them under IHL. The chapter concludes that the principle of distinction is a *jus cogens* norm of international law and cannot be overridden by a resolution of the Security Council.

The applicability of international humanitarian law to United Nations peace operations has been subject to debate since the beginning of the Organization.¹ It has been part of a more fundamental query regarding the international legal personality of the United Nations and the extent to which it can be both a rights holder and duty-bearer under international law. This question, not settled by the actual terms of the UN Charter, arose in the first years of the existence of the UN. It was positively resolved by the International Court of Justice in the 1949 *Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion.² The Court considered the characteristics of the Organization in connection to its political tasks and concluded that the Charter conferred upon the UN rights and obligations indicative of its international personality, although different from those of its Members. The UN could not fulfil its purposes and exercise its functions if it was deprived of an international personality. Accordingly, the Organization has an objective international personality, distinct from that of its Members, and the capacity to operate on an international plane; however, it is not to be considered a state or a super-state.³ The UN is not a sovereign and holds only limited powers,

¹ See e.g.: D W Bowett, *United Nations Forces: A Legal Study* (London, Sweet and Maxwell 1964) 484-516; F Seyersted, *United Nations Forces in the Law of Peace and War* (Leiden, Sijthoff 1966); D Schindler, 'United Nations forces and international humanitarian law' in C Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (The Hague, Martinus Nijhoff 1984) 521; G-J van Hegelsom, 'The law of armed conflict and United Nations peace-keeping and peace-enforcing operations' (1993) 6 *The Hague Yearbook of International Law* 45; U Palwankar, 'Applicability of international law to peace-keeping forces', 33 *IRRC* (1993) 227; ICRC, *Symposium on Humanitarian Action and Peace-keeping* (Geneva, ICRC 1994) L Condorelli et al (eds), *The United Nations and International Humanitarian Law* (Paris, Editions Pedone 1996); C Greenwood, 'International humanitarian law and United Nations military operations', 1 *Yearbook of International Humanitarian Law* (1998) 3; D Shraga, 'The United Nations as an actor bound by international humanitarian law' (1998) 5(2) *International Peacekeeping* 64; M Zwanenburg, 'Compromise or commitment: human rights and international humanitarian law obligations of UN peace forces' (1998) 11 *Leiden Journal of International Law*; R Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?' (2003) 14(2) *Criminal Law Forum* 153-194; M Odello, R Piotrowicz (eds), *International Military Missions and International Law* (Brill Nijhoff 2011).

² The advisory opinion originated from the death of Count Bernadotte, the U.N. Mediator in Palestine while engaged in the service of the United Nations in 1948. The General Assembly decided to submit the following legal questions to the I.C.J. for an advisory opinion: 'I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him? II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?' See: *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 174

³ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 174, 178-179

either explicitly recognised in the UN Charter or implicitly deduced from its practice as long as they are necessary to fulfil its purposes.⁴ Therefore, in order to determine the norms of international law applicable to the UN, one must refer back to its purposes and functions.⁵

The ICJ reaffirmed the general applicability of international law to international organisations later in the 1980 Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* stating that:

“International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”⁶

The principle of functionality determines the scope of law applicable to activities carried out by international organisations. When applied to the UN’s primary purpose of the maintenance of international peace and security, its enforcement powers and peacekeeping activities, the functional approach justifies the conclusion that the United Nations, as such, is bound by norms of international humanitarian law. The practice of the UN itself as well as states regarding this matter has gradually developed over the years and there is a wide consensus now that IHL is applicable to UN military operations as a matter of law.⁷

There are, however, a few important issues, which deserve a closer look in the context of the present study. They relate to the relationship between the organisation establishing a peacekeeping operation (the UN or a regional organisation), the troop contributing states and peacekeeping forces on the ground, especially the nuances of authority structures, which impact upon the scope of applicability of IHL.

⁴ This reasoning was later confirmed in the jurisprudence of the Court. See: J F Hogg, ‘Peace-keeping Costs and Charter Obligations - Implications of the International Court of Justice Decision on Certain Expenses of the United Nations’ (1962), 62 Columbia Law Review, 1230
Legality of the use of nuclear weapons (Advisory Opinion) [1996], ICJ Reports 1996, para. 25

⁵ M N Shaw, *International Law* (5th ed. Cambridge University Press, 2008) 46; G Porretto, S Vite, ‘The application of international humanitarian law and human rights law to international organisations’ (2006) Research Paper Series No.1 Centre Universitaire de Droit International Humanitaire University Centre for International Humanitarian Law, 18

⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt Reports* (Advisory Opinion) [1980] ICJ Reports 1980, 73 at 89-90 para. 37

⁷ See: Section 4.2 of this thesis.

4.1. Command and control in United Nations-led peacekeeping operations

The drafters of the United Nations Charter at the Dumbarton Oaks Conference envisaged the new world organisation with strong coercive powers able to fulfil its goal of maintaining international peace and security.⁸ To achieve this, a centralised enforcement system was agreed and incorporated in the UN Charter with Article 43 as one of its cornerstones. Pursuant to paragraph 1 of Article 43, Member States undertake to make armed forces available to the Security Council and to render further assistance if necessary.⁹ However, due to the fundamental disagreements among major powers regarding the practicalities of the implementation of the envisaged system, the provisions regarding the standing UN army remained a dead letter. The UN has no standing army or police force and must rely on *ad hoc* contributions or coalitions for peacekeeping or enforcement action. In general, all UN-mandated peace operations depend on the voluntary contribution of troops by Member States and that has a major impact on the command and control arrangements.¹⁰ The most important distinction from a political and organisational perspective is the one between UN “authorised” and UN “commanded” operations. The first category relates to an enforcement action, which is normally delegated to a regional organisation or a coalition of states willing to enforce a Security Council mandate, so called “the coalitions of the willing”. The Security Council retains overall legal and political authority over the operation, but most if not all command

⁸ M Bothe, ‘Peace-keeping’ in B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press 2002) 703

⁹ Article 43 of the Charter of the United Nations

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

¹⁰ United Nations, Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations, Principles and Guidelines* (2008) 52

<http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> [hereinafter: UN, *United Nations Peacekeeping Operations, Principles and Guidelines*]

and control is transferred to a lead nation or regional or other organisation.¹¹ The second group encompasses operations in which contributing countries usually transfer part of their authority over the troops to the United Nations for the duration of their participation in the operation.¹² This is the rule in most peacekeeping operations. As it is briefly described below, United Nations command and control in such cases is limited which, in fact, makes the dichotomy of “authorised” and “commanded” operations of less significance than it is stressed in the literature.¹³

Command and control arrangements in multinational operations, including UN peace operations, have a direct impact on the development of rules of engagement, applicable laws and other key issues such as command responsibility or individual criminal responsibility.¹⁴ The next section provides the general framework for the authority over armed forces and then discusses in greater detail the precise nuances of the command and control structure in UN-led peacekeeping operations.

4.1.1. Command and control - definitions

Command and control is the authority over armed forces in military operations.¹⁵ The command and control structures and related definitions vary among states, yet a basic framework can be distinguished and it rests on three generally recognised levels: full/strategic, operational and tactical.¹⁶

Full command

Full command is the totality of command authority covering all aspects of organisation, administration and direction of forces. It is exclusively exercised at the

¹¹ T D Gill, ‘Legal Aspects of the Transfer of Authority in UN Peace Operations’ (2011) Netherlands Yearbook of International Law 39

¹² Ibid 39

¹³ For critique of this distinction see: D Stephens, ‘The lawful use of force by peacekeeping forces: the tactical imperative’ (2005) 12(2) International Peacekeeping 157

¹⁴ B Cathcart, ‘Command and control in Military Operations’ in D Fleck, T D Gill (eds) *The Handbook of the International law of military operations* (Oxford University Press 2010) 238

¹⁵ According to *NATO Glossary Terms AAP-06* (2013), command and control are defined as follows: Command - the authority vested in an individual of the armed forces for the direction, coordination, and control of military forces (29 May 2002); Control - 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 (30 Jan 2012)

¹⁶ R Murphy, ‘Legal Framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces’ (1999) 4(1) J Conflict Security Law 41, 49

national strategic level and as an attribute of national sovereignty cannot be delegated.¹⁷ What follows is that no international organisation or coalition exercises full command over national armed forces. Contributing countries always retain full command, which includes the authority to decide to participate in a given (multinational) operation and to withdraw from it.¹⁸ Strategic level command includes the overall direction and coordination of armed forces and the provision of advice to and from political authorities at the national and international level.¹⁹ In the context of multinational operations it usually implies at least some degree of influence over the overall strategic objectives of a given operation, but it will vary according to circumstances.

Operational command

Operational command is the authority granted to a commander to assign specific tasks or missions to subordinate commanders, to deploy units within the area of operations, to reassign forces, and to retain or delegate elements of operational or tactical level command or control.²⁰ Operational level command aims at fulfilling the overall strategic objectives of the operation as a whole as it links strategy and tactics. Operational control is an attribute of operational level command and means the authority of a commander to direct forces assigned to accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned; and to retain or assign tactical control of those units. It can be delegated and it does not include administrative or logistic control.²¹ In a multinational operation all or part of operational command and control can be delegated by a troop contributing country to an international organisation, which will designate a multinational commander.²²

Tactical command

Tactical command and control are exercised at the level of single units or combination of subunits. Tactical command is the authority delegated to a commander to assign tasks to forces under his command for the accomplishment of

¹⁷ B Cathcart (n 14) 237

¹⁸ T D Gill (n 11) 46

¹⁹ B Cathcart (n 14) 238

²⁰ The definition dated 1 October 2010 in *NATO Glossary Terms AAP-06* (2013)

²¹ The definition dated 1 October 2010 in *NATO Glossary Terms AAP-06* (2013)

²² B Cathcart (n 14) 238

the mission mandated by a higher authority; whereas tactical control is the detailed, local direction and control of movements or manoeuvres necessary to accomplish missions or tasks.²³ In multinational operations tactical command and control are normally retained by troop contributing countries, although they must be exercised in conformity with the operational authority of the UN, NATO, or coalition operational commanders.²⁴

4.1.2. The United Nations chain of command

Despite over a half-century long history of United Nations peacekeeping, there still exists a certain “degree of institutional ambiguity not normally considered consistent with an efficient and effective command structure.”²⁵ This is partially due to the *ad hoc* nature of peacekeeping operations and the fact that the UN for years lacked a proper military doctrine to support command and control arrangements. Nevertheless, after few decades of practice the typical organisational and authority structure of a peacekeeping operation can be identified and it involves four hierarchical/organisational levels: (1) the principal organ, which creates the peacekeeping forces (usually the Security Council, although the General Assembly acted in this role as well), (2) the Secretary-General, (3) the commander-in-chief and his staff, (4) national contingents headed by national contingent commanders.²⁶

The Security Council provides “the legal authority, high-level strategic direction and political guidance for all UN peacekeeping operations”.²⁷ Troop contributing states retain full and exclusive strategic level command and control over their armed forces and equipment but they transfer operational authority to direct their forces to the United Nations. This is done either through a formal agreement or through a Memorandum of Understanding (MOU) concluded between contributing states and the United Nations and involves transferring the authority to issue operational

²³ The definitions dated 1 September 1974 and 1 October 2001 respectively in *NATO Glossary Terms AAP-06* (2013)

²⁴ T D Gill (n 11) 49

²⁵ H McCoubrey and N D White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth 1996) 137

²⁶ M Bothe (n 8) 681-82

²⁷ *Authority, Command and Control in United Nations Peacekeeping Operations, Policy February 2008*, United Nations Department of Peacekeeping Operations Department of Field Support (Ref. 2008.4) 6

directives within the limits of (1) a specific mandate of the Security Council; (2) an agreed period of time, with the requirement of a prior notification in case of an earlier withdrawal of a contingent; and (3) a specific geographic area (the mission area as a whole).²⁸ The Security Council possesses a discretionary power to determine the overall strategic objectives of the UN-mandated operation; however, it will engage in consultations with the UN Secretariat, contributing states and other key players. The sustained consultations with troop and police contributing countries at all stages of the planning and decision-making process of a peacekeeping operation are regarded as critical to its success.²⁹

The Security Council confers the operational authority over a peacekeeping mission on the Secretary-General of the United Nations, who acts through the Department of Peacekeeping Operations (DPKO) and the Department of Field Support (DFS), headed by Under-Secretaries-General in charge of those respective departments.³⁰ The Secretary-General appoints a civilian Head of Mission and the UN Force Commander (or Head of Military Component). The Head of Mission, usually a Special Representative of the Secretary-General, has the overall control of the mission including military, police and civilian resources, and reports to the Secretary-General through the Under-Secretary-General for Peacekeeping Operations. The Force Commander exercises operational control (but not command) over military personnel provided by Member States and reports to the Head of the Mission.³¹ Operational control is thus unified and centralised, and the chain of

²⁸ Ibid 3

²⁹ *Capstone Doctrine* lists all key stages in the life of a United Nations peacekeeping operation at which such consultations should take place, including: a) the development of the concept of operations and the elaboration of the mandate of a new operation; b) any change in the mandate, in particular the broadening or narrowing of the scope of the mission, the introduction of new or additional functions or components, or a change in the authorisation to use force; c) the renewal of the mandate; d) significant or serious political, military or humanitarian developments; e) a rapid deterioration of the security situation on the ground; f) the termination, withdrawal or scaling down in size of the operation, including the transition from peacekeeping to post-conflict peacebuilding; and g) before and after Security Council missions to a specific peacekeeping operation. UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 10) 52

³⁰ 'Planning a United Nations Peacekeeping Operation' in UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 10) 47–56; P C Cammaert, B Klappe, 'Authority, Command, and Control in United Nations-led Peace Operations' in T D Gill and D Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press 2012) 159–161

³¹ As stipulated in UN *Peacekeeping Operations: Principles and Guidelines* "military personnel provided by Member States . . . are placed under the operational control of the United Nations Force Commander or head of military component, **but not under United Nations command**" [emphasis added] UN, *United Nations Peacekeeping Operations Principles and Guidelines* (n 10) 68

command runs from the Security Council to the Secretary-General and then to the Head of Mission. In the field, unity of command is maintained through the overall authority of the Head of Mission over all mission components. At the Headquarters level, the keystone of unity of command is that the Under-Secretary-General for Field Support reports to the Under-Secretary-General for Peacekeeping Operations on all peacekeeping related matters. Contributing states are expected to be familiar with UN authority arrangements so to ensure that personnel are contributed accordingly.³² Once assigned, national contingents in UN peacekeeping forces are under UN (operational) control exercised through national commanders of those contingents.³³ National contingent commanders report to the Force Commander and they should not act on national direction, especially if such actions could adversely affect implementation of the mission mandate or contradict United Nations policies applicable to the mission.³⁴ This is critical to secure the unity of command in a peacekeeping mission. However, as *Peacekeeper's Handbook* (1984) states “if soldiers of a contingent are required to undertake duties or acts which in any way clash with the normal principles under which they would be expected to operate in their own army, the contingent commander has the right to refer to his own Minister of Defence.”³⁵ As a matter of fact there is an accepted practice that national commanders consult their national capitals to make sure that their actions are in accordance with national laws and policies. For example, *U.S. Doctrine for the Armed Forces of the United States* (2013) states as follows:

“US commanders will maintain the capability to report to higher US military authorities in addition to MNFCs (*Multinational Force Commanders – clarification added*). For matters perceived as illegal under US or international law, or outside the mandate of the mission to which the President has agreed, US commanders will first attempt resolution with the appropriate foreign MNFC. If issues remain unresolved, the US commanders refer the matters to higher US authorities.”³⁶

³² Authority, *Command and Control in United Nations Peacekeeping Operations, Policy February 2008* (n 27) 3

³³ R C R Siekmann, *National Contingents in United Nations Peace-keeping Forces* (Martinus Nijhoff1991) 119

³⁴ “Managing United Nations Peacekeeping Operations” in UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 10), 67-68

³⁵ *International Peace Academy, Peacekeeper's Handbook* (Pergamon Press1984), 365

³⁶ U.S. Joint Chiefs of Staff, *Joint Publication I - Doctrine for the Armed Forces of the United States* (2013) II-24

The management of multinational military operations at the tactical level as well as the supervision of individual personnel remain in hands of troop contributing states.³⁷ The tactical level of command and control generally involves the physical conduct of tasks assigned, the detailed and local direction and control of movement or manoeuvre necessary to implement or safeguard the mission's mandate.³⁸ Internal or administrative control over contingents including their organisation, disciplinary and criminal jurisdiction is also a national responsibility. National command and control at the tactical level is necessitated by the fact that peacekeepers remain soldiers in their national service as well as by constitutional requirements of many states, which prohibit putting national armed forces directly under foreign command.³⁹ The contingents comprising a UN force retain therefore their national character and remain "subject to the military rules and regulations of their respective national States without derogating from their responsibilities as members of the Force as defined in these [the relevant U.N.] Regulations."⁴⁰ This unique cluster of peacekeepers' legal and institutional obligations is reflected even in their attire, they wear their countries' uniforms supplemented by a UN blue helmet or beret and a badge.⁴¹

4.1.3. The legal framework of United Nations-led peacekeeping operations

The normative framework of peacekeeping operations corresponds to the organisational and authority structure described above and is usually composed of: (1) the resolution of the Security Council or the General Assembly, (2) the Status of Force Agreement between the United Nations and the host state (SOFA); (3) the agreement between each of the troop contributing states and the United Nations; (4) and the regulations for the force issued by the Secretary General.⁴²

³⁷ T D Gill (n 11) 49

³⁸ *Authority, Command and Control in United Nations Peacekeeping Operations, Policy February 2008* (n 27), 4

³⁹ See e.g. U.S. Joint Chiefs of Staff, *Joint Publication 1 - Doctrine for the Armed Forces of the United States* (2013); Canada Department of National Defence, *Canadian Forces Joint Publication CFJP 01 - Canadian Military Doctrine* (2009)

⁴⁰ Regulations Governing United Nations Force in the Congo (ONUC), U.N. SC, 15th Sess., para. 29(c), U.N. Doc. ST/SGB/ONUC/I (1963), reprinted in: Rosalyn Higgins, *United Nations Peacekeeping 1946-1967: Documents and Commentary 71* (1980) 3

⁴¹ <http://www.un.org/en/peacekeeping/operations/newoperation.shtml>

⁴² R Murphy (n 16) 41, 43

The resolution provides the legal basis for a peacekeeping operation, defines its purpose and the mandate. Following the peacekeeping mandate, the Status of Force Agreement regulates the relationship between the United Nations and the state, in which the UN forces are deployed, outlining the rights and obligations as between the parties. It specifies the principles and arrangements under which the peacekeeping force will function, stipulates special freedoms, privileges and duties necessary for a peacekeeping force to carry out its mission.⁴³ The SOFA grants the members of the peacekeeping operation the privileges and immunities given to mission commanders and UN officials and experts. Military personnel are subject to the exclusive jurisdiction of their national states for any criminal offence committed in the host nation or territory. They are granted functional immunity for any action committed while carrying out their official duties. This functional immunity continues to operate even when they are no longer members of the operation.⁴⁴ The practice of signing such arrangements began with UNEF I in Egypt and drawing on this experience the Secretary General issued, at the request of the General Assembly in 1990, the Model Status of Forces Agreement to serve as the basis for the mission-specific SOFAs to be agreed between the UN and host states.⁴⁵ The Security Council acting under Chapter VII of the UN Charter may decide to provisionally apply the Model SOFA until a mission-specific agreement is concluded.

The agreement between each of the troop contributing states and the United Nations, called the Memorandum of Understanding (MOU), forms the third important pillar of the legal framework for UN peacekeeping operations. The MOU establishes the responsibility and standards for the contribution of personnel, major equipment and self-sustainment support services for both the UN and the contributing state.

⁴³ The provisions of the agreement include, inter alia: the status of the operation and its members; responsibility for criminal and civil jurisdiction over the members of the operation; taxation, customs and fiscal regulations pertaining to the members of the operation; freedom of movement, including the use of roads, waterways, port facilities and airfields; provision of water, electricity and other public utilities; locally recruited personnel; settlement of disputes or claims; protection of United Nations personnel; and liaison. Such agreements also require inter alia, that the parties provide certain facilities (e.g., suitable premises for the operation's headquarters) free of charge.

