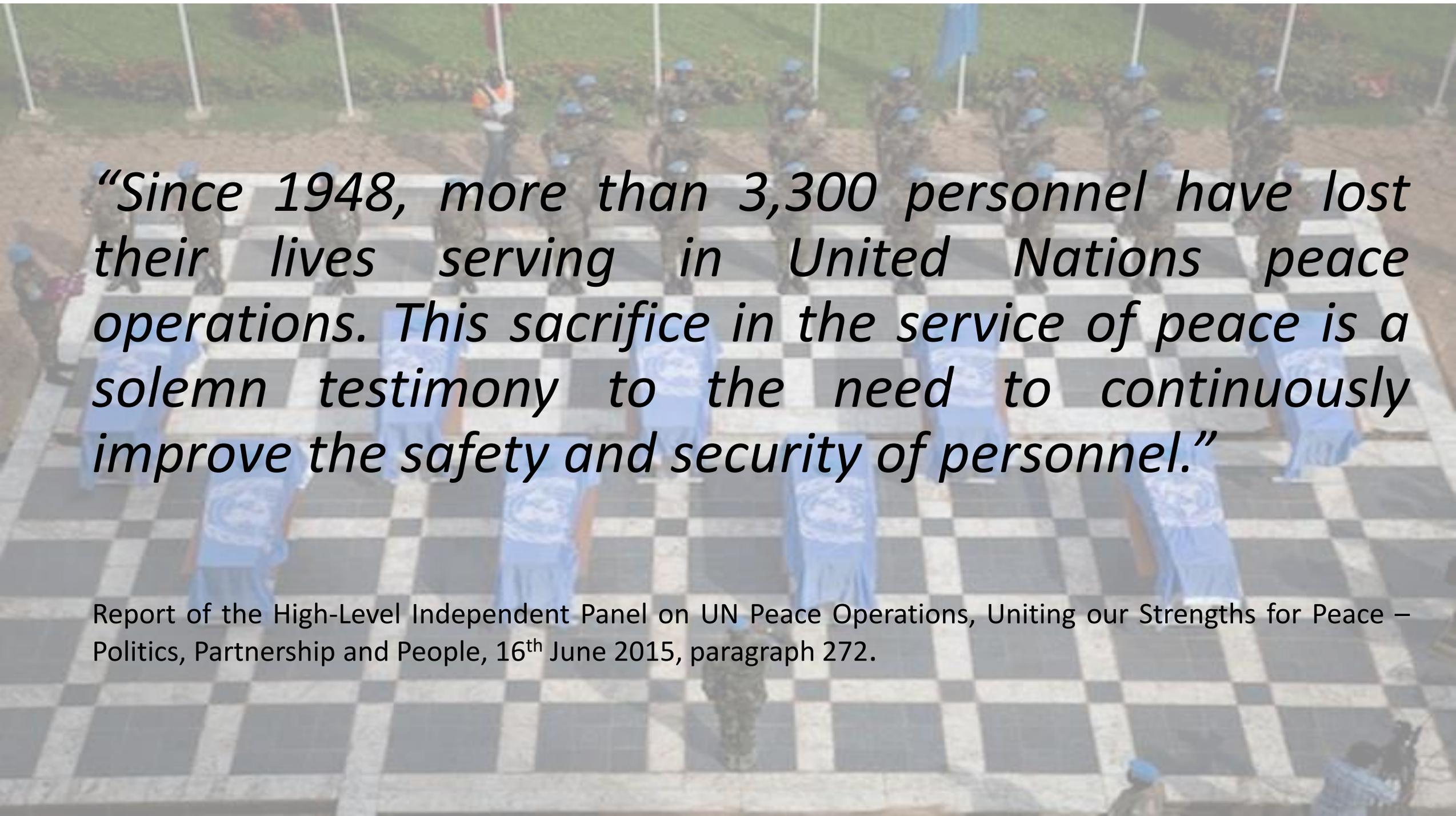


Dealing with Crimes against Peacekeepers

Lt Col Jerry Lane

Defence Forces of Ireland

Network of Military Prosecutors (IAP)

An aerial photograph showing a large formation of United Nations peacekeepers. They are wearing their characteristic blue helmets and uniforms, marching in precise rows on a large, checkered floor. The perspective is from directly above, looking down on the formation. The background shows a green field and some structures, but the focus is on the disciplined movement of the personnel.

