

PERSPECTIVES ON IHL AND MULTINATIONAL FORCES

Perspective on the applicability and application of international humanitarian law: the UN context

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The applicability of international humanitarian law (IHL) to United Nations (UN) forces has long generated discussion. When peacekeepers have become engaged in hostilities of such a nature as to trigger the application of IHL (either via acts in self-defence, or in the course of carrying out a mandate as authorised by the UN Security Council under Chapter VII of the Charter of the United Nations¹), questions have arisen as to whether they should be equally subject to the rules of IHL. Such questions arise as UN peacekeeping forces act on behalf of the international community and thus have a ‘just cause’, so to speak, to use force.² Despite these questions, however, it now appears well settled that the distinction between *jus ad bellum* (the right to use force under public international law) and *jus in bello* (the law governing the conduct of hostilities) should be maintained, and that IHL applies

* The views expressed herein are those of the author in her personal capacity and do not necessarily reflect the official position of the United Nations.

in respect of UN peacekeeping operations³ whenever the conditions for its application are met.⁴ That said, questions regarding the conditions for the application of IHL, as well as its scope of application, continue to be relevant, particularly at a time when the Security Council is tasking UN operations with increasingly robust mandates.

On 28 March 2013, the Security Council adopted Resolution 2098 (2013) by which it extended the mandate of the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) and established the Intervention Brigade, a special combat force, as part of MONUSCO. '[C]onsisting, *inter alia*, of three infantry battalions, one artillery and one Special force and Reconnaissance company... under direct command of the MONUSCO Force Commander',⁵ the Intervention Brigade is mandated 'to carry out targeted offensive operations... to prevent the expansion of all armed groups, neutralise these groups, and to disarm them'.⁶ While mandates to perform enforcement tasks are not new in UN operations, this mandate has generated increased discussion about the application of IHL to UN forces, including by members of the UN Security Council in the course of adopting the resolution.⁷ For instance, Rwanda underscored 'the need to ensure that the impartiality of the military component of MONUSCO and the protection of the Blue Helmets not be endangered at any cost' and reiterated

- 1 For example, current peacekeeping operations, such as the UN Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO), the United Nations Operation in Côte d'Ivoire (UNOCI), the UN Stabilisation Mission in Haiti (MINUSTAH), and the African Union/UN Hybrid Operation in Darfur (UNAMID) are authorised by the Security Council under Chapter VII of the Charter of the UN to carry out tasks such as the protection of civilians under imminent threat of physical violence. See the mandates of MONUSCO under SC Res. 2098, 28 March 2013; ONUCI under SC Res. 2000, 27 July 2011, as extended by SC Res. 2112, 30 July 2013; MINUSTAH under SC Res. 1542, 30 April 2004, as extended by SC Res. 2119, 10 October 2013; UNAMID under SC Res. 1769, 31 July 2007, as extended by SC Res. 2113, 30 July 2013.
- 2 For example, in 1952, the Committee on Study of Legal Problems of the UN considered the question, 'should the laws of war apply to United Nations enforcement action?' Without resolving the issue, it concluded that '[t]he purposes for which the laws of war were instituted are not entirely the same as the purposes of regulating the use of force by the United Nations. This we may say without deciding whether United Nations enforcement action is war, police enforcement of criminal law, or *sui generis*.' Report of the Committee on Study of Legal Problems of the United Nations, *Proceedings of the American Society of International Law*, Vol. 46, 1952, p. 216.
- 3 References hereinafter to UN peacekeeping operations concern those operations which are conducted under UN command and control. Regarding the distinction between military operations conducted under UN command and control, and military operations authorised by the UN and conducted under national or regional command and control, see the comments by the UN to the International Law Commission on the responsibility of international organisations: *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN Doc. A/CN.4/637/Add.1, 17 February 2011, p. 10.
- 4 See Christopher Greenwood, 'International humanitarian law and United Nations military operations', in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 3–34; Daphna Shrager, 'The United Nations as an actor bound by international humanitarian law', in *International Peacekeeping*, Vol. 5, No. 2, Summer 1998, pp. 64–81; Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 159–208; Dapo Akande, 'Classification of armed conflicts: relevant legal concepts', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 64–70.
- 5 SC Res. 2098, 28 March 2013, op. para. 9.
- 6 *Ibid.*, op. para. 12(b).
- 7 UN Doc. S/PV.6943, Security Council provisional records of the 6943rd meeting, 28 March 2013.

