RIGA GRADUATE SCHOOL OF LAW

Conflicting Peacekeepers:

The Applicability of International Humanitarian Law to the UN Mission in the Democratic Republic of the Congo

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) ……

RIGA, 2018

Summary

The following thesis *"Conflicting Peacekeepers: The Applicability of International Humanitarian Law to the UN Mission in the Democratic Republic of the Congo"* intends to direct attention to the problems caused by the increased legitimization of use of force through peacekeeping mandates. The core of the thesis answers whether peacekeepers can, once authorized to take up arms, be bound by international humanitarian law (IHL), and whether they can be held accountable for grave breaches thereof. The case study of the MONUSCO peacekeeping-mission in the Democratic Republic of the Congo (DRC) offers valuable ground for consideration of the two formerly distinct concepts of peacekeeping and the laws of armed conflict.

As an instrument deployed by the United Nations Security Council (SC), peacekeeping plays an important role in the maintenance of international peace and security. Traditionally characterized by impartiality, consensual deployment, and abstention from the use of force, peacekeeping had been considered far from colliding with the obligation to comply with IHL. Throughout the last two decades, however, the SC has increasingly authorized peacekeeping-operations (PKOs) with stronger mandates, legitimizing missions to resort to force beyond the necessity for self-defence and the protection of their mandates.

In 2013, the United Nations Security Council established the *Intervention Brigade* under the United Nations Peacekeeping Operation in the Democratic Republic of the Congo (MONUSCO), mandated to fight alongside the Congolese government in neutralizing armed rebel groups. The *Intervention Brigade* is a well-equipped military-force, about 3,000 military-personnel strong, directly placed under the command of the MONUSCO mission. This force is unique insofar as it enjoys "explicit authorization to use force against parties to the conflict", an unprecedented characteristic to peacekeeping.

The following thesis thus outlines that the *Intervention Brigade*'s role in the DRC qualifies it as a party to the ongoing war, and consequently binds it by the rules governing this non-international armed conflict, at least for the time and duration its peacekeepers exercise the role of combatants. Furthermore, the thesis addresses that the UN acknowledges that their peacekeepers, once actively engaged the conflict, must abide by the rules regulating the respective hostilities. However, persisting immunities and privileges provided for by the 1994 Convention on the Safety of United Nations and Associated Personnel allow to question the equal applicability of laws of war to peacekeepers. Further, the narrow scope of necessary observance of IHL provided for by the 1999 Secretary General's Bulletin causes uncertainty for which period of time peacekeepers enjoy a protected status as civilians, and from which moment on they can be considered as combatants in a conflict. In acknowledging the importance to enforce respect for IHL, the International Criminal Court (ICC) has held accountable perpetrators and compensated victims to grave violations of the Geneva Conventions (GC) that were committed in the context with the Congolese conflict. However, though part of the MONUSCO-contingent is bound by IHL, it appears that their prosecution for grave breaches depends on their national courts' willingness and ability to cooperate in prosecutions of their personnel and to condemn international crimes.

The increased authorization of the resort to force through peacekeeping mandates triggers a valid discussion regarding the relationship between a new “aggressive” generation of peacekeeping and the traditional laws of war.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AP	Protocol Additional to the Geneva Conventions
DPKO	United Nations Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
FARDC	The Armed Forces of the Democratic Republic of the Congo
GC	Geneva Convention
IAC	International Armed Conflict
ICC	International Criminal Court
IHL	International Humanitarian Law
MINUSMA	Forces of the United Nations Multidimensional Integrated Stabilization Mission in Mali
MONUSCO	UN Organization Stabilization Mission in the Democratic Republic of the Congo
MONUC	UN Organization mission in the Democratic Republic of the Congo
MoU	Memorandum of Understanding
NIAC	Non-international armed conflict
PKO	Peacekeeping Operation
SC	United Nations Security Council
SCSL	Special Court of Sierra Leone
SG	United Nations Secretary General
SOFA	Status of Forces Agreement
TCC	Troop contributing country
UN	United Nations
UNC	Charter of the United Nations

INTRODUCTION

Peacekeeping has emerged as a core instrument of the international community to safeguard and restore peace and security, and to shield humanity from the atrocities of warfare. Branded with impartiality, consent, and abstention from the use of force[1], the peacekeepers are seen as the protectors of victims of armed conflicts, and harbinger of transition to sustainable peace. Charged with these tasks, the international community long understood the importance of peacekeepers' safety and protection as integral to the successful exercise of peacekeeping missions. Over the last two decades, however, certain peacekeeping-operations (PKOs) have undergone changes in terms of the legal basis of mandates. Increasingly authorized under Chapter VII of the United Nations Charter (UNC), the United Nations Security Council (SC) has legitimized several missions to resort to force, beyond the mere necessity for self-defence and the protection of the safe execution of their mandates. This new generation of peacekeeping is often referred to as "robust" peacekeeping.[2]

Indeed, with the establishment of the *Intervention Brigade* under the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in 2013, the UN has taken peacekeeping to another level. The *Intervention Brigade*, a well-equipped military-force, with 3,000 personnel contributed from South Africa, Malawi and Tanzania[3], is placed under the direct command of the MONUSCO mission.[4] The SC has authorized this military contingent to deploy offensive use of force in support of the Congolese government in the ongoing domestic conflict. Such fundamental development under a PKO allows for substantial consideration regarding the compatibility of such practice with the traditional features of peacekeeping, as well as with the applicability of the laws of war to peace-operation. More specifically, the authorization of MONUSCO's military contingent to directly engage in hostilities gives considerable ground for contemplation whether, under what circumstances, and to what extent, peacekeepers can be bound by IHL and whether peacekeepers could be prosecuted for grave breaches thereof.

Witnessing a trend in increased legitimized force, the essence of this thesis aims at drawing attention to the controversies and problems caused by the authorized use of force under peacekeeping mandates, and discusses whether the laws of force allows for an equal application and enforcement in situations when peacekeepers have been authorized to deploy offensive force.

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[1] Magdalena Pacholska, "(Il)Legality of Killing Peacekeepers: The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals." *Journal of International Criminal Justice.* Vol. 13, No. 1 (March 1, 2015). pp. 67–68.

[2] The Brahimi report defines "robust peacekeeping" as a form of PKOs with more clarity on the operation's authority to use force, equipped with more extensive military capabilities and resources to fulfill a deterrent function. Such mandates are intended for peacekeeping in complex environments where the effective deterrence from potential threat is necessary for the effective execution of a mission. In *United Nations General Assembly and United Nations Security Council*, "Identical Letters Dated 21 August 2000 from the Secretary-General to the President of the General Assemly and the President of the Security Council (Brahimi Report)." August 21, 2000, p. x.

[3] Peter Fabricius, "Africa: Is the Force Intervention Brigade Still Justifying Its Existence?", *Institute for Security Studies (Tshwane/Pretoria)*. June 22, 2017, http://allafrica.com/stories/201706220262.html. Accessed May 14, 2018.

[4] "MONUSCO Background", *United Nations Peacekeeping*, February 19, 2016, https://monusco.unmissions.org/en/background. Accessed May 10, 2018.

Essentially, this thesis attempts to answers the following research question: **Can peacekeepers of the *Intervention Brigade* in the MONUSCO mission be bound by international humanitarian law (IHL), and can they be held accountable for grave breaches thereof?** To adequately address this question, it is essential for the thesis to clarify several sub-issues, namely

i. which rules of IHL are applicable and enforced with regard to the conflict in the Democratic Republic of the Congo (DRC),
ii. under what circumstances and to what extent UN peacekeepers can be bound by IHL,
iii. whether this is the case for the peacekeepers of the *Intervention Brigade* in the DRC
iv. and whether such peacekeepers can be held accountable for grave breaches of IHL.

In order to adequately answer these questions, the thesis will be structured in five main parts.

Part 1 of this thesis defines peacekeeping, highlighting its main purpose and tasks, as well as the current classification of peacekeepers under international law. Furthermore, attention will be directed to the changing nature of peacekeeping mandates and the increasing number of missions authorized under Chapter VII of the UNC. Most prominently reflecting the development from traditional to robust peacekeeping, the MONUSCO mission in the DRC will serve as an example. The *Intervention Brigade,* MONUSCO's offensive military force, is an example where peacekeepers have been authorized to become actively engaged in a conflict, which differentiates it from prior missions. Sources used in this first part are documents by the UN Department of Peacekeeping Operations (DPKO), SC Resolutions establishing respective PKO mandates, international law, customary law and case law essential for defining the legal status of peacekeepers, as well as academic scholarship.

