

## Articles

# The Protection of Peacekeepers and International Criminal Law: Legal Challenges and Broader Protection

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### Abstract

The concern for the safety and security of personnel involved in peacekeeping missions has grown in the last two decades, mainly because of the increased risks deriving from deployment in volatile environments and mandates comprising multiple tasks. This article provides an overview of the developments of international law regarding the protection of peacekeepers, with a special focus on international criminal law and its role in enhancing the safety of the personnel and objects involved in peacekeeping missions. Indeed, starting in 2008, international and hybrid tribunals have issued their first decisions and judgments against individuals indicted for war crimes and crimes against humanity in connection with attacks against peacekeepers.

After an analysis of the legal regimes established by the 1994 Convention on the Safety of United Nations and Associated Personnel and by international humanitarian law, the article examines the relevant international criminal law provisions and their application and interpretation by the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court. It is argued that the application of the specific war crime of attacking peacekeepers, introduced for the first time in the Rome Statute in 1998, presents particular challenges, but it has also led to the punishment of a broader range of offences against peacekeepers. Furthermore, the application of this crime may contribute to the broadening of the range of punishable offences under the more general war crime of attacking civilians, thus leading to the enhancement of the protection of civilians.

### A. Introduction

On 16 February 2010, seven peacekeepers of UNAMID, the UN/African Union (AU) hybrid mission in Darfur, Sudan, were wounded following an attack by “unidentified gunmen;” less than one month later, four peacekeepers were reported as unaccounted for, probably

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kidnapped, in the same region.<sup>1</sup> Similar security and safety problems have been experienced by peacekeepers in other areas of the world, such as Afghanistan, where five UN staff members were killed and nine injured in October 2009 in an attack by terrorists, and the Democratic Republic of the Congo, where, as recently as 5 April 2010, a UN peacekeeper was killed along with two contractors in an attack by insurgents.<sup>2</sup> These episodes clearly demonstrate the risks that UN personnel involved in peacekeeping missions face daily. As UN Under-Secretary-General for Peacekeeping Operations Alain Le Roy has recently affirmed, “[i]t is clear that over the past few years, UN personnel have often become a target” and “[t]his is a major issue.”<sup>3</sup> Indeed, the evolution that the traditional peacekeeping missions have undergone in the past decades has often led to their deployment in volatile environments and their management of multiple and complex tasks, such as protection of civilians in armed conflicts. As a consequence, peacekeepers face increasing risks in being involved in armed conflicts and being attacked.<sup>4</sup>

This article analyses the protection granted to peacekeepers under international law, focusing in particular on one instrument that has been increasingly used to enforce this protection—international criminal law. Recent developments in this field with regard to the protection of peacekeepers are examined, and especially the establishment of the war crime of attacks against personnel and objects involved in peacekeeping missions and its application by international and hybrid tribunals. First, the legal regimes applicable to peacekeepers—the 1994 Convention on the Safety of United Nations and Associated Personnel (Safety Convention) and international humanitarian law (IHL)—are briefly analyzed;<sup>5</sup> second, attention is devoted to the relevant international criminal law

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<sup>1</sup> Reuters, *UN Calls on Sudan to Probe Attack on Peacekeepers*, 17 February 2010, available at: <http://www.alertnet.org/thenews/newsdesk/N17129558.htm>, last accessed 15 June 2010. BBC News, *Four Darfur Peacekeepers Kidnapped*, 14 April 2010, available at: <http://news.bbc.co.uk/2/hi/africa/8621060.stm>, last accessed 15 June 2010. The toll of peacekeepers killed in Darfur “due to direct acts of violence since the beginning of 2008” until the end of 2009 was 22. PEACE AND SECURITY SECTION OF THE UNITED NATIONS – DEPARTMENT OF PUBLIC INFORMATION, UNITED NATIONS PEACE OPERATIONS 2009: YEAR IN REVIEW 15 (2010).

<sup>2</sup> *Id.*, 14; Katrina Manson, *Fighters Kill U.N. Peacekeeper in North Congo Attack*, available at: <http://www.reuters.com/article/idUSTRE63315D20100404>, last accessed 15 June 2010.

<sup>3</sup> PEACE AND SECURITY SECTION OF THE UNITED NATIONS – DEPARTMENT OF PUBLIC INFORMATION (note 1), 7. On the issue of safety and security of staff and how this can affect the effectiveness of missions, see also, for example, *Global Field Support Strategy: Report of the Secretary-General*, UN Doc. A/64/633 (2010), para. 8.

<sup>4</sup> See, for example, ALEX J. BELLAMY, PAUL WILLIAMS, AND STUART GRIFFIN, *UNDERSTANDING PEACEKEEPING* (2004); MICHAEL W. DOYLE AND NICHOLAS SAMBANIS, *MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS* (2006).

<sup>5</sup> Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, UNTS, 2051, 391. 88 states are parties to the Convention as of 17 February 2010. On 8 December 2005, the General Assembly through its resolution 60/42 adopted the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, which has not yet entered into force. Article 2 of the Protocol extends the application of the Convention to “all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of: (a) Delivering humanitarian, political or development assistance in peacebuilding, or (b)

provisions and their application and interpretation by the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the International Criminal Court (ICC). In the article it is argued that the application of the war crime of attacking peacekeepers presents particular challenges, such as the classification of a mission as a peacekeeping one and the qualification of peacekeepers under IHL, but that it has also led to the punishment of a broader range of offences against peacekeepers and may contribute to the broadening of the range of punishable offences under the more general war crime of attacking civilians, thus leading to the enhancement of the protection of civilians.

## **B. Protecting Peacekeepers: The Safety Convention and International Humanitarian Law**

Following the increase in the number of peacekeeping missions after the end of the Cold War and the parallel increase in the number of attacks against peacekeepers, the international community realized that peacekeepers were not sufficiently protected. As a consequence, initiatives were taken to remedy this situation.

### *1. The Safety Convention*

A first important step taken to guarantee the safety of peacekeepers is the 1994 Safety Convention, which entered into force on 15 January 1999. Article 7 of the Convention states that “United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate” and that “States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel.” In particular, Article 9 provides a list of “crimes against United Nations and associated personnel” that includes, if intentionally committed, “murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel” and “violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty.” The Convention not only requires states parties to criminalize these conducts, but also requires each state party to either prosecute or extradite any alleged offender found within its territory.<sup>6</sup>

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Delivering emergency humanitarian assistance.” These operations are otherwise covered by the Convention only if “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” (Article 1(c)(2)).

<sup>6</sup> See, *Id.* Articles 9-19. On the regime of universal jurisdiction, see, for example, Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 621, 626-628 (1995).

Pursuant to Article 2(2), the Safety Convention does not apply to UN operations which are “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.”<sup>7</sup> Also, a saving clause guarantees the continuous applicability of IHL and international human rights law to UN and associated personnel.<sup>8</sup> Indeed, it is now widely recognized that IHL can be applied to peacekeeping missions.<sup>9</sup>

## *II. What Protections are there for Peacekeepers under IHL?*

In peacetime peacekeepers are protected by the customary law and the treaty law on privileges and immunities of agents of international organizations, including the Safety Convention.<sup>10</sup> On the other hand, in case they are deployed in an area where an armed conflict is taking place, peacekeepers may be the addressees of norms of IHL, even if they do not take part in the conflict. Different scenarios can occur, depending on the nature of the conflict and on whether peacekeepers engage in it.

