

## ATTACKING A PEACEKEEPING MISSION – A WAR CRIME UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

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### ABSTRACT

The Article examines the war crime of attacking peacekeeping missions under the Rome Statute of the International Criminal Court. It explores the meaning of a peacekeeping mission within the context of Article 8 of the Rome Statute, the status of peacekeeping missions under international humanitarian law as well as the key principles of peacekeeping. The Article further analyzes the notion of direct participation in hostilities in connection with peacekeeping missions. Lastly, the Article critically examines the ICC Prosecutor's investigation into the alleged attacks against the Joint Peacekeeping Forces in South Ossetia during the 2008 August war and identifies the challenges that face this investigation.

**Key Words:** Peacekeeping mission; War crime; Rome Statute

### INTRODUCTION

One of the most controversial episodes of the 2008 Russia-Georgia war is the alleged attack against the Joint Peacekeeping Forces (JPKF) stationed in Tskhinvali, which has been under investigation by the Office of the Prosecutor of the International Criminal Court (hereinafter referred to as OTP) since 27 January 2016.<sup>1</sup> As explained in the decision on the authorization of investigation, the investigation, *inter alia*, concerns the alleged intentional attacks on the peacekeeping forces under Article 8 (2) (b) (iii) of the Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute).<sup>2</sup> The investigation covers the alleged attacks perpetrated by Ossetian separatist forces against Georgian peacekeepers, as well as the alleged attacks initiated by the Georgian armed forces against Russian peacekeepers.<sup>3</sup> In parallel with this ICC investigation, proceedings before the European Court of Human Rights are ongoing regarding individual applications lodged by Russian peacekeepers against Georgia (*Shmyganovskaya v. Georgia*)<sup>4</sup>, claiming a violation of the European Convention of Human Rights. Apart from its legal dimension, this episode has political significance as Russia justified its aggression against Georgia under the pretext of attacks on Russian peacekeepers.<sup>5</sup> In view of the legal and political

<sup>1</sup> International Criminal Court, Decision on the Prosecutor's request for authorization of an investigation into the situation in Georgia, PTC-I, ICC-01/15, 27 January 2016, [https://www.icc-cpi.int/CourtRecords/CR2016\\_00608.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF) [accessed 07.11.2019].

<sup>2</sup> Id, para. 7.

<sup>3</sup> Id, para. 29.

<sup>4</sup> ECtHR, *Shmyganovskaya v. Georgia*, application no. 34945/09, pending before the European Court of Human Rights, Statement of facts, <http://hudoc.echr.coe.int/eng-comold?i=003-3083768-3412760> [accessed 07.11.2019].

<sup>5</sup> Letter dated 11 August 2008 from the Permanent Representative of Russia to the UN, S/2008/545, <https://undocs.org/S/2008/545> [accessed 27.12.2019].

proceedings referred to above, research into the war crime of attacking peacekeeping forces is of particular importance.

In accordance with Article 8 (2) (b) (iii) and (2) (e) (iii) of the Rome Statute, in both international and non-international armed conflicts, the following act is considered a war crime: “*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.*”<sup>6</sup>

The meaning and scope of the war crime of attacking peacekeeping personnel and objects is rather controversial.<sup>7</sup> It is not clear what is meant under “*peacekeeping mission in accordance with the Charter of the United Nations*”, the status of a peacekeeping mission under international humanitarian law and the confines of the right to self-defense of the peacekeeping forces.<sup>8</sup> It is also not explicitly defined to what extent the peacekeeping personnel and objects enjoy protection accorded to civilians and civilian objects. Modern peacekeeping operations acting under the authorization of the United Nations Security Council (hereinafter referred to as the UNSC) are facing new legal challenges as they use force beyond the limits of self-defense, which questions their peacekeeping status.<sup>9</sup> Additionally, the Article critically examines the alleged attacks on the Joint Peacekeeping Forces in the course of the 2008 August war and identifies the challenges facing the OTP.

## 1. DEFINITION OF A PEACEKEEPING MISSION

Attacking peacekeeping personnel and objects was first criminalized as “war crime” in the Rome Statute.<sup>10</sup> The underlying reason was the growing number of attacks against United Nations (UN) peacekeeping personnel in the 1990s, especially in the Former Yugoslavia and Rwanda.<sup>11</sup> Subsequently, the war crime of attacking peacekeeping missions was also reflected in the Statute of the Special Court of Sierra Leone (SCSL).<sup>12</sup>

According to Article 8 (2) (b) (iii) of the Rome Statute, *actus reus* of the crime requires intentional attacks against the personnel and objects involved in a peacekeeping mission

<sup>6</sup> Rome Statute of the International Criminal Court, 1 July 2002, Article 8 (2) (b) (iii) and Article 8 (2) (e) (iii). <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [accessed 18.04.2020].

<sup>7</sup> Christopher Greenwood, “Protection of Peacekeepers: The Legal Regime,” *Duke Journal of Comparative & International Law* 7 (1997): 185.

<sup>8</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edition (Oxford: Oxford University Press, 2016), 262.

<sup>9</sup> Devon Whittle, “Peacekeeping in Conflict: The Intervention Brigade, Monusco, and the Application of International Humanitarian Law to United Nations Forces,” *Georgetown Journal of International Law* 46 (2015): 866.

<sup>10</sup> Daniel Frank, “The Elements of War Crimes - Article 8(2)(b)(iii),” in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy S. Lee (Ardsey: Transnational Publishers, 2001), 145.

<sup>11</sup> Michael Cottier and Elizabeth Baumgartner, “Paragraph 2(b)(iii): Attacks on humanitarian assistance or peacekeeping missions in international armed conflict,” in *Commentary on the Rome Statute of the International Criminal Court*, ed. Otto Triffterer and Kai Ambos (C.H. Beck, Hart, Nomos, 2016), 366.

<sup>12</sup> Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, 12 April 2002, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800860ff> [accessed 27.04.2020].

under the UN Charter. Therefore, it is important to explain what a peacekeeping mission established in accordance with the UN Charter is. Does the definition of war crime under Article 8 of the Rome Statute cover only UN peacekeeping missions? Does Article 8 (2) (b) (iii) and (2) (e) (iii) exclude peacekeeping missions authorized by Regional organizations? What is the distinction between Peacekeeping and Peace enforcement?

