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The intervention brigade within the MONUSCO. The legal challenges of applicability and application of IHL

*Yutaka Arai-Takahashi**

1. *Introduction*

The Intervention Brigade was established by UN Security Council Resolution 2098¹ in 2013, within the framework of the United Nations Stabilization Mission in the Democratic Republic of Congo (Mission de l'Organisation des Nations unies pour la stabilisation en République démocratique du Congo – MONUSCO). MONUSCO, a UN-commanded mission pursuant to Chapter VII of the UN Charter, is comprised of both military and civilian components. The Brigade's mandate, to employ all necessary means to 'neutralize' armed groups, goes beyond the mandate of the existing military wing of MONUSCO, which can be engaged in non-frontline operations (such as planning and coordination of military operations envisaged by the governmental forces).² Indeed, the Brigade is heralded as the first-ever offensive force under the control and command of the United Nations,³ straddling the dynamic of peace enforcement operations in unprecedented fashion.

This short essay will examine the question of the applicability of international humanitarian law (IHL) to the Intervention Brigade, taking into account the ramifications that its distinctive mandate may entail.

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¹ UNSC Res 2098 (28 March 2013) S/RES/2098. This has been renewed by UNSC Res 2147 (28 March 2014) S/RES/2147.

² Compare T Ferraro, 'The Applicability and Application of International Humanitarian law to Multinational Forces' (2013) 95 Intl Rev Red Cross 561, 583.

³ S Sheeran and S Case, 'The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo' (November 2014) 2 available at <http://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_legal_issues_drc_brigade.pdf>.



The diagnosis will first deal with issues relating to the applicability of IHL to UN peace forces in general. In this respect, inquiries will address two intertwined, preliminary questions, namely: how to determine the existence of armed conflict, international armed conflict (IAC) or non-international armed conflict (NIAC); and when UN peace forces are understood as becoming a party to the armed conflict in question. Consideration will then turn to specific issues that may surface when the ‘atypical’ mandates of the Brigade are tested against the generic framework of IHL surrounding the UN peace troops.

2. *Little relevance of the distinction in the mandates to the question of applicability of IHL*

As is widely known, the UN-commanded operations can be divided into two types: peacekeeping operations established under Chapter VI of the UN Charter; and those pursuant to Chapter VII of the Charter (which can be termed ‘peace enforcement’ operations).⁴ Peacekeeping missions, on the one hand, are premised on three principles: consent; impartiality; and non-use of force save in case of self-defence.⁵ The deployment of UN peace troops in this context has depended on the consent of a territorial state.⁶ Now under the so-called Capstone Doctrine,

⁴ The term UN ‘peacekeeping’ is routinely used in a generic manner to encompass all UN peace operations (starting with the earlier peacekeeping operations created by the General Assembly, and covering the majority established by the Security Council, whether under Chapter VI or Chapter VII of the UN Charter: J Sloan, ‘The Evolution of the Use of Force in UN Peacekeeping’ (2014) 37 *Journal of Strategic Studies* 674, 692. However, this essay employs this term narrowly to refer to the operations put in place under Chapter VI. In contrast, here, the term UN ‘peace enforcement’ forces is reserved only for the Chapter VII-based multinational peace troops under UN command and control (excluding UN mandated forces and ‘coalition of the willing’). See, R Glick, ‘Lip Service to the Laws of War: Humanitarian Law and the United Nations Armed Forces’ (1995-6) 17 *Michigan J Intl L* 53, 55; R. Murphy, ‘United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?’ (2003) 14 *Crim L Forum* 153, 166-7.

⁵ The continuing validity of these three traditional elements was underscored by UN General Assembly and Security Council, *Report of the Panel on United Nations Peace Operations (the Brahimi Report)* UN Doc A/55/305 and S/2000/809 (21 August 2000) ix and para 48.

⁶ Nevertheless, ONUC in Congo and UNOSOM II in Somalia were two outstanding cases in which the UN could not obtain the consent of host states: K



the focus of appraisal has shifted to ‘the consent of the main parties to the conflict’.⁷ Insofar as this consent is valid, peacekeepers enjoy the protected status akin to civilians’ under IHL. Peace enforcement operations, on the other hand, founded on the authority of Chapter VII of the Charter, the have been undertaken without the consent of a territorial (host) state.⁸ Generally, two interlocking consequences will ensue. First, the UN peace forces become a party to the conflict that is underway on the ground, turning their members into combatants in the juridical sense, even when they are deployed in a NIAC.⁹ Secondly, as a result, the IHL rules on conduct of hostilities apply to such an operation.

However, this paper’s underlying premise is that the procedural question of whether peace support operations are based on Chapter VI or Chapter VII of the UN Charter is hardly significant for assessing the applicability of IHL to peacekeepers. Determining the applicability of IHL on the basis of the mandates of the Security Council would erode the assumption that issues of *jus ad bellum* have little bearing on the principle of equal application of *jus in bello* to parties to an armed conflict. This is a logical corollary of the underlying premise of IHL, which segregates those two branches of international law.¹⁰ Moreover, the di-

Okimoto, ‘Violations of International Humanitarian Law by United Nations Forces and Their Legal Consequences’ (2003) 6 YB Intl Humanitarian L 199, 217.

