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*Attacks against peacekeepers:
An overview of recent trends and
underlying legal issues*

SUMMARY: 1. Attacks against Peacekeepers: Facts, Causes and Legal Issues. – 2. The Legal Regime for the Protection of Peacekeepers. – 2.1. Protection under International Humanitarian Law. – 2.2. Protection under the 1994 Convention on the Safety of UN Personnel. – 2.3. Protection under International Criminal Law. – 3. Prevention and Repression of Crimes against Peacekeepers: Which Way Ahead?

1. *Attacks against Peacekeepers: Facts, Causes and Legal Issues*

In a Press Statement dated 10 May 2017, the members of the Security Council condemned in the strongest terms the attack on a convoy of the Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), perpetrated on 8 May by alleged anti-Balaka elements, which resulted in four Cambodian peacekeepers killed, 10 wounded and one reported missing in action. The members of the Security Council reiterated that “*attacks against peacekeepers may constitute war crimes*”, reminded “*all parties of their obligations under international humanitarian law*”, and concluded by a call on the Government of the Central African Republic to swiftly investigate the attack and bring the perpetrators to justice.¹ Further Press Statements along the same lines were issued by the members of the Security Council in following months, namely on 4 December 2017, concerning the attack on a MINUSCA detachment that was protecting an internally displaced persons camp, which resulted in one Mauritanian peacekeeper killed and two other Mauritanian peacekeepers and one Zambian peacekeeper injured;² on 8 De-

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¹ See UN Press Release SC/12815-PKO/639, 10 May 2017, <https://www.un.org/press/en/2017/sc12815.doc.htm>.

² See UN Press Release SC/13102-PKO/696, 4 December 2017, <https://www.un.org/press/en/2017/sc13102.doc.htm>.

ember 2017, concerning the attack against the Company Operating Base of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), which caused the death of 15 Tanzanian peacekeepers and injured at least 53 others;³ on 29 January 2018, concerning the attack on MONUSCO that occurred two days before and resulted in the death of one Pakistani peacekeeper and injured another;⁴ on 28 February 2018, concerning the attack against a convoy of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), which caused the death of four Bangladeshi peacekeepers and injured others;⁵ and most recently on 6 April 2018, concerning the attack against a vehicle of MINUSMA which caused the death of a Nigerian peacekeeper.⁶

Those above are some examples of hostile incidents and acts of violence directed against United Nations peacekeepers during the last year. As a matter of fact, the phenomenon is not new, as the heaviest fatalities were suffered by peacekeepers during the sixties, in the context of the UNEF I and ONUC missions deployed for countering the Suez canal crisis and the upcoming civil war in Congo; as well as in the nineties, mainly in the context of two of the most controversial missions of the whole history of UN peacekeeping, i.e. UNPROFOR in the former Yugoslavia and UNOSOM II in Somalia. However, statistics warn that since 2011 peacekeeping fatalities due to acts of violence are rising and that 2017, with 56 fatalities, has been the deadliest single year on record since 1994.⁷ Alarmed by these trends, in November 2017 the UN Secretary-General appointed the (retired) Lieutenant General Carlos Alberto dos Santos Cruz from Brazil to lead a high-level review panel of peacekeeping

³ See UN Press Release SC/13114-PKO/699, 8 December 2017, <https://www.un.org/press/en/2017/sc13114.doc.htm>.

⁴ See UN Press Release SC/13186-PKO/704, 29 January 2018, <https://www.un.org/press/en/2018/sc13186.doc.htm>.

⁵ See UN Press Release SC/13232-PKO/708, 28 February 2018, <https://www.un.org/press/en/2018/sc13232.doc.htm>.

⁶ See UN Press Release SC/13283-PKO/721, 6 April 2018, <https://news.un.org/en/story/2018/04/1006792>.

