

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

THE SCOPE OF WAR CRIMES AGAINST PEACE- KEEPING
PERSONNEL

**Do Articles 8 (2) (b) (iii) and (e) (iii) ICC- Statute and 4 (b) SCSL- Statute fulfil
the requirements of the principle of specificity in international law?**

Supervisor: Christopher Oxtoby

Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws (LL.M.) in International Law in approved courses and a minor dissertation/research paper. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations/research paper, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

14/09/2011

Signed by candidate

Katharina Elena Seifert
Student -no.: SFRKAT001
Master of Laws (LL.M.)

**THE SCOPE OF WAR CRIMES AGAINST PEACE- KEEPING
PERSONNEL**

**Do Articles 8 (2) (b) (iii) and (e) (iii) ICC- Statute and 4 (b) SCSL- Statute fulfil
the requirements of the principle of specificity in international law?**

Supervisor: Christopher Oxtoby

Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws (LL.M.) in International Law in approved courses and a minor dissertation/research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations/research paper, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

*“One can see the true values of a society by taking
a look at how it treats its most obnoxious members.”*

-Unknown-

University of Cape Town

ABBREVIATIONS

ACHR	American Convention on Human Rights
A.F.L.Rev.	Armed Forces Law Review
AJIL	American Journal of International Law
AMIS	African Mission in Sudan
AU	African Union
AP I	Additional Protocol I to the Geneva Conventions
AP II	Additional Protocol II to the Geneva Conventions
cf.	Compare
Chitty's L.J. & Fam L. Review	Chitty's Law Journal & Family Law Review
CIS	Commonwealth of independent States
Colum. Hum. Rts. L. Rev.	Columbia Human Rights Law Review
Colum. L. Rev	Columbia Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Crim. L. Forum	Criminal Law Forum
G.A.	General Assembly of the United Nations
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
Emory Int'l L. Rev	Emory International Law Review
e.g.	for Example
Eur. J. Int'l L.	European Journal of International Law
Geo. L.J.	The Georgetown Law Journal
GLJ	German Law Journal
Hastings Int'l & Comp. L. Rev	Hastings International and Comparative Law Review

ICC	International Criminal Court
ICC-Statute	Rome Statute of the International Criminal Court
ICTY–Statute	Statute for the International Criminal Tribunal the former Yugoslavia
ICTR-Statute	Statute for the International Criminal Tribunal for Rwanda
Int'l Crim L Rev	International Criminal Law Review
IHL	International Humanitarian Law
ILC	International Law Commission
ILJ	International Law Journal
IMT	International Military Tribunal
J. Conflict & Sec. L.	Journal of Conflict and Security Law
J Int'l Crim Just	Journal of International Criminal Justice
JUS	Juristische Schulung
Mich. J. Int'l L.	Michigan Journal of International Law
NATO	North Atlantic Treaty Organization
NStZ	Neue Zeitschrift für Strafrecht
N.Y.U. J. Int'l L. & Pol.	N.Y. U. International Law and Politics
NZAFLR	New Zealand Armed Forces Law Review
OAS	Organization of American States
RoE	Rules of Engagement
RUF	Resistance United Front
S.C.	Security Council of the United Nations
SCSL	Special Court for Sierra Leone
Temple Int'l & Comp. L.J	Temple International & Comparative Law Journal
Tex. Int'l L.J.	Texas International Law Journal
UDHR	Universal Declaration of Human Rights
U.N.	United Nations
UNPROFOR	United Nations Protection Force
U.N.S.G.	United Nations Secretary General
URF	United Resistance Front (Darfur)

WashUJLPoly

Washington University Journal of Law
and Policy

WW II

World War II

ZiS

Zeitschrift für internationale
Strafrechtsdogmatik

University of Cape Town

BIBLIOGRAPHY

Primary Source

Cases:

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

ICJ, Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 180.

ICTR Trial Chamber, The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera & André Rwamakuba, Decision on Defense's Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, 11 May 2004 (ICTR-98-44-T).

ICTY Trial Chamber Prosecutor v. Dusko Tadic, Decision on the Defence Motion on Jurisdiction 10 August 1995 (IT-94-1AR72).

ICTY Appeal Chamber, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (IT-94-1-AR72).

ICTY Trial Chamber, The Prosecutor v. Dusko Tadic, Judgment of 7 May 1997 (IT-94-1-T).

ICTY Trial Chamber, The Prosecutor v. Zejnir Delalic', Zdravko Mucic', Hazim Delic' and Esad Landz'o, Judgment of 16 November 1998 (IT-96-21-T).

ICTY Appeals Chamber; Prosecutor v. Enver Hadzihasanovic and Mehmed Alagic and Amir Kubura Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction of 27 November 2002 (IT-01-47-PT).

ICTY Appeals Chamber, The Prosecutor v. Enver Hadzihasanovic and Mehmed Alagic and Amir Kubura, Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility of 16 July 2003 (IT-01-47-PT).

ICTY Appeals Chamber, The Prosecutor v. Dario Kordic and Mario Cerkez, Judgment of 17 December 2004 (IT- 95- 14/2-A).

ICTY Appeals Chamber, The Prsoecutor v. Stanislav Galić, Separate opinion of Judge Mohammed Shahabuddeen of 30 November 2006 (IT-98-29-A).

ICTY Appeals Chamber, The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Partially dissenting opinion of Judge Fausto Pocar of 5 May 2009 (IT-95-13/1-A).

IMT, Judgment of the International Military Tribunal for the Trial of German Major War Criminals Nuremberg, 30 September and 1 October, 1946.

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

SCSL Appeals Chamber, The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case), Judgment of 26 October 2009 (SCSL-04-15-A).

SCSL Appeals Chamber, The Prosecutor v. Sam Hinga Normen, Decision on Preliminary Motion Based on Lack of Jurisdiction of 31 May 2004 (SCSL-2004-14-AR72(E)).

SCSL Appeals Chamber, The Prosecutor v. Sam Hinga, Dissenting opinion of Judge Robertson, Judgment of 31 May 2004 (SCSL-2004-AR72(E)).

Statutes/ Treaties/ Conventions/International Instruments:

Additional Protocol I to the Geneva Conventions (1949) of 1977.

Additional Protocol II to the Geneva Conventions (1949) of 1977.

African Charter on Human and Peoples' Rights of 1981.

American Convention on Human Rights of 1969.

Charter of the United Nations of 1945.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Person, including Diplomatic Agents of 1973.

Convention on the Privileges and Immunities of the United Nations of 1946.

Convention on the Safety of United Nation and Associated Personnel of 1994.

Draft Code of Crimes against Peace and Security of Mankind of 1996.

Elements of Crimes 2002.

European Convention on Human Rights of 1950.

Geneva Conventions of 1949.

Hague Convention II Laws and Customs of War on Land of 1899.

International Convention against Taking of Hostages of 1979.

International Covenant on Civil and Political Rights of 1966.

Persons, including Diplomatic Agents of 1973.

Statute of the International Court of Justice of 1945.

Statute of the International Criminal Court of 1998.

Statute of the International Criminal Tribunal for Sierra Leone of 2002.

Universal Declaration of Human Rights of 1948.

Secondary Source:

Ambos, Kai ‘Remarks on the general part of the international criminal law’ (2006) 4 Journal of International Criminal Justice 660.

Allain, Jean and **Jones, John R.W.D.** ‘A patchwork of norms: A commentary on the 1996 Draft Codes against the Peace and Security of Mankind’ (1997) 1 European Journal of International Law 100.

Arsanjani, Mahnoush H. ‘The Rome Statute of the International Criminal Court’ (1999) 93(1) American Journal of International Law 22.

Bantekas, Ilias ‘Reflections on sources and methods of international criminal and humanitarian law’ (2006) 6 International Criminal Law Review 121.

Baroni, Franca *Völkerrechtliche Auswirkungen der Friedensicherungspraxis der Vereinten Nationen nach Ende des kalten Krieges* (1995) Helbing & Lichtenhahn, Basel.

Bassiouni, Cherif M. (ed.) *International Criminal Law* vol 2, 3ed (2008) Martinus Nijhoff, Leiden.

Bialke, Joseph P. ‘United Nations Operations: Applicable norms and the application of law of armed conflict’ (2001) 50 The Air Force Law Review 1.

Bloom, Evan T. ‘Protecting peacekeepers: The Convention on the Safety of United Nations and Associated Personnel’ (1995) 89(3) American Journal of International Law 621.

Boutros-Ghali, Boutros ‘Beyond peacekeeping’ (1992) 25 New York University International Law and Politics 113.

Boutros-Ghali, Boutros ‘Empowering the United Nations’ (1992) 71(5) Foreign Affairs 89.

Bratt, Duane ‘Peace over justice: Developing a framework for UN peacekeeping operations in internal conflicts’ (1999) 5 *Global Governance* 63.

Braun, Leonie von *Internationalisierte Strafgerichte* (2008) Berliner Wissenschafts-Verlag, Berlin.

Breitegger, Alexander ‘Aktuelle Beiträge der internationalen Strafjustiz zur Entwicklung des humanitären Völkerrechts’ (2010) 11 *Zeitschrift für Internationale Strafrechtsdogmatik* 712.

Cassese, Antonio *International Criminal Law* (2003) Oxford University Press, Oxford.

Childers, Kelly A. ‘United Nations peacekeeping forces in the Balkan wars and the changing role of peacekeeping forces in the post-cold war world’ (1994) 8 *Temple International & Comparative Law Journal* 117.

Clark, Roger S. ‘The mental element in international criminal law’ (2001) 12 *Criminal Law Forum* 291.

Clemons, Elgin ‘No Peace to keep: Six and three- quarters peacekeepers’ (1994) 26 *New York University Journal of International Law & Politics* 107.

Cryer, Robert et al ‘A “special” court for Sierra Leone?’ (2001) 50(2) *British Institute of International and Comparative Law Quarterly* 435.

Dahm, Georg et al *Völkerrecht* vol 2, 2ed (2002) De Gruyter, Heidelberg.

Darge, Tobias *Kriegsverbrechen im nationalen und internationalen Recht* (2010) Springer, Heidelberg.

Doyle, Michael W. and **Sambanis**, Nicholas ‘The UN record on peacekeeping operations’ (2007) 62 *International Law Journal* 495.

Dörmann, Knut *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003) Cambridge University Press, Cambridge Mass.

Evans, Malcom D. (ed.) *International law* 2ed (2010) Oxford University Press, Oxford

Fink, Udo Fink *Kollektive Friedenssicherung* (1999) Peter Lang GmbH, Frankfurt am Main.

Fletcher, George P. and **Ohlin** Jens David 'Reclaiming fundamental principles of criminal law in the Darfur case' (2005) 3 *Journal of International Criminal Justice* 539.

Freeman, Kenneth S. 'Punishing attacks on United Nations peacekeepers: A case study of Somalia' (1994) 8 *Emory International Law Review* 845.

Frulli, Michaela 'The Special Court for Sierra Leone: Some preliminary comments' (2000) 11(4) *European Journal of International Law* 857.

Gadler, Alice 'The Protection of peacekeepers and international criminal law: Legal Challenges and Broader Protection' (2010) 11(6) *German Law Journal* 585.

Gasser, Hans- Peter *Humanitäres Völkerrecht* (2007) Schulthess, Zürich.

Goulding, Marrack 'The evolution of United Nations peacekeeping' (1993) 69(3) *International Affairs* 451.

Green, LC 'Peace keeping under the UN' (2000) 48 *Chitty's Law Journal & Family Law Review* 30.

Gropp, Walter *Strafrecht Allgemeiner Teil* 2ed (2001) Springer, Berlin.

Hall, Christopher Keith 'The first two sessions of the UN Preparatory Committee on the establishment of an International Criminal Court' (1997) 91(1) *The American Journal of International Law* 177.

Herdegen, Mathias *Völkerrecht* 6ed (2007) C.H. Beck, München.

Jescheck, Hans- Heinrich 'The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC Statute' (2004) 2 *Journal of International Criminal Justice* 38.

Jesse, Björn *Der Verbrechensbegriff des Römischen Statuts* (2009) Duncker & Humblot, Berlin.

Koch, Arnd 'Über den Wert der Verbrechenselemente ("Elements of Crimes") gem. Art. 9 ISTGH-Statut' (2007) 4 *Zeitschrift für internationale Strafrechtsdogmatik* 150.

Kittichaisaree, Kriangsak *International Criminal Law* (2001) Oxford University Press, Oxford.

Kurth, Michael E. *Das Verhältnis des Internationalen Strafgerichtshofes zum UN-Sicherheitsrat* (2006) Nomos, Baden- Baden.

Kühne, Hans- Heiner/ **Esser**, Robert/ **Gerdning**, Marc (eds.) *Völkerstrafrecht* (2007) Julius Jonscher, Osnabrück.

Lee, Ricky J. 'The United Nations: 'Peacekeeping success but peace- enforcement failures' (2000) *Australian International Law Journal* 180.

Lee, Roy S. 'United Nations peacekeeping: Development and prospects' (1995) 28 *Cornell International Law Journal* 619.

Levitt, Jeremy 'The cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal* 333.

Mantovani, Ferrando ‘The General principles of international criminal law: The viewpoint of a national criminal lawyer’ (2003) 1 *Journal of International Criminal Justice* 26.

Maybee, Larry ‘Attacks on United Nations peacekeepers: Can international law protect the blue helmets?’ 2002 *New Zealand Armed Forces Law Review* 25.

Melzer, Nils *Interpretative Guideline on the notion of direct participation in hostilities* (2008) International Committee of the Red Cross, Geneva.

Mohamed, Saira ‘From keeping peace to building peace: A proposal for a revitalized United Nations Trusteeship Council’ (2005) 105 *Columbia Law Review* 809.

Mundis, Daryl A. ‘New mechanisms for the enforcement of international humanitarian law’ (2001) 95(4) *American Journal of International Law* 934.

Murphy, Ray ‘United Nations peacekeeping in Lebanon and Somalia, and the use of force’ (2003) 8 *Journal of Conflict and Security Law* 71.

Naarden, Gregory L. ‘UN intervention after the Cold War: Political will and the United States’ (1994) 29 *Texas International Law Journal* 231.

Neethling, Theo ‘International Peacekeeping trends: The significance of African contributions to African peacekeeping requirements’ (2004) 31(1) *South African Journal of Political Studies* 49.

Nissel, Alan ‘Continuing crimes in the Rome Statute’ (2004) 25 *Michigan Journal of International Law* 653.

Olásolo, Héctor ‘A note on the evolution of the principle of legality in international criminal law’ (2007) 18 *Criminal Law Forum* 301.

Olásolo, Héctor *Unlawful attacks in combat situations: From the ICTY's case law to the Rome Statute* (2008) Martinus Nijhoff, Leiden.

Ortega, Martin C. 'The ILC adopts the Draft Code of Crimes against the Peace and Security of Mankind' (1997) 1 Max Planck Yearbook of United Nations law 283.

Oswald, Bruce 'Addressing the institutional law and order vacuum: Key issues and dilemmas for peacekeeping operations' (2006) 6 New Zealand Armed Forces Law Review 1.

Raimondo, Fabian O. *General principles of law in the decisions of international criminal courts and tribunals* (2008) Martinus Nijhoff, Leiden.

Sadat, Leila N. 'The International Criminal Court and the transformation of international law' in: Leila N. Sadat/ Michael P. Scharf (eds) *The theory and practice of international criminal law: Essays in honor of Cherif M. Bassiouni* (2008) Martinus Nijhoff, Leiden.

Satzger, Helmut 'Das neue Völkerstrafgesetzbuch' (2002) 3 Neue Zeitschrift für Strafrecht 125.

Satzger, Helmut 'Die Internationalisierung des Strafrechts als Herausforderung für den Bestimmtheitsgrundsatz' (2004) 11 Juristische Schulung 943.

Schaack, Beth van 'Crime Sine Lege: Judicial lawmaking at the intersection of law and morals' (2008) 97 The Georgetown Law Journal 119.

Schabas, William A. *An introduction to the International Criminal Court* 2ed (2004) Cambridge University Press, Cambridge Mass.

Schneider-Enk, Michaela *Der völkerrechtliche Schutz humanitärer Helfer in bewaffneten Konflikten* (2008) Dr. Kovac, Hamburg.

Shahabuddeen, Mohamed 'Does the principle of legality stand in the way of progressive development of law?' (2004) 2 *Journal of International Criminal Justice* 1007.

Sloan, James 'The use of offensive force in U.N. peacekeeping: A cycle of boom and bust?' (2007) 30 *Hastings International and Comparative Law Review* 385.

Sloan, James 'Peacekeepers under fire: Prosecuting the RUF for attacks against the UN Assistance Mission in Sierra Leone' (2010) 9 *The Law and Practice of International Courts and Tribunals* 243.

Simma, Bruno *The United Nations Charter: A commentary* (1995) Oxford University Press, Oxford.

Sivakumaran, Sandesh 'War crimes before the Special Court for Sierra Leone' (2010) 8 *Journal of International Criminal Justice* 1009.

Tallgren, Immi 'The sensibility and sense of international criminal law' (2002) 13 *European Journal of International Law* 561.

Triffterer, Otto (ed.) *Commentary on the Rome Statute of the ICC; Observers' notes* 2ed (2003) Nomos, Baden- Baden.

Wedgwood, Ruth 'United Nations peacekeeping operations and the use of force' (2001) 5 *Washington University Journal of Law & Policy* 69.

Weiner, Robert O. and **Aolain**, Fionnuala Ni 'Beyond the laws of war: Peacekeeping in search of a legal framework' (1996) 27 *Columbia Human Rights Law Review* 293.

Werle, Gerhard *Völkerstrafrecht* 2ed (2007) Mohr Siebeck, Tübingen.

Wessels, Johannes and Beulke, Werner *Strafrecht Allgemeiner Teil* 32ed (2002)
C.F. Müller, Heidelberg.

Wolfrum, Rüdiger (ed.) *United Nations: Law, policies and practice* Volume 2
(1995) C.H. Beck, München.

University of Cape Town

TABLE OF CONTENTS

1. Chapter I: Introduction	- 1 -
2. Chapter II: Setting the background: U. N. Peacekeeping	- 2 -
2.1 THE DEVELOPMENT OF UNITED NATION PEACEKEEPING	- 3 -
2.2 THE LEGAL BASIS OF PEACEKEEPING MISSIONS	- 5 -
2.3 PEACEKEEPING V. PEACE-ENFORCEMENT	- 7 -
2.4 THE CHARACTERISTICS OF AN U.N. PEACEKEEPING MISSION	- 9 -
2.5 THE DIFFERENT TYPES OF PEACEKEEPING MISSIONS	- 11 -
3. Chapter III: The development of the war crime of an intentional attack against U.N. peacekeepers	- 15 -
3.1 THE GENEVA CONVENTIONS (1949) AND THEIR ADDITIONAL PROTOCOLS (1979)	- 16 -
3.2 THE U.N. CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL	- 18 -
3.3 THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND	- 20 -
3.4 THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT	- 22 -
3.5 THE STATUTE FOR THE SPECIAL COURT FOR SIERRA LEONE	- 24 -
3.6 CONCLUSION	- 25 -
4. Chapter IV: The principle of specificity	- 25 -
4.1 PRELIMINARY STATEMENTS	- 26 -
4.2 THE PRINCIPLE OF SPECIFICITY IN NATIONAL CRIMINAL LAW	- 27 -
4.3 THE PRINCIPLE OF SPECIFICITY IN INTERNATIONAL CRIMINAL LAW	- 29 -
4.3.1 Derivation of the principle of specificity in international criminal law	- 29 -
4.3.2 Content of the principle of specificity in general international criminal law	- 31 -
4.3.3 Conclusion	- 35 -
4.4 THE PRINCIPLE OF SPECIFICITY IN THE ICC- STATUTE	- 36 -
4.5 CONCLUSION	- 37 -
4.6 EXCURSE: TRANSFERABILITY OF THE PRINCIPLE OF SPECIFICITY OF THE ICC-STATUTE TO THE SCSL-STATUTE	- 38 -
5. Chapter V: Specificity of war crimes against peacekeepers	- 39 -
5.1 <i>ELEMENTS OF CRIMES</i> (ARTICLE 9 ICC-STATUTE)	- 39 -
5.2 WAR CRIMES AGAINST PEACEKEEPERS IN JUDICIAL PRACTICE (CASE- LAW)	- 41 -
5.2.1 The Special Court for Sierra Leone	- 42 -
5.2.2 The International Criminal Court	- 43 -
5.3 THE SPECIFICITY OF ARTICLE 8 (2) (B) (III) AND (E) (III) OF THE ICC- STATUTE & 4 (B) OF THE SCSL- STATUTE	- 44 -
5.3.1 The specificity of the element 'attack'	- 44 -
5.3.2 The specificity of the term 'peacekeeping mission in accordance with the U.N. Charter'	- 49 -
5.3.2.1 Peacekeeping missions under a regional mandate	- 50 -
5.3.2.2 Conclusion	- 52 -
5.3.3 The element of disqualification of protection: 'as long as they are entitled to protection afforded to civilians under IHL'	- 53 -
5.3.3.1 The exception of use of force in self- defence situations	- 54 -
5.3.3.2 Use of force by single peacekeepers	- 58 -
5.3.3.3 Conclusion	- 60 -
6. Chapter VI: Finding	- 60 -

1. Chapter I: Introduction

The United Nations was established to promote international peace and security and has become the world's most important peacekeeper and safeguard of human rights.¹ Due to the increasing number of attacks against those who keep the peace in practice, the international community felt the urgent need for a better protection for its peacekeeping personnel.²

Therefore, attacks against peacekeepers have been incorporated in Article 8(2)(b)(iii) and (e)(iii) of the Statute of the International Criminal Court (ICC-Statute) as well as later in Article 4(b) of the Statute of the Special Court for Sierra Leone (SCSL-Statute).