⁴⁴ Major General Tim Ford (Retd), *Commanding United Nations Peacekeeping Operations. A Course Produced by The United Nations Institute for Training and Research, Programme of Correspondence Instruction*; Series Editor: Harvey J. Langholtz (UNITAR POCI 2004), 26

⁴⁵ Model Status of Forces Agreement (SOFA) between the United Nations and the State on whose territory United Nations Forces are deployed, UN Doc. A/45/594, 9 October 1990. For discussion of Model SOFA see e.g. F L Kirgis, *International Organisations in their Legal Setting* (St. Paul: West Publishing Co., 2nd ed., 1992) 722-733

Similarly to the Model SOFA, the UN Secretary-General promulgated in 1991 the *Model Agreement between the United Nations and Member States contributing personnel and equipment to the United Nations peace-keeping operations*,⁴⁶ intended to provide the basis for individual agreements subject to modifications appropriate for particular cases.

Finally, the Secretary General issues the regulations for the force, usually in a form of a directive to the Force Commander, which is based on the mandate and provides instructions for carrying out the tasks assigned.⁴⁷

As stipulated in MOU, contributed military personnel are bound by UN codes of conduct and administrative guidelines and obliged to respect host nation law.⁴⁸ It is unclear though what are the consequences for an individual soldier for the breach of UN regulations. They are intended to be legally binding but unless specifically incorporated into domestic law of a contributing state, they do not have an immediate municipal effect. The fact that a state concluded an agreement to contribute troops to United Nations peacekeeping does not automatically amend its municipal law, or establishes a legal obligation to do so.⁴⁹ While neither the Force Commander nor the Head of Mission has direct authority over the internal structure and functioning of a particular contingent, or criminal and disciplinary matters which remain exclusive prerogative of contributing states, they can recommend the removal of a contingent commander and/or individual members for failing to perform assigned tasks or breaching of UN administrative codes of conduct. In case of grave misconduct, a whole contingent can be sent home and a troop contributing country banned from participation in the mission.⁵⁰

Retaining national authority over troops at the tactical and internal levels determines the applicability of national laws and procedures. Forces remain bound by national law and treaty obligations of their national states, which means that soldiers can only

⁴⁶ UN Secretary-General, *Model Agreement between the United Nations and Member States contributing personnel and equipment to the United Nations peace-keeping operations* (23 May 1991) UN Doc. A/46/185

⁴⁷ R Murphy (n 3) 41, 43

⁴⁸ T D Gill (n 11) 50, Footnote 19

⁴⁹ R Murphy (n 16) 41, 47

⁵⁰ T D Gill (n 11) 50

be held individually criminally responsible for violations of national law or international law that binds their country. Each troop contributing state normally has its own ROE or at least national caveats on UN ROE, its own interpretation of self-defence, military objective or the use of deadly force to defend property.⁵¹ National commanders are responsible to their own governments that their units are not used in excess of the approved mandate or inconsistently with the understanding of national authorities.⁵² This finding complements the conclusions of the preceding chapter on rules of engagement and the right to self-defence – peacekeeping missions operate according to the dual-key rule: each contingent operates under its own national ROE that reflect domestic legal and political constraints and additionally is issued with “international” ROE.

As apparent from this brief description, command and control arrangements in UN-led peacekeeping operations result in the UN and the troop contributing countries exercising different degrees of authority over the troops participating in the mission. This multi-layered authority structure gives rise to certain operational and legal issues - it places certain limits of what can be demanded from national contingents as well as what law is applicable to the conduct of military personnel. This is elaborated in more detail in the next section.

4.2. International humanitarian law obligations of the United Nations and Member States

This section briefly discusses the extent to which UN peacekeeping forces are bound by international humanitarian law. Since this topic has been extensively covered by scholarship, this section only summarises the findings to provide background for an analysis of the material scope of the war crime of attacking peacekeeping personnel and objects. Given the command and control arrangements in UN-led peacekeeping operations, the IHL obligations of the UN and obligations of contributing states are discussed accordingly.

⁵¹ B Cathcart (n 14) 242-243

⁵² H McCoubrey, N D White (n 25) 145; as an example see the above cited fragment from *U.S. Doctrine for the Armed Forces of the United States* (2013)

Due to the functional and limited nature of the legal personality of the United Nations, it is necessary to determine the extent of its rights and obligations under international humanitarian law. IHL was originally developed to regulate actions of states as primary subjects of international law possessing the exclusive right to use force hence its application to other international subjects must factor in necessary adjustments.⁵³ It was acknowledged early on that the UN was subject to customary international humanitarian law, which by virtue of its customary status is presumed to bind all members of the international community and would apply to the UN *mutatis mutandis*.⁵⁴ More problematic were treaty-based IHL norms. As a rule, only states can accede to IHL treaties, which is often indicated by the explicit terms of their preambles and provisions.⁵⁵ Some of the state-centred rules may not be easily transposable on the non-state international bodies which do not have necessary administrative or judicial structures to implement certain provisions, such as those concerning the treatment of prisoners of war or regulating the prosecution and punishment of grave breaches of the law.⁵⁶ The debate about the scope of applicability of IHL to the UN was intensified in the 1990s by the unprecedented increase in peacekeeping operations. One of the points of legal and political debate, apart from those mentioned above, was the sensitive issue of some IHL treaties which are not universally ratified including the 1977 Additional Protocols. It was argued that any declaration on their applicability would be prejudicial to peacekeeping troops of those contributing States which were not parties to the Protocols, whereas non-applicability would be detrimental to the promotion of IHL as a whole.⁵⁷

4.2.1. The United Nations early approach to the applicability of international humanitarian law to its military operations

The United Nations' own approach to the applicability of international humanitarian law to forces and operations under its authority has evolved over time. Initially, the

⁵³ With time rules were adopted for additional actors – non-state armed groups participating in “armed conflict not of an international character, see Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II

⁵⁴ D W Bowett (n 1) 507; D Schindler (n 1) 526-528; Françoise Bouchet-Saulnier, *The practical guide to humanitarian law* (2nd ed. Lanham, Md.; Oxford : Rowman & Littlefield Publishers 2002) 308

⁵⁵ J K Kleffner, ‘Human Rights and International Humanitarian Law: General Issues’ in T D Gill and D Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press 2012) 61

⁵⁶ Françoise Bouchet-Saulnier (n 54) 308

⁵⁷ U Palwankar (n 1) 227ff

UN used to generally acknowledge the importance of this legal regime while maintaining that peacekeeping forces discharging the mandate act on the behalf of the “international community” and cannot be considered a “party” to the conflict nor a “power” under the Geneva Conventions.⁵⁸ With time the UN recognised that peacekeeping troops must respect the “principles and spirit of general international conventions applicable to the conduct of military personnel”.⁵⁹ This stipulation is used in the *Model Agreement between the United Nations and Member States contributing personnel and equipment to the United Nations peace-keeping operations* issued in 1991, in which the UN peacekeeping mission undertakes to observe and respect the principles and spirit of the general conventions applicable to the conduct of military personnel, while the contributing states undertake to ensure that the members of their national contingents are familiar with the principles and spirits of these conventions.⁶⁰ Interestingly, such clause does not appear in the *Model Status of Forces Agreement* (1990).⁶¹ It should be noted though that such provision was nevertheless added to many of the mission-specific SOFAs concluded in the 1990s. The clause about conducting UN operations with full respect for the “principles and spirit” of the relevant IHL treaties and an assurance that peacekeeping forces were familiar with the relevant standards was introduced for the first time in 1993 UNAMIR SOFA.⁶² The continued practice of including such reference triggered a debate about its precise meaning.⁶³ The clause was regarded as too abstract to guide peacekeeping operations on practical issues, such as the legal

⁵⁸ D Shraga (n 1) 67

⁵⁹ Ibid 64, 67-68; R D Glick, ‘LIP Service to the Laws of War: Humanitarian Law and United Nations Forces’ (1995) Vol. 17 Michigan Journal of International Law 53- 107

⁶⁰ UN Secretary-General, *Model Agreement between the United Nations and Member States contributing personnel and equipment to the United Nations peace-keeping operations* (23 May 1991) UN Doc. A/46/185, Annex, para. 28:

X. Applicability of International Conventions

28. [The United Nations peace-keeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving with [the United Nations peace-keeping operation] be fully acquainted with the principles and spirit of these Conventions.

⁶¹ *Model Status of Forces Agreement (SOFA) between the United Nations and the State on whose territory United Nations Forces are deployed* (9 October 1990), UN Doc. A/45/594

⁶² Many of the subsequent SOFAs contained such reference e.g. UNCRO/Croatia (1995), UNIFIL/Lebanon (1995), MONUC/Uganda (2003), ONUB/Burundi (2005) and UNAVEM III/Angola (1995); for a discussion see generally: United Nations Peacekeeping Law Reform Project, School of Law, University of Essex, *UN Peacekeeping and The Model Status of Forces Agreement. Background Paper Prepared for the Experts’ Workshop* (26 August 2010), paras. 162-165

⁶³ See e.g. U Palwankar (n 1); L Condorelli et al. (eds) (n 1) 317ff

status of UN forces taken hostage, or that of detainees held by UN forces, or the use of certain types of weapons.⁶⁴

More concrete declaration regarding the applicability of IHL to UN operations appeared in the 1994 Convention on the Safety of United Nations and Associated Personnel. Article 20 on saving clauses acknowledges “the applicability of international humanitarian law and universally recognised standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel”. There are two major implications of this provision. As Bourloyannis-Vrailas notes, although the Convention criminalises attacks on UN personnel, it does not absolve UN and associated personnel from respecting rules of international humanitarian law and human rights law. In turn, these two regimes also confer certain rights on UN and associated personnel independently from the operation of the Convention.⁶⁵ If persons protected under the Convention find themselves in the area of armed conflict while performing non-combatant functions, they are also protected as civilians under international humanitarian law.⁶⁶ The Convention has been criticised though for not making its own protective regime and IHL mutually exclusive.⁶⁷

4.2.2. The United Nations Secretary-General’s Bulletin

Aiming at further clarification of the scope of applicability of IHL to UN operations, the ICRC initiated a series of expert meetings. The conclusions were submitted to the UN Secretariat and served as a basis for the *Secretary-General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law*.⁶⁸ The *Bulletin* was promulgated in 1999 “for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations

⁶⁴ D Shraga, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage’ (2000) 94 *American Journal of International Law* 406, 407

⁶⁵ M Bourloyannis-Vrailas, ‘The Convention on the Safety of United Nations and Associated Personnel (1995) 44 *Int’l & Comp. L.Q.* 583

⁶⁶ *Ibid*

⁶⁷ See literature review on the UN Safety Convention in Chapter 1 of the thesis.

⁶⁸ D Shraga (n 64) 407

forces conducting operations under United Nations command and control”⁶⁹ as stated in its introductory paragraph, which can be regarded as the Secretariat’s official recognition of the applicability of IHL to UN forces. The *Bulletin* is an administrative regulation issued by the Secretary-General acting as “commander-in-chief” and, as stated in the cited above paragraph, it is binding on members of UN-commanded and controlled operations. It does not apply to UN-authorized missions conducted under national or regional command and control.⁷⁰

The *Bulletin* outlines the field of its application and accordingly it sets out the fundamental principles and rules of international humanitarian law applicable to members of UN forces actively engaged as “combatants” in situations of armed conflict, to the extent and for the duration of their engagement. Importantly, they apply in enforcement actions as well as in peacekeeping operations when the use of force is permitted in self-defence.⁷¹ This stipulation implies that it is not the qualification of a mission by the Security Council that is determinative of the application of IHL but the situation on the ground as even consensual peacekeeping operations might get engaged in combat. This is in line with the universal agreement that the application of IHL should be determined in accordance with the facts on the ground. The *Bulletin* refers to the 1994 Convention on the Safety of United Nations and Associated Personnel stating that it does not affect the protected status of members of peacekeeping operations under this Convention “as long as they are entitled to the protection given to civilians under the international law of armed conflict” (para. 1.2). This formulation comes from the Rome Statute rather than from the Convention though, and accordingly, it finally draws the line between peacekeepers “as combatants” and peacekeepers who as “non-combatants” are entitled to protection given to civilians under IHL.⁷² Shraga stresses two cumulative conditions of a “double-key” test that must be met for IHL to apply to UN forces: (1) the existence of an armed conflict in the area and time of their deployment, and (2)

⁶⁹ UN Secretary-General, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law* (6 August 1999) ST/SGB/1999/13

⁷⁰ D Shraga (n 64) 408

⁷¹ *The Secretary-General's Bulletin* (n 69) Section 1

⁷² D Shraga (n 64) 409

their engagement as combatants.⁷³ The *Bulletin* does not claim to be exhaustive, or to prejudice or replace the national laws by which military personnel remain bound throughout the operation. It does not create any new obligations under IHL or changes its scope. As noted by Shraga, the source of legal obligation in relation to the principles and rules covered by the *Bulletin* lies outside of it, namely in the IHL provisions incorporated in the municipal laws of states participating in the operation and in customary rules.⁷⁴ The contributing states would also prosecute in national courts the violations of IHL committed by their personnel.⁷⁵

The *Bulletin* is not restricted to customary IHL norms to be found in the Geneva Conventions and their Additional Protocols and the 1954 Convention on the Protection of Cultural Property,⁷⁶ but includes also rules which have not attained such status.⁷⁷ As it does not qualify the nature of armed conflict in the area of deployment of UN forces, the *Bulletin* is by implication presumed to extend to both international and non-international armed conflicts.⁷⁸ Such interpretation is consistent with the UN unqualified undertaking in Status of Force Agreements concluded since 1990 to “observe and respect the principles and spirit” of the 1949 Geneva Conventions and their 1977 Additional Protocols and the Hague Convention on the Protection of Cultural Property in the event of *armed conflict* (emphasis added).⁷⁹ From 1999, and in line with the Secretary-General’s *Bulletin*, SOFA references to IHL were amended to respect the “principles and rules” of the relevant IHL conventions.⁸⁰

⁷³ D Shraga, ‘The Secretary-General’s Bulletin on the Observance by the United Nations Forces of the International Humanitarian Law: A Decade Later’ (2009) 39 *Israel Yearbook on Human Rights* 357, 358

⁷⁴ *Ibid* 360

⁷⁵ *The Secretary-General’s Bulletin* (n 69) Section 4

⁷⁶ The Bulletin sets out the principles and rules governing protection of the civilian population in the UN area of operation and in the area controlled by the other party; means and methods of combat; treatment of civilians and persons hors de combat; treatment of detained persons; protection of the wounded, the sick, and medical and relief personnel.

⁷⁷ Provisions of conventional international law nature such as the prohibitions on using methods of warfare intended to cause widespread, long-term, and severe damage to the natural environment; rendering useless objects indispensable to the survival of the civilian population, and causing the release of dangerous forces with consequent severe losses among the.

⁷⁸ D Shraga (n 73) 372

⁷⁹ See *supra* note 45

⁸⁰ More recent SOFAs, e.g. UNAMID (2008), UNMISS (2011) include the following provision: “Without prejudice to the mandate of [name of mission] and its international status:

(a) The United Nations shall ensure that [name of mission] shall conduct its operations in the territory with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. These international conventions include the Four Geneva Conventions

4.2.3. International humanitarian law obligations of troop contributing states

By virtue of Common Article 1 of the 1949 Geneva Conventions states parties are bound to “respect and to ensure respect for the present Convention in all circumstances”. While Article 1(1) of the 1977 Additional Protocol I repeats this provision, it does not appear in the 1977 Additional Protocol II applicable to non-international armed conflicts. Nevertheless, such conflicts indirectly fall within the scope of this obligation, insofar as Protocol II “develops and supplements” common Article 3 of the four Geneva Conventions, as stated in its Article 1(1).⁸¹ According to the *ICRC Customary International Humanitarian Law Study* state practice has established this rule as a norm of customary international law applicable in both international and non-international armed conflicts.⁸² As a customary norm it binds all subjects of international law.

The International Court of Justice has elaborated about Common Article 1 in a few cases before it. In the case concerning *Military and Paramilitary Activities in and against Nicaragua* the Court ruled that:

“(…) there is an obligation on the United States in the terms of Article 1 of the Geneva Conventions, to ‘respect’ the Conventions, and even to ‘ensure respect’ for them ‘in all circumstances,’ since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions (…)

of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict;

(b) The Government undertakes to treat at all times the military personnel of [name of mission] with full respect for the principles and rules of the general international conventions applicable to the treatment of military personnel. These international conventions include the Four Geneva Conventions of 12 April 1949 and their additional Protocols of 8 June 1977.

[Name of mission] and the Government shall ensure accordingly that members of their respective military personnel are fully acquainted with the principles and rules of the above-mentioned international instruments.”

UNAMID SOFA (2008) available at:

<http://unamid.unmissions.org/Portals/UNAMID/UNAMID%20SOFA.pdf>

UNMISS SOFA (2011) available at:

http://www.un.org/en/peacekeeping/missions/unmiss/documents/unmiss_sofa_08082011.pdf

⁸¹ L Boisson de Chazournes and L Condorelli, ‘Common Article 1 of the Geneva Conventions revisited: protecting collective interests’ 837 *International Review of the Red Cross* (2000), 67, 85–86

⁸² Rule 139, applicable in both international and non-international armed conflicts, in: J-M Henckaerts, L Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (ICRC and Cambridge University Press 2005)

Parties to the conflict should further endeavour to bring into force by means of special agreements, all or part of the other provisions of the present Convention.”⁸³

In its Advisory Opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Court’s view was stronger that Article 1 entails third party obligations:

“It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.”⁸⁴

The obligation to respect and to ensure respect for IHL is two-folded. “To respect” means that the state is required to do everything it can to ensure that the rules in question are respected by its organs and all others under its jurisdiction; while “to ensure respect” can be interpreted to entail an obligation to take all possible steps to ensure universal compliance with the rules, regardless of whether the state itself is engaged in a conflict.⁸⁵ Since the states possess the capacity to legislate for their nationals and to impose upon them obligations that originate from international law, IHL is binding on individuals because their national states consented to conventional rules or are bound by customary norms.⁸⁶ The binding force of IHL on individuals has been long recognised, and it applies to them disregarding their formal status under IHL: combatants in an international armed conflict as members of the armed forces of a party to such conflict, members of armed groups in a non-international

⁸³ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Merits, Judgment [1986] ICJ Reports 1986, para. 220

⁸⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136, para. 158

⁸⁵ According to the *Commentary on the Geneva Conventions of 12 August 1949*:
The use of the words “and to ensure respect” was, however, deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. It is for the State to supervise their execution. Furthermore, if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention as and when the occasion arises. It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention.
J S Pictet (ed.), *Commentary, I Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 25-26

⁸⁶ This is according to the doctrine of legislative jurisdiction. See: L Moir, *The Law of Internal Armed Conflict* (Oxford University Press 2002) 53–54; J Kleffner, ‘The applicability of international humanitarian law to organized armed groups’ (2011) 93(882) IRRC 443, 445-449

armed conflict or civilians.⁸⁷ It is important to keep in mind that IHL distinguishes between two addressees, namely parties to an armed conflict being the collective entities (states and organised armed groups) and individuals. The former are not just the sum of all their members but bear duties under IHL independently from their members acting as individuals. What follows is that the violations of IHL committed by individuals engaged in the violence on a behalf of a collective entity, e.g. a state, may simultaneously entail both their individual criminal responsibility and the responsibility of the state to whom their acts or omissions can be attributed.⁸⁸

Concurrent responsibility to respect international humanitarian law

In the light of the above discussion, it must be concluded that peacekeeping forces bear obligations under IHL even if they themselves are not involved in armed conflict. IHL is fully applicable to peacekeeping troops due to the international obligations of their national states, and it is concurrently applicable to a peacekeeping operation as a subsidiary organ of the United Nations which is bound by customary IHL *mutatis mutandis*. Given that the UN does not have necessary judicial and administrative structures to enforce laws, it enters agreements with troops contributing states, which stipulate that national contingents provided by states are subject to states' exclusive criminal jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of a United Nations peacekeeping mission as well as disciplinary jurisdiction with respect to all other acts of misconduct committed that do not amount to crimes or offences.⁸⁹

⁸⁷ C Greenwood, 'Historical development and legal basis', in Fleck D (ed), *The Handbook of International Humanitarian Law* (2nd edition, Oxford University Press 2008) para. 134; J Kleffner, 'The applicability of international humanitarian law to organized armed groups', 93(882) IRRC (2011), 443, 449-450

⁸⁸ A Nollkaemper, 'Concurrence between individual responsibility and state responsibility in international law' (2003) 52 *International and Comparative Law Quarterly* 615-640. In contrast to the state responsibility, a legal regime for the collective responsibility of organised armed groups is still pretty underdeveloped. For analysis see J Kleffner, 'The collective accountability of organised armed groups for system crimes' in A Nollkaemper and H van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, Cambridge, 2009) 238-269.