Part 2 of the thesis draws upon the applicability of the Geneva Conventions (GCs) in both, IACs and NIACs and to whom the deriving obligations are binding upon. It is established to which degree the laws of war apply and how they are enforced in the ongoing conflict in the DRC. Sources used are the GCs, relevant data on the conflict in the DRC, documents on the presence of the International Criminal Court (ICC) in the DRC, and academic scholarship.

Part 3 of the thesis outlines whether and to what extent UN peacekeepers and, subsequently, members in the *Intervention Brigade* are bound by IHL. Sources used in this second part of the thesis are the GCs and their Additional Protocols (APs), UN documents relevant to the applicability of IHL to UN-forces, SC Resolution outlining the MONUSCO mandate, reports on military operations in the DRC, as well as academic scholarship.

Part 4 of this thesis addresses whether MONUSCO peacekeepers can be held accountable for grave breaches of IHL. Outlining the relevance of International Criminal Law to the enforceability of and compliance with IHL, it will be assessed whether it is practically possible for peacekeepers of the *Intervention Brigade* to be prosecuted for international crimes. Obstacles as deriving from the special legal framework of peacekeeping will be analysed, such as immunities of the 1994 UN Convention, and the exclusive jurisdiction of troop-contributing countries, and the complementary nature of the ICC.

Part 5 of this thesis offers a short insight into state opinion on the eventual future development in favour or against the authorization of robust peacekeeping mandates. Sources used in this part of the thesis are Member States' diplomatic statements and scholarly opinion and research.

Scope

This thesis focuses primarily on military-contingents of PKOs authorized by the UN. The case study of MONUSCO has been chosen as the *Intervention Brigade* under MONUSCO is the first UN-force authorized to deploy offensive force under a peacekeeping-mandate and is therefore the most likely to engage in combat activity in an armed conflict – an area regulated by IHL. Throughout the text, the terms, "the laws of war", and "the law of armed conflict" are used interchangeably.

1. DEFINING PEACEKEEPING

Ever since PKOs were launched, the complexity and controversy of their legal status under international law has puzzled scholars and practitioners. As an instrument deployed by the SC to exercise its duty to maintain international peace and security[5], PKOs have become an important subsidiary organ of the UN.[6] With mandates tailored to the needs of each respective host-country, the main task of peacekeeping is to monitor the successful transition from conflict to peace.[7] The authorization of traditional peacekeeper-mandates has been based on the so-called Chapter VI ½ of the UNC, neither fully belonging to the instruments of pacific settlements of disputes under Chapter VI[8] nor, when deployed in volatile environments, to mechanisms in response to threats or breaches of international peace and security under Chapter VII.[9] As of today, 14 active PKOs are deployed by the UN in ongoing- and post-conflict zones around the world.[10]

As the concept of peacekeeping did not exist when the UNC was drawn up, the Charter itself does not provide for a precise definition. Similarly, the GCs, concerned with the regulation of hostilities in warfare (*ius in bello*), do not address the peacekeeping concept.[11] Indeed, prior peacekeeping-practice falls far outside the scope of *ius in bello*, as it is characterized by three distinct features, namely (1) the warring parties' consent for their deployment, (2) impartiality, and (3) the non-use of force, except for self- and mandate-defence.[12] Currently, the UN Department of Peacekeeping Operations (DPKO) defines peacekeeping as

> a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the

[5] Scott Sheeran et.al., "The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo," *International Peace Institute* (2014), p. 3.
[6] *Ibid.*, p .4.
[7] "United Nations Peacekeeping." *United Nations Peacekeeping*. Available at https://peacekeeping.un.org/en/node. Accessed May 11, 2018.
[8] Charter of the United Nations and Statute of the International Court of Justice (1945), Chapter VI.
[9] "United Nations Peacekeeping Operations: Principles and Guidelines." *United Nations Department of Peacekeeping Operations* (2010), pp. 13–14.; *Ibid.*, Chapter VII.
[10] "Principles and Guidelines", *ibid.*
[11] Katharina Grenfell, "Perspective on the Applicability and Application of International Humanitarian Law: The UN Context", *International Review of the Red Cross*, Vol. 95, No. 891/892 (2013), p. 648; Sheeran et.al., "The Intervention Brigade," *supra* note 5, p. 3.
[12] Conflict Barometer 2017. *Heidelberg Institute for International Conflict Research* (Heidelberg, 2018), p. 23.

> years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex mode of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace.[13]

The DPKO's definition of PKOs rightly captures the growing interdisciplinarity of missions, which is reflected in the diversity of personnel, comprising police, civilian, and military contingents.[14] The focus of this thesis, however, remains on military contingents of peacekeeping missions, as they are the most likely to become bound by IHL, and whose legal status will in more detail be outlined subsequently.

1.1. The Legal Status of Peacekeepers

Military-peacekeepers are characterized by three regimes. Namely, they are members of the armed forces of their troop-contributing countries (TCC)[15], further, they qualify for immunities as UN personnel, and lastly, they enjoy the status of protected persons under IHL.

Firstly, the functioning of the UN peacekeeping-system heavily relies on the cooperation and willingness from TCCs to make available their troops.[16] The legal framework for such troop-deployments is defined by bilateral agreements, the Memorandums of Understanding (MoUs) and Status of Forces Agreements (SOFAs), between each respective TCC, the UN, and the host state of deployment.[17] MoUs and SOFAs define practical and legal obligations of such cooperation. Crucially, both MoUs and SOFAs outline that TCCs reserve *exclusive jurisdiction* over their troops, with respect to "*any crimes* or offences that might be committed by them while they are assigned to the *military component* of a [UN PKO] [emphasis added]."[18] It follows that military peacekeepers, as opposed to civilian personnel may only be prosecuted before their national criminal and military tribunals, as they do not lose the attribution to their armed forces of their sending states.

Secondly, although peacekeeping was not considered at the time the UNC was drafted, it has been established retrospectively that peacekeepers qualify for the immunities and privileges of the organization, provided for in Art 105(2) UNC.[19] Subsequently, peacekeepers qualify for "privileges and immunities as are necessary for the independent exercise of their functions" when serving the UN.[20] Additionally, and most relevant for peacekeeping, the Convention on the Safety

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[13] "Principles and Guidelines", *supra* note 9, p. 18.
[14] Pacholska, "(Il)Legality of Killing Peacekeepers", *supra* note 1, p. 67.
[15] Neha Jain, "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court." *The European Journal of International Law.* Vol. 16, No. 2 (2005), p. 245
[16] *Ibid.*
[17] "Memorandum of Understanding between the United Nations [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation]", United Nations Department for Peacekeeping Operations. Available at http://www.un.org/en/peacekeeping/documents/MOU_with_TCCs.pdf. Accessed February 14, 2018.; Report of the Secretary General, "Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: Model Status-of-Forces Agreement for Peace-Keeping Operations", *United Nations General Assembly* (1990).
[18] "Memorandum of Understanding", *ibid*., Art. 7.22.
[19] Charter of the United Nations, *supra* note 8, Art. 105(2).
[20] *Ibid*., Art. 105(2).

of United Nations and Associated Personnel in 1994 (1994 Convention)[21], allocates immunities to "members of military, police, or civilian components of a [UN] operation."[22] Further, it reads that specific privileges and immunities must be concluded between the UN and the host-country of a respective PKO[23], which is done through Status of Forces Agreements (SOFAs). Essentially, in a SOFA the host-countries accept the peacekeepers privileges and immunities[24] as PKOs are subsidiary organs to the UN, and thus permanently immune from the prosecution for any act performed during the official capacity.[25] Furthermore, the SOFA distinguishes between civilian and military personnel. Civilian peacekeepers may be forwarded to criminal proceedings in the host country, while military members are subjected to TCCs' exclusive jurisdiction "in respect to any criminal offence […] committed […] in the host country"[26]. These provisions are relevant in the fourth part of the thesis, addressing accountability of peacekeepers for grave violations of IHL. Indeed, the 1994 Convention was drafted in response to re-occurring attacks on peacekeepers in the 1990s, and thus concerns itself with the protection of the personnel in the first place, condemning their direct targeting as illegal.[27] Interestingly, the Convention's definition of "United Nations operation" explicitly limits its protective scope, privileges, and immunities to peacekeeping-mandates that have not become involved inter-state war, as it excludes "personnel […] engaged as combatants against organized armed forces and to which the law of *international armed conflict* applies [emphasis added]"[28]. This notion that is especially relevant in the further analysis of applicability of IHL to peacekeepers in the third part of this thesis.