‘the importance of a clear separation between the role of the Intervention Brigade and that of the regular forces of MONUSCO, whose main purpose is to protect civilians’.⁸ Guatemala voiced concerns ‘that the entire MONUSCO runs the risk of indirectly becoming a peace enforcement mission’, noting that such a development ‘would raise many conceptual, operational and legal considerations that . . . have not been adequately explored’.⁹

The notion that a UN peacekeeping operation may, by virtue of engaging in a sufficiently intense level of hostilities against another organised armed force so as to trigger the application of IHL, be considered a ‘party to an armed conflict’ gives rise to a number of concerns, not least that it appears to contradict one of the basic principles of peacekeeping – that of impartiality.¹⁰ As UN peacekeeping operations act pursuant to a mandate of the UN Security Council on behalf of the international community, the fact that a UN operation may become a ‘party to a conflict’ runs counter to the idea that such forces act in a role akin to that of an ‘international policeman’,¹¹ and that they should not promote a particular national or other political agenda.

Further, there is the understandable concern of troop-contributing countries for the safety of their personnel. The application of IHL usually entails that members of the armed forces belonging to a party to the armed conflict become lawful targets at all times during the armed conflict, including times when they are not actually engaged in combat. Civilians, of course, may not be the object of attack, unless and for such time as they take a direct part in hostilities. Subject to the application of the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter ‘the Safety Convention’),¹² which will be discussed below, these principles could also apply in respect of UN peacekeeping operations, should a peacekeeping operation become a ‘party to an armed conflict’.

Regarding the application of IHL to UN forces, as the UN is not a party to any IHL treaties, including the Geneva Conventions and their Additional Protocols, it is not formally bound by these instruments.¹³ That being said, as the

8 *Ibid.*, p. 3.

9 *Ibid.*, p. 4.

10 See UN Department of Peacekeeping Operations and Department of Field Support (DPKO/DFS), UN Peacekeeping Operations: Principles and Guidelines (the ‘Capstone Doctrine’), 2008, p. 33, available at: http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (last visited in December 2013).

11 Report of the Committee on Study of Legal Problems of the United Nations, above note 2, p. 218.

12 Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999). Art. 2(2) of the Safety Convention provides that it ‘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’.

13 In 1972, proposals were made that Additional Protocol I include a provision under which the Geneva Conventions would be open for accession by the UN, to apply ‘each time the forces of the United Nations are engaged in operations’. See Report of the Secretary-General, UN Doc. A/8781, 20 September 1972. However, these proposals were ultimately not adopted following an explanation on behalf of the Secretary-General that such ‘accession would raise questions as to the legal capacity of the Organisation to become a party to multilateral treaties . . . Chiefly, the lack of certain competences, including the lack of territorial jurisdiction and of disciplinary and penal authority, would make it impossible for the Organisation to discharge many of the obligations laid down in the Geneva Conventions’. *Ibid.*, para. 218.

*Reparation Case*¹⁴ makes clear, the UN is a 'subject of international law and capable of possessing international rights and duties',¹⁵ including under customary international law. The question is what rules of customary international law apply to the UN and, in particular, how the rules that are generally applicable to states may be modulated or adapted to the case of an international organisation such as the UN.

There have been a number of developments which have assisted in clarifying the scope of the UN's obligations. Dating back to its operation in the Congo in the 1960s, the UN has stipulated that its forces should 'observe the principles and spirit of the general international conventions applicable to the conduct of military personnel'.¹⁶ While this practice was followed in a number of successive operations, further clarity was provided in 1999 when the UN Secretary-General issued an internal instruction entitled 'Observance by United Nations forces on international humanitarian law'¹⁷ (hereinafter 'the Secretary-General's Bulletin'). Prepared as a 'code of conduct' at the request of the Special Committee on Peacekeeping Operations,¹⁸ the Secretary-General's Bulletin sets out minimum 'fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control'.¹⁹ Without differentiating whether a conflict is international or non-international in nature, the Secretary-General's Bulletin sets forth obligations concerning: the protection of the civilian population; means and methods of combat; the treatment of civilians and persons *hors de combat*; the treatment of detained persons; and the protection of the wounded, the sick, and medical and relief personnel. It specifies that its provisions 'do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation'.²⁰

In contemporary operations, the UN typically undertakes in its status-of-forces agreements (SOFAs) entered into with states hosting peacekeeping operations to:

conduct its operation . . . with full respect for the principles and rules of the international conventions applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949, and their Additional Protocols of 8 June 1977 and the UNESCO

14 International Court of Justice (ICJ), *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Reports 1949*, p. 174.

15 *Ibid.*, p. 179.