⁸⁹ *Revised Draft Model MOU*, see *Report of the Special Committee on Peacekeeping Operations and Its Working Group on the 2007 Resumed Session* (12 June 2007) UN Doc. A/61/19 (Pt III) annex (*Revised Draft Model Memorandum of Understanding*) ('*Revised Draft Model MOU*'). Also the *Secretary-General's Bulletin* stipulates that the contributing states would prosecute in national courts the violations of IHL committed by their personnel, see: *supranote* 75. This has also been confirmed in the UN submissions to the ILC on the responsibility of international organisations see: ILC, *Responsibility of international organizations. Comments and observations received from international organizations* (17 February 2011) A/CN.4/637/Add.1 Commentary to Draft Article 6, para. 3.4

In the context of applicability of IHL to peacekeeping forces and the responsibility of the UN v. the responsibility of its member-states, Tittmore points at the more general issue of independence of the Organization. It goes back to the ICJ pronouncements in the *Reparation Case* about the need to keep UN agents independent of UN Member States.⁹⁰ The United Nations and its Members have concurrent duties to uphold the independence of the Organization and its agents, which can be compromised if the UN leaves it entirely to individual Member States to ensure that acts authorised by the UN comply with international law.⁹¹

If IHL applies to peacekeeping forces through their national states in any case, one could ask why for so many years the ICRC and the UN battled about acknowledging that IHL applies also to the UN. One of the reasons is the already mentioned issue of the responsibility of collective entities for illicit acts. An international legal personality implies not only the capacity to bring claims under international law as in the *Reparations Case* but also the capacity to accept the responsibility for such claims.⁹² A regime of legal liability for international wrongdoing requires that the illegal act is attributable to the legal person in question and that it breaches one of that legal person's international duties.⁹³ In the case of violations of IHL, the UN could only be responsible for violations of IHL attributed to it if it was itself bound by IHL in the first place. Having established the applicability of IHL to the UN, the question of attribution requires the examination of the command and control

⁹⁰ As the Court held:

*In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that whether the agent belongs to a powerful or to a weak State; to one more affected or less affected, by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent - he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless. ICJ, *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Reports 174, 183-184.*

⁹¹ B D Tittmore, 'Belligerents in blue helmets: applying international humanitarian law to United Nations peace operations', 33(1) *Stanford Journal of International Law* (1997) 61, 92-93.

⁹² I Brownlie, *Principles of Public International Law* (Oxford University Press 2008) 323

⁹³ Art. 2(a) of the UN ILC *Draft Articles of State Responsibility* (2001) U.N. Doc. A/56/10, Art. 3(2)(a) of the UN ILC *Responsibility of International Organizations* (2003) U.N. Doc. A/CN.4/L.632

arrangements between the UN and contributing states and the application of the “effective control test”. When a peacekeeping operation is conducted under the (operational) command and control of the UN, it has a legal status of the UN subsidiary organ and violations of IHL committed by its members might be imputable to the Organization.⁹⁴ With the responsibility comes the liability to make reparations.⁹⁵ By virtue of the multi-layered authority structure in peacekeeping operations it might be difficult to assess the appropriate locus of responsibility for IHL violations of peacekeeping forces.⁹⁶ In the submissions to the International Law Commission on the responsibility of international organisations, the United Nations Secretariat explained that:

“In the practice of the United Nations the test of “effective command and control” applies “horizontally” to distinguish between a United Nations operation conducted under United Nations command and control and a United Nations-authorized operation conducted under national or regional command and control.”⁹⁷

This is in contrast to the test of “effective control” as proposed by the Commission that would apply “vertically” in the relations between the United Nations and its troop contributing states to condition the responsibility of the Organization on the extent of its effective control over the conduct of the troops in question. The UN further explained that:

“It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are “transformed” into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, “effective”. In the practice of the United Nations, therefore, the test of “effective control” within the meaning of draft article 6 has never been used to determine the division of responsibilities for damage caused in the course of

⁹⁴ D Shraga (n 1). There are two tests which could be applied to this case – an “effective” control test set out by the ICJ in *Nicaragua* Case and an “overall” control test used by the ICTY in *Tadic* Case

⁹⁵ Art. 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907; Art. 91 of 1977 the Additional Protocol I

⁹⁶ It might be shared between the participating states and the United Nations; see e.g.: ECtHR, *Behrami v. France* (Application no. 71412/01) and *Saramati v. France, Germany and Norway* (Application no. 78166/01) (2007); ECtHR, *Al-Jedda v. The United Kingdom* (Application No. 27021/08) (2011); The Supreme Court of the Netherlands, *Hasan Nuhanjovic v. The State of the Netherlands* (12/03324) (2013). However, it is beyond the scope of this study to discuss this issue in more details.

⁹⁷ ILC, *Responsibility of international organizations. Comments and observations received from international organizations* (17 February 2011) A/CN.4/637/Add.1 Commentary to Draft Article 6, para. 3.2

any given operation between the United Nations and any of its troop-contributing States (...) In this connection, the Secretariat notes that the residual control exercised by the lending State in matters of disciplinary and criminal prosecution, salaries and promotion for the duration of the operation, is inherent in the institution of United Nations peacekeeping, where the United Nations maintains, in principle, exclusive “operational command and control” and the lending State such other residual control. However, as long as such residual control does not interfere with the United Nations operational control, it is of no relevance for the purpose of attribution.”⁹⁸

4.3. The status of peacekeepers under international humanitarian law

Having established full applicability of international humanitarian law to peacekeeping forces by virtue of the obligations of their national states and concurrent obligations of the United Nations, their formal status under international humanitarian law needs to be examined.

4.3.1. The principle of distinction

One of the most fundamental principles of international humanitarian law is the principle of distinction which requires that parties to the conflict must at all times distinguish between civilians and civilian objects on one hand and combatants and military objectives on the other, and they may direct attacks only against the latter group.⁹⁹ The principle appeared for the first time in the preamble to the St. Petersburg Declaration, which states that:

“(...) the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy (...) for this purpose it is sufficient to disable the greatest possible number of men”.¹⁰⁰

⁹⁸ ILC, *Responsibility of international organizations. Comments and observations received from international organizations* (17 February 2011) A/CN.4/637/Add.1 Commentary to Draft Article 6, para. 3.3 -3.4. The further discussion of the issue of attribution and international responsibility is, however, beyond the scope of this research.

⁹⁹ A P V Rogers, *Law on the battlefield* (Juris Publishing Manchester University Press, 2nd ed. 2004), 7; M Sassòli, A Bouvier, A Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law. Volume I: Outline of International Humanitarian Law* (ICRC 3rd ed. 2011) 1

¹⁰⁰ Preamble of St. Petersburg Declaration of 1868 (or in full *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*)

The 1907 Hague Regulations do not spell out the principle of distinction with regard to persons but they prohibit “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”.¹⁰¹ Similarly, the 1907 Hague Convention IX contains such prohibition in Article 1 with regard to undefended ports, towns, villages, dwellings, or buildings. In Article 2 it excludes from the prohibition of bombardment by naval forces

“(…) military works, military or naval establishments, depots of arms or war *matériel*, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour”.¹⁰²

In modern international humanitarian law the principle of distinction is codified in Articles 48, 51 and 52 of the 1977 Additional Protocol I. Article 48 of AP I reads as follows:

Article 48 – Basic Rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

There is no such explicit expression of the principle of distinction in conventional IHL relating to non-international armed conflicts. However, this rule is expressed in other terms in particular as the principle of distinction between combatants and non-combatants, whereby civilians who do not take direct part in hostilities are included in the category of non-combatants.¹⁰³ No official contrary practice was found with respect to either international or non-international armed conflicts and the principle is recognised as a customary international law norm applicable to both types of armed conflicts.¹⁰⁴ It has been so applied by international courts and tribunals. Inter-

¹⁰¹ Art. 25 of 1907 Hague Regulations

¹⁰² Art. 2 of the 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War

¹⁰³ Indirectly, Common Article 3 to the 1949 Geneva Conventions and Article 4 of the 1977 Additional Protocol II apply the principle of distinction speaking of those who do not take a active/direct part in hostilities or who have ceased to take part in hostilities, and providing fundamental guarantees for them. The explicit prohibition of attacks against civilians is included in Article 13(2) of the 1977 Additional Protocol II, and in other international treaties: II and III Protocol to the Convention on Certain Conventional Weapons, in the Ottawa Convention banning anti-personnel landmines, and in the Statute of the International Criminal Court

¹⁰⁴ Rule 1 (Distinction between Civilians and Combatants) and Rule 7 (Distinction between Civilian Objects and Military Objectives) of the ICRC Customary International Law Study and commentary to

American Commission on Human Rights noted the customary status of the principle of distinction and its applicability to all armed conflicts.¹⁰⁵ The International Criminal Tribunal for the former Yugoslavia affirmed that the principle of distinction together with the principles of precaution and protection form “the foundation of international humanitarian law”.¹⁰⁶ In its Advisory Opinion on *the Legality of the Threat or Use of Nuclear Weapons* the International Court of Justice stated that the principle of distinction, aiming at the protection of the civilian population and civilian objects and establishing the distinction between combatants and non-combatants, was one of “the cardinal principles (...) constituting the fabric of humanitarian law” so fundamental to the respect of the human person and “elementary considerations of humanity” that they are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute “intransgressible principles of international customary law”.¹⁰⁷ As restated by the ICTY: “(...) it is now a universally recognised principle (...) that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.”¹⁰⁸

Combatants v. civilians

The corollary of the principle of distinction regarding persons is that there are two formal statuses under international humanitarian law: combatants and civilians. The definition of combatants is provided in Article 43(2) of the Additional Protocol I, which stipulates that:

Article 43 – Armed forces

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.¹⁰⁹

these rules. For a general discussion on customary status of the principle of distinction see e.g.: C Greenwood “Customary Law Status of the 1977 Additional Protocols” in A J M Delissen, G J Tanja (eds) *Humanitarian Law of Armed Conflict- Challenges Ahead* (Nijhoff Publishers Dordrecht-Boston-London 1991), 108; Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) 82

¹⁰⁵ Inter-American Commission on Human Rights, *Tablada* case, Report No. 55/97, Case No. 11.137: Argentina, OEA/ Ser/ L/V/II.98, Doc. 38, December 6 rev., 1997, para. 176-177

¹⁰⁶ *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Judgement, (12 December 2007), para. 941

¹⁰⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996], ICJ Reports 1996 at 257, paras. 78-79

¹⁰⁸ *The Prosecutor v. Kupreškić et al.* Case No. IT-95-16, Judgment, (14 Jan 2000), para. 521

¹⁰⁹ State practice has established this rule as a norm of customary international law in international armed conflicts; see: ICRC Customary IHL Study, Rule 3

The term “armed forces” is defined in paragraph 1 of the same Article as the armed forces of a party to a conflict consisting of all organised armed forces, groups and units under a command responsible to that party for the conduct of its subordinates. Such armed forces shall be subject to an internal disciplinary system to enforce their compliance with the rules of international humanitarian law.¹¹⁰ This definition of armed forces is based on the qualifications of belligerents in the Hague Regulations and the qualifications of prisoners of war in the Third Geneva Convention.¹¹¹ Accordingly, all members of regular/organised armed forces of a party to a conflict are considered to be combatants; whereas “irregular” militia and volunteer corps, including organised resistance movements, belonging to a party to the conflict are required to comply with certain conditions in order to be considered combatants (entitled to POW status).¹¹² All these provisions are based on the same idea that all persons fighting on a behalf of a party to a conflict and meeting certain criteria are combatants.¹¹³ The concept of “belonging to” necessitates at least a *de facto* relationship between an organised armed group and a party to a conflict. It may be expressed by an official declaration or just a tacit agreement if actions of the “irregular” forces are indicative of their affiliation.¹¹⁴

¹¹⁰ State practice has established this rule as a norm of customary international law applicable in international armed conflicts. For purposes of the principle of distinction, it may also apply to State armed forces in non-international armed conflicts; see ICRC Customary IHL Study, Rule 4

¹¹¹ Annex to the Convention (IV) respecting the Laws and Customs of War on Land (1907): Regulations respecting the laws and customs of war on land - Section I: On belligerents - Chapter I: The qualifications of belligerents

Art. 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army”.

See also Art. 4 A (1), (2), (3) and (6) of the Third Geneva Convention

¹¹² They all are entitled to prisoner-of-war status provided that they comply with the rules of international law of armed conflicts. Violations of these rules do not deprive combatants of their combatant status or the right to be a prisoner of war, with the exception that when they fail to distinguish themselves from the civilian population, they will forfeit the right to be a prisoner of war; see Article 44 of AP I.

¹¹³ See Commentary to Rule 4 of the ICRC Customary IHL Study

¹¹⁴ J S Pictet (n 85) 57

Civilians, on the other hand, are defined negatively as persons who are not members of the armed forces, as set forth in Article 50 of the Additional Protocol I.¹¹⁵ As according to *ICRC Customary IHL Study*, state practice has established this definition of civilians as a norm of customary international law applicable in both international and non-international armed conflicts.¹¹⁶ This definition of civilians by exclusion as “anyone who is not a member of the armed forces or of an organised military group of a party to a conflict” has been recognised and applied as customary law by the ICTY.¹¹⁷ In the *Blaškić* case, the Tribunal further clarified that civilians are also “persons who are not, or no longer, members of the armed forces”.¹¹⁸

There is no formal combatant status in non-international armed conflicts. Treaties applicable to this type of armed conflicts use the terms “civilian”, “armed forces” and “organised armed group” but do not define them. These concepts should, nevertheless, be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of IHL.¹¹⁹ Since the protection of civilians is one of the main goals of international humanitarian law and the principle of distinction applies equally in non-international armed conflicts, the parties to such conflict must draw a distinction between combatants understood in generic sense as those who fight (“fighters”)¹²⁰ and the civilian population/civilians who does not. In line with this, Common Article 3 of the Geneva Conventions provides that each party to the conflict must afford protection to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”. The Additional

¹¹⁵ Art. 50 AP I Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

¹¹⁶ Rule 5 of the ICRC Customary Study. In case of non-international armed conflict, however, practice is vague as to whether members of armed opposition groups are considered members of armed forces or civilians; see further the commentary to Rule 5

¹¹⁷ *The Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Judgement, (5 December 2003), para. 47; *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgement, (29 July 2004), para. 110; *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, (17 December 2004), para. 97

¹¹⁸ *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Judgement, (2 March 2000), para. 180

¹¹⁹ Art. 31(1) of the Vienna Convention on the Law of Treaties

¹²⁰ E.g. the term “fighters” is used in the Manual on the Law of Non-International Armed Conflict, International Institute of Humanitarian Law (Sanremo 2006) at 4

Protocol II implicitly distinguishes between “armed forces” of a state, “dissident armed forces”, and “other organised armed groups” who have the function and ability “to carry out sustained and concerted military operations”¹²¹ on the one hand, and the civilian population and individual civilians who enjoy general protection against the dangers arising from military operations carried out by these forces and the protection from the attack “unless and for such time as they take a direct part in hostilities” on the other.¹²² Therefore, it can be concluded that similarly to international armed conflicts the concept of a civilian in non-international armed conflict is delimited in opposition to state “armed forces”, “dissident armed forces” and “other organised armed groups”.¹²³

The *ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* suggests that for the purposes of the principle of distinction in a non-international armed conflict, organised armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities (“continuous combat function”).¹²⁴ Members of such armed groups belonging to a non-state party to the armed conflict cease to be civilians and lose protection against direct attack for so long as they take on their continuous combat function. A continuous combat function does not entitle to combatant privilege; rather, it distinguishes members of the armed forces of a non-state party from civilians who assume political, administrative or other non-combat functions for a non-state party and from civilians who directly participate in hostilities on a spontaneous, sporadic, or unorganised basis.¹²⁵

In light of the above analysis of treaty and customary IHL, the combatant and civilian statuses under IHL are recognised as complementary and exclusive. This position was questioned by the U.S. and Israel in the wake of the “war on terror” and the third category of “unlawful combatants” was applied to detained members of

¹²¹ Art. 1(1) of the Additional Protocol II

¹²² Art. 13 of the Additional Protocol II. The prohibition on directing attacks against civilians is also contained in Protocol II and Protocol III to the Convention on Certain Conventional Weapons; The Ottawa Convention banning anti-personnel landmines

¹²³ N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 29-30

¹²⁴ *Ibid* 27

¹²⁵ *Ibid* 33-34

terrorist organisations.¹²⁶ An “unlawful combatant” would be a person who takes part in hostilities and thereby is not protected from direct attacks but who upon capture neither qualifies for the privilege of being a prisoner of war nor is he subject to rules applicable for the detainment of civilians.¹²⁷ The qualification of some detainees as “unlawful combatants” has been criticised by the International Committee of the Red Cross and international human rights institutions as not having any legal justification.¹²⁸ Human Rights Watch¹²⁹ recalled the 1998 judgment of the ICTY in *Čelebići Camp* case, which stated that:

“(…) there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements [defining a protected person – an explanation added] are satisfied.”¹³⁰

The ICTY referred to the Commentary to the Fourth Geneva Convention, which asserts that:

¹²⁶ The existence of the third category of “unlawful combatants”/“unprivileged belligerents” was advocated by the Bush Administration and the Government of Israel. The term “unlawful combatant” was first used in U.S. municipal law in a 1942 United States Supreme Court decision in the case *Ex parte Quirin et al.* (Supreme Court of the United States, *Ex parte Quirin et al.*, 317 US 1 (1942)). See e.g.: The White House, President George W. Bush's Military Order of 13 November 2001: *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*; The White House, *Memorandum Humane Treatment of Al Qaeda and Taliban Detainees* February 7, 2002; *Final Report of the Independent Panel To Review DoD Detention Operations*, August 2004 (United States, The Schlesinger Report); Government of the United States, *Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba*, 10 March 2006; Supreme Court of Israel, Public Committee against Torture in Israel v. Government of Israel, Case No. HCJ 769/02, 13 December 2006; Supreme Court of Israel, *Iyad v. State of Israel*, 1 Crim A 6659/06, 11 June 2008

¹²⁷ For a general discussion about “unlawful belligerency” see e.g.: R R Baxter, ‘So-called ‘Unprivileged Belligerency’: Spies, Guerrilla, and Saboteurs’ 28 *B.Y.I.L.* (1951) 323; Y Dinstein, ‘The Distinction Between Unlawful Combatants and War Criminal’ (2003) 79 *International Law Studies*, 151; Y Dinstein (ed.) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers 1989) 103; G Aldrich, ‘The Taliban, Al Qaeda, and the determination of illegal combatants’ 96 *American Journal of International Law* (2002), 892; K Dörmann, ‘The legal situation of “unlawful/unprivileged combatants”’ (2003) No. 849 85 *IRRC* 45; K W Watkin, ‘Combatants, unprivileged belligerents and conflicts in the 21st century’ (January 27-29,2003) Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Harvard Program on Humanitarian Policy and Conflict Research

¹²⁸ Reactions of the International Committee of the Red Cross to the Schlesinger Panel Report on Department of Defence Detention Operations (8 September 2004): D. Page 86-7: “[The ICRC] contends that Geneva Conventions III and IV allow for only two categories of detainees: (1) civilian detainees who must be charged with a crime and tried and (2) enemy combatants who must be released at the cessation of hostilities.”