⁷ United Nations Peacekeeping Operations – Principles and Guidelines (Capstone Doctrine) (2008) 31-2.

⁸ G-J F van Hegelsom, ‘The Law of Armed Conflict and UN Peace-Keeping and Peace-Enforcing Operations’ (1993) 6 Hague YB Intl L 45, 57 (using the existence of consent to distinguish peacekeeping forces from peace enforcement).

⁹ This essay surmises that in a NIAC context, the notion ‘combatants’ may be recognized with respect to members of governmental forces, and *mutatis mutandis*, to those of UN troops. Compare J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, vol I (CUP 2005) 12 (Rule 3).

¹⁰ US Military Tribunal at Nuremberg, *Trial of Wilhelm List and Others (The Hostages Trial)* (1949) 8 Law Reports of Trials of War Criminals vol VIII, 59. See also Sassòli, ‘*Ius Ad Bellum* and *Ius in Bello*, the Separation between the legality of the use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?’, M Schmitt and J Pejic (eds), *International Law and Armed Conflict* (2007), at 241-264; Sassòli, ‘International Humanitarian Law and Peace Operations, Scope of Application *ratione materiae*’, in G L Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations*, 31st Round Table on Current Problems of International Humanitarian Law (International Institute of Humanitarian Law 2009), 100 at 103; J Moussa, ‘Can “*Jus ad Bellum*” Override “*Jus in Bello*”? Reaffirming the Separation of the Two Bodies of Law’, (2008) 90 Intl Rev Red Cross 963.



chotomised approach to this question, based on the distinction between peacekeeping and peace enforcement is challenged by the operational reality. The very division between these two genres may be blurred in many instances. In volatile circumstances, there is a tendency to give peacekeeping operations 'robust' mandates to 'use all necessary means' to pursue purposes on tactical ground: (i) deterring any forcible attempts to hamper political process; (ii) shielding civilians from imminent threat of physical attack; and/or (iii) helping national authorities maintain law and order.¹¹ Admittedly, their use of force remains at the tactical level, as compared with the peace enforcement operations which may be mandated to deploy military force at the strategic level.¹² The use of force by 'robust peacekeeping troops' at the tactical level aims to safeguard civilians from militias or criminal gangs. Still, one issue is that robust peacekeeping may involve the 'proactive' use of force to defend the mandates (including the force to ensure the environment for long-term peacebuilding).¹³ Further, even peacekeeping operations that are initially deployed pursuant to Chapter VI with the consent of the host state may be drawn into hostilities¹⁴ so that they become a party to the conflict.¹⁵ Such a transmutation into a *de facto* peace enforcement framework, a 'mission-creep' scenario,¹⁶ may be brought about by the deterioration of the relationship between the population in the relevant terrain and the peacekeeping forces. In such situations, the UN-authorized multinational forces can be considered to have become parties to the conflict, calling into play the normative paradigm of IHL re-

¹¹ Capstone Doctrine (n 7) 19 and 34.

¹² *ibid.*

¹³ There is a suggestion that such a 'proactive' use of force seen in robust peacekeeping may even justify pre-emptive or offensive use of force: T Findlay, *The Use of Force in UN Peace Operations* (OUP 2002) 14-15, 74 and 356.

¹⁴ Apart from the ONUC discussed here, note should be taken of UNOSOM II, which was authorized by Security Council Resolution 837 of 6 June 1993, adopted under Chapter VII of the UN Charter, to take 'all necessary measures against all those responsible for the armed attack' on UNSOM II personnel. R Kolb, 'Background Document 1: Applicability of International Humanitarian Law to Forces under the Command of an International Organisation', in A Faite and J Labbé Grenier, *Report to the Expert Meeting on Multinational Peace Operations, Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (ICRC 2004) 68.

¹⁵ Murphy (n 4) 184-5; Sloan (n 4) 675, 694.

¹⁶ *ibid.* 685-90.



lating to conduct of hostilities.¹⁷ To propose otherwise would be counterfactual. It also may well be that *de jure*, the mandate for a peacekeeping mission is transformed, over time, into a full-blown Chapter VII-based enforcement operation.¹⁸ The so-called ‘widened peacekeeping’ missions, as in the case of UN Operation in the Congo (Opération des Nations Unies au Congo – ONUC) in Katanga province,¹⁹ may create a grey area verging on peace enforcement. Moreover, multinational forces may be equipped with ‘hybrid mandates’ derived from both Chapters VI and VII.²⁰ In all those circumstances, it is reasonable that upon becoming parties to the conflict, the UN-based multinational forces be divested of the civilian protection they have been granted.²¹

Overall, this paper submits that determining the applicability of IHL depends entirely on the specific factual events on the ground. The gist is to verify the existence (eruption or continuation) of hostilities.²² While peacekeepers may be vested with the mandate to use force purely for a self-defensive purpose, or with a view to defending the mandated mission, their actual recourse to force may reveal a varying level of force.²³ Irrespective of this, whenever defensive measures invoked by peacekeeping forces have brought about an armed confrontation reaching the level of an armed conflict, this should be considered to trigger the application of IHL on conduct of hostilities.²⁴

¹⁷ *ibid* 565.