Peacekeeping is not a 21<sup>st</sup> century phenomenon or an invention of the UN.<sup>13</sup> Even before the establishment of the UN, the League of Nations set up several peacekeeping operations - considered as being the predecessors of peacekeeping missions.<sup>14</sup> Peacekeeping missions, however, gained special significance in the aftermath of World War II. During the Cold War, a constant struggle between the Superpowers brought the United Nations Security Council to a dead lock.<sup>15</sup> Consensus among the permanent members of the UNSC was almost impossible to achieve. Both the USSR and the US employed their veto rights, thus undermining the implementation of the UN's main function – maintenance of international peace and security.<sup>16</sup> Despite numerous attempts to overcome the crisis, such as the adoption of the “*Uniting for Peace Resolution*“ by the UN General Assembly,<sup>17</sup> more effective means were necessary. Peacekeeping became a mechanism which soon served as an alternative for collective security.<sup>18</sup>

Unlike peace enforcement operations under Chapter VII of the UN Charter, classical peacekeeping operations are founded on the principles of *host state consent*, *impartiality* and *non-use of force except in self-defense*, which were developed by the then UN Secretary-General Dag Hammarskjöld, in the 1950s, for the purpose of enabling UN peacekeeping missions to function effectively.<sup>19</sup> Pursuant to those principles, the UN peacekeeping missions require host state consent to operate in the state's territory, peacekeeping forces must be impartial in their dealings with the hostile parties, and force can only be used in self-defense.<sup>20</sup>

It is difficult to develop a uniform definition of peacekeeping since this concept emerged through practice and is not predicated on a well-established theoretical or legal framework. The history of peacekeeping demonstrates that each peacekeeping mission is different in mandate and functions which makes the adoption of a common definition impossible.<sup>21</sup> It is noteworthy that the UN Charter does not at all refer to peacekeeping missions or operations. Hence, according to some authors, to define peacekeeping means to impose

<sup>13</sup> Michael Bothe, “Peacekeeping,” in *The Charter of the United Nations: A Commentary, Volume I* (3rd Edition), ed. Bruno Simma et al. (Oxford: Oxford University Press, 2012), 1176.

<sup>14</sup> Id.

<sup>15</sup> Joachim A. Koops et al., *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford: Oxford University Press, 2015), 2-3.

<sup>16</sup> James R. Crawford, *Brownlie's Principles of Public International Law*, 8th Edition (Oxford: Oxford University Press, 2012), 766.

<sup>17</sup> Christina Binder, “Uniting for Peace Resolution,” *MPEPIL* 568 (2017): 9–12.

<sup>18</sup> Hilaire McCoubrey and Nigel D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth: Dartmouth Publications, 1996), 2-3, 11-12.

<sup>19</sup> Michael Bothe, “Peacekeeping Forces,” *MPEPIL* 365 (2015): 2.

<sup>20</sup> Norrie MacQueen, *Peacekeeping and the International System* (Abingdon: Routledge, 2006), 8.

<sup>21</sup> Ramesh Thakur and Albrecht Schnabel, *United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement* (New York: United Nations University Press, 2001), 9.

limits on this concept whose flexibility makes it the most pragmatic instrument at the disposal of the UN.<sup>22</sup>

Despite the lack of a common definition of peacekeeping, several UN policy documents, to some extent, clarify the meaning of this notion. In particular, the Report of the Panel on United Nations Peace Operations, commonly referred to as the “*Brahimi Report*”, contains an interpretation of peacekeeping operations as follows:

*“[...] a 50-year-old enterprise that has evolved rapidly in the past decade from a traditional, primarily military model of observing ceasefires and force separations after inter-State wars, to incorporate a complex model of many elements, military and civilian, working together to build peace in the dangerous aftermath of civil wars.”*<sup>23</sup>

The United Nations Operations Principles and Guidelines, the so-called “*Capstone Doctrine*”, describe peacekeeping as “*a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers.*”<sup>24</sup>

The majority of UN peacekeeping operations have been established by Security Council resolutions with the exception of some peacekeeping missions that were authorized by the UN General Assembly.<sup>25</sup> Often, the UNSC does not specify the chapter of the UN Charter based on which it creates a peacekeeping mission.<sup>26</sup> Hence, the determination of the legal basis of peacekeeping is a controversial issue.<sup>27</sup>

In its advisory opinion on *Certain Expenses of the United Nations*, the International Court of Justice (ICJ) confirmed that peacekeeping operations were consistent with the UN Charter, thereby determining that the Security Council as well as the General Assembly had the authority to establish peacekeeping missions.<sup>28</sup> The Court explained that when the Organization takes action which warrants the assertion that this action is appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* of the Organization.<sup>29</sup> The Court also clarified that although the UN Charter vested the Security Council with the primary responsibility to maintain international peace and security, the responsibility conferred upon the Council was not “*exclusive*”, as the General Assembly was also authorized under Articles 14 and 11 of the UN Charter to recommend such measures.<sup>30</sup>

<sup>22</sup> Shashi Tharoor, “The Changing Face of Peacekeeping and Peace-enforcement,” *Fordham International Law Journal* 19 (1995): 414.

<sup>23</sup> Report of the Panel on United Nations Peace Operations (October 2000) UN. Doc. A/55/305- S/2000/809, (hereinafter - *Brahimi Report*) [http://www.un.org/peace/reports/peace\\_operations](http://www.un.org/peace/reports/peace_operations) [accessed 12.03.2020].

<sup>24</sup> UN Department of Peacekeeping Operations, United Nations Peacekeeping Operations, Principles and Guidelines, *Capstone Doctrine* 2008, 17, (hereinafter - *Capstone Doctrine*) <https://www.un.org/ruleoflaw/blog/document/united-nations-peacekeeping-operations-principles-and-guidelines-the-capstone-doctrine/> [accessed 18.04.2020].

<sup>25</sup> Lindsey Cameron, *The Privatization of Peacekeeping: Exploring Limits and Responsibility under International Law* (Cambridge: Cambridge University Press, 2017), 51-52.

<sup>26</sup> *Capstone Doctrine*, 2.

<sup>27</sup> Christine Gray, *International Law and the Use of Force*, 3rd Edition (Oxford: Oxford University Press, 2008), 262.

<sup>28</sup> ICJ, *Certain Expenses of the United Nations (Advisory Opinion)*, 1962, ICJ Rep 151, 169.

<sup>29</sup> *Id.*, 168.

<sup>30</sup> *Id.*, 164-165.

The ICJ differentiated Peacekeeping operations and Peace enforcement operations based on Chapter VII of the UN Charter. The Court held that peacekeeping operations did not constitute enforcement measures falling within the coercive acts under Chapter VII since they were not directed against any member state.<sup>31</sup> Accordingly, the General Assembly was competent to set up such peacekeeping missions. It stems from this reasoning that one of the key differences between Peacekeeping and Peace enforcement is that peacekeeping missions operate with the consent of the host state and may only use force in self-defense,<sup>32</sup> while enforcement actions under Chapter VII of the UN Charter are taken against a state and force is used beyond self-defense.<sup>33</sup>

Article 8 (2) (b) (iii) requires that a peacekeeping mission must be “*in accordance with the Charter of the UN*”. This raises the question to what extent the protection under the Rome Statute applies to peacekeeping operations authorized by Regional organizations. At first glance, the formulation of the wording provided in Article 8 (2) (b) (iii) of the Rome Statute supports a restrictive interpretation.<sup>34</sup> However, as it was explained by the ICC in the *Abu Garda* case, such a condition is not tantamount to the requirement that Article 8 (2) (b) (iii) includes missions established by the United Nations only, but that it encompasses also missions that are otherwise foreseen by the UN Charter, such as missions authorized by Regional organizations.<sup>35</sup> This approach is correct given that Article 52 of the UN Charter grants regional arrangements or agencies authority to take measures relating to the maintenance of international peace and security, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization.<sup>36</sup>

## 2. BASIC PRINCIPLES OF PEACEKEEPING

As previously mentioned, a peacekeeping mission is founded on three key principles – *host state consent*, *impartiality*, and *non-use of force except in self-defense*. These principles determine whether a given mission constitutes a peacekeeping mission and distinguish it from other forms of conflict management and resolution.<sup>37</sup> Thus, each peacekeeping mission must, at the very least, fulfill these bedrock principles to fall within the purview of Article 8 (2) (b) (iii) and (2) (e) (iii) of the Rome Statute.<sup>38</sup>

<sup>31</sup> Id, 179.