“Since 1948, more than 3,300 personnel have lost their lives serving in United Nations peace operations. This sacrifice in the service of peace is a solemn testimony to the need to continuously improve the safety and security of personnel.”

Report of the High-Level Independent Panel on UN Peace Operations, *Uniting our Strengths for Peace – Politics, Partnership and People*, 16th June 2015, paragraph 272.

Contents



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- **Introduction.**
 - **A heavy toll.**
 - **Legal Regime applicable.**
 - **Caselaw.**
 - **Case study.**





I. Introduction

CHATHAM HOUSE

THE ROYAL INSTITUTE OF
INTERNATIONAL AFFAIRS

Chatham House
rule please!

Select References*



- <https://peacekeeping.un.org/en>
- ‘Leuven Manual on the International Law applicable to Peace Operations’, Gill, Fleck, Boothby and Vanheusden (Ed.), 2017, Cambridge University Press.
- ‘The (Il)legality of Killing Peacekeepers: The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals’, M. Pacholska, Journal of International Criminal Justice, Vol. 13, Issue 1, 1st March 2015, pp 43-72.
- ‘The legal status of personnel involved in UN Peace Operations’, D. Fleck, Review of the Red Cross (2013) 95 (891/892) 613–636.
- ‘The Protection of Peacekeepers and International Criminal Law’, A. Gadler, 11 German Law Journal (2010), pp 585-608.
- ‘Customary International Humanitarian Law’, Vol I, Rules, J-M Henckaerts, & L. Doswald-Beck, 2005, Cambridge University Press.
- ‘The Use of Force in Peace Operations’, Trevor Findlay, 2002, OUP.

Crimes against Peacekeepers

- Applicable law covers a wider scope of offences/ conduct.
- Variations dependent upon conflict classification.
- Developing (but limited) caselaw.
- Focus on UN as a conduit for international civil society and as an agent for change.
- Case study: MONUSCO.



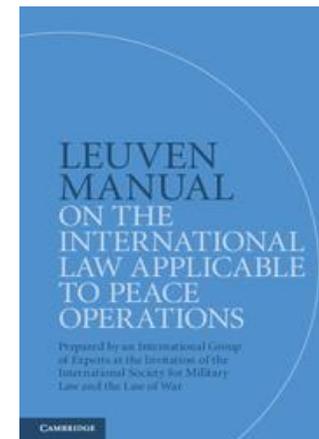
Where lies the responsibility?

“... the United Nations itself is not in a position to bring charges against the alleged or suspected perpetrators of crimes committed against its peacekeepers, nor is it in a position to prosecute them. The Organization **relies on its Member States to fulfil their obligations under the relevant international legal instruments** ... to exercise their jurisdiction to investigate such crimes and prosecute the Perpetrators thereof ...”

‘Prosecution of crimes against deployed peacekeepers’,
Report of the Secretary General, UN, 28th January 2011, A/65/ 700 at paragraph 2.

Focus on the 'Leuven Manual'

- Rule 21.5, pp. 324 - 325
- Making a member of a Peace Operation the object of an attack constitutes a war crime if the Peace Operation is not a party to an armed conflict and if the member of the Peace Operation retains the right to protection under IHL.



Focus on the 'Leuven Manual'

- Rule 21.5, pp. 324 - 325
- Making a **member of a Peace Operation** the object of an **attack** constitutes a **war crime** if the Peace Operation is **not a party to an armed conflict** and if the member of the Peace Operation **retains the right to protection under IHL**.