The incorporation of attacks against peacekeepers in the ICC-Statute was not the only novelty. It is the first international criminal code that provides a general part which explicitly includes the principle of legality (Articles 22- 24 ICC-Statute) and its component of specificity (*nullum crime sine lege scripta*) (Article 22(2) ICC-Statute).

It is the aim of this paper to examine whether the war crimes of intentionally directed attacks against peacekeepers, in its current version, meets the requirement of specificity. This paper will argue that the notion of the principle of legality (*nullum crime sine lege*) in the ICC-Statute witnesses a development from a loose to a strict application of this principle, and its components. Due to the limitation of this paper, the discussion will focus on the most controversial elements of crime, namely 'attack', 'peacekeeping mission in accordance with the U.N. Charter' and 'as long as

¹ Gregory L. Naarden 'UN Intervention after the Cold War: Political will and the United States' (1994) 29 Tex. Int'l L.J. 231 at 232; Boutros Boutros-Ghali 'Beyond peacekeeping' (1992) 25 N.Y.U. J. Int'l L. & Pol. 113 at 113.

² Alice Gadler 'The protection of peacekeepers and international criminal law: Legal challenges and broader protection' (2010) 11(6) GLJ 585 at 585; Larry Maybee 'Attacks on United Nations peacekeepers: Can international law protect the blue helmets?' (2002) 25 NZAFLR at 25; Joseph P. Bialke 'United Nations operations: Applicable norms and the application of law of armed conflict' (2001) 50 A.F. L. Rev. 1 at 33; Kenneth S. Freeman 'Punishing attacks on United Nations peacekeepers: A case study of Somalia' (1994) 8 Emory Int'l Law Review 845 at 845; Ruth Wedgwood 'United Nations peacekeeping operations and the use of force' (2001) 5 WashUJLPoly 69 at 74.

they are entitled to the protection afforded to civilians under IHL.’ I will argue that the elements ‘attack’ and ‘as long as they are entitled to the protection afforded to civilians under IHL’ cannot be clearly defined and that their scope is controversy, which makes it impossible for the subject of law to determine whether certain behaviour has a criminal conduct. This paper will conclude that the current versions of Article 8(2)(b)(iii), (e)(iii) and Article 4(b) SCSL-Statute are consequently violating the principle of specificity, which makes them void. The conclusion will offer a possible lawful version.

2. Chapter II: Setting the background: U. N. Peacekeeping

In this chapter, I propose to first to analyze the political environment in which peacekeeping developed (2.1); then to define its’ legal bases (2.2); followed by a discussion concerning the distinction between peacekeeping and peace-enforcement mission (2.3) and a discussion of the most important characteristics of a peacekeeping operation (2.4). The chapter will end with the discussion of the different types of peacekeeping operations (2.5).

This is important to set a general background on peacekeeping. The discussion of the different characteristics and types of peacekeeping missions is further crucial to determine, whether the principle of specificity is violated by the provisions of Article 8(2)(b)(iii) and (e)(iii) ICC-Statute and Article 4(b) SCSL-Statute.

2.1 The development of United Nation Peacekeeping

The term *peacekeeping* was used for the first time during the Suez-Crisis in 1965.³ Today, peacekeeping is a growth industry and probably the most famous activity of the U.N.⁴ However peacekeeping missions were originally developed as an interim solution in times of political struggle, to serve as a technique for maintaining international peace and security.⁵

Due to the unstable political environment during the Cold War, shortly after its establishment in 1945,⁶ the United Nations (U.N.) had already become close to being incapable of action.⁷ The realization of one of its main goals, the maintenance of international peace and security as, set out in Article 1(1) of the U.N. Charter,⁸ was highly endangered.⁹

Chapter VII of the U.N. Charter empowers the Security Council (S.C.) to implement actions that are necessary to provide international peace and security (cf. Article 39 U.N. Charter).¹⁰ One of these actions is the establishment of peace-enforcement missions which are based on the use of military force as a means to re-establish

³ Franca Baroni *Völkerrechtliche Auswirkungen der Friedenssicherungspraxis der Vereinten Nationen nach Ende des Kalten Krieges* (1995) at 13.

⁴ Boutros Boutros-Ghali 'Empowering the United Nations' (1992) 71(5) *Foreign Affairs* 89 at 90; Marrack Goulding 'The evolution of United Nations peacekeeping' *International Affairs* (1993) 69(3) at 452; Duane Bratt 'Peace over justice: Developing a framework for UN peacekeeping operations in internal conflicts' (1999) 5 *Global Governance* 63 at 63.

⁵ Theo Neethling 'International peacekeeping trends: The significance of African contributions to African peacekeeping requirements' *South African Journal of Political Studies* (2004) 31(1) 49 at 49; Boutros-Ghali (note 4) at 89; Hans-Peter Gasser *Humanitäres Völkerrecht* (2007) at Chapter IV; Karin Rudolph, Peacekeeping forces, in: Rüdiger Wolfrum (ed.) *United Nations: Law, Policies and Practice* vol 2 (1995) at 962; Bruce Oswald 'Addressing the institutional law and order vacuum: Key issues and dilemmas for peacekeeping operations' (2006) 6 *NZAFLR* 1 at 3; Naarden (note 1) at 233; Michael W. Doyle and Nicholas Sambanis 'The UN record on peacekeeping operations' (2007) 62 *ILJ* 495 at 501.

⁶ Website of the United Nations, available at <http://www.un.org/en/aboutun/index.shtml> [Accessed 9 September 2011]; Elgin Clemons 'No peace to keep: Six and three- quarters peacekeepers' (1994) 26 *N.Y.U. J. Int'l L. & Pol.* 107 at 108; Saira Mohamed 'From keeping peace to building peace: A proposal for a revitalized United Nations Trusteeship Council' (2005) 105 *Colum. L. Rev.* 809 at 813; Freeman (note 2) at 847; Wedgwood (note 2) at 69.

⁷ LC Green 'Peace keeping under the UN' (200) 48 *Chitty's L.J. & Fam L. Review* 30 at 30; Wedgwood (note 2) at 70.

⁸ Article 1(1) U.N. Charter states that it is the main purpose of the U.N.: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."; Naarden (note 1) at 234.

⁹ Udo Fink *Kollektive Friedenssicherung* (1999) at 31; Jeremy Levitt 'The cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple Int'l & Comp. L.J.* 333 at 351; Bialke (note 2) at 1; Mohamed (note 6) at 813; Clemons (note 6) at 108; Boutros-Ghali (note 4) at 89; Baroni (note 3) at 9.

¹⁰ Roy S. Lee 'United Nations peacekeeping: Development and prospects' (1995) 28 *Cornell Int'l L.J.* at 619.

peace (Article 42 U.N. Charter).¹¹ However, the practice of such an assessment failed due to the opposing legal and political views of the permanent members of the S.C.¹² The required majority of at least nine votes -including the 'concurring' votes of all five permanent members (cf. Article 27 of the U.N. Charter)- was practically unachievable.¹³ From 1945 until 1990 a total of 279 resolutions of the S.C. were vetoed by a permanent member of the S.C. and thus prevented the U.N. from taking action.¹⁴ To fulfil functions under Chapter VII was therefore impossible.¹⁵ Peacekeeping missions have thus been established as a new tool to obtain compromise and give the S.C. at least a minimum ability to act.¹⁶ After the end of the Cold War,¹⁷ the S.C. regained its capacity to act under Chapter VII. Nevertheless peacekeeping operations remained important.¹⁸ The demand for peacekeeping missions is based on, besides other things, ethnical, nationalist and religious parameters that relate to the fight for control of a states territory by opposing parties.¹⁹ The increase of such conflicts during the 1990's led to a rapid increase of U.N. peacekeeping missions in both number and intricacy.²⁰ The increasing use of peacekeeping missions, in contrast to peace-enforcement missions, after the end of the Cold War, was based on the grounds that peacekeeping missions were easier to implement than its complementary function of peace-enforcement.²¹ This is due to the fact that peacekeeping operations are much less intrusive.²² In contrast to peace-enforcement missions, they are established with the consent of the conflicting parties and are limited to use of force in self-defence

¹¹ Rudolph (note 5) at 962.

¹² Green (note 7) at 30; Roy Lee (note 10) at 619; Goulding (note 4) at 452; Wedgwood (note 2) at 70; Naarden (note 1) at 234.

¹³ Wedgwood (note 2) at 70; Naarden (note 1) at 235; Bialke (note 2) at 6; Roy Lee (note 10) at 619.

¹⁴ Bialke (note 2) at 7.

¹⁵ Roy Lee (note 10) at 619; Bialke (note 2) at 6; Goulding (note 4) at 452; Wedgwood (note 2) at 70; Naarden (note 1) at 234.

¹⁶ Ricky J. Lee 'United Nations peacekeeping: Developments and prospects'(1995) 28 Cornell Int'l L.J. 619 at 180; Kelly A. Childers 'United Nations Peacekeeping forces in the Balkan wars and the changing role of peacekeeping forces in the post-cold war world' (1994) 8 Temple Int'l & Comp. L.J 117 at 118; Naarden (note 1) at 234; Roy Lee (note 10) at 619; Goulding (note 4) at 452; Bialke (note 2) at 7; Wedgwood (note 2) at 70; Mohamed (note 6) at 817; Bialke (note 2) at 7; Wedgwood (note 2) at 70; Mohamed (note 6) at 817; Ricky Lee (note 16) at 180.

¹⁷ *In December 1991, the republics of Russia, Belarus and Ukraine act to dissolve the Soviet Union.*

¹⁸ Baroni (note 3) at 12; Wedgwood (note 2) at 72; Roy Lee (note 10) at 619; Childers (note 16) at 117; Boutros-Ghali (note 4) at 90; Naarden (note 1) at 235; Doyle and Sambanis (note 5) at 501; Mohamed (note 6) at 809; Freeman (note 2) at 846.

¹⁹ Neethling (note 5) at 49.

²⁰ Childers (note 16) at 118; Neethling (note 5) at 49; Wedgwood (note 2) at 72; Naarden (note 1) at 242.

²¹ Doyle and Sambanis (note 5) at 499; Green (note 7) at 33.

²² Bratt (note 4) at 63; Doyle and Sambanis (note 5) at 500.

situations.²³ The lack of use of force makes peacekeeping missions more acceptable to the conflicting parties, because it shows the respect of the sovereignty of the member state (cf. Article 2(1) U.N. Charter) whereas peace-enforcement missions are likely to be seen as (military) interventions in internal matters (c.f. Article 2(7) U.N. Charter) by the host state.²⁴

The increased intricacy of peacekeeping missions was due to the new and additional tasks of peacekeeping missions, such as the protection of the delivery of humanitarian supplies for civilians.²⁵ We will turn to this in length later in this Chapter (2.5).

2.2 The legal basis of peacekeeping missions

The legal foundation for the establishment and implementation of peacekeeping missions has to be sought, as for all actions by the U.N., in the U.N. Charter.²⁶ The Charter does not explicitly mention nor authorize peacekeeping missions.²⁷ However, as a political instrument, the Charter is open to various legal interpretations.²⁸ This means that it is possible to legitimize peacekeeping missions as a non-coercive instrument.²⁹

One possibility for this is Article 1 of the U.N. Charter, which names the maintenance of international peace and security as its' main purpose.³⁰ Peacekeeping mission can be seen as one tool to achieve this goal. Article 24(1) of the U.N. Charter entrusts the S.C. with the primary responsibility and authorizes the S.C. to take the necessary action to provide the maintenance of international peace and security.³¹ It

²³ Cf. Gerhard Werle *Völkerstrafrecht* 2ed (2007) at 510; Bratt (note 4) at 63; Boutros-Ghali (note 4) at 90; Green (note 7) at 33; Naarden (note 1) at 232; Doyle and Sambanis (note 5) at 499.

²⁴ Ray Murphy 'United Nations peacekeeping in Lebanon and Somalia, and the use of force' (2003) 8 *J. Conflict & Sec. L.* 71 at 96; Bratt (note 4) at 63; Bialke (note 2) at 19; Naarden (note 1) at 236; Doyle and Sambanis (note 5) at 501; Clemons (note 6) at 110.

²⁵ Naarden (note 1) at 242.

²⁶ U.N. peacekeeping website, <http://www.un.org/en/peacekeeping/operations/pkmandates.shtml>, [Accessed 9 September 2011]; Bialke (note 2) at 7.

²⁷ U.N. peacekeeping website (note 26); Bialke (note 2) at 7; Murphy (note 24) at 71; Naarden (note 1) at 236; Mohamed (note 6) at 820; Ricky Lee (note 16) at 180; Clemons (note 6) at 108.

²⁸ Bialke (note 2) at 7.

²⁹ Boutros-Ghali (note 4) at 89; Bialke (note 2) at 7; Roy Lee (note 10) at 619; Ricky Lee (note 16) at 180; U.N. peacekeeping website (note 26).

³⁰ Bratt (note 4) at 64; Naarden (note 1) at 234.

³¹ Clemons (note 6) at 108; Ricky Lee (note 16) at 184; Rudolph (note 5) at 963.

is widely accepted that the measures mentioned in the Charter are not exhaustive³² in terms of the allowed tools to achieve the goals of the Charter.³³ Article 1 U.N. Charter can therefore be interpreted in the way that the U.N. (through the S.C.) is given the implied powers to implement peacekeeping missions.³⁴

This view was also derived by the International Court of Justice (ICJ) in its Advisory Opinion concerning 'Reparation for Injuries Suffered in the Service of the United Nations' in 1949, in which the Court stated that "[T]he Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to it in the course of its duties."³⁵ It is therefore possible to establish peacekeeping missions based on that general responsibility.³⁶

Also Chapter VI ('Pacific Settlements of Disputes') and Chapter VII ('Actions with Respect to Threats to the Peace, Breaches of Peace, and Acts of Aggression') of the U.N. Charter provide specific measure to achieve the purposes of Chapter I.³⁷

Peacekeeping operations can be associated with Chapter VI,³⁸ in particular with Article 33(1) which states that 'the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'³⁹ Since peacekeeping missions depend on the consent of the conflicting parties, they can be included under the term 'other peaceful means of their choice.'⁴⁰ However, due to the use of military personnel, peacekeeping missions are going beyond the powers expressively mentioned in Chapter VI.⁴¹

³² *In its first case Prosecutor v Dusko Tadic, the ICTY decided itself, that its establishment through the S.C. Res. 808 and 827 has been lawful. It based its founding on the broad (implied) powers of the S.C. under Chapter VII of the Charter (cf. ICTY Trial Chamber Prosecutor v. Dusko Tadic, Decision on the Defence Motion on Jurisdiction 10 August 1995 (IT-94-IAR72).*

³³ U.N. peacekeeping website (note 26); Bialke (note 2) at 7.

³⁴ Bialke (note 2) at 8; Naarden (note 1) at 236; Freeman (note 2) at 848.

³⁵ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 180.

³⁶ Naarden (note 1) at 234.

³⁷ Clemons (note 6) at 108; Mohamed (note 6) at 820.

³⁸ Rudolph (note 5) at 963; Wedgwood (note 2) at 70; Naarden (note 1) at 235; Doyle and Sambanis (note 5) at 501; Mohamed (note 6) at 820; Ricky Lee (note 16) at 185; Clemons (note 6) at 108.

³⁹ Bialke (note 2) at 7; Mohamed (note 6) at 820; Ricky Lee (note 16) at 183.

⁴⁰ Rudolph (note 5) at 963; Bialke (note 2) at 7; Ricky Lee (note 16) at 185.

⁴¹ Naarden (note 1) at 235; Mohamed (note 6) at 820; Ricky Lee (note 16) at 184.

According to Chapter VII, the U.N. has the authority to use military force,⁴² but peacekeeping missions fall short of Chapter VII enforcement measures since they are established with the consent of the parties and therefore lack the active use of force as the main tool.⁴³ Since both Chapters somehow relate to peacekeeping missions, but still do not really fit, peacekeeping missions have been referred to as Chapter VI½⁴⁴ missions.⁴⁵

Regardless on which of the above stated terms one wants to base the establishment of peacekeeping missions on, it can be concluded that the U.N. Charter does provide a legal foundation for their establishment.

2.3 Peacekeeping v. peace-enforcement

As the discussion above already indicated, is it crucial to distinguish between peacekeeping ('traditional' (Chapter VI ½)⁴⁶ and robust (Chapter VI ¾)⁴⁷) on the one hand, and peace-enforcement (Chapter VII) measures on the other.⁴⁸

Since neither the term peacekeeping nor the term peace-enforcement is mentioned explicitly in the Charter, they have to be distinguished through their content and purpose.⁴⁹

The main purpose of a peacekeeping mission is to monitor, or implement, a ceasefire in an area of conflict,⁵⁰ and thus make further diplomatic negotiations for maintaining possible peace.⁵¹ The use of force is traditionally limited to self-defence

⁴² Clemons (note 6) at 108.

⁴³ Ricky Lee (note 16) at 184; Naarden (note 1) 235; Mohamed (note 6) at 820.

⁴⁴ *The Term 'Chapter 6 ½' was first used by the former U.N. Secretary- General Dag Hammerskjöld.*

⁴⁵ James Sloan 'The use of offensive force in U.N. peacekeeping: A cycle of boom and bust?' (2007) 30 *Hastings Int'l & Comp. L. Rev.* 385 at 385; Mohamed (note 6) at 820; Ricky Lee (note 16) at 184; Clemons (note 6) at 108.

⁴⁶ *Traditional peacekeeping mission are only allowed to use force in classical self- defence situations, requiring an (imminent) armed attack against a person or property.*

⁴⁷ *In robust peacekeeping missions the term self-defence is extended to situations in which the fulfillment of the mandate is endangered.*

⁴⁸ Childers (note 16) at 118; Bialke (note 2) at 7; U.N. peacekeeping website (note 26); Wedgwood (note 2) at 70; Murphy (note 24) at 95; Sloan (note 45) at 390; Werle (note 23) at 510.

⁴⁹ Evan T. Bloom 'Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel' (1995) 89(3) *AJIL* 621 at 625; Tobias Darge *Kriegsverbrechen im nationalen und internationalen Recht* (2010) at 349; Sloan (note 45) at 389; Murphy (note 24) at 95.

⁵⁰ Werle (note 23) at 510; Bloom (note 49) at 625; Darge (note 49) at 349; Doyle and Sambanis (note 5) at 501.