<sup>32</sup> Sandesh Sivakumaran, *Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), 325.

<sup>33</sup> Michael Cottier, “Article 8 – War Crimes,” in *Commentary on the Rome Statute of the International Criminal Court*, ed. Otto Triffterer (Beck, Hart, 2008), 330, 333; ICC, *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Pre-Trial Chamber I, 8 February 2010, Decision on the Confirmation of Charges, para. 74 (hereinafter - ICC, *Prosecutor v. Abu Garda*).

<sup>34</sup> Mohamed A. Bangura, “Prosecuting the Crime of Attack on Peacekeepers: A Prosecutor’s Challenge,” *Leiden Journal of International Law* 23 (2010): 172.

<sup>35</sup> ICC, *Prosecutor v. Abu Garda*, para. 76.

<sup>36</sup> Charter of the United Nations, (hereinafter – the UN Charter), 24 October 1945, Article 52, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> [accessed 18.04.2020].

<sup>37</sup> Capstone Doctrine, 31.

<sup>38</sup> Cottier and Baumgartner, “Paragraph 2 (b) (iii): Attacks on humanitarian assistance or peacekeeping missions in international armed conflict,” 371.

*Host state consent* is an essential legal prerequisite for the deployment of peacekeeping forces within a state.<sup>39</sup> This derives from Article 2, paras. (1) and (7) of the UN Charter which embody the principles of sovereign equality and non-intervention.<sup>40</sup> Therefore, the UN and Regional organizations must first obtain the host state consent before commencing a peacekeeping operation. Typically, state consent is enshrined in a status of forces agreement (SOFA) concluded between an international organization and a host state.<sup>41</sup> Furthermore, in case the consent is withdrawn, the peacekeeping mission will have an obligation to terminate its presence in the territory of the state concerned.<sup>42</sup>

*Impartiality* is the second major principle of peacekeeping operations, requiring equal treatment of the parties to the conflict. The *Brahimi Report* clarified that impartiality for such operations means adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles.<sup>43</sup> Afterwards, the *Capstone Doctrine* defined the concept of impartiality more explicitly: “*Impartiality is crucial to maintaining the consent and cooperation of the main parties, but should not be confused with neutrality or inactivity. United Nations peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate.*”<sup>44</sup> Relying on the *Brahimi Report* and the *Capstone Doctrine*, the International Criminal Court held that a peacekeeping operation must avoid activities that may compromise its image of impartiality.<sup>45</sup>

The third basic principle of peacekeeping is *non-use of force except in self-defense*.<sup>46</sup> This principle constitutes the cornerstone of peacekeeping operations. At first, it was employed by the “*first generation*” peacekeeping operations, whose main function was the monitoring of cease-fire agreements.<sup>47</sup> The UN Secretary-General, Dag Hammarskjöld, defined the right to self-defense of peacekeeping missions in the following terms: “*members of an operation should never take the initiative in the use of arms, but may respond with fire to an armed attack.*”<sup>48</sup> It follows from Hammarskjöld’s interpretation that the right to self-defense of a peacekeeping mission means the use of strictly proportionate and necessary force for the purposes of repelling the attack against the peacekeeping unit. In the 1990s, against the backdrop of genocide in Rwanda and Bosnia, the Security Council included the protection of civilians as a legitimate ground for the use of defensive force in the mandate

<sup>39</sup> Ian Johnstone, “Managing Consent in Contemporary Peacekeeping Operations,” *International Peacekeeping* 18 (2011): 169.

<sup>40</sup> UN Charter, Articles 2 (1) and 2 (7).

<sup>41</sup> Nigel D. White, “Peacekeeping and International Law,” in *The Oxford Handbook of United Nations Peacekeeping Operations*, ed. Joachim A. Koops et al. (Oxford: Oxford University Press, 2015), 48.

<sup>42</sup> Nicholas Tsagourias, “Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension,” *Journal of Conflict & Security Law* 11 (2007): 475-476.

<sup>43</sup> *Brahimi Report*, para. 50.

<sup>44</sup> *Capstone Doctrine*, 33.

<sup>45</sup> ICC, *Prosecutor v. Abu Garda*, para. 73.

<sup>46</sup> SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 2 March 2009 (RUF Case), para. 228 (hereinafter - SCSL, RUF Trial Judgement).

<sup>47</sup> Lindsey Cameron, *The Privatization of Peacekeeping: Exploring Limits and Responsibility under International Law* (Cambridge: Cambridge University Press, 2017), 220.

<sup>48</sup> United Nations Emergency Force, Report of the Secretary General, 1958, <https://rinj.org/documents/un/N5902484.pdf> [accessed 17.04.2020].



of peacekeeping missions.<sup>49</sup> Authorization of the use of force to defend civilians is a new legal and moral dimension of peacekeeping operations that has attained broad support of the international community.<sup>50</sup>

Recently, the notion of use of force in peacekeeping operations evolved beyond personal self-defense or defense of the civilian population and has come to include resistance to attempts by forceful means to prevent the peacekeeping operation from discharging its mandate.<sup>51</sup> This new concept of defense of the mandate was endorsed by the Security Council and was reflected in almost all peacekeeping operations,<sup>52</sup> but has become the subject of criticism of the international community due to its vague nature.<sup>53</sup> The opponents of this concept argue that the use of force based on defense of the mandate may be stretched beyond the limits of self-defense and transform peacekeeping into peace enforcement.<sup>54</sup>

It is noteworthy that the Security Council, in some cases, not only granted the peacekeeping missions the authority to use force in defense of the mandate but also beyond the confines of self-defense. For instance, in 2013 the UN peacekeeping mission in Mali (MINUSMA) was tasked to assist the Government of Mali in deterring threats by taking “*active steps to prevent the return of armed elements to those areas*”.<sup>55</sup> In this context, the UN Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) is similarly problematic as it was mandated to take “*all necessary measures*” to neutralize armed groups.<sup>56</sup> The language of taking “*active steps*” or “*all necessary measures*” indirectly authorizes the UN peacekeeping missions to take the initiative of using force and no longer requires actual attacks on a peacekeeping mission or threats to civilians.<sup>57</sup>

In view of the foregoing, the UN peacekeeping framework needs to be reviewed and differentiated from peace enforcement operations. The nature and scope of use of force by peacekeeping missions must be more clearly articulated.<sup>58</sup> Otherwise, peacekeeping missions may lose their function and become parties to an armed conflict.

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<sup>49</sup> Scott Sheeran, “The Use of Force in United Nations Peacekeeping Operations,” in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford: Oxford University Press, 2015), 368-369.

<sup>50</sup> Id.

<sup>51</sup> Capstone Doctrine, 34.

