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When and how do United Nations peacekeepers lose protection under international humanitarian law?

A case study of the Force Interventions Brigade in the Congo

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Table of contents

LIST OF ABBREVIATIONS **1**

1 INTRODUCTION **2**

1.1 The theme and the motivation of the thesis 2
1.2 Method 2
1.2.1 Treaties 3
1.2.2 Customary law 3
1.2.3 Judicial decisions 3
1.2.4 The use of published scholars 4
1.2.5 UN Security Council resolutions and other UN documents 4
1.3 Scope and structure of the thesis 4

2 UNITED NATIONS PEACEKEEPING AND INTERNATIONAL HUMANITARIAN LAW **6**

2.1 UN peacekeeping 6
2.1.1 The principles of peace keeping 6
2.1.2 Defining UN peacekeeping operations 7
2.2 The evolution of the UN's standpoint 9
2.2.1 UN Secretary-General's Bulletin: Observances by the UN Forces of International Humanitarian Law 11
2.2.2 The Capstone Doctrine 13
2.2.3 High-Level Independent Panel on Peace Operations Report 14
2.2.4 The Cruz Report 15

3 PEACEKEEPING IN THE DEMOCRATIC REPUBLIC OF CONGO **17**

3.1 Brief history of UN peacekeeping in Congo 17
3.1.1 United Nations Organization in the Congo (ONUC) 1960-64 17
3.1.2 United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) 1999-2010 18
3.1.3 United Nations Organization Stabilization Mission in the DR Congo (MONUSCO) 2010- present 20
3.2 FIB 21

4 PROTECTION OF PEACEKEEPERS UNDER INTERNATIONAL LAW **23**

4.1 The principle of distinction 23
4.1.1 International armed conflicts 24

4.1.2 Non-international armed conflicts 28
4.2 Application of the principle of distinction to peacekeepers 32
4.2.1 Peacekeepers as civilians 32
4.2.2 Loss of protection 35

5 CONSEQUENCES FOR THE PEACEKEEPERS IN DRC 40

5.1 Is the Force Intervention Brigade party to the conflict? 40
5.1.1 Mandate 40
5.1.2 The situation on the ground 41
5.2 Is MONUSCO party to the conflict? 41
5.3 Consequences of being party to the conflict 43

6 CONCLUSIONS 45

TABLE OF REFERENCE 46

Judgments 46
Treaties 46
UN publications and documents 47
ICRC documents and publications 49
Books and articles 49
News articles 55
Database 55

List of Abbreviations

ADF	Allied Democratic Forces
AP	Additional Protocol
APCLS	Alliance des Patriotes pour un Congo libre et souverain
CA	Common Articles
CCF	Ccontinuous Combat Function
DPKO	Department of Peacekeeping Operations
FARDC	Armed Forces of the Democratic Republic of the Congo
FDLR	Forces Démocratiques de Libération du Rwanda
FIB	Force Intervention Brigade
FNL	National Force of Liberation
ICTY	International Criminal Tribunal for Former Yugoslavia
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Persons
IHL	International Humanitarian Law
LRA	Lord's Resistance Army
M23	Mouvement du 23-Mars
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
GC	Geneva Conventions
MONUSCO	United Nations Stabilization Mission in the Congo
NATO	North-Atlantic Treaty Organization
NIAC	Non-International Armed Conflict
OUNC	United Nations Force in the Congo
SCLS	Special Court for Sierra Leone
TCC	Troop Contributing Countries
UN	United Nations
UNAMIR	UN Assistance Mission for Rwanda
UNITAF	Unified Task Force
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNPROFOR	United Nations Protection Force
UNSOM	United Nations Assistance Mission in Somalia
UNTAET	United Nations transitional Administration in East Timor
UNTSO	United Nations Truce Supervision Organization
VCLT	Vienna Convention Law of Treaties

1 Introduction

1.1 The theme and the motivation of the thesis

In May 2013, spokesperson Rene Abandi of the *Mouvement du 23-Mars* (M23) guerrilla in the Democratic Republic of Congo (hereafter Congo) said "It's a very complicated situation for us. Blue helmets come with an offensive mandate while others are deployed on the same areas with a peacekeeper's mandate. They have really to separate areas so that we can make the distinction".[1] The distinction Mr Abandi is referring to here is the principle of distinction in international humanitarian law (IHL). The principle of distinction is one of the most fundamental guiding principles of international humanitarian law. In short, it holds that the parties of an armed conflict must distinguish between civilians and those who fight, and that attacks must only be directed at fighters[2], not civilians.[3] Mr Abandi's comment highlights a recurring problem in a growing number of peacekeeping operations, where some United Nations (UN) peacekeepers are peacekeepers in the more traditional sense, whereas others are engaged in hostile acts against rebel groups. This makes it problematic to distinguish the former from the latter.

The goal of this thesis is to look at how the principle of distinction in international humanitarian law applies to UN peacekeepers. The focus will be on how the current UN approach to this might not be sufficient in situations where the UN peacekeeper's mandate is to target a specific group. It will do so by focusing on the UN peacekeeping mission in the Congo, where the Force Intervention Brigade (FIB) has been mandated to target M23 guerrillas and other non-sate armed groups. The situation in the Congo has shone light on the legal dilemmas that arise when peacekeepers engage in offensive operations.

This introductory chapter will briefly discuss the method applied before it lays out the structure of the thesis.

1.2 Method

This thesis comprises of a desk top study employing doctrinal methodology. In researching the thesis, recourse has been to treaties, customary law, judicial decisions and academic literature.[4]

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[1] As quoted in IRIN News (2013)

[2] This thesis will use the term «fighter» to describe someone that is not an civilian under IHL.

[3] Additional Protocol I to the Geneva Conventions (hereafter AP I) art. 48, art. 51 (2), art. 52 (2), AP II art 13 (2), ICRC Customary IHL Database (hereafter CIHL Study), rule 1

[4] Statute for the International Court of Justice (hereafter the ICJ Statute) art. 38(1)

1.2.1 Treaties

Treaties are written agreements between states that are governed by international law.[5] IHL is one of the most codified areas of international law,[6] and most central are the Geneva Conventions and it two Additional Protocols. These treaties set out the main rules for armed conflict and are therefore relevant for this thesis.

While the Geneva Conventions regulate armed conflict in general there are number of treaties that regulate more specific parts of armed conflict in detail, for example the 1994 Convention on the Safety and Security of UN and Associated Personnel (hereafter the Safety Convention).[7] Treaty provisions referred to in this thesis have been interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT), namely according to their ordinary meaning, in their context and in the light of their object and purpose.

1.2.2 Customary law

Customary international law is often not systematized, and it can be difficult to know for certain if a rule is customary since it demands detailed knowledge of state practice and the believes that follow their practice. In this thesis, references are made to the International committee of the Red Cross Customary International Humanitarian Law study (hereafter CIHL Study). The ten years long study resulted in the list of 161 rules where all are applicable to international armed conflicts (IAC) and 140 to non-international armed conflicts (NIAC), and additional eight arguable applicable to non-international conflicts. The outcome is a result of a large scale consultation process where the International Commission of the Red Cross (hereafter the ICRC) Legal Division consulted with over a 100 legal experts.[8]

The CIHL Study has been criticized for looking too much at statements that could be an expression of policy rather than at whether the state saw that obligation as binding legally.[9] Nevertheless, there is little doubt that many of the rules the study resulted in are uncontroversial, as for example the principle of distinction.[10]

1.2.3 Judicial decisions

The thesis also relies on judicial rulings. A ruling from an international court can tell us something about the state of the law on a specific question. Even though article 59 of the ICJ Stat-

[5] Crawford and Pert (2015) p. 36
[6] Crawford and Pert (2015) p. 37
[7] The Saftey Convention, art. 7
[8] Kellenberger (2005) p. xi
[9] Crawford and Pert (2015) p. 39
[10] Ibid. (2015) p. 39

utes do state the court's ruling is only binding on the parties in that particular case, courts do use previous decision to distinguish the cases before them. This does ensure both predictability and consistency in a legal system. As subsidiary sources of law, judicial decisions can have some influence, particularly when there are repeated decisions on a particular matter.

1.2.4 The use of published scholars

Academic writing is useful to structure and focus international law, as well as to stimulate thought about the value and purposes of international law. Further it can point to weaknesses of the system and discuss how the law best can be developed.[11] Since the central concern of international humanitarian law is to balance humanity with military necessity, I have attempted to use writing both from writers with a humanitarian background as well as writers that have a military background to highlight different aspects of and intentions of international humanitarian law.

1.2.5 UN Security Council resolutions and other UN documents

Even though UN General Assembly resolutions and UN Security Council resolutions are not formal sources of international law there seem to be consensus that can be expression of *opinio juris*.[12]

In this thesis mandates given through UN Security Council resolutions are central, but not as sources of international law. These mandates, as well as other UN documents such as reports and press releases, are useful sources for several reasons. Firstly, they establish the purpose, as well as the duties and privileges of UN peacekeeping missions. Secondly, they give insight into the background and justifications for such peacekeeping mission. And thirdly, they might throw light on the internal discussions in the UN regarding the issues at stake.

However, when using the UN documents one have to keeping in mind that they do portray the world as it looks from the UN headquarter, and one should therefore be precarious before one accepts their arguments..

1.3 Scope and structure of the thesis

Using the FIB in Congo as a case study this thesis will look at the status of UN peacekeepers in IHL. When and how do UN peacekeeping missions and their personnel lose protection and become legal targets?

[11] Shaw (2003) p. 106

[12] See for example Lowe (2007) p. 90-97 and Thirlway (2014) p. 113-114

The thesis will start by swiftly drawing up the context the thesis is set in, namely the principles of peacekeeping and how peacekeeping missions are defined and how they have change over time. In chapter 2 it will also look at how the UN standpoint on how IHL applies to their peacekeepers has evolved over timer. The third chapter will outline the history of UN peacekeeping in Congo and focus especially on MONUSCO and the FIB. Then it turns to discuss the law as it applies to peacekeepers in Chapter 4, by first looking at the principle of distinction and then discussing how UN peacekeepers can lose protection. Before concluding the thesis looks at which consequences this will have for the peacekeepers that are members of the FIB and UN Stabilization Mission in the Congo (MONUSCO).

2 United Nations Peacekeeping and International Humanitarian Law

2.1 UN peacekeeping

The UN was formed in 1945, with the underlying idea that the organisation would be used as a peaceful means to solve international disputes. The UN Charter does not provide for peace keeping directly,[13] however the Charter does provide for that the member states to make armed forces available to the organization for the purpose of maintaining international peace and security.[14] From an early stage it became clear that some sort of force was needed to keep the peace in the world. Consequently, UN methods of peacekeeping evolved organically over time.

This section will first discuss the three guiding principles of UN peacekeeping, before it looks at how UN peacekeeping has changed over time.

2.1.1 The principles of peace keeping

In the United Nations Peacekeeping Operations: Principle and Guidelines[15] (hereafter the Capstone Doctrine) the UN Department of Peacekeeping Operations (DPKO) outlines the guiding principles that underlie UN peacekeeping operations. The first principle is consent of the parties. The parties must be part of a political process and accept the mission's mandate. This consent ensures that the mission is free to carry out its mandate, and prevents the UN from becoming a party to the conflict. Impartiality is the second principle. The UN should be impartial when dealing with the parties. This does not mean that the mission should be neutral when it comes to executing the mandate, nor should it be taken to mean inaction. The third principle is the non-use of force except in self-defence and defence of the mandate. The latter part of this principle implies that the UN can respond forcefully to elements that attempt to undermine the political process or are a threat to the civilian population, as long as the mandate tasks the peacekeepers with doing so.

