ATTACKS ON UN AND REGIONAL ORGANIZATIONS PEACEKEEPERS: POTENTIAL LEGAL ISSUES BEFORE THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

In November 2008 the ICC Prosecutor of the International Criminal Court (ICC)[(1)] Luis Moreno Ocampo stated that "Attacks on Peacekeepers will not

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be tolerated".[2] He presented evidence to ICC judges showing that on 29 September 2007, a group of rebels attacked the United Nations (UN) peacekeepers compound murdering 12 peacekeepers and injuring 8 others. According to the evidence presented by the Prosecutor, the rebels also completely destroyed peacekeepers' facilities and property, putting in risk therefore the security for millions of people of Darfur who are in need of protection.[3]

UN and regional organizations' missions in the world involve thousands of women and men dedicated to the cause of maintaining international peace and security. They fulfill a broad range of functions: from humanitarian relief to coercive military operations. They became a common feature of our world.

> *According to information from the UN Department of Peacekeeping Operations (UNDPKO), there have been 63 peacekeeping operations since 1948, amongst which 48 were established in the last 16 years.*[4] *Presently about 18 UN Missions are under way, with about 91,382 peacekeepers serving in them (among whom military forces, police forces, and military observers).*[5] *In total, about 750,000 men and women (both civilian and military personnel) coming from around 112 countries of the world have served in UN peacekeeping operations up until recently.*[6]

With the increase in the numbers of UN and regional organizations peace operations, the attacks on such personnel became more frequent, too. The total number of fatalities in peace operations has now mounted up to more than 2500.[7] Attacks on UN and other regional organizations' personnel have included taking them hostage, and subjecting them to other inhumane acts.

> *In February 1994, Somali rebels took 15 UN aid workers hostage, demanding $420,000 for their release.*[8] *During the conflict in*

Bosnia in May 1995, Bosnian Serb forces seized UN military observers in the Pale region and used them as "human shields" against further NATO air strikes.(9) *In August 1995, during the Croat attacks on Serb rebel positions in Knin, Croatian forces used Danish peacekeepers as human shields during an operation.*(10) *In 2000 rebel forces seized about 400 peacekeepers in Sierra Leone.*(11) *In September 2007 a rebel group in Darfur attacked the UN compound killing 12 peacekeepers and injuring 8 others.*(12)

These events have since put the issue of punishing attacks against UN or regional peacekeeping personnel on the agenda of the UN and international criminal jurisdictions.(13)

THE AIM OF THE PAPER

This paper will explore the options available to the ICC Prosecutor for conducting successful cases based on attacks against peacekeepers. Sections II and III below start by reviewing briefly the definitions of UN and associated personnel, and by identifying the types of missions in which they may be involved. Section IV addresses the legal framework of UN operations, mainly the more conceptual question of whether or not norms of International Humanitarian Law (IHL) can apply to these operations, and if so how. Section V follows on starting from the proposition that IHL applies to such operations and reviews in detail the more specific norms that could apply to such operations and how. In doing so, special attention is dedicated to the scope of the concept of self-defence in UN operations. The protected status of UN peacekeepers is reviewed, and insights are given on how to build successful prosecution cases based on attacks on UN and regional organizations' peacekeepers under the ICC Statute. Section VI concludes the discussion.

II. THE DIFFERENT FORMS OF UN OPERATIONS

Although there are no accepted definitions of UN operations[14], traditionally two kinds of such UN military operations can be distinguished: a) peacekeeping and similar missions (like observer missions), and b) peace enforcement missions.[15]

The purpose of traditional peacekeeping and similar operations (observer missions) is to ensure that cease-fires and demarcation lines are respected and assist in the implementation of troop-withdrawal agreements. In recent years the scope of such operations has been extended to cover other tasks such as the supervision of elections, the forwarding of humanitarian relief and assistance in national reconciliation processes, protection of the civilian populations.

The following could be counted among the main features of these operations: 1) traditionally deployed only with the consent of the parties to the conflict[16]; 2) authorized to use force only in cases of legitimate self-defense[17]; 3) normally neutral and impartial, in the conduct of their mandate; 4) normally subsidiary organs of the UN General Assembly (UNGA) or Security Council (UNSC) established under articles 22 or 29 of the UN Charter[18].

Traditional peacekeeping operations have very often both military/civilian components. This author defends the position that IHL applies to them as protected persons with a status of *non-combatants*, unless they engage in unauthorized military operations in which case they can be labelled either lawful or unlawful combatants, depending on the circumstances.[19]

The classification of such operations in two categories as peacekeeping and peace enforcement is not the only possibility, and the reader will indeed find several other classifications of UN operations depending on the pursued purposes. For example, a rather complicated and interesting classification of UN operations is given in the UN Convention on the Safety of United Nations and Associated personnel adopted in 1994[20]. The definition used

pretends to be based on the criteria of "applicable law", but then it turns out unnecessarily confusing, because the main criteria is actually whether the operation was "established" or only "authorized" by a UN organ.(21)

Considering the aims of the paper, the term "UN Operations" as used here refers to "UN *military* operations" traditionally established as "peacekeeping operations" (including UN police forces and observer missions), and either in isolation or in combination with peace enforcement operations. The term also applies to peacekeepers under control of regional organizations as endorsed by the UNSC.

Peace *enforcement* operations (except as for comparison purposes) will not be primarily the subject of the discussion in the paper as they are less of a problem since everyone agrees IHL fully applies to them. Peacekeeping operations in contrast raise a series of problems that will be considered below, because they involve armed UN forces (but who are nonetheless equipped and authorized to make use of their weapons only in legitimate self-defense, not to engage in full fledged operations as a party to a particular conflict). The situation is more complicated when peacekeeping operations mix with enforcement missions conducted by national states, which risks jeopardizing the status of properly UN peacekeepers, as it is not clear whom they should be considered to be then ("combatants" just like the combat troops in the enforcement mission, or "civilians" or "non-combatants"). Since UN peacekeepers are constantly attacked (as in the case of the UN compound in Darfur, now under review before the ICC), it is difficult to find out if this would actually be a violation of IHL or not. These issues are addressed further below.

III. CLASSIFICATION OF UN PERSONNEL INVOLVED IN UN OPERATIONS

The UN Safety Convention defines two different groups of personnel involved in UN operations (UN personnel properly (group I) and those

considered only as UN "*associated*" personnel (group II)).

> *The reference to "UN personnel" in the UN Safety Convention covers both a) "persons engaged or deployed by the Secretary-General of the UN as members of military, police or civilian components of a UN operation"; and b) "other officials and experts on mission for the UN or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a UN operation is being conducted".*
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> *The term "UN associated personnel" is meant to cover the status of: a) "persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations"; b) "persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency"; and c) "persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-general of the United Nations or with a specialized agency or with the International Atomic Energy Agency".*
>
> *Those defined as "UN associated personnel" are normally engaged in UN support activities.*[22] *They conduct their activity independently but in the same area in which UN personnel properly are also engaged. This is the typical situation of forces "authorized" by the UNSC but which remain under state national control and command. Concrete examples from past operations include the cases of NATO air crews involved in support of the UN Protection Force (UNPROFOR) in Bosnia; the French troops in the "Operation Turquoise" deployed parallel to the forces of UNAMIR in Rwanda; the troops of the "Operation United Task Force" in Somalia, and the contingent of British troops in Sierra Leone. A distinctive feature of this type of personnel is that they*

are people assigned by their respective governments with the agreement of the relevant UN organ to carry out activities in support of a United Nations operation in a certain geographic region."[23] *Normally they are deployed when the UN resources properly have shown to be inadequate to deal with a particular situation.*

The term "UN personnel" as used in the paper refers foremost to UN peacekeepers engaged in a standard peacekeeping operation under UN or regional organizations' control and command when the use of force is allowed for limited legitimate self-defense purposes. The term "legitimate self-defense" is viewed as a term of art as understood in the *jus in bello*, and not the *jus ad bellum.*[24]

IV. APPLICABILITY OF IHL TO UN AND REGIONAL ORGANIZATIONS' PEACEKEEPING OPERATIONS

The issue of the applicability of IHL to forces deployed by the UN has arisen ever since they were first created.[25] Initially this issue raised only scholarly interest[26], not only because UN operations were very few, but also since they practically excluded the use of force. In these circumstances, situations in which IHL could have been applied were rare.

With the end of the Cold War the situation changed, with the upsurge of conflicts of all sort, and the UNSC becoming more active in adopting decisions establishing UN peacekeeping operations. As the use of force in such operations became more frequent, so too the question whether or not IHL applied to such operations could no longer be ignored. As one would expect opinions differ both among States and scholars. Essentially, opinions differ along the lines identified in the UN Safety Convention. On one side, there are those who would like to see any UN operation as exempt from any obligations under the laws of war, and on the other, those who, like Ch.

Greenwood, think that, once force is used, IHL applies automatically irrespective of who is using it, whether the UN or states or non-state actors. Between these two extremes, there are some borderlines as always. In particular, it remains controversial the status of UN peacekeepers acting in legitimate self-defence.

A few examples illustrating the official position of states (Canada, Italy and Belgium), and international organizations (UN, and the International Committee of the Red Cross (ICRC)) will be reviewed to show the difference of opinions on this issue, before turning to an academic discussion of the problem.

1. THE POSITION OF THE MOST INTERESTED PARTIES (UN, MEMBER STATES, AND THE ICRC)

Broadly speaking, the ICRC tends to consider that IHL should apply whenever UN peacekeeping forces deployed in zones of conflict resort to force, whereas states that contribute forces to such UN operations have offered resistance to such an interpretation. The UN has had an ambiguous position on this issue.

A) THE UN POSITION

The UN position can be briefly summarised as follows: 1) before the adoption of the UN Secretary-General's Bulletin in 1999[27], the UN practice was to declare its general commitment to apply only the *general principles* and the *spirit* of international humanitarian law[28] to its peacekeeping operations. The UN took the view that the detailed provisions of IHL could not apply to UN forces, allegedly because in discharging their mandate UN forces acted on behalf of the international community *at large*, and thus could not be considered as "a party to the conflict"[29], or a "Power" within the meaning of the Geneva Conventions,[30] and their Additional Protocols.[31] According to this view UN forces that acted with international legitimacy were supposed to be regarded as impartial, objective and neutral,

therefore, full observance of IHL provisions could even endanger the mission entrusted to these forces by the international community.(32)

2) It was also argued that the UN as an international organisation could not become a party to and implement the Geneva Conventions, nor did the provisions of these Conventions allow membership by international organizations. Since the UN is not a state, it would not be in a position to discharge many of the obligations laid down in these Conventions anyway, for instance, the obligation to prosecute and punish offences in violations of the Geneva Conventions.(33)

B) THE POSITION OF TROOP-CONTRIBUTING STATES

The pre-1999 S-G bulletin's UN position that IHL did not apply to UN operations was broadly supported only by troop-contributing states for understandable reasons. Below we provide selected incidents and trial cases which serve to show the position defended by these states:

> *CANADA. In the Brocklebank case in 1996(34), the Court Martial Appeals Court of Canada, whilst considering the question of the applicability of the Geneva Conventions and the Additional Protocols, held that Private Brocklebank who had been arrested for aiding and abetting in the torture of Shidane Arone, a Somali boy who entered the Canadian Forces compound and was tortured and beaten to death while in custody, had no legal obligation to ensure the safety of the prisoner. This according to the Court was because neither the Geneva Conventions nor the Additional Protocol II applied to Canadian forces in Somalia. The Court found that there was no evidence of an armed conflict in Somalia in 1992-1993, and further that the Geneva Conventions and Additional Protocols did not apply to peace operations.*(35)
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> *In the court's view since there was no declared war, or armed conflict of any type in Somalia, and as the Canadian forces*

deployed in that country were performing a peacekeeping mission, they were not engaged in any conflict. Therefore the Geneva Conventions (not even its Common Article 3) were not applicable, nor was the Canadian Unit guide.(36)

ITALY. After a series of publications of photographs concerning presumed maltreatment and violence to Somali citizens appeared in the local weekly magazine PANORAMA(37)*, both competent military and ordinary judicial authorities commenced investigations. A fact-finding Commission was also instituted in 1997 by the Italian Government. After a series of investigations it was found that the 1941 Military Penal Code of War of Italy was not applicable to this situation apparently because this code deals only with crimes committed by Italian military personnel against civilians and military nationals of the enemy party. As Somali victims were not civilian nationals of an enemy party in a conflict with Italy, therefore it was found that the Code was not applicable. Additionally it was also argued that the 1941 Military Penal Code of Peace of Italy does not contain provisions punishing such offences as torture and maltreatment against civilians in times of war, as in 1941 this type of offences was not considered as capable of being committed by soldiers. So the alternative that the Italian judicial authorities found was to prosecute these crimes as ordinary ones.*(38) *The fact-finding Commission was not able to specify whether the events reported could be better viewed within a legal context of war or within that of a police operation aimed at restoring public order. Having failed to do so, it also failed to express any legal evaluation of the facts, particularly from the perspective of IHL.*(39) *We note that the incidents occurred, while Italian soldiers were members of the United Nations task force (the UNITAF) - a multinational enforcement operation under national*

control and command of the United States, and not as peacekeeping forces.