Thirdly, peacekeepers qualify as protected persons under IHL and International Criminal Law. Most notably, such protection is engraved in the Customary IHL Rule 33[29] and the statutes of international criminal tribunals that criminalize the direct killing of peacekeepers.[30] Accordingly, the Rome Statute was the first multilateral treaty to label the direct targeting of humanitarian or peacekeeping personnel a war crimes under its Art. 8(2)(e)(iii).[31] The Special Court of Sierra Leone (SCSL) was the first international tribunal to hold a perpetrator criminally liable under this war crime in the landmark case *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (RUF Trial, 2009). In its reasoning, the Court underlined that the crime to target a peacekeeper corresponds with the traditional fundamental prohibition of IHL to attack the civilian population, identifying it as a mere "particularisation" of a rule already deeply engraved in customary

[21] "Convention on the Safety of United Nations and Associated Personnel", 1994. Preamble.
[22] *Ibid.*, Art. 1 (a)(i).
[23] *Ibid.*, Art. 4.
[24] "Model Status-of-Forces Agreement", *supra* note 17, Art. 3.
[25] *Ibid.*, Art. 46.
[26] *Ibid.*, Art. 47(b).
[27] 1994 Convention, *supra* note 21, Art. 15.
[28] *Ibid.*, Art. 2 (2).
[29] Customary IHL Rules 33 reads as follows: "Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited." In "Customary IHL - Rule 33. Personnel and Objects Involved in a Peacekeeping Mission", available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule33. Accessed March 16, 2018,
[30] "Rome Statute of the International Criminal Court", 1999. Available on http://legal.un.org/icc/statute/romefra.htm. Accessed February 14, 2019. Art. 8(2)(e)(iii); "Statute of the Special Court for Sierra Leone" 2000. Available on https://doi.org/10.1163/ej.9789004152342.i-873.9. Accessed April 18, 2018. Art. 4.
[31] Rome Statute, *ibid.*, Art. 8(2)(e)(iii).

international law (CIL), rather than the establishment of a new crime.[32] A year later, in 2010, the ICC reaffirmed this classification in *Prosecutor v. Bahar Idriss Abu Garda (2010)*, condemning a Sudanese national for war crimes under the Statute's Art. 8(2)(e)(iii) for intentionally attacking peacekeeping-personnel and objects.[33] Throughout the judgement, the Court reaffirmed that

> peacekeeping personnel, installations, materials, units and vehicles involved in a peacekeeping mission established in accordance with the [UNC] [are] entitled to the protection given to civilians and civilian objects under [IHL].[34]

Both cases manifest that military-peacekeepers are considered protected persons under international law, and that it is in the interest of their TCCs and the international community to shield them from becoming directly targeted during armed conflicts. It follows that peacekeepers are entitled to civilian protection under customary IHL, though only insofar as they do not engage in hostilities as combatants, which would consequently deprive them of such protected status. Furthermore, the 1994 Convention's privileges apply for as long as peacekeepers do not engage in hostilities governed by the laws of international armed conflicts (IACs). However, accounting for the development of mandates, the compatibility of this current legal framework with a revised and more robust generation of peacekeeping, has ground to be questioned, as subsequently outlined on the example of MONUSCO.

1.2. The Changing Nature of Peacekeeping

Since the 1990s, peacekeeping has undergone a rapid development in terms of growing numbers of PKO deployments and a complexity from robust mandates.[35] Missions have been deployed in situations of persisting violence, and not, as previously outlined in the definition provided by the DPKO, merely in situations where "fighting has been halted"[36]. Indeed, the fact that the SC has increasingly chosen UNC Chapter VII as the legal basis for mandates implies the existence of a "threat to peace"[37] and the need to adequately equip PKOs for the exercise of duties in volatile environments. In light of an emergence of increasingly robust missions the 1999 Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law (1999 Bulletin) acknowledged the possibility that peacekeepers, when acting under the authorization of force or self-defence, can in situations of armed conflict become "actively engaged therein as combatants"[38]. It follows that such development has increasingly legitimized peacekeepers' resort to military activities in conflicts, which in turn might qualify them as

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[32] *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (RUF Trial), Case No. SCSL-04-15-T (Special Court for Sierra Leone), March 2, 2009.
[33] *Prosecutor v. Bahar Idriss Abu Garda* (Abu Garda), Case No. ICC-02/05-02/09 (International Criminal Court), February 8, 2010.
[34] *Ibid.*, p. 27, §60.
[35] Scott Sheeran, "UN Peacekeeping and The Model Status of Forces Agreement", *United Nations Peacekeeping Law Reform Project* (School of Law University of Essex, August 26, 2010), p. 5; RUF Trial, *supra* note 5.
[36] "Principles and Guidelines", *supra* note 9, p. 15, 19.
[37] Jaume Saura, "Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations," *Hastings Law Journal* Vol. 58 (2007-2006), p. 502.
[38] "Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law (1999 Bulletin)", August 6, 1999. Art. 2(2); Tristan Ferraro, "The Applicability and Application of International Humanitarian Law to Multinational Forces", *International Review of the Red Cross*, Multinational Operations and the Law, 95, No. 891/892 (2013), pp. 580-581.

combatants, legitimate targets, and eventually even as a party to a conflict.[39] This transition was witnessed most prominently on the UN PKO in the DRC.

1.2.1. The Example of MONUSCO

The prime example for the development of PKOs is the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), whose current mandate fundamentally differs from the traditional characteristics of peacekeeping, namely (1) consent, (2) impartiality, and (3) abstention from use of force .[40] The UN's involvement in the DRC as well as the background of the ongoing domestic conflict is long-lasting and complex.[41] Initially, the presence of peacekeepers in the DRC began under the UN Organization mission in the DRC (MONUC) in 1999, whose mandate gradually expanded from observational tasks to including the supervision of ceasefire agreements, the support to humanitarian and human rights work, the protection of the civilian population, and the supervision of the electoral process in 2006.[42] As a milestone development in peacekeeping, MONUC became the first PKO to be authorized under Chapter VII of the UNC, charged with the protection of civilians as the mission's number-one priority, which legitimized resort to force whenever seen necessary for the protection of the population.[43] In 2010, the SC Resolution 1925 (2010)[44] succeeded MONUC by establishing the MONUSCO mandate[45], which was essentially charged with stabilization and peace consolidation[46] and with effective protection of civilians from violence of the conflict[47] by "all necessary means"[48], which implied the resort to force when the execution of tasks was under threat.

Three years later, in 2013, and as a response to persisting violence in the DRC, threatening the stability of the country and the Great Lakes region, the MONUSCO mission was furnished with the so-called *Intervention Brigade*, established by SC Resolution 2028(2013).[49] The Brigade is an offensive military force, placed under the Force Commander of MONUSCO, and comprises three infantry battalions, one artillery, as well as one special force.[50] Its establishment was seen necessary and appropriate, in light of the previous mandate's failure to protect the civilian population from large-scale human rights violations perpetrated by rebel groups.[51] Consequently, the Secretary General's proposal to create a force of such strength was adopted unanimously by the SC.[52] It follows that since Resolution 2028(2013), the MONUSCO mission is furnished with