¹⁸ M Cottier, ‘Attacks on Humanitarian Assistance or Peacekeeping Missions’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck/Hart 1999) 187, 195. Such an adjustment is salutary to avoid the charge of *ultra-vires*.

¹⁹ The ICJ, in its advisory opinion on *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, found that ONUC was not an enforcement action under Chapter VII of the UN Charter. *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 166. Yet, it can be averred that the Security Council implicitly invoked Chapter VII, because Resolution 161 of 21 February 1961 and Resolution 169 of 24 November 1961 granted ONUC the authority to take ‘all appropriate measures’ and to use necessary force within the parameters of self-defence: Sloan (n 4) 686.

²⁰ Murphy (n 4) 186; Ferraro (n 2) 565.

²¹ Cottier (n 18) 195.

²² Ferraro (n 2) 565, 573; and O Engdahl, ‘A Rebuttal to Eric David’ (2014) 95 Intl Rev Red Cross 667, at 669.

²³ Sloan (n 4) 675-6, 687, 691.

²⁴ Sassòli, ‘International Humanitarian Law’ (n 10) 103.



3. *Determining the existence of armed conflict*

Generally, in cases where UN peacekeeping forces intervene to fight against armed forces of a territorial state, this constitutes an IAC.²⁵ The rationale is that the two opposing parties are entities that enjoy international legal personalities.²⁶ In contrast, when multinational forces including UN peacekeepers are involved in clashes against one or more non-state armed groups, or to combat against such insurgent groups alongside or in support of armed forces of a host state, this can be classified as a NIAC.²⁷ However, there is a policy-oriented view that because of the inadequacy of IHL rules on NIAC, the mere involvement of a multinational force *should* internationalize the nature of armed conflict,²⁸ or that UN peace forces must observe IHL rules on IAC irrespective of the legal characterisation of the conflict.²⁹ Yet, this paper argues that the simple presence of multinational forces under the UN Security Council's mandate does not transmogrify the multinational NIAC into an IAC,³⁰ and that in customary IHL there is a tendency to converge the rules applicable to NIACs and those applicable to IACs.

For the purpose of ascertaining if there exists an NIAC, analysis should focus on three criteria. First, as laid down in Article 1(2) Additional Protocol II (APII) and Article 8(2)(d) Rome Statute of the International Criminal Court (Rome Statute), violence must reach a minimum level of intensity that exceeds the level of internal disturbances and tensions that are commonly observable in case of riots, isolated and

²⁵ Engdahl (n 22) 672, 674.

²⁶ Ferraro (n 2) 596.

²⁷ See, for instance, ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Report for the 31 International Conference of the Red Cross and Red Crescent (October 2011) 10.

²⁸ See, for instance, Sassòli, 'International Humanitarian Law' (n 10) 100; E David, 'How Does the Involvement of a Multinational Peacekeeping Force Affect the Classification of a Situation' (2013) 95 *Intl Rev Red Cross* 659, 661 and 665.

²⁹ See Sassòli, 'International Humanitarian Law' (n 10) 104; and J Saura, 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations' (2007) 58 *Hastings L J* 479, 513.

³⁰ For the same view, see E Wilmshurst, 'Conclusions' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 487 and Ferraro (n 2) 598.



sporadic acts of violence.³¹ The threshold for assessing the occurrence of a NIAC may be considered higher than that for evaluating an IAC under common Article 2 to the Geneva Conventions (GCs),³² the provision that attaches less importance to the criteria of duration and intensity of hostilities.³³ Still, this understanding is tempered by a ‘tendency’ to lower the threshold of intensity required for ascertaining the existence of a NIAC within the meaning of Article 3 common to the Geneva Conventions.³⁴ Second, while not spelt out in the conventional text itself, it is implicitly assumed that for a NIAC to be identified, an armed opposition group must attain a certain level of organisation.³⁵ The element of organisation is crucial for an armed group to implement military operations in accordance with IHL rules.³⁶ Third, there is controversy over whether NIACs must be of sufficient duration. Article 8(2)(f) Rome Statute explains that NIACs within the meaning of Article 8(2)(e) must be ‘protracted’, as affirmed in *Tadić* by the ICTY.³⁷ For all the contrary inference that may be drawn from the *travaux préparatoires*,³⁸ the absence of the express *renvoi* to the category of NIACs contemplated in Article 8(2)(d) favours the argument that the Rome Statute assumes not a unified notion of NIACs but two distinct genres of them: the one contemplated by Article 8(2)(d) Rome Statute (and common Article 3 GCs), which undercuts the significance of the temporal requirement; and the other envisaged by Article 8(2)(e) Rome Statute, which must be of ‘protracted’ nature. Even supposing that this temporal criterion is necessary, this does not necessitate a ‘sustained’ or

³¹ K Grenfell, ‘Perspective on the Applicability and Application of International Humanitarian Law: the UN Context’ (2013) 95 Intl Rev Red Cross 645, 647.

³² S Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 Intl Rev Red Cross 69, 76.

³³ Ferraro (n 2) 575-6.