BELGIUM. In this country, two cases have been heard in connection with peacekeepers. As soon as ten Belgian peacekeepers were killed in April 1994, a Parliamentary Commission of Inquiry concerning the events in Rwanda was established.[40] *A related case (the case of Marchal) was also heard by a Military Court of Belgium in 1996.*[41] *Another case was heard by a Belgian Military Court in 1997 regarding violations of IHL committed in Somalia and Rwanda.*[42]

The decisions in those two cases were controversial. In the Marchal case, Colonel Luc Marie Ghislain Marcel Marchal, the Commander of the Belgian group in the UN Assistance Mission for Rwanda (UNAMIR), was indicted for the deaths of the ten Belgian soldiers, on grounds of "lack of caution or precaution". According to the prosecutor, he was criminally responsible for not having "prepared a timely contingency plan to guarantee the safety of the soldiers in case the situation would rapidly turn into an armed conflict". He was also accused of not having taken into account the well-known fact that members of the local militia wanted the departure of the Belgian troops in order to carry out the planned genocide. The operation in which the peacekeepers were massacred had been ordered by the Canadian General Romeo Dallaire. However, prosecutions against Roméo Dallaire were barred in view of the diplomatic immunities that he enjoyed on the basis of the 1993 Agreement between the UN and the Government of the Republic of Rwanda regarding the status of the UN Assistance Mission for Rwanda (UNAMIR), and the 1946 Convention on the privileges and immunities of the United Nations, of which the mission was a subsidiary organ.[43] *The UN Secretary-*

General supported this basis for denying the jurisdiction of the Court over General Dallaire.

As regards Colonel Marchal over which the Belgium Court had initially asserted jurisdiction presumably for being of Belgium nationality, the Court later acquitted him on all charges, after finding that there was no negligence on his part. The Court in its decision defended that Colonel Marchal could not be held responsible for lack of appropriate level of armament (which would have enabled the soldiers to defend themselves during the massacre). According to the Court that responsibility lied with the immediate officer carrying out the operation (i.e. one of those who died), and the higher-ranking commander who gave the order to the unit (i.e. the Canadian General, who was considered to enjoy diplomatic immunities).(44)

The second case heard by the Belgian Military Court in 1997 acting as an Appeals Court ("Violations of IHL committed in Somalia and Rwanda") involved two Belgian soldiers indicted for crimes committed against the civilian population when the soldiers were part of the UN operation II in Somalia (UNOSOM II) . The Court confirmed the acquittal of the two soldiers pronounced by the Military Tribunal earlier that year, on the ground that the four 1949 Geneva Conventions and the two 1977 Additional Protocols were not applicable. According to the Court as there was no armed conflict in Somalia, so the civilian population was not "protected" under those instruments.(45) *Even Common Article 3 was not applicable "as the militia did not have an organised military structure, a responsible leadership or exercise authority over a specific part of territory."*(46) *The Belgian law of 16 July 1993 (conferring universal jurisdiction to Belgium courts to try international crimes whenever and wherever they are committed)*

was therefore not applicable either. Further the Court asserted that UNOSOM II personnel were not "combatants", because "their primary task was not to fight against any of the factions, nor were they an "occupying power"".[47]

In these few examples we can see how reluctant interested states were to recognise, that in situations of peacekeeping operations, a concept of "armed conflict" could be applied. The problem appears, though, more political (states, generally, do not want to have their soldiers taking part in UN peacekeeping operations, prosecuted), rather than strictly legal. This becomes particularly clear when the *victims* of the offences prohibited under IHL are peacekeepers from these states that are detained or killed in connection with the conflict. Belgium, for example, in its *amicus curie* in the *Bagosora case* (the case of the killed Belgian soldiers)[48] before the ICTR, could not deny any more that the crimes were committed during an armed conflict, and tried to prove as much as it could that the acts were serious violations of IHL.

Likewise, the practice shows that the UN tended to view the UN peacekeepers as protected under the 1946 Convention on privileges and immunities of the United Nations, not by IHL provisions.[49]

C) THE ICRC POSITION

It is only normal for the ICRC to defend its traditional position that a distinction had to be drawn between *jus ad bellum*, and *jus in bello* at all times. Briefly, the ICRC shares the view that as IHL principles and provisions recognised as part of customary international law are binding upon all states and all armed forces in situations of armed conflict (regardless of the nature of the conflict, the legal status of the parties, or of the territory in question), this could only logically extend *mutatis mutandis* to the UN as an organisation established by those states. Obviously there was never a question of applying all the detailed rules of the Geneva Conventions (today considered customary law) to UN peacekeeping

operations , but the essential rules pertaining to methods and means of combat, category of protected persons and respect for recognised signs, were to be respected by the UN forces.(50)

2. THE ACADEMIC DISCUSSIONS

The discussions among scholars turned around the applicability of the law of armed conflict to UN peacekeepers, as the question was whether or not the UN could be a party at all to IHL treaties. Most of the scholars gave an affirmative answer to this question.(51) In fact, the UN as a subject of international law can enter into any agreements if they fall within the scope of its functions. As the UN in discharging functions often makes recourse to military operations(52), treaties concerning the conduct of hostilities should also bind the UN. However, for an organization to become a party to a multilateral agreement it is necessary that the agreement itself allows such a possibility. As this possibility is not envisaged in the IHL treaties, those provisions could only bind the UN as a matter of customary law.

However, the crucial question remains, whether or not, and to what extent, the UN SC could override, by means of its mandatory resolutions under Chapter VII, relevant IHL provisions.

> *Since this question relates to the wider issue of UNSC powers under the UN Charter and international law generally, reviewing it would require taking for a while a perspective broader than the specific object of this paper, which we will do below.*
>
> *Arguably the UNSC has always had the power to interpret IHL, this power enshrined by the very need to ensure international peace and security as stated in Article 1(1) of the UN Charter. As Article 42 of the UN Charter mandates the UNSC to take "effective collective measures" when international peace and security are at stake, it has sometimes interpreted this right very broadly. One evident broad interpretation of its powers we see in the Lockerbie*

case[53]*, in which the UNSC peremptorily demanded that Libya surrender for trial, in the UK and in the US, those charged with the terrorist attack against Pan Am Flight 103 in December 21, 1988. Arguably this step was not consistent with customary and conventional international law regarding extradition. Indeed the 1971Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation provides that extradition is subject to the law of the State that receives an extradition request (Article 8).*[54] *Libya, consistently acting according to the provisions of this Convention, refused to comply with the UNSC demands arguing that its national law does not allow for extradition of its own nationals. When the UNSC further imposed the threatened sanctions upon it, Libya brought a claim against the US and the UK before the International Court of Justice (ICJ) In the ICJ, the US and UK arguments, suggesting that the Court should refuse to hear the case, supposedly because it had been already the subject of UN SC decisions under Chapter VII, did not convince the judges, and the case on indication of provisional measures proceeded.*[55] *However, pending an order by the Court (and three days after the closing of oral hearings) in subsequent developments of the case, the UN SC adopted resolution 748 (1992) in which, acting under Chapter VII, it called upon Libya to surrender the suspects to justice and declared void any other obligations of states stating specifically that it calls "upon all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to 15 April 1992".*[56]

Whereas Libya contended that the Court should disregard that resolution as being contrary to international law, the Court accepted the UK arguments according to which under the UN Charter (Articles 25 and 103) countries must respect decisions adopted by the UNSC, even if they override provisions of existing treaties, and denied by 11 votes against 5 Libya's request for indication of provisional measures.(57)

Another case of UNSC's broader interpretation of its powers may be partly evidenced by the adoption of resolution 1422 of 12 July 2002, concerning the ICC. This resolution granted immunity from the jurisdiction of the ICC to current and future officials or personnel participating in any United Nations established or authorized operations, whose countries are not party to the Rome Statute. This resolution purports to be in conformity with Article 16 of the ICC Statute(58)*. Scholars have manifested their disapproval of such an interpretation since Article 16 is intended to offer the UNSC an opportunity to defer an ongoing investigation or prosecution, when it is seized of situations potentially amounting to a breach or threat of peace and security, not as a basis for exempting from the Court's jurisdiction any particular type of cases which may appear in future, but unrelated to a discussion of a present situation that would require invocation of Chapter VII powers.*(59) *Apart from this incident, the UN reluctance to apply IHL to its military operations has also been consistently resisted by the ICRC, as discussed above.*

Due to these contradictory developments, it is also helpful to have a cursory look at the question of the scope of the UNSC competence.

In the Tadić jurisdiction decision, the Appeals Chamber faced with a similar problem, stated that "neither the text nor the spirit of the

Charter conceives of the Security Council as legibus solutus (unbound by law)"[60]*. It further stated that the UN SC is "thus subject to certain constitutional limitations, however broad its powers under the constitution may be". In the opinion of the Appeals Chamber "those powers cannot in any case, go beyond the limits of the jurisdiction of the Organization at large…"*[61] *itself. The Appeals Chamber also asserted that this opinion was implicit in the interpretation of article 24 (2) of the UN Charter, which provides that, "in discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The Specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."*

Scholars broadly share the opinion, according to which, the UNSC should discharge its functions with full respect for the UN Charter itself and the principles *jus cogens* of international law.[62] This is partly because according to article 53 of the 1969 Vienna Convention on the Law of Treaties, "a treaty is void if at the time of its conclusion, it conflicts with a peremptory norm of general international law".[63] This rule which is general customary law of course concerns also the UN Charter and the activity of organs based upon it. From this point of view, it is first important to review the principles *jus cogens* of international law applicable in the area of IHL, which the UNSC is obliged to respect and enforce in its decisions and activities under Chapter VII.

In this author's opinion among the general principles of international law relevant to the matter at issue it is important to consider the principle of sovereignty of states, the principle of non-intervention in domestic affairs of states, the principle *pacta sunt servanda* and the principle of respect for human rights.[64] Could the UNSC under any particular circumstances limit the application of these principles?