⁵¹ Michael Cottier in: Otto Triffterer (ed) *Commentary on the Rome Statute of the ICC: Observers' notes* 2ed (2003), Article 8 at 36; Doyle and Sambanis (note 5) at 501; Werle (note 23) at 510.

situations, however as I will discuss under Chapter V (5.4.3), a broader authorization to use force seems to be the trend in more recent peacekeeping missions.⁵²

Peace-enforcement measures as Chapter VII operations (particularly Article 42 of the U.N. Charter) are implemented in situations where no peace is.⁵³ To be able to achieve its overarching goal to maintain international peace and security (Article 1 U.N. Charter), Chapter VII authorizes the U.N. to actively enforce peace before maintaining it.⁵⁴ This authorization explicitly involves the use of force by U.N. troops.⁵⁵ In this scenario, the possibility to use force makes sense, since without the authorization to create peace the U.N. would be incapable of achieving its main goal as soon as hostilities occur.⁵⁶ The final main difference between peacekeeping and peace-enforcement missions is that the latter does not require the consent of the conflicting parties.⁵⁷

According to that (theoretical) sight, this distinction might look clear, however, in practice the distinguishing line is not that easy to draw.⁵⁸ Particularly in the distinction between the authorization to use force, and the amount of force used in practice. One reason for this is that U.N. missions are not always characterized as one or the other in their authorizing resolutions.⁵⁹

Additionally, as the Special Court for Sierra Leone (SCSL) held in its judgments against members of the Resistance United Front (RUF) in terms of the distinction between peacekeeping and peace-enforcement, the actual and factual circumstances in each isolated case are more important than the formalistic referring to one Chapter.⁶⁰ This means that even if the U.N. mission is formally classified as a Chapter VI or Chapter VII mission, this is not always helpful because the actual amount of force used can differ from the authorization given in the resolution.⁶¹

⁵² Bialke (note 2) at 19; Doyle and Sambanis (note 5) at 501; Werle (note 23) at 510.

⁵³ Childers (note 16) at 119; Bialke (note 2) at 23; Naarden (note 1) at 232; Green (note 7) at 30; Naarden (note 1) at 232; Doyle and Sambanis (note 5) at 504; Sloan (note 45) at 390.

⁵⁴ Bialke (note 2) at 23; Green (note 7) at 30.

⁵⁵ Sandesh Sivakumaran 'War crimes before the Special Court of Sierra Leone' (2010) 8 J Int'l Crim Just 1009 at 1025; Childers (note 16) at 119, Bialke at (note 2) 10; Murphy (note 24) at 95; Sloan (note 45) at 390; Werle (note 23) at 510.

⁵⁶ Bialke (note 2) at 10.

⁵⁷ Sloan (note 45) at 392.

⁵⁸ Murphy (note 24) at 95; Sivakumaran (note 55) at 1026; Bialke (note 2) at 30.

⁵⁹ Sivakumaran (note 55) at 1026.

⁶⁰ Alexander Breitegger 'Aktuelle Beiträge der internationalen Strafjustiz zur Entwicklung des humanitären Völkerrechts'(2010) 11 ZiS 712 at 719.

⁶¹ Sivakumaran (note 55) at 1026; Bialke (note 2) at 30.

Besides this, the S.C. is able to change the mandate of an on-going mission and is hence able to turn a peacekeeping mission into a peace-enforcement mission and vice versa.⁶²

Neither is the authorization to use force alone, a crucial factor for the characterization of a mission, due to the fact that it is not clearly determined what the term self-defence embodies.⁶³ This is one crucial factor for the determination of the specificity of the examined articles. The full problem of the use of force in self-defence will be discussed in Chapter V (5.4.3.1).

2.4 The characteristics of an U.N. peacekeeping mission

Even though some of the characteristics of a peacekeeping mission have already been mentioned, this section will describe them at length. This is important because, firstly, it gives necessary background for the further discussion and, secondly, a full discussion will give a basis to refer to during the discussion of the specificity of attacks against peacekeepers (Chapter V).

An internationally agreed definition of peacekeeping does not exist.⁶⁴ However, there are three main and widely accepted characteristics (the so called 'Holy Trinity'), which a mission has to fulfil to be a peacekeeping operation: consent, impartiality and use of force only in self-defence.⁶⁵

The first characteristic is that the consent of the conflicting parties is required.⁶⁶ This derives from Article 2 of the U.N. Charter which states that "(T)he Organisation is based on the principle of the sovereign equality of all its Members,"⁶⁷ and that "(N)othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the

⁶² Bialke (note 2) at 30.

⁶³ Sivakumaran (note 55) at 1026; Murphy (note 24) at 83.

⁶⁴ Matthias Herdegen *Völkerrecht* 6ed (2007) at 294; Murphy (note 24) at 71, Rudolph (note 5) at 961; Goulding (note 4) at 452; Childers (note 16) at 119.

⁶⁵ Abu Garda Decision on the Confirmation of Charges at 71; Naarden (note 1) at 239; Rudolph (note 5) at 961; Goulding (note 4) at 452; Childers (note 16) at 119; Herdegen (note 64) at 294; Sloan (note 45) at 386.

⁶⁶ Bialke (note 2) at 13; Rudolph (note 5) at 957; Boutros-Ghali (note 4) at 90; Childers (note 16) at 119; Bratt (note 4) at 63; Wedgwood (note 2) at 71; Oswald (note 5) at 6; Naarden (note 1) at 232; Doyle and Sambanis (note 5) at 499.

⁶⁷ Article 2(1) U.N. Charter; Bialke (note 2) at 19; Bratt (note 4) at 65; Naarden (note 1) at 236; Doyle and Sambanis (note 5) at 501; Mohamed (note 6) at 835.

present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”⁶⁸ From this follows that the S.C. is not authorized to deploy armed forces in a sovereign state other than for enforcement measures.⁶⁹

The consent is, in general, formalized with a Status of Force Agreement (SOFA) in which the host nation agrees to afford the peacekeeping troops jurisdictional immunity from the host nation regarding national criminal matters, and to allow the troops freedom of movement.⁷⁰ However, it is worth noting that the consent can be withdrawn at any time.⁷¹

The second characteristic is impartiality.⁷² To be able to mediate between the parties the U.N. needs to be seen as a neutral third party.⁷³ This means that peacekeepers are not allowed to act in advance of the interests of one party.⁷⁴ If U.N. troops are taking sides they are more likely peace-enforcement troops, established to stop a determined aggressor-party.⁷⁵

The third characteristic of a peacekeeping mission is that the troops are only authorized to use the minimum amount of force necessary.⁷⁶ This means that troops are only allowed to use force in self-defence situations.⁷⁷ Nonetheless it is worth noting at this point that it is uncertain what situations are characterized as self-

⁶⁸ Article 2(7) U.N. Charter; Bialke (note 2) at 19; Bratt (note 4) at 65; Naarden (note 1) at 236; Mohamed (note 6) at 835; Clemons (note 6) at 110.

⁶⁹ Bialke (note 2) at 13.

⁷⁰ Robert O. Weiner and Fionnuala Ni Aolain ‘Beyond the laws of war: Peacekeeping in such a legal framework’ (1996) 27 *Colum. Hum. Rts. L. Rev.* 293 at 308; Freeman (note 2) at 848; Maybee (note 2) at 31; Bialke (note 2) at 13.

⁷¹ Childers (note 16) at 119; Rudolph (note 5) at 957; Bialke (note 2) at 13; Naarden (note 1) at 241.

⁷² Oswald (note 5) at 6; Wedgwood (note 2) at 71; Childers (note 16) at 117; Boutros-Ghali (note 4) at 90; Goulding (note 4) at 454; Bialke (note 2) at 13; Green (note 7) at 35; Murphy (note 24) at 712; Naarden (note 1) at 239; Doyle and Sambanis (note 5) at 499.

⁷³ Rudolph (note 5) at 964; Bialke (note 2) at 19; Doyle and Sambanis (note 5) at 501.

⁷⁴ Wedgwood (note 2) at 71; Childers (note 16) at 117; Boutros-Ghali (note 4) at 90; Goulding (note 4) at 454; Green (note 7) at 35; Doyle and Sambanis (note 5) at 500.

⁷⁵ Article 39 U.N. Charter states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 [measures not involving force] and 42 [demonstrations, blockade, and other operations by air, sea, or land forces], to maintain or restore international peace and security; Bialke (note 2) at 14; Doyle and Sambanis (note 5) at 501.

⁷⁶ Childers (note 16) at 119; Boutros-Ghali (note 4) at 90; Goulding (note 4) at 455; Bialke (note 2) at 20; Maybee (note 2) at 27; Oswald (note 5) at 6; Murphy (note 24) at 72; Naarden (note 1) at 239; Doyle and Sambanis (note 5) at 499.

⁷⁷ Murphy (note 24) at 723; Childers (note 16) at 119; Goulding (note 4) at 455; Bialke (note 2) at 4; Maybee (note 2) at 27; Naarden (note 1) at 239.

defence situations.⁷⁸ Since this issue will be dealt with at length later (Chapter V (5.4.3.1)) further remarks will not be made at this point.

In light of the above mentioned characteristics, a definition of peacekeeping mission could be: 'Field operations established with the consent of the parties concerned, to help control and resolve conflicts between them with military personnel acting impartially between the parties and using force to the minimum extent necessary.'⁷⁹

Even though all peacekeeping missions have the above characteristic in common, they largely vary in their tasks and mandates, as the next section explains.

2.5 The different types of peacekeeping missions

To be successful, a peacekeeping mission has to be constructed in due consideration of the nature of the conflict (interstate or intrastate), the parties involved (governments, rebels, a people, or social groupings) and the level of stability of the negotiated ceasefire agreement.⁸⁰ Therefore peacekeeping missions can vary in their tasks, and so too the circumstances that generate them.⁸¹ This section will discuss the different types of peacekeeping missions with consideration to their tasks. It is crucial to be aware of the different types of missions, since it is the variety of different tasks that creates the problem of determining the specificity of the war crime in question. As will be argued in detail in Chapter V (5.4.3.1), the establishment of new tasks leads in turn to the authorization of a further use of force in order to fulfil these tasks, and to an extension of the classical definition of self-defence, now including self-defence, to defend the mandate.⁸² This in return, together with other factors, can be recognized as one crucial factor for a possible violation of the principle of specificity in Article 8(2)(b)(iii) and (e)(iii) ICC-Statute, respectively Article 4(b) SCSL-Statute.

⁷⁸ Goulding (note 4) at 455

⁷⁹ *Idem*.

⁸⁰ Cottier (note 51) 37; Bialke (note 2) at 9; Boutros-Ghali (note 4) at 91; Doyle and Sambanis (note 5) at 508.

⁸¹ Green (note 7) at 30; Bialke (note 2) at 9; Doyle and Sambanis (note 5) at 508.

⁸² Roy Lee (note 10) at 624; Boutros-Ghali (note 4) at 91; Goulding (note 4) at 459; Doyle and Sambanis (note 5) at 500; Mohamed (note 6) at 810.

The United Nations Emergency Force (UNEF), which was established in 1956, was arguably the first⁸³ U.N. peacekeeping mission.⁸⁴ Its purpose was to supervise the ceasefire being negotiated between Egypt and Israel during the Suez Crisis.⁸⁵ This example by the UNEF shows the mandate of traditional peacekeeping forces, which included military observers and lightly-armed peacekeeping forces.⁸⁶

Since the 1990's, the types of demands for U.N. peacekeeping missions have changed drastically.⁸⁷ Besides their original military tasks, peacekeeping missions today have to fulfil a huge variety of significant civilian functions.⁸⁸ This development can be traced back to the increasing prevalence of internal, rather than inter-, state conflicts.⁸⁹ Civil wars are predestined to establish civilian functions for a peacekeeping mission since peace agreements in internal conflicts almost always involve some kind of political, social and economic restructuring of the state.⁹⁰ Such tasks include the bringing home and resettlement of refugees, the observing, verifying and organization of elections, the monitoring of local police forces and ensuring respect for the enforcement of human rights in the conflict zone by the parties involved in the conflict.⁹¹

Basically, U.N. peacekeeping missions can be categorized by dividing them in to five groups, based on the different functions:⁹² (1) traditional, (2) multidimensional, (3) preventive (4) post-conflict peace-building and (5) truce-enforcement missions:⁹³

⁸³Some authors argue that *The United Nations Supervision Organisation (UNTSO) in 1948 was the first peacekeeping mission* (c.f. Ricky Lee (note 16) at 183; Clemons (note 6) at 113). *But this mission was limited to (unarmed) military observance only; and is thus more a 'peace observing mission' instead of a 'peacekeeping' mission (which are lightly armed)* (c.f. Doyle and Sambanis (note 5) at 499, Rudolph (note 5) at 957.)

⁸⁴ UN peacekeeping website (note 25); Goulding (note 4) at 452; Doyle and Sambanis (note 5) at 499.

⁸⁵ Bialke (note 2) at 9; Goulding (note 4) at 452; Roy Lee (note 10) at 620; Wedgwood (note 2) at 70; Ricky Lee (note 10) at 183; Clemons (note 6) at 118.

⁸⁶ Rudolph (note 5) at 957; Roy Lee (note 10) at 621; Bialke (note 2) at 9; Naarden (note 1) at 232; Doyle and Sambanis (note 5) at 495.

⁸⁷ U.N. peacekeeping website (note 25); Goulding (note 4) at 456; Childers (note 16) at 117; Wedgwood (note 2) at 73; Naarden (note 1) at 242; Doyle and Sambanis (note 5) at 495; Ricky Lee (note 16) at 182.

⁸⁸ Goulding (note 4) at 456; Bratt (note 4) at 64; Oswald (note 5) at 4; Doyle and Sambanis (note 5) at 497; Clemons (note 6) at 120; Mohamed (note 6) at 818.

⁸⁹ Doyle and Sambanis (note 5) at 495; Roy Lee (note 10) at 624; Goulding (note 4) at 456; Mohamed (note 6) at 810.

⁹⁰ Goulding (note 4) at 456; Oswald (note 5) at 4; Doyle and Sambanis (note 5) at 495; Mohamed (note 6) at 810; Clemons (note 6) at 121.

⁹¹ Green (note 7) at 31; Boutros-Ghali (note 4) at 92; Oswald (note 5) at 4; Doyle and Sambanis (note 5) at 495; Mohamed (note 6) at 810.

⁹² Goulding (note 4) at 456; Roy Lee (note 10) at 622.

⁹³ Roy Lee (note 10) at 622; Rudolph (note 5) at 957.

Traditional peacekeeping missions are largely military in task and composition.⁹⁴ Their main task is to monitor and supervise the realization of a negotiated ceasefire and to provide a buffer zone between the conflict parties.⁹⁵ The goal is reached if conditions are created in which a lasting settlement can be negotiated.⁹⁶ Even though traditional peacekeeping missions are supposed to be interim arrangements, they can last for a very long time, sometimes more than over 40 years, such as in the case of UNTSO in the Middle East.⁹⁷

The second type of peacekeeping mission is the multidimensional peacekeeping operation.⁹⁸ These are concerned with civilian issues arising out of a conflict, such as collapsing economics, natural disasters and failure of governance.⁹⁹ Like the traditional type, these missions are based on a ceasefire already agreed by the conflicting parties.¹⁰⁰ They are entrusted with new tasks like demobilizing troops, the destruction of weapons, rebuilding infrastructure, training and monitoring national civil police, repatriating and rehabilitating refugees and displaced persons, safeguarding the delivery of humanitarian supplies and verifying respect for human rights.¹⁰¹ Specifically the U.N. missions in Cambodia, as well as in Namibia, are examples for the first interactions between military observers, lightly armed forces and civilian police during a peacekeeping mission.¹⁰²

The third type is preventive missions.¹⁰³ Their purpose is to prevent the break out of hostilities to begin with.¹⁰⁴ Their challenge is that they depend on an early exposure

⁹⁴ Naarden (note 1) at 242; Doyle and Sambanis (note 5) at 499; Goulding (note 4) at 456; Roy Lee (note 10) at 623.

⁹⁵ Bratt (note 4) at 64; Roy Lee (note 10) at 623; Goulding (note 4) at 457; Wedgwood (note 2) at 70; Weiner and Aolain (note 70) at 318; Naarden (note 1) at 232; Doyle and Sambanis (note 5) at 499.

⁹⁶ Goulding (note 4) at 457.

⁹⁷ *Idem*.

⁹⁸ Roy Lee (note 10) at 624; Wedgwood (note 2) at 73; Oswald (note 5) at 12; Doyle and Sambanis (note 5) at 502.

⁹⁹ Bratt (note 4) at 64; Roy Lee (note 10) at 624; Wedgwood (note 2) at 73; Weiner and Aolain (note 70) at 318; Oswald (note 5) at 4; Doyle and Sambanis (note 5) at 502.

¹⁰⁰ Goulding (note 4) at 457; Oswald (note 5) at 12; Doyle and Sambanis (note 5) at 502.

¹⁰¹ Green (note 7) at 31; Goulding (note 4) at 457; Roy Lee (note 10) at 624; Wedgwood (note 2) at 73; Weiner and Aolain (note 70) at 318; Oswald (note 5) at 6; Naarden (note 1) at 232; Doyle and Sambanis (note 5) at 502; Mohamed (note 6) at 819.

¹⁰² Naarden (note 1) at 242; Roy Lee (note 10) at 621; Doyle and Sambanis (note 5) at 500; Mohamed (note 6) at 818.

¹⁰³ Roy Lee (note 10) at 625; *the idea of preventative peacekeeping was established by Mikhail Gorbachev, and was adopted by the former U.N.S.G) Boutros-Ghali in his report 'An Agenda for Peace'*.

¹⁰⁴ Roy Lee (note 10) at 625.

to an emerging conflict.¹⁰⁵ A preventive peacekeeping mission operates only on the demanding party's territory.¹⁰⁶ The mission's main purpose is to increase the political pressure on a potential aggressor.¹⁰⁷ An example for preventive peacekeeping is the presence of the U.N. in the Former Yugoslav Republic of Macedonia, along its borders with Albania and the Federal Republic of Yugoslavia (Serbia and Montenegro).¹⁰⁸

The fourth type is post-conflict peace-building.¹⁰⁹ Since they are likely to involve force, they are a mixture of peacekeeping and peace-enforcement and it is arguable if it belongs in this list.¹¹⁰ They occur when a government has collapsed, the collapse is imminent, or if there is no more law enforcement at all.¹¹¹ The duties of the U.N. forces in such a situation involve the demobilization and disarmament of troops, supplying humanitarian relief, ensuring the truce and implementing a program for reconciliation and the rebuilding of administrative and economic structures.¹¹² Examples for such post-conflict peace-building missions are the U.N. operation in the DRC in the 1960s and in Somalia.¹¹³

The final type is called truce-enforcement and, like the latter type, it is not purely peacekeeping.¹¹⁴ This type shows the thin line between peacekeeping and peace-enforcement.¹¹⁵ As with traditional peacekeeping, ceasefire-enforcement depends on an already negotiated truce. Additionally, the truce agreement authorizes U.N. troops to use armed force against any party which is violating the negotiated agreement.¹¹⁶ Therefore, peacekeepers are allowed to open fire in situations other than self-defence.¹¹⁷ The difference to an enforcement mission under Chapter VII is, that the given consent of the parties.

¹⁰⁵ *Idem*.

¹⁰⁶ Goulding (note 4) at 457.

¹⁰⁷ *Ibid* at 456.

¹⁰⁸ Roy Lee (note 10) at 625; Goulding (note 4) at 457.

¹⁰⁹ Wedgwood (note 2) at 83; Doyle and Sambanis (note 5) at 497; Mohamed (note 6) at 810.

¹¹⁰ Goulding (note 4) at 459; Mohamed (note 6) at 810.

¹¹¹ Oswald (note 5) at 2; Mohamed (note 6) at 819; Goulding (note 4) at 459.

¹¹² Wedgwood (note 2) at 73; Mohamed (note 6) at 819; Oswald (note 5) at 2; Doyle and Sambanis (note 5) at 497.

¹¹³ Bratt (note 4) at 64; Goulding (note 4) at 459; Oswald (note 5) at 5; Murphy (note 24) at 72; Clemons (note 6) at 122.

¹¹⁴ Mohamed (note 6) at 810; Doyle and Sambanis (note 5) at 498.

¹¹⁵ Bratt (note 4) at 64; Goulding (note 4) at 459.

¹¹⁶ Doyle and Sambanis (note 5) at 500; Goulding (note 4) at 459.

¹¹⁷ Goulding (note 4) at 459.

The different types of peacekeeping missions highlight two crucial things.

First, as argued under (2.3), it is hard to distinguish peacekeeping from peace-enforcement measures.

Secondly, and probably even more importantly, it highlights that peacekeeping missions went through a huge development during the last few decades. Their tasks vary greatly and contain much more tasks than the early traditional missions. Due to this development, the authorities of peacekeepers also developed through their Rules of Engagement. From a practical point of view, it is obvious that the assignment of further tasks, like the protection of humanitarian supplies affords the authority to take action to fulfil such a task. This is particularly interesting in terms of the definition of self-defence -especially in multidimensional and humanitarian relief missions, and as will be discussed later in more detail (Chapter V (5.4.3.1)), this development is crucial to determine, if the war crime against peacekeeping personnel meets the requirement of the principle of specificity.