¹²⁹ Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (29 January 2002)

¹³⁰ *The Prosecutor Mucić et al.* Case No. IT-96-21-T, Judgment, (16 November 1998), para. 271

“Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.”¹³¹

Military objective v. civilian objects

The principle of distinction with regard to objects distinguishes between military objectives, which may be attacked, and civilian objects, which must be protected from direct attacks. The term “military objectives” first came into use in the non-binding 1923 Hague Rules of Air Warfare. Article 24 legitimises aerial bombardment only when directed at a military objective, which is defined as “an object of which the destruction or injury would constitute a distinct military advantage to the belligerent”.¹³² The definition is accompanied by an illustrative list of military objectives.¹³³ The embodiment of the principle of distinction can be found in Article 48 and 52 of the Additional Protocol I.¹³⁴ Paragraph 2 of Article 52 provides a definition of a military objective:

Article 52 – General protection of civilian objects

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹³⁵

¹³¹ Ibid; Commentary to GC IV, 51

¹³² Art. 24(1) of the 1923 Hague Rules of Air Warfare

¹³³ Art. 24 (2) of the 1923 Hague Rules of Air Warfare; The list includes: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes. The list is not considered to be exhaustive; see: APV Rogers (99) 60

¹³⁴ Generally, Chapter III (Arts. 52-56) of the Additional Protocol I deals with the protection of civilian objects. The prohibition on directing attacks against civilian objects is also included in Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons. Under the Rome Statute of the International Criminal Court, “intentionally directing attacks against civilian objects, that is, objects which are not military objectives”, constitutes a war crime in international armed conflicts (Article 8(2)(b)(ii)).

¹³⁵ The Geneva Conventions refer to military objectives but do not define them, e.g. Article 19 of the GC I requires that the responsible authorities ensure that “medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety”. Article 18 of the GC IV contains a similar provision for the benefit of civilian hospitals. Article 8(1) of the 1954 Hague Convention for the Protection of Cultural implies what may constitute

This definition is considered to reflect a norm of customary international humanitarian law applicable in both international and non-international armed conflicts.¹³⁶ The term “attacks” is defined in Article 49(1) of the Additional Protocol as “acts of violence against the adversary, whether in offence or in defence.” The noun “objects” clearly refers to material and tangible things,¹³⁷ however, it is not to say that “military objectives” are limited to inanimate objects. Military personnel are also military objectives.¹³⁸

The definition contains two elements both of which must be simultaneously present for an object to constitute a military objective. With regard to the first prong, it refers to different types of objects that may make an “effective contribution to military action” of the enemy either by virtue of their inherently military “nature” or because of the circumstances surrounding their “location, purpose or use”. The fact that a military objective must make an “effective contribution to military action” does not require a direct connection with a combat operation such as is implied in Article 51(3) of the Additional Protocol I with respect to civilians.¹³⁹ Contrary to civilian persons who lose their protection from direct attacks only while they “take a direct part in hostilities”, civilian objects may become military objectives and lose the immunity from direct attacks through their use which is only indirectly related to combat action, but which nonetheless provides an “effective contribution” to the military phase of a party’s overall war effort.¹⁴⁰ However, an “effective contribution”

a military objective but does not define it either. The definition in Article 52(2) of AP I is limited to objects, nevertheless, members of the armed forces are considered military objectives, which is in line with Preamble of the Declaration of St. Petersburg, see further: Commentary AP I at 635 para. 2017

¹³⁶ Rule 8 of the ICRC Customary IHL Study; for a general discussion of the principle of distinction, see: H B Robertson Jr., “The Principle of the Military Objective in the Law of Armed Conflict” in Michael N. Schmitt (ed.), *The Law of Military Operations – Liber Amicorum Professor Jack Grunawalt*, volume 72, US Naval War College’s International Law Studies (1998) 199, 204-207; A P V Rogers (n 99) 58-85; S Oeter, ‘Methods and means of combat’ in D Fleck (n 87) 175-193

¹³⁷ Y Sandoz, C Swinarski, B Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff Publishers 1987), 633-634, para. 2007-2008 [hereinafter: *Commentary on the Additional Protocols*]

¹³⁸ It is worth noting the language of Article 52(2): “[i]n so far as objects are concerned,” underscoring that not only inanimate objects constitute military objectives. See: A P V Rogers (n 96) 63; Y Dinstein, ‘Legitimate Military Objectives Under The Current Jus In Bello’ in A E Wall, (ed.), *Legal and Ethical Lesson of NATO’s Kosovo Campaign* (2002) Vol. 78, US Naval War College’s International Law Studies 139, 142-143

¹³⁹ W A Solf, ‘Article 52’ in M Bothe, K J Partsch and W A Solf (eds) *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers 1982) 318, 324, para. 2.4.3; Y Dinstein (n 138) 145

¹⁴⁰ W A Solf (n 139) 324, para. 2.4.3.; Y Dinstein (n 138) 145

does not cover general war-sustaining efforts.¹⁴¹ It is also important that the targeted object is connected to the *military* action of the enemy, which necessarily excludes such civilian objects that only politically, financially or psychologically support the war machine.¹⁴²

With regard to the “nature”, the term denotes the intrinsic character of the military objective which makes an effective contribution to military action. According to the ICRC *Commentary on the Additional Protocols*, the “nature” category comprises objects of inherently military character such as weapons, equipment, fortifications, depots, buildings occupied by armed forces, staff headquarters or communications centres.¹⁴³ A particular “location” of objects might also satisfy the requirement of effective contribution to military action, like in the case of bridges.¹⁴⁴ According to interpretative declarations made with respect to Articles 52(2) of API, a specific area may constitute a legitimate military objective in view of its location and the circumstances.¹⁴⁵ The criterion of “purpose” refers to the intended future use of an object.¹⁴⁶ Since any object could be converted into something useful for the military in the future, this criterion needs to be considered in the light of “the circumstances ruling at the time” which excludes too broad interpretation of any hypothetical possible future uses.¹⁴⁷ The use of the present tense “make effective contribution” in Article 52(2), instead of the conditional “would make” or “could make”, corroborates this approach. The term “use” is concerned with the present/current function that makes an object of a military value, e.g. if a building such as school or hotel is used as military headquarters, it becomes a military objective.¹⁴⁸ In case of doubt whether an object, which is normally used for civilian purposes, is being used for a military action, it should be presumed to have a civilian status and be protected from a direct

¹⁴¹ Y Dinstein (n 138) 145-146; M Sassòli, ‘Legitimate Targets of Attacks under International Humanitarian Law’ (Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge 2003), Program on Humanitarian Policy and Conflict Research at Harvard University, HPCR (2003) 3

¹⁴² A Boivin, ‘The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare’ (2006) Research Paper Series No. 2 University Centre for Humanitarian Law, 18

¹⁴³ *Commentary on the Additional Protocols* (n 137) 636 para. 2020

¹⁴⁴ *Ibid* para. 2021

¹⁴⁵ Statements and declarations with regard to Article 52(2) of AP I were made by Canada, Federal Republic of Germany, the Netherlands, the United States and the United Kingdom; see *Commentary AP I* at 636 para. 2025; see also: A P V Rogers (n 99) 68-69

¹⁴⁶ *Commentary on the Additional Protocols* (n 137) 636 para. 2022

¹⁴⁷ W A Solf (n 139) 323-324

¹⁴⁸ *Commentary on the Additional Protocols* (n 137) 636 para. 2022

attack.¹⁴⁹ If an object has a dual-function or dual-use, i.e. it is being used for civilian as well as military purposes such as communications facilities or power plants, its classification depends, in the final analysis, on the application of both prongs of the definition of a military objective.¹⁵⁰ Finally, since the first prong of the definition of military objectives is of an objective character, it requires reliable information on “nature, location, purpose or use” of an object in question to be obtained before ordering or executing the attack.

The second element of the definition demands that “destruction, capture or neutralization” of an object capable of making an effective contribution to military action must offer a “definite military advantage” to the attacking party in “the circumstances ruling at the time”. *A contrario*, if “destruction, capture or neutralization” of an objects would offer only potential or indeterminate advantages, such object should not be attacked.¹⁵¹ The expression “definite military advantage” (as well as “military objective” discussed above) derives from the 1923 Hague Rules of Air Warfare, which uses the phrase “a distinct military advantage.”¹⁵² According to *the Commentary*, the adjective “definitive” was discussed at length during negotiations but eventually no reason was given for the choice among other words: “distinct”, “clear”, “immediate”, “obvious”, “substantial”, “specific”.¹⁵³ What it does stand for is “a concrete and perceptible military advantage rather than a hypothetical and speculative one.”¹⁵⁴ It must also be of a military nature and not just purely political, hence for example: forcing a change in the negotiating attitudes of the adverse party would not qualify as a military advantage.¹⁵⁵ The process of assessing military advantage must be made “in the circumstances ruling at the time”, which turns certain objects into military objectives only in specific timeframes.¹⁵⁶ This restriction to the actual situation at hand is critical as every object could, due to possible future developments, become a military objective.¹⁵⁷ This element

¹⁴⁹ Art. 52(3) of the Additional Protocol I; It should be stressed that the presumption applies only to objects, which normally do not have any significant military use or purpose

¹⁵⁰ Rule 8 of the ICRC Customary IHL Study

¹⁵¹ *Commentary on the Additional Protocols* (n 137) 636 para. 2024

¹⁵² Art. 24(1) of the 1923 Hague Rules of Air Warfare

¹⁵³ *Commentary on the Additional Protocols* (n 137) 635 para. 2019

¹⁵⁴ W A Solf (n 139) 326.

¹⁵⁵ Y Dinstein (n 138) 144

¹⁵⁶ *Ibid* 144

¹⁵⁷ M Sassòli (n 141) 3

emphasises dynamic circumstances of war and necessitates that timely and reliable information of the military situation is provided for the selection of targets for attack.¹⁵⁸

Despite these situational limitations the notion of “military advantage” is not restricted to tactical gains but has a broader meaning that takes into account the full context of a war strategy¹⁵⁹ which is not, however, to be confused with the entire war.¹⁶⁰ The term “military advantage” refers to the advantage which can be expected from an attack as a whole and not from its isolated parts.¹⁶¹ This interpretation recognises the fact that military operations consist of separate actions, each of which could be described as a specific “attack”, but which are directed toward a goal lying outside such single action and depending on the aggregate strategy of the party to a conflict.¹⁶² It would also cover “coalition wars”, so common in recent conflicts, as the military advantage could be applied to coordinated operations undertaken by the members of the coalition, providing that they fight for the same goal in an coordinated integrated manner.¹⁶³ Finally, it is not necessary that the “effective contribution” made by the object to the military action of the enemy be related to the advantage anticipated by the attacker from the destruction, capture or neutralisation of the object.¹⁶⁴

The integrity of the principle of distinction is preserved only if two prongs of this definition are considered and satisfied.¹⁶⁵ Furthermore, even if an object is determined a military objective, it might still be unlawful to attack it if other conditions are not satisfied: precautionary measures to spare civilians must be taken;¹⁶⁶ indiscriminate attacks¹⁶⁷ as well as reprisals¹⁶⁸ are prohibited; the

¹⁵⁸ *Commentary on the Additional Protocols* (n 137) 636 para. 2024; W.A. Solf (n 139) 326

¹⁵⁹ E.g. J Burger, ‘International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to Be Learned’ (2000) 82 *IRRC* 129, 132

¹⁶⁰ Y Dinstein (n 138) 145

¹⁶¹ E.g. S Oeter, ‘Methods and means of combat’ in D Fleck (n 87) 185-186

¹⁶² *Ibid* 186; W A Solf (n 139) 324-325

¹⁶³ M Roscini, ‘Targeting and Contemporary Aerial Bombardment’ (2005) 54 *International and Comparative Law Quarterly* 411, 423

¹⁶⁴ Solf gives the example of preparations of the invasion in Normandy in 1944, see: W A Solf (n 139) 325

¹⁶⁵ A Boivin (n 142) 16

¹⁶⁶ Art. 2(3) of the 1907 Hague Convention (IX), Art. 57(1) of Additional Protocol I; Art. 3(10) of the Amended Protocol II to the Convention on Certain Conventional Weapons; Art. 7 of the Second

proportionality rule must be respected;¹⁶⁹ and the natural environment must be protected against widespread, long-term and severe damage.¹⁷⁰ Some objects are exempted from attack, despite their distinct character as military objectives, such as works and installations containing dangerous forces.¹⁷¹

Regarding the definition of civilian objects, the second sentence of Article 52(1) of the Additional Protocol I defines civilian objects using a negative method, similarly to Article 50 dealing with civilians: civilian objects are all objects that are not military objectives. Although the Additional Protocol II to the Geneva Conventions does not include definitions of military objectives or civilian objects, such definitions have nevertheless been incorporated into treaty law applicable in non-international armed conflicts and are regarded to reflect norms of customary IHL.¹⁷²

References to peacekeeping missions in international humanitarian law treaties

Articles 8(2)(b)(ii) and 8(2)(e)(iii) of the Rome Statute prohibit intentionally directing attacks against peacekeeping personnel and objects in international and non-international armed conflicts respectively “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”. It is not the same as to say that peacekeeping personnel and objects are civilians and civilian objects. It should be noted that following the concept of “integrated missions”, most contemporary peacekeeping operations consist of different components: military, police and civilian.¹⁷³ The Rome Statute does not

Protocol to the Hague Convention for the Protection of Cultural Property; Rule 15 of the ICRC Customary IHL Study

¹⁶⁷ Art. 51(4) of the Additional Protocol I

¹⁶⁸ Arts. 51(6) and 52(1) of the Additional Protocol I

¹⁶⁹ Art. 51(5)(b) and 57 of the Additional Protocol I; Art. 3(3) of the Protocol II to the Convention on Certain Conventional Weapons; Art. 3(8) of the Amended Protocol II to the Convention on Certain Conventional Weapons; Article 8(2)(b)(iv) of the ICC Statute; Rule 14 of the ICRC Customary IHL Study

¹⁷⁰ Art. 35(3) and 55(1) of the Additional Protocol I; Art. 8(2)(b)(iv) of the ICC Statute; Rule 45 of the ICRC Customary IHL Study

¹⁷¹ Art. 56 of the Additional Protocol I

¹⁷² Rules 8 and 9 of the ICRC Customary IHL Study. The definition of military objectives is repeated in Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons and the Second Protocol to the Hague Convention for the Protection of Cultural Property. Protocol II and III to the Convention on Certain Conventional Weapons contain also definitions of civilian objects.

¹⁷³ The concept of “integration” of the UN activities in the field was formally introduced in 1997, although various efforts aiming at achieving greater coherence within the UN system were undertaken long before. Calling for “unity of purpose” the Secretary-General Kofi Annan initiated in 1997 a program for UN reform centred on “integration” between its humanitarian, peace-keeping and

make any reference to this fact. While the status of civilian police and civilian personnel such as administrative and humanitarian staff should not cause much controversy, the same is not true for military personnel. There is no specific reference to peacekeeping missions in any of the 1949 Geneva Conventions or their Additional Protocols.¹⁷⁴ An indirect reference that can be found in Article 37(1)(d) of the Additional Protocol I relates to the prohibition of perfidy and bans “the feigning of protected status by the use of signs emblems or uniforms of the United Nations or of neutral or other States not Parties to the Conflict”. This provision suggests the implied protected status of persons entitled to use these signs and has been so assessed by scholars.¹⁷⁵ Cottier compares it to the protected status of civilians and persons *hors de combat*.¹⁷⁶ However, it should be noted that the same article contains separate paragraphs prohibiting “the feigning of an intent to surrender, or an incapacitation by wounds or sickness, or civilian, non-combatant status”,¹⁷⁷ which suggests that the protected status related to the UN might be of a distinct nature. Doria refers in this context to Article 38 of the Additional Protocol I on recognised emblems arguing that Article 37(1)(d) places the ICRC and the UN in the same category of “specially protected entities”.¹⁷⁸ It is worth noting, however, that the Additional Protocol I itself does not explicitly define the nature of the “protected status” in the particular case of the United Nations or the rights and obligations flowing from it for UN personnel.¹⁷⁹ The protective rules explicitly applying to peacekeepers can also be found in the 1980 Conventional Weapons Convention (Article 9) and its Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Article 8).¹⁸⁰

political structures. See: United Nations. *Renewing the United Nations: A Programme for Reform*. Report of the Secretary General A/51/950, 14 July 1997.

¹⁷⁴ M Cottier, ‘War Crimes – para. 2(b)(iii)’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article* (2nd edition, Beck 2008) 335; K Dorman, *Elements of War Crimes under the Rome Statute of the International Criminal Law. Sources and Commentary* (ICRC/Cambridge University Press 2003) 154, 452

¹⁷⁵ M Cottier (n 174) 336

¹⁷⁶ Ibid

¹⁷⁷ Art. 37(1)(a), (b) and (c) of the Additional Protocol I

¹⁷⁸ J Doria, ‘Attacks on UN and Regional Organisations Peacekeepers: Potential Legal Issues Before the International Criminal Court’ (2008) 5 Int’l Stud. J. 65-66

¹⁷⁹ *Commentary on the Additional Protocols* (n 137) 439-440; see also: C Greenwood ‘Protection of Peacekeepers: The Legal Regime’ (1996) 7 Duke J. Comp. & Int’l L. 185, 190

¹⁸⁰ L Moir (n 86) 500; see also: *The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980*

Article 9(2) (Denunciation): Any such denunciation shall only take effect one year after receipt by the Depository of the notification of denunciation. If, however, on the expiry of that year the denouncing

Before accepting Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute in the present form, delegations at the Rome Conference discussed different proposals on the structure and scope of the crime. These proposals advocated for a split of the offence as it was done for Articles 8(2)(b)(i) and 8(2)(b)(ii), thereby differentiating between the personnel attacked and the objects attacked.¹⁸¹ It was also suggested to make a distinction between civilian and military personnel of a humanitarian assistance or peacekeeping mission and to define the protected objects as not associated with the latter category of persons. This concept was eventually dropped as not likely to be easily determined in practice.¹⁸² It was believed that the reference to IHL would provide better protection of missions than “an explicit association of the personnel and objects involved with combatants”.¹⁸³ What the commentaries do not conclude but what can be reasonably deduced on the basis of the preparatory work is that the categories “peacekeeping personnel” and “peacekeeping objects” were not seen as homogenous but as containing or composed of dissimilar groups or

High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the person protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.

Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices
Art. 8 (Protection of United Nations forces and missions from the effects of minefields, mines and booby-traps)

1. When a United Nations force or mission performs functions of peacekeeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in that area, as far as it is able:

- (a) remove or render harmless all mines or booby traps in that area;
- (b) take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby traps while carrying out its duties; and
- (c) make available to the head of the United Nations force or mission in that area, all information in the party's possession concerning the location of minefields, mines and booby traps in that area.

2. When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area.

¹⁸¹ PCNICC/1999/DP.4/Add.2; D Frank, ‘Article 8(2)(b)(iii) – Attacking Personnel or Objects Involved in A Humanitarian Assistance or Peacekeeping Mission’ in R Lee, H Friman (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey, NY: Transnational Publishers 2001) 146

¹⁸² D Frank (n 178) 146

¹⁸³ Ibid 146-147

elements (military and civilian), which appeared troubling in the context of equal civilian protection proposed for them.

Despite the lack of the explicit qualification of peacekeeping personnel in core IHL treaties, all peacekeepers have to belong either to the category of combatants or the category of civilians, as the two are complementary and exclusive and there is no intermediate status between them. The same applies to objects involved in peacekeeping missions. The following section will briefly discuss how this issue was approached in international jurisprudence.