Concerning the principles of *sovereignty of states*, *and non intervention*

in their domestic affairs, it is an accepted fact that the UNSC could impose restrictions in their application by force of Articles 24, 25 and 2(7) of the UN Charter, according to which UN member states themselves have consented to abide by UNSC decisions under Chapter VII. This consent is an essential element of the system of collective security established under the UN Charter. In the same way, the application of the principle *pacta sunt servanda*, as the *Lockerbie case* reviewed above(65) shows, can also be limited by the UNSC based on Article 103 of the UN Charter that provides for a higher hierarchical status of the states obligations under the UN Charter as compared to those under any other treaties.

The *jus cogens* principle *of respect for human rights* is directly relevant here to clarify the relationship between UN peacekeeping operations and IHL, for this principle connects general international law to IHL. It is grounded on provisions of the UN Charter(66) and finds expression in the various human rights instruments.(67) The principle of respect for human rights which embodies the most fundamental right of human beings (the right to life and human dignity irrespective of any differences) is , however, applied in situations of armed conflict, subject to the provisions of IHL, as *lex specialis*.(68)

HAS THE PRACTICE OF STATES CREATED NORMS JUS COGENS IN THIS BODY OF LEX SPECIALIS?

The ICJ in the "*Nicaragua* Case" has indicated that common article 3 to the Geneva Conventions expresses "elementary considerations of humanity" which states "undertake to respect and ensure respect, in all circumstances." This obligation has become a general principle of IHL to which the Conventions merely give specific expression.(69) In the "*Nuclear weapons* case", the ICJ further indicated that there are at least two principles which constitute "*inviolable* rules of customary international humanitarian law": a) the first according to which a distinction must be made between combatants and civilians, and b) the second, according to which, the right of the parties

to a conflict "to adopt means of injuring the enemy", is not unlimited."[70]

Many scholars share the view that the expression "inviolable" refers to the character *jus cogens* of such principles.[71] In the *Tadić* case the ICTY Appeals Chamber also came to the conclusion that these principles apply equally both in cases of international, and internal armed conflicts.[72] It can be argued then that the UN including its Security Council cannot disregard norms of IHL reflecting these common core principles (among which the principle of distinction between combatants and civilians, the principle of care in the choice of means and methods of injuring the enemy, and the principle of respect for human dignity under any circumstances).

The question remains whether or not apart from these common core principles, there are other principles *jus cogens* in IHL, which could not be changed by a Chapter VII resolution of the UN SC?

Of particular interest is finding whether or not the so-called principles of the 'combatant's *privilege'* and of '*equality of the parties*' would be part of such *jus cogens* norms that the UNSC could not override with a Chapter VII resolution.

As it is common knowledge, whereas the right to human dignity is to be respected in all circumstances both in time of peace and of war, the right to life is limited by the "privilege of combatants" under IHL. This privilege entitles combatants to kill combatants in action during an armed conflict. On the basis of this proclaimed "privilege" it has been argued by some scholars that killing UN peacekeepers engaged in combat action, irrespective of the nature of the incident (in self-defence, (for example, in the incident before the ICC, what if the UN peacekeepers in Darfur resisted the attack and as a result more victims among them were made?) or in enforcement action) cannot be seen as a crime, because the *combatant's privilege* is one of the basic principles of the law of armed conflict.[73]

Likewise the principle of the 'equality of the parties' to an armed conflict starts from the proposition that "…it is impossible to visualise the conduct of hostilities in which one side would be bound by rules of warfare

without benefiting from them and the other side would benefit from them without being bound by them".(74)

The conclusion made by some scholars is that those willing to benefit from the relevant provisions of the laws of armed conflict should subject themselves to a similar treatment by the other party. This argument, however, is only entirely true for situations of international armed conflicts, whereas the *law of internal armed conflicts,* strictly speaking, does not provide for a similitude of treatment of those engaged in hostilities.(75) The status of UN peacekeepers engaged in operations on behalf of all the community of nations could then be assimilated to that of government forces in an internal conflict, for example.

In this author's opinion, the fact that the twin principles of 'combatant's *privilege'* and '*equality of the parties'*, are not recognized irrespective of the nature of the conflict (as opposed to the principles of *respect for human dignity,* and *care in the choice of means of injuring the enemy,* for example) would not support the contention that these principles are absolute peremptory norm (*jus cogens*) of IHL. Therefore, UNSC resolutions demanding that the life of UN peacekeepers be respected whilst they are on peacekeeping missions and have recourse to force only exceptionally and exclusively in legitimate self-defence appears compatible with general international law, and consequently, killing UN peacekeepers (like in the incident in Darfur, now before the ICC), should be considered a crime under international law.

> *Another example, which shows that the UN is at times objectively compelled to disregard the detailed no jus cogens provisions of IHL is the creation of "safe havens" in the former Yugoslavia. While the ICRC pretended to create "demilitarized zones" according to IHL provisions that require previous consent of the parties involved and demilitarization, the UNSC instead created these Zones under its own Chapter VII authority and provided for their protection by armed UN peacekeeping forces.*(76) *In the*

beginning, the ICRC strongly disagreed. But later, ICRC officials recognised that there are situations where violations of IHL are so massive, that this very fact becomes a threat or even a breach of the peace and security, in which case the UNSC must act according to its functions under the UN Charter.(77) *Obviously in these cases, in order to act, the UN SC would be compelled at times to disregard the detailed provisions of IHL, and this cannot be considered a violation of international law, as most scholars agree.*

V. APPLICATION OF IHL TO UN PEACEKEEPING OPERATIONS

1. PRELIMINARY LEGAL ISSUES

A) WHAT RULES SHOULD APPLY IN INTERNATIONALISED ARMED CONFLICTS WITH PARTICIPATION OF UN PEACEKEEPING FORCES (THE LAW OF INTERNATIONAL ARMED CONFLICTS, THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS OR THE REGIME OF PRIVILEGES AND IMMUNITIES UNDER THE UN SAFETY CONVENTION)?

It is not always easy to categorise conflicts as purely international or internal, in cases of violence occurring within a state's territory especially when there is involvement of foreign forces in the conflict.(78)

Some defend the position that only the law of international armed conflict should apply in these situations. For example, the UN Commission of Experts established pursuant to UNSC Resolution 780 to review the situation in the former Yugoslavia, suggested in its final Report that "the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the commission's approach in applying the law

applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia."[79] However, most scholars, alongside international jurisprudence, take the position that both groups of norms can be applied in simultaneous depending on the status of the parties involved; that the law of international armed conflict should apply only to the relationship between subjects of international law (including cases in which the rebel group acts under overall control of another subject of international law); whereas the law of internal armed conflicts ought to apply in the conflicts between a state and a non-state actor (or non-state actors among themselves).

> *The ICJ in the Nicaragua case found indeed that in the context of the US assistance to the contras rebels in the internal Nicaraguan conflict, the laws governing the domestic armed conflict would apply as between the Nicaraguan government and the contras, but that the laws governing international armed conflicts would apply as between Nicaragua and the United States.*[80]

i) Is the situation different when the foreign entity involved is not a state but the UN?

The UN position on this issue is controversial as evidenced by the 1994 UN Safety Convention on one side, and the 1999 UN Secretary-General's Bulletin, on the other. The relevant provisions of the UN Safety Convention, for instance, are ambiguous and confusing, and seem to indicate that the question of applicability of IHL to UN peacekeeping operations depends on the type of operations in question (authorized or established) and the type of conflicts requiring its intervention. The UN Safety Convention distinguishes indeed between: a) operations "established" by the competent UN organ in accordance with the UN Charter and conducted under UN authority and control (article 1(c))[81]; and b) operations "authorized" by the UNSC as "an enforcement action under Chapter VII of the UN Charter in which any of the personnel are engaged as combatants against organized armed forces and to

which the law of international armed conflict applies." (Article 2(2)).

One reading of the confusing provisions of the aforementioned UN Safety Convention would make IHL applicable only to those UN operations conducted as an enforcement action in situations of international armed conflicts. If this is how it should be interpreted then the UN Safety Convention would put beyond reach of IHL all the remaining types of conflicts (mixed or internal conflicts) and situations (such as UN peacekeeping or observer missions, irrespective of the character of the conflict) and arguably even UN peace enforcement missions in situations of internal armed conflicts).(82) In this author's opinion, this position would be untenable since for all purposes at least provisions of common article 3 would have to apply in situations of internal conflicts.

The UN Safety Convention could also be interpreted to mean that only operations of the type b) i.e. the so-called UNSC "authorized" operations fall under IHL, whereas those so-called "established" operations do not fall under IHL. However since in the group of "established" operations are included chapter VII situations, it is difficult to see why the Convention is not explicit in stating that IHL also applies. The fact of being conducted under UN mandate obviously could not make violations of IHL any more legal in such operations. Moreover, the distinction between "established" and "authorized" also wrongly assumes that IHL should apply only when UN forces are viewed as *combatants* (i.e. in peace enforcement missions), not as *persons not taking an active part in hostilities* (i.e. in peacekeeping or similar observer missions). The fact is that whenever there is an armed conflict (international or internal in character) there cannot be a legal *vacuum*. Anybody caught up in the conflict is always somehow protected, whether he is a combatant or not (even *per se* war criminals like mercenaries will be protected at least by the residual provisions of article 75 of Protocol I or common article 3 of the Geneva Conventions).(83)

It is clear therefore that the UN Safety Convention creates more problems than it solves them.(84) The question of the applicable law in cases

of internationalised conflicts with UN intervention cannot therefore be clarified based on provisions of the UN Safety Convention alone. Subsequent documents adopted (the 1998 ICC Statute, and the 1999 Secretary-General's Bulletin) have not contributed to clarify this position either. While the 1998 ICC Statute provides for a war crime of "Attacks on UN Personnel" (article 8(d)(iii);8(e)(iii)) which may be committed in international or internal armed conflicts (thus suggesting that there would be a case where one or the other block of norms would apply), the Secretary-General's Bulletin contains a single enumeration of minimum rules to be respected by UN personnel in any type of conflicts . However, many of the provisions of this instrument are not found in either treaty or customary rules of IHL which apply in situations of internal armed conflicts.(85)

That means that at least from the UN point of view, only the law of international armed conflicts applies to UN forces. This seems to contradict provisions of the ICC Statute - an agreement negotiated outside the UN framework- which more properly encapsulates the interpretation of relevant provisions of IHL under which, there are two different blocks of norms applied to different types of armed conflicts (international or internal).

Does the dichotomy in the application of the rules of war (different set of rules for different types of armed conflicts) mean that the UN is prevented from applying the more complete set of norms (that of international armed conflict) to an internal conflict involving forces under its mandate? In this author's opinion, there is nothing in law, which would prevent it. On the contrary, in situations of internal armed conflicts, parties are even encouraged (common article 3 to the Geneva Conventions) to apply by way of special agreements, all the provisions of the law of international armed conflict. However, unless the UN signs special agreements with rebels, it is difficult to see how these rebels could be bound by all the provisions of the laws of international armed conflict in their attitude towards the UN forces themselves. The question could be particularly difficult to solve with regard to criminal prosecutions.

B) THE CONCEPT OF SELF-DEFENCE

Basically it can be said that IHL is always applicable to UN peacekeepers, if and when they are deployed in circumstances of an armed conflict. It does not matter whether the UN itself becomes involved therein as a party to a conflict or not. It does not matter either, whether the conflict is international or internal. This would appear to be undisputed. Nor does there seem to be a problem, in situations such as in Korea or in Iraq, with the UN deploying forces for an enforcement action against a state found guilty of a breach of international peace and security.