3. Chapter III: The development of the war crime of an intentional attack against U.N. peacekeepers

This chapter describes the development of the war crime of an attack against U.N. peacekeeping personnel in international law. This is important because the legal interpretation of Articles 8(2)(b)(iii) and (e)(iii) ICC-Statute and Article 4(b) SCSL-Statute, relies on the first provisions, which explicitly prohibit attacks against peacekeepers. Determining the specificity of the elements is not possible without them.

The international legal regime for the protection of peacekeepers includes *inter alia* the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (IPP Convention), the Convention against Taking of Hostages (the Hostage Convention), The Convention on the Privileges and Immunities of the United Nations (the Convention on Privileges and Immunities), the Convention on the Safety of United Nations and Associated Personnel (the Safety Convention), the Draft Code of Crimes against Peace and

Security of Mankind, the Statute of the International Criminal Court and the Statute of the Special Court for Sierra Leone.¹¹⁸ Due to the limitation of this paper, it is not possible to discuss all of these instruments. Neither the IPP Convention nor the Hostage Convention or the Convention on Privileges and Immunities explicitly mentions peacekeepers. Peacekeepers are just protected through their role as U.N. Personnel or in respect to the Hostage convention, as persons. They thus add nothing to the discussion of the interpretation of the specific war crime against peacekeepers, and it is legitimate, to exclude them from the further discussion. Nevertheless, as the most important instruments the Geneva Conventions and their Additional Protocols (3.1), the U.N. Convention on the Safety of United Nations and Associated Personnel (3.2), the Draft Code of Crimes against the Peace and Security of Mankind (3.3), the ICC-Statute (3.4) as well as the SCSL-Statute (3.5) will be discussed. Those instruments are either explicitly addressing attacks against peacekeepers or they are an important tool for the interpretation of the wording of the war crime.

3.1 The Geneva Conventions (1949) and their Additional Protocols (1979)

The four Geneva Conventions and their Additional Protocols (AP) I¹¹⁹ and II¹²⁰ are addressing the protection of non-combatants armed conflicts.¹²¹ Thus they are fundamental part of International humanitarian law (IHL). According to common Article 2¹²² the Geneva Conventions and AP I apply in the context of an international armed-conflict. However, their application in internal conflicts is today undoubted.¹²³ The distinction between civilians and combatants is the key issue of the Geneva Law

¹¹⁸ Cf. Maybee (note 2) at 26.

¹¹⁹ *Supplements the four Geneva Conventions and lays down rules on "how" to fight.*

¹²⁰ *First international instrument that lays down detailed rules of humanitarian law applicable in non-international armed conflicts.*

¹²¹ William A. Schabas *An introduction to the International Criminal Court* 2ed (2004) at 52.

¹²² *Articles 2 of all four Geneva Conventions have the same wording, they are thus referred to as 'common Article 2'.* Article 2 (1): "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".

¹²³ Schabas (note 121) at 53; *in its Res. 955 concerning the establishment of the ICTR the S.C. first acknowledged its application in non-international armed conflicts (c.f. UN Doc. S/RES/955, Annex, Art.4); this was endorsed by the ICTY Appeals Chamber in Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (IT-94-1-AR72).*

(including the AP). The Geneva Law does not explicitly mention peacekeepers.¹²⁴ Whether peacekeepers are protected by the rules and regulations of IHL, especially the Geneva Conventions and their AP has been a controversial subject. An explicit debate goes beyond the scope of this paper. However, the heart of the controversy lies in the role of peacekeepers as military personnel on the one hand, and their (civilian like) non-participation in hostilities on the other. It therefore seems correct that peacekeepers are classified in between and are thus entitled to the same protection as civilians, as long as they do not take part in the hostilities.¹²⁵ This argumentation is congruent to Article 50 of the AP I, which states that ‘a civilian is any person who does not belong to the categories of prisoners of war or of armed forces of a party of the conflict.’¹²⁶ This means that peacekeepers are protected by Geneva Law, especially by the Fourth Geneva Convention (relative to the Protection of Civilian Persons in Times of War), Common Article 3 of the Geneva Conventions (applying to non- international conflicts) as well as Articles 37(1)(d)¹²⁷ and 38¹²⁸ of the AP I.¹²⁹ Article 72 AP II is limited to personnel of humanitarian missions and is thus not applicable to peacekeeping missions.¹³⁰

It can be concluded that the Geneva Conventions and their AP are interpreted in the way, that they do provide protection for peacekeepers. However, due to the lack of an explicit mentioning, the Geneva Law does not contribute anything to the establishment of the war crimes of attacks against peacekeepers. However, it remains an important tool of interpretation of undefined elements of crime and especially to elements that explicitly refer to IHL under Chapter V.

¹²⁴ Werle (note 23) at 509.

¹²⁵ Gadler (note 2) at 589; Freeman (note 2) at 855.

¹²⁶ Bialke (note 2) at 334; Bloom (note 49) at 624.

¹²⁷ *All four Geneva Conventions of 1949 use identical language in their Article 3, This is why they are known as ‘Common Article 3.*

¹²⁸ *Article 38 states: “[I]t is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.” Article 37 (1) states that It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy and its subparagraph (d) clarifies that: “the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.”*

¹²⁹ Freeman (note 2) at 855.

¹³⁰ Werle (note 23) at 509.

3.2 The U.N. Convention on the Safety of United Nations and Associated Personnel

As just mentioned, the rules and regulations of the Geneva Conventions and their AP do not explicitly forbid attacks against peacekeepers.¹³¹ Consequently before the adoption of this convention, attacks against U.N and associated personnel were punished, *inter alia*, as murders and assaults under the criminal law of the host state.¹³² Since host nations usually find themselves in an extraordinary situation of internal instability, law enforcement capabilities are often unsatisfactorily and insufficient. Hence the attacks against peacekeepers lacked a legal consequence in most cases.¹³³ This was an unacceptable condition for the international community.¹³⁴ It led to the adoption of the U.N. Convention on the Safety of United Nations and Associated Personnel in 1994 (hereinafter 'Safety Convention').¹³⁵ The Safety Convention provides for the prosecution and extradition of persons accused of attacking U.N. peacekeepers and other persons operating under a mandate of the U.N.¹³⁶

For our purposes, the Articles 2, 7 and 9 of the Safety Convention are of special interest.

Article 2(1) states that "the Convention applies in respect of United Nations and associated personnel and United Nations operations, as defined in Article 1."¹³⁷ Article 1 of the Convention defines the element of a 'United Nation operation' as "operations" established by the "competent organ of the United Nations in

¹³¹ Bloom (note 49) at 621; Maybee (note 2) at 28; Werle (note 23) at 509.

¹³² Maybee (note 2) at 27; Bloom (note 49) at 622; Freeman (note 2) at 847.

¹³³ Maybee (note 2) at 27; Bloom (note 49) at 622; Oswald (note 5) at 1; Freeman (note 2) at 847; Gadler (note 2) at 587.

¹³⁴ Michaela Schneider- Enk *Der völkerrechtliche Schutz humanitärer Helfer in bewaffneten Konflikten* (2008) at 157; Bloom (note 49) at 621; Maybee (note 2) at 25; Gadler (note 2) at 587; Werle (note 23) at 510.

¹³⁵ Bialke (note 2) at 34; Gadler (note 2) at 587; Bloom (note 49) at 621; Maybee (note 2) at 28; Weiner and Aolain (note 70) at 331; Werle (note 23) at 510.

¹³⁶ Bloom (note 49) at 621; Gadler (note 2) at 587; Maybee (note 2) at 28; Weiner and Aolain (note 70) at 331.

¹³⁷ Article 2(1) U.N. Convention on the Safety of United Nations and associated Personnel; Schneider-Enk (note 134) at 158; Maybee (note 2) at 29.

accordance with the Charter of the United Nations and conducted under United Nations authority and control."¹³⁸

Article 7 stresses that "United Nations and associated personnel, their equipment and premises shall not be made the object of an 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 Nation personnel."¹³⁹

And Article 9 sets out that the "crimes against United Nations and associated personnel include "murder, kidnapping or other attacks upon the person or liberty of any United Nations or associated personnel" as well as "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."¹⁴⁰

To avoid an undermining of the laws of war, it was argued that the Safety Convention should not be applied in cases where U.N. troops act as combatants.¹⁴¹ This controversy was rooted in the fact that the laws of war rely, for their effectiveness, on the fact that the forces of all parties involved in an armed conflict are subject to the same legal norms.¹⁴² To criminalize the attack on just one of the parties (the U.N. forces) would demoralize the whole concept and international acceptance of the laws of war including the Geneva Conventions.¹⁴³ Out of this consideration, Article 2(2) of the Safety Convention was drafted pursuant to which the Safety Convention "shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."¹⁴⁴

¹³⁸ Article 1 of the U.N. Convention on the Safety of United Nations and associated Personnel; SCSL Trial Chamber I, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* Judgment of 2 March 2009 (SCSL-04-15 T) (RUF-Case) at 231[hereinafter RUF Judgment]; Maybee (note 2) at 29.

¹³⁹ Gadler (note 2) at 587; Maybee (note 2) at 28; Doyle and Sambanis (note 5) at 500.

¹⁴⁰ Maybee (note 2) at 28; Gadler (note 2) at 587.

¹⁴¹ Bialke (note 2) at 43; Bloom (note 49) at 625; Weiner and Aolain (note 70) at 331.

¹⁴² Gadler (note 2) at 590; Bialke (note 2) at 43.

¹⁴³ Bloom (note 49) at 625.

¹⁴⁴ Article 2(2) U.N. Convention on the Safety of United Nations and associated Personnel; Schneider-

As will be discussed under Chapter V (5.4.3), the content of such a clause gives rise to a highly controversial discussion, namely under what circumstances U.N. personnel is actually engaged as combatants and thus loses protection under international humanitarian law (IHL). As discussed in Chapter II (2.5), the tasks of peacekeeping missions have developed from traditional mandates to mandates which are close to being peace-enforcement missions in practice (cf. post-conflict peace building, truce-enforcement missions). Relying on this development, many peacekeepers are close to being or are actually combatants. The distinction in is hard to draw in practice and leads, as will be pointed out, to legal uncertainties whether or not peacekeepers are protected as non-combatants or otherwise.¹⁴⁵

Nevertheless, the Safety Convention was the cornerstone on the development of the war crime of attacks against peacekeeping personnel as we know it today and is still one of the main sources when it comes to defining the elements and scope of this crime.

3.3 The Draft Code of Crimes against the Peace and Security of Mankind

Two years after the adoption of the Safety Convention, the Draft Code of Crimes against the Peace and Security of Mankind was adopted.¹⁴⁶

This draft has been in the making since 1947.¹⁴⁷ In the aftermath of World War II, after the Nuremberg Trials, the General Assembly (G.A.) of the U.N. demanded the International Law Commission (ILC) to draft a Code stating the offences against the peace and security of mankind and to put together the principles of international law recognized in the Charter of the Nuremberg Tribunals.¹⁴⁸ The first Draft Code of 1991 was referred back to the ILC and, five years later in 1996, the ILC adopted a

Enk (note 134) at 158; Gadler (note 2) at 588; Bialke (note 2) at 43; Weiner and Aolain (note 70) at 331; Mohamed (note 6) at 835.

¹⁴⁵ Jean Allain and John R.W.D. Jones 'A patchwork of norms: A commentary on the 1996 Draft Codes of Crimes against the Peace and Security of Mankind' (1997) 1 Eur. J. Int'l L. 100 at 102.

¹⁴⁶ Cottier (note 51) 30; Werle (note 23) at 509.

¹⁴⁷ Michael E. Kurth *Das Verhältnis des Internationalen Strafgerichtshofes zum UN Sicherheitsrat* (2006) at 25; Allain and Jones (note 145) at 100; Cherif M Bassiouni (ed) *International Criminal Law* vol 2, 3ed (2008) at 131.

¹⁴⁸ Allain and Jones (note 145) at 100; Werle (note 23) at 14.

new text of draft articles constituting the Code of Crimes against the Peace and Security of Mankind (hereinafter referred to as the 'Draft Code').¹⁴⁹ The General Assembly of the United Nations decided not to adopt it as a treaty or declaration.¹⁵⁰ Instead, it was sent to the Preparatory Committee of the ICC.¹⁵¹ Unfortunately, at its first session the ICC-Preparatory Committee did not have the final text and at its second session the Draft Code was not discussed.¹⁵² However many provisions of the Draft Code were unchanged adopted in the ICC-Statute, hence it has become the fundament of the ICC-Statute including the Rules of Evidence and Procedure as well as the *Elements of Crimes*. Today, the Draft Code is one of the main sources for interpreting the Statute.

In its Article 19(1), the Draft Code contains an offense entitled 'Crimes against United Nations and associated personnel'.¹⁵³

Article 19(2) contains a similar provision like Article 2(2) of the Safety Convention. It is stated that "this article shall not apply to a United Nations operations 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."¹⁵⁴

One main characteristic of the Draft Code is the requirement that a crime has to be committed *systematically* or on a *large-scale*.¹⁵⁵ This requirement can be traced back to the political circumstances shortly after WW II. It therefore relates to the view that an offence must meet an additional element, making it so grave under international law that it is able *to threaten mankind*.¹⁵⁶ This criteria is the reason why the Draft Code alone does not ensure sufficient protection from a peacekeeping point of view,

¹⁴⁹ Kurth (note 147) at 25; Allain and Jones (note 145) at 100; Bassiouni (note 147) at 131; Werle (note 23) at 14.

¹⁵⁰ Martin C. Ortega 'The ILC adopts the Draft Code of Crimes against the Peace and Security of Mankind' (1997) 1 Max Planck Yearbook of United Nations Law 283 at 316.

¹⁵¹ Ortega (note 150) at 316.

¹⁵² Christopher Keith Hall 'The first two sessions of the UN Preparatory Committee on the establishment of an International Criminal Court' (1997) 91(1) AJIL 177 at 180.

¹⁵³ Cottier (note 51) at 30; Werle (note 23) at 510; Ortega (note 150) at 310.

¹⁵⁴ Article 19(2) of the Draft Code of Crimes against Peace and Security of Mankind; Werle (note 23) at 510.

¹⁵⁵ Lindsay Moir, Non- international armed conflict and guerilla warfare, in: M. Cherif Bassiouni (ed.) *International Criminal Law* vol 2, 3ed (2008) at 307; Allain and Jones (note 145) at 102.

¹⁵⁶ Allain and Jones (note 145) at 102.

since it is not only *systematic* or *large-scale* attacks on peacekeepers that need to be punishable internationally, but every attack. The protection of peacekeepers under the Draft Code is therefore not adequate, and further protection is required. Despite its deficiency to protect individuals in single cases of an attack, the Draft Code is another important source for the interpretation of the war crime of attacks against U.N. personnel.

3.4 The Statute of the International Criminal Court

The war crime of attacks against peacekeeping personnel was established for the first time in the ICC-Statute.¹⁵⁷ The establishment of the specific war crime had to be endorsed, even though a similar prohibition was already contained in the Safety Convention, because the number of states which are parties to the Safety Convention is quite limited.¹⁵⁸ Furthermore, the Safety Convention is only binding for States and not, for example, for non-state armed groups.¹⁵⁹ Finally, the implementation of the Safety Convention is subject to the will of States since it relies on enforcement through national courts.¹⁶⁰

The ICC-Statute came into force in 2002.¹⁶¹ It is composed of thirteen parts including 128 articles and entrusts the ICC with the jurisdiction over four categories of the most serious crimes (core crimes) of concern to the international community as a whole, namely genocide, crimes against humanity, war crimes and aggression.¹⁶² The definitions of crimes are set out in Articles 6 to 8 of the Statute, and are supplemented by the *Elements of Crimes* and general international law (mostly

¹⁵⁷ RUF Judgment at 214; Bloom (note 49) at 624; Werle (note 23) at 509.

¹⁵⁸ Maybee (note 2) at 29.

¹⁵⁹ Idem.

¹⁶⁰ Breitegger (note 60) at 717.

¹⁶¹ ICC website, available at <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> [Accessed 9 September 2011]; Werle (note 23) at 509; Roger S. Clark 'The mental element in international criminal law' (2001) 12 *Crim. L. Forum* 291 at 291; Leonie von Braun *Internationalisierte Strafgerichte* (2008) at 17; Fabian O. Raimondo *General principles of law in the decisions of international criminal courts and tribunals* (2008) at 149; Leila N. Sadat 'The International Criminal Court and the transformation of international law' in: Sadat/Scharf (eds) *The theory and practice of international criminal law: Essays in honor of Cherif M. Bassiouni* (2008) at 310; Hans-Heinrich Jescheck 'The general principles of law set out in the Nuremberg, as mirrored in the ICC Statute' (2004) 2 *J Int'l Crim Just* 38 at 39; Cottier (note 51) 4; Werle (note 23) at 509.

¹⁶² Hall (note 152) at 179; Robert Cryer in Malcolm D. Evans (ed) *International Law* 2ed (2010) at 752; Schabas (note 121) at 26; Helmut Satzger 'Die Internationalisierung des Strafrechts als Herausforderung für den Bestimmtheitsgrundsatz' (2004) 11 *JUS* 943 at 944; Sadat (note 161) at 313; Mahnouch H. Arsanjani 'The Rome Statute of the International Criminal Court' (1999) 93(1) *AJIL* 22 at 25, Clark (note 161) at 296; Cherif M Bassiouni in: O. Triffterer, Preface at 8.

IHL).¹⁶³ Article 8 ICC-Statute is concerned with war crimes. It is the lengthiest provision of the Statute and embodies over 50 different elements of crime.¹⁶⁴ It consists of four categories of war crimes, of which two address international armed conflicts, and two address non-international armed conflicts.¹⁶⁵ The first category of war crimes are ‘grave breaches of the Geneva Conventions of 12 August 1949’ (Article 8(2)(a) ICC-Statute); the second category are ‘other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law’ (Article 8(2)(b) ICC-Statute); the third category are ‘serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 in the case of an armed conflict not of an international character’ (Article 8(2)(c) ICC-Statute); and the last category is called ‘other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law’ (Article 8(2)(e) ICC-Statute).¹⁶⁶

After lengthy controversy, the drafters of the ICC- Statute decided to not just include attacks against peacekeeping personnel as a ‘treaty crime’ but due to the huge impact of political demands for the protection of peacekeepers to enlist it as an own standing war crime.¹⁶⁷ It is set out in Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the ICC-Statute, which provides that “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”¹⁶⁸ are an ‘other serious violation of the laws and customs, “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”¹⁶⁹ The only difference between the two provisions is that Article 8(2)(b)(iii) ICC-Statute applies for international conflicts, whereas Article 8(2)(e)(iii) ICC-Statute applies to non international conflicts.

¹⁶³ Arsanjani (note 162) at 28; Schabas (note 121) at 26.

¹⁶⁴ Darge (note 49) at 121; Werle (note 23) at 396; Arsanjani (note 162) at 32; Schabas (note 121) at 51.

¹⁶⁵ Héctor Olásolo ‘A note on the evolution of the principle of legality in international criminal law’ (2007) 18 *Crim. L. Forum* 301 at 306; Arsanjani (note 162) at 33.

¹⁶⁶ Arsanjani (note 162) at 32; Schabas (note 121) at 54; Darge (note 49) at 121; Werle (note 23) at 396; Olásolo (note 165) at 306.

¹⁶⁷ Maybee (note 2) at 27; Arsanjani (note 162) at 30; Cottier (note 51) at 28.

¹⁶⁸ Article 8 (2)(b)(iii) ICC-Statute.

¹⁶⁹ Article 8 (2)(b) ICC-Statute; Moir (note 155) at 312; Breitegger (note 60) at 717.

3.5 The Statute for the Special Court for Sierra Leone

The conflict in Sierra Leone was one of the most brutal in recent memory.¹⁷⁰ Of the 4.2 million citizens, over 500,000 Sierra Leoneans were murdered, raped, or mutilated, and more 2.5 million were internally displaced.¹⁷¹ In August 2000, the government of Sierra Leone called on the United Nations Security Council for assistance in establishing a special court to prosecute those who were responsible for crimes committed in its civil war during the 1990's.¹⁷² A few days later the S.C. adopted Resolution 1315, in which the S.C. requested the Secretary-General to negotiate the establishment of a special court along with the government of Sierra Leone.¹⁷³ The outcome of the negotiations saw the SCSL having jurisdiction over violations of common Article 3 of the Geneva Conventions¹⁷⁴ and of AP II, including crimes against humanity, other serious violations of international humanitarian law as well as some specifically mentioned offenses under the national law of Sierra Leone.¹⁷⁵

Article 4 of the SCSL-Statute defines serious violations of IHL as follows:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (b) 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; and
- (c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.¹⁷⁶

¹⁷⁰ David M. Crane 'The Special Court for Sierra Leone' in: Cherif M. Bassiouni (ed.) *International Criminal Law* vol 3, 3ed (2008) at 209.