### 1. Peacekeepers as Civilians

The qualification of peacekeepers under IHL in case they are caught in an armed conflict but do not participate in it has been an object of debate among scholars. While some authors have argued that if the military components of a mission get caught in an armed conflict of an international character (but do not take part in it), “they have, although they may be military personnel, the status of civilians”,<sup>11</sup> other scholars have affirmed that

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<sup>7</sup> *Id.* Article 2(2).

<sup>8</sup> See, *Id.* Article 20(a).

<sup>9</sup> See, for example, ROBERT KOLB, GABRIELE PORRETTO, AND SYLVAIN VITE, *L'APPLICATION DU DROIT INTERNATIONAL HUMANITAIRE ET DES DROITS DE L'HOMME AUX ORGANISATIONS INTERNATIONALES: FORCES DE PAIX ET ADMINISTRATIONS CIVILES TRANSITOIRES* 121-129 (2005). For an analysis of relevant state practice and UN practice, see MARTEN ZWANENBURG, *ACCOUNTABILITY OF PEACE SUPPORT OPERATIONS*, 161-179 (2005).

<sup>10</sup> See, KOLB, PORRETTO, AND VITE, (note 9), 182; ROBERT KOLB, *DROIT HUMANITAIRE ET OPERATIONS DE PAIX INTERNATIONALES: LES MODALITES D'APPLICATION DU DROIT INTERNATIONAL HUMANITAIRE DANS LES OPERATIONS DE MAINTIEN OU DE RETABLISSEMENT DE LA PAIX AUXQUELLES CONCOURET UNE ORGANISATION INTERNATIONALE (EN PARTICULIER LES NATIONS UNIES)* 44 (2006). Other relevant conventions are: Convention on the Privileges and Immunities of the United Nations, 13 February 1946, UNTS, vol. 1, 15; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, UNTS, vol. 1035, 167; International Convention against the Taking of Hostages, 17 December 1979, UNTS, vol. 1316, 205.

<sup>11</sup> Michael Bothe, *War Crimes*, in: *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, Vol. I (Antonio Cassese, Paola Gaeta, and John R. W. D. Jones eds., 2002), 411. See also OLA ENGDAL, *PROTECTION OF*

peacekeepers cannot be protected as civilians, since they are members of armed forces,<sup>12</sup> but nevertheless they are entitled to protection equivalent to that accorded to civilians.<sup>13</sup> It seems correct to affirm that peacekeepers can be classified as civilians, since, pursuant to Article 50 of Additional Protocol I, a civilian is any person who does not belong to the categories of prisoners of war or of armed forces of a party to the conflict. Therefore, peacekeepers, belonging to neither of the two categories, may be classified as civilians, despite the fact that they are members of armed forces. Moreover, peacekeepers may well be protected persons under Geneva Convention IV,<sup>14</sup> unless they are nationals of a neutral or co-belligerent state that has “normal diplomatic representation in the State in whose hands they are.”<sup>15</sup> The UN Secretary-General has classified peacekeepers as “a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection.”<sup>16</sup> As far as the civilian component of a peacekeeping mission is concerned, the personnel will undoubtedly be protected as civilians, as long as they do not take active part in hostilities.<sup>17</sup>

In case members of a peacekeeping mission are caught in a non-international armed conflict, both military and civilian personnel will qualify as “persons taking no active part in the hostilities” under Article 3 common to the four Geneva Conventions and, accordingly, they will be entitled to the guarantees envisaged by this provision, including humane

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PERSONNEL IN PEACE OPERATIONS: THE ROLE OF THE ‘SAFETY CONVENTION’ AGAINST THE BACKGROUND OF GENERAL INTERNATIONAL LAW 93 (2007).

<sup>12</sup> See, KOLB, PORRETTO, AND VITÉ (note 9), 182.

<sup>13</sup> See, *Id.*; ERIC DAVID, *PRINCIPES DE DROIT DES CONFLITS ARMÉS* 282 (4th ed., 2008). The study *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* published by the International Committee of the Red Cross (ICRC) in 2005 states that “[s]tate practice treats peacekeeping forces, which are usually professional soldiers, as civilians” (JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I: RULES 112* (2005). Emphasis added). These authors have proposed two sources of protection. Some have affirmed that the peacekeepers are still protected by the law applicable in peacetime (see KOLB, PORRETTO, AND VITÉ (note 9), 182; KOLB (note 10), 44), while others have argued that they are protected under IHL, in the sense that Article 37(1)(d) of Additional Protocol I, prohibiting 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,” would imply some kind of protected status for UN personnel (Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 *DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW* 185, 189-190 (1996)). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, UNTS, vol. 1125, 3 [hereinafter API].

<sup>14</sup> Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS, vol. 75, 287 [hereinafter GCIV].

<sup>15</sup> Article 4 GCIV.

<sup>16</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), para. 16.

<sup>17</sup> See, for example, GREENWOOD (note 13), at 190.

treatment, the prohibition of violence to life and person, and the prohibition of taking of hostages.<sup>18</sup> In sum, peacekeepers caught in an armed conflict of an international or non-international character and not taking part in it deserve to be protected as civilians under IHL and thus to be protected from attack.<sup>19</sup>

## 2. Peacekeepers as Combatants

If peacekeepers become involved in an armed conflict and take part in it, they will qualify as combatants under IHL and will be subject to the relevant IHL provisions.<sup>20</sup> This is true not only for enforcement actions authorized by the Security Council under Chapter VII, as it is envisaged by Article 2(2) of the Safety Convention, but also for peacekeeping operations authorized under Chapter VI, in case peacekeepers become involved in an armed conflict. Indeed, the application of IHL depends on the factual existence of an armed conflict, not on the legal qualification of the mission pursuant to the mandate established by the Security Council.<sup>21</sup> Civilian personnel of the peacekeeping mission, like civilians in general, may be the object of attack as long as they take direct part in hostilities.<sup>22</sup>

### *III. Applying IHL to Peacekeepers: What Limits for Self-Defence?*

A particularly problematic aspect that may emerge when applying IHL to peacekeepers is the identification of the threshold for applying IHL. This threshold is crucial, since it determines the rights and obligations applicable to peacekeepers and thus also the extent to which they are protected and attacks against them are criminalized and subject to prosecution.

In particular, determining the existence of an armed conflict involving peacekeepers, and thus the applicability of IHL, is made particularly complex by the broad meaning that the

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<sup>18</sup> See, *id.*, 191. The author also adds that “it is arguable that the guarantees in Articles 4 and 5 of [Additional Protocol II] are declarations of customary law”. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, UNTS, 1125, 609 [hereinafter APII].

<sup>19</sup> See, ENGDahl (note 11), 117. See also HENCKAERTS AND DOSWALD-BECK (note 13), 112.

<sup>20</sup> The term “combatant” is used here because the author shares the view that the engagement of peacekeepers in an armed conflict internationalizes it.

<sup>21</sup> See, for example, GREENWOOD (note 13), 189; KOLB (note 10), 40-41; Marco Sassoli, *International Humanitarian Law and Peace Operations, Scope of Application Ratione Materiae*, in INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND PEACE OPERATIONS: PROCEEDINGS OF THE 31ST ROUND TABLE ON CURRENT PROBLEMS OF INTERNATIONAL HUMANITARIAN LAW, SANREMO, 4-6 SEPTEMBER 2008, 100, 104-106 (Gian Luca Beruto ed., 2009).