More problematic is the situation where UN military personnel are deployed as part of peacekeeping missions. In this case, UN military personnel are authorised to use arms only in legitimate self-defence.(86) The situations of legitimate self-defence are exactly those covered by the UN Safety Convention, and by the Status of the Forces Agreements (SFA) which provide for immunities and privileges for UN military personnel in cases when they use force in self-defence. Basically, the concept of "self-defence" under the UN Safety Convention has been understood to mean that armed incidents involving UN military personnel cannot be considered "an armed conflict" capable of triggering the application of IHL.(87)

In this, the concept of self-defence is difficult to reconcile with the common definition of "armed conflict" as found in the Geneva conventions(88) and developed by the jurisprudence of the ad hoc Tribunals.(89) Indeed, these definitions depart from the point of view that "it is the *fact* of hostilities, not the existence of a *formal legal condition* which brings the law into operation."(90)

If an armed conflict is found to exist, the rules of IHL apply equally to all parties to that conflict, irrespective of whether the UN peacekeepers were acting legally in self-defence or not. Indeed Additional Protocol I in its preamble states that "the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse

distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."[91]

Moreover, common article 1 to the Geneva Conventions provides that the parties undertake "to respect and to ensure respect" for the conventions "in all circumstances". These "all circumstances" seem to encompass situations of the kind referred to as "self-defence".

However, as just showed, in the past, not only the UN but also individual states refused to recognize the application of IHL to situations where UN military personnel were engaged in merely peacekeeping missions. This is most regrettable, because then UN peacekeepers would not be covered by the protection offered by IHL rules (since the argument is that IHL does not apply to those forces).

In this author's opinion, an approach which regards UN personnel in peacekeeping missions as *per se non combatants* is more appropriate and defensible. Likewise, an approach which regards the concept of "self-defense" under the UN Safety Convention as a concept excluding unlawfulness of the acts of UN peacekeepers under IHL and international criminal law and not a purported manifestation of privileges and immunities of those forces (which has the potential of making conflicts in which UN peacekeepers are involved "non armed conflicts" at all) is also more appropriate and defensible. To deny the evident fact that UN peacekeepers can be involved in incidents of certain intensity capable of triggering the application of at least common article 3 of the Geneva Conventions in any type of armed conflicts is indefensible.

If UN peacekeepers are considered *per se non combatants*, then according to customary IHL, they always enjoy the protection offered to non-combatants (even when they use arms in legitimate self-defense) "unless and for such time as they take a direct part in hostilities", i.e. when they voluntary neglect their protected status, and side with one of the parties to the conflict against the other party.[92] This is indeed the approach taken in the subsequent Secretary-General's Bulletin, according to which "the

promulgation of the Bulletin does not affect the protected status of members of peacekeeping operations "as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict."(93)

Once the position according to which UN personnel in peacekeeping missions have a similar status to the one offered to civilians and non-combatants is accepted (including the right to use arms in legitimate self-defence against unlawful attack), the next question is to find out whether or not measures taken in self-defence may, under certain circumstances, risk such peacekeepers losing their protected status and make them become lawful targets. If this is possible, would it depend on the type of weapons used, the intensity of the incidents in self-defence, or the protracted character of the incidents in which they are engaged?

Some commentators would favour the *intensity* criteria to define the moment from when acts in self-defence become unlawful acts of combat which make peacekeepers lose their status and become combatants i.e. lawful targets. Professor Ch. Greenwood, for instance, agrees that UN peacekeepers would not be lawful targets when involved in only "low level isolated incidents, such as an exchange of fire by sentries", since these incidents "would not constitute an armed conflict".(94) However, this approach is not helpful since the emphasis here is on incidents to which IHL does not apply at all, because they do not qualify as "armed conflicts". If the incidents do not qualify as "armed conflict" they will not be covered by IHL, and therefore the question of lawfulness of these acts cannot be decided on the basis of IHL.

What we are concerned here with, however, are incidents in self-defence which occur within an ongoing armed conflict. Do incidents exceeding in intensity that of an "exchange of fire by sentries", automatically make UN peacekeepers lawful targets? In other words what are the limits of permissible self-defence? In this author's opinion *intensity* of the incidents in self-defence cannot be a valid criteria invalidating the protected status of UN

peacekeepers since it would amount to a dangerous pretext encouraging "would-be attackers to ensure the legality of their actions by increasing the size and intensity of their attack" against UN personnel, to use the words of Professor Sharp.(95) Therefore acts in self-defence whatever their intensity, (provided that the requisites conditions of proportionality and imminence of the unlawful attack are respected), cannot give rise under law to a purported second right of self-defence of the initial wrongdoer.

> *In U.S v. von Weizsacker et al., a US military Tribunal sitting in Germany rejected a purported right of self-defence against attacks, where that party was itself the initial aggressor. The Tribunal held that international law does not recognise a right to exercise "self-defence against self-defence". Because Germany had begun a war of aggression against Russia, measures in self-defence by Russia could not justify other acts by Germany since self-defence presupposes a response to an unlawful attack.*(96)

A second argument puts the legality of self-defence dependent upon the type of *weapons used*. It is argued that those entities that are recognised under IHL a right of individual self-defence to protect themselves or those entrusted to their care (military officials of a protecting power, military personnel assigned to the civil defence organizations, police forces in occupied territory, and medical personnel)(97) are allowed to use only light weapons, whereas the concept of self-defence under the 1999 UN Secretary-General's Bulletin is understood not only in the individual sense but also in the collective one, and therefore, it may entail using non light weapons to protect those entrusted with their care in a safe haven, for example.

In this author's opinion, since collective defence (respecting the requisites of proportionality and imminence) has been admitted into a right under the *jus in bello* compatible with the protected status of UN peacekeepers, these do not lose their protected status for the mere fact of being forced to use non exclusively light weapons in self-defence in order to

protect those under their responsibility. In this situation, the killing of such UN peacekeepers will still qualify as an unlawful attack against protected persons. The right of self-defence under the ICC Statute, the UN Safety Convention and the UN Secretary-General's Bulletin is therefore a right preventing UN peacekeepers from losing their protected status, rather than a right justifying the commission of war crimes. UN peacekeepers acting in collective self-defence would still be required to respect the rules of war, in particular differentiate between civilians and combatants..

The right to self-defence finds expression in article 31(1) (c) of the ICC Statute which provides that: "a person shall not be criminally responsible if, at the time of that person's conduct: (c) the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph."(98)

2. THE LEGAL PROTECTIVE REGIME OF UN PEACEKEEPERS UNDER IHL

A. THE PROTECTION OFFERED TO UN PEACEKEEPERS AS A MATTER OF RIGHTS GRANTING LAW

Treaty and customary IHL not only imposes obligations upon UN forces, but also grants certain rights.(99) The discussion of whether or not IHL is at all applicable to UN forces is only relevant in order to assert the extent to which UN forces can in turn expect protection from this body of law. Protection, however, is only possible where a party to the conflict accepts the respective obligations. .

Generally speaking, there is no disagreement among states or scholars

as to the very fact that IHL confers on UN personnel certain legal protection. The only point of disagreement is the scope of such protection.(100) In this connection, two questions will be reviewed below, first the scope of the protected status of UN peacekeepers under current norms of IHL (1), and then the diverging arguments *pros* and *cons* regarding the possible expansion of this protection (2, 3).

1. THE GENERAL SCOPE OF LEGAL PROTECTION GRANTED TO UN PERSONNEL

Although the status of UN personnel is not clearly provided for in the norms of IHL, a careful reading of a combination of all such norms brings us to the conclusion that UN peacekeeping forces have a protected status more closely similar to that granted mutatis *mutandis* to ICRC staff members, rather than that offered to ordinary civilians.(101)

A) THE GENEVA LAW

(I) THE 1949 GENEVA CONVENTIONS

1. For as long as UN military personnel in peacekeeping missions remain neutral to the international armed conflict they are protected persons within the meaning of article 4 of Geneva Convention IV. Therefore any acts committed against them are also prohibited as grave breaches. If they take part in hostilities, they are entitled to the privileges of combatants, and as such protected by the provisions of the remaining Geneva Conventions, as the case may be.

It is to be noted, that provisions of article 4 of the Geneva Convention IV do not explicitly address their application to armed forces of states not party to the conflict, i.e., neutral states in the zone of conflict. The ICRC Commentary to 1949 Convention IV provides that the language "*at a given moment and in any manner whatsoever*" was intended to ensure that all situations and cases were covered, and that the expression "*in the hands of*" is used in a general sense to include all persons in the territory under control

of a party to the conflict that are not nationals of that party.(102) Article 4 was intended to cover everyone in the hands of a state party to a conflict who is not a national of that party.(103)

2. When UN peacekeepers are caught up as neutral forces in an internal armed conflict, the basic provisions in common article 3 of the Geneva Conventions will apply, if the peacekeepers fall into the hands of the rebels as "*persons not taking active part in hostilities*". In addition, if the state concerned is also a party to Additional Protocol II to the Geneva Conventions, its provisions concerning the protection of "*persons who do not take direct part in hostilities*" (article 4), would also apply. However, if UN peacekeepers fall into the hands of the state concerned, provisions of article 4 of the Geneva Convention IV would instead apply.(104)

(II) ADDITIONAL PROTOCOL I TO THE GENEVA CONVENTIONS

More specifically the scope of the protection granted to UN personnel can be found in the main provisions of Additional Protocol I to the Geneva Conventions. In cases in which UN personnel are caught up in an international armed conflict of which they are not a party, and are subjected to attacks by members of one of the belligerent forces, Protocol I provides protection under article 37(1) (d), which prohibits "*the feigning of protected status by the use of signs, emblems or uniforms of the UN or of neutral or other states not parties to the conflict*", as an unlawful act of perfidy.

Article 38 places the UN in the same category as other internationally protected organizations like the ICRC that are not lawful objects of attack unless being misused for hostile purposes (article 38 (1)). Article 38 (2) makes the distinctive emblem of the UN like that of "*the red cross, red crescent or red lion and sun" (article 38 (1*), an internationally protected emblem, providing that*: "it is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.*"

This provision clearly envisages that the UN and, by extension, UN personnel, are "specially protected entities". Moreover, a clear indication of

this protected status if found in the Report of the drafting Committee for articles 37 and 38 which states that "*the protected status of the UN is limited to those situations where the UN are not belligerents engaged in an enforcement action involving armed combat*."[105] The ICRC makes a similar reading of those provisions stating that they are "*not applied to situations in which UN forces were engaged as combatants on one side of an armed conflict."*[106]

Further, the parties to the conflict have a duty to respect and protect UN personnel engaged in relief operations (articles 69-71 of Additional Protocol I).

Next, as UN personnel, their buildings, vehicles, and equipment would not constitute military objectives under articles 48 and 50-52 of Additional Protocol I, therefore, attacks against them by a party to an international armed conflict, are also unlawful.

Additionally, article 75 of Additional Protocol I concerning the protection of those "*who do not benefit from more favourable treatment*", under IHL may also apply in controversial situations.

Scholars share the view that these provisions can be considered as covering the minimum protective status granted to UN military personnel not engaged in hostilities. Ch. Greenwood even assumes, that as those "provisions are largely considered declaratory of customary international law, it matters little whether or not the belligerents are party to the Protocol"[107].

