

The protection of the Intervention Brigade under Article 8 (2)(e)(iii) of the Rome Statute of the International Criminal Court

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1. Introduction

As a non-international armed conflict continued in the eastern Democratic Republic of the Congo between the DRC armed forces and non-state armed groups, the United Nations Security Council acting on the recommendation of the Secretary-General Ban Ki-moon and in response to the call of the governments in Africa's Great Lakes region, adopted Resolution 2098 on 28 March 2013, which extended the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and authorised the creation of an 'Intervention Brigade' to conduct offensive operations against armed rebel groups. The Brigade is a 'first-ever offensive combat force' intended to carry out targeted operations against 23 March Movement (M23) and other Congolese rebels and foreign armed groups in eastern DRC.¹ As stressed in the resolution, the Intervention Brigade is established within the operation's existing force 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping'.² With reference to Chapter VII of the UN Charter, the resolution authorises MONUSCO to take 'all necessary measures' to perform the mandated tasks, through its military component – its regular forces and its Intervention Brigade as appropriate.

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¹ UNSC Press Release "Intervention Brigade" Authorized as Security Council Grants Mandate Renewal' (28 March 2013) UN Doc SC/10964 available at <www.un.org/News/Press/docs/2013/sc10964.doc.htm>. All other websites were last checked on 31 January 2015.

² UNSC Res 2098 (28 March 2013) S/RES/2098 para 9.



Specifically, MONUSCO is authorised, in support of the authorities of DRC and taking full account of the need to protect civilians, to carry out:

‘(...) targeted offensive operations through the Intervention Brigade (...) either unilaterally or jointly with the FARDC, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy on UN-support to non-UN forces (HRDDP), to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities’.³

In October and November 2013 MONUSCO participated in robust Congolese-led operations against the M23, which led to the military defeat of the movement.⁴ MONUSCO support included combat operations by ground troops from the Intervention Brigade, attack helicopters, artillery and mortar fire, and logistics support.⁵ On 28 March 2014 the Security Council acting under Chapter VII of the UN Charter unanimously renewed the mandate of MONUSCO, including its Intervention Brigade, until 31 March 2015.⁶ The period following the extension of the mandate was characterised by further momentum in the efforts of MONUSCO to neutralise armed rebel groups in support of the Congolese armed forces.⁷ The Mission provided support to FARDC operations against various military factions in the eastern Congo and these operations were marked by heavy fighting, with significant casualties

³ *ibid* para 12(b).

⁴ *The Report of the Secretary General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* (17 December 2013) S/2013/757 para 17.

⁵ *ibid* para 40.

⁶ UNSC Res 2147 (28 March 2014) S/RES/2147 para 1.

⁷ *The Report of the Secretary General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* (5 March 2014) S/2014/157 para 39 and *The Report of the Secretary General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* (30 June 2014) S/2014/450 para 28.



sustained by both the rebels and FARDC.⁸ As announced by a senior UN envoy on 8 January 2015, the DRC government jointly with MONUSCO and its Intervention Brigade will continue the military offensive against the Forces for the Liberation of Rwanda (FDLR), the Rwandan Hutu rebels in the DRC. The FDLR refused to disarm and surrender unconditionally by 2 January 2015 and the Secretary-General has urged for ‘decisive action’ against them.⁹

As noted above, the Intervention Brigade has been involved in a number of combat operations since its creation,¹⁰ which gives rise to legal questions regarding the applicability of international humanitarian law (IHL) to such use of force, the status of its personnel and consequently the lawfulness of attacks against them. This contribution will analyse these issues from the perspective of the protection afforded to peacekeeping missions under the Rome Statute of the International Criminal Court (ICC). Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute proscribe as a war crime in international and non-international armed conflicts respectively:

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

This contribution examines the question of whether MONUSCO with its Intervention Brigade, a ‘first-ever offensive combat force’, can be regarded as a ‘peacekeeping mission’ covered by the protective regime of Article 8(2)(e)(iii) of the Rome Statute applicable in non-

⁸ *ibid* (S/2014/450) para 53.

⁹ <www.unmultimedia.org/radio/english/2015/01/un-priority-for-2015-disarming-rebels-in-the-congo/#.VMGJ4ih8vww>.