⁷ See the report *Improving Security of United Nations Peacekeepers: We Need to Change the Way We Are Doing Business*, 19 December 2017, pp. 4-5, https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf. Drawing from data of the United Nations Operation and Crisis Center (UNOCC), the report records a total number of 943 UN peacekeepers who lost their lives due to acts of violence, from 6 July 1948 to 19 December 2017. Spikes in fatalities were attained in the periods 1960-1962, during the deployment of UNEF I and ONUC, and in 1992-1996, during the deployment of UNPROFOR, UNOSOM, UNAMIR in Rwanda and UNTAC in Cambodia. A third increase is recorded since 2011, with 2013-2016 establishing a plateau, and 2017 ending the plateau with significant higher fatalities. 90.2% of fatalities are suffered by military components with the vast majority from attacks on movements and camps. MINUSMA, MINUSCA and MONUSCO represent an increasingly higher level of fatalities, with African peacekeeping troops suffering the overwhelming number of fatalities.



fatalities and injuries due to violent acts, and to submit short- and long-term recommendations on measures to reduce the number of such fatalities.⁸ The high-level review panel report, which was rendered on 19 December 2017, builds heavily on the factual background outlined above.⁹ Concerning the root causes of the rise of violent attacks against peacekeepers, the report does not add too much to the findings already contained in previous UN documents, by simply pointing out at the outset that “*two-thirds of all UN peacekeepers are deployed in environments of ongoing conflicts and operate in increasingly complex, high-risk environments*”.¹⁰

The main findings and recommendations of the high-level review panel report on the security of peacekeepers relate to the changes in operational behaviour and mind-set required from both the UN organs and troop contributing States for effectively countering such threats.¹¹ Very assertive and proactive on the operational side, the high-level panel report appears however rather laconic in the legal analysis. This aspect is apparently evoked in the passage stating that “*the United Nations must update the principles of peacekeeping to reflect that the blue helmet and flag do not offer natural protection, they are target. (...) The United Nations and Troop Contributing Countries must plan operations based on threat assessment of the specific environment, not standards and policies better suited to “traditional” peacekeeping (...)*”. In the following, the recommended updating of the legal principles applicable to peacekeeping is however confined to the muscular suggestion that “*Peacekeepers must adopt a proactive posture in self-defence: they must take the initiative to use force to eliminate threats and end impunity for attackers by quickly organising special operations. (...) Overwhelming force is necessary to defeat and gain the respect of hostile actors*”.¹² Strangely enough, the report omits any reference to the legal instruments that are available under inter-

⁸ See UN Press Release SG/A/1772-BIO/5045-PKO/688, 17 November 2017, <https://www.un.org/press/en/2017/sga1772.doc.htm>.

⁹ *Improving Security of UN Peacekeepers*, supra note 7.

¹⁰ *Ibidem*, p. 1. On the root causes of attacks against peacekeepers see in particular *Report of the Special Committee on Peacekeeping Operations*, 2017 Substantive Session (New York, 21 February-17 March 2017), UN Doc. A/71/19, 20 March 2017, p. 12, para. 42, explaining that the rise of deaths and security incidents can result from “*the deployment of United Nations peacekeeping missions in fragile political and security environments, escalating the levels of violence and the asymmetrical and complex threats*”. The ensuing implementing report of the Secretary-General has been specific in ascribing the growing complexity of the environments in which peacekeepers operate to “[t]he fracturing and proliferation of armed groups and their increasingly transnational and transactional character, coupled with the linkages that exist between criminal incentives and operational capabilities in some theatres”: see *Implementation of the recommendations of the Special Committee on Peacekeeping Operations. Report of the Secretary-General*, UN Doc. A/72/573, 3 November 2017, p. 23, para. 100.

¹¹ *Improving Security of UN Peacekeepers*, supra note 7, especially under the sections “Changing Mindset” and “Improving Capacity”, at 10-15.

¹² *Ibidem*, p. 10.

national law for guaranteeing or enhancing the protection of peacekeepers. It is not clear whether this omission is only due to the operative and practical approach to the problem adopted in the report, or whether it reveals an underlying conviction of its drafters about the lack of effectiveness of the existing legal instruments relevant for the protection of peacekeepers. Be that as it may, it can be useful to provide in this context a sketched overview of the legal framework applicable to the issue under consideration.