¹⁷¹ Crane (note 170) at 209.

¹⁷² Daryl A. Mundis 'New mechanisms for the enforcement of international humanitarian law' (2001) 95(4) AJIL 934 at 936.

¹⁷³ Robert Cryer et al 'A "special" court for Sierra Leone?' (2001) 50(2) *British Institute of International and Comparative Law Quarterly* 435 at 436; Mundis (note 172) at 935; Braun (note 161) at 238; Crane (note 170) at 197.

¹⁷⁴ Common Article 3 states: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions'.

¹⁷⁵ Braun (note 161) at 245; Mundis (note 172) at 936.

¹⁷⁶ Article 4 (b) SCSL-Statute; Cryer et al (note 173) at 444; Braun (note 161) at 250.

Like most crimes set out in the SCSL-Statute, Article 4(b) SCSL-Statute mirrors the ICC- Statute.¹⁷⁷ It echoes the wording in Article 8(2)(b)(iii) and (e)(iii) of the ICC-Statute exactly.¹⁷⁸

The SCSL was the first international criminal tribunal which had to deal with these offenses in jurisdictional practice and therefore played an important role in the practical implementation and legal scope of this war crime, as will be shown under Chapter V.¹⁷⁹

3.6 Conclusion

International criminal law concerning the protection of peacekeepers has developed from a complete absence of special provisions, to its own convention providing protection, to a characterization of an attack as a single standing war crime.

After the above is said, it can be concluded, that current international criminal law provides a sufficient protection of peacekeepers. Particularly with the establishment of Articles 8(2)(b) (iii) and (e)(iii) ICC-Statute and Article 4(b) SCSL-Statute a high standard of protection has been achieved.

In the next chapter, I will discuss the application and scope of specificity which the Articles have to fulfil.

4. Chapter IV: The principle of specificity

The aim of this Chapter is to identify the requirements that Articles 8(2)(b)(iii) and (e)(iii) ICC-Statute and Article 4(b) SCSL-Statute respectively have to fulfil, in order to be in line with the principle of specificity. The discussion will start with some preliminary statements (4.1), followed from the examination of the principle of legality in national criminal jurisdictions (4.2). Section (4.3) deals with the principle of specificity in international criminal law. The principle of specificity of the ICC-Statute will be excluded from the discussion under Section (4.3) and will be subject of its own section (4.4). After a short conclusion of the applicable scope of

¹⁷⁷ Michaela Frulli 'The Special Court for Sierra Leone: Some preliminary comments' (2000) 11(4) Eur. J. Int'l L. 857 at 864; Braun (note 161) at 248.

¹⁷⁸ Braun (note 161) at 250.

¹⁷⁹ RUF Judgment at 214; Sivakumaran (note 55) at 1024.

specificity (4.5) the Chapter closes with an excursus concerning the applicable scope of specificity in relation to the SCSL-Statute (4.6)

4.1 Preliminary Statements

The principle of legality (*nullum crime sine lege, nulla poena sine lege*)¹⁸⁰ has constitutional significance in most national criminal law systems and is recognized in international law.¹⁸¹ It is, *inter alia*, mentioned in the following international conventions: Article 2(2) of the Universal Declaration of Human Rights (UDHR), Article 15 of the International Covenant on Civil and Political Rights (ICCPR), Article 7 of the European Convention on Human Rights (ECHR), Article 7(2) of the African Charter on Human and Peoples' Rights (ACHPR), Article 9 of the American Convention on Human Rights (ACHR), Article 2(c) of the AP I, Article 6(c) of AP II as well as Article 13(2) of the Draft Code.¹⁸²

It is a constitutional element, on which a legal system bases its legitimacy. It is based upon four values: written law, legal certainty, prohibition on analogy and non-retroactivity.¹⁸³ Its' main purpose is to limit criminalization to acts that have been clearly prescribed by law and thus made a criminal act foreseeable in advance.¹⁸⁴ It is part of fundamental justice, since it protects against potential judicial abuse and arbitrary application of law by courts.¹⁸⁵ It is a fundamental element of the rule of law, since it is a further expression of the separation of powers.¹⁸⁶ If a norm violates the principle of legality, the consequence is that the penal power (*ius puniendi*) can not be exercised.¹⁸⁷ The norm is thus void. Despite its importance, its content is

¹⁸⁰ *Even though the concept goes back to ancient Roman and Greek law, the maxim was established by the German jurist Anselm Feuerbach in Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts, 1801.*

¹⁸¹ Immi Tallgren 'The sensibility and sense of international criminal law' (2002) 13 Eur. J. Int'l L. 561 at 564; Alan Nissel 'Continuing crimes in the Rome Statute' (2004) 25 Mich. J. Int'l L. 653 at 673; Satzger (note 162) at 943; Regine Hartstein in: Kühne et al *Völkerstrafrecht* (2007) at 62; Bruce Broomhall in: O. Triffterer, Article 22 at 23; Beth van Schaack 'Crime sine lege- Judicial lawmaking at the intersection of law and morals' (2008) Geo. L.J. 119 at 121; Bassiouni (note 147) at 73; Werle (note 23) at 44.

¹⁸² Bassiouni (note 147) at 93; Raimondo (note 161) at 131.

¹⁸³ Antonio Cassese *International Criminal Law* (2003) at 37; Broomhall (note 181) at 9; Nissel (note 181) at 673, Schaack (note 181) at 121.

¹⁸⁴ Broomhall (note 181) at 9, Nissel (note 181) at 674; Bassiouni (note 147) at 74; Olásolo (note 165) at 301; Schaack (note 181) at 121; Cassese (note 183) at 38.

¹⁸⁵ Cassese (note 183 at 37; Bassiouni (note 147) at 100; Olásolo (note 165) at 301.

¹⁸⁶ Schaack (note 181) at 121.

¹⁸⁷ Olásolo (note 165) at 301; Schaack (note 181) at 138.

subject to wide ranging differences (especially in comparison of national criminal justice systems) and to fundamental changes throughout the last decades (especially in international criminal law).¹⁸⁸

The principle of specificity (*nullum crime sine lege stricta*) is one of the characteristics of the principle of legality.¹⁸⁹ It entails that the elements of crime as well as the legal consequences of a provision have to be drafted with precision.¹⁹⁰ Due to the limitation of this paper, the following discussion will omit the examination of the specificity of the legal consequences (Article 8 ICC-Statute states none) and concentrate on the specificity of the elements of crime.

The principle of specificity requires that criminal provisions are drafted as clear as possible.¹⁹¹ The use of undefined elements of crime should thus be limited to a minimum. If a provision contains an undefined element, it must be possible to give that undefined element a specific meaning through interpretation, which allows the subject of law to determine whether, a certain behaviour is prohibited, or not.

4.2 The principle of specificity in national criminal law

The world's criminal justice systems differ in terms of the application of the principle of legality, and its component of specificity. Basically, they can be divided into two different approaches, depending on the origin of a legal system.¹⁹² While common law countries tend to apply a looser scope of the principle of specificity (*substantive justice*), civil law countries tend to apply a formal approach (*strict legality*).¹⁹³

The approach of *strict legality* has its origin in continental Europe namely in Germany and France.¹⁹⁴ Their legal systems bore influence other national criminal systems and today about 120 countries follow that approach in some variation.¹⁹⁵ The

¹⁸⁸ Schaack (note 181) at 121.

¹⁸⁹ Johannes Wessels and Werner Beulke *Strafrecht Allgemeiner Teil* 32ed (2002) at 11; Walter Gropp *Strafrecht Allgemeiner Teil* 2ed (2001) at 44; Schaack (note 181) at 121.

¹⁹⁰ Wessels and Beulke (note 189) at 11; Gropp (note 189) at 53; Hartstein (note 181) at 63; Olásolo (note 165) at 301; Schaack (note 181) at 121.

¹⁹¹ Cassese (note 183) at 37.

¹⁹² Broomhall (note 181) at 24; Cassese (note 183) at 36; Raimondo (note 161) at 107; Bassiouni (note 147) at 74.

¹⁹³ Darge (note 49) at 154; Bassiouni (note 147) at 74; Cassese (note 183) at 36.

¹⁹⁴ Bassiouni (note 147) at 97.

¹⁹⁵ Raimondo (note 161) at 107; Bassiouni (note 147) at 97.

approach of *strict legality* entails that no crime exists without a legal text defining it.¹⁹⁶ This includes a clear definition of the elements of crimes.¹⁹⁷ Its fundament is the complete codification of crimes. Customary law is hence not a basis for criminal prosecution. However, *strict legality* does not exclude reasonable legal interpretation of the elements of crime, through the acknowledged legal techniques.¹⁹⁸ A criminal norm is void under that approach, if it is not possible to clearly define its scope under consideration of the wording of the norm and legal interpretation techniques (excluding the use of analogy conclusions).

The approach of *substantive justice* has its origin in the English common law.¹⁹⁹ It is an endorsement of an extensive protection of legal assets and material justice. Under this approach, the rules for the judicial interpretation of criminal law are much broader. According to the *substantive justice* approach, offences are punishable without being codified as long as they are prohibited under customary ('unwritten') law.²⁰⁰ Contrary to *strict legality*, analogy is allowed.²⁰¹ However it seems noteworthy that in most national criminal jurisdictions, customary law is as certain as written law.²⁰² The element of "unwritten" only refers to the fact that the text is not laid down in a certain Statute.²⁰³ It does not mean that the content of that law is not subject to a specific interpretation, or that its content is not clear or uncertain.²⁰⁴

Both legal approaches acknowledge the same purposes of the principle, cf. (4.1). The difference is the scope of application.²⁰⁵ The approach of the *strict legality* limits flexible judicial application of law to a minimum, and forbids extension of criminal liability through analogy and customary law.²⁰⁶ The approach of *substantive justice*, on the other hand, allows flexible judicial application as well as interpretation by analogy.²⁰⁷ It hence appears that the *strict formality* approach favours the rights of

¹⁹⁶ Cassese (note 183) at 37; Darge (note 49) at 153.

¹⁹⁷ Bassiouni (note 147) at 97.

¹⁹⁸ Ibid at 98.

¹⁹⁹ Raimondo (note 161) at 107.

²⁰⁰ Darge (note 49) at 162.

²⁰¹ Bassiouni (note 147) at 98.

²⁰² Darge (note 49) at 176.

²⁰³ Idem.

²⁰⁴ Idem.

²⁰⁵ Bassiouni (note 147) at 98.

²⁰⁶ Idem.

²⁰⁷ Idem.

the accused, whereas the *substantive justice* approach sets its focus on the guaranty of an overall material justice through flexible judicial application.²⁰⁸

4.3 The principle of specificity in international criminal law

It is not viable to simply transfer the content of one specific national criminal code and copy it into international law.²⁰⁹ One may argue that, having been influenced mainly by custom, international criminal law would be close to common law and thus the *substantive justice* approach would have to be applied.²¹⁰ However, recent years have seen a shift towards the application of the principle of *strict legality*, as further discussions will imply.²¹¹ Nevertheless, especially with reference to the different law systems, it has to be clear that the content of *nullum crime sine lege scripta* can not have the same strict regulated content as in (continental) Europe but is instead subject to further interpretation by the courts.²¹²

4.3.1 Derivation of the principle of specificity in international criminal law

Despite its mention in several international conventions, cf. (4.1), the principle of legality is not written down in any of the Statutes of the modern international criminal tribunals, apart from the ICC-Statute, which will be subject to an own section (4.4) and is hence excluded from this discussion.²¹³

As in all international law, the principle of specificity has to be based on one of the sources acknowledged in international law and set forth in Article 38 of the ICJ-Statute, namely 'treaty', 'custom' or a 'basic principle of international law'.²¹⁴ In this

²⁰⁸ Cassese (note 183) at 37; Bassiouni (note 147) at 98.

²⁰⁹ Darge (note 49) at 184.

²¹⁰ Cassese (note 183) at 38.

²¹¹ George P. Fletcher and Jens David Ohlin 'Reclaiming fundamental principles of criminal law in the Darfur case' (2005) 3 J Int'l Crim Just 539 at 541; Cassese (note 183) at 39.

²¹² Darge (note 49) at 184.

²¹³ Olásolo (note 165) at 313; Schaack (note 181) at 122.

²¹⁴ Werle (note 23) at 59; Darge (note 49) at 153, Bassiouni (note 147) at 5, Schaack (note 181) at 158 Raimondo (note 161) at 73.

regard, it is possible to base the principle of specificity on custom²¹⁵ or on the basic principles of international law.²¹⁶

It is possible to argue that the principle of specificity in international law is based on custom.²¹⁷ This requires a steady national practice (*consuetudo*) and the view to be legally bound to such a practice (*opinio iuris*).²¹⁸ Before the establishment of the modern international criminal tribunals, international criminal law was applied indirectly, through national criminal justice systems. The principle is recognized in all major national criminal justice systems.²¹⁹ That fact that national systems vary in their scope of application (4.2) is not contrary to a constant practice since the matter in question is the application *per se*, and not the scope of application. It was thus applied constantly. It is also a fundamental constitutional element of national criminal law, which implies the view to be legally bound to an application. Since the principle is further mentioned in both AP it has customary law status in international law.

However, the overwhelming view in international law seems to be that the principle of legality (including its components) is a general principle of international law.²²⁰ All legal orders have general principles of law.²²¹ Their purpose is to provide an “overreaching” guideline for the interpretation of law.²²² A principle becomes a principle of international law, if it is steadily applied and if its application is undoubted as part of the fundamental legal order. That fact the principle of legality is a general principle of international law can *inter alia*, be argued with reference to its application in most national criminal justice systems and its application and affirmation by international criminal tribunals. As will be discussed below, the International Military Tribunal was the only international criminal tribunal, which denied that the principle of legality is a general principle of law, classifying it as ‘a

²¹⁵ Werle (note 23) at 100.

²¹⁶ ICTY Trial Chamber, *The Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landz'o*, Judgment of 16 November 1998 (IT-96-21-T) at 402.

²¹⁷ Werle (note 23) at 100.

²¹⁸ Herdegen (note 64) at 125.

²¹⁹ Bassiouni (note 147) at 75; Broomhall (note 181) at 23.

²²⁰ Fletcher and Ohlin (note 211) at 541; Bassiouni (note 147) at 103; Cassese (note 183) at 36.

²²¹ Cassese (note 183) at 33.

²²² *Idem*.

principle of justice.²²³ Besides its application by the international criminal tribunals the principle is also acknowledged by several other instruments of international law (cf. 4.1). Finally the principle is set out in part 3 of the ICC-Statute (general principles of criminal law).

It doesn't matter which opinion one will follow since the outcome is the same, namely that the principle of legality (and its component of specificity) does apply in international law.²²⁴

4.3.2 Content of the principle of specificity in general international criminal law

More controversy exists in relation to the scope, since it has been subject of an on-going change and development.²²⁵

Even though its existence was not explicitly denied during the Nuremberg Tribunals it had no practical relevance. It was *inter alia* held that because the conduct was unquestioned wrong, it was also unlawful under international law. And further that the principle of legality would be a principle of justice which can be overwritten by the Allied powers.²²⁶ Even new crimes have evolved, namely 'crimes against peace' and 'crimes against humanity' and been applied retrospectively.²²⁷ Practically, its scope was therefore amounted to nothing.

With the establishment of the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone, the question of the content and application of the principle of legality and its components was raised once again. The recognition of the principle in human rights treaties (cf. 4.1) has underlined its growing importance in international law. Even though it is still unsettled, if international criminal tribunals are bound by international human rights

²²³Judgment of the International Military Tribunal for the Trial of German Major War Criminals Nuremberg, 30 September and 1 October, 1946 at 38.

²²⁴Darge (note 49) at 168.

²²⁵Broomhall (note 181) at 25.

²²⁶Schaack (note 181) at 26.

²²⁷Ferrando Mantovani 'The general principles of international criminal law: The viewpoint of a national criminal law lawyer' (2003) 1 J Int'l Crim Just 28; Schaack (note 181) at 191; Cassese (note 183) at 43.

treaties themselves,²²⁸ or if they are just bound to apply the ‘substance of the standards set out by the provisions,’²²⁹ the adoption of the principle witnesses a shift towards a gain of importance in international law. The modern international criminal tribunals accepted the application of *nullum crime sine lege* and its components for their rulings.²³⁰ Their judgments stated that the Nuremberg approach can not be upheld.²³¹ One example is the dissenting opinion of Judge Robertson concerning the judgment of the SCSL-Appeals Chamber in the Prosecutor v. Sam Hinga, in which the Judge (referring to the Nuremberg Tribunal) stated that “the fact that the conduct of the accused ‘would shock or even appall decent people is not enough to make it unlawful in the absence of a prohibition.’”²³²

Nonetheless, international criminal jurisdiction implicitly or explicitly denied the application of the approach of *strict legality*.²³³ In its case Prosecutor v. Delalić, Mucić, Delić & Landžić, the ICTY Trial Chamber stated that “[i]t is not certain to what extent [the principle of legality and its components] have been admitted as part of international legal practice, separate and apart from the existence of the national legal system.”²³⁴

Basically, international criminal law focused on the realization of the underlying principles and purposes of the approach cf. (4.1).²³⁵ This means that the main

²²⁸ ICTY Appeals Chamber, The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Partially dissenting opinion of Judge Fausto Pocar of 5 May 2009 at 8.

²²⁹ ICTY Appeals Chamber, The Prosecutor v. Stanislav Galić, Separate opinion of Judge Mohammed Shahabuddeen of 30 November 2006 (IT-98-29-A) at 19.

²³⁰ SCSL Appeals Chamber, The Prosecutor v. Sam Hinga Normen, Decision on Preliminary Motion Based on Lack of Jurisdiction of 31 May 2004 (SCSL-2004-14-AR72(E)) at 25; ICTY Trial Chamber, The Prosecutor v. Dusko Tadić, Judgment of 7 May 1997 (IT-94-1-T) at 577 and 623; ICTR Trial Chamber, The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera & André Rwamakuba, Decision on Defense’s Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, 11 May 2004 (ICTR-98-44-T) at 39 [hereinafter Karemera Decision on Jurisdiction]; The ICTY Trial Chamber, The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžić, Judgment of 16 November 1998 (IT-96-21-T) at 402 [hereinafter Delalić Judgment]; ICTY Appeals Chamber, Prosecutor v. Enver Hadzihasanović and Mehmed Alagić and Amir Kubura Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction of 27 November 2002 (IT-01-47-PT) at 64; Schaack (note 181) at 162.

²³¹ Schaack (note 181) at 141.

²³² SCSL Appeals Chamber, The Prosecutor v. Sam Hinga, Dissenting opinion of Judge Robertson, Judgment of 31 May 2004 (SCSL-2004-A72(E)) at 13; Shahabuddeen ‘Does the principle of legality stand in the way of progressive development of law?’ (2004) 2 J Int’l Crim Just 1007 at 1010.

²³³ Bassiouni (note 147) at 98.

²³⁴ Delalić Judgment at 403; the same approach was affirmed by the ICTR in its’ Decision on Jurisdiction in Karemera at 43.

²³⁵ Schaack (note 181) at 141.

requirement of the principle of legality in international law is that there is law in place (written or custom) that prohibits the behaviour.²³⁶

This loose scope of the principle of legality in international criminal law is for the most part explained by referring to the special circumstances underlying this discipline. Indeed, the goals and techniques of international criminal law differ from those of national criminal law.²³⁷

The goal of international criminal law is, first and foremost, to put an end to impunity for crimes concerning the international community as a whole.²³⁸ It is the outcome of prosecuting those responsible for gross violations of human rights, crimes against humanity and war crimes that often leads to the willingness to ignore legality in relying on the “highest principles of humanity.”²³⁹

The general justification for going clearly beyond written international law has not changed over the decades. In general, the international community merits its action on a “higher law”, which allows the prosecution of these crimes due to their seriousness.²⁴⁰ Without meaning to undermine the well-intentioned reliance on a “higher law” in these cases, it is non-defensible because “what is one mans’ higher law is the other mans’ crime”.²⁴¹ The truth of this sentence gets particular clear with reference to the Nuremberg Tribunals. It was exactly this defense that some of the accused rose, stating that to obey Adolf Hitler as their “higher law.”²⁴² Taking that into account, the goals of international criminal law may *explain* why the rule of legality has a loose scope and application in general international criminal law. However, they nonetheless do not provide a *justification*.