¹⁰ See also press releases e.g.: D Oliver, ‘How M23 was rolled back’, *African Defence Review* (October 2013) available at <www.africandefence.net/analysis-how-m23-was-rolled-back/>; J Stupart, ‘Squaring Up Against the ADF’, *African Defence Review* (6 March 2014) available at <www.africandefence.net/squaring-up-against-the-adf/>; S Raghavan ‘In Congo, trapped in violence and forgotten’, *The Washington Post* (27 September 2014) available at <www.washingtonpost.com/sf/world/2014/09/27/in-congo-trapped-in-violence-and-forgotten/>.



international armed conflict.¹¹ The main argument is that regardless of its peacekeeping mandate, MONUSCO including its Intervention Brigade is bound by IHL when the conditions for its application have been met. The fact that it is a peacekeeping mission and its actions are authorised by the UN Security Council, and therefore legal under *ius ad bellum*, does not grant the immunity under *ius in bello* or in any way modify the applicability of the latter regime. The status of peacekeeping personnel under IHL should be determined exclusively based on their actions and facts on the ground. The distinction should also be made between civilian and military personnel of the mission. If military personnel from MONUSCO engage in hostilities with non-state armed groups and become a party to a non-international armed conflict, they are subject to IHL rules like any other armed force. This effectively means that peacekeeping military personnel should be considered combatants for the purpose of the principle of distinction and therefore legitimate targets for as long as the mission is a party to the conflict. It also means that they will not be covered by Article 8(2)(e)(iii) of the Rome Statute of the ICC.

The above argument is built upon the analysis of two major issues, and this is reflected in the structure of the article. First, it considers whether MONUSCO and its Intervention Brigade can be regarded as ‘a peacekeeping mission in accordance with the Charter of the United Nations’ for the purpose of the Rome Statute. Secondly, it examines the status of peacekeeping personnel under international humanitarian law and the conditions under which they can enjoy protection of Article 8(2)(e)(iii) of the Rome Statute. Finally, it applies the conclusions of this analysis to MONUSCO and its Intervention Brigade and recapitulates the main argument of the paper.

¹¹ The DRC is a State-party to the Rome Statute and the conflict in its territory is classified as non-international. The author shares the majority view that the involvement of multinational armed forces, such as UN peace operations, in a non-international armed conflict in support of governmental forces against non-state armed groups does not internationalise the conflict, see e.g.: ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Report of the 31st International Conference of the Red Cross and Red Crescent (ICRC, Geneva 2011) available at <www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>; S Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 *Intl Rev Red Cross* 69.



2. 'A peacekeeping mission in accordance with the Charter of the United Nations'

Neither the Rome Statute nor the Elements of Crimes thereto provide a definition of a 'peacekeeping mission in accordance with the Charter of the United Nations'. Defining 'peacekeeping' is not an easy task since the concept was not conceived as a part of a well-considered theoretical framework or a coherent doctrine. It was born in practice, or rather the term 'peacekeeping' was invented after the practice had already begun.¹² Peacekeeping was developed during the Cold War when, due to ideological differences, the Security Council was unable to perform collective security actions.¹³ It is not mentioned anywhere in the UN Charter and the Organization itself was for years disinclined to define it, most likely because 'to define peace-keeping was to impose a strait-jacket on a concept whose flexibility made it the most pragmatic instrument at the disposal of the world organization'.¹⁴ Although there is still no single and authoritative UN definition of peacekeeping, there is an agreement regarding three constitutional principles that have traditionally governed UN peacekeeping operations, namely: consent of the parties to the conflict to the deployment of a peacekeeping mission, impartiality, and non-use of force except in self-defence and defence of the mandate.¹⁵ These principles were derived from the experiences of

¹² T Findlay, *The Use of Force in UN Peace Operations* (OUP 2002) 4; W J Durch, M L England, *The Purposes of Peace Operations* (Center on International Cooperation 2009) 9.

¹³ For a general discussion see e.g.: O Schachter and C Joyner (eds), *United Nations Legal Order* (CUP 1995); H McCoubrey and N D White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth 1996); M Bothe, 'Peacekeeping' in B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 661; N MacQueen, *Peacekeeping and the International System* (Routledge 2006).

¹⁴ As remarked by Shashi Tharoor, the Special Assistant to the Under-Secretary-General for Special Political Affairs/Peacekeeping Operations in 1989-1996 'peacekeeping was an activity that the United Nations had always been politically reluctant to define'. S Tharoor, 'The Changing Face of Peace-keeping and Peace-enforcement' (1995) 19 *Fordham Intl L J* 408, 414.