2. *The Legal Regime for the Protection of Peacekeepers*

2.1. *Protection under International Humanitarian Law*

A first layer of protection for peacekeepers is provided by the principles and rules of International Humanitarian Law (IHL). In fact, the applicability of this body of law to UN peacekeeping operations has represented for a long time a bone of contention. On one hand, the point has rightly been made that IHL is in most cases without pertinence with respect to peacekeeping operations because, as a consequence of the basic principles informing those operations – ie consent of the host State, impartiality, and use of force limited to self-defence – peacekeepers would *a priori* not be involved in hostilities and would not take the side of any of the parties to an armed conflict.¹³ On the other hand, it has been maintained that IHL might matter because peacekeepers are often deployed in territories where armed conflicts of an international or internal nature are ongoing, and they cannot be considered as ‘mere passers-by’ in those situations.¹⁴ On account of the aforementioned features of peacekeeping operations, in legal literature the idea has consolidated that peacekeepers can be assimilated to civilians and that they are entitled to the same level of protection which is granted to civilians under IHL.¹⁵ The same idea seems to have spilled into the UN practice, if one takes into account the

¹³ See for example L. CONDORELLI, *Le statut des forces de l'ONU et le droit international humanitaire*, in *Rivista di Diritto Internazionale*, 1995, p. 881, 902-904.

¹⁴ J. SAURA, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, in *Hastings Law Journal*, 2007, p. 479, at 503.

¹⁵ See especially J.M. HENCKAERTS-L. DOSWALD-BECK, *Customary International Humanitarian Law. Volume I. Rules*, Cambridge University Press, Cambridge, 2005, p. 112 ff. See also A. GADLER, *The Protection of Peacekeepers and International Criminal Law: Legal Challenges and Broader Protection*, in *German Journal of International Law*, 2010, p. 585, at pp. 588-590; A. SPAGNOLO, *The Crime of Attacking Peacekeepers*, in F. POCAR-M. PEDRAZZI-M. FRULLI (eds.), *War Crimes and the Conduct of Hostilities. Challenges to Adjudication and Investigation*, Edward Elgar, Cheltenham, 2013, p. 153, at pp. 156-158. As to the material scope of the protection applicable to peacekeepers, it will first of all encompass the prohibition of intentional attacks directed against civilian persons and civilian objects, which are provided for under Arts. 51-52 of the I Protocol Additional to the Geneva Conventions of 1949.

Secretary-General report concerning the establishment of a Special Court for Sierra Leone, which qualifies peacekeepers as “*a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection*”.¹⁶

Further clues on this issue are brought about in the Bulletin promulgated in 1999 by the UN Secretary-General on the observance by United Nations Forces of IHL.¹⁷ The Bulletin, the purpose of which is to set out fundamental principles and rules of IHL applicable to UN forces conducting operations under the UN command and control, describes its field of application as follows:

“1.1. The fundamental principles and rules of international humanitarian set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

*1.2. The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict”.*¹⁸

Leaving aside for the moment the scope of the 1994 Convention (on which *infra*, subsection 2.2), this quoted provision proposes a factual approach to the question of the status of peacekeepers under IHL, by suggesting that they will in principle be considered as “non-combatants”, and as such entitled to the protection reserved to civilians, except in situations where they are actively engaged as combatants in armed conflicts. In fact, the clauses “*to the extent and for the duration of their engagement*” and “*so long as they are entitled to protection*”, emphasized in the text above, allow the inference that the status of peacekeepers is qualified by the same requirement of “direct participation of hostilities” applicable to civilians: according to this formula, any civilian who takes part in hostilities loses his condition of protected person and assumes that of combatant, thereby becoming a potential target of legitimate belligerent violence.¹⁹ It is however to be expected that interpretative hurdles

¹⁶ *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, p. 4, para. 16. This statement referred to the crime provided for in Art. 4 (b) of the draft statute of the Special Court, concerning the intentional attacks against personnel and materials involved in humanitarian and peacekeeping missions: see *infra*, note 29.

¹⁷ Secretary-General’s Bulletin, *Observance by United Nations forces of international humanitarian law*, UN Doc. ST/SGB/1999/13, 6 August 1999.

¹⁸ *Ibidem*, section 1, at p. 1 (emphasis added).

¹⁹ On the notion of direct participation in hostilities see J.M. HENCKAERTS-L. DOSWALD-BECK,

similar to that raised in the application to civilians of the notion of direct participation of hostilities, especially insofar as the conditions and the duration of this participation are concerned, will also be encountered with regard to peacekeepers.²⁰ This is all the more likely, if one considers the above mentioned growing complexity of the environments in which peacekeepers are called to operate, as well as the growing differentiation of the functions entrusted to modern peacekeeping operations.