³⁴ Vité (n 32) 81-2; O Engdahl, ‘The Status of Peace Operation Personnel under International Humanitarian Law’ (2008) 11 YB Intl Humanitarian L 117.

³⁵ J Pejic, ‘The Protective Scope of Common Article 3: More Than Meets the Eye’ (2011) 93 Intl Rev Red Cross 1, 3-4, 11 and 35.

³⁶ *Prosecutor v Limaj et al* (Judgment) IT-03-66-T (30 November 2005) 90; and *Prosecutor v Haradinaj et al* (Judgment) IT-04-84-T (3 April 2008) para 60.

³⁷ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (2 October 1995) para 70.

³⁸ Vité (n 32) 81, n 49.



‘continuous’ military operation.³⁹ It can involve repeated or intermittent armed confrontations straddling some lulls.⁴⁰ In that light, the UN peacekeepers’ defensive force against sporadic attacks by an armed group may cross a lower hurdle of NIACs within the meaning of Article 8(2)(d) Rome Statute, but also the hurdle applicable for NIACs under Article 8(2)(e) Rome Statute.⁴¹

4. *Implications of the UN Safety Convention*

The 1994 UN Convention on the Safety of the United Nations and Associated Personnel appears to distinguish between enforcement action on one hand, and what it defines as a ‘United Nations operation’ on the other. Article 2(2) makes clear that it does 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’. This exclusion clause raises questions as to the parameters of UN peace operations that are debarred from the coverage of the Convention.

On careful inspection, one finds that Article 2(2) does not speak of all forms of peace enforcement operations. The enforcement operations mentioned in that paragraph are attended by the strings consisting of three normative elements: (i) engagement of the UN personnel as ‘combatants’; (ii) fighting against ‘organized armed forces’; and (iii) application of the law of *international* armed conflict (IAC). With respect to (i), it should be remarked that not all peace enforcement troops get involved in actual fighting.⁴² It is not inconceivable that hostilities in the

³⁹ S Boelaert-Suominen, ‘Commentary: the Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Conflicts’ (2000) 13 *Leiden J Intl L* 619, at 634-5.

⁴⁰ Ferraro (n 2) 579.

⁴¹ Kolb (n 14) 68. *Contra*, *Prosecutor v Sesay et al (RUF Case)* (Judgment) SCSL-04-15-T (2 March 2009) para 233; *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) para 83.

⁴² Ferraro (n 2) 565, n 9 (referring to the EU forces deployed in the DRC in 2003, which was an enforcement action authorized under Security Council Resolution 1484, but was not drawn into hostilities and hence not subject to IHL).



territory may have subsided by the time that the peace enforcement troops are deployed, or even that these forces end up staying out of hostilities. Clearly, in those circumstances, the peace enforcement forces fall short of constituting ‘parties to the hostilities’.

As regards (ii) and (iii), on the face of it, Article 2(2) seems to preclude the application of the Safety Convention where UN enforcement troops are confronted with ‘organized armed forces’ in the conflict regulated by ‘the law of *international* armed conflict’. The literary construction might suggest that the UN enforcement troops are bereft of protection under the Safety Convention only when involved in IACs.⁴³ Accordingly, it might be argued that the applicability of the Safety Convention is preserved in relation to UN peace enforcement forces deployed in NIACs so that it would be a crime to launch attacks against them.⁴⁴ On this reading, the breadth of application of the Safety Convention would not be limited to Chapter VI-based peacekeeping operations. However, ostensibly, this is incongruent. This dissonance can be explained by the fact that when the Safety Convention was adopted, the drafters did not envisage peace enforcement to take shape in the context of NIACs.⁴⁵ For the sake of systemic interpretation, Article 2(2) of the Safety Convention should be considered to foreclose peace enforcement operations conducted in NIACs as well.

4.1. *Repercussions of the saving clause of the UN Safety Convention*

The thesis that the UN Safety Convention and IHL are mutually exclusive normative regimes appears irreconcilable with the savings clauses of the Safety Convention (Article 20). Article 20(a) stipulates that nothing in the Convention shall affect ‘the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards’. The crux of the matter is how to read this provision consistently with Article 2(2). First, it may be argued that this saving clause

⁴³ Grenfell (n 31) 650.

⁴⁴ Engdahl (n 22) 672.

⁴⁵ Sheeran and Case (n 3) 11.



does not add anything new to Article 2(2) of the Convention.⁴⁶ According to this interpretation, the normative impact of Article 20(a) is only ‘declaratory’. This clause is considered merely to reiterate that UN military personnel must respect IHL where the Convention is not applicable under Article 2(2). In contrast, the second view suggests that notwithstanding Article 2(2), the saving clause under Article 20(a) does envisage the concurrent application of IHL and the Safety Convention.⁴⁷ There is even an assertion that the mutually non-exclusive nature of IHL and the Safety Convention, not only in NIAC but in the IAC context is inferable from the negotiations leading up to the adoption of Article 20(a) and from the textual tenor of the Safety Convention (Article 8 in particular).⁴⁸

4.2. *Reconciling the UN Safety Convention with the applicability of IHL to UN peace forces*