The UN sees these principles as related and mutually reinforcing. Despite the fact that UN peacekeeping operations have developed significantly since the 1950's, the UN DPKO argues that the three traditional principles still apply.[16] However, as this thesis will show, the mandate that established the FIB as a part of MOUSCO is in contrast to all three of these principles.

[13] Sloan (2014) p. 677

[14] UN Charter art. 43

[15] UN (2008) especially pp. 31-35

[16] UN (2008) p. 31

2.1.2 Defining UN peacekeeping operations

Different kinds of UN peacekeeping operations have been created over the decades. In 1990, the UN defined peacekeeping as missions "involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict".[17] This notion of peacekeeping builds directly on the three principles of peacekeeping outlined above. The peacekeepers are not a party to the conflict. It is the consent of the parties to the conflict that makes it possible for the peacekeepers to fulfil their mandate without substantial military capabilities.[18] These mandates are often referred to as Chapter VI mandates, where the emphasis is on the consensus of the parties.[19] Such peacekeeping missions are often referred to as first generation peacekeeping missions and include such missions as the UN Military Observer Group in India and Pakistan (UNMOGIP) deployed to Kashmir in 1949 and the UN Truce Supervision Organization (UNTSO) deployed to the Middle East in 1948.[20] Both missions are still running today.

With the end of the Cold War, the UN Security Council was willing and able to step up its peacekeeping activities. So-called second generation peacekeeping missions had wider goals than in the Cold War period. The missions had more complex political and social goals. Civilian experts and police forces were often an important part of the mission.[21] There was a shift from peacekeeping to peace building.[22] These types of missions adhered to the three fundamental principles of peacekeeping and often had state building as their ultimate goal.[23] Examples of such missions are the UN Protection Force (UNPROFOR) in former Yugoslavia and the UN transitional Administration in East Timor (UNTAET).[24]

Third generation peacekeeping is often referred to as peace enforcement. In such missions there was no peace to keep, rather the peacekeepers had to enforce a peace deal by the threat of military force. Often these missions started as second generation peacekeeping missions, but as the situation on the ground developed the mission adopted its behaviour. This process is often referred to as "mission creep". Peace operations mandates under Chapter VII that are mandated to use "all necessary means" or similar language, are normally seen as being peace

[17] UN (1990a) p. 4
[18] Findlay (2002) p. 4
[19] Ibid. p. 8
[20] Ibid. p. 5
[21] White (2011) pp. 8-9
[22] Ibid. p. 2
[23] Findlay (2002) p. 5
[24] Ibid. p. 6

enforcement missions.[25] Examples of such missions are the United Nations Assistance Mission in Somalia (UNSOM) I and II and Unified Task Force (UNITAF) mission in Somalia from 1992 to 1995.[26] Impartiality is no longer neutrality, but partiality in carrying out the mandate.[27]

Even though it might be a helpful to divide peace operations in to generations that follow a chronological order, this terminology should be used with caution, as they do overlap and there are no clear distinctions, but rather fluid changes.[28] For example, the UN Operation in the Congo (ONUC) which took place in the early 1960's, was mandated to use offensive force by the Security Council and as such can best be classified as a third generation mission, despite the fact that it took place during the Cold War.[29] However, the generational approach to peacekeeping is useful in that it shows how the three fundamental principles of peacekeeping have evolved, and how changes have occurred in response to failures in the past.

Another term that often is used when conceptualizing peacekeeping is 'robust peacekeeping'. The UN defines robust peacekeeping as "a technique designed to preserve the peace, however fragmented, where fighting has been halted, and to assist in implementing agreements achieved by the peacemaker.[30] Robust peacekeeping was first outlined in the Brahimi Report which particularly focused on the use of force in defense of the mandate.[31] In cases of robust peacekeeping, the use of force at a tactical level is authorized by the UN Security Council and agreed to by the host nation and/or the main parties to the conflict.[32] While in peace enforcement situations the use for force is at the strategic level, in robust peacekeeping operations the use of force is "limited in time and space, and aimed at countering or containing specific spoilers".[33]

Mandates that establish peacekeeping missions in areas where there is no peace to keep and where the focus is on forceful protection of civilians and maybe even neutralizing specific groups, often have 'stabilization' in the name. These peacekeeping missions with peace enforcement mandates are often referred to as stabilization missions.[34] Examples of such mis-

[25] White (2011) pp. 4-5
[26] Bellamy and Williams (2010) pp. 223-226
[27] White (2011) p. 16-17
[28] Sloan (2014), 675
[29] Ibid.
[30] UN (2008) p. 18
[31] Braga (2018) p. 69
[32] UN (2008) pp. 34-35
[33] DPKO and DFS (2010) p. 3
[34] Andersen (2018) p. 352

sions are the UN *Stabilization* Mission in the Congo and UN Multidimensional Integrated *Stabilization* Mission in Mali (MINUSMA).[35] Some has argued that these kinds of mandates might have implications for the UNs role as an impartial peace negotiator.[36]

2.2 The evolution of the UN's standpoint

Originally, the UN was reluctant to accept that UN peacekeepers are bound by IHL.[37] Firstly, the UN is not a signatory to the Geneva Conventions. Nor can it be, as the term "high Contracting Parties" refers to states.[38] In addition, there are some duties under the Geneva Conventions that the UN cannot comply with, simply because the organization is not a state and therefore does not have territory or a standing army.[39]

Secondly, Common Article 1 to the four Geneva Conventions refers to the "parties to the conflict". The UN does not view its forces as parties to the conflict, but rather as a neutral force that are there with the consent of the parties.[40] In addition, Common Article 1 of the Geneva Conventions establishes a duty upon the signatory states to ensure respect for the Conventions. It can be argued that this obligation can only be fulfilled by states that have a regular army that can be trained in IHL. As an example, Norway fulfils this obligation in part by training all military personnel in IHL. Since the UN does not have military personnel it cannot do the same.

However, this does not imply that the UN as an international organization is unable to hold obligations under international law. In the *Reparation Advisory Opinion* the ICJ stated that the UN is a subject of international law and capable of possessing international rights and duties.[41] Such rights and duties can be established by treaty law, or through customary law. From this it follows that as long as the UN is engaged in armed conflict "to achieve its goals and carry out its functions" the laws that apply to such situations also apply to the UN.[42] UN peacekeeping missions are normally established by the UN Security Council as a subsidiary organ under the UN[43] and can as such hold rights and obligations under international law.

[35] Karlsrud (2018) pp. 86-92
[36] See among others Karlsrud (2015)
[37] Odello and Piotrowicz (2011a) p. 31
[38] Tittemore (1997) p. 96
[39] See for example GC I art 49, GC II art 50, GC III art 129
[40] Saura (2006) p. 495
[41] Reparation Case (1949) p. 174
[42] Sams (2011) p. 53
[43] Ibid. p. 58

The ICRC has long been preoccupied with the relationship between UN peacekeepers and IHL. In the 1960s[44] and 1970s,[45] the ICRC emphasised the responsibility of Troop Contributing Countries (TCCs) to ensure that their troops complied with IHL. More recently, the focus of the ICRC has been that the principles of IHL that are customary law are binding on all armed forces in armed conflicts, regardless of the status of the parties or the nature of the conflict.[46] Thus, IHL can also apply to UN peacekeepers. The UN's starting point has been that the UN peacekeepers should respect the principles and spirits of IHL, but that the UN is not party to the conflict[47]. This is expressed among other places in the Model Agreement between the United Nations and member states contributing personnel and equipment to United Nations peacekeeping operations from 1991.[48]

The UN has attempted to meet the ICRC criticism in different ways. As early as in 1963 in the *Regulation for the United Nations Force in the Congo* the UN headquarters wrote to The United Nations Force in the Congo (OUNC) "the force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel".[49] In 1978, the UN formally acknowledged its duty to comply with the principles and spirit of international humanitarian law in a letter to the ICRC.[50] In 1993, for the first time, the UN included in the Agreement for Status of the United Nations Assistance Mission for Rwanda that the mission would be conducted with respect for the principles and spirits of the general IHL conventions.[51] Quite soon it became apparent that the "principle and spirit" clause rather served to confuse the matter than to clarify it. It was too abstract to serve as any guidance in practical situations.[52] Opinions vary greatly as to which concrete rules belong to the 'principle and spirit' of international humanitarian law. For example, during the negotiations that resulted in the UN secretary-General's Bulletin, Marco Sassoli suggested to the UN interlocutors that they include the rule that obliges all parties to a conflict to collect and care for the

[44] See for example Memorandum entitled " Application and dissemination of the Geneva Conventions " of 10 November 1961, addressed to the States party to the Geneva Conventions and Members of the UN and Resolution XXV "Application of the Geneva Conventions by the United Nations Emergency Force ", adopted by the 20th International Conference of the Red Cross (Vienna, 1965) as quoted by Palwankar (1993)

[45] Letter from the President of the ICRC to the UN Secretary-General dated 10 April 1978 as quoted by Palwankar (1993)

[46] Statement by the ICRC at the 47th Session of the General Assembly on 13 Nov. 1992, as quoted by Palwankar (1993)

[47] Murphy (2003) p.154

[48] UN (1990b)

[49] Secretary-General's Bulletin (1963) p.17

[50] See fn. 19 and 159

[51] Commonly understood to be the four Geneva Conventions, including the two Additional Protocols from 1977 and the Hague Convention on the Protection of Cultural Property

[52] Shraga (2000) p. 406

wounded and sick no matter which side they belong to,[53] but this was rejected because, according to the UN, a UN field mission will only have limited medical resources and has to prioritize its own personnel.[54] Taking into account that it was the lack of care for the wounded during and after the battle of Solferino in June 1859 that lead Henry Duant to start the work that lead to the founding of the ICRC and the Geneva Conventions, this standpoint is somewhat unexpected. In the end, a provision to care for the wounded and sick was included in the UN Security-General's Bulletin that regulates the application of international humanitarian law to UN peacekeepers.[55]

In 1994, the UN Office of Legal Affairs issued a statement that specified that UN peacekeepers are bound by their mandate and are not legally obliged to follow the Geneva Conventions.[56] The statement was a response to a UN staff officer in UNPROFOR that had written a memorandum to his superiors (and been heard) arguing that the UN peacekeepers were obliged under the Geneva Conventions to protect a hospital that was likely to come under attack from Serb troops in Bihac.[57] Even though this statement was in response to a specific incident it illustrates the ambivalent and difficult relationship the UN has to IHL and how it applies to its peacekeepers.