A further element of complexity is introduced by the final sentence of section 1.1 of the Bulletin, where it is stated that principles and rules of IHL set out herein are applicable to UN enforcement operations, as well as to “*peacekeeping operations when the use of force is permitted in self-defence*”. In other words, according to the Bulletin, peacekeepers using force in self-defence may be considered as combatants and therefore lose the special protection granted to civilians, provided of course that the threshold of an armed conflict has been crossed. The practical application of this requirement may be however raise difficulties, especially if one consider the expanded notion of self-defence as determined by the UN Security resolutions establishing the mandate of peacekeeping forces, which often encompasses not only the use of force needed for the personal defence of blue helmets or of civilians under threat of attack, but also the force needed for carrying out the operation’s mandate.²¹

To sum up, it may be observed that if a certain degree of protection for peacekeepers can be deduced by analogy from IHL rules devoted to civilians, the threshold of application of this regulation often remain problematic in practice.

2.2. *Protection under the 1994 Convention on the Safety of UN Personnel*

A second layer of legal protection for peacekeepers is offered by the Convention on the Safety of United Nations and Associated Personnel, which was adopted on 9 December 1994 by the General Assembly,²² entered into force on 15 January 1999 and is currently gathering 93 States parties.²³ The Convention,

supra, note 15, pp. 22-23. N. MELZER, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, 2009.

²⁰ See M. PACHOLSKA, *(Il)legality of Killing Peacekeepers. The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals*, in *Journal of International Criminal Justice*, 2015, p. 43, at 55-57. For a critical assessment about the application to peacekeepers of the notion of direct participation to hostilities see also Y. ARAI-TAKAHASHI, *The Intervention Brigade within the MONUSCO. The Legal Challenges of Applicability and Application of IHL*, in *QIL-Questions of International Law*, n. 13, 2015, pp. 18-19, www.qil-qdi.org/wp-content/uploads/2015/03/02_MONUSCO_Arai_FIN.pdf.

²¹ See A. GADLER, *supra*, note 15, pp. 590-591.

²² See UNGA resolution 49/59 of 9 December 1994, UN Doc. A/RES/49/59, 17 February 1995.

²³ See *Multilateral Treaties Deposited with the Secretary General*, status as at 11 April 2018,

which constituted the reaction of the international community to the appalling attacks suffered by peacekeepers in the context of UNPROFOR and UNOSOM missions, was in fact prompted by the awareness that “existing measures of protection for United Nations and associated personnel are inadequate” and was aimed at supplying “appropriate and effective measures for the prevention of attacks committed against United Nations and associated personnel and for the punishment of those who have committed such attacks”.²⁴

This instrument departs from the “protection-by-analogy” approach based on IHL, as it is specifically tailored to the needs of the UN operations and outlaws all attacks against UN personnel.²⁵ Art. 7 of the Convention establishes that UN and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate, and sets forth a general obligation of States Parties to take all appropriate steps to protect UN personnel, especially when deployed in their respective territories. Art. 9 provides for a detailed list of acts against UN personnel which States Parties are bound to criminalize under their national law²⁶ and Art. 10 further engages each State Party to establish its jurisdiction over such criminal acts or to extradite an alleged offender towards other Parties having established their jurisdiction. Art. 11 of the Convention covers the aspect of prevention of crimes against UN personnel, as it sets forth an obligation of States parties to cooperate to that effect, in particular by taking all practicable measures to prevent preparations in their respective territories of the commission of crimes against UN personnel, and by exchanging information and coordinating administrative and other measures to prevent the commission of those crimes.

<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-8.en.pdf>. Italy has deposited its instrument of ratification of the Convention on 5 April 1999. On 8 December 2005 the General Assembly has adopted an Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel which extends the application of the Convention in respect to UN operations established by a competent organ of the United Nations for the purposes of delivering humanitarian, political or development assistance in peacebuilding, or delivering emergency humanitarian assistance (UN doc. A/RES/60/42, 6 January 2006). The Optional Protocol entered into force on 19 August 2010 and as at 11 April 2018 gathers 32 States Parties (Italy is not a Party).

²⁴ See the 6th and 9th paragraphs of the preamble of the 1994 Convention.

²⁵ See C. GREENWOOD, *Protection of Peacekeepers: The Legal Regime*, in *Duke Journal of Comparative & International Law*, 1996, p. 185 ff., 194.

²⁶ In particular, under Art. 9, para. 1, the following shall be considered as crimes against UN personnel: “The intentional commission of: (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty; (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act; (d) An attempt to commit any such attack; and (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law”.