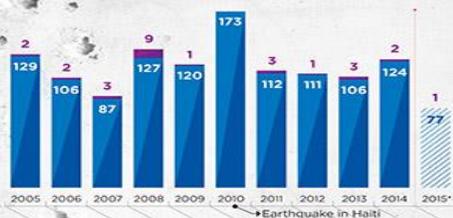
II. A heavy toll



UNITED NATIONS PEACEKEEPING THE HUMAN COST OF PEACE

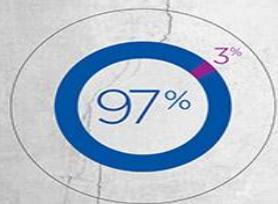


Keeping the peace is more dangerous and challenging than ever.



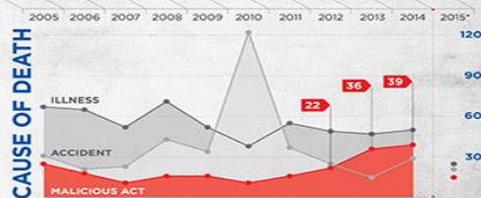
Peacekeepers make up the vast majority of those killed in the pursuit of peace while serving under the UN flag.

PERSONNEL IN:
■ PEACEKEEPING MISSIONS
■ OTHER FIELD MISSIONS**



1948-2015*
3316 Peacekeepers**
79 Other field missions staff**
DIED IN THE CAUSE OF PEACE

FATALITIES IN PEACEKEEPING MISSIONS



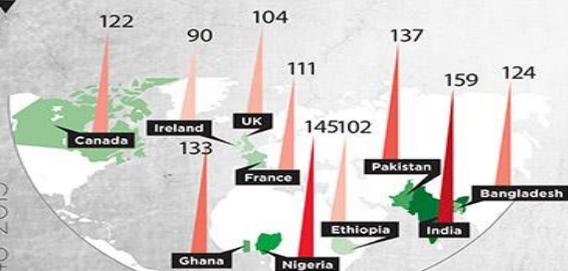
Cause of death by malicious acts has been increasing compared to deaths by accidents and illness.

INJURIES FROM MALICIOUS ACTS



COUNTRIES WITH MOST CASUALTIES
1948-2015*

Since the first peacekeeping mission in 1948, over 3,000 peacekeepers have died while serving. Over the years, the following 10 troop contributing countries have suffered the most casualties:



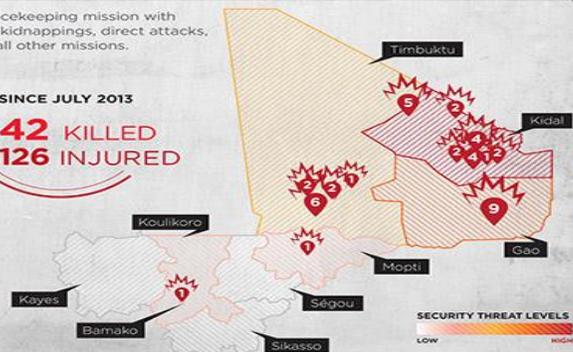
SNAPSHOT: UN MISSION IN MALI

Today, Mali is the most dangerous peacekeeping mission with nearly a third of all security incidents (kidnappings, direct attacks, violent protests, etc.) compared with all other missions.



SINCE JULY 2013

42 KILLED
126 INJURED



SECURITY THREAT LEVELS
 LOW HIGH



*Data reflects Jan - Aug. 2015.
 **UN Operations and Crisis Centre data, includes political missions, but excludes agencies, funds and programmes.

- 2/3 of all UN Peacekeepers operate in countries where armed conflict is ongoing and in some cases intensifying.
- Since the end of the 1990s peacekeeping mandates have become more robust.
- *“... peacekeepers in 21st century missions face unprecedented risks ... because we are asking them ... to take on more responsibilities in more places and in more complex conflicts than at any time in history.”*

Ambassador Samantha Power, UN, Security Council, 7275th meeting, S/PV.7275, 9th Oct 2014



III. Legal Regime applicable

- Hard Law
 - Armed Conflict
 - Peace
 - Other relevant Conventions
- Customary Law
- The ‘Safety Convention’
- The Rome Statute



'Hard' Law

- **Armed Conflict (IHL)**

- 'War Crimes' ICC Statute, Article 8(2)(b)(iii) and (e)(iii).
- See also - Statute of the Special Court for Sierra Leone, Article 4(b) (ibid., § 5). *

Note the issue of where peacekeepers are interpreted as 'civilians' a wider range of legal provisions arise, e.g. CAH.