4.3.2. Jurisprudence of International Courts and Tribunals

The status of peacekeeping personnel under international humanitarian law in relation to the attacks against them came before both UN ad hoc tribunals (ICTY and ICTR), the Special Court for Sierra Leone and the International Criminal Court.¹⁸⁴

The International Criminal Tribunal for the former Yugoslavia

The first two indictments for crimes against peacekeepers were filed against Radovan Karadžić and Radko Mladić before the International Criminal Tribunal for the Former Yugoslavia and concerned the hostage taking of over 200 UN peacekeepers and military observers in 1995 and holding them in various locations of strategic or military significance across Bosnia and Herzegovina in order to prevent further NATO air strikes against those sites. Given that the ICTY Statute does not contain any specific provisions dealing with the “intentionally directing attacks” against peacekeepers, the indictments against the two suspects charged them with “taking of hostages, a violation of the laws and customs of war, as recognised by Common Article 3(1)(b) of the Geneva Conventions of 1949” (Count 11).¹⁸⁵ This qualification places peacekeepers into a general category of individuals protected by Common Article 3 and these are persons who take no active part in the hostilities “including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”. It does not indicate the

¹⁸⁴ See references in Chapter 1 *supra* note 6

¹⁸⁵ *The Prosecutor v. Radovan Karadžić* (IT-95-5/18-I), The Amended Indictment, Count 11 (28 April 2000); *The Prosecutor v. Radko Mladić* (IT-09-92), The Amended Indictment, Count 15 (10 October 2002)

status of peacekeepers taken hostage as the protection covers equally civilians taking no active part in hostilities as well as combatants rendered *hors de combat* and no longer taking active part in hostilities.

Karadžić tried to challenge the charge of UN hostage taking on the basis that, *inter alia*, this crime requires the unlawfulness of detention whereas the UN personnel had been captured prisoners of war and not civilians hence their detention could not have been unlawful.¹⁸⁶ The Trial Chamber dismissed the motion ruling that the detention of peacekeepers had been unlawful as they had been held not to ensure their safety or to protect them but in order to compel the NATO to abstain from conducting air-strikes against Bosnian Serb military targets. Also, they had been unlawfully threatened with death and/or injury during their detention. The Chamber reminded that the protection against hostage taking in Common Article 3 extended to both civilians and persons *hors de combat* and at the very least UN personnel had been rendered *hors de combat* by the mere fact of detention. In the light of this, the Trial Chamber did not find it necessary to rule on the status of peacekeepers prior to the detention.¹⁸⁷ The issue of the status of UN personnel in relation to UN hostage taking returned before the Chamber in 2012.¹⁸⁸ Also this time the Appeals Chamber did not take a position on whether the peacekeepers were combatants, finding that Common Article 3 would apply to the detained UN personnel irrespective of their status prior to detention.¹⁸⁹

The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda also had an opportunity to approach the issue of the status of peacekeepers under international humanitarian law. In the

¹⁸⁶ *The Prosecutor v. Radovan Karadžić* (IT-95-5/18), Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction (18 March 2009) para. 13-15

¹⁸⁷ *The Prosecutor v. Radovan Karadžić* (IT-95-5/18), Trial Chamber Decision on Six Preliminary Motions Challenging Jurisdiction (28 April 2009), para. 58-66. This decision was appealed by the accused, but the appeal was dismissed by the Appeals Chamber in its decision of 9 July 2009 (Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment)

¹⁸⁸ At a hearing on 28 June 2012, Trial Chamber III of the Tribunal orally dismissed Karadžić's motion for a judgement of acquittal on Count 11. Karadžić appealed this decision on 25 July 2012 submitting that the UN personnel had undertaken acts of force for reasons other than self-defence and, accordingly, become combatants taking an active part in hostilities, thus falling outside the protective scope of Common Article 3. The appeal was dismissed by the Appeals Chamber on 11 December 2012.

¹⁸⁹ *The Prosecutor v. Radovan Karadžić* (IT-95-5/18), Appeals Chamber Decision on Appeal from Denial of Judgment of Acquittal for Hostage Taking (11 December 2012)

case *The Prosecutor v. Theoneste Bagosora et al.* the killings of ten Belgian paratroopers serving for the United Nations Mission to Rwanda (UNAMIR) were subsumed under crimes against humanity and war crimes (serious violation of Common Article 3 and AP II) since the ICTR Statute does not contain a crime of intentionally directing attacks against peacekeeping personnel.¹⁹⁰

In relation to crimes against humanity committed as part of a widespread or systematic attack against a civilian population, it had to be established whether or not the killed peacekeepers had been civilians. The Trial Chamber was very brief and simply ruled that:

“[c]onsidering their status as United Nations peacekeepers and that they were disarmed, the Chamber is satisfied that the victims could not be considered as combatants. The fact that the peacekeepers were able to obtain a weapon during the course of the attack in order to defend themselves against a mob of soldiers intending to kill them can in no way alter this conclusion.”¹⁹¹

Interestingly, the Chamber referred to the ICTY Appeals Judgment in *Martić* case, which ruled that the crimes against humanity could also be directed against *hors de combat* provided that all other conditions were met.¹⁹² The importance of this reference is that it implies that peacekeepers could have been combatants before they were disarmed and rendered *hors de combat* and the attack against them would still qualify as a crime against humanity. However, the second sentence of the cited fragment of the *Bagosora* Judgment contradicts the condition of being *hors de combat*, as it says that the peacekeepers could obtain weapons and defend themselves.¹⁹³

¹⁹⁰ *The Prosecutor v. Theoneste Bagosora* (ICTR-98-41-T)

¹⁹¹ *The Prosecutor v. Theoneste Bagosora* (ICTR-98-41-T), Judgment and Sentence (18 December 2008), para. 2175

¹⁹² *The Prosecutor v. Theoneste Bagosora* (ICTR-98-41-T), Judgment and Sentence (18 December 2008), para. 2175 and footnote 2353; *The Prosecutor v. Milan Martić* (IT-95-11), Appeals Judgement (8 October 2008), paras. 302, 313

¹⁹³ According to Art. 41(2) of the Additional Protocol, a person is ‘*hors de combat*’ if (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

The Commentary to this provision explains that the safeguard applies to both combatants and to ordinary civilians, as it simply prohibits making any person who is recognised, or who should be recognised as being ‘*hors de combat*’ the object of attack. J Pictet (ed) (n 85) 490, para. 1630)

In relation to the attacks against peacekeeping personnel as a serious violation of Common Article 3 and the Additional Protocol II, the Trial Chamber had to determine whether or not peacekeepers had been taking active part in hostilities at the time of the attacks. Again, the Chamber was very succinct. It stated that although the Belgian peacekeepers had been highly trained members of the Belgian Army's Para Commando Battalion, as part of UNAMIR they had been neutral in the conflict between the Rwandan government forces and the Rwandan Patriotic Front. They had been disarmed well before the attack against them and had not been taking active part in hostilities. The fact that one of them had obtained a weapon and used it in self-defence did not alter their status and they remained civilians.¹⁹⁴

The Special Court for Sierra Leone

In the case before the Special Court for Sierra Leone, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, the specific crime of attacking peacekeeping personnel was applied for the first time.¹⁹⁵ The attacks against peacekeepers were subsumed also under other offences in the Statute, murder as a crime against humanity, hostage taking and murder as war crimes.

At the outset of its analysis, the Trial Chamber stated that the prohibition of attacks on peacekeeping personnel did not represent a new crime under international criminal law but rather a particularisation of the general prohibition on attacks on civilians and civilian objects.¹⁹⁶ It did not explain why peacekeeping personnel should be regarded as civilians in the first place, but moved on to the discussion of the limits of this protection. The Chamber held that:

“(...) common sense dictates that peacekeepers are considered to be civilians only insofar as they fall within the definition of civilians laid down for non-combatants in customary international law and under Additional Protocol II as discussed above – namely, that they do not take a direct part in hostilities. It is also the Chamber's view that by force of logic, personnel of peacekeeping missions are entitled to protection as long as they are not taking a direct part in the hostilities – and thus have become combatants - at the time of the alleged offence. Where peacekeepers become combatants, they

¹⁹⁴ *The Prosecutor v. Theoneste Bagosora* (ICTR-98-41-T), Judgment and Sentence (18 December 2008), para. 2175 and footnote 2353; *The Prosecutor v. Milan Martić* (IT-95-11), Appeal Judgement (8 October 2008), paras. 2239-2240

¹⁹⁵ *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-T), Trial Judgment (2 March 2009) [hereinafter: *RUF Judgment*]

¹⁹⁶ *Ibid* para. 215

can be legitimate targets for the extent of their participation in accordance with international humanitarian law.”¹⁹⁷

This is an interesting passage to analyse. At first sight (and despite the appeals to logic) the Chamber seems to miscomprehend the mutual exclusivity of the combatant and civilian status. If peacekeepers are civilians, the fact that they start taking direct part in hostilities does not turn them into combatants. It does deprive them of protection from direct attacks, but they remain civilians, which means that they can only be targeted for the duration of their participation in hostilities and that they are not entitled to the prisoner of war status upon capture. In contrast, combatants can be targeted at all times and not only when they are directly involved in combat. It has to be noted though, that the case before the Court concerned the crimes committed in a non-international armed conflict, while the formal combatant status applies only to international armed conflicts. Therefore, it should be assumed that the Court used the term “combatant” in the generic sense, as meaning someone directly involved in combat.¹⁹⁸ With regard to the limits of protection granted to peacekeepers, the Chamber held that:

“As with all civilians, their protection would not cease if the personnel use armed force only in exercising their right to individual self-defence. Likewise, the Chambers opines that the use of force by peacekeepers in self-defence in the discharge of their mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers.”¹⁹⁹

Regarding the first sentence, the Court correctly stated that the use of force in individual self-defence does not qualify as direct participation in hostilities hence it does not deprive civilians of their protection. The second sentence is more problematic. Elsewhere in the judgment, the Chamber held that the concept of self-defence for peacekeeping missions includes “the right to resist attempts by forceful means to prevent the peacekeeping operations from discharging its duties under the mandate of the Security Council”.²⁰⁰ It did not use the term “defence of the mission/mandate”, however this expression stands for this concept.²⁰¹ As already analysed, the individual self-defence and the defence of the mandate can be

¹⁹⁷ Ibid para. 233

¹⁹⁸ Rule 5 of the *ICRC Customary IHL Study*

¹⁹⁹ *RUF Judgment* (n 195) para. 233

²⁰⁰ Ibid para. 228

²⁰¹ See Chapter 3 of this thesis.

increasingly intertwined when exercised in practice; nevertheless, they constitute two distinct rights resting on two different legal bases. The Court stated that this extended right to self-defence is now “settled law” but did not refer to any international or national criminal law to support this conclusion. It only referenced the UN *Capstone Doctrine* and few reports of the UN Secretary-General but without any further analysis.²⁰² The Court’s interpretation of the extent of peacekeepers’ right to self-defence has been criticised in the scholarship as unconvincing.²⁰³

In order to determine whether personnel or objects involved in a peacekeeping mission were entitled to the civilian protection the Court held that it must consider “the totality of circumstances existing at the time of any alleged offence”:

“(…) including, inter alia, the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.”²⁰⁴

When applying these criteria to the facts of the case, the SCSL found that UNAMSIL personnel had not participated directly in hostilities although they had used force in self-defence in response to the attacks by the RUF.²⁰⁵ As rightly noted by Engdahl, the examination of “the totality of circumstances” is not really necessary to determine whether personnel were entitled to the protection of civilians. Analysing the mandate or ROE might help to determine whether the mission was of a peacekeeping or an enforcement nature but the entitlement to protection would depend on the facts on the ground and actual actions taken by peacekeepers. He stresses that the authorisation to use force belongs to the *jus ad bellum* perspective of international law, not determinative for the protection under *jus in bello*.²⁰⁶ It might

²⁰² *RUF Judgment* (n 195) para. 228; see also references to this paragraph in the judgment

²⁰³ J Sloan, ‘Peacekeepers Under Fire: Prosecuting for Attacks against UN Assistance Mission in Sierra Leone’, 9 *The Law and Practice of International Courts and Tribunals* (2010) 282-284; O Engdahl, ‘Protection of Personnel in Peace Operations (2005) 10 *International Peacekeeping: The Yearbook of International Peace Operations* 270-271

²⁰⁴ *RUF Judgment* (n 195) para. 234

²⁰⁵ *Ibid* para. 1925

²⁰⁶ O Engdahl, (n 203) 275

also be questioned whether the same standard of reviewing “the totality of circumstances” is required from the attacking party before launching an attack and how this party is supposed to know the mission-specific ROE or operational orders to be able to determine whether peacekeepers are still entitled to civilian protection or not any longer.

With regard to the count on taking hostages of UNAMSIL personnel, as a violation of Common Article 3 of the Geneva Conventions and of Additional Protocol II,²⁰⁷ the Chamber confirmed that one of the general requirements for this war crime is that the person or persons held hostage must not be taking a direct part in hostilities at the time of the alleged violation.²⁰⁸ As already discussed in relation to *Karadžić* case, it encompasses civilians as well as *hors de combat*, hence is unhelpful in the determination of the status of peacekeepers prior to capture.

In relation to the attacks against UNAMSIL personnel as other offences under the Statute, the Chamber maintained the qualification of peacekeepers as civilians not taking direct part in hostilities.²⁰⁹

The International Criminal Court

In the Decision on the Confirmation of Charges in the case *The Prosecutor v. Bahar Idriss Abu Garda*²¹⁰ the ICC Pre-Trial Chamber referred in many instances to the SCSL’s jurisprudence. The legal findings in *Abu Garda* Decision were reiterated in the Decision on the Confirmation of Charges in *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* case.²¹¹ For the first time the Court considered the status of “installations, material, units or vehicles involved in a peacekeeping mission” under IHL, as this matter was not addressed by the SCSL.

The Chamber analysed the mandate of the African Mission in Sudan (AMIS) and found that it was a peacekeeping mission in accordance with the UN Charter and

²⁰⁷ *RUF Judgment* (n 195) para. 236. The accused were eventually not found guilty of this crime, which was upheld on appeal.

²⁰⁸ *Ibid* paras. 241-242

²⁰⁹ *Ibid* paras. 1949, 1959-1960

²¹⁰ *The Prosecutor v. Bahar Idriss Abu Garda* (ICC-02/05-02/09)

²¹¹ *The Prosecutor v. Abdallah Banda Abakaer Nourain* (ICC-02/05-03/09). Proceedings against Saleh Mohammed Jerbo Jamus were terminated by Trial Chamber IV on 4 October 2013 after receiving evidence pointing towards his death.

therefore its personnel and objects should enjoy the protection given to civilians and civilian objects.²¹² Given the context of a non-international armed conflict, the Chamber referred to Article 13(3) of the Additional Protocol II and stated that peacekeepers were entitled to the protection unless and for such time as they took a direct part in hostilities. The protection would not have ceased if they used armed force in exercise of their right to self-defence. Similarly to the approach taken by the SCSL, the ICC considered that AMIS personnel were entitled to civilian protection simply because they were involved in a peacekeeping mission in accordance with the UN Charter. It did not find it necessary or even relevant to investigate why a peacekeeping mission should be granted such a protection in the first place. Instead of applying IHL criteria for combatants and civilians, the Chamber focused on the question whether peacekeepers as civilians retained their protected status at the time of the attack. Based on the presented evidence, the Chamber concluded that there were substantial grounds to believe that AMIS personnel had not taken any direct part in hostilities or used force beyond self-defence and therefore they had been entitled to the protection of civilians.²¹³

With regard to peacekeeping objects, the Chamber noted that while the Additional Protocol I provides for general protection of civilian objects during international armed conflict, such broad protection is not offered by the Additional Protocol II applicable to non-international armed conflicts as only a limited number of civilian objects is protected under the latter treaty. Accordingly, the Rome Statute mirrors this asymmetry and there is no equivalent to Article 8(2)(b)(ii) that would apply to non-international armed conflicts.²¹⁴ The Chamber turned then to the definition of a military objective in Article 52(2) of the Additional Protocol I and asserted that this definition applies as a rule of customary international humanitarian law also in non-international armed conflicts.²¹⁵ Accordingly, it ruled that:

²¹² *The Prosecutor v. Bahar Idriss Abu Garda* (ICC-02/05-02/09), Decision on the Confirmation of Charges (8 February 2010) para. 126 [hereinafter: *Decision on the Confirmation of Charges in Abu Garda case*]

²¹³ *Ibid* para. 131

²¹⁴ *Ibid* para. 85

²¹⁵ In support, the Chamber referred to the *ICRC Customary IHL Study* and the ICTY Appeals Chamber's reached conclusion in following cases: *The Prosecutor v. Dario Kordic and Mario Cerkez* (IT-95-14/2-A), Appeals Judgment (17 December 2004), para. 59; and *The Prosecutor v. Stanislav Galic* (IT-98-29-A), Appeals Judgment (30 November 2006), para. 190

“(…) installations, material, units or vehicles involved in a peacekeeping mission in the context of an armed conflict not of an international character shall not be considered military objectives, and thus shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”²¹⁶

The Defence’s submission in this case was that peacekeeping objects had lost their protection due to their improper use, without challenging the civilian protection of AMIS personnel. The Defence alleged that the AMIS base in Haskanita had been used by the representative of the government of Sudan, who had been present there, to collect intelligence and to provide the coordinates to attack rebel groups. Thus, the base had become a lawful military target. Having examined the evidence, the Chamber found that the representative of the government of Sudan had been evacuated from the compound two weeks before the attack and in the presence of the members of the armed rebel groups. In the light of this fact, the Chamber concluded that the alleged improper activities of the government representative could not be considered as having had an impact on the protected status of AMIS installations, material, units or vehicles at the time of the attack.²¹⁷ It recalled that the presence of the representatives of all parties to the conflict had been permitted in accordance with the agreement signed between them, and determined that the mere presence of the government representatives, or of rebel representatives, could not have rendered the base a legitimate military target.²¹⁸ Noticeably, in arriving to the conclusion that AMIS installations, material, units or vehicles had been entitled to the protection afforded to civilian objects, the Chamber did not in fact apply the two-prong test for military objectives. It did not consider whether the peacekeeping objects could have made an effective contribution to military action of the government of Sudan due to their nature, location, purpose or use and whether their destruction, capture or neutralization, in the circumstances ruling at the time, could have offered a definite military advantage to the rebel groups. The only element that the Chamber relied on in its ruling was the time issue, which makes the legal analysis incomplete.

²¹⁶ *Decision on the Confirmation of Charges in Abu Garda case* (n 212) para. 89

²¹⁷ *Ibid* paras. 134-142

²¹⁸ *Ibid* para. 146

4.3.3. Peacekeeping personnel and objects entitled to civilian protection

For the purpose of determining whether peacekeepers are entitled to the protection of civilians, the alternative approach to the one taken by the international courts is to try to first identify whether peacekeepers qualify as combatants.²¹⁹ Given the way the definitions of the combatant and civilian statuses are constructed, the analysis should start by examining whether peacekeeping forces can be qualified as the armed forces belonging to a party to the conflict; only if that is determined in negative, they can be considered as falling into the category of civilians. Similarly, the status of objects involved in a peacekeeping mission should be determined by reference to the definition of military objectives.

As the previous sections prove beyond any doubt, military personnel of peacekeeping operations are members of the armed forces of troop contributing states, placed under responsible command and subject to an internal disciplinary system ensuring their compliance with international humanitarian law. It does not in itself make them combatants unless the second condition of belonging to a party to the armed conflict is also satisfied. A state participating in a peacekeeping operation would have to become a party to the conflict for its armed forces to become combatants. Since “a party to the conflict” represents a collective entity, not exclusively a state, a question might be raised here whether the United Nations could equally become a party to the conflict and what criteria should be used to determine whether peacekeeping forces could be said to “belong to” the UN-party to the conflict. Melzer argues that in the case of organised armed groups, they can be said to belong to a state if their conduct is attributable to that state under the international law of state responsibility.²²⁰ By analogy, if conducts of peacekeeping forces are attributable to the UN, could they be said to “belong to” it and would that make the UN a party to the conflict? The positive answer does not seem convincing. The level of command and control exercised by the UN over peacekeeping forces might be sufficient to attribute the responsibility for illicit acts committed by those forces and

²¹⁹ O Engdahl (n 203) 278

²²⁰ N Melzer (n 123) 23

the UN itself admits such responsibility for the act of its subsidiary organs,²²¹ it would not, however, change the fact that military personnel contributed to a peacekeeping operation remain armed forces of their national states, subject to national jurisdiction and internal disciplinary system and that these states never relinquish full command over their contingents at the strategic level e.g. they might decide to withdraw their contingents at any time and for whatever reason. The fact that the UN does not have its own armed forces nor has it ever exercised “exclusive command and control” over peacekeeping forces contributed by UN Member States (despite the commonly and incorrectly used phrase), so to make them “belonging” to the Organization rather than to their national states, seems to preclude the UN from becoming a party to a conflict. This is regardless of the fact that the UN might still be held liable for violations committed in the course of a peacekeeping operation.²²²

The risk for peacekeeping forces to become a party to a conflict is ruled out at least in the beginning of the operation since peacekeeping missions are deployed on the basis of the consent, which as elaborated in Chapter 2 is one of the fundamental principles of peacekeeping. Consent is necessary to ensure freedom of movement and to enable a mission to carry out its mandate, and this is why a United Nations peacekeeping operation must work continuously to ensure the consent of the main parties and avoid situations that could jeopardize it.²²³ The Status of Force Agreements concluded between troop contributing states and a host state, granting peacekeeping personnel certain privileges and immunities, corroborate a consensual character of peacekeeping operations. In this light, how should we treat the armed forces of a state not engaged in a conflict itself that find themselves in the area of hostilities? The law of neutrality might provide some guidance in this respect.