Another reason for the loose scope of the principle of legality in international criminal law provides its drafting circumstances and techniques. In contrast to national criminal codes, international criminal law is mostly conventional.²⁴³

This means that international criminal law is, for the most part made by diplomats and international organisations rather than (international criminal) lawyers.²⁴⁴

²³⁶ ICTY Appeals Chamber, *The Prosecutor v. Enver Hadzihasanovic and Mehmed Alagic and Amir Kubura*, Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility of 16 July 2003 (IT-01-47-PT) at 32.

²³⁷ Ohlin and Fletcher (note 211) at 540.

²³⁸ Schaack (note 181) 147.

²³⁹ Mantovani (note 227) at 28; Tallgren (note 181) at 564; Schaack (note 181) 147.

²⁴⁰ Tallgren (note 181) at 564.

²⁴¹ Bassiouni (note 147) at 90.

²⁴² *Idem*.

²⁴³ *Ibid* at 87.

Accordingly, international criminal law is a product of political circumstances and compromises.²⁴⁵ As most made up of being non-experts in criminal law, the drafters of international criminal law lack the ability of legal drafting techniques.²⁴⁶ The use of wide-ranging and undefined terms is the outcome in most international criminal documents.²⁴⁷ They thus mostly foul the requirement of *strict legality* and lean towards the *substantive justice* approach.²⁴⁸

However, the general assumption in early international criminal law was that, due to a lack of an enforcement mechanism, states would incorporate the treaties under their municipal law.²⁴⁹ It was assumed that every state would define the criminal laws according to their national understanding of the principle of specificity.²⁵⁰ Under this regard, a vague formulation did not occur as problematic.²⁵¹ The situation has changed with the establishment of the modern international criminal tribunals. A direct enforcement of international criminal law towards the individual takes place today.²⁵² The chance of further specification of criminal norms through national law is no longer achievable.²⁵³ This has led to the awareness that the principle of legality (and with it the principle of specificity) has, at least in terms of its principles and purposes, been satisfied in international criminal norms.²⁵⁴

According to this awareness, the principle of legality has the following meaning in modern general international criminal law: The behavior must be prohibited under international conventional or customary law. Furthermore, it must be foreseeable that a certain conduct is punishable under international criminal law, at the time of commission.²⁵⁵

This approach clearly emphasizes that general international criminal law sets the focus on the conduct, instead of a specific description of the norm.²⁵⁶ It is based on the assumption that, through the foreseeability of a criminal liability, the principle of

²⁴⁴ Schaack (note 181) at 135.

²⁴⁵ *Idem*.

²⁴⁶ Mantovani (note 227) at 27.

²⁴⁷ *Idem*.

²⁴⁸ For example 'military necessity' or 'protected person'.

²⁴⁹ Mantovani (note 227) at 27.

²⁵⁰ Bassiouni (note 147) at 88.

²⁵¹ *Ibid* at 87.

²⁵² Mantovani (note 227) at 27.

²⁵³ Schaack (note 181) at 136.

²⁵⁴ Mantovani (note 227) at 27.

²⁵⁵ Schaack (note 181) at 141.

²⁵⁶ *Idem*.

fairness towards a potential accused is fulfilled, which denies a violation of the principle of legality.²⁵⁷

However, after the above explanation, the requirement of foreseeability requires known or knowable criminal provisions, which in return requires a certain specificity of their conduct, understandable to ordinary persons, not just to law experts.

4.3.3 Conclusion

Based on the above stated cases, it can be concluded, that international criminal law does indeed have fundamental differences in relation to national criminal jurisdictions. This explains the practical impossibility to implement the principle of legality in a similar application and scope to national criminal systems,²⁵⁸ - at least in its current state of development.

However, it is notably that with the development of international criminal law, especially in the period after WW II, the principle of legality has gradually gained more importance.²⁵⁹ And with the direct application of international criminal norms, the main justification for a loose application of the principle of legality has lost its basis. The principle of legality is part of the protection of fundamental human rights of the accused, which all international criminal tribunals have to respect (either through a direct application of the treaties or through the application of their substance. Article 21(3) ICC-Statute explicit binds the ICC to the application of internationally recognized human rights.²⁶⁰ Rule 26 *bis* of the rules of procedure of the SCSL states that the Chambers: “shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused.” And the former ICTY Registrar, Hans Holthuis, proudly states that “Persons accused by the Tribunal are provided fair trials meeting the highest standard of international justice. Absolute respect for the rights of the accused is an essential ingredient of justice and lies at the heart of the Tribunal’s work.”²⁶¹ This means that the standard of legality in international criminal norms has had to rise to a higher standard.

²⁵⁷ *Idem*.

²⁵⁸ Bassiouni (note 147) at 88.

²⁵⁹ Darge (note 49) at 170.

²⁶⁰ Olàsolo (note 171) at 311; Fletcher and Ohlin (note 211) at 552.

²⁶¹ ICTY website <http://www.icty.org/action/cases/4> [Accessed 09 September 2011].

Following this, the principle of specificity must therefore at least satisfy the approach of *substantive justice*.²⁶²

4.4 The principle of specificity in the ICC- Statute

During the drafting of the ICC-Statute, there was controversy, as to whether the ICC-Statute should contain its own norm, which would explicitly refer to the principle of legality.²⁶³ At the end it was held that, as the most important document in international criminal law, it should recognize the developments in general international law concerning the strengthening of the rule of *nullum crime sine lege*.²⁶⁴ Consequently, the principle was codified in Articles 22 to 24 of the ICC-Statute.²⁶⁵

Article 22(2) clearly confirms the application of the principle of specificity in stating that:

‘The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.’²⁶⁶

Article 21 of the ICC-Statute, refers to the applicable law. It lacks any explicit mention of customary law and therefore limits the Courts ability to rely on it.²⁶⁷ It is possible to interpret the phrase ‘principles and rules of international law’ in Article 21(1)(b) ICC-Statute in the way that the Court is required to consider customary international law.²⁶⁸ However, based on the above, the lack of an explicit mention is by way an expression of denying custom as applicable law under the ICC-Statute.²⁶⁹ This means, in relation to the principle of specificity, that criminal conduct requires a

²⁶² Bassiouni (note 147) at 100.

²⁶³ Nissel (note 181) at 677; Darge (note 49) at 178.

²⁶⁴ Olásolo (note 165) at 303.

²⁶⁵ Darge (note 49) at 178; Olásolo (note 165) at 306.

²⁶⁶ Article 22(2) ICC-Statute; Björn Jesse *Der Verbrechensbegriff des Römischen Statuts* (2009) at 149; Olásolo (note 165) at 306.

²⁶⁷ Schaack (note 181) at 189.

²⁶⁸ Margaret McAuliffe de Guzman in: O. Triffterer (note 51) Article 21 at 442; Schaack (note 181) at 189.

²⁶⁹ Cf. Fletcher and Ohlin (note 211) at 588; Schaack (note 181) at 189.

written norm and it further implies a general switch of the approach of *substantive justice* towards *strict legality*.²⁷⁰

With the enactment of the ICC-Statute, the elements of war crimes in Article 8 of the ICC-Statute are written down and are determined so that the application of law has to be in conformity with the wording, as laid down in the statute.²⁷¹ However, Articles 6 to 8 of the ICC-Statute still use normative undefined elements in the definition of war crimes, i.e. 'military necessity', 'attack' or 'protected person'.²⁷² Most of those undefined elements of crime derive from IHL, especially from the Hague Conventions relative to the laws and customs of war on land of 1899 and 1907, and the Geneva Conventions and their two AP.²⁷³ The use of such undefined terms does not violate the principle of specificity of the ICC-Statute *per se*. As discussed under (4.2) the *strict formality* approach allows the precision of undefined terms through legal interpretation.²⁷⁴ It will be the aim of Chapter V to examine if such a precision is possible in relation to the undefined elements of crime, as set out in Article 8 (2)(b)(iii) and (e)(iii) of the ICC-Statute.

4.5 Conclusion

It is accepted, that the principle of specificity is part of international criminal law in general and the ICC-Statute in particular. It therefore has to be satisfied in relation to all criminal provisions in international law.²⁷⁵ However, as examined throughout this Chapter, the content of the principle of specificity in general international criminal law differs from that as set out in Article 22(2) of the ICC-Statute.²⁷⁶ The main difference is that while in general international law, criminal liability can arise through custom, this is impossible according to the ICC-Statute.²⁷⁷

The enforcement of the ICC-Statute is an example of a development from a loose international system (*substantive justice*) to a closed system (*strict legality*) of

²⁷⁰ Cassese (note 183) at 39.

²⁷¹ Darge (note 49) at 175.

²⁷² Olásolo (note 165) at 310; Schaack (note 181) at 189.

²⁷³ Darge (note 49) at 179; Olásolo (note 165) at 311.

²⁷⁴ Cf. Darge (note 49) at 352.

²⁷⁵ Darge (note 49) at 186.

²⁷⁶ Hartstein (note 181) at 62.

²⁷⁷ Ilias Bantekas 'Reflections on sources and methods of international criminal and humanitarian law' (2006) 6 Int'l Crim L Rev 121 at 124.

international criminal law.²⁷⁸ The principle of specificity laid out in the ICC-Statute can be seen as having a similar content, such as the *strict formality* approach. This means that the definitions of the ICC-Statute crimes have to be strictly understood.²⁷⁹ It may not have the same strict content as in civil law jurisdictions just yet, but the trend moves in that direction.

4.6 Excuse: Transferability of the principle of specificity of the ICC-Statute to the SCSL-Statute

The SCSL-Statute does not contain an explicit provision concerning the principle of specificity. It is thus questionable if the elements of crime set out in the SCSL-Statute have to meet the requirements of the principle of specificity, as set out in the ICC-Statute.

In its current form, the ICC-Statute has to be classified as treaty law,²⁸⁰ which generally can not be just transferred to the SCSL-Statute.²⁸¹ This is also emphasized by its' Article 22(3), which states that "[T]his article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

However, it has to be acknowledged that the ICC-Statute mirrors the current *opinio iuris*²⁸² of the international community, towards a stricter application of the principle of specificity in international criminal law as a whole (including the SCSL-Statute).²⁸³ According to this, it will be very hard to justify a lower standard of specificity of a criminal norm than is required by the ICC-Statute.²⁸⁴ This is especially true, if provisions of the SCSL entail the exact same wording as the ICC-Statute. The main difference between the ICC approach and the SCSL is the reliance on custom as a source of criminal liability. But in this case it is not a question of

²⁷⁸ Darge (note 49) at 177; Schaack (note 181) at 192.

²⁷⁹ Triffterer (note 51) Article 22 at 22.

²⁸⁰ *Even though it may crystallize in custom in the future.*

²⁸¹ Mantovani (note 227) at 30.

²⁸² *Even though the ICC-Statute came in existence after the SCSL-Statute, the drafting of the ICC-Statute occurred before the SCSL-Statute and the opinio iuris was thus expressed before the establishment of the SCSL-Statute. That the SCSL-Statute does not contain an explicit provision concerning strict legality can be seen as outcome of its characteristic as ad hoc tribunal and not as an expression that specificity of norms is not required. As being established after the conducts occurred, it needed to be able to judge on the basis of customary law.*

²⁸³ Cassese (note 183) at 39.

²⁸⁴ Darge (note 49) at 180.

custom since both Statutes explicitly stating the criminal conduct. It comes down to a question of the wording of a *written* norm. The technically correct argument that the scope of the applicability of the rule of specificity from the ICC-Statute is limited to the ICC-Statute should therefore be limited to those crimes which have a different wording.²⁸⁵

5. Chapter V: Specificity of war crimes against peacekeepers

This Chapter will examine the specificity of Articles 8(2)(b)(iii) ICC-Statute and 4(b) SCSL-Statute. It will start with a discussion of the instruments used to determine the specificity of elements of crime besides, namely the *Elements of Crimes* (5.1) and the case law (5.2). Section (5.3) will discuss the most problematic elements of crime in terms of their specificity, namely ‘attack’ (5.3.1), ‘peacekeeping mission on accordance with the U.N. Charter’ (5.3.2) and ‘as long as they are entitled to protection afforded to civilians under IHL’ (5.3.3).

5.1 *Elements of Crimes* (Article 9 ICC-Statute)

For the purpose of interpreting and applying the definitions of crimes found in Articles 8(2) (b)(iii) and (e)(iii) ICC-Statute and 4(b) SCSL-Statute, reference must be made to the *Elements of Crime*, a document adopted in June 2000 by the Preparatory Commission, and endorsed in September 2002 by the Assembly of States parties.²⁸⁶

Of special interest is Article 9(1) and (3) ICC-Statute which states:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

²⁸⁵ *Idem*.

²⁸⁶ Schabas (note 121) at 35; Arsanjani (note 162) at 28; Clark (note 161) at 316.

According to Article 9(1) of the ICC-Statute the *Elements of Crimes* shall assist the Court in interpretation and application of the core crimes.²⁸⁷ They are a completely new instrument of interpretation, no similar source of law existed before.²⁸⁸

During the negotiations for the ICC-Statute the US-Delegation raised the criticism that the elements of crime would not be satisfactorily defined, and that the principle of specificity of Article 22(2) ICC-Statute would require further definition.²⁸⁹ To meet those requirements, the US Delegation made the suggestion to include *Elements of Crimes*.²⁹⁰

The US proposal was initially declined by most delegations on basis that, firstly, the adoption of additional elements of crimes would delay the coming into force of the ICC, and secondly that the adoption of *Elements of Crimes* would be unnecessary since these would already be included in the definition of crimes or in part 3 of the Statute, namely the general principles of criminal law. Thirdly, they felt that the restriction of the interpretation possibilities of the judges would be inappropriate, considering their expertise and status.²⁹¹ Article 9 was thus adopted as a compromise agreed to under the condition that the *Elements of Crimes* would be negotiated separately from the statute.²⁹²

The importance of the *Elements* depends among other things on they rank in the hierarchy of sources of law which is set out in Article 21 of the ICC-Statute.²⁹³

Article 21(1)(a) of the ICC-Statute names the *Elements of Crimes* on the same hierarchic level as the ICC-Statute.²⁹⁴ According to this provision it first occurs that both have to be considered equally when interpreting crimes,²⁹⁵ but on the other hand, Article 9(3) of the ICC-Statute clarifies that the ICC Statute has priority over the *Elements of Crimes*.²⁹⁶ In relation to Article 21, Article 9(3) is *lex specialis* and

²⁸⁷ Clark (note 161) at 316; Arnd Koch ‘Über den Wert der Vebrechenselemente (“Elements of Crimes”) gem. Art. 9 ISTGH-Statut‘ (2007) 4 ZiS 150 at 150.

²⁸⁸ Koch (note 287) at 151; Clark (note 161) at 316.

²⁸⁹ Arsanjani (note 16) at 36.

²⁹⁰ Ibid.

²⁹¹ Koch (note 287) at 151.

²⁹² Arsanjani (note 162) at 36.

²⁹³ Koch (note 287) at 150; Jesse (note 266) at 31; Werle (note 23) at 179; Mantovani (note 227) at 29; Nissel (note 181) at 677.

²⁹⁴ Cf. Article 21(1)(a) ICC-Statute; Darge (note 49) 122; Werle (note 23) at 512; Mantovani (note 227) at 29.

²⁹⁵ Arsanjani (note 162) at 28.

²⁹⁶ Cf. Article 9(3) ICC-Statute.

has therefore priority which means that all definitions contained in the *Elements of Crimes* have to be in accordance with the former.²⁹⁷ Consequently, the *Elements of Crimes* serve only as a subsidiary source of law. Their main purpose is seen in their declaratory and systemizing function.²⁹⁸

However, even though the *Elements of Crimes* are not able to bind the ICC, they are an acknowledged tool for interpretation and are a mechanism to substantiate the principle of specificity in international law.²⁹⁹ Unfortunately, they are often simply echo the Statute and do not contribute anything new to a problematic.³⁰⁰ This is also true for Articles 8(2)(b)(iii) and (e)(iii) of the ICC-Statute, and it must therefore be concluded that the *Elements of Crimes* are not able to make any further contribution to the specificity of that core crime.³⁰¹ It is consequently the interpretation of the judges that has to be relied on to achieve legal certainty.³⁰² The next section therefore discusses the case law.

5.2 War crimes against peacekeepers in judicial practice (Case-law)

Recent years have witnessed the first decisions and judgments by the SCSL and the ICC regarding individuals accused of committing war crimes in terms of attacks against peacekeepers.³⁰³

In 2009 the SCSL was the first international criminal tribunal to deal with this crime.³⁰⁴ The ICC followed, and made reference to the findings of the SCSL in relation to the scope of elements of the crime of attacks against peacekeepers. Due to the short come of case-law concerning this crime, the findings in those limited cases are essential to determine the scope of this crime, and in legal discussions as to whether the requirements of the principle of specificity in international criminal law are met. The following section will discuss the existing case law.

²⁹⁷ Koch (note 287) at 150.

²⁹⁸ Idem.

²⁹⁹ Darge (note 49) at 126.

³⁰⁰ Ibid at 127.

³⁰¹ Article 8(2)(b)(iii) and (e)(iii) of the *Elements of Crimes* at 18.

³⁰² Darge (note 49) at 127.

³⁰³ Gadler (note 2) at 598.

³⁰⁴ RUF Judgment at 213; Gadler (note 2) at 600; Breitegger (note 60) at 717.

5.2.1 The Special Court for Sierra Leone

During the conflict in Sierra Leone, about 150 members of the United Nations Mission in Sierra Leone (UNAMSIL) were captured by the rebels of the Revolutionary United Front (RUF) and injured or killed in the course of an attack against them.³⁰⁵

The judgement of the SCSL-Trial Chamber of March, 2nd 2009 can be seen as groundbreaking in terms of the courts finding in relation to the specific nature and scope of that war crime.³⁰⁶ Three leaders of the RUF, namely Sesay, Kallon and Gbao, were accused of committing attacks against peacekeepers.³⁰⁷

The Trial Chamber found all three accused guilty.³⁰⁸ Sesay was found guilty on the basis of superior responsibility, Kallon on basis of superior as well as direct responsibility, and Gbao on basis of individual responsibility.³⁰⁹ The accused based their appeal *inter alia* on the grounds that members of the peacekeeping personnel would have taken direct part in hostilities, and would therefore not fallen under the scope of Article 4(b) SCSL- Statute.³¹⁰ The Appeals Chamber denied all grounds for appeal, particularly stating that the UNAMSIL troops did not take direct part in the hostilities and hence did not loose their protection under Article 4(b) SCSL- Statute.³¹¹

The SCSL-Appeals Chamber further found that committing this crime may also be a violation of customary international law.³¹² Besides the expressive mentioning in the ICC-and SCSL-Statute, it based its conclusion on the practice of the U.N., the adoption of the Safety Convention and its prohibition in national military manuals.³¹³ In addition, the Chamber considered that this offence is a mere "particularization of the general and fundamental prohibition in international humanitarian law, in both international and internal conflicts, against attacking civilians and civilian property,"

³⁰⁵ James Sloan 'Peacekeepers under fire: Prosecuting the RUF for attacks against the UN Assistance Mission in Sierra Leone' (2010) 9 *The Law and Practice of International Courts and Tribunals* 243 at 244.

³⁰⁶ RUF Judgment at 213; Gadler (note 2) at 600; Breitegger (note 60) at 717.

³⁰⁷ Sivakumaran (note 55) at 1024 Sloan (note 305) at 244.

³⁰⁸ Breitegger (note 60) at 719; Gadler (note 2) at 600.

³⁰⁹ RUF Judgment at 676- 687.

³¹⁰ SCSL Appeals Chamber, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Judgment of 26 October 2009 (SCSL-04-15-A) at 525 [hereinafter RUF Appeal Judgment].

³¹¹ RUF Appeal Judgment at 528- 529.

³¹² Gadler (note 2) at 600; Breitegger (note 60) at 717; Werle (note 23) at 509.

³¹³ Breitegger (note 60) at 717; Werle (note 23) at 509.

thereby seemingly classifying peacekeepers as civilians.³¹⁴ The mere classification of peacekeepers as civilians by the Special Court has to be seen as problematic. Even though peacekeepers, like civilians, are not party of the conflict, their military composition and mandate tasks (i.e. disarmament of fighters on a voluntary basis), clearly distinguishes them from civilians.