<sup>52</sup> Denis M. Tull, “The Limits and Unintended Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo,” *International Peacekeeping* 25 (2018): 170.

<sup>53</sup> Thierry Tardy, “A Critique of Robust Peacekeeping in Contemporary Peace Operations,” *International Peacekeeping* 18 (2011): 158.

<sup>54</sup> Boddens Hossang, “Force Protection, Unit Self-Defence and Extended Self-Defence,” in *The Handbook of the International Law of Military Operations*, 2nd Edition, ed. Terry D. Gill and Dieter Fleck (Oxford: Oxford University Press, 2015), 417.

<sup>55</sup> UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100, <https://www.refworld.org/docid/519dffbe4.html> [accessed 12.03.2020].

<sup>56</sup> UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, <http://unscr.com/en/resolutions/2098>, [accessed 18.04.2020].

<sup>57</sup> Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, 2nd Edition, (Oxford: Oxford University Press, 2015), 176.

<sup>58</sup> Nigel D. White, “Peacekeeping or War-fighting?” in *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum*, ed. Nigel D. White and Christian Henderson (Cheltenham: Edward Elgar Publishing, 2013), 590.

### 3. WHAT IS THE STATUS OF A PEACEKEEPING MISSION UNDER INTERNATIONAL HUMANITARIAN LAW?

The Geneva Conventions of 1949 and their additional protocols do not contain legal norms determining the status of peacekeeping missions. Nevertheless, according to the *International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law*, the prohibition of attacks on the personnel and objects of peacekeeping missions constitutes a customary rule of international law.<sup>59</sup>

It is the prevailing view, supported by the case law of international courts, state practice and UN documents, that peacekeepers enjoy the status of civilians and retain protection as civilians, until they directly participate in hostilities against one of the belligerent parties.<sup>60</sup> This is further confirmed by two other UN documents – the 1994 Convention on the Safety of United Nations and Associated Personnel<sup>61</sup> and the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law.<sup>62</sup>

Given that peacekeeping forces are not members of a party to the conflict, they are deemed to be entitled to the same protection against attacks as that accorded to civilians under international humanitarian law, until they take a direct part in the hostilities.<sup>63</sup> It is worth noting that Article 50 of Additional Protocol I to the Geneva Conventions of 1949 defines civilians as persons who are not members of the armed forces.<sup>64</sup> Moreover, pursuant to Article 51 (3) of the AP I to the Geneva Conventions, civilians enjoy the protection, unless they take a direct part in the hostilities.<sup>65</sup> Hence, members of a peacekeeping force do not constitute legitimate military objectives and are equal to civilians within the meaning of Article 48 of the AP I to the Geneva Conventions, which obliges the parties to a conflict to constantly distinguish between civilians and combatants.<sup>66</sup>

Moreover, in non-international armed conflict, peacekeepers are persons who are not directly involved in armed conflict and enjoy protection under Common Article 3 of the Geneva Conventions as well as under Article 13 of AP II, prohibiting attacks against

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<sup>59</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules (Cambridge: Cambridge University Press, 2009), 112.

<sup>60</sup> Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, UN doc ST/SGB/1999/13. <https://www.refworld.org/docid/451bb5724.html> [accessed 18.04.2020]; ICC, *Prosecutor v. Abu Garda*, para. 126; ICTR, *Prosecutor v. Theoneste Bagosora*, ICTR-98-41-T, Judgment and Sentence of 18 December 2008, para. 2175.

<sup>61</sup> Convention on the Safety of United Nations and Associated Personnel, 15 January 1999, Article 2. <https://www.un.org/law/cod/safety.htm> [accessed 18.04.2020].

<sup>62</sup> Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, UN doc ST/SGB/1999/13. <https://www.refworld.org/docid/451bb5724.html> [accessed 18.04.2020].

<sup>63</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, International Committee of the Red Cross, 1986), 625.

<sup>64</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977, Article 50.

<sup>65</sup> AP I, Article 51 (3).

<sup>66</sup> AP I, Article 48.



civilians.<sup>67</sup>

As has already been mentioned, Article 8 (2) (b) (iii) and (2) (e) (iii) forbids attacks against peacekeeping personnel and objects in both international and non-international armed conflicts. Installations, equipment, units, and vehicles belonging to a peacekeeping mission are entitled to protection given to civilian objects under international law of armed conflict in so far as they are not used for military purposes.<sup>68</sup>

The notion of direct participation in hostilities is of fundamental importance in the research on the war crime of attacking peacekeeping missions. In case the peacekeeping forces are directly engaged in hostilities, they may become legitimate military targets and an attack against them will not constitute a violation of international humanitarian law and thus will not be qualified as a war crime under Article 8 (2) (b) (iii) and (2) (e) (iii) of the Rome Statute. Hence, it is necessary to define the essence and scope of direct participation in hostilities.

The ICRC Interpretive Guidance identifies three main constitutive elements of Direct Participation in Hostilities (DPH): 1) *threshold of harm*; 2) *direct causation*; 3) *belligerent nexus*.<sup>69</sup>

In order for a specific act to qualify as DPH, the harm likely to result from it must attain a certain threshold.<sup>70</sup> This threshold can be reached when the act adversely affects the military operations or military capacity of the adversary or by inflicting death, injury, or destruction on persons or objects.<sup>71</sup>

In addition to the threshold of harm, two other elements must exist cumulatively for the qualification of an act as DPH. In particular, for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.<sup>72</sup> Also, the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another. The latter element is called belligerent nexus.<sup>73</sup>

The concept of DPH was also clarified by the Israeli Supreme Court in the *Targeted Killings* case.<sup>74</sup> The Court identified specific instances, which are, for the greater part, in conformity with the ICRC approach, when a civilian is deprived of protection as a result

<sup>67</sup> Christopher Greenwood, "Protection of Peacekeepers: The Legal Regime", *Duke Journal of Comparative & International Law* 7 (1997): 185.

<sup>68</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules (Cambridge: Cambridge University Press, 2009), 112.

<sup>69</sup> Nils Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," *International Committee of the Red Cross* (Geneva: ICRC, 2009), 46 (hereinafter - ICRC Interpretive Guidance).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, 47.

<sup>72</sup> *Id.*, 51.

<sup>73</sup> *Id.*, 58.

<sup>74</sup> High Court of Justice of Israel, *The Public Committee against Torture in Israel v The Government of Israel*, (Targeted Killings Case), HCJ 769/02, 13 December 2006.

of direct participation in hostilities, such as: collection of intelligence on the adversary; transportation of combatants or fighters to or from the place where the hostilities are taking place; transmission of information concerning targets directly intended for the use of a weapon; planning of concrete military operations, etc.<sup>75</sup>

In view of the foregoing, several observations can be made in terms of direct participation in hostilities of peacekeeping forces. Bearing in mind the special characteristics of peacekeeping operations, it is often difficult to draw a clear dividing line between direct participation in hostilities and the use of force by peacekeeping missions in self-defense or in defense of the mandate. Nonetheless, it is evident that any peacekeeping mission, notwithstanding the peculiarities of its mandate, should use force restrictively, only in self-defense and avoid conducting offensive operations. As soon as a peacekeeping mission resorts to proactive use of offensive force, peacekeeping and peace enforcement can no longer be distinguished.<sup>76</sup> DPH of peacekeeping missions should be decided on a case-by-case basis through the examination of the circumstances of the use of force. If the use of force satisfies the *threshold of harm*, *direct causation*, and *belligerent nexus*, this will amount to DPH and deprive a peacekeeping mission of protection from direct attacks. If the peacekeeping mission uses necessary and proportionate force in self-defense, it will retain the protection accorded to civilians and attacks against such a mission will be qualified as a war crime.