2.2.1 UN Secretary-General's Bulletin: Observances by the UN Forces of International Humanitarian Law

In 1995, in response to this situation, the ICRC took the initiative to arrange a series of meetings of experts to discuss how international humanitarian law could best be applied to UN peacekeepers. The result of this process was submitted to the Office of Legal Affairs of the UN Secretariat, and became the basis of the 1999 Secretary-General's Bulletin bulletin called the *Observance by the UN Forces of International Humanitarian Law* (hereafter the Bulletin) that sought to clarify the relationship between international humanitarian law and UN peacekeeping.[58] The Bulletin can be seen as an internal code of conduct for military personnel serving in an UN peacekeeping mission,[59] and is often referred to as internal law in the UNs own system of regulations.[60] Thus, while the Bulletin is not a source of international law, it can tell

[53] See for example AP I art. 10, AP II art. 8 and CIHL Study, rule 109
[54] Sassoli (2003) p. 85
[55] Secretary-General's Bulletin (1999), section 6
[56] Murphy (2003) p. 173
[57] Murphy (2003), 173
[58] Sharga (2000), 407
[59] Grenfell (2013), 648
[60] Saura (2006), 497

us something about how the UN understands international humanitarian law in relation to their peacekeepers.

Section 1.1 of the Bulletin states that "the fundamental principles and rules" of international humanitarian law that are included in the bulletin apply to UN peacekeeping forces "when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement." The bulletin then refers concretely to protection of the civilian population,[61] means and methods of combat,[62] treatment of civilians and persons *hors de combat,*[63] treatment of detained persons[64] and protection of the wounded, the sick and medical and relief personnel.[65]

The Bulletin does not distinguish between IACs, ordinary NIACs and Common Article 3 NIACs, and therefore applies equally to all situations of armed conflict.[66] This is significant because it suggests that the UN's view is that the application of the rules of international humanitarian law does not depend on the classification of the conflict, but rather on the situation on the ground and the action of the peacekeepers.

The Bulletin does clarify to a certain extent what the principle and spirit approach[67] entails, as it lists the rules it finds relevant. However, the Bulletin is not unproblematic from the viewpoint of international humanitarian law for several reasons.

It has been criticized for being too narrow in two ways. Firstly, it is narrow in scope as it only applies when the peacekeepers are engaged in combat.[68] When read literally this must mean that the duties of peacekeepers to treat civilians, detained person and persons *hors de combat* humanely only applies while the peacekeepers are directly engaged in combat.

Secondly, the Bulletin lists only some of the rules of international humanitarian law as being applicable to UN peacekeepers. As Odello and Piotrowicz point out, these regulations are limited and general in comparison with the regulations we find in international humanitarian

[61] Secretary-General's Bulletin (1999), section 5
[62] Ibid. section 6
[63] Ibid. section 7
[64] Ibid. section 8
[65] Ibid. section 9
[66] Grenfell (2013) p. 648
[67] Note that the Bulletin refers to «principle and rules» rather than principles and spirit, which might be somewhat more specific.
[68] Saura (2006) p. 497

law.[69] Nevertheless, section 2 of the Bulletin makes it clear that it is not an exhaustive list of the rules and regulations that bind the military personnel engaged in peacekeeping. This raises the question of which additional rules do apply, and if it is the remaining body of international humanitarian law, why not just open up for the full application of this body of law.

The Bulletin may be interpreted so that UN personnel are regulated by international humanitarian law when they are actively taking part in combat, but once they are no longer doing so they are again protected as UN personnel and not legal targets as they might have been under international humanitarian law.[70] In other words, the Bulletin does treat peacekeepers as civilians that can lose their protections if the take direct part in hostilities. According to this interpretation UN personnel will only be legal targets in combat situations. As soon as the peacekeepers are no longer engaged in direct hostilities, they will no longer be legal target. From an international humanitarian law standpoint this is problematic because the regulation of war builds on the notion that the parties to the conflict are equal and have the same rights and duties.[71]

2.2.2 The Capstone Doctrine

As peacekeeping operations evolved, the UN Secretariat and practitioners at different levels saw the need to further develop the principles of peacekeeping. This was done in 2008 the Capstone Doctrine. The purpose of the Capstone Doctrine was to provide a set of common guidelines to UN planners and practitioners.[72] The Capstone Doctrine outlines four elements which make up the normative framework of UN peacekeeping operations: the UN Charter, UN Security Council Mandates, human rights and IHL.[73] The Capstone Doctrine underlines that it is important that peacekeepers have "a clear understanding of the principles and rules of international humanitarian law and observe them in situations where they apply".[74] It then refers back to the Bulletin without specifying the relationship between the Bulletin and the body of IHL law any further.[75] Despite its reference to "the principles and rules" of IHL, the Capstone Doctrine does not clarify the situation, since it does not even attempt to outline a set of rules that can serve as guidance to military personnel in the field.[76]

[69] Odello and Piortowicz (2011a) p. 32
[70] Sams (2011) p. 64
[71] AP 1, preamble paragraph 5 and Mezler (2016) p. 17
[72] Malan (2018) p. 50
[73] UN (2008) pp. 13-16
[74] Ibid. p. 15
[75] Ibid. p. 16
[76] Odello and Piortowicz (2011b), p. 268

It is interesting to note that the Capstone Doctrine states that IHL is relevant to UN peacekeeping because the missions deploy to "post-conflict environments where violence may be ongoing or conflict could reignite".[77] There seems to be no recognition that UN peacekeepers sometimes are involved in more offensive operations. One might therefore question if the Capstone Doctrine was meant to be applied to this type of operations.

2.2.3 High-Level Independent Panel on Peace Operations Report

In 2015, the High-Level Independent Panel on Peace Operations issued a report, often referred to as the HIPPO-report that sought "to take a dispassionate look at UN peace operations to ascertain their relevance and effectiveness for today and tomorrow's world".[78] When the then Secretary-General Ban Ki-Moon assigned the task to the Panel he pointed to the changing nature of peacekeeping and the environment that it takes place in. He emphasised that peacekeeping forces are increasingly deployed to areas where there is no peace to keep, where it might be difficult to identify the parties to the conflict and where there is no political process to speak of.[79] The goal of the Panel was to address these challenges and provide clear guidelines for the future of UN peacekeeping operations.[80]

The HIPPO-report concludes that lasting peace can only be achieved through political solutions, and not through military means alone. The report concludes that "clarity is needed on the use of force" by UN peacekeeping missions.[81] When it comes to offensive military operations carried out by UN peacekeepers the Panel points out that "extreme caution should guide the mandating of enforcement tasks to degrade, neutralize or defeat a designated enemy. Such operations should be exceptional and time-limited".[82]

This has led some scholars to argue that such operations can undermine the three traditional principles of peacekeeping.[83] When it comes to the core principles of UN peacekeeping the panel finds that the principles "must be interpreted progressively and with flexibility in the face of new challenges".[84] However, these conclusions are not of much help for the military personnel on the ground, and, as Braga points out, "better answers are needed" as the conclusions are too broad to have any direct applicability in the field.[85]

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[77] Odello and Piortowicz (2011a), p.15

[78] UN (2015) p. iii

[79] Secretary-General's Remarks at Security Council Open Debate on Trends in United Nations Peacekeeping (11th June 2014)

[80] UN Press Release 31 October 2014

[81] UN (2015) p. 12

[82] Ibid p. x

[83] Hunt (2018) p. 146

[84] UN (2015) p. 12

[85] Braga (2018) p. 67

Others see the HIPPO report as an attempt by the UN bureaucracy to push back against member states' increasing will towards "militarizing UN peacekeeping".[86] The UN bureaucracy's view is that peacekeepers are soldiers without enemies that work with, not target, the parties of the conflict.[87] On the release of the report the chairman of the panel, Jose Ramos-Horta stated the UN "cannot be seen as party to the conflict", because then the UN would lose "credibility, authority, and is not able to exercise a meditation role". In other words, the principle of neutrality is emphasised. This view conflicts with the members of the UN Security Council's will to issue mandates to establish stabilization missions, that is missions that are open for more robust peacekeeping, where the peacekeepers are authorized to use "all necessary means" in defence of the tasks in the mandate.[88]

2.2.4 The Cruz Report

As a response to the increase in deaths of peacekeepers due to violent incidents, the UN Secretary-General tasked former UN Force Commander in Haiti and Congo, Carlos Alberto dos Santo Cruz, with looking into the matter. His work resulted in the report *Improving Security of United Nations Peacekeepers: We need to change the way we are doing business*, (hereafter the Cruz Report).

The Cruz Report concludes that to reduce fatalities the UN "must update the principles of peacekeeping" so that they reflect that UN peacekeepers may be seen as targets and are no longer seen as neutral by all.[89] Further, the report focuses upon the fact on that peacekeepers can engage in proactive self-defence that is "take the initiative to use force to eliminate threats".[90] To be able to do so the military capacity of the peacekeepers must be improved through better training and equipment.[91] It is noteworthy that the Cruz Report acknowledges that UN peacekeepers are no longer necessarily seen as neutral, and that this might explain the increase in fatal attacks on peacekeepers.

The Cruz Report focuses on military tools and how force can be used to protect peacekeepers and limit the fatalities. These conclusions can be said to be in stark contrast to the conclusion of the HIPPO report where the focus was on political solutions. In this sense, one could say that the Cruz Report better represents the views of the members of the Security Council that is issuing stabilisation mandates, than those who see the strength of the UN to be the ability to

[86] Andersen (2018) p. 344
[87] Ibid. p. 351
[88] Ibid. pp. 351-55
[89] Cruz (2017), 10
[90] Ibid.
[91] Ibid. pp. 13-15

find political solutions to armed conflict. It is however, understandable that Cruz, a general and former Force Commander, focus is on how troop fatalities can be reduced with better training and equipment, and clearer mandates.

This section has showed how the UN has wrangled with the issue of how IHL should apply to peacekeepers. Their starting point was that peacekeepers are impartial and are present with the consent of the parties. Peacekeepers may only use force in self-defence, and are therefore not legal targets, unless they are directly participating in hostilities. As we have seen, the principles and nature of peacekeeping has evolved over time, and this might have implications for the application of IHL to peacekeepers. The next section will discuss peacekeeping missions in the Congo before we use the case study to investigate when peacekeepers can lose their protection and become legal targets under IHL.

3 Peacekeeping in the Democratic Republic of Congo

This chapter will outline the history of UN peacekeeping in Congo, emphasising the use of force in the different missions, indicating that the offensive mandate for the FIB was not a significant break in the UN's Congo polices.

3.1 Brief history of UN peacekeeping in Congo

There has been armed conflict in the Congo since independence in 1960. During this time three UN peacekeeping missions have been established. This section will describe the background of these missions and the extent to which they have resorted to use of force.

3.1.1 United Nations Organization in the Congo (ONUC) 1960-64

ONUC was the first UN peacekeeping mission that was mandated to use force.[92] On the 1st July 1960 Congo became independent. Only twelve days later the Congolese President Kasa-Vubu and Prime Minister Lumumba asked the Secretary-General of the UN, Dag Hammarskjöld for military assistance as an answer to the attempted secession of the Katanga province.