The Trial Chamber identified the following elements of the crime: the accused is directing an attack against personnel of a peacekeeping mission, which has to be in accordance with the Charter of the U.N.; the accused intended that such personnel were the subject of the attack; at the time of the attack the targets must be entitled to protection under IHL, and the accused had reason to be aware that the targets were protected by IHL.³¹⁵

5.2.2 The International Criminal Court

Attacks against peacekeepers had been dealt with by the ICC when, in February 2010, the Pre-Trial Chamber declined to confirm the charges against Bahr Idriss Abu Garda [hereinafter Abu Garda Decision on the Confirmation of Charges].³¹⁶ He was *inter alia* accused of having planned and executed attacks against the personnel and material of a camp of the African Mission in Sudan (AMIS) in North-Darfur in September 2007.³¹⁷ Even though the Pre-Trial Chamber denied the confirmation of the charge, the findings of the chamber made interesting comments on the war crime, especially in relation to the status of protection of regional peacekeeping operations.³¹⁸ Similar to the criteria developed by the SCSL-Trial Chamber, the ICC-Pre-Trial Chamber named the following characteristics of the offence:

- (1) attack;
- (2) target of the attack was peacekeeping personnel whose mandate was in accordance with the U.N. Charter;
- (3) the offender had the intention to target such personnel;

³¹⁴ Gadler (note 2) at 600; Sivakumaran (note 55) at 1024.

³¹⁵ Breitegger (note 60) at 717.

³¹⁶ ICC Pre-Trial Chamber I, The Prosecutor v. Bahr Idriss Abu Garda, Decision on the Confirmation of Charges-Public Redacted Version of 8 February 2010 (ICC-02/05-02/09-243-Red) at 97[hereinafter Abu Garda Decision on the Confirmation of Charges]; Gadler (note 2) at 604; Breitegger (note 60) at 719.

³¹⁷ Abu Garda Decision on the Confirmation of Charges at 21; Gadler (note 2) at 604.

³¹⁸ Gadler (note 2) at 604; Breitegger (note 60) at 719.

- (4) the peacekeepers were entitled to special protection under international humanitarian law;
- (5) the accused was aware of the facts which entitled the peacekeepers to protection in accordance with IHL;
- (6) the accused was aware of the facts that constitute an armed conflict.³¹⁹

5.3 The specificity of Article 8 (2) (b) (iii) and (e) (iii) of the ICC-Statute & 4 (b) of the SCSL- Statute

As was pointed out in Chapter IV (4.4) to be in accordance with international criminal law it is necessary that the objective elements of the war crime of intentional attacks against peacekeepers meet the requirements of the rule of specificity in Article 22(2) ICC-Statute. The aim of this section will be to examine, if that has been achieved.

My discussion will be limited to the most controversial ones, in term of their specificity, namely ‘attack’, ‘peacekeeping mission in accordance with the United Nations Charter’ and the element of disqualification ‘as long as they are entitled to special protection afforded to civilians under IHL’.³²⁰

5.3.1 The specificity of the element ‘attack’

Neither the ICC nor the SCSL-Statute contains a definition of the term ‘attack’. This means that it has to be defined under consideration of its meaning in general international law, and the findings of the ICC and SCSL. Two main issues arise in that concern. The first is what actions have to be seen to constitute an attack. The second is whether actual damage has to be result of an attack. Both issues will be discussed below.

On the one hand the term ‘attack’ can be defined with explicit reference to the Safety Convention.³²¹ Article 9 of the Safety Convention, considers inter alia ‘[a] murder, kidnapping or other attacks upon the person or liberty of any United Nations or

³¹⁹ Breitegger (note 60) at 719.

³²⁰ Cf. Darge (note 49) at 352.

³²¹ Cf. Werle (note 23) at 511.

associated personnel' as a crime.³²² Such an interpretation means that the term 'attack' includes 'any type of use of force'³²³ and hence includes *all* acts regarding their personal liberty.³²⁴

On the other hand, it is possible to support a narrower interpretation. In relation to IHL, especially in the laws covering the means and methods of warfare (so called Hague Law),³²⁵ the term "attack" is limited to situations in which the use of force has the purpose to cause physical harm, but leaves out the use of force for the purpose of restraining the personal liberty. According to such a narrower interpretation, the term 'attack' would, at its broadest meaning, include some specific scenarios concerning the personal liberty (i.e. kidnapping) but not "the whole range of attacks upon the person or liberty."³²⁶ This narrow interpretation is also used in the traditional interpretation of 'attack' in Article 49(1) of the AP I (referring to civilians).³²⁷

The following discussion will determine if 'attack' under Articles 8(2)(b)(iii) and (e)(iii) of the ICC-Statute and 4(b) of the SCSL-Statute has to be understood in the broader or narrower sense.

In its judgment in *Prosecutor v Sesay, Kallon & Gbao*, [hereinafter RUF-Judgment], the SCSL-Trial Chamber stated that the term 'attack' has to be understood in harmony with Article 49 of the AP I.³²⁸ According to Article 49(1) AP I, an attack is every *act of violence* against an enemy, whether it has an offensive or defensive character.³²⁹ The SCSL thus seemed to follow the narrow approach.

However, later in the judgment the SCSL-Trial Chamber defined an *act of violence* with relation to Article 9 of the Safety Convention as 'a forceful interference which endangers the person *or impinges on the liberty of the peacekeeper*'.³³⁰ This definition goes beyond the traditional scope of AP I and follows the broader interpretation. In conclusion, the SCSL followed the broader approach of the Safety Convention.

³²² Article 9 of the Safety Convention; Sivakumaran (note 55) at 1025; Gadler (note 2) at 601.

³²³ Gadler (note 2) at 595; Werle (note 23) at 511.

³²⁴ Werle (note 23) at 511.

³²⁵ Cottier (note 51) at 57.

³²⁶ Gadler (note 2) at 595.

³²⁷ Knut Dörmann in: O. Triffterer (note 51), Article 8 (2)(b)(i) at 323; Werle (note 23) at 343; Gadler (note 2) at 595.

³²⁸ RUF Judgment at 220; Sivakumaran (note 55) at 1024; Breitegger (note 60) at 717; Darge (note 49) at 345.

³²⁹ Darge (note 49) at 345; Sivakumaran (note 55) at 1025; Gadler (note 2) at 595.

³³⁰ Sivakumaran (note 60) at 1025.

The ICC-Pre-Trial Chamber on the other hand, did not analyze the term ‘attack’ itself, but simply referred to Article 49 AP I and defined it as an act of violence.³³¹ Further references to the Judgement of the SCSL-Trial Chamber or the Safety Convention have not been made. This allows the conclusion that the ICC, in opposition to the SCSL, did not intend to derive from the traditional interpretation of ‘attack’.

Both approaches are defensible. The SCSL can rely on the wording of the Safety Convention as a fundamental source of interpretation of this war crime (cf. Chapter III (3.2)). Further to that, the desirable outcome of a wide scope of protection is also an argument for the finding of the SCSL.

On the other hand Article 49 of the AP I, to which both courts are explicitly referring, does not provide for this broad scope. The wording of Article 49 AP I does not necessarily exclude acts concerning the liberty of peacekeepers.³³² However, the finding of the SCSL classifies ‘*all* interferences which endanger the persons’ liberty as an act of violence,’ including mere acts of deprivation.³³³ Such a wide interpretation is clearly beyond the scope of Article 49 AP I. Additionally, a wide scope of protection can also be achieved if attacks on the liberty of peacekeepers would be limited to specific offences.³³⁴ Such an interpretation would also heed Article 49 AP I. This interpretation seems to be the most favourable since it gives consideration to both, the desired wide range scope of peacekeepers and the wording of Article 49 AP I. Nevertheless, in terms of the specificity of this element of crime, it must be concluded that the Courts differ in their interpretation and that acts that would fulfil the requirement of an attack according to the SCSL would not fulfil the requirements of an attack according to the ICC. The wording is the same in both Statutes, and both Courts can possibly rely on the Safety Convention as a tool of interpretation of the elements crime. That the ICC did not in this case, can thus only be seen as expression of a different legal opinion in the same matter.

The second issue concerns the outcome of the attack. It is questionable in this regard as to whether the attack has to have an actual damage as a result. In IHL, a harmful result is required, as Article 85(3) AP I emphasizes.³³⁵ This was also found in the

³³¹ Abu Garda Decision on the Confirmation of Charges at 65; Gadler (note 2) at 605.

³³² Cottier (note 51) at 57.

³³³ RUF Judgment at 1891.

³³⁴ Cottier (note 51) at 57.

³³⁵ Article 85 (3) states that: “In addition to the grave breaches defined in Article 11, the following

jurisprudence of the ICTY in its case Prosecutor v Kordic and Cerkez, in which the Appeals Chamber found that an attack “must be shown to have caused death or serious bodily injury.”³³⁶

This interpretation is different to the ICCs’ and the SCSL. In its RUF-Judgement the SCSL-Trial Chamber explicitly finds that actual damage is not required as a result of an attack.³³⁷ It underlines this finding by stating that ‘the mere attack is the gravamen of the crime’.³³⁸ However the Court further declared that threats alone would not be sufficient either.³³⁹ It stated “peacekeepers are by definition deployed in areas of actual or recent armed conflict, often in precarious situations before the warring factions have disarmed and while tensions remain high.”³⁴⁰ Therefore, it would be natural that not everybody approves of the presence of peacekeepers in the area and that the international community did not “intend to make it an international crime for persons to express objection to or dissatisfaction with the work of peacekeepers”.³⁴¹

In its Abu Garda Decision on the Confirmation of Charges the ICC-Pre-Trial Chamber approved the view of SCSL-Trial Chamber, explicitly stating that the element of an attack would not require any material result or harmful impact.³⁴² Also, the *Elements of Crimes* are lacking the requirement of a harmful result.³⁴³ In conclusion it can be stated, that the term ‘attack’ in Article 8(2)(b)(iii) and (e)(iii) ICC-Statute and Article 4 (b) SCSL-Statute does not require an actual damage.

It is questionable is if this interpretation affects the interpretation of the term ‘attack’ in relation to civilians, as set out in Article 8(2)(b)(i) and (e)(i) of the ICC-Statute. Since Article 8(2)(b)(iii) and (e)(iii) have the same wording as Article 8(2)(b)(i) and (e)(i) it is arguable that the element of an ‘attack’ must be defined the same way. The jurisdiction of the ICC and SCSL would therefore be an explicit abandonment of the previous interpretation of ‘attack’ in international law. The wording of the Statute explicitly lacks the requirement of a result in relation to both provisions. The same is

acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health... ”

³³⁶ ICTY Appeals Chamber, The Prosecutor v. Dario Kordic and Mario Cerkez, Judgment of 17 December 2004 (IT- 95- 14/2-A) at 55-68; Gadler (note 2) at 601; Sivakumaran (note 55) at 1025.

³³⁷ RUF Judgment at 220; Gadler (note 2) at 595; Breitegger (note 60) at 717.

³³⁸ RUF Judgment at 220; Sivakumaran (note 55) at 1024.

³³⁹ RUF Judgment at 1889.

³⁴⁰ Idem; Sivakumaran (note 55) at 1025; Gadler (note 2) at 601.

³⁴¹ RUF Judgment at 1889; Gadler (note 2) at 601; Sivakumaran (note 55) at 1025.

³⁴² Abu Garda Decision on the Confirmation of Charges at 65.

³⁴³ Sivakumaran (note 55) at 1025; Gadler (note 2) at 601.

true for the *Elements of Crimes*. This indicates that the drafters of the ICC-Statute did not intend for the two terms to be interpreted in different ways.

On the other hand, it can be argued that this is an expression of a clear distinction between the war crimes of attacks against civilians and peacekeepers, justified by the special function that is inherent to peacekeepers.³⁴⁴ After the arguments above, it is not possible to justify the interpretation of the same wording in the same legal text in two different ways. The purpose of the establishment of a specific war crime of attacking peacekeepers has to be seen in the differences between the subjects of protection (peacekeeper or civilian), rather than the behaviour that is criminalized. Since neither the ICC nor the SCSL make any remarks on this, future court decisions will show if the broad meaning of ‘attack’ is actually applied to civilians or not.

With regard to the principle of specificity, it can be concluded that the element of ‘attack’ (at least concerning the war crime in question) does not have to cause actual damage. The jurisprudence is clear on that and the finding is in line with the wording.

In relation to the question of which actions constitute an attack against peacekeepers, it must be concluded that international law does not provide an answer in its current state. While the SCSL includes all acts against the personnel liberty, the ICC jurisdiction limits theirs to cases in which physical harm is intended. Scholars also differ in this argument. While *Cottier* favours a narrow definition according to Article 49 AP I,³⁴⁵ *Werle* and *Kittichaisaree* are favouring the application of a broader interpretation according to the Safety Convention.³⁴⁶ This element of crime can not be clearly defined by the Statutes in their current state, or through legal interpretation in general (including existing case law). This means that the subject of law is not able to foresee if his behaviour will or will not be punishable as war crime against peacekeeping personnel. The principle of specificity of Article 22(2) ICC-Statute is violated.

³⁴⁴ Gadler (note 2) at 595.

³⁴⁵ Cf. *Cottier* (note 51) at 57.

³⁴⁶ Cf. Kriangsak Kittichaisaree *International Criminal Law* (2001) at 160; *Werle* (note 23) at 1265.

5.3.2 The specificity of the term ‘peacekeeping mission in accordance with the U.N. Charter’

The attack has to be directed against personnel of a ‘peacekeeping mission in accordance with the U.N. Charter’.

As discussed under Chapter II (2.4) the phrase ‘peacekeeping mission in accordance with the U.N. Charter’ lacks a universally recognized definition.³⁴⁷ It is also not defined by the Statutes. Nevertheless as argued in Chapter II (2.4), there are widely accepted characteristics that a mission has to fulfil in order to be qualified as a peacekeeping mission (consent, impartiality and minimum use of force). The SCSL-Trial Chamber approved these criteria in its’ RUF-Judgment.³⁴⁸ The Court came to the conclusion that these characteristics are fulfilled³⁴⁹ by the UNAMSIL troops,³⁵⁰ which categorizes them as a peacekeeping mission according to Article 4(b) SCSL-Statute.

These criteria were reaffirmed by the ICC-Pre-Trial Chamber in its decision in Prosecutor v. Bahar Idriss Abu Garda.³⁵¹ Like the SCSL-Trial Chamber the ICC-Pre-Trial Chamber examined the status of the AMIS personal under due consideration of the elements of consent, impartiality and limited use of force.³⁵² The ICC-Pre-Trial Chamber ascertained that AMIS troops fulfil these criteria and thus fall under the scope of Article 8(2)(e)(iii) ICC-Statute.³⁵³

After the above is said, it can be concluded that even though international law and the Statutes are lacking a definition of the term peacekeeping mission, the rule of specificity is not violated. As shown under consideration of general international law and the case law, it is possible to clearly determine this element of crime.³⁵⁴

³⁴⁷ RUF Judgment at 221; Georg Dahm et al *Völkerrecht* vol 2, 2ed (2002) at 1059; Knut Dörmann *Elements of war crimes under the Rome Statute of the International Criminal Court* at 158; Werle (note 23) at 510; Cottier (note 51) at 31.

³⁴⁸ RUF Judgment at 225.

³⁴⁹ *Highly controversial, since the parties never gave their consent to UNAMSIL troops but only to UNOMSIL troops (which consist of 70 unarmed observers). Since UNAMSIL is a successor troop to UNOMSIL, the Court regards the consent as involving UNAMSIL.*

³⁵⁰ RUF Judgment at 225; Gadler (note 2) at 602.

³⁵¹ Abu Garda Decision on the Confirmation of Charges at 62.

³⁵² Ibid at 107-109; Breitegger (note 60) at 720.

³⁵³ Idem.

³⁵⁴ However, as shown, *the legal interpretation by the Courts is questionable in some regards.*

The war crime of an attack against peacekeepers further requires that the peacekeeping mission be 'in accordance with the United Nation Charter'. What this means is quiet uncertain. It can be argued that this requirement is only a formalistic one, which requires that the peacekeeping mission be launched in accordance with the purposes (Article 1 U.N. Charter) and principles (Article 2 U.N. Charter) of the U.N.³⁵⁵ However, it can also argued that an operation in accordance with the Charter of the U.N. is only a mission which is adopted from the 'competent organ of the U.N. conducted under U.N. authority and control.'³⁵⁶

This scenario is particularly interesting in relation to peacekeeping missions under a regional mandate like AMIS.³⁵⁷ If one follows the argument that this element would only be a formalistic one, regional peacekeeping operations would be protected. Whereas under the second approach, regional peacekeeping could not be seen as a peacekeeping mission in accordance with the U.N. Charter since they are not established by a U.N. organ and conducted under U.N. authority and control. The following discussion will determine which approach has to be favoured.

5.3.2.1 Peacekeeping missions under a regional mandate

Chapter VIII of this paper makes the involvement of regional arrangements and agencies in the maintenance of international peace and security possible, and is therefore the legal basis for the actions of regional organization under a U.N. mandate.³⁵⁸

Due to the increasing demand for peacekeeping missions, a wide range of cooperative activities between the U.N and regional organizations has occurred.³⁵⁹ Examples are the North Atlantic Treaty Organisation (NATO) provision of air support to the United Nations Protection Force (UNPROFOR) mission in Bosnia-Herzegovina; the field missions of Economic Community of West African States (ECOWAS) in Liberia and Commonwealth of Independent States (CIS) in Georgia,

³⁵⁵ Sivakumaran (note 55) at 1026.

³⁵⁶ Cf. Article 1 (c) of the Safety Convention; Darge (note 49) at 349.

³⁵⁷ *This problematic does not account to Article 4 (b) SCSL- Statute, since no regional organizations have been involved in the U.N. peacekeeping mission in Sierra Leone.*

³⁵⁸ U.N. peacekeeping website, (note 25); Doyle and Sambanis (note 5) at 504.

³⁵⁹ Roy Lee (note 10) at 624; Goulding (note 4) at 457; Oswald (note 5) at 5.

or the joint operation of Organisation of American States (OAS) in Haiti, to name just a few.³⁶⁰

It is arguable that peacekeeping missions under a regional mandate are not covered by this war crime. This can be supported by the Safety Convention, which limits peacekeeping missions to an 'operation established by the competent Organ of the U.N, in accordance with the Charter of the U.N. and conducted under U.N. authority and Control.'³⁶¹ With reference to the Safety Convention regional peacekeeping missions, are therefore not covered.³⁶²

However, the wording of the ICC and the SCSL-Statute differs from that of the Safety Convention.³⁶³ Both legal instruments require a peacekeeping mission 'in accordance with the Charter of the United Nation.'³⁶⁴ The ICC-Pre-Trial Chamber had to deal with that element of crime in its case concerning attacks on AMIS personnel, since this mission was established and directed by a regional organization, namely the African Union (AU).³⁶⁵ It ruled that the fact that AMIS was not directly established by the S.C. did not mean that the units were not protected by Article 8(2)(e)(iii) of the ICC-Statute. The Chamber referred to the wording of the provision, that explicitly wider than the Safety Convention, and therefore also embodies missions under a regional mandate as long as they would be in accordance with the purposes and principles of the Charter. To analyze whether a regional mandate would be in accordance with the Charter, the ICC-Pre-Trial Chamber took two main factors into account: first the court classified the AU as an organization whose existence would explicitly be provided by Article 52(1) of the U.N. Charter, and secondly that it was regularly endorsed by the S.C. Council.³⁶⁶ It therefore ruled that AMIS would be a peacekeeping mission in accordance with the Charter.

³⁶⁰ Wedgwood (note 2) at 77; Roy Lee (note 10) at 624; Goulding (note 4) at 457; Oswald (note 5) at 5; Ricky Lee (note 16) at 192; Clemons (note 6) at 128.

³⁶¹ Cf. RUF Judgment at 231; Gadler (note 2) at 596.

³⁶² Gadler (note 2) at 596.

³⁶³ RUF Judgment at 231.

³⁶⁴ Cf. Article 8 (2)(b)(iii) ICC-Statute and Article 4(b) SCSL-Statute.

³⁶⁵ Breitegger (note 60) at 720; Gadler (note 2) at 596.

³⁶⁶ Abu Garda Decision on the Confirmation of Charges at 75; Breitegger (note 60) at 720; Jeremy Levitt 'The case of ECOWAS in Liberia and Sierra Leone' (1998) 12 Temple Int'l & Comp. L.J at 374.