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[39] Ferraro, *ibid.*, p. 562.
[40] Pacholska, "(Il)Legality of Killing Peacekeepers", *supra* note 1, pp. 67–68.
[41] "MONUSCO Background", *supra* note 4.
[42] *Ibid.*
[43] Patrick Cammeart, "The UN Intervention Brigade in the Democratic Republic of the Congo", *International Peace Institute* (July 2013), p. 2.
[44] "Resolution 1925 (2010)", *United Nations Security Council*, May 28, 2010.
[45] Whittle, "Peacekeeping in Conflict: The Intervention Brigade, Monusco, and the Application of International Humanitarian Law to United Nations Forces", *Georgetown Journal of International Law* 46 (2015 2014), pp. 843-844.
[46] Resolution 1925 (2010), *supra* note 44, Art. 12(l-t).
[47] *Ibid.*, Art. 12(a-k).
[48] *Ibid.*, Art.11.
[49] "Resolution 2098 (2013)", *United Nations Security Council*, March 28, 2013; Conflict Barometer 2017, *supra* note 12, p. 24.
[50] "MONUSCO Background", *supra* note 4.
[51] Cammeart, "The UN Intervention Brigade", *supra* note 43, p. 2.
[52] *Ibid.*

the following tasks: Firstly, MONUSCO was charged under Art. 12(a)(i) with the protection of civilians from threat of physical violence from any party to the conflict[53], which includes the cooperation to eradicate violations of human rights and IHL, such as from conflict-related sexual violence.[54] Secondly, and as a distinguished feature of the mission, the Resolution authorizes the *Intervention Brigade* to deploy offensive military force for the "*[n]eutralization of armed groups […] [i]n support of the authorities* of the DRC [emphasis added]."[55] The Resolution underlines further that such use of forced may be deployed unilaterally or in cooperation with the DRC's armed forces, the Forces Armées de la Republique Democratique du Congo (FARDC), but requires it to be exercised "in a robust, highly mobile and versatile manner and in *strict compliance* with international law, including *international humanitarian law* [emphasis added]."[56] Thirdly, MONUSCO is mandated to assist in bringing perpetrators of international crimes to justice, i.e. war crimes and crimes against humanity committed in the DRC, by cooperating with the Congolese government, regional states and the ICC.[57] Thus, the obligations of MONSUCO can be summarized as the protection to the civilian population in the fight against HR and IHL violations, the neutralization of armed groups through offensive force exercised by the *Intervention Brigade*, and the assistance of the international criminal justice system to ensure enforcement and compliance of IHL.

The *Intervention Brigade* distinguishes itself from other PKOs insofar as it enjoys "explicit authorization to use force against parties to the conflict"[58], an unprecedented characteristic to peacekeeping. Indeed, the creation of the *Intervention Brigade* allows to question MONUSCO's character as a traditional PKO insofar as it essentially contradicts the three distinct features of peacekeeping: non-use of force (unless for self- and mandate-defence), impartiality, and consent. Indeed, Resolution 2028(2013) authorized parts of the mission's personnel to "neutralize" organized armed forces[59], with infantry battalions, artillery and a special force at their disposal[60], it fundamentally contradicts the traditional characteristic to abstain thereof, unless for the purpose of self-defence.[61] Furthermore, the *Intervention Brigade*'s support to the FARDC in the fight against rebel groups fundamentally contradicts previous PKOs' features of impartiality and consensual deployment.[62] Additionally, the assistance to the Congolese government has shaken the credibility of the UN, as the FARDC has been accused of several IHL and HR violations.[63]

The mandate of MONUSCO, and with it the *Intervention Brigade*, has been renewed annually without substantial modification.[64] The latest renewal of Resolution 2409 (2018) in March 2018

[53] Resolution 2098 (2013), *supra* note 49, Art. 12(a)(i).
[54] *Ibid.*, Art. 12(a)(iii).
[55] *Ibid.*, Art. 12(b).
[56] *Ibid*.
[57] *Ibid.*, Art. 12(d).
[58] Sheeran et. al., "The Intervention Brigade", *supra* note 5, pp. 4-5.
[59] Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 871.
[60] Grenfell, "Perspective on the Applicability", *supra* note 11, p. 646.
[61] Pacholska, "(Il)Legality of Killing Peacekeepers", *supra* note 1, 67–68.
[62] Conflict Barometer 2017, *supra* note 12, p. 24; Pacholska, *ibid.*
[63] Sheeran et.al., "The Intervention Brigade", *supra* note 5, p. 3.
[64] *Ibid*., p. 1.

extends the authorization to exercise this robust mandate for another year.[65] As of 2018, MONUSCO is the largest PKO deployed by the UN, and comprises a total of 16,215 military personnel, out of which 3,000 peacekeepers are assigned to the *Intervention Brigade*, whose TCCs are Tanzania, Malawi and South Africa.[66] Even though the UN repeatedly emphasises that the *Intervention Brigade* is an exceptional and unique mandate[67], with its creation it has become indispensable to clarify the obligations of peacekeepers under international law, that including the law of armed conflict.

1.3. Conclusion of Part 1

Peacekeeping has been regarded as a valuable tool at the SC's disposal to assist countries in their transition from conflict to peace. The important execution of peacekeepers' tasks justifies their extensive protection under IHL, the necessity for immunities as UN personnel and their TCCs interest to protect their military forces from attack and foreign prosecution. While initial PKO mandates where deployed on consent from all parties to a conflict, pledging impartiality as well as abstention from force, the SC has increasingly authorized missions on the legal basis of Chapter VII of the UNC. Indeed, peacekeepers were initially not intended to become engaged in hostilities, but with an increased legitimization of the execution of mandates "by all necessary means", especially in volatile environments, has brought the two initially contradicting domains of "*peace*-keeping" and the "laws of *war"* closer together than ever. Especially with the formation of the *Intervention Brigade* under MONUSCO, the UN has for the first time explicitly authorized a PKO to deploy offensive military force in support of a party to a conflict, which allows for re-consideration of the mission's peacekeepers legal status and their possible obligations under the law of armed conflict. To address this, the second part of this thesis outlines to what degree IHL applies to the conflict in the DRC, which is necessary for the subsequent analysis of the relationship between UN peacekeeping, the *Intervention Brigade* and the law of armed conflict.

2. The Applicability of International Humanitarian Law to the Conflict in the Democratic Republic of The Congo

The applicability of IHL to PKOs has been a controversial debate, reflecting that peacekeeping was originally not designed to resort to actions covered by this set of laws.[68] Additionally, PKOs were, as subsidiary organs to the UN, who is neither a Signatory to the GCs of 1949 nor to their Additional Protocols of 1977 and 2005, considered as being bound by the obligations of IHL deriving from these treaties.[69] However, the *Intervention Brigade*'s involvement in the conflict in the DRC justifies the consideration when and under which circumstances the rules regulating the

[65] "Unanimously Adopting Resolution 2409 (2018), Security Council Extends Mission in Democratic Republic of Congo until 31 March 2019", *Meetings Coverage and Press Releases*. Available on https://www.un.org/press/en/2018/sc13265.doc.htm. Accessed March 11, 2018.
[66] Fabricius, "Africa", *supra* note 3.
[67] Sheeran et.al., "The Intervention Brigade", *supra* note 5, p. 3.
[68] Ferraro, "The Applicability and Application", *supra* note 38, p. 563.
[69] Sheeran et.al., "The Intervention Brigade", *supra* note 5, p. 5.

respective conflict become relevant, and even obligatory, for MONUSCO's peacekeepers. Thus, in the following, the scope and substance of IHL applicable to the conflict in the DRC are analysed. Essentially, the existence of a conflict is a prerequisite for the applicability of the laws of armed conflict, meaning that that hostilities must be exercised with a sufficient level of intensity.[70] Furthermore, the rules set out in the GCs apply differently according to the nature of a respective conflict, offering a more extensive protection in IACs, giving relevance to all four GCs of 1949 in their entirety, than in non-international armed conflicts (NIACs), where essentially Common Article 3 and the Additional Protocol II (AP II) apply. This second part of the thesis outlines firstly, the scope of the applicable IHL to the conflict in the Congo, and, secondly, the outlines the general substance of IHL rules applicable.

2.1. The Scope of International Humanitarian Law applicable to the Conflict in the Democratic Republic of the Congo

In order to identify which rules govern the hostilities in the DRC, and to what extent the warring parties are bound by them, it must be identified whether the relevant conflict is of international or non-international nature.[71] The hostilities in the Congo are essentially fought on the territory of the DRC between the government's armed forces and numerous non-state armed groups.[72] Indeed, acknowledging the complexity of the conflict in the DRC[73], this thesis will focus directly on the FARDC's fight against Mayi-Mayi groups and Kamuina Nsapu (KN) rebels, in the Eastern Congo (North Kivu[74] and Kasai region, see Annex I), where the *Intervention Brigade* is deployed, as MONUSCO has been active with regard to these hostilities. As the FARDC seems to be the only the state-party directly involved in the fight against these rebel group[75], it appears reasonable to investigate first whether the conflict qualifies as non-international within the reading of the GCs and APII, before subsequently accounting for the possibilities of it constituting an IAC.