Hammarskjöld referred the question of whether to grant military assistance to the Security Council with his approval and the Council authorized the deployment of a peacekeeping mission.[93] The mandate creating ONUC[94] called for the UN to provide "military assistance as may be necessary" until the Congolese government security forces were able to solve their task without support. Remarkably, less than a week later the UN had deployed 3500 troops to Congo.[95]

Only after the situation in Congo further deteriorated and Prime Minster Lumumba was murdered did the Security Council authorize the use of force. In a resolution in February 1961 the UN Security Council called upon the UN to take a several measures to prevent a full civil war in Congo, including arranging cease-fires, preventing clashes "and the use of force, if necessary, in the last resort".[96] It was not clear from the mandate in which situations and in which regions the missions was authorized to use force.[97] The harassment and attacks on UN peacekeepers[98] and civilians by the secessionists increased towards the end of 1962 and led the UN commanders on the ground to push ahead robustly. They were met with little resistance and

[92] UN Security Council Resolution 143 (1960), para. 2
[93] Ibid.
[94] UN Security Council Resolution 143 (1960)
[95] UN Security Council Resolution 145 (1960)
[96] UN Security Council Resolution 161 (1961)
[97] Doss (2014) p. 709
[98] In 1961 alone, 105 peacekeepers were killed in Congo.

the secession came to an end. This robust response was a decision made by the commanders on the ground and had no formal approval from the UN headquarters in New York.[99] The mission closed down in June 1964.

The authorization for the use of force by ONUC was in a sense before its time, as it took many years before the Security Council would again authorize peacekeepers to use force other than in limited self-defence. The mission met several of the same challenges as similar missions do today. For example the mission was criticized for mainly using force against the Katanga secessionists, and not against the Congolese Army, even though it also was the cause of violence against civilians. Even though the mission was concerned with the protection of civilians it was not mandated to disarm or reform the Congolese Army.[100]

3.1.2 United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) 1999-2010

MONUC was deployed to the Congo in 1999. Its main task was to monitor and facilitate the ceasefire that was a part of the Lusaka agreement[101]. The mission started out as a small mission consisting of up to 90 military liaison officers with civilian support staff.[102] In February 2000 the mandate was extended to include the deployment of 5537 military personnel plus civilian staff.[103] The mission was further mandated under Chapter VII of the UN Charter to "take the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities, to (...) protect civilian under imminent threat of physical violence".[104]

As the conflict in Congo escalated it became increasingly clear that the UN peacekeepers were not able to protect civilians. The UN faced harsh critiques after the massacre of civilians in Kisangani in May 2002, the escalation of violence in the Ituri district in the beginning of 2003, and capture of Bukavu by Laurent Nkundas rebel forces in 2004. In all three instances there had been MONUC peacekeepers close by, but they failed to prevent the incidents.[105] The UN Secretary General Kofi Annan recognized that the Chapter VII mandate had created

[99] Doss (2014) p. 710

[100] Ibid. p. 711

[101] The Lusaka Ceasefire Agreement was an agreement negotiated with the help of the UN in attempt to end the conflict in Congo. The agreement was sign in Lusaka by Angola, DRC, Namibia, Rwanda, Uganda Zambia and Zimbabwe in July 1999.

[102] UN Security Council Resolution 1258 (1999), para. 8

[103] UN Security Council Resolution 1291 (2000), para. 4

[104] Ibid, para. 8

[105] Doss (2014) pp. 714-15

expectations that the UN mission would ensure peace and safety in Congo. He concluded that "there is a wide gap between such expectations and the Mission's capacity to fulfil them".[106]

The increasing violence, especially in the Ituri district and mounting international pressure led the Security Council to increase the troop numbers to nearly 6000 personnel[107] and authorized the mission to "use all necessary means"[108] "to ensure the protection of civilians".[109] The MONUC Commander in eastern Congo, Major General Patrick Cammaert[110] interpreted the mandate as permission to offensively target the militias in Ituri, with or without support from the national Congolese armed forces.[111] The operation was seen as a relative success that ensured the return of many internally displaced persons.[112] It is interesting that this increased willingness to use force and target militias was not a consequence of changes in the mandate, nor probably in the concept of operations or the rules of engagement,[113] but rather that the mandate was open to wide range of interpretations,[114] and the Commander's will to interpret the mandate widely. Under Cammaert's command there can be little doubt that the operations were targeted at specific militia groups, arresting their leaders, disarming them forcefully and using deadly force to achieve this if necessary.[115] Some have criticised Cammaert's approach arguing that once the UN engages in fighting specific groups the organizations credibility and legitimacy as a negotiator of political solutions will decrease.[116]

Despite some initial successes MONUC has been heavily criticised. News reports cited by Tull[117] conclude that "the rebels accuse MONUC for fighting against them, the Congolese army accuses it for not fighting enough with it, and the people accuse it of no longer protecting them". The UN recognized that the mission's weaknesses were at least partly due to the ambiguity of the mission's mandate and what is meant by "robust peacekeeping". The 2005 report from the Secretary General to the Special Committee on Peacekeeping Operations points out that the mandates "do not provide the sort of detailed guidance that personnel need

[106] UN Secretary General Resolution 1565 (2004), para. 59
[107] Ibid. para. 3
[108] Ibid. para. 6
[109] Ibid. para. 4 (b)
[110] Terrie (2009) p. 22
[111] Doss (2014) p. 716
[112] Ibid
[113] These are not public documents, but there have been some indication from several members of the UN Staff that the content for these guidelines had not been changed. See among others Terrie (2009) pp. 24-25
[114] Terrie (2009) p. 24
[115] Ibid. p. 30
[116] Karlsrud (2018) pp. 159-160
[117] Ibid. p. 224

in the field".[118] Practitioners, commentators and academics alike seem to agree that even though the greater goal of the mission was pretty clear, if not somewhat ambitious (a peaceful and stable Congo), the challenge was there were no clear guidelines on which tools the mission could use to achieve this goal, or how it should prioritize its aims in the face of insufficient recourses.

3.1.3 United Nations Organization Stabilization Mission in the DR Congo (MONUSCO) 2010- present

As of 1st July 2010 MONUC closed down and its activities phased out or transferred to the Congolese government or UN development agencies. The mission's peacekeeping activities were transferred to the re-branded mission, the UN Stabilization Mission in the Congo (MONUSCO).[119]

MONUC was transformed into MONUSCO to reflect the new phase Congo was entering, but also perhaps in an attempt to solve the challenges MONUC experienced. MONUSCO was created by the Security Council a Chapter VII mission that was mandated to "use all necessary means" to protect civilians "under imminent threat of physical violence, in particular violence emanating from any of the parties engaged in the conflict".[120] The mandate continues to establish that the mission should support the Congolese governments on-going military operations against two militia groups, namely the (LRA) and Forces Démocratiques de Libération du Rwanda (FDLR)[121].

It gradually became clear that a new mandate and a new name did not solve all problems for the UN peacekeepers in the Congo. The inability of the UN to protect civilians was strongly highlighted by the fall of Goma. In November 2012, the Rwanda-backed M23 guerrilla took the provincial capital of North Kivu, Goma, a city with a population of nearly one million people, many of them refugees and internally displaces persons IDP's. The presence of 1500 peacekeepers did not manage to protect the city from the rebels[122]. The fall of Goma led to a will to strengthen MONUSCO's military capabilities and change the mandate so that the peacekeepers could take a more active role in opposing the armed groups in the eastern Congo[123].

[118] UN (2005), para. 33
[119] Doss (2014) p. 726
[120] UN Security Council Resolution 1925 (2010), paras. 11 and 12(a)
[121] Ibid. para. 12(h)
[122] Berdal (2016) p. 15
[123] Ibid

3.2 FIB

As a response to the increasing instability in the Congo the neighbouring countries began to prepare a neutral intervention force. The idea of the brigade came from the International Conference of the Great Lakes Region and was supported by the African Union and the Southern African Development Community.[124]

The idea of the force was adopted by the UN that was anxious to regain initiative after the Goma incident.[125] In March 2013 the UN Security Council issued the mandate that established the FIB.[126] The brigade was established "on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping",[127] and was under direct command of the MONUSCO Force Commander. The brigade was mandated to "neutralize armed groups"[128] by carrying out "targeted offensive operations (...) in a robust, highly mobile and versatile manner"[129] that were named in the mandate. The operations were to be carried out "in strict compliance with international law, including international humanitarian law".[130] The mandate mentions the following armed groups, the M23, the Forces Démocratiques de Libération du Rwanda (FDLR), the Alliance des Patriotes pour un Congo libre et souverain (APCLS) and the Allied Democratic Forces (ADF), the Lord's Resistance Army (LRA), the National Force of Liberation (FNL) and various MayiMayi groups as well as "all other armed groups".[131]

From the beginning the FIB consisted of 3069 troops that were deployed to eastern Congo in July 2013. The following month, the brigade started its operations. In that November, the brigade's efforts had already put an end the M23 insurgency.[132] In the first setup of the FIB South Africa and Tanzania were the central TCCs. They were prepared to target the M23 offensively mainly because it was in their own national interests to prevent Rwanda from becoming too influential in the region. Once the M23 was successfully defeated the FIB seem less willing to target other armed groups in the region.[133]

[124]Cammaert (2013) p. 2
[125]Ibid.
[126]UN Security Council Resolution 2098 (2013)
[127] Ibid. para 9
[128]Ibid
[129]Ibid. para 12(b)
[130]Ibid.
[131]Ibid. para 8
[132]Sheeran and Case (2014) p. 2
[133]Berdal (2016) p. 17

The fact that the mandate established an offensive operation has been seen to be unprecedented[134]. However, as the outline of the former DRC missions' mandates above show, this mandate was not a break with earlier mandates. Rather it was one step further in the development of the UN's role in Congo.

Some have argued that the FIB mandate does not so much change the legal basis of the use of force, as it signals changes in political will to use force and build capacity to do so within the UN peacekeepers.[135] The MONUSCO mandate already opened for the use "all necessary means" to protect civilians[136]. This is the broadest authority the UN Security Council can give and opens for conduct of offensive operations against armed groups that threatens civilians.[137] Cammaert confirms that the rules of engagement[138] for the mission do indeed provide for this type of offensive operation.[139] Nevertheless, even though the FIB mandate was not the first to open for lethal force by UN peacekeepers in the Congo "it does represent a shift from peacekeeping to peace enforcement operations in the region".[140] This was confirmed by the MONUSCO Force Commander Lieutenant General Carlos Alberto dos Santos Cruz, who stated "we are going to exercise our mandate to the maximum possible, not only against M23, against all the groups."[141]

It is interesting to note that the mandate starts with reaffirming the three basic principles of peacekeeping, consent of the parties, impartiality, and the non-use of force, except in self-defence and defence of the mandate, but as many have pointed out, the FIB seems to go beyond these three principles.[142]

This chapter has outlined the history and practice of UN peacekeeping in the Congo. It has showed how the UN missions in Congo have been issued mandates that opened for the use of force more explicitly, and not only in self-defence. This may have implications for the status of the peacekeepers under IHL. The next chapter will outline the principle of distinction and which implications it might have for the status of UN peacekeepers..