This interpretation of the ICC-Pre-Trial Chamber can be strengthened by the argument that the term *in accordance* arguable refers to ‘being in accordance with the purposes and principles of the Charter’ (Articles 1 and 2 U.N. Charter), rather than to an explicit authorisation through the Charter.³⁶⁷

The finding of the Court is convincing and also finds support from scholars.³⁶⁸ Furthermore the international community has clearly demonstrated that it is willing to entrust regional actors³⁶⁹ with peacekeeping missions. Additionally, as stated above, the wording of the war crime does not automatically exclude regional peacekeepers.³⁷⁰ It can therefore be concluded that peacekeepers mandated under a regional organization are protected by the ICC-Statute, if the establishment of the peacekeeping mission is in accordance with the U.N. Charter according to the above mentioned criteria, as set out by the ICC-Pre-Trial Chamber in *Prosecutor v Bahar Idriss Abu Garda*.³⁷¹

5.3.2.2 Conclusion

It is concluded, that the characteristic of being ‘in accordance with the U.N. Charter’ is only a formalistic one, which relates to the purposes and principles of the U.N. Charter and not to an explicit authorization by the competent organ of the United Nations, conducted under United Nations authority and control.

The ICC-Pre-Trial Chamber was the first international criminal tribunal that had to deal with the question, whether peacekeepers under a regional mandate are protected by the war crime of attacks against peacekeeping personnel. Its clear finding made a huge contribution to international criminal law. Under due consideration of the scholarly opinion, the wording of the Statutes and the case law, it can be concluded, that this requirement is specific enough to be in accordance with the principle of specificity.

³⁶⁷ Moir (note 155) at 313.

³⁶⁸ Bruno Simma *The United Nations Charter: A commentary* (1995) at 699; Cottier (note 51) at 39; Roy Lee (note 10) at 625; Bratt (note 4) at 64; Levitt (note 366) at 334.

³⁶⁹ United Nations, *The 50th anniversary annual report on the work of the Organization* 1996 at 306 (1996); U.N. General Assembly Resolution 49/57 of December 9, 1994.

³⁷⁰ Levitt (note 366) at 374.

³⁷¹ Cf. Gadler (note 2) at 596.

5.3.3 The element of disqualification of protection: ‘as long as they are entitled to protection afforded to civilians under IHL’

The application of the war crime is limited to persons who are entitled to special protection afforded to civilians under IHL.³⁷² Civilians are entitled to protection under IHL, especially Article 51(3) AP I, ‘as long as they do not take direct part in hostilities.’³⁷³ A person takes direct part in hostilities through any activity that, by its purpose is intended, to cause damage to an opposing groups’ personnel or material.³⁷⁴ If peacekeepers take direct part in hostilities (through using force), they become combatants.³⁷⁵ Combatants, as defined in Article 43 of the AP I³⁷⁶ are persons who, according to the international law of armed conflict, are entitled to launch attacks against military objectives.³⁷⁷ On the other hand they are possible lawful targets themselves; hence attacking a combatant is no war crime if the *ius in bello* is not violated.³⁷⁸ Consequently, they are not protected as peacekeepers anymore and lose their protection under Article 8(2)(b)(iii) and (e)(iii) of the ICC-Statute. The theoretical assumption is clear, however in practice there exists a grey area as to when certain acts must be considered as taking part in hostilities.³⁷⁹

³⁷² Héctor Olásolo *Unlawful attacks in combat situations: From the ICTY’s case law to the Rome Statute* (2008) at 92; Maybee (note 2) at 27; Gadler (note 2) at 596; Sivakumaran (note 55) at 1026.

³⁷³ Gadler (note 2) at 596; Werle (note 23) at 512; Olásolo (note 372) at 108.

³⁷⁴ Olásolo (note 372) at 108.

³⁷⁵ Maybee (note 2) at 27; Olásolo (note 372) at 93; Sivakumaran (note 55) at 1026; Bloom (note 49) at 625.

³⁷⁶ Article 43 AP I: 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system that, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict. 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict

³⁷⁷ Olásolo (note 372) at 105.

³⁷⁸ Maybee (note 2) at 27; Kittichaisaree (note 346) at 161; Werle (note 23) at 1123; Bloom (note 49) at 625; Sivakumaran (note 55) at 1026; Olásolo (note 372) at 105.

³⁷⁹ Nils Melzer *Interpretative guidance on the notion of direct participation in hostilities* (2008) at 61; Cottier (note 51) at 51.

5.3.3.1 The exception of use of force in self- defence situations

One of those grey areas arises in relation to self-defence. Self-defence is an exception of the prohibition of use of force.³⁸⁰ In such situations, peacekeepers are allowed to use force without losing their protected status.³⁸¹ This is only consequential since civilians are not losing their protection under IHL in cases of self-defence either.³⁸²

In IHL, self-defence is defined as the right to protect oneself or a third person against an unlawful (imminent) armed attack endangering the persons' life or physical integrity.³⁸³ Lawful self-defence is limited by the principles of necessity and proportionality.³⁸⁴ The principle of proportionality requires that the specific defence action be justified under consideration of the potential result of the threat by the potential threat. The principle of necessity requires that a defence action involve no greater use of force than absolutely necessary to deal with the threat.³⁸⁵

This term is thus definable and causes, in general, no doubt as it meets the requirements of specificity.

However, the term self-defence is applied in a broader sense by the U.N. in relation to peacekeepers, namely to include situations in which armed forces may use force *to carry out or to defend* the mandate.³⁸⁶ This happened for the first time in 1973 in the Second United Nations Emergency Force (UNEF II), and became the norm afterwards.³⁸⁷

In the first judgement concerning this war crime, the SCSL-Trial Chamber affirmed the interpretation of self-defence to protect the mandate.³⁸⁸ It stated: "it is now settled law³⁸⁹ that the concept of self-defence for these missions [relating to peacekeeping

³⁸⁰ Sivakumaran (note 55) at 1027; Olásolo (note 372) at 107; Bialke (note 2) at 19; Green (note 7) at 32; Murphy (note 24) at 72.

³⁸¹ Cf. Bloom (note 49) at 625; Sivakumaran (note 55) at 1027; Maybee (note 2) at 27.

³⁸² Melzer (note 379) at 61.

³⁸³ Kevin C. Kenny, Self-defence, in: Rüdiger Wolfrum (ed.) at 1162; Olásolo (note 372) at 107; Frulli (note 177) at 865; Bialke (note 2) at 20; Gadler (note 2) at 603.

³⁸⁴ Kenny (note 383) at 1162; Olásolo (note 372) at 107; Bialke (note 2) at 19; Murphy (note 24) at 77; Melzer (note 379) at 61.

³⁸⁵ Bialke (note 2) at 21; Murphy (note 24) at 73.

³⁸⁶ Cottier (note 51) at 52; Sivakumaran (note 55) at 1028; Bialke (note 2) at 22; Murphy (note 24) at 72; Doyle and Sambanis (note 5) at 500; Mohamed (note 6) at 810.

³⁸⁷ Murphy (note 24) at 72; Sivakumaran (note 55) at 1028.

³⁸⁸ RUF Judgment at 228; Sloan (note 305) at 282; Sivakumaran (note 55) at 1028.

³⁸⁹ *This statement is simply wrong. Even though it is the practice of the U.N., it is not "settled law."* Actually is such a broad interpretation denuding self-defence of much of its meaning (cf. Sloan

missions] has evolved to include the right to resist attempts by forceful means to prevent the peacekeeping operation from discharging its duties under the mandate of the Security Council.³⁹⁰

The Chamber based its findings on international practice and on the wording of Article 7(1) of the Safety Convention, which states that ‘United Nations personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate’.³⁹¹

Such a broad interpretation alone is not violating the principle of specificity *per se*. Nevertheless a violation is given, if such an interpretation makes a clear definition of the prohibited behaviour impossible.³⁹² The following discussion will determine if this is the case.

As shown in Chapter II (2.5) peacekeeping missions vary largely in their mandate. With the establishment of new tasks the authorization to use force has also been extended.³⁹³ The task of safeguarding humanitarian supplies for example usually leads to an authorization to use force in order to fulfil the task.³⁹⁴ Consequently even the *active* use of force to defend the supplies is the use of force to defend the mandate. This in turn would be acting in self-defence. In such, so called robust peacekeeping missions, peacekeepers are more likely to be fighters than civilians since the authorization to use *active* force in defence of its mandate is the same, like allowing to *enforce* the mandate.³⁹⁵ Depending on the nature of the mandate and the practical circumstances, it is therefore possible that peacekeepers acting in defence of their mandate but also become involved as combatants.³⁹⁶

One example for a mandate being able to create such a situation is the UNOSOM II mandate, which entitled peacekeepers to ‘*prevent* any resumption of violence and, if necessary, *take appropriate action* against any faction that violates *or threatens* to violate the cessation of hostilities’ and to ‘seize small arms of any unauthorized

(note 305) at 282).

³⁹⁰ RUF Judgment at 228.

³⁹¹ Article 7(1) of the Safety Convention; Sivakumaran (note 55) at 1028.

³⁹² Cassese (note 183) at 41.

³⁹³ Sivakumaran (note 55) at 1028.

³⁹⁴ Bialke (note 2) at 22; Murphy (note 24) at 72; Doyle and Sambanis (note 5) at 387.

³⁹⁵ Sloan (note 305) at 282.

³⁹⁶ Sivakumaran (note 55) at 1028.

armed elements.³⁹⁷ This mandate is so wide that peacekeepers would through the same action, defend their mandate (act in self-defence') and also act as combatants. Another example is the UNAMSIL mandate, which authorized the UNAMSIL personnel to “*take necessary action* to ensure the security of its personnel and the freedom of movement of its personnel or to protect civilians under the threat of physical force.”³⁹⁸ The U.N.S.G. found that the UNAMSL troops have the power “to use force, including deadly force, in self-defence or against any hostile attack or *intent*.”³⁹⁹ In other mandates peacekeepers are authorized to *take action against spoilers*.⁴⁰⁰ Depending on the individual situation, taking actions against spoilers can constitute interference in the hostilities and/or a self-defence action at the same time.⁴⁰¹

As these examples show, self-defence (to defend the mandate) and taking direct part in hostilities (authorized by the mandate) may overlap. How hard it is to determine if the use of force is covered by self-defence (to defend the mandate) or is an active engaging in hostilities is also shown by the case law. In its RUF-Judgment the Special Court held that in determining whether peacekeeping personnel is entitled to civilian protection or acting as combatants, “the totality of the circumstances existing at the time of the alleged offence, including, *inter alia*, the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their Rules of Engagement, the nature of the arms and equipment used by the peacekeepers, the interaction between them and the parties involved in the conflict, any use of force between the U.N. troops and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victims” has to be analyzed and taken into account.⁴⁰²

Despite the fact that it is highly controversial, whether the term self-defence under IHL can be interpreted to cover actions like the use of force to ensure the delivery of

³⁹⁷ *Idem*.

³⁹⁸ UN SC Res. 1270, 22 October 1999 at 14; RUF Judgment at 1750.

³⁹⁹ United Nations, “Fourth Report of the Secretary-General pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone”, (UN document S/2000/455), 19 May 2000 at 89.

⁴⁰⁰ Sivakumaran (note 55) at 1029.

⁴⁰¹ *Idem*.

⁴⁰² RUF Judgment at 234; Sivakumaran (note 55) at 1029; Gadler (note 2) at 603.

humanitarian supplies in the first place,⁴⁰³ the broad interpretation of the S.C in addition to the development to broad authorization to use force leads to the consequence that it is unclear, in what situations peacekeepers are acting in self-defence.

The case law of the SCSL has not been so far reaching as to establish an overall clarity. Moreover, it stated that it would depend on a case-to case basis to determine if the use of force can be justified through self-defence. Taking this case law into account, it is not possible to hold the view that international law consists of clear legal guidelines. As Cottier resignedly states: 'in sum, without clearer standards it will be difficult to determine under what circumstances the entitlement to the protection as civilians exists, or ceases to exist'.⁴⁰⁴

In terms of the specificity of the element of self-defence, it must therefore be concluded that through its broad, and at the current time undefined, scope does not heed the requirement of specificity. The individual cannot be expected to be able to clearly determine if self-defence justifies the use of force by peacekeepers or if it makes them military targets.⁴⁰⁵ Even if one wants to reduce the content of the principle of specificity to the merely foreseeable, it seems artificial to argue that a subject of law should be able to foresee whether the use of force in those situations is a war crime. When international criminal law experts and international criminal tribunals are not able to clearly determine the legal requirements how can they expect the individual to?

A related problem arises if peacekeepers are authorized to use force beyond the classical definition of self-defence, but in fact did not do so. They therefore did not become involved in the armed conflict.⁴⁰⁶ It is arguable that the application of IHL depends on the factual circumstances and that peacekeepers are still protected. On

⁴⁰³ According to IHL self-defence is limited to 'individual self-defence or defence of others against violence prohibited under IHL.' Violence prohibited under IHL is scenarios such as the imminent threat of rape, murder and similar attacks. These examples indicate that IHL assumes a certain amount of seriousness of the (imminent) attack. It must be concluded that it is hard to justify that the theft of humanitarian supplies has the same amount of seriousness as the aforementioned scenarios. Consequently, the use of force to defend the mandate can therefore not be justified by self-defence under IHL (cf. Frulli (note 177) at 865; Gadler (note 2) at 603).

⁴⁰⁴ Helmut Satzger 'Das neue Völkerrechtsgesetzbuch' (2003) NStZ at 130; Cottier (note 51) 44.

⁴⁰⁵ Satzger (note 404) at 130.

⁴⁰⁶ Gadler (note 2) at 591.

the other hand, the conflict parties can not be expected to treat peacekeepers under such a mandate as an impartial third party, since they would in theory be able to use force.⁴⁰⁷ It can be argued that if the parties gave their consent (and did not withdraw it) they expressively accepted the peacekeepers as being impartial and not participations of the conflict. Consequently, peacekeepers would still be protected.

In situations, in which the parties withdraw their consent, the characteristics of peacekeeping mission are no longer fulfilled. From the withdrawing parties' point of view, further presence of the peacekeepers (especially with an extensive mandate to use force) must be seen as interference in the conflict.⁴⁰⁸ It is therefore arguable that in the case of a withdrawing of consent by one conflict party the remaining peacekeeping units become party, to the conflict (similar to peace-enforcement missions) and thus loses protection under IHL. This also appears correct in relation to the characteristics of a peacekeeping mission (cf. Chapter II (2.4)) which in any case requires the consent of the parties. Peacekeepers consequently lose their protection under IHL, even if they factual did not use force if a party withdrew its consent. While in cases of consent, a protection under IHL is granted.

5.3.3.2 Use of force by single peacekeepers

The question of the protection of peacekeeping personnel also arises if single members of the mission or a single unit of the mission uses force beyond self-defence (cf. Articles 51(3) and (52)(2) AP I).⁴⁰⁹ The question that arises is if the whole mission loses protection in such a scenario, or just the single individual.⁴¹⁰

On one hand, it can be argued that just the individual loses protection. This view can be supported with the argument that peacekeepers should be protected as long as they act within the borders of their mandate. In practice, there is always the possibility that individuals may overstep their authority. It can be seen as inappropriate to let the whole troop suffer for the behaviour of individuals. Therefore, it is arguable that the other members of the unit would still be protected.

⁴⁰⁷ Idem.

⁴⁰⁸ Idem.

⁴⁰⁹ Werle (note 23) at 512.

⁴¹⁰ Cottier (note 51) at 55.

On the other hand, it can be argued that the whole unit loses its protection. This view can be based on the argument that a conflict party can not be expected to be able to distinguish between members of identically labelled troops in different stages of involvement. The requirement of doing so would bring the opposing party at great risk to commit a war crime.⁴¹¹

According to the wording of the Safety Convention, the whole unit loses its protection, since Article 2(2) states ‘...*any* of the personnel...’⁴¹² Thus, in terms of the Safety Convention, if any unit or individual participating in a peacekeeping mission loses protection then same is true for all other units.

This approach can also be strengthened by the argument that under IHL, all military components of a mission would obtain combatant status if single members are directly taking part in hostilities, because the mission would then become a party to the conflict.⁴¹³

Finally the approach that only the individual would lose protection would be a clear violation of the principle of specificity, since it would be impossible to foresee a criminal liability if personnel of one mission has different legal status (combatants and non-combatants) without a clear sign of distinction. It cannot be concluded that the Drafters of the ICC-Statute and the SCSL-Statute had the intention to violate a principle of international law.

Therefore, the approach followed here is that the arguments in respect of the lost protection of the whole unit are outweighing the arguments in favour of an individual lost of protection. Therefore the whole unit loses its protected status as peacekeepers.

This finding is in line with the principle of specificity, since the subject of law is able to clearly distinguish between scenarios in which a criminal liability results and in which it does not.

⁴¹¹ Darge (note 49) at 346.

⁴¹² *Idem*.

⁴¹³ Gadler (note 2) at 598.

5.3.3.3 Conclusion

After the above has been said, it must be concluded that the element of crime ‘as long as they are afforded to protection given to civilians under IHL’ violates the principles of specificity. It is not clearly determined in what situations peacekeepers are entitled to the protection of civilians under IHL. Uncertainty especially arises if peacekeepers have an authorization to use force beyond classical self-defence, combined with the broad definition of self-defence to defend the mandate. Furthermore, it is still debatable⁴¹⁴ in what practical circumstances the whole mission loses its protection, if just single peacekeepers are directly taking part in hostilities.⁴¹⁵

6. Chapter VI: Finding

In conclusion it must be stated that the elements of crime including ‘attack’ and ‘entitled to the protection afforded to civilians under IHL’ lack a sufficient specificity. Article 8(2)(b)(iii) and (e)(iii) ICC-Statute and Article 4(b) SCSL-Statute are therefore violating the principle of specificity.⁴¹⁶

The principle of legality and its component of specificity are parts of the fundamental human rights of the accused.⁴¹⁷ Even if this principle is narrowed down to the plain foreseeability of the punishment, the punishable behaviour can hardly be determined because it depends on value judgments (particularly true for the requirement of peacekeepers being protected under IHL). Even though intentionally directed attacks against peacekeepers are one of the most serious crimes, the punishment cannot come through sacrificing the basic human rights of the accused, since international criminal law would lose its legitimacy if that happened.⁴¹⁸

⁴¹⁴ *The solution provided in this paper is solely the authors' view.*

⁴¹⁵ Satzger (note 404) at 130; Cottier (note 51) 43.

⁴¹⁶ Kai Ambos ‘Remarks on the general part of the international criminal law’ (2006) 4 J Int'l Crim Just. 660 at 669; Satzger (note 404) at 130.

⁴¹⁷ Ambos (note 416) at 669.

⁴¹⁸ *Idem.*

Under consideration of the argumentation of this paper, a lawful version of a war crime against peacekeeper could be:

“Intentionally directing attacks against *the person or the liberty of personnel or units*⁴¹⁹ involved in a humanitarian assistance or peacekeeping mission in accordance with *the purposes and principles* of the Charter of the United Nations, as long as they are entitled to the protection given to civilians under the international law of armed conflict *or as long as they are acting within the scope of their mandate, authorized by the S.C., explicitly having the consent of the conflict parties. Attacks concerning the liberty of a person in this Article are limited to kidnapping and taking hostage.*

The phrase ‘*person or liberty*’ in addition, with the last sentence of the paragraph, would clearly state what actions concerning the liberty of a person constitute an attack in this regard. All attacks against the person would still be punishable. The notion of *purposes and principles* would clearly bring regional peacekeeping missions under the protected persons, and the additional phrase ‘*as long as they are acting within the scope of their mandate*’ would ensure that peacekeepers, even using force to defend their mandate would still fall under the scope of the war crime- even if they are close to being fighters and thus not anymore entitled to protection of civilians under IHL. The last additional requirement -*explicitly having the consent of the conflict parties*- fulfils three purposes. First, it ensures that no peace-enforcement mission falls under the scope of the war crime. Secondly, it protects any potential accused, since the conflict parties are clearly aware in what situations peacekeepers are entitled to use force. This in regard, it would draw a clear line between committing a war crime and a lawful attack. Furthermore the consent requirement avoids an extensive and vague authorization to use force by the S.C.

⁴¹⁹ *Attacks concerning objects should be embodied in their own subparagraph to avoid an over lengthy provision confusing wording.*