2.1.1. Non-International Armed Conflict

Essentially, a conflict must meet several criteria to trigger IHL applicability to NIACs. These are outlined in the definition of a NIAC in Article 1 of AP II Relating to the Protection of Victims of Non-International Armed Conflicts of 1977, which identifies NIACs as

> all armed conflicts […] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under

[70] "International Humanitarian Law and the Challenges of Contemporary Armed Conflict", *International Committee of the Red Cross* (December 2011), p. 8.
[71] *Ibid.*
[72] Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 846.
[73] In the eastern DRC alone more than 100 armed groups are engaged in hostilities "over subnational predominance as well as the access to natural resources" repeatedly confronting the FADRC and MONUSCO. In Conflict Barometer 2017, *supra* note 12, p. 69.
[74] "Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (Secretary General's Report on MONUSCO)", *United Nations Security Council*. October 2, 2017, p. 12.
[75] ICRC, "Challenges of Contemporary Armed Conflict", *supra* note 70, p. 8.

> responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[76]

In further reading, AP II deliberately excludes from its scope "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence" which simply are not considered sufficiently strong to qualify as conflict.[77] It follows that for domestic hostilities to amount to a NIAC, two core conditions must be met: Firstly, the warring parties must reflect an organizational structure which allows them to exercise coordinated operations, such as a functional line of command, access to necessary logistics, and the group's ability to "respect and ensure respect" for IHL.[78] Secondly, the hostilities must meet certain threshold of intensity for qualifying as a NIAC.[79]

Indeed, while the warring in the eastern DRC essentially takes place between numerous organized armed groups, reports of hostilities clearly reflect their capability to exercise coordinated military operations as attacks are recurring and systematically-targeted on the FARDC and MONUSCO throughout the year 2017 in the South Kivu and Kasai region (mainly perpetrated by Mayi-Mayi and KN groups).[80] The ability to exercise such sustained targeted operations reflects sufficient organization and command structure needed to render the rebel groups combatants and to bind them by IHL relevant to NIAC. Additionally, reports on the security situation in eastern DRC clearly outline that required intensity is reached. Especially the Kasai-Region has been arena to intense violence since early 2016, with over 60 militia groups fighting against one another. As of June 2017, 3,383 people had been killed, many of which civilians, and in late 2017, 1.4 million people were displaced from only this regional crisis.[81] Apart from the Kasai region, most violence has been exercised in the eastern provinces of the of the DRC.[82] Especially in North and South Kivu (Annex I), clashes between the FARDC, essentially directed against the Mayi-Mayi and KN militia, reached the threshold of a war in 2016[83] with more than 4,000 casualties as of mid-2017 and more than 600,000 displaced people.[84] In the second half of 2017, the security situation in many areas of the DRC was reported as having deteriorated, characterized by an increased targeting of the FARDC by the Mayi-Mayi rebels[85] , and was subsequently classified having escalated from a "limited […] to a full-scale war."[86] It follows that the conflict in the DRC, with special regard to the eastern regions, has triggered the applicability of IHL relevant to NIACs.

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[76] "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (Additional Protocol II)", 1977. Art. 1(1).
[77] *Ibid.*, Art. 1(2).
[78] Ferraro, "The Applicability and Application", *supra* note 38, pp. 576-577.
[79] Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 852.
[80] Secretary General's Report on MONUSCO, *supra* note 74, pp. 4-5.
[81] "Time for Concerted Action in DR Congo", *Crisis Group*. December 4, 2017. Available on https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/257-time-concerted-action-dr-congo. Accessed May 12, 2018, p. 14.
[82] *Ibid*., p.15.
[83] Conflict Barometer 2017, *supra* note 12, p. 79.
[84] *Ibid.*, p. 77.
[85] Secretary General's Report on MONUSCO, *supra* note 74, p. 4.
[86] Conflict Barometer 2017, *supra* note 12, p. 69.

2.1.2. International Armed Conflict

The lack of direct involvement of another state-party, which is the essential characteristic for an IAC as provided for in the GCs' Common Article 2[87], allows to assume the existence of a conflict of non-international nature. However, valid consideration must be given to the role of foreign involvement in the conflict, as several rebel groups are suspected to receive support from neighboring states, i.e. from Rwanda, Uganda, and Burundi [88], and as the "automatic internationalization" of a NIAC by the presence of UN-forces has been given attention in academic literature.[89] However, based on the current situation, both considerations can be rendered obsolete. In order to justify for the internationalization of a NIAC through foreign state-support to militias, outside involvement is required to be exercised through "effective control" over a supported non-state actor, who is opposing their respective government.[90] Such "effective control" must extend beyond financial and resource support, which has not been proven for the rebel-groups in the DRC.[91] Furthermore, the "automatic internationalization" by the fact of UN engagement, especially through the *Intervention Brigade* as an offensive force exclusively composed of foreign soldiers, does not render the conflict in the DRC international either, as it acts in support of the FARDC and not against it. Equally, would another state intervene on request of the Congolese government, it would become engaged side-by-side with it in a NIAC, a situation that can be compared to the *Intervention Brigade's* involvement.[92] Moreover, this theory overlooks the separate legal personality of the UN, which is commanding the *Intervention Brigade* essentially under its own control[93], as opposed to situations where foreign states would become engaged in a domestic conflict out of sovereign interests. At most, due to the international component the UN mission adds to the hostilities in the DRC, hostilities could be classified as "a subset of [a] multinational NIAC".[94] However, to identify the extent of applicable law to the parties involved, such differentiation is not decisive, as the GCs merely distinguish between IACs and NIACs.[95]

Nonetheless, the consideration of an internationalization of the conflict in DRC is especially fruitful as IHL offers an extensive protection to situations of IAC, essentially applying all four GCs of 1949 apply in their entirety, including the provisions laid down in APs I (1977) and III (2005) - provided the respective State Parties have ratified them. The GCs applicable provide for extensive protection regarding the treatment of the wounded and sick at field[96] and at sea[97],

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[87] ICRC, "Challenges of Contemporary Armed Conflict", *supra* note 70, p. 7.
[88] Sheeran et.al., "The Intervention Brigade", *supra* note 5, p. 7; "Time for Concerted Action in DR Congo", *supra* note 81, p. 15.
[89] Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 854.
[90] "ICJ, Nicaragua v. United States | How Does Law Protect in War?", *International Committee of the Red Cross Online Casebook*, available on https://casebook.icrc.org/case-study/icj-nicaragua-v-united-states. Accessed May 12, 2018, § 115; Sheeran et. al., "The Intervention Brigade", *supra* note 5, p. 7.
[91] "Nicaragua v. United States", *ibid.*; Sheeran et.al., *ibid.*
[92] Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 858.
[93] *Ibid.*, p. 855.
[94] Jelena Pejic, "The Protective Scope of Common Article 3: More than Meets the Eye", *International Review of the Red Cross* 93, No. 881 (March 2011), p. 194.
[95] *Ibid.*, p. 194.
[96] "The Geneva Conventions of 12 August 1949", *The International Committee of the Red Cross*. 1949, p. 35.
[97] *Ibid.*, pp. 61-80.

prisoners of war (PoWs)[98], and civilians during wartime.[99] In addition to AP I, Additional Protocol III sets out the use of the red crystal emblem for the protection of humanitarian personnel (2005)[100] to IACs. Furthermore, and subject to more detailed analysis in the third part of this thesis, the 1994 Convention's scope ceases to apply its immunities and protections for UN personnel in IACs, provided they are therein engaged as combatants.[101] However, based on the current facts of the situation, an internationalization of the conflict in the DRC is subject to speculation. It follows that, with the FARDC as the only state-party directly involved in continuous and reoccurring armed hostilities against organized armed rebel groups in the eastern regions, the portions of IHL relating to conflicts not of international nature apply, which are outlined subsequently.