[134]Sheeran and Case (2014) p. 1
[135]Ibid. pp. 1-2
[136] UN Security Council Resolution 1925 (2010), para. 11
[137]Jenks (2015) p. 718
[138]The RoE is not a public document
[139]Cammaert (2013) p. 1
[140]Ibid. 5
[141]Kulish and Sengupta (2013)
[142] See among others, Sheeran and Case (2014)

4 Protection of Peacekeepers under International Law

4.1 The principle of distinction[143]

Distinction has been called one of the "cardinal principles" of IHL by the ICJ[144] and has been described by the ICRC as "the cornerstone of international humanitarian law".[145] The International Criminal Tribunal for Former Yugoslavia (ICTY) has stated that violating the principle knowingly can never be justified.[146]

The principle of distinction is a two-fold obligation.[147] Firstly, the parties to the conflict must distinguish between civilians and combatants and attacks can only be directed against combatants and those who directly participate in hostilities.[148] Secondly, the parties can only lawfully attack military objects.[149] The purpose of the principle is to protect those who do not directly take part in hostilities.[150] The distinction is not between the aggressor and the attacked, but between those who fight and those who do not.[151]

Historically, the principle of distinction was easier to apply as conflicts were primarily between states[152] and it was quite simple to differentiate between combatants and civilians.[153] Today, conflicts are rarely between two opposing states, but rather between one state and one or several armed groups, or between several armed groups. Both these situations are NIACs.[154][155] Since the parties in NIACs do not necessary wear uniforms or emblems that identify themselves as combatants, it is far more difficult to draw the line between legitimate and illegitimate targets than in conflicts between two states.[156]

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[143] I am in debt to my thesis supervisor Joanna Nicholson and especially Chapter 1 of her book *Fighting and Victimhood in International Criminal Law* for the structure of this chapter.

[144] The Nuclear weapons case, para. 78

[145] Melzer (2016) p. 18

[146] Prosecutor v. Stanislav Galić, para. 44

[147] Crawford and Pert (2015) p. 42

[148] AP I art. 48, 51 (2) and 52(2), AP II art. 13(2), CIHL Study, rule 1

[149] AP I art. 48, 52 (2), AP II 13 (1), CIHL Study, rule 7

[150] Schmitt (1999) p. 145

[151] Kasher (2007) p. 159

[152] Nicholson (2018) p. 7

[153] Ibid.

[154] AP II and CA 3

[155] According to the Uppsala Conflict Data Program, in 2017 there is no ongoing IACs, but 82 ongoing armed conflicts where two groups use armed force in which neither is a government or a state and 49 ongoing armed conflicts where a government is one of the parties (NIACs as I call these conflicts).

[156] Nicholson (2018) p. 8

The principle of distinction is closely linked to another central principle in IHL –the principle of equality of belligerents.[157] The rules of IHL are equally binding on all parties to the conflict, no matter their motivations for taking part in conflict or how it started.[158] The parties to the conflict cannot justify failure to comply with the rules with the harsh nature of the conflict or their special status. The obligations must be fulfilled under all circumstances, in all armed conflicts.[159] International courts have confirmed that the principle also applies in NIACs.[160] The underpinning idea of the principle of equality is that the rules of IHL only become just when the parties to the conflict have the same rights and duties.

The precise application of the principle of distinction differs according to whether the conflict in question is an IAC or a NIAC.

4.1.1 International armed conflicts

IACs are regulated by the four Geneva Conventions and the first Additional Protocol to those Conventions. Common Article 2 of the four Conventions defines IACs as situations where there is "declared war or any other armed conflict which may arise between two or more of the High Contracting Parties". High Contracting Parties here refers to the signatories of the Conventions, which are states. It is not necessary that the state of war is recognized by the parties. IACs are thus armed conflicts between two or more states.[161] Treaty law in IACs distinguishes between combatants and civilians.

4.1.1.1 Combatants and combatant status

In everyday language the meaning of "combatant" is a person that fights, however IHL provides a very specific definition of the term. GC AP I article 43 (2) states that "Members of the armed forces of a Party to a conflict (…) are combatants", except for medical and religious personnel.[162]

AP I article 43 (1) defines "armed forces of a Party to a conflict" as "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates". According to VCLT article 31(1) one should interpret a convention "in good faith in accordance with the ordinary meaning to be given to the terms". The ordinary

[157] Saura (2006) p. 514

[158] AP 1, preamble para. 5

[159] Common Article 1 of Geneva Conventions I-IV (hereafter Common Article 1) and CIHL Study, rule 139

[160] *Prosecutor v. Kordic and C*erkez, para. 1082 and *Prosecutor v. Fofana and Kondewa*, para. 530-1

[161] Crawford and Pert (2017) p. 53

[162],AP I art. 43(1), CIHL Study, rule 3

meaning of the term "armed forces" is the armed services of a state, usually consisting of the army, the navy and the air force as well as different types of special forces.

Members of such armed forces are combatants.[163] Combatants have the right to take a direct part in hostilities.[164] This is often referred to as the combatant's privilege which is the right to kill or injure enemy combatants and target military objects.[165] This right implies that members of armed forces that engage in such acts cannot be prosecuted for them as long as they act within the limits of international humanitarian law.[166] The flipside of the combatant's privilege is that the combatant becomes a legal target at all times.[167] That is, she can be targeted by opposing combatants at any time[168], even if she is unarmed or asleep.[169]

4.1.1.2 Civilians

Civilians are negatively defined as being a person that does not belong to the armed forces of a party to the conflict or a *levée en masse*[170].[171] Civilians enjoy special protection from military operations under international law.[172] Civilians have an obligation not to use their protected status to engage in hostile acts[173] and can lose their protection by taking a direct part in hostilities.[174]

4.1.1.3 Direct Participation in Hostilities (DPH)

Civilians are protected as long as and because they abstain from hostile acts. Implicitly, the fact that they do not engage in acts that can be damaging to one of the parties to the conflict is a prerequisite for their protection.[175] Civilians lose their protection by taking direct part in hostilities (DPH).[176]

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[163] AP I art. 43 (2)

[164] AP I art. 43 (2)

[165] Nicholson (2018) p. 9

[166] Gasser and Dörmann (2013) p. 255

[167] Nicholson (2018) p. 9

[168] Unless hors de combat, GC AP I art. 41 (1)

[169] Keeman (2013) p. 357

[170] Levée en masse is a term used to refer to situation where civilians on an unoccupied territory take up arms spontaneously to resist an invading force (GC I and GC II art. 13(6) and GC III 4 (A)(6)). Or in other words, situation where a population spontaneously form an informal armed force in response to an external threat. It is clear that the three categories are exclusive and that one individual can only belong to one of these categories at a given time (ICRC (2009), 21).

[171] AP I art. 50 (1), ICRC (2009) p. 20

[172] AP I art. 48, 51 (1) and (2), 57, 58

[173] Parks (2010) pp. 772-3

[174] AP I, art. 51 (3)

[175] Gasser and Dörmann (2013) p. 234

[176] AP I art. 51 (3) and AP II 13 (3), CIHL Study, rule 6

The DPH principle is found in article 51(3) of the Additional Protocol I and in article 13(3) of the Additional Protocol II of the Geneva Conventions, as well as in Common Article 3, Rule 6 of the CIHL Study, and numerous military manuals.[177] It is not disputable that this constitutes customary international law.[178]

There is no treaty definition of the term DPH,[179] nor is there a clear concept emerging from state practise and jurisprudence.[180] Since civilians DPH are legal targets under international law, the lack of a clear definition is a severe issue.[181] In an attempt to clarify matters, the ICRC took the initiative to study the issue. This resulted in the publication of the *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International humanitarian law* in 2009.[182] [183] Parts of the ICRC Guidance are not universally accepted. Since much of the debate[184] in the field has the guidance as a starting point it is nevertheless natural reference.

In the Guidance, the ICRC claims that for an act to constitute DPH it must meet three cumulative criteria:

(i) 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

(ii) 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

(iii) 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).[185]

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[177] See for example United Kingdom Ministry of Defence (2004) The manual on the law of armed conflict § 5.3.2

[178] CHIL Study, rule 6, Schmitt (2010) p. 13

[179] CHIL Study, rule 6

[180] ICRC (2009) p. 41

[181] Pejic (2012) p. 106

[182] ICRC (2009)

[183] It is important to note the Interpretative Guidance is only an expression of the ICRC's views and is not as such not legally binding. However, it is an interpretation of the concept of direct participation in hostilities. For more see the Forward to the Interpretative Guidance

[184] See for example Boothby (2010), Watkin (2010), Corn and Jenks (2011), Parks (2010), Kleffner (2012), Schmitt (2010a) and (2010b)

[185] ICRC (2009) p. 46

The criteria are meant to distinguish activities that constitute DPH from those that do not.[186] The purpose of the Interpretative Guidance was to provide military commanders with a legal standard that was applicable on the ground. Some have argued that the standard is still too broad and needs to be translated into an operational tool in order for it to be useful on the ground.[187]

Civilians lose their protection "for such time" as they are directly participating in hostilities. It is therefore essential to determine exactly when the protection is lost and then regained.[188] According to the Guidance, civilians can lose their protection while preparing for hostile acts.[189] In addition, the travel to and from the act itself is reckoned to be so closely linked to the act itself that the civilian has also lost protection during this transportation. [190]

The "for such time"-criterion relates to what is often referred to as the "revolving door" debate. An often used example is an individual that works on her fields during the day, and fights as a rebel during the night. She will then be a legitimate target during the night, but will have regained protection while working as a farmer during the day.[191] The ICRC does not see this as a problem, as the mechanism "prevents attacks on civilians who do not, at the time, represent a military threat".[192] Schmitt argues that civilians lose protection when they DPH not because they are a threat, but because they have *chosen* to be part of the conflict. If civilians lost protection when they were a threat, they would lose protection also during acts of self-defence. [193]

Schmitt further argues that the interpretation of "for such time" does not make sense from a military perspective because for example when other organized armed groups use IEDs the attacks often occur when the insurgents are back in their homes and as such no longer legitimate targets. The most viable military option is often to gather intelligence and then attack the insurgents where they live.[194] While this might be a valid point, it does not undermine the ICRC interpretation fully, as the opposing party could hold off the attack until the insurgents leave their dwellings again to execute another attack and thus become legal targets again.

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[186] Pejic (2012) p. 107
[187] Ibid p. 106
[188] ICRC (2009) p. 65
[189] Ibid pp. 65-66
[190] Ibid. pp. 67-68
[191] Schmitt (2010b) p. 37
[192] ICRC (2009) p. 70
[193] Schmitt (2010b) p. 37
[194] Ibid. p. 38

Schmitt argues that a better alternative would be that civilians that chose to take part in hostilities will be a legal target until "he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal".[195] It is difficult to see how this might work on the ground. How long is "extended non-participation"? And what is to be reckoned as "an affirmative act of withdrawal"? Boothby[196] supports Schmitt's view here, arguing that those who engage in DPH should bear the burden that the adverse party, may, absent a clear act of disengagement, think that they are a legal target. In my view, these criteria are not practical and would probably make it difficult for a civilian engaging in DPH to re-enter the protected group of civilian.

Civilians only lose their protection while engaged in DPH, and on the way to and from such acts. If the civilian is killed and injured during the time he or she is DPH or on the way to or from such acts, the killing or injuring does not violate IHL.[197] If a civilian DPH is captured, he or she is not entitled to prisoner of war status[198][199], and may be held accountable for their acts under domestic law[200], and for war crimes or other crimes under international law.[201] They regain protection again once they no longer are engaged in such acts. [202] It is significant to note that even though a civilian directly participates in hostilities this is not a violation of international humanitarian law, and it not a war crime under treaty nor customary law.[203]

4.1.2 Non-international armed conflicts

NIACs are regulated by customary international law and by Common Article 3 of the Geneva Conventions. In addition, conflicts on a state's territory between a state's armed forces and dissident armed forces or other armed groups that are "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations"[204] are regulated by Additional Protocol II to the Geneva Conventions.