B) THE HAGUE LAW

The normative scope of the protective rule on UN peacekeepers is further found in provisions of the 1980 Conventional Weapons Convention[108] and its Protocol II on the 'Prohibitions or restrictions on the use of mines, booby-traps and other devices' under article 8 (protection from the effects of minefields, mined areas, mines, booby-traps and other devices), which provides in particular that:

"When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission, except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area."[109]

The same provisions are found in the amended version of Protocol II to that Convention in article 12 (2) (b), which extends the protection granted to UN personnel to the ICRC staff (article 12 (4) (b)).[110] The amended Protocol II (article 1) to the Conventional Weapons Convention also extends its field of application to situations of internal armed conflicts.

The 1980 Conventional Weapons Convention also provides that a High contracting party is not released of its obligations when denouncing the Convention "in the case of any annexed Protocol containing provisions concerning situations in which peacekeeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions" (article 6).

C) PROGRESSIVE DEVELOPMENT OF THE LAW (THE ICC STATUTE AND THE UN SAFETY CONVENTION)

With the adoption and entry into force of the ICC Statute, the protection of UN peacekeepers was reinforced. Article 8(b) (iii) (situations of international armed conflicts) and article 8(e) (iii) (situations of internal armed conflicts) define in equal terms the war crime of "intentionally directing attacks against UN personnel".

A corollary to this rule is article 31(1) (c) of the ICC Statute which considers acts of self –defense as justifying an exemption from individual criminal responsibility.[111] In this regard, this novel treaty law provision could be understood as justifying as lawful the actions of UN peacekeeping forces in self-defense, without making them unlawful combatants and therefore lawful targets.

It is also worth noting that provisions of articles 8(b)(iii) (8(e)(iii) of the ICC Statute which proscribe the act of "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"[112] confirms that UN peacekeepers would enjoy their privileged status only where their acts were indeed carried out in self-defence against imminent attack and not where they would be attackers in offensive actions against one party to the conflict. In this case peacekeepers would lose their status and become illegal combatants.[113]

The UN Safety Convention details in article 9 which acts could fall under the definition of an "intentional attack against UN peacekeepers": the intentional commission of (a) murder, kidnapping or other attack upon the person or liberty of any UN or associated personnel; (b) violent attack upon the official premises, the private accommodation or the means of transportation of any UN or associated personnel likely to endanger his or her person or liberty; (c) 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) attempt to commit any such attack; e) complicity in any of the above acts".

The Secretary-General's Bulletin though not a binding instrument for states further clarifies the normative scope of the status of UN personnel. It confirms that IHL applies to peacekeeping missions when use of force is authorized only in self-defense (para. 1.1. of section 1). Moreover, the scope of provisions included in the Bulletin (beyond the minimum rules adopted in relation to internal conflicts) which the Secretary-General advises to apply to any UN operation seem to indicate that whatever the character of the conflict (international or internal), the applicable norms should be those of the law of international armed conflicts in any circumstance.

B. THE PROTECTION GRANTED TO UN PEACEKEEPERS AS A MATTER OF RIGHTS ENFORCING LAW

Any legal system to function effectively in its role of protecting important community values must provide not only for the norms which establish the scope of the protected values but also for the norms which ensure protection for those values. The Geneva Conventions and their Additional Protocol I identify certain offences as "grave breaches" and obligate all states parties to enact legislation to provide penal sanctions for persons committing or ordering the commission of grave breaches. Article 85 of Protocol I provides that all grave breaches are war crimes. The ICTY Appeals Chamber in the *Tadić* Jurisdiction Decision rightly held that the grave breaches system of the Geneva Conventions establishes a twofold system: on the one hand, "an enumeration of offences that are regarded so serious as to constitute "grave breaches", and on the other, a mandatory enforcement mechanism based on the concept of a duty and right of all contracting states to search for, and try or extradite persons allegedly responsible for "grave breaches"".[(114)] Other serious violations of IHL may also attract individual criminal responsibility.

1. PROSECUTING CRIMES COMMITTED AGAINST UN PEACEKEEPERS UNDER THE ICC STATUTE

Potentially any of the crimes falling under the ICC Statute (genocide, crimes against humanity and war crimes) could be charged whenever crimes are committed against UN peacekeepers.

A. GENOCIDE

Articles 5(1) (a) and 6 of the ICC Statute provide that a person commits a crime of genocide whenever any of the enumerated acts (killing members of the group, causing serious harm to members of the group, inflicting conditions of life intended to bring about the destruction of the group; imposing measures to prevent birth; forcible transferring children of the group to another group) is committed with *intent* to destroy (in whole or in

part) the group to which the victim belongs. For purposes of the crime of genocide, protected groups are only those defined by national, ethnical, religious or racial specific characteristics. It is clear that the UN personnel as such although a group, do not present characteristics which could make it capable of being a victim of genocide. However, in the context of killing orgies targeting certain religious, ethnical or racial groups, individual UN peacekeepers could potentially be victims of genocide if they belong to one of the groups targeted for genocide. The crime would then be committed against the victim not because he is a member of the UN personnel, but because of his/her more peculiar characteristics which made him part of the group targeted for destruction. In these circumstances, UN peacekeepers would be protected in their individual capacity.

B. CRIMES AGAINST HUMANITY

Articles 5(1)(b) and 7 of the ICC Statute provide that a person commits a crime against humanity if he/she commits any of the enumerated acts (murder; extermination; enslavement; deportation or forcible transfer; imprisonment or other severe deprivation of physical liberty; torture; rape; enforced prostitution and other forms of sexual assault; persecution against any identifiable group or collectivity on political and other grounds; enforced disappearance; apartheid; other inhuman acts) as part of a widespread or systematic attack against any civilian population and with knowledge of the attack.

UN peacekeepers could potentially be victims of a crime against humanity if any of the enumerated acts was committed as part of a widespread or systematic attack against the civilian population to which UN peacekeepers undoubtedly belong. In addition the UN peacekeepers could also hypothetically be victims of the crime of persecution, if the specific intent underlying the persecutory act was discrimination against the collectivity (the UN) to which the personnel belong for political reasons.

There is no need under customary law or the ICC Statute to prove a

connection between the crimes and any armed conflict at all. The term "widespread" refers to the general number of victims, whereas "systematic" signifies the existence of a pattern or methodical plan.(115) There is no need for both of the conditions to be met. Proof is only needed for either of them.

I) ARE UN PERSONNEL PART OF "ANY" CIVILIAN POPULATION?

According to the approach developed by the *ad hoc* Tribunals(116) the term "civilian population", may include former combatants who have not been involved in combat action at the time, when the acts charged as crimes against humanity occur. Protected persons such as non-combatant and civilians only lose their status of non-combatants if they participate in the conflict as combatants i.e. attacking forces and not self-defenders.

Provided that the UN peacekeepers preserve their status of *persons not taking a direct part in hostilities*, with the exception of acts in self-defense, they would qualify as part of "any" civilian population for the purposes of the definition of crimes against humanity.

C. WAR CRIMES

Articles 5(1)(c) and 8 of the ICC Statute give a list of acts considered war crimes falling under the jurisdiction of the Court. Reflecting the desire to see only the most serious crimes of international concern to be adjudicated by the Court, the drafters of the Statute have included a pre-condition which is that for a war crime to fall within its jurisdiction, it must have been *in particular* committed as part of a plan or policy or as part of a large-scale commission of such crimes.

Apart from situations in which crimes committed against UN peacekeepers are considered under articles 8(b) (iii) 8(e) (iii) as intentional attacks on UN personnel, crimes against UN peacekeepers could also be considered separately as grave breaches of the Geneva Conventions under article 8(a); violations of the laws and customs of war (under article 8(b) other than (iii)) or violation of common article 3 (article 8(c)).

1) CRIMES AGAINST UN PERSONNEL AS GRAVE BREACHES OF THE GENEVA CONVENTIONS (ARTICLE 8(A))

To trigger the application of article 8(a) of the ICC Statute, an attack against UN peacekeepers must involve the commission of prohibited acts provided that these acts are: a) listed as grave breaches in one of the four Geneva Conventions; b) committed when common article 2 of the Geneva Conventions applies (i.e. in a situation of an international armed conflict); c) there is a nexus with the armed conflict; d) and committed against persons or property "protected" under international law.

I) UN PERSONNEL AS "PROTECTED PERSONS"

The definition of "protected" persons in case of civilians is given in article 4 of the IV Geneva Convention, which states:

"Persons protected by the Convention are those who at a given moment and in any manner whatsoever find themselves in case of a conflict or occupation, in the hands of a party to the Conflict or occupying power of which they are not nationals.

Nationals of a state, which is not bound by the Convention, are not protected by it. Nationals of a neutral State, who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the state in whose hands they are."

II) UN PERSONNEL AS "NATIONALS OF A STATE WHICH IS BOUND BY THE CONVENTION"

The UN is bound by provisions of the Geneva Conventions as a matter of customary law, not treaty law. However, since UN peacekeepers are also nationals of states bound by provisions of the Geneva Conventions as a matter of treaty law, they are for this reason protected persons both *qua* treaty law and *qua* customary law. This argument is not disputed. However,

more problematic is the status of UN peacekeepers *vis-à-vis* the second requirement that they should not be "nationals of a neutral state with diplomatic relations with the party to the conflict in whose hands they find themselves".

III) UN PERSONNEL AS NATIONALS OF A NEUTRAL STATE

Some commentators argue that UN peacekeepers who are taken prisoners by one of the parties to the conflict "would not normally have the status of protected persons under either 1949 Geneva Convention III or IV, since UN personnel will usually be drawn from countries which have normal diplomatic representation with the states parties to the armed conflict", whereas the requirement under the applicable law is that they should not be so, in order to qualify as "protected persons".(117)

This view differs from Prof. Sharp's position, who argues that UN personnel are entitled to protected status because they, like members of armed forces of any neutral state not a party to the conflict, but operating in a zone of armed conflict, are protected persons under the 1949 Geneva Convention IV.(118)

In this author's view, IHL provisions are not static; they should be interpreted having in mind the spirit that has dictated their adoption. In the *Čelebići case*, the ICTY Trial Chamber held indeed that "the kind of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parties of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of the existing provisions of international customary law."(119)

It is clear from this provision that when the Geneva Conventions were adopted it was not envisaged that they could be applied to UN military personnel. However the evolution of the international life has proved the need for UN intervention in armed conflicts around the globe.

The question of whether or not the state to which UN personnel belong has normal diplomatic representation with the state in whose hands the peacekeepers find themselves is relevant here, but needs to be applied *mutatis mutandis* when at issue we have personnel acting under command and control of the UN, an independent subject of IHL.

When the UN is engaged in a peacekeeping mission under its command and control, the mission is considered a subsidiary organ of the UN entitled to all privileges and immunities accorded to the UN under the Safety Convention. Therefore it seems more reasonable to consider the question of which party the UN personnel belong in connection with the status of the UN itself, as an independent entity bound by provisions of customary IHL. UN personnel must thus be considered for the purposes of provisions of Article 4 of the fourth Geneva Convention, *mutatis mutandis,* as "belonging" to the UN.(120) Based upon this, the protected status of the UN peacekeepers under IHL has been endorsed by the Safety Convention and the ICC Statute under article 8.

Accordingly, prohibited acts committed against UN personnel can be charged as “grave breaches” of the Geneva Conventions punishable under article 8(a) of the ICC Statute.

2) CRIMES AGAINST UN PERSONNEL AS A VIOLATION OF THE LAWS AND CUSTOMS OF WAR

UN PEACEKEEPERS AS "PERSONS NOT TAKING DIRECT PART IN HOSTILITIES"

If the conflict is international in character, and there is no way to prove that a particular person is a “protected person” under the Geneva Conventions (or if the conflict is internal), he will still be entitled to the protection of IHL against prohibited acts listed in article 8 of the ICC Statute based upon provisions of common article 3 of the Geneva Conventions, since common article 3 reflects elementary considerations of humanity applied as customary law in any kind of conflict (international or internal).