#### **4. JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURT AND THE SPECIAL COURT FOR SIERRA LEONE**

There are two major cases in the jurisprudence of the ICC and the Special Court for Sierra Leone (SCSL) in which the two Courts interpreted the elements that constitute the war crime of attacking peacekeeping missions, analyzed the scope of civilian protection afforded to peacekeeping forces and examined the issues related to their direct participation in hostilities.

The SCSL explained in the *Revolutionary United Front (RUF)* case that the war crime of attacking peacekeeping personnel was not a new crime in international criminal law, but rather a demonstration of the fundamental prohibition of attacks against civilians and civilian objects.<sup>77</sup> The Court continued to note that the members of peacekeeping forces are civilians and benefit from protection accorded to civilians in so far as they do not take direct part in hostilities, which would transform them into legitimate targets under international humanitarian law.<sup>78</sup>

For the purpose of assessing to what extent the members of a peacekeeping mission participated in hostilities, the SCSL developed a “*totality of circumstances*” test, which, among others, reviews relevant Security Council resolutions for the operation, the peacekeeping mandate, the role and practices adopted by the peacekeeping mission and the

<sup>75</sup> Id, paras. 35-36.

<sup>76</sup> Charles T. Hunt, “All Necessary Means to What Ends? The Unintended Consequences of The ‘Robust Turn’ in UN Peace Operations,” *International Peacekeeping* 24 (2017): 111.

<sup>77</sup> SCSL, RUF Trial Judgment, para. 215.

<sup>78</sup> Id, para. 233.

rules of engagement.<sup>79</sup> The Court further examined the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the parties, as well as the nature and frequency of such force.<sup>80</sup>

The ICC scrutinized the potential existence of a war crime of attacking peacekeeping forces in the case of *Prosecutor v. Abu Garda* at the “confirmation of charges” stage. The case involved attacks on the African Union Mission in Sudan (AMIS), conducted by the armed groups fighting against the Sudanese Government in 2007.<sup>81</sup>

The Pre-Trial Chamber of the ICC considered the practice of the SCSL pertaining to the crime of attacking peacekeeping forces. The Court reviewed the mandate of the African Union Mission (AMIS), and concluded that it was a peacekeeping mission established in accordance with the UN Charter whose personnel and objects enjoyed protection accorded to civilians and civilian objects until their potential direct participation in hostilities.<sup>82</sup> The Pre-Trial Chamber referred to specific examples amounting to direct participation in hostilities, such as: “[...] bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property, or equipment, transmitting military information for the immediate use of a belligerent, and transporting weapons in proximity to combat operations.”<sup>83</sup>

An analysis of the case law of the SCSL and the ICC demonstrates that both Courts start their reasoning with the assumption that peacekeeping personnel and objects enjoy protection accorded to civilians and civilian objects. They explore to what extent a peacekeeping mission complies with the three fundamental principles of peacekeeping - *host state consent, impartiality, and non-use of force except in self-defense*. The jurisprudence of both Courts confirms that if a peacekeeping mission directly engages in hostilities, it loses protection and becomes a lawful military target.

## **5. THE ICC INVESTIGATION INTO THE ATTACKS ON THE JOINT PEACEKEEPING FORCES DURING THE 2008 RUSSIA-GEORGIA INTERNATIONAL ARMED CONFLICT**

On 27 January 2016, Pre-Trial Chamber I of the International Criminal Court granted the Prosecutor’s request to open an investigation into the situation in Georgia, in relation to alleged crimes against humanity and war crimes coming within the jurisdiction of the Court, in the context of the Russia-Georgia international armed conflict between 1 July and 10 October 2008.<sup>84</sup>

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<sup>79</sup> Id, para. 234.

<sup>80</sup> Id.

<sup>81</sup> ICC, *Prosecutor v. Abu Garda*, para. 21.

<sup>82</sup> Id, para. 78.

<sup>83</sup> Id, para. 81.

<sup>84</sup> ICC, Decision on the Prosecutor’s request for authorization of an investigation into the situation in Georgia, PTC-I, ICC-01/15, 27 January 2016, [https://www.icc-cpi.int/CourtRecords/CR2016\\_00608.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF) [accessed 07.11.2019].

The Office of the Prosecutor, among others, attempts to determine whether attacks against peacekeepers under Article 8 (2) (b) (iii) of the Rome Statute were intentionally directed by the Ossetian separatist forces against Georgian peacekeepers and by Georgian armed forces against Russian peacekeepers.<sup>85</sup>

It is noted in the Prosecutor's request that, according to the Georgian authorities, the attacks of South Ossetian forces resulted in the killing of two Georgian peacekeepers and the injury of five to eight others, and the destruction of vehicles involved in a peacekeeping mission.<sup>86</sup> On the other hand, Russia claimed that 10 Russian peacekeepers were killed and 30 of them wounded as a result of an attack against their facility, when the compound of the Russian peacekeeping battalion was destroyed, including a medical facility within the compound and peacekeepers' armored vehicles.<sup>87</sup>

The following chapter will review the brief historical background of the Joint Peacekeeping Forces, their mandate and the episode involving the attacks on the peacekeeping forces during the 2008 August war. Moreover, specific legal issues relating to the qualification of the attacks against the Joint Peacekeeping Forces as a war crime will be identified.

## 5.1 The History and Mandate of the Joint Peacekeeping Forces

The Sochi Agreement of 24 June 1992 on the Principles of a Settlement of the Georgian-Ossetian Conflict provided, *inter alia*, for an immediate ceasefire and the withdrawal of armed formations from the conflict zone.<sup>88</sup> Also, in order to exercise control over the implementation of the cease-fire, over the withdrawal of armed formations, dissolution of defense forces and to maintain security in the region, the Sochi Agreement provided for the establishment of Joint Peacekeeping Forces under the supervision of the Joint Control Commission (JCC), consisting of representatives of the parties to the conflict, the Republic of North Ossetia and the Russian Federation.<sup>89</sup>

The Joint Peacekeeping Forces, deployed in the Georgian-Ossetian conflict zone, consisted of three peacekeeping battalions: a Russian battalion, a Georgian battalion and a North Ossetian battalion.<sup>90</sup> Each battalion consisted of 500 soldiers.<sup>91</sup> The JPKF had two posts in Tskhinvali. The Russian Defense Ministry proposed the candidate for Commander of the JPKF, while the decision on the appointment was made by the Joint Control Commission

<sup>85</sup> Id, para. 29.