- **Peace**

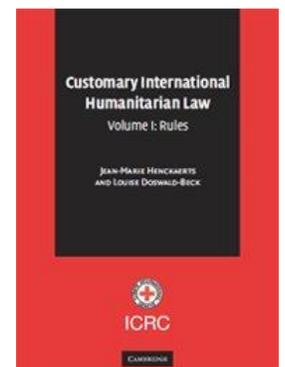
- Convention on the Safety of UN and Associated Personnel, 1994.
- Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, 2005.

Other relevant Conventions

- ‘Convention on the Privileges and Immunities of the United Nations’, 13th February 1946, UNTS, vol. 1, 15;
- ‘Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents’, 14th December 1973, UNTS, vol. 1035, 167;
- ‘International Convention against the Taking of Hostages’, 17th December 1979, UNTS, vol. 1316, 205.

Customary International Law of Armed Conflict*

- Rule 33. Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited.
- *“State practice establishes this rule as a norm of customary international law applicable in both IAC and NIAC.” **
- https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule33



Convention on the Safety of United Nations and Associated Personnel

- New York, 9th December 1994
- Entry into force – 15th Jan 1999
- States party: 94* [*question of custom and practice?*]
- https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8&chapter=18&clang=en
- Optional Protocol – 2005
- Entry into force - 2010.
- Widening of applicability.

Article 1

For the purposes of this Convention:

(a) "United Nations personnel" means:

(i) Persons engaged or deployed by the Secretary-General of the United Nations as **members of the military, police or civilian components of a United Nations operation;**

(c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:

(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or

(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;

Article 7

States that “United Nations and associated personnel, their equipment and premises shall *not be made the object of attack* or of any action that prevents them from discharging their mandate” and that “States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel.”

Article 9

Provides a list of “crimes against United Nations and associated personnel” that includes, if intentionally committed, “*murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel*” and “*violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty.*”

Article 2(2)

The Safety Convention **does not apply** to UN operations which are *“authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”*

Article 20

Guarantees the continuous applicability of IHL and international human rights law to UN and associated personnel.

Commentary on the Safety Convention

- 94 states party raises the question of commitment as well as whether state practice can be viably asserted.
- Lack of adequate implementing activities by states.
- The international obligations it creates are those of states, not of non-state actors.
- The Ch VII ‘exclusion’.
- *“It is a particular matter of concern that, two decades after the Convention was adopted, hardly any of the many host states to a peace operation has become party to it.”*

‘The legal status of personnel involved in UN Peace Operations’, D. Fleck, Review of the Red Cross (2013) 95 (891/892) 613–636 at 635.

ICC (Rome) Statute

- 8(2)(b)(iii) [*applicable in IAC*] 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 UN, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.
- 8(2)(e)(iii) [*applicable in NIAC*] 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 UN, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Elements of Crimes of the ICC

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the LOAC.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of & was associated with a IAC/ NIAC.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

NO 'RESULT' Requirement.

IHL areas of focus

Peacekeepers as Civilians?

Peacekeepers as Combatants

**Are there limits on self-
defence?**

a. Peacekeepers as civilians?

- Qualification of peacekeepers under IHL as been the subject of some debate.
- Peacekeepers **CAN** be classified as civilians - Article 50, AP I provides that a civilian is a person who does not belong to the categories of PW or **of armed forces party to the conflict**. [*i.e. not taking part in the conflict*]
- UNSG has classified peacekeepers as “*a targeted group within the generally protected group of civilians ...*”

Report of UNSG, UN Doc S/2000/915 (2000) at para 16.

Significance of peacekeepers as ‘civilians’

“... where UN forces are not engaged as combatants on one side in an armed conflict, it is possible to deduce some elements of protection from the provisions of the 1949 Geneva Conventions, other international agreements and the customary international law applicable to armed conflicts.”

‘Protection of Peacekeepers: the Legal regime, C. Greenwood, Duke Journal of Comparative and International Law [Vol 7: 185]185-207 at p. 205.