2.2. The Substance of International Humanitarian Law applicable to the Conflict in the Democratic Republic of the Congo

It is beyond the scope of this thesis to outline the substance of applicable IHL rules in detail, however it is adequate to provide an overview to what extent parties to the conflict in the DRC are obliged to abide by the respective Conventions. The GCs and their APs, as the main codifications of IHL, concern themselves with the regulation of the means (weaponry causing unnecessary suffering)[102] and methods (proportionality, distinction, humanity, and precaution of attacks) of warfare, for the sake of the protection of non-combatants in armed conflicts.[103] However, as the conflict in the DRC qualifies as a NIAC, essentially the GCs' Common Article 3 and the full AP II, outline the codified rules regulating the domestic hostilities.[104] According to the preamble of AP II, the foundation for the protection of persons in NIACs is enshrined in Common Article 3. Consequently, each party to a NIAC is, at a minimum, obliged to abide by the principle of humane treatment to civilians, non-combatants, and *hors de combat* "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria" and to provide the sick and wounded with adequate care.[105] Furthermore, Common Article 3 prohibits, regardless of place and time, to commit on these protected persons, the following crimes

> a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court,

[98] *Ibid.*, pp. 81-135.
[99] *Ibid.*, pp. 151-205.
[100] "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem of 8 December 2005 (Additional Protocol III)", 2005.
[101] 1994 Convention, *supra* note 21, Art. 2 (2).
[102] Jean Marie Henckaerts, "Study on Customary International Humanitarian Law", *International Review of the Red Cross* 87, No. 857 (March 2005), pp. 204-206.
[103] This includes victims, civilian, persons *hors de combat*, the wounded and sick. In Henckaerts, *ibid.*, p. 199.
[104] Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 852.
[105] Geneva Conventions, *supra* note 96, pp. 36, 81, 152. Common Art. 3(1-2).

> affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[106]

In addition, AP II on the Protection of Victims in NIACs supplements Common Article 3, and applies in its entirety, that is if the respective conflict is exercised in the territory a signatory state, repeating the humane treatment to non-combatants[107] and according special protection the casualties of war, the wounded, sick, or shipwrecked.[108] Furthermore, AP II outlines the protection of the civilian population, whose direct targeting, as the essence of the principle of distinction, is prohibited "at all times"[109], which is in line with the obligation to "ensure respect for and protection of the civilian population."[110] While only a small part of codified IHL rules appear to apply in NIACs, the universal ratification of all four GCs has allowed the majority of the set of the law of armed conflict to gain customary status[111], rendering them equally applicable in NIACS as in IACs, and regardless of the legal status of a party (be it non-state or state actors, or Signatories to the GCs or not).[112] Such urge for universal compliance is especially crucial to the conflict in the DRC, as most actors involved, such as various rebel groups and also MONUSCO as a "subsidiary organ" to the UN[113], are not Signatories to the GCs, but are bound by most customary IHL rules nonetheless.

2.3. The Enforcement of the applicable International Humanitarian Law

However, the mere identification of IHL applicability in the Congolese war is not a reflection that it is complied with, implemented and enforced. Witnessing a failed domestic justice system, international criminal law became essential in holding accountable perpetrators of grave breaches of GC's Common Article 3 (war crimes)[114] and crimes against humanity.[115] In light of grave violations of IHL going unpunished, the ICC opened his Office of the Prosecutor to the conflict in 2004, after the DRC ratified the Rome Statute and referred its domestic situation to the Court's jurisdiction.[116] Reports over impunity for war crimes and crimes against humanity, such as

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[106] *Ibid.*, Art. 3(1)(a).
[107] Additional Protocol II, *supra* note 76, Art. 4.
[108] *Ibid.*, Art. 7-13.
[109] Henckaerts, "Study on Customary International Humanitarian Law", *supra* note 102, p. 198.
[110] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law - Volume I: Rules. Vol. I.* (International Committee of the Red Cross: 2005), p. 6; *RUF Trial*, *supra* note 32, § 215-2018; Geneva Conventions, *supra* note 95, pp.151-213; "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)", 1977. Preamble, Art. 48.
[111] Examples of such customs are the fundamental principle of distinction, prohibiting the direct attacking of civilians and civilian objects at any time, the principle to avoid unnecessary suffering with the regulation of weaponry and methods of warfare, the principle to humanely treat protected persons (s.a. Peacekeepers under Customary IHL Rule 33) and objects and to provide fundamental guarantees civilians and persons *hors de combat.* In Henckaerts et.al., *ibid.*, pp. 299–489, Rules 87-138.
[112] *Ibid.*, xvi.
[113] Sheeran et.al., "The Intervention Brigade", *supra* note 5, p. 5.
[114] Rome Statute, *supra* note 30, Art. 8(2)(f); Pejic, "The Protective Scope of Common Article 3", *supra* note 94, p. 192.
[115] Karima Bennoune, "Do We Need New International Law to Protect Women in Armed Conflict", *Case Western Reserve Journal of International Law*, Vol. 38 (2007), p. 364.
[116] "Situation in the Democratic Republic of the Congo", *International Criminal Court.* Available on https://www.icc-cpi.int/drc?ln=en. Accessed May 14, 2018.

patterns of rape, conscription of child soldiers, attacking civilians, mutilation, torture, and cruel treatment, and pillaging (all breaches under Customary IHL Rules, or Common Article 3) led the ICC to extend its jurisdiction to prosecute perpetrators of crimes committed in connection with the conflict, especially in the eastern, DRC (and Ituri, North and South Kivu, see Annex I) from July 2002 onwards.[117] In 2014, Thomas Lubanga Dyilo (former president of the Union des Patriotes Congolais, UPC) was convicted of the war crime of conscripting child soldiers.[118] Commander Bosco Ntaganda (UPC) is currently accused of several war crimes (13 counts), for conscription of child soldiers, rape, attacking of protected objects, destroying the enemies property, sexual slavery.[119] As of 2018, the ICC has delivered six decisions, convicting commanders and heads of rebel groups for numerous crimes against humanity and war crimes under Articles 7 and 8 of the Rome Statute (e.g. conscription of child soldiers, rape, attacking of protected objects and persons, sexual slavery).[120] Furthermore, as MONUSCO itself is mandated to assist in the enforcement of the substantive IHL rules, by cooperation with the Congolese government, regional states and the Office of the Prosecutor of the ICC, to bring perpetrators of international crimes to justice.[121] In line with this, the UN SG Report of 2017 on the DRC reflects that MONUSCO assisted in convicting and sentencing a FARDC colonel and war criminal[122] and identified leaders of rebel groups who had been wanted for crimes against humanity.[123] Above all, efforts for holding accountable perpetrators of grave breaches of IHL have proven important for the protection and compensation of victims to the armed conflict. As the GCs concern themselves in the first place with the protection of vulnerable persons during armed conflict, assuring their fundamental guarantees[124], the ICC brought reparation to victims of grave breaches of IHL. So, did the ICC's Trial Chamber in 2016 compensate the 297 victims of the *Katanga Case* for their suffering from the war crimes and crimes against humanity committed on them.[125] In December 2016, the ICC Trial Chamber II established *Lubanga*'s liability for collective reparations to victims, more than 400 direct and indirect victims, at $ 10 million USD.[126] It follows that the ICC, MONUSCO and the government of the DRC cooperate in the enforcement of substantive IHL, by identifying commissioners of grave breaches of the GCs, and by delivering justice to those who have suffered from the conflict.

2.4. Conclusion of Part 2

The second part of this thesis outlined the scope, substance, and enforceability of IHL applicable to the conflict in the DRC. Hostilities in the eastern DRC are primarily fought between organized

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[117] *Ibid.*
[118] Resolution 2098 (2013), *supra* note 49, Art. 12(d).
[119] *Ibid.*, Art. 12(d).
[120] "Ntaganda Case: ICC Appeals Chamber Confirms the Court's Jurisdiction over Two War Crimes Counts", *International Criminal Court.* Available on https://www.icc-cpi.int/Pages/item.aspx?name=pr1313. Accessed May 14, 2018; "Lubanga Case: The Prosecutor v. Thomas Lubanga Dyilo." *International Criminal Court.* February 15, 2016. Available on https://www.icc-cpi.int/drc/lubanga. Accessed May 14, 2018.