<sup>22</sup> See, Article 51(3) API.

concept of “self-defence” in peacekeeping operations has acquired over time. Commentators widely agree that the use of force by peacekeepers in self-defence does not transform them into combatants, and thus they do not lose the protection to which they are entitled under customary international law and under the Safety Convention.<sup>23</sup> However, the meaning of self-defence has been broadened by the Security Council’s resolutions establishing the mandate of peacekeeping missions, so that it has often encompassed the use of force by peacekeepers to defend not only themselves and civilians under imminent threat of attack, but also the possibility to carry out their mandate.<sup>24</sup> It is arguable, as some commentators have submitted, that “personnel involved in peacekeeping missions are entitled to *self-defence* to the extent protected persons are permitted to use self-defence under humanitarian law without forgoing the protection they are entitled to as civilians.”<sup>25</sup> Therefore, the use of force to defend the mission’s mandate arguably does not amount to self-defence under IHL, which is limited to “individual self-defence or defence of others against violence prohibited under IHL,” as for example “the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers,” always considering that the use of force must be “necessary and proportionate.”<sup>26</sup>

Another possible controversial issue is the classification of peacekeepers caught in an armed conflict, in case they are authorized to use force beyond self-defence in the traditional sense, but they have actually not done so and thus have not become involved in the conflict. On the one hand, the application of IHL depends on factual circumstances;<sup>27</sup> on the other, the parties to the conflict may not perceive peacekeepers as impartial and thus entitled to protection. The problem should be overcome in case peacekeepers are deployed with the consent of the parties to the conflict. On the contrary, if peacekeepers

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<sup>23</sup> See, for example, KOLB (note 10), 41; BLOOM (note 6), 625; GREENWOOD (note 13), 198; Michael Cottier, *Article 8 para. 2 (b) (iii)*, in: COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER’S NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 2nd ed., 2008) 336. On the other hand, Kittichaisaree makes reference to Section 1.1 of the Secretary-General’s Bulletin: Observance by United Nations forces of international humanitarian law of 6 August 1999 (UN Doc. ST/SGB/1999/13) and he affirms that “the UN itself officially recognizes as ‘combatants’ UN forces engaged in situations of armed conflict, including those engaged in enforcement actions or those using force in self-defence during peace-keeping operations.” KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 161 (2001).

<sup>24</sup> On this evolution, see TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS (2002).

<sup>25</sup> COTTIER (note 23), 336. For a less strict interpretation, see ENGDAHL (note 11), 98 and 103.

<sup>26</sup> NIELS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 61 (2009).

<sup>27</sup> See, for example, KOLB (note 10), 45; Antoine Bouvier, “*Convention on the Safety of United Nations and Associated Personnel*”: *Presentation and Analysis*, 35 INTERNATIONAL REVIEW OF THE RED CROSS 638, 652 (1995).

are deployed without consent, it is arguable that they are conducting an enforcement mission and should therefore not be classified as civilians.<sup>28</sup>

### C. International Criminal Law and the Crime of Attacking Peacekeepers

As seen from above, international law, in particular the Safety Convention and IHL, provides different levels of protection for peacekeepers, depending on the scenario in which they operate and on their behavior in this scenario. Moreover, the effectiveness of the protection granted to the personnel of UN peacekeeping missions must be evaluated in terms of the enforcement of the relevant provisions. In other words, it is necessary to consider what mechanisms are in place to react to a violation of the prohibition on attacking peacekeepers. As already mentioned, the Safety Convention requires state parties to criminalize and prosecute attacks against peacekeepers under national law. In addition to this, other instruments have been developed in order to provide for the criminalization and prosecution of this conduct at the international level.

Various acts punishable as crimes against humanity and/or war crimes under international criminal law can become relevant for the protection of peacekeepers, depending on the circumstances. In the case of crimes against humanity, certain conducts (such as murder, extermination, torture) are criminalized because they are committed as part of a widespread or systematic attack against a civilian population.<sup>29</sup> Therefore, these crimes are committed against a civilian population and “apply regardless of the presence of an armed conflict.”<sup>30</sup> In the case of war crimes, which are crimes committed in the context of an armed conflict and associated with the conflict, they are violations of IHL criminalized under treaty or customary international law. Examples of war crimes include the wilful killing or torture of prisoners of war, wounded or sick soldiers, and persons protected

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<sup>28</sup> Further complications may then derive from the enhancement of the mandate of a peacekeeping mission after its deployment, which may lead to the loss of consent from the parties. Another problematic aspect in the application of IHL to peacekeepers regards the relationship between the Safety Convention and IHL, in the sense that different interpretations of article 2(2) of the Convention have been proposed and while some authors have argued that in case of engagement of peacekeepers in armed conflict IHL (and only IHL) should apply; others have affirmed that in case of non-international armed conflict both the Safety Convention and IHL would be applicable. The present author shares the first point of view. See, on the one hand, BOUVIER (note 27), 661-662; SASSOLI (note 21), 102; Jakob Kellenberger, *Keynote Address*, in INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND PEACE OPERATIONS: PROCEEDINGS OF THE 31ST ROUND TABLE ON CURRENT PROBLEMS OF INTERNATIONAL HUMANITARIAN LAW, SANREMO, 4-6 SEPTEMBER 2008, 32, 36 (Gian Luca Beruto ed. 2009). On the other hand, see ENGDahl (note 11), 238; GREENWOOD (note 13), 199.

<sup>29</sup> See, for example, Rome Statute of the International Criminal Court, 17 July 1998, Article 7, UNTS, vol. 2187, 3 [hereinafter ICCSt.]. On crimes against humanity, see, for example, Roger S. Clark, *Crimes Against Humanity and the Rome Statute of the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY, 75 (Mauro Politi and Giuseppe Nesi eds., 2001).

<sup>30</sup> GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 219 (2005).



under the fourth Geneva Convention, and the intentional direction of an attack against the civilian population.

In the category “other serious violations of international humanitarian law,” the ICC Statute also comprises for the first time a specific provision envisioning for both international and non-international armed conflicts: the war crime of “[i]ntentionally 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.”<sup>31</sup> The offence is clearly based on Articles 7 and 9 of the Safety Convention, but the conducts are criminalized as a war crime, a violation of IHL.<sup>32</sup> A provision identical to that of the ICC Statute, but limited to non-international armed conflict, is also contained in the SCSL Statute.<sup>33</sup>

Although at first sight it may appear that that this new international crime covers only conducts already covered by the provisions sanctioning attacks against civilians, it is arguable that this specific offence may cover different conducts and might also influence the interpretation of the offence of attacking civilians. Given that this specific war crime is clearly limited in its application to personnel and objects as long as they are entitled to the protection that is guaranteed to civilians and civilian objects under IHL, it has been affirmed that it does not cover anything that would not be punishable already under the crimes of intentionally directing attacks against civilians and civilian objects, that are explicitly provided both in the ICC Statute and in the SCSL Statute.<sup>34</sup> Therefore, it has been argued both that the “offense embodies customary international law” and that its insertion in the ICC Statute has mainly a symbolic value, in the sense that it “emphasizes the

<sup>31</sup> Articles 8(2)(b)(iii) and 8(2)(e)(iii) ICCSt.