<sup>86</sup> "Request for authorisation of an investigation pursuant to article 15", 16 October 2015, ICC-01/15-4-Corr, Office of the Prosecutor of the International Criminal Court, 17 November 2015 (ICC Prosecutor's Request), para. 334, <https://www.legal-tools.org/doc/eca741/pdf/> [accessed 26.10.2019].

<sup>87</sup> Id.

<sup>88</sup> Sochi Agreement of 24 June 1992 on Principles of a Settlement of the Georgian-Ossetian Conflict, [http://www.parliament.ge/files/613\\_8104\\_674812\\_9b.pdf](http://www.parliament.ge/files/613_8104_674812_9b.pdf) [accessed 12.03.2020]; The Independent International Fact-Finding Mission on the Conflict in Georgia, Volume II, September 2009, 93. (hereinafter - IIFMCG II).

<sup>89</sup> Sochi Agreement, Article 3.

<sup>90</sup> The Independent International Fact-Finding Mission on the Conflict in Georgia, Volume III, September 2009, 63-64. (hereinafter- IIFMCG III).

<sup>91</sup> IIFMCG III, 64.

(JCC).<sup>92</sup>

## 5.2 Does the JPKF Constitute a Peacekeeping Mission for the Purposes of Article 8 (2) (b) (iii) of the Rome Statute?

In order for the JPKF to be considered as a peacekeeping mission within the meaning of Article 8 (2) (b) (iii), it must meet the three fundamental principles of peacekeeping operations – *host state consent*, *impartiality* and *non-use of force except in self-defense*.

As explained above, the JPKF was deployed within the territory of Georgia pursuant to the 1992 Sochi Agreement.<sup>93</sup> For many years, Georgia repeatedly requested the replacement of the Joint Peacekeeping Forces with an international peacekeeping mission. In fact, on 15 February 2006, the Parliament of Georgia adopted a resolution, assessing the fulfillment, within their current mandate, of the obligations of the peacekeeping forces located in the Former Autonomous District of South Ossetia as extremely negative, and actions of the Russian Federation as continuous efforts aimed at an annexation of this region of Georgia.<sup>94</sup>

Despite the evident dissatisfaction with the JPKF, the Government of Georgia did not officially request the withdrawal of the mission. A unilateral denunciation of the Sochi Agreement occurred after the conflict, on 27 August 2008.<sup>95</sup> Consequently, during the 2008-armed conflict, the JPKF was lawfully present in the Tskhinvali Region, with the consent of Georgia.

The JPKF is substantially different from other peacekeeping missions, given that it was established under a bilateral agreement and comprised of battalions provided by the belligerent parties. It would appear that the hybrid nature of the peacekeeping mission would be a guarantor of its impartiality, but in reality, under the mantle of peacekeeping, the Russian battalion of the JPKF became Russia's foothold in the Tskhinvali Region through which it incited separatism and facilitated the escalation of armed conflict.

The ICC Prosecutor stated in the request for authorization of investigation that “*the information available at this stage indicates that sporadic incidents that might have jeopardized the impartiality of particular peacekeeping battalions did not necessarily affect the impartiality of the JPKF as a whole peacekeeping mission which was meant to stem from its very hybrid nature, and which in effect lasted for almost 16 years.*”<sup>96</sup>

It is necessary to point out that the OTP made premature assessments concerning the impartiality of the Russian and North Ossetian peacekeeping battalions by disregarding incidents which jeopardized their peacekeeping status. There is plenty of evidence

<sup>92</sup> JCC Decision of 6 December 1994 and its appendix, <http://peacekeeper.ru/ru/?module=pages&action=view&id=87&fbclid=IwARogLCgltY4YaJocJKt1wyfxQfr9VrNMErSf97id-nIvkTiklSVjTzLcrdA> [accessed 12.03.2020].

<sup>93</sup> Sochi Agreement, Article 3.

<sup>94</sup> Resolution of the Parliament of Georgia of 15 February 2006, <https://matsne.gov.ge/ka/document/view/43594?publication=0> [accessed 10.03.2020].

<sup>95</sup> “The Government of Georgia withdraws from the Sochi Agreement”, <https://old.civil.ge/eng/article.php?id=19341> [accessed 12.03.2020].

<sup>96</sup> ICC Prosecutor's Request, paras. 283-284.

demonstrating that the Russian peacekeeping battalion actively armed and trained separatist forces.<sup>97</sup> Most particularly, the North Ossetian peacekeeping battalion was manned to a considerable extent by South Ossetian residents, in grave violation of the Sochi Agreement.<sup>98</sup> Additionally, the Georgian side presented numerous pieces of evidence to the International Independent Fact-Finding Mission on the Conflict in Georgia (IIFMCG), substantiating the long-standing history of coordination and collaboration by the Russian and North Ossetian peacekeeping battalions with the irregular forces of the South Ossetian de facto regime.<sup>99</sup>

In case the investigation concludes that certain battalions of the JPKF failed to comply with the principle of impartiality, these battalions would not be considered as part of a peacekeeping mission established in accordance with the UN Charter within the meaning of Article 8 of the Rome Statute. Furthermore, the Prosecutor pointed out that the activities of certain peacekeeping battalions would not affect the impartial nature of the entire mission.<sup>100</sup> It seems that the OTP supports an individual assessment of the activities of each peacekeeping battalion. This should be welcomed, since, if the investigation finds, for instance, that the Georgian peacekeeping battalion functioned impartially, the activities of Russian and Ossetian peacekeepers would not have an impact on the protected status of Georgian peacekeepers.

Although the JPKF was equipped with a broad mandate, they could neutralize armed groups only in case of armed resistance, which means that the JPKF was still bound by the principle of non-use of force except in self-defense.<sup>101</sup>

### 5.3 FACTUAL BACKGROUND OF THE ATTACKS ON THE JPKF

#### 5.3.1 Alleged Attack against Georgian peacekeepers

According to Georgian authorities, South Ossetian forces conducted intensive artillery attacks against the Georgian peacekeepers' positions prior to the active phase of hostilities, killing two and wounding several Georgian peacekeepers, followed by the return of defensive fire by the Georgian peacekeepers.<sup>102</sup> The fact that the attacks happened is not disputed by any party.<sup>103</sup> As described in the Prosecutor's Request, these acts fall within the ambit of Article 8 (2) (e) (iii), since, by the time of this incident, hostilities between

<sup>97</sup> European Parliament Resolution P6\_TA(2007)0572 on the situation in Georgia, 29 November 2007, [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007\\_0572+0+DOC+XML+Vo//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007_0572+0+DOC+XML+Vo//EN) [accessed 26.10.2019].

<sup>98</sup> International Crisis Group, "Georgia's South Ossetia Conflict: Make Haste Slowly," Europe Report 183(2007):17-18. <https://d2071andvipowj.cloudfront.net/183-georgia-s-south-ossetia-conflict-make-haste-slowly.pdf> [accessed 18.03.2020].

<sup>99</sup> IIFMCG III, 65-66.

<sup>100</sup> ICC Prosecutor's Request, para. 155.

<sup>101</sup> JCC Decision of 6 December 1994 and its appendix, <http://peacekeeper.ru/ru/?module=pages&action=view&id=87&fbclid=IwARogLCgltY4YaJocJKt1wyfxQfr9VrNMERsF97id-nlvkTiklSVjTzLcrdA> [accessed 12.03.2020].