VI. CONCLUSIONS

Researching issues related to the status of UN peacekeepers is important since it may dissipate misunderstandings and bring more states' adherence to the ICC Statute, especially those concerned that peacekeepers can be exposed to frivolous investigations before the ICC. The objective of this paper was to find ways of ensuring the same result by making sure that provocations against UN peacekeepers do not go unpunished merely because the attackers succeeded to raise the level of intensity of an accident involving UN peacekeepers to that of "protracted violence".

The research on the legal status of UN personnel in peacekeeping missions under IHL shows that UN personnel are protected under IHL as *non-combatants* and not as *combatants* even when they are forced to act in self-defense of those they are required to protect. Self-defense does not give justification for the commission of war crimes. Instead, it acts to preserve the protected status of UN personnel, in a sense that a protected person who is forced to defend himself or those entrusted to him for care, does not lose his/her status for the mere fact of having been forced to act in self-defense. The preservation of their protected status will not be dependent upon the intensity of the conflict either, lest an injustice will occur, since "would-be attackers" might only raise the intensity of the conflict to evade responsibility for attacks on UN personnel.

Not every provision of IHL is part of *jus cogens*. In particular whereas the common core principles of respect for human dignity, and care in the choice of means and methods of injuring the enemy are such, the so –called principle of the "combatant's privilege" appears not to be one following the careful research conducted in the paper.(121) UN peacekeepers are lawfully permitted to participate in self-defense operations, but they don't lose their protected status for this fact alone. The UN SC acting under Chapter VII can derogate from some of the detailed *non jus cogens* provisions of IHL when it finds absolutely necessary to do so to maintain international peace and security. These are all important factors that the Prosecutor of the ICC will have to consider while conducting investigations and/or bringing cases based on offences against UN or regional organizations peacekeepers. ❖

NOTES:

1. The ICC was established pursuant to the Statute adopted in Rome on 17 July 1998. The Statute entered into force on 1 July 2002, after 60 instruments of ratification were lodged with the depositary of the Statute – the UN Secretary-General. The Statute criminalizes attacks on UN personnel under articles 8(b) (iii); 8(e) (iii).

2. "Attacks on Peacekeepers will not be tolerated" – ICC Prosecutor presents evidence in third case in Darfur', The Hague, 20 November 2008, available at: http://www.icc-cpi.int/press/pressreleases/446.html

3. See '"Attacks on Peacekeepers will not be tolerated" – ICC Prosecutor presents evidence in third case in Darfur'.

4. See: http://www.un.org/Depts/dpko/dpko/bnote.htm.

5. Ibid.

6. The UN peacekeeping force deployed presently in the Democratic Republic of Congo counts alone 17.000 peacekeepers, and recent events in the north Kiwu have prompted the UN Secretary-General Ban ki-Moon to request an additional 3000 forces. See 'MONUC, UN Chief wants 3000 more troops in DR Congo', in *Welt online,* 12 November 2008.

7. See information available at the UN DPKO website: http://www.un.org/Depts/dpko/dpko/bnote.htm.

8. See Arsanjani M., "Defending the Blue Helmets: Protection of United Personnel", In *The United Nations and International Humanitarian Law.* (Actes du Colloque International a l'occasion du cinquantième anniversaire de L'ONU (Geneve – 19, 20 et 21 Octobre 1995)), Paris 1996, p. 117.

9. See *Prosecutor v. Radovan Karadžić & Ratko Mladić*, Case No. IT-95-5-R61, Rule 61 Decision, 11 July 1996.

10. See *New York Times*, August 8, 1995, p. A-1, col.6.

11. See Dossier Sierra Leone, in the *New York Times*, available at: http://nytimes.com.

12. See '"Attacks on Peacekeepers will not be tolerated" – ICC Prosecutor presents evidence in third case in Darfur'.

13. See '"Attacks on Peacekeepers will not be tolerated" – ICC Prosecutor presents

evidence in third case in Darfur'. It should be noted that back in 1992 already the former Secretary-General Boutros-Boutros Ghali had admitted that in view of the "unconscionable increase in the number of fatalities" among UN personnel (para.66) "innovative measures will be required to deal with the dangers facing United Nations personnel" (para. 67). See: *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping:* Report of the Secretary-General, UN Doc. A/47/277-S/24111 (1992). See also *Security of United Nations Operations: Report of the Secretary-General, UN GAOR, 48th Sess.,* UN Doc. A/48/349-S/26358 (1993).

14. In *An Agenda for Peace,* the UN Secretary-General defines five different models of conflict management mechanisms: preventive diplomacy, peace-making, peacekeeping, peace-enforcement, and peace-building. See "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary-General", paras.20-21, 42-44, *UN Doc. A/47/277-S/24111 (1992)*. For an in-depth analysis of all these different models of UN Operations as defined in the Agenda for Peace, See Walter Gary Sharp, Sr. 'Protecting the Avatars of International Peace and Security', in *Michigan Journal of Comparative & International law*, 1996-97, vol. 7, p.98-112.

15. For an extended discussion of UN operations, see J.Hillen, *Blue Helmets: The strategy of UN military operations,* London, 1998.

16. Sometimes, however, peacekeeping missions may be deployed without the consent of the parties, especially where, like in Somalia, there is no official Government. See Boutros Boutros-Ghali, "Supplement to An Agenda for Peace", *UN Doc. A/50/60-S/1995/1,* (1995).

17. For the concept of self-defense see discussion *infra,* part V. b).

18. The Model Agreement between the UN and member states contributing personnel and equipment to UN operations provides in para. 9 that it "affirms the international nature of (the UN peacekeeping operations) as a subsidiary organ of the UN and defines the privileges and immunities, rights and facilities as well as the duties of (the UN peacekeeping forces) and its members". See "Comprehensive Review of the whole Question of Peacekeeping Operations in all their aspects, Model Agreement between the United Nations and member States contributing personnel and equipment to United Nations Operations, Report of the Secretary-General*", UN. GAOR, 46th Sess., Annex, para. 4, UN Doc. A/46/185* (1991).

19. By contrast UN peace enforcement operations properly are authorized by the UN SC under Chapter VII or VIII. These forces are given a combat mission and are authorized to use coercive measures for carrying out their mandate. The consent of the parties is not necessarily required. IHL fully applies to them.

20. See "Convention on the Safety of United Nations and Associated Personnel", 9

December 1994, *G.A. Res. 49/59, UN GAOR, 49th Sess., UN Doc A/Res/49/59 (1994)*, reprinted in *34 ILM 482(1995) (*hereinafter, '*UN Safety Convention')*.

21. See *infra* notes 83-86 for the discussion of the definitions of the UN Safety Convention and their implications.

22. See UN Safety Convention, article 1(b)..

23. See detailed discussion in Evan T. Bloom, 'Protecting peacekeepers: the Convention on the Safety of United Nations and Associated Personnel*'.*

24. This however does not exclude addressing other types of UN Personnel for comparison purposes. The term "UN personnel will be used interchangeably with that of "UN or/and regional organizations' peacekeepers" throughout this paper.

25. The first UN Operation to be set up was the United Nations Truce Supervision Organization (UNTSO) (an Observer mission) in the Middle East in 1948.

26. For contributions to the study of this problem see in particular: Antoine Bouvier, 'Convention on the Safety of United Nations and associated personnel: Presentation and analysis' in *International Review of the Red Cross*, no. 309, p.638-666; Evan T. Bloom, 'Protecting peacekeepers: the Convention on the Safety of United Nations and Associated Personnel*'*; M. Christina Bourloyannis-Vrailas, 'The Convention on the Safety of United Nations and Associated Personnel', at 566; B. D. Tittemore, 'Belligerents in Blue Helmets: Applying international humanitarian law to United Nations peace operations', in *Stanford journal of International Law,* vol.33 (1997), p.61; H. McCobrey, 'The law of armed conflict and the United Nations forces: Regulating military action for peace', in *Malaysian Journal of international law*, vol.7 (1993), p.63; Mahnoush Arsanjani, "Defending the Blue Helmets: Protection of United Nations Personnel*",* in *Les Nations Unies et le Droit international Humanitaire/ The United Nations and International Humanitarian Law*, p. 131; Daphna Shraga, "The United Nations as an actor bound by international humanitarian law*"*, in *Les Nations Unies et le droit international humanitaire/ The United Nations and International Humanitarian Law*, p. 319-337. Francoise Hampson, "States' military operations authorized by the United Nations and international Humanitarian law"*,* in *Les Nations Unies et le droit international humanitaire/ The United Nations and International Humanitarian Law*, p. 371-426; Claude Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire*, Montréal 1995 ; Ralph Zaklin, « Le droit applicable aux forces d'intervention sous les auspices de l'ONU », in *Le Chapitre VII de la Charte des Nations Unies (50 anniversaire des Nations Unies, Colloque de Rennes),* Paris 1995, p.191-199.; Walter Gary Sharp, Sr. 'Protecting the Avatars of International Peace and Security', in *Michigan Journal of Comparative & International law.* (1996-97), vol. 7, p.93-183; Richard D. Glick, 'Lip Service

to the Law of War: Humanitarian Law and United Nations Armed Forces', in *Michigan Journal of international law*, (1995-96), N 17, p. 53-107; Christopher Greenwood, "International humanitarian law and United Nations Military Operations*"*, p.3-34; D.W. Bowet, *United Nations Forces*, London 1964, pp.484-516; F. Seyersted, *United Nations Forces in the Law of Peace and War,* Leiden 1966; ICRC, *Symposium on Humanitarian Action and peacekeeping operations,* Geneva, ICRC, 1994; *The United Nations and International humanitarian law,* (L. Condorelli *et al,* eds.), Paris 1996; D. Schindler, "United Nations Forces and International Humanitarian law*"*, in, *Studies and essays on international humanitarian law*, (C. Swinarski, ed.), The Hague, 1984, p . 521; P. Benvenuti, "The implementation of international Humanitarian law in the Framework of United Nations Peacekeeping operations", in *European Commission Law in Humanitarian Crises,* Luxemburg, 1995, vol. 1, p.83; G.-J. van Hegelsom, "The law of Armed conflict and united Nations peacekeeping and peace enforcing operations*"*, 6 *Hague Yearbook of International Law* (1993), p. 45; G.-J. van Hegelsom, 'UN forces and humanitarian law. Use of force and humanity in action*',* in *Revue de Droit militaire et de droit de la guerre,* (1989), vol. XXVIII-1-2, p. 473; M. H. Hoffman, 'Peace enforcement actions and humanitarian law: Emerging rules for "interventional armed conflict', in *International Review of Red Cross*, (2000), p.193; Yves Sandoz, 'The application of humanitarian law by the armed forces of the United Nations organisation', in *International Review of the Red Cross* (1978), p.274; M. Flory, 'L'Organization des Nations Unies et les operations de maintien de la paix'. *Annuaire français de droit international,* 1965, p. 449; H. McCoubrey and N. White, *The Blue Helmets: Legal regulation of United Nations Military operations,* Sydney, 1996; A. Ryniker, 'Respect du droit international humanitaire par les forces des Nations Unies' in *Revue internationale de la Croix Rouge* (1999), p.795; U. Pawankar, 'Applicability of international humanitarian law to United Nations peacekeeping forces', 33 *International Review of the Red Cross* (1993), p. 227.