²²¹ ILC, *Responsibility of international organizations. Comments and observations received from international organizations* (17 February 2011) A/CN.4/637/Add.1 Commentary to Draft Article 6, para. 3.3 -3.4. See section 4.2.3. of this Chapter

²²² For a general discussion see: O Engdahl, ‘Multinational Peace Operations Forces involved in Armed Conflict: Who are the Parties?’ in K Mujezinovic Larsen, C Guldahl Cooper & G Nystuen (eds) *Searching For a ‘Principle of Humanity’ in International Humanitarian Law* (Cambridge, Cambridge University Press, 2012) 233-271

²²³ UN, *United Nations Peacekeeping Operations, Principles and Guidelines* (n 10) 32

The international legal regime of neutrality has its sources in both customary and conventional international law.²²⁴ Neutrality refers to the formal position taken by a state, which is not participating in an armed conflict and does not want to become involved. This status entails certain rights and obligations. The basic principles that should guide neutral states are non-participation and non-discrimination. In return, the neutral state has the right to stand apart from and not be adversely affected by the conflict.²²⁵ Nationals of a neutral state benefit from its neutral status unless they commit hostile acts against a belligerent, and/or acts in favour of another belligerent.²²⁶ As long as their national state maintains diplomatic relations with a belligerent state in which territory they live or visit, they remain under diplomatic protection and should be treated in the same way, as they would be in peacetime.²²⁷ The SOFA is a diplomatic law instrument and indicative of the fact that the states-parties to this agreement are not in a “state of war” and retain normal diplomatic relations. Given that the combatant status is only applicable in wartime, visiting forces of a neutral state have to be treated as civilians. If, for some reason, there are no such diplomatic relations, nationals of a neutral state are entitled to be treated as protected persons under the Fourth Geneva Convention.²²⁸ It does not make a difference to their status under IHL if they are civilians or members of the armed forces of a neutral state to which they belong.²²⁹ This analysis supports the view that peacekeeping forces are entitled to civilian protection. At this juncture, the reference should be made to the constitutive principles of peacekeeping: consent, impartiality and non-use of force except in self-defence and defence of the mandate. As extensively discussed in Chapter 2, the three principles distinguish peacekeeping from peace enforcement and prevent a peacekeeping mission from becoming a party to a conflict. Consent of a host state to the presence and operation of a peacekeeping mission within its territory is expressed through signing SOFAs with troops contributing states. If consent is withdrawn, the mission has to be withdrawn as well.

²²⁴ In particular: the Paris Declaration of 1856, the 1907 Hague Convention No. V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, the 1907 Hague Convention No. XIII concerning the Rights and Duties of Neutral Powers in Naval War, the Four 1949 Geneva Conventions and the Additional Protocol I of 1977

²²⁵ Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2005) 25-29

²²⁶ Arts. 16-17 of the 1907 Hague Convention V; Art. 17 lists these two situations without implying whether they are cumulative conditions. See also: Art. 47 of API on mercenaries

²²⁷ Art. 4 of the Geneva Convention IV

²²⁸ Art. 4 of the Geneva Convention IV

²²⁹ ICRC Unit for Relations with Armed and Security Forces, *The Law of Armed Conflict – Neutrality* (ICRC Publication 2002) 3

Impartiality shall be understood as an operational term. Peacekeeping missions are impartial in their dealings with the parties since they treat them equally in material terms in relation to the operation's mandate. Peacekeepers may use force in self-defence and defence of the mandate, but this is allowed only at the tactical level in the execution of the mandate and without favour or prejudice to any of the parties. Peacekeeping is meant to facilitate peace but not to enforce it. Such understanding of impartiality is compatible with the requirements of the neutral status under IHL. As explained above neutrality in war is conditional upon the principles of non-discrimination and non-participation. Similarly, the peacekeeping principle of impartiality requires equal treatment of all parties vis-à-vis a mandate, without favour or prejudice to any of them, while the principle of non-use of force except in self-defence excludes participation in a conflict as a party to it.

Accordingly, peacekeepers' protection against direct attacks shall be governed by the same rules and standards of the international law of armed conflict that protect nationals of neutral states, which essentially means the rules and standards of civilian protection. As in case of all civilians, the protection of peacekeepers would cease "for such time as they take direct part in hostilities".²³⁰ The following section will address this issue in more detail.

As regards the objects involved in a peacekeeping mission, it should be noted at the outset that their status under international humanitarian law does not depend on the status of peacekeepers using them. The two have to be assessed separately. The analysis of the status of installations, material, units or vehicles involved in a peacekeeping mission should start with the two-prong test from Article 52(2) of the Additional Protocol I. Let us take military equipment of peacekeeping forces as an example. Weapons, ammunitions, armoured vehicles or attack helicopters that a peacekeeping mission might be equipped with seem easy to qualify as military objectives due to their inherently military nature. As discussed earlier however, it does not suffice if they do not in any way contribute to military action of a party to a conflict or to military action of peacekeeping forces themselves if they become directly involved in hostilities. The contribution has to be "effective" otherwise the

²³⁰ Art. 51(3) of the Additional Protocol I

first condition of the test is not met. As noted before, an “effective contribution to military action” does not require a direct connection with a combat operation. This is relevant for objects of non-military nature, which through their location, purpose or use might only be indirectly related to a specific combat action. The example of a peacekeeping base serving as headquarters of one of the parties to the conflict or a radio station in such base being used to provide intelligence to one of the parties, like was allegedly the case in Haskanita, would meet the first requirement. The second prong of the definition of military objectives demands that “destruction, capture or neutralization” of an object satisfying the first condition offers a “definite military advantage” to the attacking party in “the circumstances ruling at the time”. If we apply this condition to the above example of the peacekeeping compound used as a military base of the one the parties to plan and prepare operations, destroying or neutralising it will offer “a definite military advantage” to the adversary. If however, a radio station is no longer used to provide intelligence then destroying it will not offer any definite military advantage to the attacking party “in the circumstances ruling at the time”, as it will not change the actual situation on the ground in any way. The test for a military objective would thereby fail.

4.4. What constitutes “direct participation in hostilities”?

International humanitarian law treaties do not define the notion of direct participation in hostilities. The term derives from “taking active part in hostilities” in Common Article 3 where the concept was used for the first time. Although the Additional Protocols use the word “direct”, the equally authentic French texts consistently use the phrase “*participent directement*” throughout the Geneva Conventions and both Protocols, which implies that the terms are synonymous and that they stand for the same type of participation in both international and non-international armed conflicts. This interpretation was confirmed by the International Criminal Tribunal for Rwanda in the *Akayesu* case.²³¹ Nevertheless, a disagreement among academics regarding this interpretation has emerged after the adoption of the Rome Statute of the International Criminal Court. The Preparatory Committee for the Establishment

²³¹ *The Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4-tT), Trial Judgment (2 September 1998), para. 629

of an International Criminal Court distinguished between “active” and “direct” participation in the specific context of recruitment of children. It is argued, however, that this choice of words was made to draw a distinction between “combat” and “military activities linked to combat”, not between “active” and “direct” participation.²³²

“Direct participation” refers to the individual involvement, while “hostilities” is understood as the collective recourse by parties to the conflict to means and methods of injuring the enemy.²³³ Treaty law on conduct of hostilities use the term “hostilities”, but also “warfare”,²³⁴ “military operations”²³⁵ or “operations”.²³⁶ *The Commentary on the Additional Protocols* stresses that the immunity granted to individual civilians is subject to a strict condition of abstaining from all “hostile acts”, interpreted as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”²³⁷ or “struck at the personnel and ‘matériel’ of enemy armed forces”.²³⁸ An example given is that of a civilian who takes part in armed combat, either individually or as part of a group, and thereby becomes a legitimate target but only for as long as he takes part in hostilities.²³⁹ By reference to the discussions during the conference leading to the adoption of the Protocols, *the Commentary* implies that the expression “hostilities” includes preparations for combat and the return from combat, similarly to the phrase “military deployment preceding the launching of an attack” in Article 44 of the Additional Protocol I.²⁴⁰ There seems to be no condition that a civilian actually uses his weapon as the word ‘hostilities’ also covers the time when he is carrying it as well as situations in which he undertakes hostile acts without using a weapon.²⁴¹ Only during direct participation in hostilities a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, he regains the protection and may no longer be attacked, as he no longer presents any danger for the

²³² N Melzer (n 123) 43

²³³ Ibid 43.

²³⁴ See e.g. Title Part III, Section I and Art. 35(1) the Additional Protocol I

²³⁵ See e.g. Art. 53 of the Geneva Convention IV; Art. 51(1) of the Additional Protocol I; Art. 13(1) of the Additional Protocol II

²³⁶ See e.g. Art. 48 of the Additional Protocol I

²³⁷ *Commentary on the Additional Protocols* (n 137) 618, para. 1942

²³⁸ Ibid 1453, para. 4788

²³⁹ Ibid 618, para. 1942

²⁴⁰ Ibid 618 para. 1943 and 1453, para. 4788

²⁴¹ Ibid 618-619, para. 1943ff

adversary.²⁴² Furthermore, there is a presumption in favour of the civilian status in case of doubt provided for in Article 50(1) of the Additional Protocol I,²⁴³ which according to *the Commentary* concerns “persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances.”²⁴⁴ *The Commentary* makes a clear distinction between direct participation in hostilities and participation in the war effort. The latter may involve the population as a whole in various degrees as many activities of the nation contribute to the conduct of hostilities, directly or indirectly.²⁴⁵ The term “direct participation in hostilities” implies a “direct” causal relationship between the activity and the harm done to the enemy at the time and the place where the activity takes place, or put differently, between the act of participation and its immediate consequences.²⁴⁶

The Commentary’s general approach to what constitutes direct participation in hostilities was applied by the ICTY Trial Chambers in *Galić*²⁴⁷ and *Milošević*²⁴⁸ and referred to by the ICC Pre-Trial Chamber in the Decision on the Confirmation of Charges in *Abu Garda* case.²⁴⁹ The international jurisprudence has relied on the contextual determination of direct participation in hostilities, which involves a case-by-case analysis. In *Tadić* the Trial Chamber applied the test to ask whether, at the time of the alleged offence, the alleged victims of the attacks had been directly taking part in hostilities, in the context of which these attacks were committed and concluded that:

“It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.”²⁵⁰

²⁴² Ibid 619, para. 1944 and 1453, para. 4789

²⁴³ Ibid 1453, para. 4789

²⁴⁴ Ibid 612, para. 1920. Based on that the ICTY Trial Chamber in *Galić* found that “a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant” *The Prosecutor v. Stanislav Galić* (IT-98-29-T), Trial Judgement, (5 December 2003), para. 50

²⁴⁵ *Commentary on the Additional Protocols* (n 137) 619, para. 1945

²⁴⁶ Ibid 516, para. 1679 and 1453, para. 4787

²⁴⁷ *Galić* (n 244) para. 48

²⁴⁸ *Milošević* (n 106) para. 947

²⁴⁹ *Decision on the Confirmation of Charges in Abu Garda case* (n 212) para. 80

²⁵⁰ *The Prosecutor v. Dusko Tadić* (IT-94-1), Opinion and Judgment, (7 May 1997), para. 616

Similarly, the need for a case-by-case analysis was stressed by the Israeli Supreme Court Judgment in “Targeted Killings” case.²⁵¹ The ICTY Appeal Chamber in the *Strugar* case gave few examples of direct participation in hostilities including: bearing, using or taking up arms; taking part in military or hostile acts, activities, conduct or operations; armed fighting or combat; participating in attacks against enemy personnel, property or equipment; transmitting military information for the immediate use of a belligerent; and transporting weapons in proximity to combat operations.²⁵² All these pronouncements have shed some light on the interpretation of the notion of direct participation in hostilities, yet none of the courts has attempted to provide a more comprehensive guidance that would help to address dilemmas surrounding its practical application in the complex circumstances of contemporary warfare and related to the recent trends such as an increased outsourcing of previously traditional military functions to civilian personnel or private contractors, or unprecedented intermingling of civilians and armed actors. In order to advance the debate with a view to strengthening the implementation of the principle of distinction, the International Committee of the Red Cross in accordance with its international mandate to work for the better understanding and faithful application of international humanitarian law, initiated jointly with TMC Asser Institute in the Hague the series of expert consultations on the notion of direct participation in hostilities.²⁵³ Widely informed by the discussions held during these expert meetings and based on other materials and sources, the ICRC produced in 2008 the *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. Ultimately, the *Interpretative Guidance* represents solely the ICRC’s institutional position and provides its recommendations on the interpretation of international humanitarian law as far as it relates to the notion of direct participation in hostilities. It is not a document of a binding nature, nor does it endeavour to change the law.²⁵⁴ The following sections will discuss briefly the ICRC interpretative guidelines for the notion of direct participation in hostilities and then apply them to peacekeeping operations.

²⁵¹ *Public Committee Against Torture in Israel v. Israel* (HCJ 769/02) para. 35

²⁵² *The Prosecutor v. Pavle Strugar* (IT-01-42-A), Appeal Judgement (17 July 2008) para. 177

²⁵³ Five informal expert meetings were held between 2003 and 2008 in the Hague and Geneva, each gathering together 40 to 50 legal experts from academic, military, governmental, and non-governmental circles, all of whom participated in their private capacity.

²⁵⁴ N Melzer (n 123) 9-13

4.4.1. The International Committee of the Red Cross approach – Interpretative Guidance

The *ICRC Interpretative Guidance* addresses three major questions: (1) Who is considered a civilian for the purposes of the principle of distinction? (2) What conduct amounts to direct participation in hostilities? (3) What modalities govern the loss of protection against direct attack? In this connection it provides ten recommendations and the commentary to them.

Having established that personnel involved in peacekeeping missions are considered civilians, this section will discuss and apply the findings of the ICRC with respect to the second and third question.

Direct participation in hostilities as a specific act

In treaty IHL the notion of direct participation in hostilities applies equally to conducts of all individuals regardless of their status as civilians or combatants. The *Interpretative Guidance* relies on this understanding and emphasises that the scope of individual conduct that constitutes direct participation in hostilities is the same in case of individuals engaging in it on a spontaneous, sporadic, or unorganised basis or as part of a continuous function assumed by an organised armed force.²⁵⁵ It notes the importance of restricting the notion of direct participation in hostilities to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.²⁵⁶ This is based on the distinction made in IHL between temporary, activity-based loss of protection in case of civilians, and continuous, status or function-based loss of protection in case of combatants.

The *Interpretative Guidance* proposes three cumulative criteria that must be met by a specific act to qualify as direct participation in hostilities:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

²⁵⁵ Ibid 44

²⁵⁶ Ibid 43

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).²⁵⁷

Threshold of harm

A specific act will qualify as direct participation in hostilities if the harm that is likely to result from it attains a certain threshold. The harm reaching this threshold does not have to materialise though, the objective likelihood that the act will result in such harm suffices. In case of a harm of a specifically military nature, any consequence adversely affecting the military operations or military capacity of a party to the conflict would qualify. There is no requirement to inflict death, injury or destruction on military personnel or objects. In absence of such military harm, for a specific act to qualify as direct participation in hostilities it must be likely to cause death, injury, or destruction of protected persons or objects.²⁵⁸

Direct causation

The use of words in the term “direct participation in hostilities” implies that some forms of participation might be “indirect”. On a collective level such acts would correspond to general war efforts or war sustaining activities. They would not result in the loss of protection. In order to qualify as direct participation in hostilities, there must be a sufficiently close causal relation between the act and the resulting harm. The distinction between direct and indirect participation in hostilities should therefore be interpreted as corresponding to that between direct and indirect causation of harm. As further explained, direct causation means that the harm must be brought about in one causal step. A conduct building up or maintaining the capacity of a party to harm its enemy only indirectly causes harm, and therefore falls outside the scope of direct participation in hostilities.²⁵⁹ Additionally, it is neither necessary nor sufficient that the act be indispensable to the causation of harm or that the act and its consequences be connected through an uninterrupted causal chain of

²⁵⁷ Ibid 46

²⁵⁸ Ibid 47-50

²⁵⁹ Ibid 52-53

events.²⁶⁰ With regard to direct causation in collective military operations, the standard of direct causation would be met in case of conducts constituting an integral part of a concrete and coordinated tactical operation that directly causes the required threshold of harm. Lastly, the requirement of direct causation refers to a degree of causal proximity, and regardless of temporal or geographical proximity.²⁶¹

Belligerent nexus

As remarked in the *Interpretative Guidance*, not every act that directly adversely affects the military operations or capacity of a party to an armed conflict or directly inflicts death, injury, or destruction on protected persons and objects necessarily constitutes direct participation in hostilities. The third requirement needs to be satisfied that “the act must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another”.²⁶² In this context, belligerent nexus is an objective criterion and should be distinguished from concepts such as subjective intent and hostile intent.²⁶³ Many activities during armed conflict cause a required level of harm but lack belligerent nexus such as individual self-defence, exercise of power or authority over persons or territory, civil unrest or inter-civilian violence.²⁶⁴ For example, the use of force by civilians to defend themselves against an unlawful attack or looting, rape, and murder by marauding soldiers may reach the required threshold of harm, but it clearly lacks belligerent nexus as it is not undertaken to support a party to the conflict against another. If the use of force is necessary and proportionate in such situations, it cannot be regarded as direct participation in hostilities.²⁶⁵

The *Interpretative Guidance* advocates that if applied in conjunction, the three requirements of threshold of harm, direct causation and belligerent nexus allow distinguishing activities that amount to direct participation in hostilities and therefore entail loss of protection against direct attacks, from those that do not.

²⁶⁰ Ibid 54

²⁶¹ Ibid 54-55

²⁶² Ibid 58

²⁶³ Ibid 59

²⁶⁴ Ibid 61-63

²⁶⁵ Ibid 61

Temporal scope

Similarly to the dominant interpretation as discussed in previous section, the *Interpretative Guidance* asserts that the concept of direct participation in hostilities includes measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution regardless of their temporal and geographical proximity, provided that they constitute an integral part of that act.²⁶⁶

According to treaty and customary IHL civilians enjoy protection against direct attack “unless and for such time” as they take a direct part in hostilities. This phrase implies that in such cases their protection against direct attacks is temporarily suspended for the duration of each specific act amounting to direct participation in hostilities; they do not however, cease to be civilians. This necessarily entails the so-called “revolving door” phenomenon; civilians lose and regain protection against direct attacks in parallel with the intervals of their involvement in direct participation in hostilities.²⁶⁷ The *Interpretative Guidance* draws a clear distinction in this respect between civilians and members of organised armed groups belonging to a non-state party to an armed conflict. The latter group lose protection against direct attack for the duration of their membership i.e. for as long as they assume their continuous combat function.²⁶⁸

The next section will apply these interpretative guidelines in a peacekeeping context in order to determine whether certain activities undertaken in the defence of the mandate in situation of an armed conflict could qualify as direct participation in hostilities.

4.4.2. Can “defence of the mandate” qualify as direct participation in hostilities?

To answer the question whether “defence of the mandate” qualifies as direct participation in hostilities, this section will examine the MONUSCO’s Intervention Brigade.