<sup>102</sup> Id, para. 164.

<sup>103</sup> Id, para. 169.



Georgian armed forces and the highly organized South Ossetian forces amounted to a non-international armed conflict.<sup>104</sup> However, it should be emphasized that, if it can be established that the Russian armed forces exercised overall control over South Ossetian forces at the time of this incident, the armed conflict would become international already at that moment and the relevant conduct would fall under article 8 (2) (b) (iii).

It is disputed between the parties whether the Georgian peacekeeping battalion enjoyed protected status at the time of the attack. According to Russia, the Georgian peacekeepers' positions in Nikozi and Avnevi were used by the Georgian Armed Forces to conduct offensive operations.<sup>105</sup> Thus, the OTP should determine in the course of the investigation, whether or not, at the time of the attacks on Georgian peacekeepers, their base and posts were used for launching attacks against South Ossetian forces. If the investigation establishes that Georgian peacekeeping battalions remained impartial, did not directly engage in hostilities and employed defensive, necessary and proportionate force, attacks against them would constitute a war crime under Article 8 (2) (b) (iii) or Article 8 (2) (e) (iii) of the Rome Statute.

### 5.3.2 Alleged Attack against Russian Peacekeepers

According to the Georgian authorities, units of Russian and North Ossetian battalions of the JPKF were actively involved in the hostilities against the Georgian army. Their peacekeeping base and facilities were used for directing aerial bombardments and artillery fire of Russian forces and of South Ossetian de facto regime irregular forces against Georgian troops.<sup>106</sup> This is confirmed by telephone conversations, intercepted at 00:23 a.m. on 8 August, between the Commander of the JPKF Marat Kulakhmetov and Mamuka Kurashvili, the head of the Georgian peacekeeping battalion.<sup>107</sup> During his conversation with Kurashvili, Marat Kulakhmetov admitted that Russian peacekeepers were providing coordinates for artillery shelling to South Ossetian forces.<sup>108</sup>

Subsequently, South Ossetian media outlets confirmed that the lieutenant of the Artillery Intelligence Division of the South Ossetian de facto Ministry of Defence, Oleg Galavanov, was present at the observation tower of the peacekeeping forces and died while relaying coordinates to South Ossetian militia.<sup>109</sup> In fact, according to the information published on the webpage of the de facto Ministry of Defence of South Ossetia, Oleg Galavanov died on August 8, 2008 while correcting artillery fire.<sup>110</sup> It should be noted that residents of South Ossetia/Tskhinvali Region were generally not allowed into the post.<sup>111</sup>

<sup>104</sup>Id, para. 168.

<sup>105</sup> IFFMCG III, 390.

<sup>106</sup> Id, 67-68.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> “Олег Галаванов отдал свою жизнь за спасение осетинского народа,” 03.08.2009, <http://cominf.org/node/1166480634> [accessed 12.03.2020].

<sup>110</sup> “Наши герои” 25.08.2017, <http://alaniamil.org/99-nashi-geroi.html> [accessed 12.03.2020].

<sup>111</sup> ICC Prosecutor's Request, para. 187.

Transmitting coordinates of the location and movements of the armed forces of one party to the other party of the conflict certainly reaches the threshold of harm because conducting artillery attacks on the basis of such intelligence adversely affects military operations and military capacity of the belligerent, directly causes death and destruction of objects. Moreover, the qualification of an act as direct participation does not require the actual materialization of harm, the likelihood of such harm is sufficient.<sup>112</sup> The fact of transmitting coordinates for the purposes of correcting artillery fire is closely related to the likely harm since this information can be used for the identification and neutralization of the enemy positions. The final element of DPH - the belligerent nexus - is clearly fulfilled since the provision of coordinates was specifically designed to give a military advantage to Ossetian armed groups to the detriment of the Georgian forces.

It should be emphasized that in the *Abu Garda* case, the ICC qualified the transmission of military intelligence on the immediate use of a weapon system as direct participation in hostilities.<sup>113</sup> In this case, the Court paid special attention to the “time” element and concluded that the representatives of the Sudanese Government had left the AMIS peacekeeping base much earlier and were not present at the base during the attacks.<sup>114</sup> Unlike in the *Abu Garda* case, telephone conversations intercepted by the Georgian side, information provided by the South Ossetian de facto authorities and reports published in the media confirm both the transmission of coordinates by Russian peacekeepers to Ossetian separatist forces and the presence of Ossetian formations at the top of the observation tower of the peacekeeping compound on 7 and 8 August 2008.<sup>115</sup> This amounts to direct participation in hostilities on behalf of the Russian peacekeepers and constitutes a legitimate ground for the loss of entitlement to the protection given to civilians and civilian objects.

In this regard, the ICRC Interpretive Guidance and the *Targeted Killings* case of the Israeli Supreme Court unanimously confirm that the transmission of intelligence information on tactical targets to one party of the conflict for the purpose of using it against the other party qualifies as direct participation in hostilities.<sup>116</sup>

As described in Georgia’s position sent to the International Independent Fact-Finding Mission on the Conflict in Georgia (IIFMCG), at 06:00 a.m. on 8 August, the Ministry of Internal Affairs Special Forces encountered sniper and massive armored vehicle cannon fire from the Russian peacekeeping headquarters “Verkhniy Gorodok” located on the southwestern edge of the town and were forced to return fire and ask for tank support.<sup>117</sup> Georgian armed forces responded with defensive fire which was strictly proportionate and necessary.<sup>118</sup>

<sup>112</sup> ICRC Interpretive Guidance, 47.

<sup>113</sup> ICC, Prosecutor v. Abu Garda, para. 81.

<sup>114</sup> Id, para. 147.

<sup>115</sup> IIFMCG III, 67.

<sup>116</sup> ICRC Interpretive Guidance, 48-50; Targeted Killings Case, paras. 35-36.

<sup>117</sup> IIFMCG III, 284.

<sup>118</sup> Id.

Conducting attacks from the peacekeeping base against the Georgian army did not comply with the principle of non-use of force except in self-defense. The Georgian attack was not directed against the Russian peacekeeping base. Hence, massive attacks perpetrated by Russian peacekeepers against the Georgian troops cannot be justified with reference to the right to self-defense of the peacekeeping forces. It must also be noted that Georgian forces opened defensive fire only against those peacekeeping regiments which directly participated in hostilities.<sup>119</sup>

Anatoly Barankevich, the Security Council Chairman of the South Ossetian de facto authority, acknowledged in an interview that he proposed to Marat Kulakhmetov, the Commander of the Joint Peacekeeping Forces, to secure together a defensive perimeter until the approach of the Russian troops.<sup>120</sup> He decided to secure the roads leading to the Russian peacekeeping base and, for that purpose, occupied the surrounding houses, from where they ambushed the Georgian police and military.<sup>121</sup>

The conduct of the Russian peacekeeping battalion demonstrates that they operated in close cooperation with the Ossetian separatist forces against the Georgian army before the commencement of the armed conflict as well as in its active phase, which amounts to direct participation in hostilities. If the OTP confirms in its investigation that the Russian peacekeeping battalion was actively involved in the hostilities in support of the Ossetian armed groups, the Russian peacekeeping base would be considered as a legitimate military target and an attack against it would not constitute a war crime under Article 8 (2) (b) (iii) of the Rome Statute.