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

28. Regarding the general undertaking to respect the general principles and spirit of IHL, from the very beginning, the opinion was that the UN was not bound by any obligation whatsoever under international law, to respect and ensure compliance with IHL. The view was that this obligation was on the force contributing states. For this reason even the provision regarding respect for general principles and the spirit of IHL would be inserted only in Regulations for these forces, and in agreements with troop-contributing states, never in the

agreement with the host state. It was not until 1992 that the UN agreed for the first time, in response to the ICRC demand, to insert a similar provision in the status of forces agreements of the UN with host states. Yet what was meant by 'respecting the principles and spirit of IHL' only became known in 1999, when the UN Secretary-General's Bulletin was adopted. The contents of this Bulletin will be discussed further below.

29. See detailed discussion of the UN position in R. Zacklin, « Le droit applicable aux forces d'intervention sous les auspices de l'ONU », in *Le Chapitre VII de la Charte de l'ONU*, Colloque de Rannes; see also Daphna Shraga, "The United Nations as an actor bound by international humanitarian law*"*, at 319; U. Pawankar, 'Applicability of international humanitarian law to United Nations peacekeeping forces', at 227;.A. Ryniker, 'Respect du droit international humanitaire par les forces des Nations Unies', at p. 795 ; Richard D. Glick, 'Lip Service to the Law of War*'*, at p. 53.

30. See 'Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field', opened for signature 12 August 1949, 75 *U.N.T.S.* 31 (hereinafter, '*Geneva Convention I')*; 'Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea', opened for signature 12 August 1949, 75 *U.N.T.S.* 85 (hereinafter, '*Geneva Convention II*'); 'Geneva Convention Relative to the Treatment of Civilians in War*'*, opened for signature 12 August 1949, 75 U.N.T.S.135 (hereinafter, '*Geneva Convention III*'*);* 'Geneva Convention Relative to the Treatment of Prisoners of War', opened for signature 12 August 1949, 75 U.N.T.S. 287 (hereinafter, '*Geneva Convention IV*').

31. See 'Protocol Additional to the Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of International Armed Conflicts', 12 Dec 1977, 1125 U.N.T.S. 3 (hereinafter, '*Additional Protocol I'*); 'Protocol Additional to the Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of Non-International Armed Conflicts', 12 Dec 1977, 1125 *U.N.T.S.* 609 (hereinafter, '*Additional Protocol II'*).

32. Ibid.

33. Ibid.

34. See *Her Majesty the Queen v. Private D.J. Brocklebank*, Court Martial Appeal Court of Canada, 2 April 1996 , in *Canada, Court Martial Reports*, (1995-1997), vol. 5, part 3, (hereinafter, the *Brocklebank* case).

35. See *Brocklebank* case. See also details of the case in *Dishonored Legacy*, *Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Ottawa, 1997, vol. 1, at pp. 351-363.

36. See *Brocklebank* case.

37. See *Panorama*, no. 24, 19 June 1997, at p. 49.

38. See discussion of the case in S. Marchisio, *The Use of Force by Peacekeeping Forces for the Implementation of their Mandate: Recent cases and New problems, Italian and German Participation in Peacekeeping: From dual approaches to cooperation*, Pisa, 1997, pp.75-86.

39. Ibid. p.379.

40. See « Commission d'enquête parlementaire concernant les événements du Ruanda: Rapport fait au nom de la Commission d'enquête par MM. Mahoux et Verhofstadt", Senat de Belgique, 6 Decembre 1997. *Documents Parlementaires*, Session 1997/8 nos. 611/7, 611/8, 611/9, 611/10, 611/11,611/12, 611/13, 611/14 et 611/15.

41. See *Marchal* case, Military Court of Belgium, 4 July 1996, in *Military law and Law of War Review*, (1997), vol. XXXXVI, 1-2, at 85-100 (hereinafter *Marchal* case).

42. See 'Jugement de la Cour militaire de Belgique concernant des violations du droit humanitaire international commis en Somalie et au Ruanda', No. 54 A.R. 1997, 20 Novembre 1997, *Journal des Tribunaux*, 24 Avril 1998, pp. 286-289 (hereinafter *Case of IHL violations in Somalia and Rwanda*).

43. It is interesting to note that the same reason has not barred the Court from hearing the case of Colonel Marchal. It is to be noted that in the *Mazilu* Case, the International Court of Justice (ICJ) opined that immunities enjoyed by the UN apply even in relation to a persons' own state, if that state whilst acceding to the Convention on UN privileges and immunities, did not make a reservation in relation to its citizens. Unless this was the case here, the Belgian Court would have been also barred from jurisdiction in relation to its own citizens. See *Mazilu* case, ICJ. Advisory Opinion on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, *29 ILM 1*, (1990), at 98-122. See also comments in Igor P. Blishenko, José Doria, *Precedents in public and private international law*. Moscow, 1999, at 222, (in Russian).

44. See *Marchal* case.

45. See *Case of IHL violations in Somalia and Rwanda*.

46. Ibid.

47. See *Case of IHL violations in Somalia and Rwanda*.

48. See *Prosecutor v. Theoneste Bagosora*, Case No. ICTR-96-7, Rule 61 Decision, 10 August 1999. Belgium *Amicus Curie* Brief.

49. This author always defended the view that failure to recognize explicitly the applicability of IHL to UN peacekeepers could only hinder in turn their effective protection under the laws of war.

50. See 'ICRC. International Conference of the Red Cross, Report on the Protection of war Victims', reprinted in *International Review of the Red Cross* (1993), 428-29. For a detailed overview of the ICRC position, see Y. Sandoz, 'The application of humanitarian law by the armed forces of the United Nations organisation', at 274; U. Palwankar, 'Applicability of international humanitarian law to United Nations peacekeeping forces', at 227. Actually the UN never denied that this should have been the case, but it made it explicit clear only when the UN S-G Bulletin was adopted in 1999. See further discussion in the sections below.

51. See *infra* note 84.

52. Article 43 of the UN Charter explicitly provides for the creation of UN Forces.

53. See Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*), Request for the indication of provisional measures, Order, *ICJ,* 14 April, 1992.

54. See "Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971", reprinted in 10 *ILM* 1151 (1971).

55. See *Lockerbie* Case. For a broader discussion of this case, see Igor P. Blishchenko, José Doria, *Precedents in public and private international law,* at 209.

56. See UN SC *Res.* 748 (1992), 31 March 1992.

57. See *Lockerbie* case, para. 43.

58. Article 16 of the Rome Statute states: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

59. For a criticism of this resolution see: Aly Mokhtar, 'The fine art of arm-twisting: The US, Resolution 1422 and security council deferral power under the Rome Statute', *International Criminal Law Review* 3 (2003), at 295-344.

60. See *The Prosecutor v. Duško Tadić,* case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 28. (Emphasis in the text) (hereinafter, '*Tadić* jurisdiction decision').

61. Ibid., para 28.

62. See Alain Pellet, « Peut-on et doit-on contrôler les actions du Conseil de Sécurité? » In Le Chapitre VII de la Charte de l'ONU, p.221; see also Peter Kovacs 'Intervention armée des forces de l'OTAN au Kosovo: Fondement de l'obligation de respecter le droit international humanitaire', in Revue internationale de la Croix-Rouge, No. 837, (2000), p. 103.

63. See 'Vienna Convention on the Law of Treaties', 23 May 1969. 1155 *U.N.T.S,* 331.

64. On principles jus cogens see generally Alfred P. Rubin, 'Actio popularis, jus cogens and offences erga omnes*'*, in 35 *New England Law Review*,265 (2001).

65. See *supra* note 58, 59.

66. UN Charter, Preamble, Articles 1(3), 55 (c).

67. See for the core of these norms, in the 'Universal Declaration of Human Rights', UNGA Res. 217A (III), U.N. Doc A/810 at 71 (1948); and 'International Covenant on civil and political rights*'*, 16 December 1966, 999 *U.N.T.S.* 171.

68. See Case *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ, 8 July 1996, para. 25 (hereinafter, '*Nuclear weapons* Case').

69. See 'Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v U.S.)' (Merits), 1986, *ICJ Reports* 14, at para.220, (27 June), (hereinafter, *Nicaragua* case).

70. See *Nuclear weapons* Case, para. 83, p. 36. See discussion of these cases in Igor Blishenko, José Doria, *Precedents in public and private international law*, at 363.

71. See Peter Kovacs, 'Intervention armée des forces de l'OTAN au Kosovo: Fondement de l'obligation de respecter le droit international humanitaire', p.103.

72. See *Tadić* jurisdiction decision, paras. 100-127.

73. See Ch. Greenwood, "International humanitarian law and United Nations Military Operations*"*, at 3; Richard D. Glick, 'Lip Service to the Law of War', at 53.

74. See H. Lauterpacht, "The limits of the Operation of the Law of War"*,* 30 *British Yearbook of International law,* (1953), p.212.

75. Common article 3(2) of the Geneva Conventions specifically provides that the application of its provisions does not affect the legal status of the parties to the conflict. Article 6 of the Additional Protocol II specifically provides for the possibility of penal prosecutions based upon the national legislation of the state concerned including for mere participation of rebels in the armed conflict.

76. The UNSC, after declaring certain areas in Bosnia and Croatia as "safe areas" free from armed attacks and from any other hostile act, extended the peacekeeping mandate of UN Protection Force (UNPROFOR) in order to enable it to deter attacks against the safe areas. For these purposes, UNPROFOR was authorized acting in self-defense (thus maintaining their status of protected persons) to take necessary measures, including the use of force, to reply to attacks against the safe areas by any of the parties. See UNSC *Res.*824 (1993), 6 May 1993; UNSC *Res*. 836 (1993), 4 June 1993; UNSC *Res.*844 (1993), 18 June 1993; UNSC *Res*. 871c (1993), 4 October 1993; UNSC *Res.* 908 (1994), 31 March 1994; UNSC *Res*. 914 (1994), 27

April 1994.

77. See Jean de Courten, « Le Comité international de la Croix-Rouge et l'action des Nations Unies dans les conflits armes », in *Les Nations Unies et le droit international humanitaire/ The United Nations and International Humanitarian Law*, p.339.

78. A clear example is given by the events in Angola in the 1970s and 1980s. Fighting against the government alongside UNITA and FNLA rebels were regular armed forces of Apartheid South Africa and Zaire. For a detailed discussion of events in Angola see, J, Doria, "Angola: A case study in the challenges of achieving peace and justice", *YIHL*, vol. 5, 2005, at 3-60.

79. See "Final Report of the UN Commission of Experts established pursuant to Security Council Resolution780", *UN SCOR, 49th Sess., Annex, para.44, UN Doc.* S/1994/674 (1992). See also Frits Kalshoven, *The Law of Warfare*: *A Summary of its recent history and trends in development,* Leiden, 1973, p. 15.

80. See *Nicaragua* case, para. 219. See also *Tadić* jurisdiction decision, paras. 77,94; David Weissbrodt, 'The Role of International Organization in the Implementation of human Rights and Humanitarian Law in Situations of Armed Conflict', 21 *Vanderbilt Journal Transnational Law* 313, 337-38 (1988); Hans Kelsen, *The Law of the United Nations*, London, 1950, p. 183.

81. Article 1(c) of the UN Safety Convention further stipulates that such operations are either established for "the purpose of maintaining or restoring international peace and security"; or "where the UNSC or the UNGA have declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation".