The shortcomings of the 1994 Convention do not arise however from its substantive provisions, but from the uncertainties relating to its application. The Convention will apply to personnel engaged in a United Nations operation, which is defined under Art. 1, letter (c), as

“an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control: (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation”.

On the other hand, the scope of application is defined under Art. 2 as follows:

“1. This Convention applies in respect of United Nations and associated personnel and United Nations operations, as defined in article 1.

2. This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”.

The purpose of the exclusion provided in the latter paragraph is to establish a clear-cut separation between the regime of the Convention, which would in principle cover the classical UN peacekeeping operations, and the laws of armed conflicts, which would apply to enforcement operations established under Chapter VII of the UN Charter, whose personnel are engaged as combatants in hostilities.²⁷ At a closer look however, the assumption that the two regimes are mutually exclusive is far from being uncontroversial, especially in view of the fact that frequently Security Council resolutions defining the mandates of peacekeeping operations contain an express reference to Chapter VII. Moreover, it must be considered that forces established without reference to Chapter VII are also entitled to the right of self-defense, which as already pointed out can be understood as encompassing a measure of force ranging from the personal defense of the peacekeepers up to the defense and/or the implementation of the mandate of the mission. Interestingly, Art. 21 of the Convention provides that *“Nothing in this Convention shall be construed so as to derogate from the right to act in self-defense”*. This clause seems to imply that UN personnel would remain under the protection of the Convention even when is engaged in

²⁷ C. GREENWOOD, *supra*, note 25, p. 198.

the use of force in self-defense. This way, the 1994 Convention endorses a presumption at variance with the above ~~considered~~ 1999 Secretary-General Bulletin, which considers as combatants both the personnel involved in enforcement operations and the personnel participating in peacekeeping operations where use of force is permitted in self-defense.²⁸ Given the ambiguities concerning the respective threshold of application, one cannot exclude the potential overlapping between the two layers of legal regulation, with all the ensuing problems that can be expected as to the effective protection of peacekeepers.

2.3. Protection under International Criminal Law

A third layer of protection for peacekeepers can be provided by International Criminal Law. After the introduction by the 1994 Convention of the requirement of criminalization of attacks against peacekeepers under domestic law, the next move by the international community was to promote the prosecution of such offences before international criminal jurisdictions. The path is traced in the 1998 Rome Statute of the International Criminal Court (ICC), Art. 8 of which qualifies as a war crime (that according to subparagraphs 2(b)(iii) and 2(e)(iii) can be committed in both international and internal armed conflicts) a conduct consisting in

“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”.



Shortly thereafter, an identical provision was included in Art. 4(b) of the Statute of Special Court for Sierra Leone (SPSR), established in 2000 on the basis of an agreement between Sierra Leone and the United Nations.²⁹ Both the ICC and the SCSR have so far developed a limited, but very interesting, case law on the provisions above. The judgment rendered on 2 March 2009 by Trial Chamber I of the SCSR in the so called “RUF case” – concerning the alleged responsibility of three military commanders of the Revolutionary United Front for attacks against the peacekeepers of the United Nations Mission in Sierra Leone (UNAMSIL) – is especially worth of consideration here, not only for its pioneering role, but also because it has brought to the forefront the main interpretative challenges raised by the offence in question.³⁰

²⁸ See *supra*, note 18.

²⁹ See the text of the Statute of the Special Court for Sierra Leone in the Secretary-General Report cited *supra*, note 16, Annex, p. 21 ff.

³⁰ See Special Court of Sierra Leone, Trial Chamber I, *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case no. SCSL-04-15-T, Judgment of 2 March 2009 [hereinafter “RUF case”]. As to the case law of the ICC, it ~~relates to~~ the decisions taken by the Trial Chamber on

The SCSL Chamber premised to its analysis that the crime of attacking peacekeepers “*can be seen as a particularization of the general and fundamental prohibition in international humanitarian law against attacks on civilians and civilian objects*”,³¹ thereby confirming the approach endorsed by Art. 4(b) of SCRL Statute (as well as by Art. 8 of ICC Statute), which assimilate the condition of peacekeepers to that of civilians for the purposes of protection afforded under IHL. This finding did not exempt the Chamber from considering from a general point of view the nature and the characters of UN peacekeeping missions,³² which are essential aspects for determining both the objective and the subjective elements of the crime of intentionally attacking peacekeepers provided for in Art. 4(b) of the SCSL Statute.