#### 5.4 Challenges Facing the OTP's Investigation into the Attacks on the JPKF

It has been more than four years since the authorization of investigation by Pre-Trial Chamber I of the ICC. According to the OTP, the investigation into the situation in Georgia is in an active phase and specific results are expected to be available by the end of 2020.<sup>122</sup> Nonetheless, the investigation faces numerous challenges. Twelve years have passed since the 2008 August armed conflict, making it exceedingly difficult to obtain evidence or witness testimonies. Due to the fact that Russia refuses to cooperate with the ICC, the OTP is unable to enter the occupied Tskhinvali Region to conduct an on the spot investigation.<sup>123</sup> It is also noteworthy that much of the evidence has already been destroyed.

Against this background, an investigation of the attacks on the JPKF is even more

<sup>119</sup> Id, 286.

<sup>120</sup> “Не место этому президенту в Южной Осетии,” <https://www.kommersant.ru/doc/1089120> [accessed 12.03.2020]; ICC Prosecutor's Request, para. 186.

<sup>121</sup> Id.

<sup>122</sup> “Fatou Bensouda says specific results of investigation into Russia-Georgia 2008 war are expected to be presented by end of 2020,” <https://www.interpressnews.ge/en/article/104877-fatou-bensouda-says-specific-results-of-investigation-into-russia-georgia-2008-war-are-expected-to-be-presented-by-end-of-2020/> [accessed 28.04.2020].

<sup>123</sup> “Russia refuses to cooperate with ICC investigation into 2008 war crimes,” <http://agenda.ge/en/news/2016/279> [accessed 12.03.2020].

difficult. The OTP will need to examine specific actions of Russian, Ossetian and Georgian peacekeepers, their coordination with the belligerent parties, particular instances of the use of force, circumstances surrounding the attacks on each battalion and their alleged direct participation in hostilities throughout the conflict. The OTP needs to explore to what extent the actions of the JPKF battalions constituted use of force in self-defense.<sup>124</sup> Furthermore, it will be challenging for the OTP to determine the exact moment when certain peacekeeping battalions lost protection as civilians and became legitimate military targets.

In case the OTP gathers sufficient evidence and brings charges for the war crime of attacking a peacekeeping mission, the Defense may challenge the peacekeeping status of the JPKF by reference to the lack of impartiality of certain peacekeeping battalions, use of force beyond self-defense and direct participation in hostilities.

The ICC investigation into the peacekeeping status of the JPKF, issues related to its impartiality, incidents of the use of force and direct participation in hostilities will be a landmark case for clarifying the vaguely defined aspects of the law applicable to peacekeeping missions. This case will play an important role not only within the context of the investigation of the Russia-Georgia armed conflict but also in connection with the UN peacekeeping doctrine, which, as explained above, faces several new legal challenges.

## CONCLUSION

The Article analyzed the different elements of the war crime of attacking peacekeeping missions under Article 8 of the Rome Statute. It examined the notion of peacekeeping and determined that there was no common definition of peacekeeping missions as this concept developed through practice and was not predicated on a clearly defined legal framework. However, some UN policy documents, such as the *Brahimi Report* and the *Capstone Doctrine*, provide certain definitions of peacekeeping operations. Peacekeeping missions are founded on three basic principles, namely *host state consent*, *impartiality*, and *non-use of force except in self-defense*, which distinguish it from peace enforcement operations authorized under Chapter VII of the UN Charter. Any peacekeeping operation must fulfill these fundamental principles to fall within the protection of Article 8 (2) (b) (iii) and (2) (e) (iii) of the Rome Statute.

Both the UN Security Council and the UN General Assembly have authority under the UN Charter to establish peacekeeping missions. In addition to UN peacekeeping missions, peacekeeping operations created through Regional organizations and arrangements also come within the purview of Article 8 (2) (b) (iii) and (2) (e) (iii) of the Rome Statute.

The use of force in self-defense by a peacekeeping mission means the use of proportionate and necessary force in response to an attack. Furthermore, the concept of the use of force in peacekeeping missions has recently evolved to include defense of the mandate. Use of

<sup>124</sup> Patrick I. Labuda, "Investigating Crimes against Peacekeepers in the Situation in Georgia," *OpinioJuris* blog, 2015, <http://opiniojuris.org/2015/10/19/guest-post-the-icc-intervenes-in-georgia-when-is-a-peacekeeper-a-peacekeeper/> [accessed 12.03.2020].

force in defense of the mandate is, however, a vague concept and must be clearly distinct from peace enforcement operations.

It has been demonstrated that peacekeeping personnel enjoy protection accorded to civilians under international humanitarian law in so far as they are not directly involved in hostilities. Additionally, the objects of peacekeeping missions are entitled to protection given to civilian objects, unless their nature, location, purpose, or use effectively contribute to the military action of a party to a conflict. The Article also discussed the jurisprudence of the Special Court of Sierra Leone (SCSL) and the International Criminal Court (ICC) and demonstrated that in the case law of both Courts a peacekeeping mission loses protection when it directly engages in hostilities.

The notion of direct participation in hostilities was assessed based on the ICRC Interpretive Guidance and the Israeli Supreme Court *Targeted Killings* case. Three elements of Direct Participation in Hostilities (DPH) were identified – *threshold of harm*, *direct causation*, and *belligerent nexus*. If the use of force by a peacekeeping missions satisfies the three elements, peacekeeping personnel and objects will be deprived of their protection entitled to civilians and civilian objects and become lawful military targets, an attack against which will not be qualified as a war crime within the meaning of Article 8 (2) (b) (iii) and (2) (e) (iii) of the Rome Statute. Hence, to maintain its peacekeeping status, any peacekeeping mission, notwithstanding the peculiarities of its mandate, should use force restrictively, only in self-defense and avoid conducting offensive operations.

The Article studied the episode involving attacks on the JPKF during the 2008 August war and identified the challenges facing the OTP's investigation into this matter. Considering the existence of many incidents that put into question the impartiality of Russian and North Ossetian peacekeeping battalions, it is alleged that these battalions of the JPKF did not comply with the principle of impartiality. Furthermore, there is evidence that the Russian peacekeeping base was used by South Ossetian de facto regime irregular forces to obtain information on the Georgian army, which amounts to direct participation in hostilities and may deprive Russian peacekeepers of protection.

It is a challenge for the OTP's investigation that almost 12 years have passed since the 2008 August war, that Russia refuses to cooperate with the ICC, and that the OTP is unable to enter the occupied Tskhinvali Region. The OTP will need to examine the specific actions of Russian, Ossetian and Georgian peacekeepers, their coordination with the belligerent parties, particular instances of the use of force, circumstances surrounding the attacks on each battalion and their alleged direct participation in hostilities throughout the conflict.

Last but not least, the Article wanted to emphasize the significance of the ICC investigation not only within the context of the Russia-Georgia war but also in terms of clarifying the legal aspects of peacekeeping operations.