<sup>32</sup> COTTIER (note 23), 330-331; BOTHE (note 11), 410-411; KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 154-155 (2003).

<sup>33</sup> See, Article 4(b) Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Freetown, 16 January 2002 [hereinafter SCSLSt.]. This hybrid Court was created through the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Freetown, 16 January 2002, available at: <http://www.scs-sl.org/LinkClick.aspx?fileticket=CLK1rMQtCHg%3d&tabid=176>, last accessed 15 June 2010.

<sup>34</sup> See, for example, Daniel Franck, *Article 8(2)(b)(iii)—Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission*, in: THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy S. Lee ed., 2001), 145; KITTICHAISAREE (note 23), 160; WERLE (note 30), 381; COTTIER (note 23), 330; BOTHE (note 11), 411; Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), para. 16. For the war crimes of attacking civilians and civilian objects, see Articles 8(2)(b)(i), 8(2)(b)(ii), and 8(2)(e)(i) ICCSt.; Article 4(a) SCSLSt.

consensus reached in Rome.”<sup>35</sup> However, recalling that several commentators have underlined that peacekeepers are entitled to a protection equivalent to that granted to civilians under IHL but that the peacekeepers are not civilians, the formulation of a specific war crime related to peacekeepers may be useful. Moreover, it is not to be taken for granted that the two crimes will be interpreted in the same way.

As appears from the analysis of the crime and of its constitutive elements, additional difficulties may emerge when applying the crime of attacking personnel and objects involved in a peacekeeping mission. The relevant provisions in the Elements of Crimes of the ICC specify, following very closely the provisions on the crimes of attacking civilians and civilian objects,<sup>36</sup> that the crime of attacking personnel and objects involved in a peacekeeping mission is composed of seven distinct elements and does not require any injury or damage resulting from the conduct:<sup>37</sup>

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/an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>38</sup>

At least three interpretative difficulties may emerge when applying these elements. The solutions chosen for solving these difficulties are crucial, since they may imply that certain

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<sup>35</sup> WERLE (note 30), 380 and FRANCK (note 34), 145. See also KITTICHAISAREE (note 23), 160; COTTIER (note 23), 330. Confirming the customary nature of this offence, see Rule 33 of the study CUSTOMARY INTERNATIONAL HUMANITARIAN LAW published by the ICRC in 2005. HENCKAERTS AND DOSWALD-BECK (note 13), 112.

<sup>36</sup> Article 8(2)(b)(i), Article 8(2)(b)(ii), and Article 8(2)(e)(i), Elements of Crimes.

<sup>37</sup> See, for example, COTTIER (note 23), 338; DÖRMANN (note 32), 153. No result requirement is provided in Article 8(2)(b)(iii) and Article 8(2)(e)(iii), Elements of Crimes of the International Criminal Court, adopted by the Assembly of States Parties 9 September 2002, ICC-ASP/1/3(part II-B) [hereinafter Elements of Crimes].

<sup>38</sup> Article 8(2)(b)(iii) and Article 8(2)(e)(iii), Elements of Crimes.

conducts against personnel and objects involved in a peace operation either are or are not subject to prosecution and punishment. Interpretative challenges are posed by the term 'attack' and the clarification of its meaning, by the definition of 'peacekeeping mission in accordance with the Charter of the United Nations,' and by the identification of situations in which peacekeepers or objects involved in a peacekeeping mission take active part in hostilities, thus losing their protection from attack under IHL.

### *I. The Meaning of Attack*

The term "attack" in Article 8(2)(b)(iii) has been interpreted by some commentators by making explicit reference to the conducts prohibited by Article 9 of the Safety Convention and thus as including "any type of use of force against ... peacekeeping missions."<sup>39</sup> On the other hand, others have argued in favor of a more restrictive interpretation, according to which the term "attack" should be given "a strict Hague law interpretation" or, at the most, should cover "specific offences such as kidnapping of ... peacekeeping personnel," but not "the whole range of (serious) attacks upon the person or liberty."<sup>40</sup> The debate is particularly interesting, since in case of a broad interpretation of the term on the basis of the Safety Convention, the war crime of attacking peacekeepers may comprise situations also not covered by the war crime of attacking civilians, or it may lead to the adoption of a broader meaning of attack also for the war crime of attacking civilians.

In the case of attacks against civilians, "attack" has been traditionally defined by reference to Article 49(1) of Additional Protocol I, as "acts of violence against the adversary, whether in offence or in defence." In this sense, attack has been generally understood as limited to "the use of armed force to carry out a military operation during the course of an armed conflict"<sup>41</sup> and thus as "cover[ing] the rifle shot and the exploding bomb, not the act of taking someone prisoner (even though the latter act may also involve the use of force)."<sup>42</sup> Moreover, as far as international case-law is concerned, the International Criminal Tribunal for the former Yugoslavia (ICTY) has affirmed the existence under international customary law of the war crime of attack against civilians and civilian objects as an autonomous war crime already at the beginning of the 1990s, thus determining its jurisdiction over such

<sup>39</sup> WERLE (note 30), 382: the author explicitly affirms that "[a]ttacks within the meaning of this offence are not only military operations under Article 49(1) of Additional Protocol I." See also BOTHE (note 11), 410; KITTICHAISAREE (note 23), 160-161.

<sup>40</sup> COTTIER (note 23), 337-338. In favor of a restrictive interpretation of "attack", see also ENGDahl (note 11), 302.

<sup>41</sup> WERLE (note 30), 343; Knut Dörmann, *Article 8 para. 2 (b) (i)*, in: COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER'S NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 2nd ed., 2008), 323; DÖRMANN (note 32), 134.

<sup>42</sup> FRITS KALSHOVEN AND LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR. AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 97 (3rd ed., 2001).

crime pursuant to Article 3 of the ICTY Statute.<sup>43</sup> However, the Tribunal has repeatedly stated that this crime requires a result, meaning that “the attacks must be shown to have caused deaths and/or serious bodily injuries or extensive damage to civilian objects.”<sup>44</sup>

Instead, under the ICC Statute, the war crime of attacking civilians, as in the case of the crime of attacking peacekeepers, “does not require any harmful impact on the civilian population or on the individual civilians targeted by the attack, and is committed by the mere launching of the attack against a civilian population or individual civilians not taking direct part in hostilities, who have not fallen yet into the hands of the attacking party.”<sup>45</sup> In this sense, the crime of attacking civilians may comprise a wider range of conducts, possibly including acts similar to those criminalized in Article 9 of the Safety Convention, such as “attack[s] upon the person or liberty” and “violent attack[s] upon the official premises, the private accommodation or the means of transportation [...] likely to endanger [one’s] person or liberty.”<sup>46</sup> In case the Safety Convention is used as an interpretative guidance by the judges called to interpret the crime of attacking peacekeepers,<sup>47</sup> it may contribute to a similar broad interpretation of the crime of attacking civilians.

## II. The Qualification as a Peacekeeping Mission

The identification of the requirements necessary for a peacekeeping mission to be covered by Article 8(2)(b)(iii) is not straightforward. In particular, Cottier has underlined that the expansion of the concept of self-defence to include also the use of armed force “to defend property or ensure the fulfillment of the mandate ... goes beyond the traditional core tasks

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<sup>43</sup> ICTY Trial Chamber, *The Prosecutor v. Pavle Strugar, Miodrag Jokić and others*, Decision on Defence Preliminary Motion Challenging Jurisdiction of 7 June 2002 (IT-01-42-PT), paragraphs 17-23. See, Updated Statute of the International Criminal Tribunal for the former Yugoslavia, September 2009, available at: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf), last accessed 15 June 2010.