[121] Resolution 2098 (2013), *supra* note 49, Art. 12(d).
[122] Secretary General's Report on MONUSCO, *supra* note 74, pp. 39, § 39.
[123] Conflict Barometer 2017, *supra* note 12, p. 80; Secretary General's Report on MONUSCO, *ibid.*, p. 13, § 68.
[124] ICC, "Ntaganda Case", *supra* note 120.
[125] Conflict Barometer 2017, *supra* note 12, p. 27.
[126] *Ibid.*, p. 28.

armed rebel groups and between the government of the DRC, thus qualifying the conflict of being of non-international nature. It follows that the law respective to NIACs applies, which essentially demands the hostilities in the DRC to be exercised in compliance with the GCs' Common Article 3, AP II, as well as customary IHL rules. Furthermore, the ICC's prosecution of crimes committed in the context of the armed conflict reflect the DRC's willingness to enforce the applicable IHL rules, as well as attempts to deliver reparations to victims. Thus, in order to establish whether MONUSCO's *Intervention Brigade* is equally bound by the IHL rules applicable to the conflict in the DRC, the following part of the thesis outlines under what conditions UN peacekeepers are regarded as subjects to IHL, and whether personnel of the *Intervention Brigade* qualify as such with respect to their engagement in the conflict at hand.

3. THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO PEACEKEEPING

Keeping in mind that PKOs were not considered during the drafting of the GCs, the UN recognized in the 1960s the necessity of its forces to "observe the principles and spirit" of international treaties regulating military conduct.[127] As of today, underlining dedication and respect for international law, the UN Department of Peacekeeping Operations (DPKO) obliges its personnel, be they deployed by a robust or a "weak" mandate, to take the oath to "comply with the Guidelines of [IHL] for Forces Undertaking [UN PKOs] and the applicable portions of the [UDHR] as the fundamental basis for our standards"[128], a provision that is reflected in many SOFAs of PKOs.[129] Indeed, while these provisions fail to elaborate in detail which rules these "guidelines and principles" comprise, the applicability of IHL to UN forces has become somewhat more straightforward with the 1994 Convention and the 1999 Bulletin, as well as with international case law establishing (military-)peacekeepers' entitlement to civilian protection in armed conflicts.[130] The relevance of all three sources to military-peacekeepers' protection but also obligations deriving from the applicable IHL to the DRC is specified subsequently.

3.1. The 1994 Convention: Continuous Protection

As outlined in the first part of this thesis, the 1994 Convention was introduced with the intention to protect peacekeepers form becoming targets of attacks in armed conflict, rendering aggressions towards them illegal.[131] Case law refined the temporal limit of protection to peacekeepers under IHL. Consequently, in outlining whether the killing of peacekeepers amounted to a war crime, the ICC assessed in *Abu Garda* the victim's status at the time of the commission of the crime[132] identifying whether, at the very moment of attack, the peacekeepers retained their protected status

[127] Grenfell, "Perspective on the Applicability", *supra* note 11, p. 648.
[128] Felicity Lewis. "Human Rights Abuses in U.N. Peacekeeping Providing Redress and Punishment While Continuing Peacekeeping Missions for Humanitarian Progress." *Southern California Interdisciplinary Law Journal.* Vol. 23 (2014), p. 596; Anne Elias and Michael McDermott, *Ethics in Peacekeeping* (Peace Operations Training Institute, 2008), p. 2.
[129] Grenfell, "Perspective on the Applicability", *supra* note 11, pp. 648-649.
[130] 1994 Convention, *supra* note 21; 1999 Bulletin, *supra* note 38; *Abu Garda*, *supra* note 33.
[131] 1994 Convention, *ibid.*, Art. 15.
[132] *Abu Garda*, supra note 33, p. 26, §56.

or whether they were taking active part in hostilities, which would have qualified their targeting legitimate.[133] Furthermore, while the 1994 Convention emphasises in Art. 20(a) that the provided immunities and privileges shall not interfere with the applicability of IHL[134], the criminalization of targeting peacekeepers appears problematic considering that the Convention limits its protective scope only in situations in which military-peacekeepers are involved "as combatants against organized armed forces and to which the law of *international armed conflict* applies [emphasis added]."[135] Indeed, the wording of the 1994 Convention overlooks the fact that PKOs are rarely deployed in situations of ongoing IACs and are more likely to become engaged in NIACs[136], as it appears to be the case for the *Intervention Brigade* in the DRC. A coexistence of the Convention's provisions in parallel to the laws of NIAC would create a double-standard for military-peacekeepers.[137] On the one hand, it would continuously criminalize of their direct targeting, despite their active engagement in hostilities of non-international nature[138], while, on the other hand, it would provide continuous immunity for military-peacekeepers as TTCs' reserve their exclusive jurisdiction for "any criminal offence […] committed […] in the host country" of deployment.[139] Responding with concern to the lacking clarity of the 1994 Convention with respect to situations of NIAC, it has been criticized by scholars as allowing for "privileging one particular group of soldiers over others."[140] The possible effects of the 1994 Convention on the accountability of personnel to the *Intervention Brigade* for grave breaches of IHL allow for valid discussion in part IV of this thesis.

3.2. The 1999 Bulletin: Observance of International Humanitarian Law

In acknowledging that robust peacekeeping-mandates have moved closer to the domain of IHL, the 1999 Bulletin has proven to be a crucial instrument clarifying parts of the contradiction caused by the 1994 Convention. Indeed, the Bulletin pledges that its provision would not interfere with the protections laid down by the 1994 Convention, for the period that peacekeepers enjoy the status of non-combatants that entitles them to civilian protection under "the international law of armed conflict."[141] Such wording reads as if the Bulletin does not, as opposed to the 1994 Convention, limit the necessary observance of IHL by peacekeepers dependent upon the nature of a conflict at hand, but rather based on the status of the peacekeepers themselves. It follows that the Bulletin requires IHL to be observed

> in situations of armed conflict [where peacekeepers] are actively engaged therein as combatants, to the extent and for the duration of their engagement.[142]

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[133] *Ibid*.
[134] 1994 Convention, *supra* note 21, Art. 20-21.
[135] *Ibid.*, Art. 2 (2).
[136] Ferraro, "The Applicability and Application", *supra* note 38, p. 583.
[137] Pacholska, "(Il)Legality of Killing Peacekeepers", *supra* note 1, p. 71; Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 872.
[138] Whittle, *ibid.*, p. 872.
[139] "Model Status-of-Forces Agreement", *supra* note 17, Art. 47(b).
[140] Adam Roberts, "The Equal Application of the Laws of War: A Principle under Pressure," *International Review of the Red Cross.* Vol. 90, No. 872 (December 2008), p. 955.
[141] 1999 Bulletin, *supra* note 38, Art. 1.2.
[142] *Ibid.*, Art. 1.1.

This provision appears narrow in scope indeed, limiting the applicability of IHL to peacekeepers strictly to the time and place of the exercise of combat activity, such as for situations of self-defense of for enforcement actions where resort to force is permitted.[143] Accordingly, as opposed to the 1994 Convention, peacekeepers having become engaged in hostilities in the DRC, be it through enforcement action or for defence-purposes, are deprived of their status as non-combatants, qualify as legitimate targets, and are bound to follow IHL "for the extent and […] duration" they are actively deploying force. Such narrow scope allows to question whether the mandate of the *Intervention Brigade* itself sets the framework of "extent and duration", or whether Intervention-peacekeepers really are bound by IHL only for the specific time they are launching a military operation.

For situations in which peacekeepers do qualify as combatants, the Bulletin obliges them to exercise their operations in abidance to the principles and rules of "general conventions applicable to the conduct of military personnel", outlining minimum standards of fundamental IHL rules in a non-exhaustive list for conducting PKOs. Essentially, the outlined rules closely resemble the applicable portion of IHL to NIACs[144], which is, as identified previously, already relevant regarding the armed conflict in the DRC. Yet, as the Bulletin presents a non-exhaustive selection of rules, it allows for the conclusion that military-peacekeepers may be subjected to a more extensive scope of IHL if a conflict situation requires it. For the enforceability of IHL, the Bulletin outlines that breaches of the outlined provisions and for violations of IHL, primary jurisdiction over military-peacekeepers is allocated to their respective TCCs.[145] This provision reminds once again of the reservation of exclusive jurisdiction over military-contingents by TCCs, as outlined previously, which are set out in SOFAs and MoUs for troop-contributions. The effects of such reservations on the accountability of peacekeepers for grave breaches of IHL will be addressed further in the fourth part of this thesis. In line with the 1999 Bulletin, the accountability for violations of IHL diminishes as soon as military-peacekeepers are not anymore actively engaged in hostilities. It appears that, as soon as resort to force ceases, as military-peacekeepers fall outside the scope of IHL again, and back in to their entitlement to civilian protection.