The problem with the convergent application of IHL and the Safety Convention to UN peacekeeping forces is that it may give rise to asymmetrical consequences. The UN peace mission’s military personnel may be caught in recurrent defensive operations against non-state armed groups. Yet, under the Safety Convention, it is unlawful for such groups to deliver attacks against the UN personnel, with the attendant risk of incurring criminal responsibility. This would strain the efficacy of the principle that IHL must apply equally to the parties to the conflict.⁴⁹ This invidious outcome would give them little incentive to abide by IHL.⁵⁰ To overcome this, it is important, as proposed above, to recognise that using force in self-defence may in certain situations trigger hostilities, so that even UN peacekeeping troops may become parties to the conflict as ‘combatants’ bound by IHL rules.⁵¹ Indeed, the viability of

⁴⁶ M Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005) 171.

⁴⁷ C Bourloyannis-Vrailas, ‘The Convention on the Safety of United Nations and Associated Personnel’ (1995) 44 ICLQ 561, 583-584; and Murphy (n 4) 186-7.

⁴⁸ A Bouvier, ‘Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis’ (1995) 35 Intl Rev Red Cross 638, 663.

⁴⁹ See A Roberts, ‘The Equal Application of the Laws of War: a Principle Under Pressure’ (2008) 90 Intl Rev Red Cross 931, 952-956.

⁵⁰ Compare *ibid* 948 and 955; and Sassòli, ‘International Humanitarian Law’ 105-6.

⁵¹ Murphy (n 4) 185-8.



this approach is borne out by Article 8(2)(b)(iii) and (e)(iii) Rome Statute, which makes the materialisation of the relevant war crimes conditional upon the entitlement of the UN peacekeeping personnel to civilian protections under IHL.

As one author has suggested, the effect of Article 2(2) of the UN Safety Convention ‘is that the threshold for the application of international humanitarian law is also the ceiling for the application of the Convention’.⁵² This strand of argument is predicated on the hypothesis that the Safety Convention and IHL are mutually exclusive. However, this must be refuted in that the correlation between the Safety Convention and IHL is more intricate and strained.

This essay proposes that the typology of this relationship be discerned in four patterns: (i) the ‘calm’ situations where self-defensive measures opted for by peacekeepers fall short of reaching the threshold of an armed conflict (be it IAC or NIAC) and where the Safety Convention applies; (ii) the ‘volatile’ non-enforcement context in which the co-application of the Safety Convention and IHL is feasible; (iii) the IAC context in which UN peace enforcement troops that have been deployed fail to be engaged ‘as combatants’,⁵³ or the NIAC context in which intervening UN peace enforcement forces fail to be involved in combat operations, so that the application of the Safety Convention (where appropriate, jointly with the body of IHL rules regulating occupation,) is not excluded;⁵⁴ (iv) the enforcement context in which UN forces have actually been embroiled in a combat operation, the context that Article 2(2) specifically considers beyond the purview of application of the Safety Convention and exposed to the full vigour of IHL alone.

⁵² C Greenwood, ‘International Humanitarian Law and United Nations Military Operations’ (1998) 1 YB Intl Humanitarian L 3, 16, 24 25. See also International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, Committee on the Use of Force (The Hague, 2010) 17.

⁵³ Being ‘engaged as combatants against organized armed forces’ is a proviso contained in Article 2(2) of the Safety Convention.

⁵⁴ See, however, Murphy (n 4) 186-7 (suggesting that the Safety Convention apply to peace enforcement operations as deployed in Somalia).



5. *When the UN peace operations are considered to become a party to an armed conflict – UN Secretary-General's Bulletin on observance by UN forces of IHL*

The UN Secretary-General's *Bulletin on Observance by United Nations Forces of International Humanitarian Law* (1999)⁵⁵ recognises the need for multinational forces conducting operations under UN command and control to comply with 'fundamental principles and rules of international humanitarian law'.⁵⁶ It states that these principles and rules are applicable in enforcement actions, or in peacekeeping operations when the use of force is allowed in self-defence. In terms of the ambit of application *ratione materiae*, the *Bulletin*⁵⁷ sets forth the fundamental rules and principles of IHL, without differentiating between IAC and NIAC. Yet, for the purpose of ascertaining the applicability of IHL, the UN has devised a criterion that is distinct from the threshold applicable to any other groups involved in armed conflict. Section 1.1 of the *Bulletin* enunciates that:

'The fundamental principles and rules of international humanitarian law 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'.

The second sentence of Section 1.1. includes the adverb 'accordingly' to clarify that the application of IHL to 'peacekeeping operations when the use of force is permitted in self-defence' is contingent upon meeting the proviso in the first sentence that 'in situations of armed conflict they [UN peace operation forces] are *actively engaged therein as*

⁵⁵ UN Secretary-General's *Bulletin on the Observance by United Nations Forces of International Humanitarian Law* (6 August 1999) UN Doc ST/SGB/1999/13 (hereinafter '*Bulletin*').

⁵⁶ *ibid.* See also *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations - Report of the Secretary-General* (1 June 2001) A/55/977 (so-called *Brahimi Report*) 59.