<sup>44</sup> ICTY Appeals Chamber, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Judgment of 17 December 2004 (IT-95-14/2-A), paragraphs 55-68 [hereinafter *Kordić Appeal Judgment*].

<sup>45</sup> ICC Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga of 5 November 2007 (ICC-01/04-01/07-55), para. 37. See also ICC Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga*, Decision on the confirmation of charges of 30 September 2008 (ICC-01/04-01/07-717), paragraphs 264-274. On the absence of any result requirement, see, Article 8(2)(b)(i), Article 8(2)(b)(ii), and Article 8(2)(e)(i), Elements of Crimes.

<sup>46</sup> Emphasis added. See, ENGD AHL (note 11), 302.

<sup>47</sup> It is arguable that the Safety Convention may be used as an interpretative guidance, since it is clear from the *travaux préparatoires* of the Statute that the Convention was the source of inspiration for the crime of attacking peacekeepers. See the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN Doc. A/CONF.183/2/Add.1 (1998), 28. See also COTTIER (note 23), 330.

of peacekeeping missions” and “[i]t is uncertain whether personnel and objects of such missions should also be subsumed under the term “peacekeeping” in article 8 para. 2 (b) (iii).”<sup>48</sup> Another commentator has submitted that this provision “refers, by implication,” to the definition of “United Nations operation” contained in the Safety Convention, thus comprising “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” and established for “the purpose of maintaining or restoring international peace and security.”<sup>49</sup> This would seem to exclude operations for the maintenance of international peace and security which are not established and directed by the UN, but for example by a regional organization such as the AU. However, other commentators have convincingly underlined that this is not necessarily the case and that peacekeeping missions established by regional organizations may be covered by the provision of the ICC Statute.<sup>50</sup>

It is arguable that, given that the crime covers peacekeepers that are entitled to the protection afforded to civilians, only peacekeepers whose mandate is limited to the use of force in self-defence as allowed to civilians should be always covered. In case of peacekeepers authorized to use force beyond self-defence, the consent of the parties to the conflict to the deployment and to the specific terms of the mandate, together with the impartial role assigned to the peacekeepers in the mandate, may play a key role in the decision on whether the mission should be classified as one of peacekeeping.

### *III. The Entitlement to Be Protected as Civilians*

The expansion of the meaning of self-defence may also pose problems for the identification of the threshold for direct participation in hostilities and thus the loss of protection from attack. Again, the most reasonable solution seems to be the application of the usual concept of self-defence as applicable to civilians.

Furthermore, it is not completely clear whether in case some members of the mission become combatants, all peacekeepers lose protection. In this regard, Cottier has highlighted that in case a part of the peacekeeping mission engages in hostilities, “the whole peacekeeping operation may not any more be perceived as neutral by combatants of the parties,” underlining that, however, “the perception certainly cannot be the sole

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<sup>48</sup> COTTIER (note 23), 334.

<sup>49</sup> See, Article 1(c) Safety Convention. BOTHE (note 11), 411-412.

<sup>50</sup> See, DÖRMANN (note 32), 156, and COTTIER (note 23), 333-334.

determining factor.”<sup>51</sup> It is arguable that under IHL, the whole military component of a peacekeeping mission would acquire the combatant status if some of them become involved in combat, since the mission would become a party to the conflict and it would be considered as such by the other belligerents. On the other hand, the civilian component of the mission should still retain the protection afforded to civilians under IHL, as long as they do not take direct part in hostilities.<sup>52</sup>

A valuable source for finding an answer to all these questions is provided by the case-law of the judicial bodies called to judge individuals indicted for having committed crimes against peacekeepers, so that an analysis of the judgments issued on the matter to date is necessary.

#### **D. International Crimes against Peacekeepers: The First Decisions and Judgments**

The years 2008 and 2009 witnessed the first decisions and judgments by the ICTR, the SCSL and the ICC regarding individuals indicted for war crimes and crimes against humanity in relation to attacks against peacekeepers.

##### *1. The International Criminal Tribunal for Rwanda*

During the genocide in Rwanda, ten Belgian peacekeepers serving in the United Nations Assistance Mission for Rwanda (UNAMIR) were captured and killed in Kigali on 7 April 1994. In December 2008, Théoneste Bagosora was condemned by the ICTR for these killings.<sup>53</sup> Given that the Statute of the ICTR does not provide for a specific war crime of attacking peacekeepers, Bagosora was condemned by the Trial Chamber I for being responsible as a superior for the deaths of the peacekeepers, amounting both to “murder as a crime against humanity” and to the war crime of “violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.”<sup>54</sup> The Chamber stated that the UNAMIR peacekeepers were part of a neutral mission and were disarmed when they were killed, so that they “could not be considered as

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<sup>51</sup> COTTIER (note 23), 337. As far as the Safety Convention is concerned, it explicitly provides that it ceases to apply (in favor of IHL) to the whole peacekeeping mission (thus including the civilian component) as soon as some of its personnel become combatants. See, for example, BLOOM (note 6), 626; ENGDAHL (note 11), 235 and 237; GREENWOOD (note 13), 202.

<sup>52</sup> In this sense, see ENGDAHL (note 11), 235.

<sup>53</sup> ICTR Trial Chamber I, *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsenyumva*, Judgment and Sentence of 18 December 2008 (ICTR-98-41-T) [hereinafter *Bagosora Judgment*].

<sup>54</sup> *Id.*, paragraphs 2186 and 2245.

combatants.”<sup>55</sup> Furthermore, “[t]he 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.”<sup>56</sup> To determine the neutral nature of the peacekeepers, the Court took into consideration the fact that the mission had been constituted upon request of the parties to the conflict,<sup>57</sup> the relevant resolutions of the Security Council, and UNAMIR’s rules of engagement. In particular, the rules of engagement “stressed the role of UNAMIR as an impartial peacekeeping force under Chapter VI of the UN Charter” and provided that “[t]he use of weapons was not authorized, except for self-defence” and for “prevent[ing] ‘crimes against humanity,’” under what the judges defined “the so-called Chapter Six and a half mandate.”<sup>58</sup> Also, the judges reviewed the practice of the mission up until the day the peacekeepers were killed and they did not highlight any instance of use of armed force by the peacekeepers that might have led to their engagement in conflict and thus to their classification as combatants.<sup>59</sup>

It is interesting to observe that the Chamber, when it examined the count of murder as a crime against humanity, considered that the killed peacekeepers were not combatants and that the use of armed force in self-defence did not change this qualification.<sup>60</sup> However, the judges did not explicitly qualify peacekeepers as civilians; they only stated that the peacekeepers were not combatants and made reference to the judgment of the ICTY Appeals Chamber in the *Martić* case, which had clarified that both civilians and persons *hors de combat* can be victims of an act amounting to a crime against humanity.<sup>61</sup>

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<sup>55</sup> *Id.*, para. 2175.

<sup>56</sup> *Id.*

<sup>57</sup> See, *Id.*, para. 145.

<sup>58</sup> *Id.*, para. 185 and footnote 210.

<sup>59</sup> See, *Id.*, paragraphs 177-193.

<sup>60</sup> *Id.*, para. 2175.