- Consideration of Protections arise:
 - Common Article 3 “... persons taking no active part in the hostilities...” [NIAC]
 - GC IV, Article 4.
 - AP 1, Article 50.
 - Also note the significance in terms of the Rome Statute where peacekeepers are interpreted as ‘civilians’.

b. Peacekeepers as Combatants?



- Involved in (taking part) armed conflict? – they qualify as combatants and will be subject to IHL.
- Applies to:
 - Ch VII (see also Article 2(2) of the Safety Convention, and
 - PK Operations under Ch VI.
- What counts is the factual existence of an armed conflict as opposed to any legal qualification in the mandate.



Self defence as a UN Principle

- Consent of the parties
- Impartiality
- Non-use of force except in self-defence **and defence of the mandate**

c. Limits for self-defence?

- The use of force by peacekeepers in self-defence does not make them combatants.
- BUT, the meaning of SD has been broadened in recent decades by SC resolutions which have included
 - Defence of themselves (classic)
 - Defence of civilians under imminent threat of harm, and
 - In defence of the mandate.

Problematic interpretation?

The meaning of 'attack':

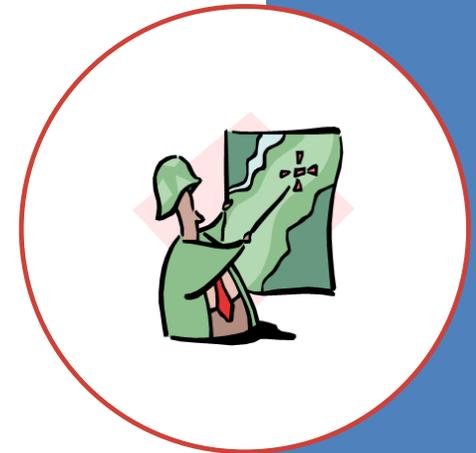
- No conclusive agreement
- Art 9, Safety Convention, "any type of force against ... peacekeeping missions." [Broad view]

Qualification as a 'peacekeeping mission'?

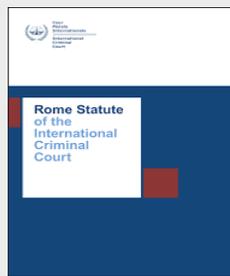
- Does expansion of self defence extend beyond the 'core' view of peacekeeping?

Entitlement to be treated as civilians:

- Active part in hostilities? [DPH] Do such peacekeepers lose protection?



IV. Caselaw: the first decisions



ICTR – the Bagosora decisions

ICTR Trial Chamber I, The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva, 18 December 2008 (ICTR-98-41-T)

SCSL – the RUF case

SCSL Trial Chamber I, The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case), 2nd March 2009 (SCSL-04-15-T)

ICC – the Abu Gharda decision

CC Pre-Trial Chamber I, The Prosecutor v. Bahr Idriss Abu Garda, Decision on the Confirmation of Charges – 8th February 2010 (ICC-02/05-02/09-243-Red)

Some points arising

- **ICTR (Bagosara):**
 - Condemned for killings of 10 Belgian peacekeepers in 1994, despite the ICTR statute not specifically providing for a war crime of attacking peacekeepers.
 - Trial Chamber stated that the peacekeepers could not be considered as combatants.
 - The use of armed force in SD did not change this qualification.

SCSL (RUF):

- First instance of the application of the war crime of attacking peacekeepers; “... *intentionally directing attacks against peacekeepers...*”
- Raised application of peacekeepers as ‘civilians’.
- Regarding the meaning of “attack,” the Chamber first determined that no serious damage resulting from the act is a necessary element..
- It took inspiration from the Safety Convention defining attack as any “*forceful interference which endangers the person or impinges on the liberty of the peacekeeper.*”



MONUSCO

V. Case Study

MONUSCO



MONUSCO at a glance ...