16 Regulations issued by the Secretary-General for the United Nations Forces in the Congo (ONUC), UN Doc. ST/SGB/ONUC/1, 15 July 1963, Art. 43.

17 United Nations, Secretary-General's Bulletin, UN Doc. ST/SGB/1999/13, 6 August 1999.

18 Report of the Special Committee on Peacekeeping Operations, UN Doc. A/50/230, 22 June 1995, para. 73.

19 Secretary-General's Bulletin, above note 17, Preamble.

20 Secretary-General's Bulletin, above note 17, Section 2.

Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict.²¹

Such SOFAs typically include a corresponding undertaking by the host state:

to treat at all times the military personnel of [the operation] with full respect for the principles and rules of the international conventions applicable to the treatment of military personnel. These international conventions include the four Geneva Conventions of 1949 and their Additional Protocols of 8 June 1977.²²

Today the issue is not so much whether the UN force should observe IHL. Depending on the mandate of the operation concerned, relevant IHL principles are incorporated into the rules of engagement of a force, and are to be applied at all times where conditions for their application arise. Rather, the issue is to determine when and for how long IHL applies. This is particularly important because the application of IHL may entail a corresponding loss of legal protection accorded to peacekeepers under the Safety Convention and the Rome Statute of the International Criminal Court (hereinafter ‘the Rome Statute’).²³

Contemporary SOFAs entered into between the UN and states hosting peacekeeping operations usually require that the host government ‘shall ensure that the provisions of the Safety Convention are applied to and in respect of the peacekeeping operation, its members and associated personnel’, and that it shall criminalise and prosecute attacks against them.²⁴ However, regarding the scope of application of the Safety Convention, Article 2(2) provides that the 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*.²⁵

As such, peacekeepers would lose the protection they are granted under the Safety Convention in situations in which a UN operation, authorised by the Security Council as an enforcement action under Chapter VII, has become a party to an

21 For example, see the Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan concerning the United Nations Mission in South Sudan (UNMISS), Registration No. 48873 (entered into force on 8 August 2011), para. 6. While such provisions are not included in the ‘Model status-of-forces agreement for peacekeeping operations’ as prepared by the Secretary-General at the request for the General Assembly (UN Doc. A/45/594, 9 October 1990), they have been included in relevant SOFAs since the UN concluded a SOFA with the Republic of Rwanda in respect of the UN Assistance Mission in Rwanda (UNAMIR) on 5 November 1993, 1748 UNTS 3.

22 *Ibid.*

23 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/Conf.183/9 (entered into force 1 July 2002).

24 For example, see the Status of Forces Agreement between the UN and the Government of the Republic of South Sudan concerning UNMISS, above note 21, para. 48.

25 Safety Convention, Art. 2(2) (emphasis added).

international armed conflict.²⁶ However, as Article 2(2) only excludes the application of the Safety Convention to situations to which the law of ‘international armed conflict’ applies, the Convention would appear to continue to apply in respect of situations in which the UN operation has become a party to a non-international armed conflict.²⁷

Under the Rome Statute, however, attacks against peacekeepers in situations of both international and non-international armed conflicts will not be considered ‘war crimes’ if the peacekeeping operation has become a ‘party to an armed conflict’. Indeed, the Rome Statute only criminalises as ‘war crimes’ attacks intentionally directed against ‘personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission . . . as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict’.²⁸ As such, the Rome Statute does not differentiate between situations of international or non-international armed conflict with respect to the loss of protection of UN peacekeepers when they have become a party to an armed conflict.

With respect to the field of application of IHL, the Secretary-General’s Bulletin states that IHL applies to UN forces:

when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. [IHL is] accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.²⁹

In accordance with general principles of IHL, the writer understands that the principles and rules of IHL as set out in the Secretary-General’s Bulletin apply in respect of a UN peacekeeping operation whenever it engages in such a level of hostilities with a state or sufficiently organised non-state armed group as would render it a ‘party to a conflict’. This could occur either (i) in the course of performing an ‘enforcement mandate’ authorised under Chapter VII of the Charter of the UN, or (ii) when using force in self-defence. In either case, the fighting would need to reach the intensity of an ‘armed conflict’ so as to trigger the application of IHL.