<sup>61</sup> See, ICTY Appeals Chamber, *The Prosecutor v. Milan Martić*, Judgment of 8 October 2008 (IT-95-11-A), para. 313. Cited in *Bagosora* Judgment, footnote 2353. On persons *hors de combat*, see Article 3 GCIV and Article 41(2) API.

## II. *The Special Court for Sierra Leone*

In May 2000 in Sierra Leone, in the context of an ongoing armed conflict,<sup>62</sup> the peacekeepers of the United Nations Mission in Sierra Leone (UNAMSIL) were the target of various attacks. Some peacekeepers were captured by the rebels of the Revolutionary United Front (RUF) and held captive; others were fired at and in some cases injured or killed. The total number of peacekeepers involved in these attacks was higher than 150.<sup>63</sup> While there seems to be no doubt that firing at peacekeepers may amount to an attack, the act of capturing them and holding them captives may be interpreted as not being an attack, if the latter is understood as requiring death or severe injuries. In relation to these episodes, the Trial Chamber I of the SCSL issued its judgment in the *RUF Case* in March 2009 and condemned the three accused for the war crime of attacking peacekeepers and for the murder of UNAMSIL personnel as a war crime.<sup>64</sup>

This was the first instance of application of the war crime of attacking peacekeepers, whose elements were analyzed in depth by the Court.<sup>65</sup> The first important conclusion drawn by the judges is that the “offence of intentionally directing attacks against peacekeepers ... constituted a crime under customary international law which entailed individual criminal responsibility at the time of the alleged attacks.”<sup>66</sup> In addition to this, the Chamber considered that this offence is a mere “particularization of the general and fundamental prohibition in international humanitarian law, in both international and internal conflicts, against attacking civilians and civilian property,”<sup>67</sup> seemingly classifying peacekeepers as civilians.

In addition to the existence of an armed conflict and of a nexus between the armed conflict and the alleged offence, which were both present in the case under scrutiny, the judges provided a list of other elements composing the offence, corresponding in substance to the

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<sup>62</sup> SCSL Trial Chamber I, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case)*, Judgment of 2 March 2009 (SCSL-04-15-T), para. 44 [hereinafter *RUF Judgment*].

<sup>63</sup> See, *Id.*, paragraphs 1784-1883.

<sup>64</sup> The Appeals Chamber of the Court reviewed the judgment in October 2009, but without any significant change in the reasoning on the war crime of attacks against personnel and objects involved in a peacekeeping mission (SCSL Appeals Chamber, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case)*, Judgment of 26 October 2009 (SCSL-04-15-A) [hereinafter *RUF Appeal Judgment*]).

<sup>65</sup> See, *RUF Judgment*, para. 214. None of the accused was indicted for attacks against objects involved in a peacekeeping mission.

<sup>66</sup> *Id.*, para. 68.

<sup>67</sup> *Id.*, para. 218.



elements envisaged in the Elements of Crimes of the ICC.<sup>68</sup> They also specified that ignorance of the law cannot be a valid excuse and that, for the offence to take place, no actual damage following the attack is necessary.<sup>69</sup> This last element is particularly interesting, since the Court chose to follow the approach adopted in the Elements of Crimes of the ICC and to depart from the ICTY jurisprudence on attacks against civilians. One may thus imply that, similarly, the crime of attacking civilians as a crime not requiring any damage resulting from the attack had achieved customary status in 2000.<sup>70</sup>

Regarding the meaning of “attack,” the Chamber first made reference to Additional Protocol I, defining “attack” as “acts of violence,” and it held this meaning to be applicable also to “attack” in Additional Protocol II.<sup>71</sup> Afterwards, when applying this definition to the case under scrutiny, the judges deemed it necessary to find a balance between the need to ensure a wide protection for peacekeepers and the fact that peacekeepers often operate in volatile environments, underlining that “[i]t was never intended to make it an international crime for persons to express objection to or dissatisfaction with the work of peacekeepers.”<sup>72</sup> The judges made reference to the Safety Convention and specified that in order for an act to amount to an “act of violence” against peacekeepers there must be “a forceful interference which endangers the person or impinges on the liberty of the peacekeeper.”<sup>73</sup> The Court determined that all the attacks against peacekeepers that had taken place in May 2000 amounted to attacks for the purpose of the crime in question, including the cases of abduction and detention without physical injuries, since “deprivation of [the peacekeepers’] liberty is itself an act of violence which endured until such time as their release was secured.”<sup>74</sup> This judgment seems thus to be the first one containing a broader interpretation of attack, one that would have not been possible under the ICTY jurisprudence, which requires a serious damage as a result of the attack. While the term has been interpreted here in relation to peacekeepers, by making reference to the Safety Convention as an auxiliary interpretative source, it may well be the case that attack will be interpreted similarly in relation to civilians more in general, since it would be highly

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<sup>68</sup> See, *Id.*, paragraphs 107-109, 990 and 977, and 219. Only the awareness of the perpetrator of factual circumstances establishing the existence of an armed conflict is not explicitly mentioned.

<sup>69</sup> *Id.*, paragraphs 235 and 220.

<sup>70</sup> On the possibility that negotiations of the ICC Elements of Crimes “may be indicative of a progressive development of international law on [the absence of the need for a result element for prosecuting the crimes of unlawful attack on civilians and civilian objects],” *Kordić Appeal Judgment*, footnote 73.

<sup>71</sup> *RUF Judgment*, para. 220.

<sup>72</sup> *Id.*, para. 1889. However, these conducts do not seem to be classifiable as act of violence.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, para. 1891.

questionable to interpret in different ways the same term contained in the definition of two almost identical crimes within a single legal text.

The Chamber identified three principles as “the necessary foundation for a peacekeeping operation: consent of the parties, impartiality, and non-use of force except in self-defence and defence of the mandate.”<sup>75</sup> It also distinguished peacekeeping missions from enforcement missions authorized under Chapter VII of the UN Charter and, having examined the relevant Security Council resolutions, it concluded that UNAMSIL was a peacekeeping mission established under Chapter VI of the UN Charter, being impartial, deployed with the consent of the parties pursuant to the Lomé Agreement, and entitled to use force only “to ensure the security of its personnel and the freedom of movement of its personnel and to protect civilians under threat of physical violence,” as specified by Resolution 1270 of 22 October 1999.

Furthermore, the Chamber interpreted the requirement that peacekeepers must be entitled to the protection afforded to civilians under IHL in the sense that peacekeepers, just like civilians under customary international law (and Additional Protocol II), “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.”<sup>76</sup> In case of direct participation in hostilities, peacekeepers can be targeted for the duration of their participation,<sup>77</sup> while they will not lose protection if they use of force in self-defence.<sup>78</sup> In order to determine whether the personnel and material involved in a peacekeeping mission are entitled to civilian protection, the Chamber affirmed that it is necessary to “consider the totality of the circumstances existing at the time of the alleged offence”:<sup>79</sup> in addition to the mandate provided in the Security Council’s resolutions, the judges noted that UNAMSIL’s Operational Orders and Rules of Engagement confirmed that force could be used only in extremely limited circumstances and as a last resort, so that “the peacekeepers were prohibited from engaging in hostilities,” and that the mission was “not manned, equipped or trained to use force in any but the most limited of circumstances.”<sup>80</sup> Also, the previous practice of UNAMSIL in the districts where the attacks took place “[had been] entirely consistent with its mandate” and even in the course of the attacks, members of UNAMSIL generally tried to reach a peaceful solution, “did not resort to the

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<sup>75</sup> *Id.*, para. 225.