²⁶⁶ Ibid 65-66

²⁶⁷ Ibid 70

²⁶⁸ Ibid 71-73

On March 28, 2013, acting on the recommendations of the Secretary-General Ban Ki-moon and in response to the call of the governments in Africa's Great Lakes region, the United Nations Security Council unanimously adopted Resolution 2098 (2013) which extended the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and authorised the creation of an "Intervention Brigade" to conduct offensive operations against armed rebels groups. The Brigade is a "first-ever offensive combat force" intended to carry out targeted operations against 23 March Movement (M23) and other Congolese rebels and foreign armed groups in eastern Democratic Republic of the Congo.²⁶⁹ As stressed in the Resolution, the Intervention Brigade is established within the operation's existing force "on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping".²⁷⁰ The Brigade operates under the direct command of the MONUSCO Force Commander "with the responsibility of neutralizing armed groups (...) and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities".²⁷¹ With reference to Chapter VII of the UN Charter, the Resolution authorises MONUSCO to take *all necessary measures* to perform the mandated tasks, through its military component - its regular forces and its Intervention Brigade as appropriate. Specifically, MONUSCO is authorised, in support of the authorities of DRC and taking full account of the need to protect civilians, to carry out:

"(...) targeted offensive operations through the Intervention Brigade (...) either unilaterally or jointly with the FARDC, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy on UN-support to non-UN forces (HRDDP), to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities"²⁷²

²⁶⁹ Press Release UN Security Council, "'Intervention Brigade' Authorized as Security Council Grants Mandate Renewal," UN Doc. SC/10964, March 28, 2013, available at www.un.org/News/Press/docs/2013/sc10964.doc.htm

²⁷⁰ S/RES/2098 (2013) 28 March 2013, para. 9

²⁷¹ Ibid para. 9

²⁷² Ibid para. 12(b)

There are a few legal issues that arise from the creation of the Intervention Brigade and from its mandate, which are relevant and illustrative in the context of the research question asked in the beginning of this section. The first issue is the status of the Brigade. As explicitly stated, it remains an integral part of the MONUSCO operation formed from its existing forces under the same command and control arrangements. Specifically, it is not meant to be an enforcement measure to operate alongside the existing peacekeeping operation and supportive to it but under command and control of participating states, as it happened in the former Yugoslavia or Somalia.²⁷³ The Resolution 2098 (2013) reaffirms in its preamble “the basic principles of peacekeeping, including consent of the parties, impartiality, and non-use of force, except in self-defence and defence of the mandate” as well as the Security Council’s “strong commitment to the sovereignty, independence, unity and territorial integrity of the DRC” and “the need to respect fully the principles of non-interference, good-neighbourliness and regional cooperation”.²⁷⁴ Given the structural integration of the Brigade with the existing peacekeeping operation as well as the consent of the host state, DRC, to its newly transformed mandate,²⁷⁵ the status of its personnel seems to remain essentially the same as the rest of the mission, that is civilian. As all civilians, they are protected from direct attacks unless and for such time as they take a direct part in hostilities. The mandate adopted under Chapter VII of the UN Charter with the explicit authorisation to take *all necessary means* to neutralise and disarm armed rebel groups through targeted offensive operations “in a robust, highly mobile and versatile manner” is more than plausible to involve the military personnel of the Brigade in the hostilities. The qualification of their actions in fulfilment of such mandate will still depend on the facts on the ground but the analysis of the resolution makes it reasonable to assume that three cumulative conditions as put forth by the ICRC in its *Interpretative Guidance* are likely to be met and such actions would amount to direct participation in hostilities.

²⁷³ UNITAF, IFOR

²⁷⁴ S/RES/2098 (2013) 28 March 2013, Preamble

²⁷⁵ The Minister for Foreign Affairs, Cooperation and La Francophonie of the Democratic Republic of the Congo expressed his gratitude on the behalf of his Government and people for United Nations efforts to help protect their country’s territorial integrity and foster peace and stability over the past 15 years. He said that the Security Council’s “innovative decision” should help the country put a definitive end to the repeated cycles of violence and lead to the “dawning of a new era” of human rights and security for all. See Press Release, UN Security Council, “‘Intervention Brigade’ Authorized as Security Council Grants Mandate Renewal,” UN Doc. SC/10964, March 28, 2013, available at www.un.org/News/Press/docs/2013/sc10964.doc.htm

Firstly, the targeted offensive operations undertaken in order to “neutralize and disarm” armed groups are probable to reach a required threshold of harm by adversely affecting the military operations or military capacity of a party to the conflict. Examples of such harm listed in the *Interpretative Guidance* include: the killing and wounding of military personnel; the causation of physical or functional damage to military objects; sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics or communications. The capturing or otherwise establishing or exercising control over military personnel, objects or territory to the detriment of the opposing party would also adversely affect military operations of that party or its military capacity.²⁷⁶ The resolution 2098 explicitly authorises offensive actions, as opposed to actions taken in self-defence, which if read in line with the usual meaning of the concept of military offensive actions, would include deliberate attacks, conducting ambushes and holding ground against the adversary.²⁷⁷ The term “neutralize” might reasonably be read to mean targeting armed forces with lethal force or at least the power to capture and detain members of the armed groups.²⁷⁸ This interpretation has been confirmed by the actual military operations undertaken by the Brigade, which undoubtedly reached the required threshold of harm.²⁷⁹

With regard to the second condition of direct causation, the collective nature and complexity of contemporary military operations must be taken into account. Not all activities constituting a military operation would, when undertaken in isolation, directly cause the required threshold of harm. As advised by the *Interpretative Guidance*, the standard of direct causation for collective operations should be interpreted to include also these conducts that cause harm only in conjunction with other acts, provided that they all form integral parts of a concrete tactical operation. Examples of such acts are, *inter alia*, the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, or the

²⁷⁶ N Melzer (n 123) 48

²⁷⁷ B Oswald, ‘The Security Council and the Intervention Brigade: Some Legal Issues’ (June 6, 2013) No. 15 ASIL Insights, American Society of International Law 17 available at http://www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues#_ednref7

²⁷⁸ Ibid

²⁷⁹ D Oliver, ‘How M23 was rolled back’, African Defence Review (October 2013) available at: <http://www.africandefence.net/analysis-how-m23-was-rolled-back/>

instruction and assistance given to troops for the execution of a specific military operation.²⁸⁰ In the case of the Intervention Brigade, the required standard of direct causation of harm would therefore be met for all individual conducts constituting integral parts of targeted offensive operations against rebels. That would also include preparatory measures for specific operations even if temporary and geographically distant from them such as equipment, instruction, and transport of personnel; gathering of intelligence; and preparation, transport, and positioning of weapons and equipment.²⁸¹

The third requirement to be satisfied for a specific act to constitute direct participation in hostilities is that it must be undertaken in support of a party to an armed conflict and to the detriment of another.²⁸² The resolution 2098 leaves no doubt that “neutralization” of rebel armed groups through the Brigade is authorised in support of the authorities of the DRC, and it is to be conducted either unilaterally or jointly with the Armed Forces of the Democratic Republic of the Congo (French: Forces Armées de la République Démocratique du Congo (FARDC)) to the obvious detriment of those armed groups.

If all these conditions are met, the actions of the Intervention Brigade will amount to direct participation in hostilities and deprive its members of civilian protection. By virtue of the fulfilment of their mandate, which has a firm legal basis in the resolution of the Security Council, the members of the Brigade will lose protection from direct targeting. While the casus of the Intervention Brigade is particularly illustrative, the same conclusion can be reached for other missions operating under robust and protective mandates. Let us take the example of MONUSCO.

MONUSCO (United Nations Organization Stabilization Mission in the Democratic Republic of the Congo) took over from an earlier UN peacekeeping operation MONUC (United Nations Organization Mission in Democratic Republic of the Congo) on 1 July 2010. It was authorised to use *all necessary means* to carry out its mandate relating, *inter alia*, to the protection of civilians under imminent threat of

²⁸⁰ N Melzer (n 123) 54-55

²⁸¹ Ibid 66

²⁸² Ibid 58

physical violence and to support the government of the DRC in its stabilisation and peace consolidation efforts.²⁸³ As discussed in the preceding chapter, the phrase “all necessary means” is a shibboleth for the use of force beyond self-defence, and depending on the interpretation of the mandated tasks and circumstances on the ground it might involve offensive and robust use of such force. Specifically, MONUSCO has been mandated within the limits of its capacity and in the areas of deployment to:

“Ensure the effective protection of civilians, including humanitarian personnel and human rights defenders, under imminent threat of physical violence, in particular violence emanating from any of the parties engaged in the conflict”²⁸⁴

This sufficiently flexible formulation could cover offensive operations aimed at destroying military capacity of rebels so to render them incapable of launching attacks against the civilian population. Arguably, the protection would only be “effective” if the attacks were thwarted in advance and prevented all together. However, although the requirements of the threshold of harm and direct causation could be met, the belligerent nexus in this specific case is questionable. While such operations would be detrimental to one party to the conflict (rebels), they would still be primarily undertaken in order to protect the civilian population from abuses and only indirectly in support of the DRC government, or more precisely in support of the government’s own efforts to protect its citizens.²⁸⁵ A more straightforward example relates to MONUSCO’s other mandated task to:

“Support the efforts of the Government of the Democratic Republic of the Congo to bring the ongoing military operations against the FDLR, the Lord’s Resistance Army (LRA) and other armed groups, to a completion, in compliance with international humanitarian, human rights and refugee law and the need to protect civilians, including through the support of the FARDC in jointly planned operations, as set out in paragraphs 21, 22, 23 and 32 of resolution 1906 (2009)”²⁸⁶

Also in this case, the language of the mandate allows for a flexible approach to the range of options of how to fulfil this task and might as well include offensive

²⁸³ The original mandate of MONUSCO was established by Security Council resolution 1925 of 28 May 2010, and further detailed in resolution 2053 adopted by the Security Council on 27 June 2012.

²⁸⁴ S/RES/1925 (2010) 28 May 2010, para. 12(a)

²⁸⁵ Ibid para. 12(c)

²⁸⁶ Ibid para. 12(h)

military operations undertaken alongside the governmental forces against the organised armed groups. If this option was chosen, such operations would be likely to meet all three conditions for direct participation in hostilities, including the belligerent nexus as clearly implied in the paragraph cited above. The legal qualification of such scenario would therefore be identical to that of the Intervention Brigade - the peacekeepers participating in such operations in the fulfilment of their mandate would be deprived of their civilian protection. If supporting the government is limited to logistics, assisting and training of its armed forces in general, the causal link with the harm inflicted on the adversary will normally remain indirect, unless where such assistance and training is specifically conducted for the execution of a specific military operation as its integral part, it would then qualify as direct participation in hostilities.²⁸⁷

These examples demonstrate that Chapter VII robust mandates authorising the missions to use force beyond self-defence to protect civilians and to help stabilise and extend state authority in an on-going non-international armed conflict are likely to involve peacekeeping troops in direct participation in the hostilities and entail their loss of protection from attack, even in the absence of any specially established intervention brigade. In fact, the involvement of UN peacekeeping missions in the offensive military operations against armed groups is not new and has already seriously compromised any pretence/claim of impartiality and allowed the use of force beyond self-defence.²⁸⁸ That calls into question the utility of these principles as parameters defining peacekeeping. It also entails serious consequences for peacekeepers under international humanitarian law. Although their actions derive their legal authority from the resolution of the Security Council, the fact that they are legal under *jus ad bellum* does not protect peacekeepers from direct attacks under *jus in bello*. Their civilian protection against direct attacks is governed by the same rules and standards of the international law of armed conflict that apply to any other civilians. As has been proven in proceeding sections of this chapter, IHL is fully and equally applicable to peacekeeping troops through their national states and also due to customary obligations of the United Nations. As has also been discussed in the

²⁸⁷ N Melzer (n 123) 53

²⁸⁸ Examples of MONUC and MONUSCO; see also J Labbé 'Is MONUSCO lost in translation?' (6 September 2013) Global Observatory, International Peace Institute available at <http://www.theglobalobservatory.org/analysis/573-is-monusco-lost-in-translation-.html>

previous chapter, the defence of the mandate does not extend this protection since it does not qualify as individual self-defence. Under IHL, peacekeeping forces lose the protection from direct attacks in the fulfilment of their mandate if and for as long as it amounts to direct participation in hostilities. If these conditions are met, such attacks will not constitute war crimes under Article 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of International Criminal Court.

Apart from concerns about this unresolved friction between *jus ad bellum* and *jus in bello*, which is explored in greater detail in the next section, robust mandates and involvement of peacekeeping forces in combat activities give rise to further problems under *jus in bello*. The most serious one concerns the principle of distinction and is two-fold. Firstly, the example of the Intervention Brigade and maybe generally peacekeeping forces operating under robust mandates involving offensive combat operations, seriously undermine the conceptual integrity of the categories of persons under international humanitarian law. Such peacekeepers are considered civilians who lose protection only for the duration of the specific acts constituting direct participation in hostilities, even though it might be argued, at least in the case of the Intervention Brigade, that their actions in the fulfilment of their mandate to “neutralize and disarm rebel armed groups” amount to assuming a continuous combat function. The civilian status provides such military peacekeeping personnel with a significant operational advantage over members of organised armed groups, who can be attacked on a continuous basis due to their membership. The second problem relates to the distinction *per se*. If the Intervention Brigade is again used as an example, the unresolved question is whether and how the members of the Brigade should distinguish themselves from the rest of the MONUSCO peacekeeping force, who is not tasked with “neutralizing and disarming rebel armed groups”, as they wear the same uniforms with the protected UN emblem and operate under the same operational control of the UN Force Commander.

4.5. *Jus ad bellum* v. *jus in bello*

As it has been conclusively shown, peacekeeping forces do not differ in their legal standing from regular national armed forces as far as the application of international

humanitarian law is concerned. The fact that peacekeepers act in fulfilment of the UN mandate makes their actions legal under *jus ad bellum*, yet it does not affect or otherwise modify the applicability of *jus in bello* which is determined by the actual situation on the ground. These two branches of international law operate independently from each other.

The clear separation of *jus ad bellum* from *jus in bello* is relatively recent.²⁸⁹ While the concepts featured in legal debate for centuries, the terms have been used regularly and the conceptual distinction between them has been advocated only since World War II.²⁹⁰ The Charter of the Nuremberg Tribunal confirmed the autonomy of *jus in bello* with regard to *jus ad bellum* by making a distinction between war crimes and crimes against peace.²⁹¹ This distinction was firmly upheld by the practice of military tribunals. In the *Hostages case (USA v. Wilhelm List et al.)* the US Military Tribunal V, citing Lassa Oppenheim, ruled that:

“Whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral states. This is so, even if the declaration of war is ipso facto a violation of international law (...).”²⁹²

This distinction is the converse of the so-called ‘just war’ theory, which subordinates *jus in bello* to *jus ad bellum* considerations.²⁹³ There are major humanitarian and practical reasons for maintaining the distinction between the two regimes. The purpose of IHL is to limit the suffering caused by war and to protect and assist all victims as far as possible regardless of the reasons for, or legality of, resorting to

²⁸⁹ ICRC, ‘IHL and other legal regimes – jus ad bellum and jus in bello’ (International Committee of the Red Cross Publication 2010) available at: <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>

²⁹⁰ The military tribunals established after the World War II were cautious to keep the crimes against peace and war crimes separate. On the emergence of the terms *jus ad bellum* and *jus in bello* see: R Kolb, ‘Origin of the twin terms jus ad bellum/jus in bello’ (1997) 320 *International Review of The Red Cross* 553-562

²⁹¹ Art. 6 of the Charter of the International Military Tribunal (in pursuance of London Agreement of August 8th 1945), available at: <http://avalon.law.yale.edu/imt/imtconst.asp>

²⁹² *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946–April 1949*, Vol. XI ‘The High Command case and the Hostage case’ (Government Printing Office, Washington DC 1949–53) at 1247, available at: http://www.loc.gov/tr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf

²⁹³ R Kolb, (n 290) 523-546

force.²⁹⁴ The practical considerations are equally compelling. Most belligerents are convinced that their cause is just, therefore the only chance that IHL will be respected is to apply it irrespective of which party bears responsibility for the outbreak of the conflict and only if the same rules apply to all.²⁹⁵ Not only does IHL apply independently of the qualification of the conflict under the law governing the use of force,²⁹⁶ the arguments under *jus ad bellum* may not be used to interpret IHL rules.²⁹⁷ What follows is that any military action undertaken within the framework of the conflict can only be judged in the light of IHL.²⁹⁸ On this last issue however, the International Court of Justice could not decide whether self-defence, the most common *jus ad bellum* argument, could be employed to interpret IHL in the extreme case of using nuclear weapons:

“It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;”²⁹⁹

A consequence of the separation of the *jus ad bellum* and *jus in bello* is the equality of belligerents under the latter regime. IHL binds all belligerents regardless of who is

²⁹⁴ M Sassòli, ‘The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?’ in M Schmitt and J Pejic (eds) *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (Martinus Nijhoff Publishers 2007) 245-246; ICRC, “IHL and other legal regimes – jus ad bellum and jus in bello” (ICRC Publication 2010) available at: <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>

²⁹⁵ M Sassòli (n 294) 246

²⁹⁶ A Roberts, ‘The equal application of the laws of war: a principle under pressure’ (2008) Vol. 90 872 *International Review of the Red Cross* 931; J Moussa, ‘Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law’ (2008) Vol. 90 872 *International Review of the Red Cross* 963

²⁹⁷ C Greenwood, ‘The Relationship Between *Ius ad Bellum* and *Ius in Bello*’, 9 *Review of International Studies* (1983) at 221-234; M Sassòli (n 841) 2007) 249-252

²⁹⁸ M Bothe, ‘Terrorism and the Legality of Pre-emptive Force’ (2003) 14 *EJIL* 227, 234

²⁹⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 1996, 226 at para. 105E. For critical comments see e.g.: L Doswald-Beck, ‘International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’ (1997) 37 *IRRC* 35; T Gill, ‘The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction between the *Ius ad Bellum* and *Ius in Bello*’ (1999) 12 *Leiden Journal of International Law* 613-624; Y Dinstein (n 225) 161-162.

the aggressor; all have to comply with the same rules.³⁰⁰ With respect to international armed conflicts this principle is articulated in Common Articles 1 and 2 of the 1949 Geneva Conventions³⁰¹ and in the Preamble to the Additional Protocol I. The latter treaty is especially explicit:

“*Reaffirming* further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict (...).”³⁰²

The principle that all belligerents are bound by international humanitarian norms is upheld also in non-international armed conflicts.³⁰³ Common Article 3 of the Geneva Conventions stipulates that “each Party” to such conflict has to apply its provisions. Although the Additional Protocol II does not contain such express provision, its Article 1 provides that the application of the Protocol II is dependent only on material circumstances linked to the nature of the military operations - the exercise of *de facto* control of part of the territory and the ability of the insurgent party to carry out sustained and concerted military operations and to implement the Protocol. If these conditions are met, the treaty applies regardless of the cause of the conflict. While there is no symmetry between the warring parties in non-international armed conflict due to the lack of the combatant immunity which results in unequal treatment under domestic law, obligations of the parties with regard to the conduct of hostilities as well as certain protections apply equally. *The ICRC IHL Customary*

³⁰⁰ R D Glick, ‘LIP Service to the Laws of War: Humanitarian Law and United Nations Forces’ (1995) Vol. 17 Michigan Journal of International Law 59; L Doswald-Beck (n 299) 53; Y Dinstein (n 225) 156-162; M Sassòli (n 294) 246-248

³⁰¹ The 1949 Geneva Conventions:

Art 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2 In addition to the provisions which shall be implemented in peacetime, 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.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

³⁰² The Preamble to the Additional Protocol I

³⁰³ *Commentary on the Additional Protocols* (n 137) paras. 4442-4444

F Bugnion, *Jus ad Bellum, Jus in Bello and Non-international Armed Conflicts Yearbook of International Humanitarian Law* (vol. VI (T. M. C. Asser Press 2003) 167-198; M Sassòli (n 294) 255-257

Study corroborates that the obligation to respect and ensure respect for international humanitarian law applies to each party in international as well as non-international armed conflicts.³⁰⁴

The principle of equal application of IHL also holds true for UN military operations, whether in enforcement or peacekeeping mode, and this has been confirmed by the UN Secretary-General's Bulletin.³⁰⁵ If UN forces engage in armed conflict, they are bound by international law in the normal way and regardless of whether their mandate authorises "the use of all necessary means" or is a traditional peacekeeping one; IHL applies according to the actual situation on the ground.³⁰⁶ What it all comes down to is that peacekeepers, not originally meant to take part in combat, may become lawful targets by virtue of fulfilling their mandate. The fact that they "defend their mandate/mission" does not grant them any immunity. The emergence of the concept of the defence of the mandate has proven helpful in maintaining the conceptual/theoretical distinction between peacekeeping and enforcement as it explains the use of force beyond self-defence without deconstructing the trinity of peacekeeping principles. Beyond maintaining semantic coherence, "the defence of the mandate" does not extend the protection of peacekeepers under international humanitarian law. What is more, the practice of robust protective mandates additionally exposes them to the risk of becoming directly involved in hostilities and losing civilian protection. This inevitably raises concerns as to whether the adherence to the principles of international humanitarian law interferes with the Organization's ability to maintain or restore the international peace and security.