While it is clear that IHL applies whenever the factual conditions for its application arise, it is not always apparent, as a practical matter, when that threshold has been met. As peacekeeping forces are typically deployed with the consent of the host state, most situations in which peacekeeping operations are likely to become involved in an armed conflict concern those to which the law of non-international armed conflicts would apply. As the law concerning non-international armed conflicts is not as well developed as that regarding international armed conflicts,

26 See M.-Christiane Bourloyannis-Vrailas, ‘The Convention on the Safety of United Nations and Associated Personnel’, in *International and Comparative Law Quarterly*, Vol. 44, 1995, pp. 567–568, for further discussion concerning the scope of the exclusion in Art. 2(2) of the Safety Convention, including the reference to UN operations authorised by the Security Council as an ‘enforcement action’ under Chapter VII of the Charter of the UN.

27 See Report of the Secretary-General on Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/55/637, 21 November 2000, note 3.

28 Rome Statute, above note 23, Arts. 8(2)(b)(iii) and 8(2)(c)(iii) (emphasis added).

29 Secretary-General’s Bulletin, above note 17, Section 1.1.

and there is little international jurisprudence concerning its application in the context of UN operations, there is minimal guidance as to its scope of application.³⁰

For example, regarding the factual conditions for the application of IHL, where peacekeepers provide support to state armed forces involved in a pre-existing conflict with non-state armed groups, what level of support would be required to render the UN operation a 'party to a conflict' with those non-state armed groups?

While such issues have to date been largely theoretical, recent developments in UN peacekeeping have made them increasingly relevant. In 2008, the UN Security Council acting under Chapter VII of the Charter mandated the UN Organisation Mission in the Democratic Republic of the Congo (MONUC) to carry out a broad range of tasks, including to 'support operations led by and jointly planned with [FARDC³¹-integrated] brigades' with a view, *inter alia*, to disarming recalcitrant local and foreign armed groups and securing the release of children associated with such groups.³² More recently the Security Council requested the Secretary-General to report on options under which the UN would provide logistics support to the African-led International Support Mission in Mali (AFISMA)³³ – a task which seemed at one point might fall to be discharged by the UN special political mission established pursuant to Security Council Resolution 2085 (2012). Matters have since evolved;³⁴ however, these examples, as well as MONUSCO's recently extended mandate under Resolution 2098 as discussed above, demonstrate that the questions posed above are currently of practical significance for the UN.

In addition, once the threshold for the application of IHL is met, what is its temporal and geographical scope of application? Does IHL apply in respect of peacekeepers in areas where they are not engaged in actual combat? This is particularly relevant in situations where peacekeepers may be deployed throughout a large territory and are carrying out a range of tasks, including purely humanitarian ones, under their mandate.

In conclusion, issues concerning the application of IHL in respect of UN operations continue to stir discussion. While it is clear that IHL applies in respect of UN operations once the factual conditions for its application are fulfilled, such application continues to raise practical questions, particularly in relation to its scope. As peacekeeping operations are often tasked with multi-dimensional mandates involving a range of responsibilities, the loss of protected status may conceivably compromise their ability to undertake their mandates. In light of these considerations, it is submitted that when mandating UN operations with enforcement tasks, the UN Security Council may wish to consider the full

30 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules, ICRC, Cambridge University Press, Cambridge, 2005, for helpful guidance on many issues concerning the application of customary law in the context of non-international armed conflicts.

31 Armed Forces of the Democratic Republic of the Congo.

32 SC Res. 1856, 22 December 2008, op. para 3(g).

33 See SC Res. 2071, 12 October 2012; SC Res. 2085, 20 December 2012; letter dated 20 January 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/37.

34 However, UN support for AFISMA from the trust fund established pursuant to SC Res. 2085, 20 December 2012, may still raise questions until the new UN peacekeeping mission, MINUSMA, commences its military operations pursuant to SC Res. 2100, 25 April 2013.

implications of its peacekeeping operations becoming subject to the application of IHL. This may require the taking of certain measures to ensure the safety and security of its personnel, the provision of additional resources in the event that its personnel are required to intern large numbers of fighters in the course of performing their operations, and consideration as to whether all aspects of particular mandates may realistically be performed within such an environment.