<sup>76</sup> *Id.*, para. 233.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, para. 234.

<sup>80</sup> *Id.*, paragraphs 1908 and 1917. On the Operational Orders and Rules of Engagement, see paragraphs 1912-1916.

use of force,” or resorted to the use of force only in a necessary and proportionate manner, in order to defend themselves.<sup>81</sup> Therefore, UNAMSIL peacekeepers were entitled to the protection accorded to civilians under IHL, since they “were not taking direct part in hostilities against the RUF at the time of the attacks” and “[t]heir use of force in self-defence did not make them combatants.”<sup>82</sup>

The Court underlined that UNAMSIL was authorized under Chapter VII to use force only “to ensure the security of its personnel and the freedom of movement of its personnel and to protect civilians under threat of physical violence” pursuant to paragraph 14 of resolution 1270 and that “[n]o other paragraph of ... the subsequent Resolution 1289 expand[ed] or create[d] additional grounds for the use of force.”<sup>83</sup> However, it is arguable that resolution 1289 further expanded the authorization of peacekeepers to use force, authorizing UNAMSIL “to take the necessary action to fulfill the additional tasks” provided in the resolution, including the provision of security at key locations and at the sites of the disarmament, demobilization and reintegration program, and the facilitation of “the free flow of people, goods and humanitarian assistance along specified thoroughfares.”<sup>84</sup> As a result, the Court classified as a peacekeeping mission a “robust peacekeeping” mission authorized (under Chapter VII) to “act against hostile elements in defence of the mandate and, ‘within the limits of its capacity,’ protect civilians under imminent threat of attack.”<sup>85</sup> Peace enforcement was instead considered to be different from peacekeeping.<sup>86</sup> Even taking into account that UNAMSIL was deployed with the consent of the parties, the subsequent enhancement of its mandate would call for the verification of the existence of ongoing consent.

The judges found that in all the cases under consideration UNAMSIL peacekeepers had been deliberately attacked by the members of the RUF, who had had previous interactions with them and recognized them as peacekeepers, thus knowing or having reason to know of their protected status.<sup>87</sup> Therefore, the Chamber determined that the “Prosecution ha[d] established beyond reasonable doubt that RUF rebels intentionally directed 14 attacks against personnel involved in a peacekeeping mission conducted in accordance

<sup>81</sup> *Id.*, paragraphs 1923, 1930, 1932, and 1935.

<sup>82</sup> *Id.*, para. 1937.

<sup>83</sup> *Id.*, para. 1908.

<sup>84</sup> Security Council Resolution, 1289 of 7 February 2000, para. 10.

<sup>85</sup> Corinna Kuhl, *The Evolution of Peace Operations, from Interposition to Integrated Missions*, in *International Humanitarian Law, Human Rights and Peace Operations: Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008*, 70, 72 (Gian Luca Beruto ed., 2009).

<sup>86</sup> On the difference between robust peacekeeping and peace enforcement, see *Id.*, 74.

<sup>87</sup> See, *RUF Judgment*, paragraphs 1901-1905 and 1942.

with the Charter of the United Nations, between 1 May 2000 and about June 2000".<sup>88</sup> Additionally, the judges determined that the murder of four peacekeepers, amounting to a war crime, had been proven beyond doubt by the prosecution,<sup>89</sup> while the indictments of unlawful killing of peacekeepers as a crime against humanity and of the war crime of hostage-taking were rejected.<sup>90</sup>

### III. The International Criminal Court

Attacks to peacekeepers have been most recently dealt with by the ICC when, on 8 February 2010, the Pre-Trial Chamber I declined to confirm the charges against Bahr Idriss Abu Garda.<sup>91</sup> Abu Garda had been accused of being responsible for the planning and execution of the attack carried out against the peacekeepers of the AU Mission in Sudan (AMIS) on 29 September 2007: on that occasion, the AMIS base in Haskanita, in Darfur, was attacked, leading to the death of 12 peacekeepers, the wounding of others, and to the looting of the base.<sup>92</sup> The judges were not satisfied that there were substantial grounds to believe that the accused could "be held criminally responsible as either a direct or indirect

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<sup>88</sup> *Id.*, para. 1944.

<sup>89</sup> See, *Id.*, para. 1959.

<sup>90</sup> As far as the war crime of hostage-taking is concerned, the Chamber considered that the prosecutor had not proven the necessary element of "the use of a threat against the detainees so as to obtain a concession or gain an advantage" (*Id.*, para. 1969). This conclusion was partly reversed by the Appeals Chamber, which determined (contrary to what had been stated by the Trial Chamber) that "the communication of a threat to a third party is not a requirement of the offence of the taking of hostages," and that "the requisite *mens rea* may arise at a period subsequent to the initial seizure or detention." It thus found that "some RUF fighters committed the offence of the taking of hostages with the intent to condition the safety or release of the captured UNAMSIL personnel on the release of Sankoh," but it stated that "the requisite *mens rea* to be held individually criminally responsible for the offence" had not been proven with reference to the Appellants (*RUF Appeal Judgment*, para. 609). Further developments regarding the taking of peacekeepers as hostages may come from the trial of Radovan Karadžić before the ICTY, since he has been indicted for having "committed in concert with others, planned, instigated, ordered, and/or aided and abetted the taking of UN military observers and peacekeepers as hostages" and thus for the war crime of taking of hostages (ICTY Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, Prosecution's Marked-Up Indictment of 19 October 2009 (IT-95-5/18-PT), paragraphs 83 and ff.). Karadžić's trial commenced on 26 October 2009. Ratko Mladić, facing the same indictment as Karadžić, is still at large (see ICTY, *The Prosecutor v. Ratko Mladić*, Amended Indictment of 10 October 2002 (IT-95-5/18-I), paragraphs 45-47). Similarly, Johnny Paul Koroma, facing indictments before the SCSL similar to those of Sesay, Kallon, and Gbao, is still at large (see, SCSL, *The Prosecutor v. Johnny Paul Koroma*, Indictment of 7 March 2003 (SCSL-2003-03-I), para. 59).

<sup>91</sup> ICC Pre-Trial Chamber I, *The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges – Public Redacted Version of 8 February 2010 (ICC-02/05-02/09-243-Red) [hereinafter *Abu Garda Decision on the Confirmation of Charges*].

<sup>92</sup> See, ICC Office of the Prosecutor, *The Prosecutor v. Bahr Idriss Abu Garda*, Public Redacted Version: Prosecutor's Application under Article 58 filed on 20 November 2008 now filed pursuant to the request of Pre-Trial Chamber I of 7 May 2009, Annex I of 20 May 2009 (ICC-02/05-02/09-16-Anx1).

co-perpetrator for the commission of the crime under article 8(2)(e)(iii) of the Statute.”<sup>93</sup> The Chamber started its analysis from the crime of attack against peacekeepers and objects involved in a peacekeeping mission because the alleged war crimes of violence to life and pillaging had been committed in the context of the attack, so that the determination regarding the attack would have had consequences for the existence of the other offences as well.