⁵⁷ The *Bulletin* refers only to general principles derived from the Geneva Law and the Hague Law.



combatants, to the extent and for the duration of their engagement'.⁵⁸ Hence, the applicability of IHL rules is subject to the criterion 'active engagement as combatants'.

One salient effect of the *Bulletin's* criterion is to endorse a higher threshold for ascertaining the existence of armed conflict when UN peacekeepers are involved.⁵⁹ Generally, at what point armed forces have become a party to an armed conflict and therefore attract the application of IHL is a question of factual and hence 'declaratory' nature. However, in the case of UN peacekeeping forces under Chapter VI, an inquiry into empirical data is needed to address the two interlocking preliminary questions: if there is an armed confrontation involving a sufficient level of intensity;⁶⁰ and if they have become a party to the conflict. This prerequisite helps differentiate defensive action in hostilities from self-defence in law enforcement scenarios. Accordingly, as compared with enforcement action that *often* (though certainly not always) presupposes that there is an ongoing armed conflict in which UN peace troops are deployed, the determination of an armed conflict can be rated as a question of 'constitutive' nature, in the event of peacekeepers resorting to self-defence measures.⁶¹ Along this line, Shraga, who has helped draft the *Bulletin*, stresses the importance of identifying the existence of an armed conflict (of whatever nature) as a criterion for ascertaining applicability of IHL to UN peace forces.⁶² One spinoff argument is that this extra criterion requires that 'the conflict had to be ongoing *prior to* their deployment', so that the level for assessing when IHL binds UN forces may be further heightened.⁶³ Still, this essay submits that the application of IHL to UN peace forces be recognised whenever they are caught up, before or *after* their deployment, in armed confrontations that have risen to the level of an armed conflict.

⁵⁸ *Bulletin* (n 55) s.1.1, emphasis added.

⁵⁹ Ferraro (n 2) 580-1.

⁶⁰ For the same view, see Grenfell (n 31) 650.

⁶¹ *ibid.*

⁶² D Shraga, 'The Applicability of International Humanitarian Law to Peace Operations, from Rejection to Acceptance', in Beruto (n 10) 90, 94 (arguing that this is one of the two cumulative conditions ('double-key' test), apart from the condition of 'active engagement as combatants').

⁶³ Ferraro (n 2) 581-2, emphasis added. See also M Zwanenburg, 'The Secretary General's Bulletin on Observance by UN Forces of IHL: a Pyrrhic Victory?' (2000) *Military L and L War Rev* 14, 21.

5.1. *Criticisms against the Bulletin's criterion*

The *Bulletin* fails to adduce guidelines on how the criterion 'active engagement as combatants' can be assessed together with the preliminary issues relating to the identification of an armed conflict as governed by common Articles 2 and 3 GCs (respectively for IAC and NIAC).⁶⁴ Moreover, it may be asked if the conceptual boundaries of the term 'combatants' in the *Bulletin* are qualified, due to its linkage to the notion 'active engagement', which entails the effect of delimiting the temporal span. Put differently, the question is if the concept 'combatants' would take on different (and narrower) meanings when applied to UN peace forces. Further, assuming that the *Bulletin* confines the temporal scope of application of IHL to the duration of *active* engagement, this span proves to be more restrictive than that contemplated in Articles 43-44 Additional Protocol I (API). The expression 'active engagement' indicates only the period in which they are involved in fighting (or directly participating in hostilities). Plausibly, it intimates that the protected status of UN peace troops is, akin to the ICRC's approach to civilians taking a direct part in hostilities,⁶⁵ recoverable once the engagement is over.⁶⁶ The *Bulletin* may be read as suggesting that the application of IHL ceases upon the termination of their combat mission, even though the armed conflict on the ground persists.⁶⁷ The limited temporal parameters of 'combatant' status of UN peace forces were endorsed by some war crimes tribunals.⁶⁸ However, this approach betrays a confusion between the temporal limit of civilians directly participating in hostilities with the notion of 'combatants' into which the soldiers of

⁶⁴ Ferraro (n 2) 581.

⁶⁵ See also ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009) 70; see also D Akande, 'Clearing the Fog of War? – The ICRC's Guidance on Direct Participation in Hostilities' (2010) 59 *ICLQ* 180, 189-91.

⁶⁶ Sheeran and Case (n 3) 8.

⁶⁷ D Shraga, 'The Secretary General's Bulletin on the Observance by UN Forces of International Humanitarian Law: A Decade Later' (2009) 39 *Israel YB Human Rights* 358-9. See also Ferraro (n 2) 604.

⁶⁸ *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC 02/05-02/09 (8 February 2010) para 83; *Prosecutor v Abdallah Banda Abakaer Nourrain et al* (Decision on the Confirmation of Charges) ICC 02/05-03/09 (7 March 2011) para 66; and *Prosecutor v Sasay et al.* (Judgment) SCSL 04-15-T (2 March 2009) para 233.