¹⁵ United Nations, Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations, Principles and Guidelines* (2008) 6 <http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> [hereinafter: *United Nations Peacekeeping Operations, Principles and Guidelines*] 31ff.



traditional ceasefire-monitoring missions¹⁶ and they are rooted in the purposes and principles of the UN Charter. They are in line with the principles of sovereignty, territorial integrity and political independence of States and non-intervention in matters that are essentially within their domestic jurisdiction. They also underline a conceptual and constitutional distinction between peacekeeping and (peace) enforcement. The clear demarcation line between these two types of operations was drawn by the International Court of Justice in *Certain Expenses of the United Nations* Advisory Opinion (1962) at the beginning of a peacekeeping practice.¹⁷ Peacekeeping is conceptually different from (peace) enforcement because it does not involve 'preventive or enforcement measures' under Chapter VII of the UN Charter against a State. Enforcement action, on the other hand, is an exception to the prohibition of the use of force in Article 2(4) of the UN Charter as it uses force against a culpable State or States to enforce peace or impose a political solution without their consent.

Traditional peacekeeping principles of consent, impartiality and non-use of force except in self-defence continue to apply despite the evolution and transformation that peacekeeping has undergone moving beyond traditional ceasefire monitoring. However, they do not apply in their original form; they had to be re-defined in response to new and evolving political and operational challenges.¹⁸ For example, the principle of consent has its origins in the early UN peacekeeping practice of deploying observer missions in inter-state conflicts. The United Nations was dealing with two or more sovereign States and needed their consent to the measure to deprive the action of enforcement character. The

¹⁶ The UN Secretary-General Dag Hammarskjöld elaborated on the characteristics of the first armed peacekeeping mission, the United Nations Emergency Force (UNEF I) established in 1956 in response to the Suez Crisis, in his Reports to the General Assembly, which consequently became the defining legal principles of UN peacekeeping in the coming decades; see e.g.: *Second and final report of the Secretary-General on the plan for an emergency international United Nations force requested in resolution 998 (ES-I), adopted by the General Assembly on 4 November 1956* (06 November 1956) UN Doc A/3302.

¹⁷ *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 166, 177.

¹⁸ N Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2007) 11 *J Conflict Security Studies* 465; A J Bellamy, P D Williams, *Understanding Peacekeeping* (2nd edn, Polity Press 2010) 173.



changing nature of conflicts and new circumstances of internal strife with which peacekeepers are confronted have influenced the understanding of the consent requirement. As stipulated in UN reports, in a non-international armed conflict, consent must be obtained from a host-State, whereas consent from local factions, who are parties to such conflict should be sought as a practical measure to facilitate the operation of the mission, but not out of a legal obligation.¹⁹ This approach appears sound, as non-state actors do not have a standing equal to States under international law. The traditional position of international law admits the existence of the right of a recognised government to invite foreign forces to assist it in combatting rebels.²⁰

The second principle of impartiality also dates back to the early peacekeeping missions and the realities of that time and, similarly to the principle of consent, has undergone a number of modifications since then. As stressed in UN peacekeeping doctrine, impartiality does not mean neutrality in the sense of inactivity or treating the parties as moral equals – following bitter lessons learned from the experience in the former Yugoslavia and Rwanda. Impartiality now refers to the way the mandate should be implemented by a peacekeeping mission at the operational level. Peacekeeping missions must be impartial in their dealings with the parties and rigorously execute the mandate without favour or prejudice to any party.²¹ Also the principle of non-use of force except in self-defence has changed under UN law – it has been transformed from its narrow origins of personal self-defence to include ‘defence of the mission’ or ‘defence of the mandate’. Peacekeeping is still distinct from peace enforcement as it does not use force against a State at the international or strategic level. It might, however, take a robust form at the tactical level to support the peace process, to defend the mission and the mandate from spoilers and criminals.²² The core business of peacekeeping is to create a secure and stable environment to facilitate the political process. Within this context the primary distinction be-

¹⁹ E.g.: *The Report of the Panel on United Nations Peace Operations* (October 2000) UN Doc A/55/305-S/2000/809 (*The Brahimi Report*).