Armed conflicts that do not meet the requirements of AP II are regulated by customary international law and article 3 of the four Geneva Conventions, often referred to as Common Article 3.

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[195] Ibid.
[196] (2010) pp. 759-60
[197] Gasser and Dörmann (2013) p. 256
[198] Prisoner of war status exist only in IACs, see AP I art. 44
[199] Gasser and Dörmann (2013) p. 256 and GC III art. 4
[200] Gasser and Dörmann (2013) p. 257
[201] Pejic (2012) p. 89
[202] ICRC (2008), ??
[203] Peijk (2012) p. 89
[204] AP I art. 1 (1)

Common Article 3 sets out a set of minimum rules that the parties to the Conventions "shall be bound to apply" in armed conflicts on their territory that is "not of an international character". The rules set out in the article shall apply to "each party to the conflict". Note that the use of the term "party" here is not a coincidence. It is used as a contrast to "High Contracting Parties" that are bound by all the rules in the conventions. "Party" here refers to a party to the conflict, not to the convention. It implies that other than states can be party to the conflict, such as non-state armed groups and peacekeeping forces. The rules set out in this article thus apply to those parties that take part in an armed conflict, also parties that have not signed the Conventions or are not able to do so. Common article 3 provides for the principle of distinction and that of non-discrimination. It specifies that violence against protected persons is prohibited, as well as taking protected persons as hostages or subjecting them to "humiliating and degrading treatment".

This implies that all the parties to the conflict, including members of non-state armed forces, are distinct from the civilian population. These armed forces are to be treated as lawful targets even though they do not belong to a state's armed forces.[205] Civilians in NIACs are those who do not bear arms on behalf of one of the parties to the conflict.[206]

The application of the principle of distinction to NIACs has been criticised for being "bad law", since it is designed for conflicts between two states and as a consequence of this "asks the impossible from the weak and little of the powerful".[207] This critique and others[208] have their roots in what is often referred to as the 'dual-use problem', namely that in NIACs a person can be both a civilian and a legal target depending on what she is doing at the time. Some[209] have also pointed out that the principle has far more negative consequences for non-state armed groups than it has for a state's armed forces. Since non-state armed groups often have poorer military equipment than state armed forces, it can be difficult for them to target well protected military installations, while the armed forces more easily can target the camps of the non-state armed groups. This might result in that the non-state armed groups abandoning the principle of distinction in order to achieve their military aims.[210]

[205] ICRC (2009) p. 28
[206] Ibid.
[207] Swiney (2005), 733
[208] See for example Keeman (2013)
[209] See for example Swiney (2005)
[210] Schmitt (1999) p. 157

Treaty law uses the term 'combatant' only in IACs. Since states are unwilling to give their opponents in NIACs combatant status and non-state armed groups do not always distinguish themselves from the civilian population, applying the principle of distinction in NIACs is more complex, because for the principle to be effective one has to be able to distinguish between those who are protected and those who are not.[211]

AP II uses the terms "civilian", "armed forces" and "organized armed groups" without defining them.[212] Also in NIAC the three terms are seen as mutually exclusive categories.[213]

In its *Interpretive Guidance*, the ICRC negatively defines civilians in NIACs as all individuals that are not part of the armed forces or an organized armed group.[214] It therefore becomes essential to define armed forces, dissident armed forces and other organized armed groups, which are the terms used in article 1 of the GC AP II.

The ICRC argues that "armed forces" should be understood in a broad sense so that other groups than those defined as armed forces in national legislation (which normally corresponds to the definition in IACs) can be included, such as national guards and polices forces.[215]

"Dissident armed forces" is taken to mean part of the state's own armed forces that have rebelled against the government and taken up arms against it.[216] The members of such groups do not become civilians because they have rebelled against their government, especially when they continue to belong to a control and command structure.[217]

"Other organized armed groups" are groups that have recruited their members from the civilian population and have "developed a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict".[218] Since such groups rarely have a formal enrolment system and do not always wear uniforms it might be difficult to establish who is a member of such a group.

[211] Nicholson (2018) p. 12
[212] ICRC (2009) p. 27
[213] Ibid. p. 28
[214] Ibid. p. 27
[215] Commentary AP § 4462
[216] Commentary AP § 4460
[217] ICRC (2009) p. 32
[218] Ibid. p. 32

For the purposes of distinction the ICRC argues that the membership of such groups must depend on whether the individual has a continuous combat function (CCF). That is, an individual will be reckoned as a member of the group if she continuously performs a function where she is directly participating in hostilities that correspond to the activities of the group, that is the conduct of hostilities on behalf on a non-state actor party to the conflict. In other words the person must have a function in the group that involves directly participating in hostilities.[219]

It is the ICRC's view that members of organized armed groups lose their civilian protection against direct attacks for as long as they assume a continuous combat function. They cease to be civilians.[220] This means that like soldiers belonging to a state's armed forces they can be attacked not only when they do not engage in hostilities, but also for example when they sleep, cook or pray. Individuals connected to the group that do not take part in hostilities on a regular basis are not reckoned as "members of the group" in this context and will be protected as if they were civilians.[221] In the Guidance the ICRC explains that they have reached this conclusion because the alternative would be to give a significant operational advantage over the armed forces belonging to the state.[222]

Schmitt[223] has criticised the Interpretative Guidance for getting the fundamental balancing act that takes place in international humanitarian law between humanity and military necessity, wrong, skewing the scales towards humanity too heavily.[224] This is because it establishes two separate legal regimes, one for the state's armed forces and one for organized armed groups. For example a cook in the state's armed forces will be a legitimate target, while a person filling the same role in an organized armed group will not be a legal target unless she directly takes part in hostilities.[225] Boothby claims that the ICRC standpoint gives civilians that regularly participate in hostilities an "unbalanced, and unjustified status of protection in comparison to members of the opposing armed forces, who are continuously targetable".[226] Watkin[227] argues that the ICRC has not successfully justified why the membership criteria armed groups should be different than those for a regular armed force. Here I have to side with the critiques

[219] Ibid. p. 33
[220] Ibid. p. 70
[221] Ibid. p. 33
[222] Ibid. p. 72
[223] He was one of the experts that participated in developing the Interpretative Guidance, but he withdrew his name from the panel of experts after reading the final draft.
[224] Schmitt (2010b) p. 6
[225] Schmitt (2010b) p. 23
[226] Boothby (2010) p. 743
[227] (2010) pp. 674-676

of the ICRC Guidance, as creating different standards for different types of armed groups is in violation of the principle of equality of belligerents.

This section has showed that even though the terminology used to describe the different categories of personnel, the principle of distinctions applies in all types of armed conflicts. No matter what type of conflict civilians are not legal targets, whereas others who are involved in the fighting (including civilians who are DPH are legal targets). As the terminology concerning who is a lawful target can be confusing, given that combatant status applies in IACs only, this thesis will use "civilian" to describe those that are not legal targets (but that may become so for a limited period of time if DPH) and "fighters" to describe those who are legal targets at all times.

4.2 Application of the principle of distinction to peacekeepers

In this section we will look at the relationship between the general protection given to civilians and the special protection established for peacekeepers in the 1994 Safety Convention and in the Rome Treaty. Then we will look at how UN peacekeepers can lose this protection.

4.2.1 Peacekeepers as civilians

In the words of the Special Court for Sierra Leone (SCLS): "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 law".[228] This in itself is not controversial- peacekeepers may be seen as civilians if they fulfill the definition of civilian in IHL. This section will show how peacekeepers as a main rule are treated as civilians under international law.

4.2.1.1 The 1994 Convention on the Safety and Security of UN and Associated Personnel

As a consequence of a considerable increase in attacks against UN peacekeepers in the early 1990's the UN Secretary General Assembly adopted the Safety Convention on December 9 1994.[229]

The Safety Convention seeks to protect UN personnel and property by holding the host nation of a mission responsible for their security,[230] and by holding state parties responsible for criminalizing behaviors listed in the conventions article 8 and 9. Article 9(1) (a) prohibits among

[228] Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gabo, para 233

[229] Saura (2006) pp. 515-516

[230] Art. 7

other things the murder "of *any* United Nations or associated personnel" (emphasis added). In other words, the killing of a peacekeeper is a crime that the Convention binds all signatory states to criminalize in their national criminal codes. Thus, the main rule of the Convention is that peacekeepers are not legal targets because they are not fighters, but civilians.

The Safety Convention limits its own scope of application in article 2(2) which states that the Safety Convention does not apply to peacekeeping operations mandated under Chapter VII of the UN Charter "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 scope of article 2(2) is not entirely clear and is open to interpretation, and there has been some academic debate on the issue. The article can be understood so that in the case of enforcement actions where the UN becomes a party to the conflict, the Convention does not apply.[231] Another reading could be that only certain aspects of the enforcement action would not be regulated by the Convention.[232] In other words, peacekeepers are not protected by the Convention if they directly participate in hostilities. In my view the second reading is the one that the authors of the Convention most likely had in mind, since their purpose was to protect UN peacekeepers and therefore it is unlikely that it would limits its application to such a great degree.[233] As we will see this interpretation is in conflict with IHL.

The purpose of the provision seems to be to ensure that the two legal regimes of the Safety Convention and IHL are mutually exclusive.[234] However, it has been argued that drafters did not succeed in making the two legal regimes mutually exclusive. Firstly, the reference to "international armed conflict" here is taken to mean that the Safety Convention would continue to apply in situations where the UN operation has become party to a NIAC.[235] In this context there seem to be agreement that if the UN becomes party to a NIAC the conflict becomes an IAC.[236][237] However, also in NIACs large parts of international humanitarian law applies.[238] Secondly, the Safety Convention is only limited not to apply in "enforcement action under Chapter VII of the Charter". Also in peace operations not established under Chapter VII the peacekeepers are entitle to use force in self-defense. As the UN interprets self-defense also to

[231] Fleck (2013) p. 624
[232] Ibid.
[233] VCLT art. 31(1)
[234] Greenwood (1996) pp. 197-198
[235] Grenfell, (2014) pp. 649-50
[236] Murphy (2003) pp. 182-4
[237] There is some debate surrounding this issue in IHL, due space constraint I am not discussing any further.
[238] CHIL Study

be in defense of the mandate[239] it is not unlikely that the peacekeepers will find themselves in protracted hostilities with armed groups that are not in a strict sense self-defence also in Chapter VI mandated missions and thus subject to international humanitarian law.[240]

As Sams[241] points out, since the two regimes are not mutually exclusive, the Safety Convention and international humanitarian law may be applicable to the same situations. This might result in a situation where attacks on UN personnel that are engaged in combat activity would be permissible under international humanitarian law, but constitute a crime under the Safety Convention. In effect the Convention removes the combatant's privilege that those fighting UN peacekeepers otherwise would have had, since the UN peacekeepers will not be legal targets unless they are in combat situations.[242] In other words, the Safety Convention might run contrary to one of the central principles of international humanitarian law, namely equality of parties.[243]

Article 20 of the Safety Convention, the savings clause, states that "nothing in this Convention shall affect the […] the applicability of international humanitarian law […] in relation to the protection of […] United Nations and associated personnel or the responsibility of such personnel to respect such laws and standards". The provision does not specify under which circumstances IHL will apply and this is problematic since it does not deal with the core of the issues the article is meant to regulate.[244]

The ICRC has been highly critical of this Convention and argues that it does not take IHL into account.[245] The ICRC holds that when article 9 does criminalize killing peacekeepers that are taking direct part in hostilities, this is in direct conflict with IHL.[246]

To summarize, the challenge is that the article 2(2) of the Convention does not succeed in clearly establishing when the Convention applies and when IHL applies, however the Convention's saving clause, article 20, seeks to ensure that IHL applies.[247] As Ferraro[248] writes, the "Convention's ambiguity should not have any bearing on the applicability and application

[239] UN (2008) p. 34
[240] Greenwood (1996) p. 198
[241] (2011) p. 61
[242] Glick (1995) p. 93
[243] Greenwood (1996) p. 189
[244] Murphy (2003) p. 182
[245] Ferraro (2014), 161
[246] Ibid.
[247] Bourloyannis-Vraiilas (1995) pp. 583-584
[248] Ferraro (2013)

of IHL" to peacekeepers if the criteria for armed conflict are met on the ground. I have to agree, when the Convention is read in context with the Rome Statute Article 8(2) (a) (iii) and IHL the ambiguity must be interpreted in favor of applicability of IHL.