After having stated that the alleged crime was of sufficient gravity and thus admissible, the Chamber declared itself satisfied that there were “substantial grounds to believe that, at the time relevant to the charges, an armed conflict not of an international character existed in Darfur.”<sup>94</sup> The judges did not analyze in depth the term “attack,” but simply made reference to Article 49 of Additional Protocol I, defining it as an “act of violence,” and underlined that no material result or harmful impact are required, but “a causal connection between the perpetrator and the attack” must be established.<sup>95</sup> The Chamber was satisfied that there were “substantial grounds to believe that an attack was directed against the MGS [Military Group Site] Haskanita on 29 September 2007.”<sup>96</sup>

“Peacekeeping mission” was interpreted as comprising missions characterized by the three elements of consent of the parties, impartiality, and use of force only in self-defence, as already clarified by the SCSL.<sup>97</sup> The Chamber found substantial grounds to believe that AMIS satisfied the three requirements, since it was deployed with the consent of the parties and, although its original mandate had been enhanced in October 2004 to include “some provision for civilian protection,” this “did not extend to a peace enforcement or disarmament mandate.”<sup>98</sup> It is understandable that the possibility to use force to protect civilians is considered as comprised in the use of force in self-defence. On the other hand, the ICC might encounter more problems in deciding whether to characterize as self-defence, for example, the use of force to “prevent the disruption of [the] implementation [of the Darfur Peace Agreement] and armed attacks,” as provided in the mandate of UNAMID, the AU/UN hybrid operation that has substituted AMIS.<sup>99</sup>

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<sup>93</sup> *Abu Garda* Decision on the Confirmation of Charges, para. 232.

<sup>94</sup> *Id.*, paragraphs 57 and 34.

<sup>95</sup> *Id.*, paragraphs 64-66.

<sup>96</sup> *Id.*, para. 105.

<sup>97</sup> See *Id.*, para. 71.

<sup>98</sup> *Id.*, paragraphs 97-98, 107-109, and 114.

<sup>99</sup> SC Res. 1769 of 31 July 2007, para. 15 (emphasis added).

The fact that AMIS was not directly established by the UN Security Council did not imply that it was not a mission established in accordance with the UN Charter. Indeed, according to the Court, the Organization of the African Union can be classified as pertaining to the category of the regional agencies whose existence is explicitly provided in Article 52(1) of the Charter.<sup>100</sup> Moreover, the deployment of AMIS was repeatedly endorsed by the UN Security Council.<sup>101</sup>

The Chamber clarified that peacekeepers enjoy the protection afforded to civilians under IHL as long as they do not take part in hostilities, and that such protection does not cease if they use force in the exercise of their right of self-defence.<sup>102</sup> The judges found that there were substantial grounds to believe that AMIS peacekeepers were entitled to the protection afforded to civilians under IHL at the time of the attack, since no evidence was adduced “suggesting that AMIS personnel [had taken] any direct part in hostilities or [had] used force beyond self-defence” and “[o]n the contrary, the evidence indicate[d] that, when faced with hostility, AMIS personnel [had] reduced their activities within the area.”<sup>103</sup>

As far as objects involved in a peacekeeping missions are concerned, the Chamber stated that in the context of a non-international armed conflict peacekeeping objects should not be considered as military objects and should be protected, “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.”<sup>104</sup> The defence at the hearing for the confirmation of the charges had argued that the Haskanita base was a legitimate military objective, since the representative of the Government of Sudan who had been hosted in the base had been collecting the intelligence necessary for the army to attack the rebels.<sup>105</sup> According to the defence’s argument, the base lost its protection and the deaths and injuries suffered by AMIS peacekeepers were justified as collateral damage of an attack legitimate under IHL.<sup>106</sup> However, the Pre-Trial Chamber rejected this argument, affirming that the Government representative who had been accused of transmitting intelligence had been removed from

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<sup>100</sup> See, *Abu Garda* Decision on the Confirmation of Charges, para. 121.

<sup>101</sup> See, for example, SC Res. 1556 of 30 July 2004 and SC Res. 1564 of 18 September 2004.

<sup>102</sup> See, *Abu Garda* Decision on the Confirmation of Charges, para. 83.

<sup>103</sup> See, *Id.*, paragraphs 131-132.

<sup>104</sup> *Id.*, para. 89.

<sup>105</sup> See, ICC Pre-Trial Chamber I, *The Prosecutor v. Bahr Idriss Abu Garda*, Transcripts of the Confirmation of Charges Hearing of 28 October 2009 (ICC-02/05-02/09-T-19-ENG ET WT 28-10-2009 1/69 NB PT), 18.

<sup>106</sup> See, *Id.*, 28-29 and 37-38.

the base well before the attack (in the presence of some members of the armed rebel groups) and that no evidence showed either that the flow of intelligence had continued after his removal or that another Government representative was present at the base at the time of the attack.<sup>107</sup> Therefore, the judges found substantial grounds to believe that “at the time of the attack of 29 September 2007, AMIS installations, material, units and vehicles stationed at the MGS Haskanita were entitled to the protection afforded to civilian objects.”<sup>108</sup>

In sum, the Chamber was satisfied that there were substantial grounds to believe that an attack had taken place and that the elements of the crime of attacking personnel or objects involved in a peacekeeping mission were fulfilled. The judges, nonetheless, were not satisfied about the evidence adduced to demonstrate the individual responsibility of the Abu Garda and thus declined to confirm the charges against him.

### E. Conclusion

The concern for the safety and security of personnel involved in peacekeeping missions has grown in the last two decades, mainly because of the increased risks deriving from deployment in volatile environments and mandates comprising multiple tasks, such as the protection of civilians from violence. Various initiatives have thus been adopted at the international level to increase the level of protection for peacekeepers, both in peacetime, with the UN Safety Convention, and in time of armed conflict, with the acknowledgement of the applicability of IHL to peacekeepers. Moreover, instruments have been adopted to criminalize and punish attacks against peacekeepers, both at the national and at the international level.

In particular, individuals have been prosecuted and condemned for attacks against peacekeepers on the basis of provisions contained in the statutes of international and hybrid courts. These courts have also applied in recent judgments and decisions the war crime of attacking personnel and objects involved in a peacekeeping mission in accordance with the UN Charter, that has appeared for the first time in the 1998 ICC Statute and afterwards in the SCSL Statute. The judges have clarified that this war crime applies not only to peacekeeping missions established and conducted under UN control, but also to missions established by regional organizations in accordance with the role assigned to them by the UN Charter. Furthermore, the crime applies to peacekeeping missions, but not to peace enforcement missions, and the category of peacekeeping missions has been interpreted as comprising missions authorized to use force to protect civilians and even,

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<sup>107</sup> See, *Abu Garda* Decision on the Confirmation of Charges, paragraphs 142 and 147-148.

<sup>108</sup> See, *Id.*, para. 149.

which seems to be more questionable, missions authorized to use force to defend their mandate.

Finally, it may be that the most innovative element provided by the application of the war crime of attacking personnel and objects involved in a peacekeeping mission is the broad meaning given to “attack” by the SCSL, which first clarified that (differently from what has been held until now by the ICTY) no serious damage resulting from the attack is necessary, and then took inspiration from the Safety Convention defining attack as any “forceful interference which endangers the person or impinges on the liberty of the peacekeeper.” This definition may be adopted by the ICC for defining attack in relation not only to the war crime of attacking personnel and objects involved in a peacekeeping mission, but also to the war crime of attacking civilians and civilian objects, thus enhancing the protection of civilians.