²⁰ The International Court of Justice referred to this principle in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 para 246.

²¹ *United Nations Peacekeeping Operations, Principles and Guidelines* (n 15) 33.

²² *ibid* 35.



tween peace enforcement and robust peacekeeping is thus more about the objectives of the use of force and less about how much force is being used, although certain caveats apply.²³ A mission might be authorised by the Security Council acting under Chapter VII of the UN Charter to ‘use all necessary means’ against criminal gangs and spoilers ‘to deter forceful attempts to disrupt the political process, to protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order’.²⁴ The use of force to defend the mandate must be seen as a concept distinct from personal self-defence as they rest on two different legal bases. Defence of the mandate derives its validity from a binding resolution of the Security Council and it has to be authorised each time, whereas the right to personal self-defence is an inherent right of every individual and exists independently of such authorisations.

The continuing relevance of these three constitutional principles of peacekeeping has been confirmed by the Special Court for Sierra Leone (SCSL) and the International Criminal Court when they were seized on cases concerning attacks against peacekeeping missions.²⁵ The similar test should also be applied to MONUSCO and its Intervention Brigade in order to establish whether the mission is a peacekeeping mission and therefore whether it could be covered by the protective regime of the Rome Statute.

3. *MONUSCO as a peacekeeping mission*

MONUSCO was established by Security Council resolution 1925 of 28 May 2010 to take over from an earlier mission deployed in the DRC - the United Nations Organization Mission in Democratic Republic of the Congo (MONUC). It was authorised to use ‘all necessary means’ to

²³ C de Coning, J Detzel, P Hojem, ‘UN Peacekeeping Operations Capstone Doctrine. Report of the TFP Oslo Doctrine Seminar 14 & 15 May 2008, Oslo, Norway’ (2008) 14 Norwegian Institute of International Affairs, NUPI Report Security in Practice 4.

²⁴ *United Nations Peacekeeping Operations, Principles and Guidelines* (n 15) 34.

²⁵ *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, (Judgment) SCSL-04-15-T (2 March 2009); *The Prosecutor v Babar Idriss Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010).



carry out its mandate relating, *inter alia*, to the protection of civilians and humanitarian personnel under imminent threat of physical violence and to support the government of the DRC in its stabilisation and peace consolidation efforts.²⁶ The mission was deployed with the consent of the government of the DRC and the Security Council has continuously stressed ‘its commitment to the sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo’.²⁷ In line with the principle of impartiality in execution of a peacekeeping mandate, which should not be confused with neutrality, and in accordance with *Human rights due diligence policy on United Nations support to non-United Nations security forces*,²⁸ the mission must ensure that any support provided to DRC forces is consistent with the purposes and principles set out in the UN Charter and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law.²⁹ The Chapter VII authorisation to use ‘all necessary means’ to fulfil the mandate, which in Security Council parlance stands for the use of force beyond self-defence,³⁰ is consistent with peacekeeping principles on the use of force, as long as force is not employed against a State at the strategic or international level. If this condition is met, ‘robustness’ and proactive use of force against spoilers and criminals does not turn MONUSCO into an enforcement tool. With these considerations in mind it seems justified to conclude that MONUSCO is a ‘peacekeeping mission in accordance with the Charter of the United Nations’. As regards the Intervention Brigade, Resolution 2098 (2013) stresses that the Brigade has been established as an integral part of MONUSCO and remains under the same command and control arrangements.³¹ Specifically, it is not meant to be an enforcement measure operating alongside the existing peacekeeping operation and supportive to it, but rather under the command and control of participat-

²⁶ The original mandate of MONUSCO was further detailed in UNSC Res 2053 (27 June 2012) S/RES/2053.

²⁷ See e.g.: UNSC Res 1925 (28 May 2010) S/RES/1925, UNSC Res 2053 (27 June 2012) S/RES/2053, UNSC Res (28 March 2014) S/RES/2147.

²⁸ A/67/775-S/2013/110 (5 March 2013).

²⁹ *ibid.*

³⁰ T Findlay (n 12) 7-9; R McLaughlin, ‘The Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising “All Necessary Means”’ (2008) 12 J Conflict Security L 389.