4.2.1.2 The Rome Statute

The killing of a peacekeeper is considered a crime under the Statute of the International Criminal Court[249] provided that the UN personnel are eligible to protected status as a civilian at the time of the attack.[250] The first element of the crime is that the attack most be directed against a "peacekeeping mission in accordance with the Charter of the United Nations". Note that this excludes attacks on peace enforcement missions. The fourth element makes it clear that for the attack on UN peacekeepers to be crime they must be "entitled to that protection given to civilians (…) under the international law of armed conflict".[251] This rule is also considered to be customary international law in both NIACs and IACs by the ICRC.[252]

As we have seen the killing of peacekeepers is considered to be a war crime in both IACs and NIACs as long as the peacekeepers are entitled to civilian protection. The questions we turn to next is when such protection might be lost.

4.2.2 Loss of protection

We will now look at three different ways peacekeepers might lose civilian protection, by DPH, CCF or by the peacekeeping mission becoming a party to the conflict.

4.2.2.1 Direct Participation in Hostilities

Civilians may lose protection if they DPH. There are two central cases from international courts on this question, the *RUF* case[253] before the SCSL and the *Abu Garda* decision[254] by the International Criminal Court (ICC). For the purpose of context I will shortly outline these cases here.

From May to September 2000, the Revolutionary United Front (RUF) in Sierra Leone attacked and abducted peacekeepers from the United Nations Assistance Mission in Sierra Leone (UNAMSIL) a number of times. This resulted in four dead peacekeepers and hundreds

[249] It also a crime under the Statute of the Special Court for Sierra Leone, art. 4(b)
[250] Rome Statute art. 8(2)(b)(iii) for IACs and art. 8(2)(e)(iii) for NIACs
[251] International Criminal Court (2011) p. 17 (for IACs), p. 28 (for NIACs)
[252] CIHL Study, rule 33
[253] *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gabo*
[254] *Prosecutor v Bahar Idriss Abu Garda*

detained and mistreated.[255] Three of RUF's military commanders were indicted by the Special Court for Sierra Leone (SCSL) for murder as a crime against humanity; hostage taking and murder as war crimes; and the offence of intentionally directing attacks against members of a peacekeeping mission that were entitled to protections as a serious violation of IHL.[256] It is especially the court's discussion of the latter charge that is of significance in this context.

There have been two cases before the ICC for attacks on peacekeepers, *Abu Garda* and *Banda*, both concerning the same attack on the African Union Mission in Sudan (AMIS) on 29 September 2007.[257] The attack left 12 peacekeepers dead and other wounded.[258] In the first case the Pre-Trial Chamber did not find evidence that Abu Garda had been directly or indirectly responsible for the attack.[259] In the second case, the *Banda* case, the court followed the factual finding in the *Abu Garda* case[260] and followed the same legal reasoning as in the Abu Garda case[261]. The rest of this discussion will therefore refer to the *Abu Garda* case.

In the *RUF case* the SCLS states "where peacekeepers become combatants, they can be legitimate targets for the extent of their participation".[262] The court thus recognizes that peacekeepers can lose their civilian protection, and the reference to the time factor here suggests to that the court is referring to DPH. However, the use of the term «combatants» is both confusing and misguided. The court uses the word combatant throughout this ruling even though the conflict in question is a NIAC. Under IHL a combatant does not become a legal target only when she engages in hostilities, she is a legal target for the duration of the conflict.[263]It therefore seems likely that the court has mixed the concept of combatant with the concept of a civilian that loses protection for the extent of time they are DPH.[264] The court finds that in the circumstances of the case, the peacekeepers in question only used force in self-defence and therefore did not DPH, nor can they be regarded as combatants.[265]

Turning to the *Abu Garda decision*, the ICC firstly discussed whether AMIS is a peacekeeping mission that would entail its personnel to civilian protection, then it looks at if the person-

[255]Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gabo para. 1893-1868
[256]Ibid. para. 6, counts 15-18S
[257] Engdahl (2012) p. 265
[258] Prosecutor v Bahar Idriss Abu Garda, para. 105 read together with para. 21
[259] Ibid.. 236
[260] Prosecutor v Abdallah Banda Abakar Nourain and Saleh Mohammed Jerboi Jamus, para. 63-64
[261] Ibid. para. 61
[262] Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gabo para 233
[263] AP I art. 43(2)
[264] Nicholson (2018) pp. 129-130
[265]Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gabo para. 1937

nel in question had been DPH at the time of the attack. It found that the peacekeepers "enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities".[266] Using force in self-defence has no consequence for this protection.[267] Since there was no evidence that the personnel in the case had used force beyond self-defence[268] they retained their civilian protection[269]. [270]

In summary, the SCLS and the ICC find that peacekeepers can lose their civilian protection by DPH, but that in the relevant cases they use force only in self-defence and were therefore not DPH. Further, it is clear from the *Abu Garda decision* that not only the peacekeepers actions on the ground but also the content of the mandate is significant in determining if the peacekeepers have lost protection.

4.2.2.2 Party to the conflict

The case law from international courts discussed above do not address the matter of whether peacekeeping missions can lose protection permanently by becoming a party to the conflict. Pacholska shows that in all cases before international tribunals that have dealt with crimes against peacekeepers, the peacekeepers have been treated as having had civilian status.[271][272] Even though international courts have not discussed if UN peacekeeping forces can become party to a conflict this does not signify that this cannot be the case.

Engdahl[273] argues that a peacekeeping missions mandate cannot per se tell us if that particular mission will become party to the armed conflict(s) in the area where it is to be deployed, but it can tell us something about the likelihood that it might happen. Peace enforcement mandates or Chapter VII mandates that opens for the use of "all necessary means" (or similar language) increases the possibility that the peacekeepers might become party to the conflict. However, it is not the authorization to use force that is the determining factor, but the actual situation on the ground. The threshold, in the law, for becoming a party to an armed conflict is the same for peacekeepers as for others.[274]

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[266] Prosecutor v Bahar Idriss Abu Garda, para. 83

[267] Ibid.

[268] Ibid. para. 131

[269] Ibid. para. 132

[270] Nicholson (2018) p. 133

[271] Pacholska (2015) p. 55

[272] Even though this is not entirely correct, in the *Bagosora* case the International Criminal Tribunal for Rwanda (ICTR) implied that the peacekeepers were *hors de combat. (*Nicholson (2018), 122 and Engdahl (2012), 276) Under IHL only combatants can have the status of *hors de combat* (AP I, art. 41)

[273] David and Engdahl (2013) p. 668

[274] Ibid. p. 669

Mona Khalil argues that the UN peacekeeping forces can become party to the conflict either by the way the mandate is formulated or by the nature of the peacekeepers actions on the ground or their support to one of the parties in an on-going conflict. [275] I disagree with Khalil. The mandate is the legal basis for the use of force by the peacekeepers. It does not, by itself, trigger the application of IHL. IHL applies if the situation on the ground meets the threshold for an armed conflict.

An example of such a situation might be an armed altercation between the UN peacekeepers and a non-state armed groups or state forces, where the situations constitute an armed conflict, then the peacekeepers become party to the conflict. An example of such a situation took place on the 7 April 1994 when Rwandan armed forces captured and killed ten peacekeepers from the UN Assistance Mission for Rwanda (UNAMIR). For that day at least, an armed conflict existed between the UNAMIR and Rwanda and UNAMIR was party to the conflict.[276] This example shows that UN peacekeepers can become party to a conflict when they are being targeted by an armed force and fight back. Another way UN peacekeepers can become party to the conflict is by providing substantial support to one of the parties in an on-going armed conflict or actively fights alongside one of the parties. The UN peacekeepers then become party to the conflict since they bear arms on behalf of one of the parties to the conflict.

The UN's position has been that UN peacekeepers act on behalf of the international community and therefore are not a party to the conflict.[277] If the UN is seen as just another party to the conflict the organization's effectiveness as a peacekeeper will suffer.[278] It appears that the UN treats the question of applicability of international humanitarian law to its peacekeepers as a political question rather than a legal obligation.[279]

As Greenwood argues this might be a dangerous standpoint to take. Firstly, because the principle of equality have been confirmed by the international community several times since World War II.[280] Secondly, the standpoint might undermine respect for international humanitarian law. The incentive to follow the law is weakened when those that are constrained by the law do not receive the benefit of the law's protection.[281] In other words, the criteria for appli-

[275] Khalil (2014) p. 157-8
[276] David and Engdahl (2013) p. 661
[277] Sharga (1998) p. 67
[278] Glick (1995) p. 70
[279] Ibid. p. 54
[280] Greenwood (1996) p. 204
[281] Ibid. p. 205

cation of IHL must be the same if they are applied to non-state armed forces or to UN peacekeepers.

Indeed, the UN's view seems to have evolved in the recent years. Mona Khalil, then Senior Legal Officer at the UN Office of Legal Counsel has opened up for that the UN peacekeepers can become party to an armed conflict under certain circumstances.[282] However, she does warn that one should not lower the threshold of the applicability of IHL too much.[283]

One the one hand it is understandable that the UN tries to avoid peacekeepers from becoming legal targets under international humanitarian law, as this is likely to make it even harder to convince member states to send their troops to peacekeeping operations, especially those that are seen as high risks. Nevertheless, in my opinion, the principle of equality has to carry more weight than the UN's fear that their peacekeepers may be legal targets under IHL and the consequences this might have for troop contributions. The cost of creating a precedent where not all fighters are equal under IHL is simply too high. It will for example make it more difficult to argue that all fighters on the ground must adhere by IHL.

To sum up, peacekeepers as all other individuals in an area of armed conflict must either be a civilian that are protected at all times, unless DPH, or a person belonging to one of the parties to an armed conflict and thus be a legal target at all times.[284] Which is the case for the peacekeepers in Congo is the question we turn to next.