- MONUSCO is a deployed UN PSO.
- Evolution of mandate from Ch VI to VII.
- Currently mandate (2409 of 2018):
 - Calls for respect for Human Rights ...
 - Condemns activities of Armed Groups ...
- Emphasises:
 - Protection of Civilians and UN
 - Support for Electoral Process



UNSCR 2089 (2013) Force Intervention Brigade (FIB)



MONUSCO shall ... *“... on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping”.*

- 3 (three) infantry battalions
- 1 (one) artillery battery
- 1 (one) Special force and Reconnaissance company

- Direct command of the MONUSCO Force Commander
- Responsibility - neutralizing armed groups.



Tasks of the FIB

- Main responsibility of the FIB is to neutralise armed groups with the objective of reducing the threat poised by armed groups to state authority and civilian security in the eastern DRC.
- The FIB is expected to carry out targeted operations, either unilaterally or jointly, in a robust, highly mobile and versatile manner and in strict compliance with international law.
- MANDATE: MONUSCO and its Intervention Brigade take all necessary measures to perform the following key main tasks: (a) protection of civilians, (b) neutralise armed groups, and (c) monitor implementation of arms embargo.
- ROBUST OPERATIONAL POSTURE.

Neutralizing armed groups?

In support of the authorities of the DRC... carry out targeted offensive operations through the Intervention Brigade either unilaterally or jointly with the FARDC...to prevent the expansion of all armed groups, neutralize these groups, and to disarm them ...reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities;



Consider ...

- Is MONUSCO a peacekeeping mission? Given the nature of the FIB and the expanded mandate.
- The 'fine line' that is the ever changing nature of PSO? Are PSOs in areas such as DRC becoming more 'warlike' than 'robust' PKO and PEO?
- What risks are there that the PSO becomes a party to the conflict? E.g. MONUSCO What are the implications for the peacekeepers of MONUSCO?

Points arising ...

- The FIB is the first ever offensive combat unit within the structure of a peacekeeping mission (PSO).*
- Are the FIB 'party to the conflict' when other personnel of MONUSCO are not? The FIB could not be 'civilians'.
- Identification/ insignia needed to distinguish the FIB from the 'rest' of MONUSCO? To address the fact that an alleged perpetrator might raise 'mistake of fact' (spectrum of available defences before the ICC).
- 'Stretching' of the 3rd principle of peacekeeping?

What about the UN today?





UN Reforms and measures

- Various reports and initiatives - <https://peacekeeping.un.org/en/reports>
- Incorporation into the 'model' SOFA of 'template' clause.
- 2017 Report '*Improving security of UN Peacekeepers: We need to change the way we are doing business*' General dos Santos Cruz.

“Overall, the UN and Troop- and Police-Contributing Countries need to adapt to a new reality: The blue helmet and the UN flag no longer offer “natural” protection. Peacekeeping environments now feature armed groups, terrorists, organised crime, street gangs, criminal and political exploitation, and other threats. The era of “Chapter VI-style” peacekeeping is over, but the United Nations and Troop/Police-Contributing Countries are, by and large, still gripped by a “Chapter VI Syndrome.””

2017 Report, Executive Summary at p. 3.





Military (non-legal) Reforms

- Operational posture to become more robust? Less defensive?
- Use of Force – the UN is overly risk averse.
- Update the Principles of Peacekeeping.
- Caveats should not be accepted.*
- Robust pre-deployment training.
- UN PSO need TCCs that offer niche capabilities.
- Use of new technologies.

Thoughts in closing ...

- Adequacy of legal regime?
- Protections both within and without 'armed conflict'.
- Limited development by caselaw.
- Need to examine related areas for revision, e.g. protection of peacekeepers to be formalised?
- Revision of the 'core' principles of peacekeeping?
- Interpretation as 'civilians' triggers a broad range of available protections and legal applications.



Considerations - the 'Leuven Manual'

- More detail needed?
- Inclusion of recent caselaw with various points of emphasis; nature of:
 - 'attack'
 - 'peacekeepers as civilians? As combatants?
- Customary nature of directing attacks against peacekeepers when (now) viewed Article 8 of the Rome Statute.

Questions?





Any matters for discussion?



Many thanks

Lt Col Jerry Lane

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Óglaigh na hÉirann

Good luck in your next mission.