UN peace missions (have come to) turn.⁶⁹ This essay asserts that the UN forces are governed by IHL until and unless their forces cease to be a party to the armed conflict, as at a general close of military operations.⁷⁰

6. *Applicability of IHL to the Intervention Brigade*

Within the framework of peace enforcement, the military component of MONUSCO is tasked with the mandate to employ force against armed groups, albeit its involvement in hostilities is confined only for the purpose of protecting civilians.⁷¹ In contrast, the mandate assigned to the Intervention Brigade is distinguishable, transcending the horizon of these peace enforcement operations. Security Council Resolution 2098 expressly states that the Brigade be engaged to support one party to the armed conflict(s) (the governmental forces, the FARDC) in ‘targeted offensive operations’ against armed opposition groups.⁷² The gist of the legal implication is that vested with a specific ‘responsibility of neutralizing’ non-state armed groups, the Brigade is purported to become an active party to an armed conflict, with its members as combatants. Two overarching objectives of the Brigade are: (i) ‘contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC’; and (ii) ‘mak[ing] space for stabilization activities’.⁷³ It is pursuant to these general objectives that the Intervention Brigade’s remit is extended to cover action of offensive nature, namely, neutralizing and disarming armed groups.⁷⁴

⁶⁹ This conflation undermines the ‘mutual exclusiveness’ of the distinction between ‘spontaneous, sporadic or unorganised action carried out by civilians’ and the ‘continuous and status-based or function-based loss of protection’ for armed forces: Ferraro (n 2) 605.

⁷⁰ *ibid* 606-7.

⁷¹ Sheeran and Case (n 3) 1.

⁷² This leaves questions of legitimacy for the Congolese in the areas under non-state governance: A Ponthieu, C Vogel, K Derderian, ‘Without Precedent or Prejudice? – UNSC Resolution 2098 and its Potential Implications for Humanitarian Space in Eastern Congo and Beyond’ (21 January 2014) *J Humanitarian Assistance*, available at <<http://sites.tufts.edu/jha/archives/2032>>.

⁷³ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, operative paras 9 and 12(b).

⁷⁴ *ibid* operative para 12(b). Before that, recourse to offensive force by UN forces to protect civilians was seen as an exception rather than as the rule: K Okimoto,

Empirically, there is hardly any question about the parallel existence of several NIACs in the DRC. Moreover, the Brigade, conceived as it was as a special *combat* force, has succeeded in routing the M23 rebels.⁷⁵ This factual evidence alone is sufficient to arrive at the conclusion that the Brigade has become a party to the armed conflict, with its members being fully-fledged combatants and bound by IHL. Being actively engaged in combat operations, these members have also satisfied the requirement for the triggering of the application of IHL as envisaged in the UN Secretary-General's *Bulletin*. As a corollary, they are excluded from the protection of the Safety Convention.⁷⁶ However, when authorising the establishment of the Intervention Brigade in 2013 (and renewing its mandate in Resolution 2147 in 2014), the Council misjudged the ramifications of the Safety Convention on the question of applicability of IHL. In the preamble, Resolution 2098 highlighted the need to bring to justice those responsible for attacks against the MONUSCO peace troops.⁷⁷ This unmasks the Council's remissness in overlooking that MONUSCO peace forces deployed pursuant to enforcement action became combatants as a party to the conflicts.⁷⁸

The Intervention Brigade might feel justified, in its mandate, in giving primacy to defeating armed groups. If so, this would depart from the hitherto consistent policy of the MONUC and MONUSCO in according the safeguarding of civilians 'the highest priority'. A perturbing implication of the Brigade's mandates is that the objective of 'neutralizing' armed groups might be sought at the expense of the hitherto sacrosanct mandate to ensure the safety of civilian population.⁷⁹ However, the introduction of this special force is designed to remedy the deficiency of the 'regular' MONUSCO force in achieving the protection-of-civilian mandate. Against the backdrop of the reluctance of some troop contributing countries (TCCs) to risking the security of their troops, the

'Protection of Civilians in International Humanitarian Law and by the Use of Force under Chapter VII of the Charter of the United Nations' (2008-11) 4 *Asia-Pacific YB Intl Humanitarian L* 1, 59.

⁷⁵ N Kulish and S Sengupta, 'New U.N. Brigade's Aggressive Stance in Africa Brings Success, and Risks', *New York Times* (12 November 2013).

⁷⁶ Sheeran and Case (n 3) 11-12.

⁷⁷ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, preamble.

⁷⁸ Security Council, Press Statement on Democratic Republic of Congo (29 August 2013) UN Doc SC/11108.

⁷⁹ Compare Sheeran and Case (n 3) 17.



Security Council's resolve to reinforce the protection of civilians was confirmed by Resolution 2147 (2014), which lowered the threshold for resorting to use of force to protect civilians. This resolution dispensed with the condition requiring the 'imminence' of a threat,⁸⁰ the condition contained in similar circumstances elsewhere,⁸¹ enabling the Intervention Brigade to take preventive measures to forestall attacks against civilians.⁸² Reportedly, the Brigade's military operations against M23 and ADF (Allied Democratic Forces) have not culminated in major civilian casualties or humanitarian displacement.⁸³ In contrast, its ongoing offensives against APCLS are considered more hazardous in that they have enmeshed MONUSCO in a much more volatile area.⁸⁴

7. *The personal scope of application of IHL to the Intervention Brigade*

The UN peace missions are often made up of a mosaic of organisations comprised of military, civilian and police personnel. The general assumption is that IHL applies only to the military components when they become a party to an armed conflict. In contrast, with respect to international civilian personnel, they are protected as civilians under IHL, unless they are considered to participate directly in hostilities.⁸⁵

To examine whether the Intervention Brigade can be considered a party to the conflict(s) in the DRC, three strands of thought can be put forward. First, it may be suggested that the MONUSCO as a whole be seen as a party to the conflict. This across-the-board approach is bolstered by the fact that the Brigade falls under the command and control

⁸⁰ See UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147, operative para 4(a).