[282] Khalil (2014) pp. 153-4, 157-8

[283] Khalil (2014), 158

[284] A third alternative way to lose protection is what ICRC calls CCF. The background for developing the continuous combatant function was that non-state armed groups rarely have a formal enrolment systems, ID cards or uniforms so that there is a need to determine membership based on other factors. This is not the case for UN peacekeepers. They carry UN ID cards, wear uniforms and are under command and control of the Force Commander. It therefore seems unlikely that a situation would occur where peacekeepers would lose protection due to CCF. If peacekeepers engage in the conflict to such an extent they would rather be parties to the conflict, than take on CCF.

5 Consequences for the peacekeepers in DRC

This chapter will argue that the FIB is party to the conflict in Congo and look at which implications this has for the FIB personnel and the ordinary MONUSCO peacekeepers.

5.1 Is the Force Intervention Brigade party to the conflict?

5.1.1 Mandate

One of the elements to look at when considering the application of IHL to UN peacekeepers is the mandate. The UN Security Council mandate establishes the FIB under Chapter VII[285]. Chapter VII opens the possibility the mission might be a peace enforcement mission. Further the mandate authorizes the mission "to take all necessary measures"[286] to fulfil its mandate. In addition the mandate tasks the FIB with carrying out "targeted offensive operations" against named non-state armed groups.[287] The mandate thus makes it clear that MONUSCO, and especially the FIB is a peace enforcement mission.

The mandate also makes it clear that the peacekeepers operations can be "either unilaterally or jointly with the FARDC[288]".[289] The mission is to support the government forces and target named non-state armed groups that the government forces is attempting to defeat. That the mandates opens up for that the peacekeepers offers military support to one of the parties to an ongoing armed conflict and for the peacekeepers to fight alongside one of the parties targeting other groups makes it likely that the FIB will become party to the conflict once deployed. However, it is the actual actions of the FIB that will determine if they do become party to the conflict.

The mandate is not in accordance with the three traditional principles of peacekeeping. The force did not have the consent of the parties to the conflict when it deployed. While the Congolese government consented, the non-state armed groups that were named in the mandate as the goal of "target offensive operations" clearly did not. Since the mandate stated that the operation could be carried out "jointly with the FARDC" which is a party the ongoing conflict, the mission is not impartial. The mandates does also open for the use of force in additional to traditional self-defence, but on can argue that the use of force the mandate opens for is in de-

[285] UN Security Council Resolution 2098 (2013), p. 4
[286] Ibid. para. 12
[287] Ibid. para. 12(b)
[288] Armed Forces of the Democratic Republic of the Congo
[289] UN Security Council Resolution 2098 (2013), para. 12(b)

fence of the mandate, and as such within the newer interpretation of the use of force only in self-defence principle.

5.1.2 The situation on the ground

The mandate itself is not sufficient to conclude that the FIB has become party to the conflict, as it is the facts on the ground that determine the application of IHL, not policy documents, mandates and doctrines. By referring to concrete episodes, one recent and two from the early days of the FIB I will show that the mandate has been carried out in such a way that the FIB indeed has become a party to the conflict.

In July and August 2013, the FIB supported the Armed Forces of the Democratic Republic of the Congo (FARDC) with combat troops, attack helicopters, artillery and mortar fire when they target the M23 in the areas in around Goma.[290] In October 2014, the FARDC and FIB again attacked the M23 and removed them from the towns of Kibumba, Rumangaba and Rutshuru, which was seen to be the group's strongholds.[291]

On the 13 November 2018, the FARDC and MONUSCO launched what was a "jointly planned offensive operations (…) with the intention of disrupting the Allied Democratic Forces (ADF) activities".[292] So far the operation in the Beni area has resulting in the retake of key ADF positions and the capture of some of their personnel.[293] Six peacekeepers, and an undisclosed number of FARDC members were killed in the action, and several more wounded.[294]

This shows that the FIB supported one side of the conflict, namely the Congolese government. As long as the FIB plan and carry out offensive operations together with FARDC it is difficult to argue under international law that they are not party to the conflict.[295] The support has been of such an extent that the FIB has become party to the conflict.

5.2 Is MONUSCO party to the conflict?

If the FIB and the peacekeepers in MONUSCO shall be considered as having different status under IHL in the conflict in the DRC they must be two separate entities.

[290] Tull (2017) p. 175
[291] Darren (2013)
[292] UN Press Release (2018)
[293] Ibid
[294] Ibid
[295] Oswald (2013)

When the UN Security Council mandated the FIB they chose not to establish it as a separate legal entity which would have separated it clearly from MONUSCO. The mandate institutes that the FIB is under control and command by the MONUSCO force commander.[296] This entails that both FIB and the other MONUSCO peacekeepers are the same force. Also practically the FIB is a part of MONUSCO and not a separate unit. They share the same support system and have the same uniforms and insignia.[297] This means that is difficult for non-state armed groups to distinguish MONUSCO from FIB peacekeepers. The FIB and MONUSCO must therefore be considered as one entity.

Ferraro argues that since the FIB clearly is a party to the conflict this means that the whole military component of the MONUSCO is party to the conflict and can be legal targets under IHL, no matter which tasks they perform.[298] Sheeran and Case[299] agree with Ferraro that MONUSCO as whole, not only FIB, is to be considered as a party to the conflict, and all peacekeepers in Congo have therefore lost their protection.

Moreover Sheeran and Case argue that this is also the UN's view. They cite the fact that when the then head of mission Martin Kobler in a press release[300]condemned the killing of a MONUSCO peacekeeper (that were not part of the FIB) he did not indicate that the killing was a violation of international humanitarian law. In my view this cannot be held as conclusive evidence of the UN's view as the statement was three sentences and most likely an initial statement motivated by a wish to express concern for the peacekeepers family and unit. Further it does not state that international humanitarian law was not violated, it just leaves the question open. Moreover, in a press release in response to the killing of a peacekeeper in May 2013 the spokesperson for then UN Secretary-General Ban Ki-moon stated that "the killing of peacekeepers *is* war crime" (emphasis added).[301]

Even though the UN has acknowledged that peacekeepers have engaged in offensive operations targeting specific armed groups, the organization has never admitted that the peacekeepers are party to the conflict.[302]Nevertheless, the UN has not tried to deny that it is party to the conflict in the DRC.[303] However, the UN has neither acknowledged that the FIB's offensive

[296] UN Security Council Resolution 2098 (2013), para. 9
[297] Sheeran and Case (2014) p. 9
[298] Ferraro (2014) p. 161
[299] (2014)
[300]UN Press Release, 28 August 2013
[301]UN Press Release, 8 May 2013
[302] Oswald (2013)
[303]Sheeran and Case (2014) p. 8

mandate may make its members legal targets under international humanitarian law.[304] In a press release commenting on the killing of seven peacekeepers in Congo in November 2018 the Security Council the "council underlined that deliberate attacks targeting peacekeepers *may* constitute war crimes under international law" (emphasis added).[305] The UN language has changed from that killing peacekeepers is a crime that it may be a crime. This might be as a reflection increased understanding of the status of peacekeepers under IHL.

5.3 Consequences of being party to the conflict

Parties to armed conflict are fighters, not civilians, and therefore the military personnel belonging to the FIB and MONUSCO are legal targets under IHL.[306] This means that the peacekeepers are legal targets for the extent of the conflict[307], and so is their equipment and bases[308].[309]

In the resolution establishing the FIB the Security Council states "its condemnation of any and all attacks against peacekeepers, emphasizing that those responsible for such attacks must be held accountable".[310] This might be read as an indication that the Security Council has not fully appreciated that they were giving a mandate that would result in that the mission became party to the conflict. Further, it has been reported that several members of the UN Security Council expressed surprised when briefed by the UN Office of Legal Affairs on a retreat for Council members 22-23 April 2013 that the ramifications of the FIB might have on the protected status of UN peacekeepers under international humanitarian law.[311]

If this awareness spread among the TCCs it might have consequences for member state's willingness to contribute troops. TCCs are often hesitant to send their personnel into mission areas where the risk of them being targeted is high. If the peacekeepers are legal targets under IHL this risks increases, and the number of troops might decrease as a result. Often do also the troops lack the right training and equipment for such missions.

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[304] Jenks (2015) p. 724

[305] UN Press Release, 15 November 2018

[306] Which implication this might have for civilian personnel and police forces belonging to the mission is a different question that will not be discussed here due to space constraints.

[307] AP I arts. 48, 51(2), 52(2), AP II art.13(2), CIHL Study rule 1

[308] AP I arts. 48, 52(2), AP II art. 13(1), CIHL Study rule 7

[309] Whittle (2015, p.861-2) also draws attention to another relevant issue namely the questions of improper use of emblems and insignia309. He points out that "the Brigade's use of the U.N. logo and colours during its offensive operations is contrary to the spirit, in no the content of the rule".

[310] UN Security Council resolution 2098 (2013), preamble

[311] Security Council Report (2013) p. 5

DPKO senior management has worried that the FIB might cause retaliations against other UN personnel that are less equipped to protect themselves.[312] This might enforce the TCCs resistance to send troops not only to the FIB, but to MONUSCO in general. This shows that the UN bureaucracy has not fully taken into consideration that if FIB is a party to the armed conflict, so is MONUSCO.

Another concern is the potential implication peacekeepers as fighters might have for IHL. If one argues that the rules are different for UN peacekeepers then for other parties to the conflict it would be quite easy to stretch the argument so that IHL does not apply to NATO peacekeepers, AU peacekeepers and so forth either. In IHL it is fundamental that that the law applies equally to all parties. If it does not, it will be increasingly simple for other parties to claim that the law does not apply to them either. If FIB is not considered to be a party to the conflict this would undermine IHL since any state party to an armed conflict could have non-states forces fight on their behalf and claim that they have civilian protection unless DPH.

[312] Security Council Report (2013) p. 5

6 Conclusions

In March 2011, then Norwegian Prime Minister, now Secretary General of NATO, Jens Stoltenberg said to the Norwegian Parliament that Norway was not at war in Libya and that "had we been, Norwegian soldiers would have been legitimate targets".[313] This shows that both rebel leaders and Prime Ministers are concerned with how the principle of distinctions should apply to peacekeeping operations, and that political leaders do not fully understand the implications for IHL.

The FIB case study has showed the mission's mandate does not fulfil the three traditional principles of peacekeeping, and that this has led it to become party to the conflict in Congo. If the mandate had followed the three principles, the likelihood is that the mission would not have become party to the conflict. This illustrates the strength of the principles of peacekeeping is that they can serve to prevent the peacekeepers from becoming party to the conflict.

When UN peacekeepers become party to an armed conflict, IHL applies to them to the same extent and in the same way as it applies to other parties to armed conflict. This means among other things, that when some of the peacekeepers in a mission do become legal targets, this may have effect for all the peacekeepers in that mission. There seem to be a lack of understanding of this both among the UN bureaucracy and among the TCCs.

Ultimately, the questions is what would the member states like UN peacekeeping to be, a neutral force that mainly can be deployed when there is already a peace to keep, or an offensive force that actively protects civilians by fighting those who harm them? The first alternative will leave a bigger room for the UN to find the political solutions the HIPPO report say is the only way to lasting peace, but might leave the UN open for criticism for not doing enough to protect civilians and fulfil their mandates.

[313] As quoted by Dagsavisen (2018) in Norwegian «Norge er i folkerettslig forstand ikke i krig. Hadde vi vært det, hadde blant annet norske soldater vært legitime mål»

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