It also seems that Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute are redundant since peacekeeping personnel are equally protected by a general prohibition to intentionally direct attacks against civilians and civilian objects in

³⁰⁴ Rule 139 of the ICRC Customary Study: *Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.* As explained in the commentary to this rule, the term "armed forces" must be understood in its generic meaning. The rule is supported by state practice and case law. Additionally, it notes that the UN Security Council and General Assembly resolutions on a wide range of conflicts have called on all the parties to implement international humanitarian law (all related practice is referred to in the commentary to the rule).

³⁰⁵ Article 1.1 of the UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law. See: M Sassòli (n 294) 259-260; A Roberts (n 296) 931, 955

³⁰⁶ ICRC/UCIHL Report of the Expert Meeting on Multinational Peace Operations "Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces" (Geneva December 2003) 1

Articles 8(2)(b)(i) and (ii) and 8(2)(e)(i).³⁰⁷ Singling out the particular group of persons and objects under separate provisions of the Rome Statute creates a promise of special protection of peacekeeping missions operating under complex robust mandates in service of the international community, which is not fulfilled.

In connection with special protection, some scholars have advocated the idea of selective applicability of IHL to UN forces or even granting forces acting under the authority of the United Nations immunity from attack in all circumstances. One of the earliest proposals pointing at the distinctive nature of UN military operations came from the American Society of International Law's Committee on the Study of the Legal Problems of the United Nations in the 1950s as part of a general debate on the applicability of IHL to the UN. Without reaching any definite conclusion on the question of applicability, the Committee noted:

“The Committee agrees that the use of force by the United Nations to restrain aggression is of a different nature from war-making by a state. The purposes for which the laws of war were instituted are not entirely the same as the purposes of regulating the use of force by the United Nations. This we may say without deciding whether United Nations enforcement action is war, police enforcement of criminal law, or *sui generis*. In the present circumstances, then, the proper answer would seem to be, for the time being, that the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes (e.g., prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible with its purposes. We think it beyond doubt that the United Nations, representing practically all the nations of the earth, has the right to make such decisions.”³⁰⁸

Sharp went even further when criticising the UN Safety Convention for its limited scope, he proposed a draft additional protocol to the Geneva Conventions that would have established a total immunity of personnel participating in any operation authorised by the competent organ of the UN.³⁰⁹ Tittamore also discussed the possibility of exempting UN forces from some or all IHL norms and pointed at the

³⁰⁷ The new addition could only be seen with regard to protection of civilian objects in non-international armed conflicts as there is no equivalent article to Article 8(2)(b)(ii) of the Rome Statute.

³⁰⁸ W J Bivens (ed), ‘Report of Committee on the Study of the Legal Problems of the United Nations, Should the Laws of War Apply to United Nations Enforcement Action?’ (1952) 46 *American Society of International Law Proceedings* 216, 220. See also: F L Kirgis, Jr. *The American Society of International Law's First Century: 1906-2006* (Martinus Nijhoff Publishers 2006) 225

³⁰⁹ W G Sharp, ‘Protecting the avatars of international peace and security’ (1996) 7 *Duke Journal of International and Comparative Law* 93–183

mechanism of derogation clauses similar to those utilised in human rights treaties and Article 103 of the UN Charter. Article 103 provides:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Shall the Security Council support the idea of enhancing the protection of peacekeeping forces from direct attacks this provision of the Charter gives it such power to override certain obligations/rules flowing from IHL treaties. The Security Council has already used its power to give precedence to the provisions of its binding resolutions over other international obligations.³¹⁰ For instance, it granted a general exemption of limited duration from investigation and prosecution by the ICC to personnel from troop contributing states, who are non-parties to the Rome Statute, taking part in any UN-established or authorised operation;³¹¹ it also modified the law of occupation in respect to the Coalition Provisional Authority in Iraq in 2003.³¹² So far it has not extended the protection of peacekeeping forces from direct attacks beyond what is prescribed by law. In resolution establishing the MONUSCO Intervention Brigade, the Security Council reiterated “its condemnation of any and all attacks against peacekeepers, emphasizing that those responsible for such attacks must be held accountable” and at the same time it prescribed that targeted offensive operations carried out through the Intervention Brigade are “in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy”, thereby leaving the tension unresolved.

Without going into a discussion as to whether the scope of Article 103 of the UN Charter extends only over “international agreements” in the sense of treaties and contracts, or also over customary international law, it is uncontroversial that it does not cover obligations flowing from peremptory norms of general international law

³¹⁰ See generally: A Roberts (n 296) 931, 952

³¹¹ SC Res. 1422 of 12 July 2002, subsequently renewed by SC Res. 1487 of 12 June 2003. The resolution promoted by the US, did not in fact exempt such personnel from IHL obligations but only secured that the enforcement of these obligations should be within national jurisdictions.

³¹² UN SC Res. 1483 of 22 May 2003; for a discussion see: M Zwanenberg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’, *854 International Review of the Red Cross* (2004) 745–768

(*jus cogens*).³¹³ Article 53 of the Vienna Convention states that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. It defines a *jus cogens* norm as “a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted”. A Security Council resolution granting peacekeeping personnel who defend their mandate total immunity from attacks, even when they take direct part in hostilities, would clash with one of the fundamental principles of IHL – the principle of distinction. Since this principle is considered to be a peremptory norm and as declared by the International Court of Justice an “intransgressible principle of customary law”³¹⁴ it is doubtful it could be disregarded. Article 53 of the VCLT further provides that a peremptory norm “can be modified only by a subsequent norm of general international law having the same character” while Article 64 adds that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with it becomes void and terminates. What follows from this is that a new peremptory norm modifying the principle of distinction would have to emerge to grant peacekeepers immunity from attack in all circumstances.

4.6. Discussion and Conclusions

This Chapter was focused on the applicability of international humanitarian law to peacekeeping operations. Firstly, it examined the command and control arrangements in UN-led peacekeeping operations and concluded that the UN and troop contributing countries exercise various degrees of authority over the troops participating in the mission. This multi-layered authority structure results in certain operational limits placed on national contingents as well as determining the law applicable to the conduct of military personnel. In this connection it should also be remarked that any statements about the UN exercising “exclusive command and control” over peacekeeping forces are largely inaccurate. National states retain full as

³¹³ For a comprehensive discussion see: R McLaughlin, “The Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising “All Necessary Means”” (2008) 12(3) *Journal of Conflict and Security Law*, 389

³¹⁴ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 1996, at 257, paras. 78-79

well as tactical command and control over their contributed forces while contingents remain bound by national laws and treaty obligations of their national states, as well as national ROE. The UN exercises operational control over contributed troops, which is unified and centralised, and the chain of command runs from the Security Council to the Secretary-General and then to the Head of Mission. States retain criminal and disciplinary jurisdiction over their contingents, which are bound by IHL through the obligations of their national states. With regard to the question as to whether the UN is also bound by international humanitarian law, the principle of functionality that determines the scope of law applicable to activities carried out by international organisations was recalled. According to this principle, the United Nations is bound by norms of international humanitarian law. Although it cannot become a party to IHL treaties, it is bound by customary law. Additionally, the Secretary-General's *Bulletin* on the observance of international humanitarian law binds members of UN-led operations.

Having established full applicability of IHL to peacekeeping forces their formal status under IHL was examined. It was concluded that peacekeeping personnel are civilians since they do not belong to the armed forces of any party to the conflict. The law of neutrality as well as peacekeeping constitutional principles proved helpful in determining the civilian status of peacekeeping forces. As in case of all civilians and in line with the principle of distinction, their protection from direct attacks would cease "for such time as they take direct part in hostilities". By applying the definition of combatants we conclude that personnel participating in peacekeeping missions do not meet the conditions to qualify as combatants; they therefore must be civilians. This determination constitutes an alternative approach to the one taken by international courts which simply assumed that on the basis of peacekeepers involvement in a mission. Similarly, the status of objects involved in a peacekeeping mission should be determined by reference to the definition of military objectives. If and for such time as such objects do not meet the two-prong test of Article 52(2) of the Additional Protocol I, they are civilian objects protected from direct attacks.

Next, the issue of direct participation in hostilities was examined to determine the circumstances in which peacekeeping personnel could lose protection from targeting. Since there is no legal definition of this concept, the ICRC *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International*

Humanitarian Law was examined and applied in a peacekeeping context. By using the example of the MONUSCO Intervention Brigade it was demonstrated that certain actions undertaken in the defence of the mandate in the situation of an armed conflict could qualify as direct participation in hostilities and deprive peacekeepers of protection from direct attacks. For as long as their engagement amounts to direct participation in hostilities, attacks against them do not constitute war crimes under Article 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of International Criminal Court.

This conclusion creates certain tensions with regard to peacekeeping practice. Although peacekeeping actions undertaken in defence of the mandate are legal under *jus ad bellum*, they might entail serious consequences for peacekeepers under *jus in bello*. While it is not a contradiction, such a result somehow misses the point of protecting peacekeepers whilst on international duty. The chapter ended with a brief overview of options at the disposal of the United Nations to remedy this conundrum and concluded that since the principle of distinction has the status of *jus cogens* norm such options are not readily available.

5. Conclusions

This concluding chapter provides an overview of the thesis, summarises the main findings of the undertaken research and provides the answer to the principal research question. It also reports on the contribution to knowledge that the thesis sought to achieve.

The study was concerned with the anatomy of the war crime of attacking peacekeeping personnel and objects as this crime is coined in the Rome Statute of the International Criminal Court. The Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute criminalise, in international and non-international armed conflicts respectively:

“(...) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”.

The central research question posed was whether or not the war crime of attacking personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations is compatible with the system of international law. As it was noted at the very outset, this crime is a conceptual construct of three different branches of international law: international criminal law, international humanitarian law and UN law. As a criminal offence it must comply with the principles of criminal law especially with the principles of legality and specificity. As a war crime it must satisfy the conditions prescribed by the norms of international humanitarian law. The category of persons and objects protected links it to the legal regime of the United Nations, especially with regard to the interpretation of a phrase “a peacekeeping mission in accordance with the Charter of the United Nations” and principles governing the activities of peacekeeping operations. The overlap of the legal regimes does not necessarily have to be problematic in itself; however, in the case of this particular war crime the objectives and principles of these specialised branches of law as well as different meanings they ascribe to the same concepts

create certain tensions. The first problematic issue identified is the lack of a single definition of peacekeeping. The concept seems to be increasingly flexible, fluid and readily adaptable to the changing parameters of international peace and security, which suits well the political nature and functions of the United Nations but contradicts the criminal law principle of specificity. The principle of specificity requires that criminal rules should be precise and specific as a criminal conviction should never be based upon a norm which does not make it sufficiently clear what conduct engages criminal responsibility. The second problem concerns the exact scope of application of the war crime of attacking peacekeeping missions. In particular, the controversies relate to the applicability of international humanitarian law with regard to the status of peacekeeping personnel and objects and qualifications of their actions undertaken in the fulfilment of their mandate, especially those involving the use of force. The Rome Statute grants to peacekeeping personnel and objects immunity from direct attacks for as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, which accordingly means, for as long as they do not take direct part in hostilities. The use of force in self-defence does not qualify as direct participation in hostilities and does not entail loss of protection. However, the concept of self-defence in a peacekeeping context is said to have been extended to cover not only individual self-defence of peacekeeping personnel but also defence of the mandate. Such broad understanding of self-defence differs from its usual meaning in criminal law and international humanitarian law and it is disputable what standards should be applied to peacekeepers.

The overlap of these legal regimes was recognised within the wider context of the fragmentation of international law. It was noted that this fragmentation is an inherent quality of the international legal system, which is a consequence of it being composed of specialised and relatively independent rule-complexes, legal institutions and fields of legal practice. Geographic and functional differentiation of international law that has led to substantive and institutional fragmentation is additionally intensified by a predominantly horizontal structure of international law. Nevertheless, international law is still a legal system and any normative conflict should be resolved in favour of establishing meaningful relationships between the norms. Resting on this presumption the thesis aimed to analyse critically the

substance of the war crime of attacking UN peacekeeping missions in order either to challenge its theoretical underpinning as being incompatible with the system of international law or to provide more clarification of its applicable scope in relation to the overlapping legal regimes. The theoretical framework applied for this thesis builds upon the concepts of modern legal positivism and International Legal Process. Within this framework, the thesis utilised traditional legal interpretative tools and legal techniques for dealing with normative clashes. It also recognised the evolving dynamics of international law and importance of the context in which legal rules operate. It noted international legal practice and processes and their role in drawing the boundaries of law and determining the content of legal rules, filling normative gaps and managing conflicts.

In order to answer the central research question with the use of the chosen methodology, four core clusters of research sub-questions were considered. The analyses of the issues that they related to were grouped thematically in chapters 2 - 4.

Chapter 2 addressed the personal scope of legal protection under Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute. The primary aim of that chapter was to investigate the meaning of “a peacekeeping mission in accordance with the Charter of the United Nations”. To achieve this it discussed the changing character of peacekeeping operations, the emergence and development of basic norms governing peacekeeping and some legal, political and military difficulties of the application of these norms. It demonstrated that peace operations do not constitute a homogenous category nor is there an official definition of the phenomenon. Peacekeeping is a flexible and evolving concept. However, international law has recognised the existence of *generic* terms with their contents changing over time, responsively to the continuous application and development of law. Therefore, it is accepted that the functional meaning of peacekeeping or a peacekeeping mission could be determined by courts on a case-by-case basis following the evolution of law and legal practice at any given time. Additionally, the lack of a precise definition can be remedied by a reference to the constitutional principles of peacekeeping and these are the principles of consent, impartiality and non-use of force except in self-defence, which also constitute a conceptual distinction between peacekeeping and enforcement. These principles originated from the experiences of the first traditional observer missions

and they continue to apply despite the evolution and transformation of peacekeeping. However, they have also been reinterpreted to include in the category of peacekeeping operations “robust” missions, which use force at the tactical level to defend a peacekeeping mandate. This creates certain tensions which in the long run might require the United Nation to reconsider their meaning and utility.

With regard to the phrase “in accordance with the Charter of the United Nations”, the systemic interpretation of it leads to the conclusion that it stands for the requirement of the compatibility with the Purposes and Principles of the United Nations in general, not just narrowly defined conformity with specified powers or procedures. In this light it encompasses not only missions established and operated by the UN in line with the powers of the Security Council and the General Assembly, but also other peacekeeping missions set up and run by regional organisations provided that they are compatible with the law of the UN Charter. Furthermore, by reference to the preparatory work of the Rome Conference it was established that the 1994 Convention on the Safety of United Nations and Associated Personnel should not be used to interpret the scope of protection under Article 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the International Criminal Court.

Chapter 3 examined the peacekeeping principle of non-use of force except in self-defence. It demonstrated that this principle was redefined on the political and doctrinal level to include the defence of a peacekeeping mandate. The emergence of the new right to use force in defence of the mandate extended the category of peacekeeping operations but it did not impact on the legal meaning and limits of the individual right to self-defence. While the exercise of these two rights might be increasingly interwoven in the operational environment, they rest on two different legal bases. Self-defence is an inherent right of every human being and does not require any authorisation although its limits are prescribed by national law. The use of force to defend the mandate must be seen as a distinct right deriving its legal force from the resolution of the UN Security Council. However, the defence of the mandate has remained problematic as it still has not been properly operationalised and entails a risk of drawing peacekeeping forces into hostilities, especially if the mission is authorised under Chapter VII of the UN Charter to use “all available means”. The chapter concluded that no extension of the right to individual self-

defence has occurred under UN law, hence there is no normative conflict between UN law and criminal law on that issue. What has also been noted in the course of the analysis is the interrupted flow of legal authority from the strategic level of the Security Council binding decision to the tactical level of the performance of tasks by peacekeeping forces on the ground. Although there is no doubt about the binding force of the Security Council resolutions at the international level, giving effect to them by states happens only through application of their national laws and in accordance with their international obligations, which necessarily constrains the will of the Security Council. The positivist perspective on international law does not fully capture the dynamics of the political and institutional environment of peacekeeping.

Since the defence of the mandate is distinct from self-defence, that has a critical impact on the scope of protection of peacekeepers under international humanitarian law and consequently under the Rome Statute. If, in the situation of armed conflict, they use force beyond self-defence to defend their mandate, such actions might deprive them of civilian protection and make them legitimate targets. This issue was examined in the last chapter.

Accordingly, Chapter 4 focused on the applicability of IHL to peacekeeping operations. Firstly, it examined the command and control arrangements in UN-led peacekeeping operations and concluded that the UN and troop contributing countries exercise various degrees of authority over the troops participating in a peacekeeping mission. This multi-layered authority structure results in certain operational limits placed on national contingents and well as determining the law applicable to the conduct of military personnel. In this connection it should also be remarked that any statements about the UN exercising “exclusive command and control” over peacekeeping forces are largely inaccurate. National states retain full as well as tactical command and control over their contributed forces while contingents remain bound by national laws, national ROE and the treaty obligations of their national states, including IHL. Only one level of control – operational control, yet not always command, is delegated to the United Nations.

With regard to the status of peacekeeping personnel and objects under international humanitarian law it was concluded that peacekeepers are civilians since they do not

belong to the armed forces of any party to a conflict. The peacekeeping constitutive principles as well as the law of neutrality in war proved helpful in determining their civilian status. As in the case of all civilians and in line with the principle of distinction, their protection from direct attacks would cease “for such time as they take direct part in hostilities”. Similarly, the status of objects involved in a peacekeeping mission was determined by reference to the definition of military objectives. If and for such time as such objects do not meet the two-prong test of Article 52(2) of the Additional Protocol I, they are civilian objects protected from direct attacks.

The next issue examined in the last chapter was direct participation in hostilities and the circumstances in which peacekeeping personnel could lose protection from targeting. In this connection, the ICRC *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* was examined and applied. By using the example of the MONUSCO Intervention Brigade it was demonstrated that certain actions undertaken in the defence of a peacekeeping mandate in the situation of an armed conflict could qualify as direct participation in hostilities and deprive peacekeepers of protection from direct attacks. For as long as their engagement amounts to direct participation in hostilities, attacks against them do not constitute war crimes under Article 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of International Criminal Court.

Based on the findings in chapters 2-4 and in the light of the adopted methodology the answer to the central research question of this thesis, namely whether or not the war crime of attacking personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations is compatible with the system of international law, is affirmative. Despite the appearance of normative conflict, different legal regimes brought into play by Article 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the International Criminal Court can be reconciled in a manner that does not undermine the legitimacy of this war crime. However, certain tensions remain, especially the expectation of protection that should be afforded to those who risk their lives in the service of the international community.

The contribution to knowledge that this thesis offers relates to critical studies on international criminal law, international humanitarian law and the United Nations system. The thesis clarifies the scope of the application of the war crime of attacking personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations as this war crime is coined in the Rome Statute of the International Criminal Court. This is the first comprehensive analysis of the overlap of legal regimes with respect to this war crime, which can assist courts in application of the rules relating to the protection of peacekeeping missions.

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