82. Not surprising, Evan Bloom from the US Department of State concluded that the UN Safety Convention and the law of armed conflict were mutually exclusive. See Evan T. Bloom, 'Protecting peacekeepers: the Convention on the Safety of United Nations and Associated Personnel', 89 *American Journal International Law* 623 (1995). See also M. Christina Bourloyannis-Vrailas, 'The Convention on the Safety of United Nations and Associated Personnel', 44*International law & Comparative Law Quarterly* 3, 1995, at 566-69; Mahnoush Arsanjani, "Defending the Blue Helmets: Protection of United Nations Personnel", in *Les Nations Unies et le Droit international Humanitaire/ The United Nations and International Humanitarian Law,* (Actes du Colloque international a l'occasion du cinquantieme anniversaire de l'ONU, Geneve –19, 20 et 21 Octobre 1995), Paris 1996, p. 131-147.; "The United Nations as an actor bound by international humanitarian law", in *Les Nations Unies et le droit international humanitaire/ The United Nations and International*

Humanitarian Law, p.334-337.

83. One should note that the UN Safety Convention drafters have included a residual *saving clause* in article 20(a), to the effect that nothing in the Convention affects "the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of the United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards." Article 8 also states in addition that if the detained UN personnel are not "promptly released" according to provisions of the Convention "pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949". However this is an exception which only confirms the rule, that in cases of the so-called "established" operations, it is the UN Safety Convention which is primarily meant to apply.

84. As C. Greenwood noted, in principle, whether or not IHL is applicable to a particular operation is dependent upon the existence of an armed conflict to which the relevant UN is a party, not on how the UN operation is classified for other UN purposes. It is the fact of participation to hostilities, not the existence of *authority* to do so which is significant. See Ch. Greenwood, 'International Humanitarian Law and United Nations Military Operations', in *Yearbook of International Humanitarian Law,*vol.1, 1998, p.11 (hereinafter, '*YIHL'*). Another commentator has also criticized as useless the distinction between different types of UN operations from an IHL stand point, arguing that even peacekeeping missions often make use of force. See Daphna Shraga, "The United Nations as an actor bound by international humanitarian law*",* in *Les Nations Unies et le Droit international Humanitaire/ The United Nations and International Humanitarian Law*, p. 320-321.

85. The 1999 UN Secretary-General's Bulletin appears to reflect generally the ICRC position. See discussion in Antoine Bouvier, 'Convention on the Safety of United Nations and associated personnel: presentation and analysis', p. 645(stating that "Another question is whether UN forces are bound by the rules of IHL applicable to international armed conflict or only to those applicable to non-international armed conflicts". Antoine Bouvier, further considers that "given the outsider status of United Nations forces and the fact that the United Nations intervenes in an internal conflict not to help one of the parties but to see that Security Council resolutions *are implemented with regard to all parties to the conflict,* those forces should logically be subject to the rules of international humanitarian law applicable in international armed conflicts").

86. The term "self-defense" is understood very broadly. It has been interpreted to include

"resistance to attempts by forceful means to prevent the force from discharging its duties under the mandate of the Security Council". See 'Report of the Secretary-General on the implementation of Security Council resolution 425 (1978)', 19 March 1978 *UN Doc.S/12611.* , p.61. See also 'Report of the Secretary-General on the situation in Bosnia and Herzegovina', 10 September 1992, *UN Doc. S/24540*.

87. The US representative Mr Rosenstock stated in the debate on the draft Convention that the Convention would cover all the UN military personnel in Rwanda, Somalia and Bosnia and even NATO military personnel operating in support of UNPROFOR. See 'UN General Assembly session 49, meeting 84, Agenda Item 141, Question of responsibility for attacks on UN and associated personnel and measures to ensure that those responsible for such attacks are brought to justice: report of the sixth committee', 9 December 1994, *UN Doc. A/49/PV 84.*

88. See text of Common Article 2 of the Geneva Conventions.

89. In the *Tadić* jurisdiction decision, the Appeals Chamber stated that "an armed conflict exists whenever there is a resort to armed force between states, or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". See *Tadić* jurisdiction decision, para. 70.

90. See Ch. Greenwood, "International humanitarian law and United Nations Military Operations*",* p. 11.

91. Additional Protocol I, preamble.

92. Additional Protocol I, article 51 (3). .

93. Point 1.2 of Section 1 (*field of application*) of the UN Secretary-General's Bulletin.

94. See Ch. Greenwood, "International humanitarian law and United Nations Military Operations*",* p.35.

95. Walter Gary Sharp Sr. 'Protecting the Avatars of International Peace and Security', p. 50.

96. See *US v. von Weizsaker al.* (Case 11), in Trials of War Criminals under CCL No. 10 (hereinafter, *T.W.C.*) XIV, 308-942, at 329. See also *US v. Ohlendorf et al.* (Case 9), in *T.W.C.* IV, 411-589, at 462 *et seq*.

97. See for instance, article 22 (1) (2) Geneva Convention I; article 35(1) Geneva Convention II; article 13(2) (a, b), articles 65(3) and 67(1) (d) of Additional Protocol I.

98. One should note that the exact scope of Article 31(1) (c) is not yet known, and its future is uncertain. Scholars and states are critical of the scope of the defenses therein contained (especially when it purports to codify new law). (See criticism in Renaud Galland et François Delooz, 'L'article 31 paragraphe 1c du Statut de la Cour pénale internationale:

une remise en cause des acquis du droit international humanitaire?' *in Revue internationale de la Croix-Rouge, No. 842 (2001),*p. 533). We l also note that in the *Kordić* case before the ICTY, the Defence raised the issue of self-defense as a justification for the crimes committed by Croats against Muslims in Central Bosnia. The Trial Chamber considered that the rule was an established principle of customary law, however, it emphasized that military operations even "in self-defense do not provide a justification for serious violations of international humanitarian law." (See *Prosecutor v. Dario Kordić* and *Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 452). Some authors interpret *collective* in Article 31(1) (c) of the ICC Statute, solely within the meaning of Article 52 of the UN Charter. This position does not seem to conform to the letter and spirit of that Article which refers to "collective defensive operations", which suggests more specific combat operations against enemy offensive action rather than the broader right of self-defense of a state against an aggression. This interpretation is in line with the concept of self-defense in the UN Safety Convention.

99. See on this issue, Steven J. Lepper, 'The legal status of military personnel in United Nations Peace Operations: One delegate's Analysis', 18 *Houston J. Int'l L.* 359 (1996), See also Claude Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire*; G-J. F. van Hegelsom, 'UN forces and humanitarian law. Use of force and humanity in action'.

100. See Ch. Greenwood*, '*Protection of peacekeepers: The legal regime*', Duke Journal of Comparative and International law,* vol. 7, 1996-97, at p. 88 (stating "the law of armed conflict also provide a measure of protection to UN personnel, with two significant limitations. First the laws of armed conflict make no special provision for UN forces. Where a UN force is engaged in hostilities as a belligerent, it is treated in exactly the same way as the armed forces of a state.)"

101. This opinion is corroborated by some authors but denied by others. See G.J.F. van Hegelsom, 'UN Forces and humanitarian law, Use of force and humanity in action', *at 481*, (stating that "the recent instruments relating to the law of armed conflict have conferred a new status upon UN forces: the forces are protected in the performance of their tasks in a manner analogous to the Red Cross personnel and other agencies involved in situations where hostilities may be ongoing. Obviously the protection is contingent upon the fact that the forces do not themselves participate in hostilities. It is submitted that in view of the tasks assigned to these forces this would normally be the case.").

102. See Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War, (Pictet, J. (ed.), Geneva, ICRC, 1958, pp. 46-47.

103. Ibid. at pp. 48-49.

104. Professor Ch. Greenwood has a different opinion. See Ch. Greenwood, *International humanitarian law and the United Nations military operations,* p. 31 (stating that: "members of a UN force embroiled in an internal armed conflict would be "persons taking no active part in the hostilities" for the purposes of Art. 3(1) common to the four 1949 Geneva Conventions. As a result of that provision, the parties to the conflict must treat peacekeepers humanely and are forbidden to commit acts of violence against them or take them hostage. The massacre of members of the Belgian contingent in UNAMIR in April 1994, during the Rwandan civil war was thus a clear example of a violation of Common Art. 3." I respectfully dissent. Although the conflict was internal, the law which engages a neutral party to the conflict is not always that which is in force as between the parties to the conflict themselves, but that which governs the relations between the party to the conflict in whose hands the neutral victims are, and the party to which those victims belong (see the *Nicaragua* case reviewed above). As UNAMIR personnel were massacred not by rebels but by government forces, the applicable law is clearly the law of international armed conflict, not the law of internal armed conflict. In this particular case the victims were protected persons, and acts against them were grave breaches of the Geneva Conventions. The question of their status, whether combatants or not, is even irrelevant here, as they were killed while in the hands of the government soldiers.

105. See Michael Bothe *et al*., *New Rules for victims of armed conflicts.* The Hague, 1982, at 206-11.

106. See Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 1509 (Yves Sandoz et al. eds. 1987).

107. Ch. Greenwood 'Protection of peacekeepers: the Legal regime'. In *Duke Journal of Comparative & International law,* vol.7, 1996-97, p.190. See G.J.F. van Hegelsom, 'UN forces and humanitarian law. Use of force and humanity in action', p. 479, stating that **"c**learly the misuse of the emblem or protection ensuing from the use of the emblem is contingent upon the fact that persons using the emblem are duly authorized by the UN and that they are, in the words of the protocol, neutral or not party to the conflict". See also Walter Gary Sharp Sr. 'Protecting the avatars of international peace and security', at p.113 –127**.** See also Theodor Meron, **'**War Crimes in Yugoslavia and the development of international law'**,** 88 *American Journal of International Law*78, 1994, at p. 80, (affirming that most of the provisions of Protocol I constitute customary international law). See also Antonio Cassese, 'The Geneva Protocols of 1977 on the Humanitarian law of armed conflict and customary International Law', 3 *U.C.L.A. Pacific Basin Law Review*, 55, (1994) p. 98.

108. See 'Convention on prohibitions or restrictions on the use of certain conventional

weapons which may be deemed to be excessively injurious or to have indiscriminate effects', 10 October 1980, 1342 *U.N.T.S.* 137, reprinted in 19 *ILM* 1524(1981).

109. See 'Protocol on Prohibitions or restrictions on the use of mines, booby-traps and other devices', (Protocol II), 10 October 1980, 1342 *U.N.T.S.* 168, reprinted in 19 *ILM* 1529 (1981).

110. See 'Protocol on Prohibitions or restrictions on the use of mines, booby-traps and other devices' as amended on 3 May 1996 (Protocol II as amended on 3 May 1996), reprinted in 35 *ILM* 1206 (1996).

111. See *supra* note 100.

112. Likewise, the UN Secretary-General's Bulletin provides in para. 1.2 of Section 1 that the Bulletin does not affect the protected status of peacekeepers under the 1994 UN Safety Convention "as long as they are entitled to the protection given to civilians under the international law of armed conflict".

113. As personnel of a peacekeeping mission, peacekeepers are not supposed to take active part in hostilities, unless the UN SC has transformed the mission into an enforcement one.

114. *Tadić* jurisdiction decision, para.80.

115. See *Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, *Opinion and Judgement*, 1999, para. 648.

116. See *Prosecutor v. Zoran Kuprešskić et al.,* Case No. IT-95-16-T, *Judgement*, 14 January 2000, para. 547; *See Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-T, *Judgement*, 3 March 2000 paras. 208, 210. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, *Judgement*, 2 September 1998, para. 582.

117. Ch. Greenwood, 'Protection of UN Peacekeepers: the legal regime', p.193.

118. See Walter G. Sharp, Sr. 'Protecting the Avatars of International Peace and Security', at 122-23.

119. See *Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-T, *Judgement*, 16 November 1998, para.162.

120. There are legal reasons for this assertion. For instance, article100 (1) of the UN Charter states that UN staff "shall refrain from any action which might reflect on their position as international officials responsible only to the Organization".

121. See *supra* notes 71-78.