As to the objective element of the crime, ~~it was necessary~~ to ascertain ~~that~~ the alleged attacks were directed against personnel involved in a “peacekeeping mission in accordance with the Charter of the United Nations”, and as such entitled to the protection given to civilians under the law of armed conflicts. The main difficulty in this regard was that while Security Council resolution 1270 (1999) assigned to UNAMSIL a rather traditional peacekeeping mandate (i.e., to monitor ceasefire and to implement the peace agreement in Sierra Leone, to assist the Sierra Leone Government in the implementation of disarmament, demobilization and reintegration plans, to facilitate the delivery of humanitarian assistance, etc.), it also included a paragraph adopted under Chapter VII providing that “*in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under threat of physical violence*”.³³ To ~~ascertain~~ whether this “robust” element in the mandate of UNAMSIL changed its character as a peacekeeping mission and whether its personnel was entitled to civilian protection, the Chamber held that “*the totality of the circumstances existing at the time of the alleged offence were to be considered*”.³⁴ In light of

the confirmation of charges in the cases *Prosecutor v. Bahar Idriss Abu Garda*, case no. ICC-02/05-02/09, 8 February 2010 and *Prosecutor v. Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jamus*, case no. ICC-02/05-03/09, 7 March 2011, both relating the situation in Darfur; and the decision of the same Trial Chamber on the request for authorization of an investigation relating the situation in Georgia, case no. ICC-01/15, 16 October 2015. The interest of the latter decisions is ~~particularly~~ that of dealing with attacks against peacekeepers deployed in operations established not by the United Nations, but under the aegis of regional organizations. One case (Abu Garda) moreover deals with attacks carried out not against peacekeeping personnel, but against installations and materials of peacekeeping missions.

³¹ See RUF case, *supra* note 30, p. 68, para. 215 and p. 70, para. 218.

³² See RUF case, *supra* note 30, especially pp. 71-75, paras. 220-231.

³³ See UN Doc. S/RES/2170 (1999), 22 October 1999, para. 14. See para. 8 of the resolution for the overall mandate of UNAMSIL.

³⁴ RUF case, *supra* note 30, pp. 75-76, para. 234; these circumstances included “*the relevant*

this consideration, the Chamber concluded that “*the fact that peacekeepers were empowered under Chapter VII to use force in certain exceptional and restricted circumstances does not alter the fundamental nature of UNAMSIL as a peacekeeping, not a peace enforcement, mission*”.³⁵ The same approach was also decisive for establishing the subjective element of the crime. In this respect, the Court declared itself satisfied “*that in such circumstances the perpetrators knew or had reason to know that the peacekeepers were not taking part in hostilities*”.³⁶

A detailed criticism of the reasoning developed by the SCSL Chamber is evidently beyond the scope of the present paper.³⁷ Nonetheless, there is some room for questioning the Chamber tendency to minimize the impact of the infiltration of Chapter VII elements into the mandate of a peacekeeping force, which is epitomized in the statement that “*Chapter VII merely reinforces the right of the peacekeepers to use force in self-defence by grounding it in the binding powers of the Security Council*”.³⁸ Be that as it may, one may doubt that the legal analysis developed in the “RUF case” with regard to UNAMSIL may work when applied to other UN missions entrusted with open “robust” mandates, such as the Mission of the United Nations for the Stabilization in Congo (MONUSCO), in the framework of which a specific “Intervention Brigade” has been set up with the responsibility “*to carry out targeted offensive operations (...) to prevent the expansion of all armed groups, neutralize these groups, and disarm them (...)*”.³⁹ There is no need to spend many words to explain how difficult can be to demonstrate that attacks targeting the personnel of MONUSCO are carried out “against a peacekeeping operation”, or to prove that the attacker was aware of the fact that he was targeting military units entitled to the protection reserved to civilians persons.⁴⁰

Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel”.

³⁵ RUF case, *supra* note 30, p. 564, para. 1911.

³⁶ RUF case, *supra* note 30, p. 571, para. 1939 and p. 572, para. 1941.

³⁷ For a detailed critical assessment, see J. SLOAN, *Peacekeepers under Fire: Prosecuting the RUF for Attacks against the UN Assistance Mission in Sierra Leone*, in *Law and Practice of International Courts and Tribunals*, 2010, p. 243 ff.

³⁸ RUF case, *supra* note 30, p. 564, para. 1911.