³¹ UNSC Res 2098 (28 March 2013) S/RES/2098 (2013) para 9.



ing states, as was the case in the former Yugoslavia and Somalia.³² Resolutions 2098 (2013) and 2147 (2014) reaffirm in their preambles ‘the basic principles of peacekeeping, including consent of the parties, impartiality, and non-use of force, except in self-defence and defence of the mandate’.³³ Given the structural integration of the Brigade with the existing peacekeeping operation, as well as the consent of the host state, DRC, to its newly transformed mandate,³⁴ MONUSCO as a whole can be regarded a peacekeeping mission for the purpose of Article 8(2)(e)(iii) of the Rome Statute.

4. *Status of peacekeeping personnel under international humanitarian law*

There is no specific reference to peacekeeping missions in any of the 1949 Geneva Conventions or their Additional Protocols.³⁵ An indirect reference in Article 37(1)(d) of the 1977 Additional Protocol I relates to the prohibition of perfidy and bans ‘the feigning of protected status by the use of signs emblems or uniforms of the United Nations or of neutral of other States not Parties to the Conflict’. This provision suggests the implied protected status of persons entitled to use these signs and has been so assessed by scholars.³⁶ Cottier compares it to the protected

³² IFOR, UNITAF

³³ UNSC Res 2098 (28 March 2013) S/RES/2098, UNSC Res 2147 (28 March 2014) S/RES/2147.

³⁴ The Minister for Foreign Affairs, Cooperation and La Francophonie of the Democratic Republic of the Congo expressed his gratitude on behalf of his Government and people for United Nations efforts to help protect their country’s territorial integrity and foster peace and stability over the past 15 years. He said that the Security Council’s ‘innovative decision’ should help the country put a definitive end to the repeated cycles of violence and lead to the ‘dawning of a new era’ of human rights and security for all. See Press Release, UN Security Council, “‘Intervention Brigade’ Authorized as Security Council Grants Mandate Renewal’ (March 28 2013) UN Doc SC/10964 available at <www.un.org/News/Press/docs/2013/sc10964.doc.htm>.

³⁵ M Cottier, ‘War Crimes – para. 2(b)(iii)’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article* (2 edn, Beck 2008) 335; K Dorman, *Elements of War Crimes under the Rome Statute of the International Criminal Law. Sources and Commentary* (ICRC/CUP 2003) 154, 452.

³⁶ M Cottier (n 35) 336; J Doria, ‘Attacks on UN and Regional Organisations Peacekeepers: Potential Legal Issues Before the International Criminal Court’ (2008) 5 *Intl Studies J* 65-66.



status of civilians and persons *hors de combat*.³⁷ However, it should be noted that the same article contains a separate paragraph prohibiting ‘the feigning of an intent to surrender, or an incapacitation by wounds or sickness, or civilian, non-combatant status’,³⁸ which suggests that the protected status related to the UN might be of a distinct nature. Despite the lack of the explicit qualification of peacekeeping personnel in core IHL treaties, peacekeepers will belong either to the category of combatants or the category of civilians, as the two are complementary and mutually exclusive and there is no intermediate status between them. It should be noted though that following the concept of ‘integrated missions’, most contemporary peacekeeping operations consist of a number of different components: military, police and civilian.³⁹ The Rome Statute does not make any reference to this fact as it speaks only of a ‘peacekeeping mission’ as a whole. Articles 8(2)(b)(iii) and 8(2)(e)(iii) prohibit intentionally directing attacks against peacekeeping personnel and objects ‘as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict’, which implies that such personnel and objects should be considered civilians and civilian objects. While the status of civilian police and civilian personnel such as administrative and humanitarian staff should not cause much controversy, the same is not true for military personnel, who consist of armed forces of troop-contributing countries. The issue of personal scope of the application of IHL should therefore be assessed for each category of personnel separately. The SCSL and the ICC, both seized of the attacks against peacekeeping missions, did not distinguish between different categories of personnel nor explain why

³⁷ *ibid.*

³⁸ Art 37(1)(a), (b) and (c) of the 1977 Additional Protocol I. See also: *Commentary on the Additional Protocols* (n 137) 439-440; C Greenwood ‘Protection of Peacekeepers: The Legal Regime’ (1996) 7 *Duke J Comp Intl L* 185, 190. The protective rules explicitly applying to peacekeepers can also be found in the 1980 Conventional Weapons Convention (Article 9) and its Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Article 8).