⁸¹ See, for instance, UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975, operative para 6; and UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100, para 16(c)(i).

⁸² See also Sheeran and Case (n 3) 18.

⁸³ C Vogel, 'DRC: Assessing the Performance of MONUSCO's Force Intervention Brigade', in African Arguments blog posted on 14 July 2014, available by a link from <<http://africanarguments.org>>.

⁸⁴ Similarly, the offensive operations against FDLR are deemed as politically very sensitive: *ibid.*

⁸⁵ Ferraro (n 2) 601-2.



of the MONUSCO Force Commander.⁸⁶ The Brigade is not formed as a distinct legal entity. Even on operations, its members act within a single military force (clad in the identical UN emblems and blue helmets) and under a single force commander, whilst relying on the same military bases and logistics as other MONUSCO troops.⁸⁷ Article 2(2) of the UN Safety Convention might be interpreted as corroborating this approach, excluding *in toto* the application of this treaty and depriving even non-military personnel of UN peace missions of special protection, once any UN personnel are engaged as combatants.⁸⁸ However, this overall approach squarely runs counter to the general assumption outlined immediately above. Further, a pitfall is that the civilian personnel, who constitute the minority of the MONUSCO staff, are exposed to the risk of *direct* attacks, as they are stationed in the bases used by the Intervention Brigade and other MONUSCO troops.⁸⁹

Secondly, it may be asserted that apart from the Intervention Brigade, only the military personnel of the MONUSCO should be deemed combatants when actively engaged in hostilities. Thirdly, as a variant of the second view, one may call for an even more nuanced analysis, differentiating between the units of ‘regular forces’ of MONUSCO which are engaged in combat operations alongside or in support of the Brigade, and the units of the military personnel focusing on humanitarian relief operations. According to this approach, those ‘regular’ military units dealing with tasks which are short of combat operations would be classified as civilians under IHL.⁹⁰ Together with the Brigade, only the former category of the military personnel would become a party to the armed conflicts.⁹¹ Nevertheless, such a nuanced approach is riddled with complex empirical evaluations, dissuading armed opposition

⁸⁶ B O Oswald, ‘The Security Council and the Intervention Brigade: Some Legal Issues’ (2013) 17 *ASIL Insights* 15 (6 June 2013).

⁸⁷ Sheeran and Case (n 3) 9, 10. Compare Engdahl (n 22) 671 (arguing that ‘the operation itself (such as ISAF or MONUSCO) is not capable of becoming a party to an armed conflict, since it does not possess the necessary independence from the subjects of international law of either troop-contributing states, or the involved organisations’).

⁸⁸ C Greenwood, ‘Protection of Peacekeepers: The Legal Regime’ (1996) 7 *Duke J Comparative Intl L* 207; D Fleck, ‘The Legal Status of Personnel Involved in United Nations Peace Operations’ (2013) 95 *Intl Rev Red Cross* 613, 625.

⁸⁹ Sheeran and Case (n 3) 7.

⁹⁰ See Oswald (n 86).

⁹¹ Grenfell (n 31) 646-7.



groups to observe the principle of distinction or the IHL rules in general. It is more reasonable to assert that the entire military contingent, irrespective of diverse functions which each of specific units may assume, should be governed by IHL upon the active participation of the military in hostilities.⁹²

8. Conclusion

Notwithstanding the Security Council's circumspection in stating that it is created 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping',⁹³ the Intervention Brigade will leave an indelible imprint in the historical trajectory of peace enforcement operations as the first UN peace mission of overtly offensive nature. Relative clarity over the applicability of IHL to the Brigade (whether based on the Safety Convention or on the UN Secretary-General's *Bulletin*) may be contrasted to uncertainty surrounding the line between the Brigade and the 'regular' force, and the personal ambit of application of IHL to the different components (military, civil and police personnel) of MONUSCO. Such opacity in the allocation of powers and duties may hamper the operational efficacy of this peace mission tasked with multi-dimensional mandates.⁹⁴ It is recommended that the Security Council elucidate the legal direction on these overarching issues,⁹⁵ and on other unresolved questions such as the detention of fighting members of armed groups, and the distribution of responsibility between the UN and the TCCs for violations of IHL and human rights perpetrated by Brigade members.

⁹² Ferraro (n 2) 600.

⁹³ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, operative para 9.

⁹⁴ Grenfell (n 31) 651.

⁹⁵ For a similar recommendation in the context of South Sudan, see R Mamiya, 'Legal Challenges for UN Peacekeepers Protecting Civilians in South Sudan' (2014) 18 ASIL Insight 26 (9 December 2014).