³⁹ See the Security Council resolution 2098 (2013), UN Doc. S/RES/2098 (2013), 28 March 2013, para. 12(b); see also the most recent Security Council resolution 2409 (2018), UN Doc. S/RES/2409 (2018), 27 March 2018, para. 36(i)(d) of which confirms the specific mandate of the Intervention Brigade, operating within the framework of MONUSCO.

⁴⁰ For an overview of these problematic issues in the context of MONUSCO, see L. MÜLLER, *The Force Intervention Brigade – United Nations Forces beyond the Fine Line Between Peacekeep-*

Once again, one is left with the impression that, also under International Criminal Law, the drawbacks affecting the protection of peacekeepers are likely to arise from the uncertainties surrounding the threshold of application of the relevant rules.

3. *Prevention and Repression of Crimes against Peacekeepers: Which Way Ahead?*

In a pioneering article on the protection of peacekeepers published in 1996, Christopher Greenwood wrote that “*the [applicable] legal regime is confused and in many respect unsatisfactory*”.⁴¹ As to the causes of this situation, the learned author observed that “*protection is not tailored to the specific situation of U.N. forces but relies on the application to them of broader general principles. The result is unsatisfactory, since the legal regime concerned is insufficiently detailed and in some respect does not adapt well to the needs of U.N. peacekeepers or the circumstances in which they operate*”.⁴²

In light of the overview carried out above, one may be tempted to conclude that more than twenty years after the situation has not improved, and this in spite of the progress realized at the level of criminalization of attacks against peacekeepers and of their prosecution before international criminal jurisdictions. The growing complexity and the volatility of the environments in which peacekeepers are deployed, the asymmetric character of the threats arising in such situations, as well as many other factual challenges can be counted among the reasons of this disappointing state of affairs. The conditions characterizing modern peacekeeping probably justifies the pragmatic approach taken by the recent report on the security of peacekeepers prepared upon request of the UN Secretary-General, where a radical change of mindset in the planning and management of peacekeeping operations is recommended for the effective prevention of crimes against peacekeepers.

One can agree with some of the submissions of the aforementioned report that a full appreciation of security risks in the planning and deployment of peacekeeping missions, as well as the adoption of an operational approach in addressing those risks could be good ways to cope with the issue. It seems however debatable to single out as a root cause of the current insecurity of peacekeepers the fact that both the United Nations and troop contributing countries are gripped by a “Chapter VI syndrome”, the result of which would

ing and Peace Enforcement, in *Journal of Conflict & Security Law*, 2015, p. 359 ff., 372-376; M. PACHOLSKA, *supra* note 20, pp. 67-71.

⁴¹ C. GREENWOOD, *supra* note 25, at 206.

⁴² *Ibidem*, at 207.

be a defensive posture of peacekeepers that cedes initiative and the first strike to hostile actors;⁴³ or to suggest that a proactive posture in the use of force to eliminate threats and end impunity would represent the speediest way to solve the problem at stake.⁴⁴ At the end of the day, current practice of peacekeeping demonstrate that the warning formulated by the Secretary-General in the 1995 Supplement to an Agenda for Peace continues to be valid today as it was more than two decades ago:

“In reality, nothing is more dangerous for a peace-keeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so. The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. *To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel*”.⁴⁵

Most of the uncertainties which surround the threshold of application of the rules relating to the protection of peacekeepers arise from the injection of enforcement elements in the mandate of peacekeeping missions, which brings as a consequence that of altering or confusing the legal nature of an operation and the legal status of peacekeepers involved in it. It is appropriate here to borrow from the conclusion formulated in the above quoted article of Christopher Greenwood, and suggest that to insist further on the enforcement dimension of peacekeeping “would be likely to weaken, rather than enhance the protection which the law affords”.⁴⁶ At the same time, an ongoing and careful reflection about the content of relevant legal regulation and the conditions of its application seems to be indispensable in order to ensure a better protection for peacekeepers.

⁴³ *Improving Security of UN Peacekeepers*, *supra* note 7, p. 11.

⁴⁴ See *supra*, note 12.

⁴⁵ *Supplement to an Agenda for Peace: Position Paper of the Secretary on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60-S//1995/1, 25 January 1995, p. 9, para. 35 (emphasis added).

⁴⁶ C. GREENWOOD, *supra* note 25, p. 207.