³⁹ The concept of ‘integration’ of the UN activities in the field was formally introduced in 1997, although various efforts aiming at achieving greater coherence within the UN system were undertaken long before. Calling for ‘unity of purpose’, the Secretary-General Kofi Annan initiated in 1997 a programme for UN reform centred on ‘integration’ between its humanitarian, peace-keeping and political structures. See: United Nations. *Renewing the United Nations: A Programme for Reform*. Report of the Secretary General (14 July 1997) A/51/950.



all of them should be protected as civilians.⁴⁰ The courts simply ruled that both peace operations under consideration were peacekeeping missions in accordance with the UN Charter and therefore their personnel and objects should enjoy the protection given to civilians and civilian objects. It should be noted that such an approach has a direct impact on the temporal scope of application of IHL to peacekeeping personnel. As civilians, they would benefit from the protection against direct attacks unless and for such time as they directly participate in the hostilities. The notion of direct participation in hostilities refers to specific hostile acts carried out in the course of armed conflict by individual civilians not associated with armed forces of the parties to the conflict.⁴¹ Such civilians lose their protection only temporarily for the duration of specific hostile acts. This necessarily creates a 'revolving-door' effect, but since civilian involvement in hostilities occurs on a sporadic, spontaneous or unorganized basis, such temporary and activity-based loss of protection is justified. It would not be justified, however, if the participation in hostilities continues in a commanded and organized way, which might be the case for a military component of a peacekeeping mission, especially if it is mandated to carry out 'targeted offensive operations' against rebel armed groups.

For the purpose of determining whether peacekeepers are entitled to the protection of civilians, an alternative approach to the one taken by the international courts should be considered, namely whether or not peacekeepers qualify as combatants.⁴² This approach is informed by the way the definitions of the combatant and civilian statuses are constructed in IHL treaties. Combatants have the right to participate directly in hostilities and they can be targeted at all times. They are defined in Article 43 of the Additional Protocol I as members of the armed forces of a party to a conflict consisting of all organized armed forces, groups and units under a command responsible to that party for the conduct of its subordinates. Such armed forces shall be subject to an internal disciplinary system to enforce their compliance with the

⁴⁰ *Sesay et al* (n 25) para 233; *Abu Garda case* (n 25) para 126.

⁴¹ See e.g.: the ICRC study by N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

⁴² See the analysis of international jurisprudence in O Engdahl, 'Prosecution of Attacks against Peacekeepers in International Courts and Tribunals' (2012) 51 *Military L and L War Rev* 249, 275-276.



rules of international humanitarian law.⁴³ This definition of armed forces is based on the qualifications of belligerents in the Hague Regulations and the qualifications of prisoners of war in the Third Geneva Convention.⁴⁴ Civilians, on the other hand, are defined negatively/by exclusion, as persons who are not members of the armed forces, as set forth in Article 50 of the Additional Protocol I.⁴⁵ As already stated above, civilians enjoy the protection from direct attacks unless and for such time as they take a direct part in hostilities.⁴⁶ There is no formal combatant status in non-international armed conflict. Treaties applicable to this type of armed conflict use the terms ‘civilian’, ‘armed forces’ and ‘organized armed group’ but do not define them. These concepts should, nevertheless, be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of IHL.⁴⁷ Since the protection of persons who are not or are no longer participating in the hostilities is one of the main goals of international humanitarian law and the principle of distinction applies in all armed conflicts,⁴⁸ the parties to a non-international armed conflict

⁴³ State practice has established this rule as a norm of customary international law applicable in international armed conflicts. For the purposes of the principle of distinction, it may also apply to State armed forces in non-international armed conflicts; see J -M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, vol I (ICRC/CUP 2005) Rule 4.

⁴⁴ Art 1 of Annex to the Hague Convention IV: Regulations respecting the laws and customs of war on land (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 227, art 4 A (1), (2), (3) and (6) of the Third Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

⁴⁵ Art 50 of the Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3.

⁴⁶ Art 51(3) of the Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3.

⁴⁷ Art 31(1) of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁴⁸ The ICRC Customary International Law Study recognised the principle of distinction as a customary international law norm applicable to both types of armed conflicts, see: Rule 1 (Distinction between Civilians and Combatants) and Rule 7 (Distinction between Civilian Objects and Military Objectives) of and commentary to these rules. For a general discussion on the customary status of the principle of distinction see e.g.: C Greenwood ‘Customary Law Status of the 1977 Additional Protocols’ in A J M Delissen, G J Tanja (eds) *Humanitarian Law of Armed Conflict-*

must draw a distinction between combatants understood in a generic sense as those who fight ('fighters')⁴⁹ and non-combatants, including civilians, who do not fight.⁵⁰

The analysis of the status of peacekeeping forces under IHL should start with examining whether they can qualify as armed forces belonging to a party to a conflict; it is only if that is resolved in the negative, that they should be considered as falling into the category of civilians. The fact that peacekeeping operations are often deployed in situations of armed conflict does not automatically make them warring parties. There are certain conditions that must be fulfilled to determine the existence of an armed conflict involving peacekeeping forces and triggering the applicable legal framework. In the case of a non-international armed conflict, the fighting must occur between two or more parties demonstrating a certain level of organization and it must have reached a certain threshold of intensity.⁵¹ A military component of a peacekeeping mission easily fulfils the requirement of internal structure and organization, yet it should not be considered a party to the conflict unless it engages in sustained combat with an organized armed group or groups reaching the threshold of intensity required by IHL. If that happens, members of the military component will become combatants for the purposes of the principle of distinction and lose the protection against direct attacks as long as the peacekeeping mission is a party to that conflict.⁵² Their loss of protection will be status-based, hence they will be legitimate targets at all times, not only when directly participating in hostilities. This conclusion will apply to all military personnel of peacekeeping forces regardless of their specific function, which is consistent with the logic of IHL and the principle of distinction. Accordingly, all other non-military personnel of a peacekeeping mission must be regard-

Challenges Ahead (Martinus Nijhoff 1991) 108; Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004) 82.

⁴⁹ E.g.: the term 'fighters' is used in the Manual on the Law of Non-International Armed Conflict, International Institute of Humanitarian Law (Sanremo 2006) 4.

⁵⁰ Common Art 3 to the 1949 Geneva Conventions, Arts 1(1) and 13 of the Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International armed conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

⁵¹ T Ferraro, 'The applicability and application of international humanitarian law to multinational forces' (2013) 95 *Intl Rev Red Cross* 561, 576.

⁵² *ibid* 606.



ed as civilians for the purposes of IHL. Thus they will benefit from the protection against direct attacks unless and for such time as they directly participate in the hostilities.

5. *Concluding remarks*

In line with the considerations above, when MONUSCO's forces, including its Intervention Brigade, engage in hostilities with non-state armed groups in the eastern DRC while pursuing the mandate of 'neutralizing' and disarming them and when fighting reaches the threshold for the applicability of IHL, they should be regarded as combatants (in a generic sense) and therefore legitimate military targets. The fact that their actions are undertaken in the fulfilment of the peacekeeping mandate and are legal under *ius ad bellum* is irrelevant for the applicability of IHL. Neither combatant nor civilian status depends on the decision of the Security Council to establish a peacekeeping mission but on the fulfilment of the criteria stipulated by international humanitarian law and actual conduct of the members of the mission. The Secretary-General's reports on MONUSCO from 2013 and 2014 seem to confirm that the criteria for the applicability of IHL have been met, as the reports talk about on-going combat operations by the Congolese armed forces supported by MONUSCO and its Intervention Brigade against various armed groups in the eastern DRC. These operations have been described as 'robust', involving ground troops, attack helicopters, artillery and mortar fire and marked by heavy fighting, with significant casualties on both sides.⁵³ If it is concluded that MONUSCO has become a party to a non-international armed conflict in the DRC, this will not change the characterisation of the mission as a peacekeeping mission since the robust use of force is allowed at the tactical level against spoilers and criminals. In such circumstances, however, the mission's military personnel, including the Intervention Brigade, as well as other brigades, whether or not actually engaged in combat, will not benefit from

⁵³ *The Reports of the Secretary General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo: S/2013/757 (17 December 2013), S/2013/773 (23 December 2013), S/2014/157 (05 March 2014), S/2014/450 (30 June 2014), S/2014/698 (25 September 2014), S/2014/956 (30 December 2014), S/2014/957 (30 December 2014).*



the protection of Article 8(2)(e)(iii) of the Rome Statute of the International Criminal Court. The protective regime of the Rome Statute will only cover civilian personnel unless and for such time as they take a direct part in hostilities.