The end of this section specified under what circumstances IHL is applicable to peacekeeping. It follows that peacekeepers are bound by the regime of IHL, through the narrow scope provided for by the 1999 Bulletin, namely for the very specific time and duration they are actively engaged as combatants in an armed conflict. However, it appears that the Bulletin, at its time of drafting, did not consider PKOs of the robustness of MONUSCO, equipped with the offensive capabilities of the *Intervention Brigade*. The Bulletin's provision that peacekeepers are bound "for the time and duration" they are acting as combatants would need clarification for this specific mission. Regarding the nature of conflict, peacekeepers' obligation to abide by IHL rules when engaged in hostilities during an IAC are straight forward, while the 1994 Convention allows for uncertainty as to whether it continues to provide for immunities and privileges when peacekeepers are engaged in NIACs, and whether their direct targeting continues to be unlawful. After identifying the scope and substance of IHL applicable to the conflict in the DRC and to the applicability of

[143] *Ibid.*, Art. 1.1.
[144] *Ibid.*, Art. 3.; Grenfell, "Perspective on the Applicability", *supra* note 11, p. 648.
[145] 1999 Bulletin, *ibid.*, Art. 4.

IHL to UN peacekeepers in general, the following section will answer the second sub-question, namely whether and to what extent MONUSCO, more specifically the personnel of the *Intervention Brigade*, is bound by IHL.

3.3. The Applicability of International Humanitarian Law to the *Intervention Brigade*

Earlier in thesis, it was established that MONUSCO is deployed in the territory of an ongoing armed conflict between the DRC and non-state organized armed groups. The conflict has been identified as a NIAC during which the main warring parties, the FARDC and militias, must respect the IHL of NIAC when engaging in hostilities against one another.[146] However, the simple presence of a PKO, in the territory of an ongoing NIAC does not qualify their peacekeepers, be their mandate robust or not, as combatants.[147] Thus, in order to establish whether and for what extent the *Intervention Brigade* is bound by IHL, it is necessary to analyze two key-issues: The role of the *Intervention Brigade* in the ongoing armed conflict, and, acknowledging that it is not a state-actor, its characteristics for qualifying as combatants in line with Art. 4 GC IV.[148]

In advocating for a broad applicability of IHL, the International Committee of the Red Cross (ICRC) has judged the mandate of a PKO to be irrelevant for the applicability of IHL in situations when UN contingents resort to force.[149] Nonetheless, Resolution 2409 (2018) proves valuable in assessing the role the *Intervention Brigade* plays in the DRC. As outlined previously, the UN SC has deployed the *Intervention Brigade* since its creation "in support of the authorities of the DRC" for the neutralization of organized armed groups posing a threat to state authority and to the protection of civilian in the eastern regions of the DRC.[150] A statement as straightforward as this, pledging support to the state-actor in a NIAC, has been interpreted as qualifying the *Intervention Brigade* as a party to the conflict.[151] Indeed, in further reading of the mandate, the deployment of offensive force is exercised "with the *support* of the whole of MONUSCO"[152] which has been interpreted as not only qualifying the offensive-military force, but also the military-contingents not authorized with the *Intervention Brigade's* authorization to force, and even the entire MONUSCO mission as a party to the conflict.[153] Such uncertainty leaves IHL obligations and protections dangerously open for interpretation. Certainly, when only accounting for the *Intervention Brigade*, it is deployed in consent and in cooperation with the Congolese government, with its armed forces mandated to launch military operations against

[146] Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 846.
[147] Ferraro, "The Applicability and Application", *supra* note 38, p. 575; Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 851.
[148] Additional Protocol II, *supra* note 76, Art. 2(2); Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 851; Geneva Conventions, *supra* note 94, p.82, Art. 4(2).
[149] Charlotte Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, International Committee of the Red Cross, Women and Wars (Geneva, 2001), p. 53.
[150] "Resolution 2348 (2017)", United Nations Security Council. March 31, 2017. Art. 34(i)(d); "Unanimously Adopting Resolution 2409 (2018)", *supra* note 65.
[151] Ferraro, "The Applicability and Application", *supra* note 38, p. 562.
[152] "Unanimously Adopting Resolution 2409 (2018)", *supra* note 65.
[153] Sheeran et.al., "The Intervention Brigade", *supra* note 5, pp. 1-9.

non-state groups in the country, which establishes that it is a party to the conflict.[154] Such support has manifested in form of specific operations on the Congolese ground. Reports reflect that continuous cooperation between the mission and FARDC in several confrontations against rebel groups, such as, but not limited to, confrontations with Mayi-Mayi rebels or Allied Democratic Forces (ADF) in Northern Kivu[155], as well as the Intervention Brigade's direct involvement in two large-scale operations against the ADF, Usalama I and II.[156]

Moreover, the *Intervention Brigade* reflects all requirements set out by the Art. 2 of AP II, but also Art. 4 of the Third GC on the protection of prisoners of war (PoWs). Indeed, the *Intervention Brigade* seems best caught by Art. 4 of the Third GC, qualifying them for the PoW status as "[m]embers of other militias […], belonging to a party to the conflict and operating in or outside their own territory"[157] under the condition that they are subordinated to a responsible commander, distinguishing themselves from civilians through distinct emblems, carry arms openly, and conduct their operations in line with IHL.[158] Command responsibility for PKOs is provided for by respective MoUs and SOFAs[159], charging Contingent Commanders (that is for the Intervention Brigade Malawi, Tanzania, and South Africa[160]) with the primary obligation to ensure compliance and respect of laws. The entire *Intervention Brigade* is subjected to the MONUSCO Force Commander, who oversees the entire 16,215 military personnel of MONUSCO.[161] The issue of distinction between the Intervention Brigade and the MONUSCO as a whole has been subject to much debate, arguing that the lines are not drawn clearly enough between personnel engaged in the conflict, and peacekeepers continuously enjoying civilian protection,[162] as the Intervention Brigade shares the same facilities as the MONUSCO, and the convoys are used interchangeably.[163] This situation can prove problematic as it might endanger MONUSCO's personnel not part of the *Intervention Brigade*, and thus should be entitled to the civilian protection even when the Brigade resorts to force.[164] Furthermore, in line with MONUSCO's mandate, the *Intervention Brigade* is expected to engage in military operations under strict "compliance with international law, including international humanitarian law."[165] In terms of intensity, the conflict between various rebel groups and the Congolese government has previously been established as meeting the required threshold for a NIAC, thus MONUSCO's identification as a party therein should be sufficient to bind them by the Common Article 3 and Customary IHL. Yet, in assuming the intensity of use of force directed between the Brigade and opposing non-state armed groups, several reports on the military operations in the region reflect peacekeeper-casualties[166], and the MONUSCO's awareness that their launching of operations in the Kasai

[154] Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 858.
[155] Conflict Barometer 2017, *supra* note 12, pp. 15, 79-81.
[156] Fabricius, "Africa", *supra* note 3.
[157] Geneva Conventions, *supra* note 94, p. 82, Art. 4(2).
[158] *Ibid*.
[159] "Memorandum of Understanding", *supra* note 17, Art. 7*ter*.
[160] Fabricius, "Africa", *supra* note 3.
[161] Sheeran et.al., "The Intervention Brigade", *supra* note 5, p. 4.; "Unanimously Adopting Resolution 2409 (2018)", *supra* note 65, Art. 36(i)(d).
[162] Sheeran et.al., *ibid.*, p. 9; Whittle, "Peacekeeping in Conflict", *supra* note 45, p. 862.
[163] Whittle, *ibid.*, p. 862.
[164] *Ibid*.
[165] "Unanimously Adopting Resolution 2409 (2018)", *supra* note 65, Art. 20.
[166] Conflict Barometer 2017, *supra* note 12, pp. 79-81.

region potentially threatens the safety of (non-combatant) MONUSCO peacekeepers.[167] Thus, fulfilling all these criteria, many scholars have criticized the prior classification of peacekeepers as entitled to the civilian status as inappropriate, witnessing a new generation of "heavy armed, organized group under responsible command complying with the laws of armed conflict and legally authorized to use offensive force."[168] Thus, accounting for the *Intervention Brigade'*s involvement in the DRC, it is only reasonable that its personnel must comply with the IHL applicable to the respective conflict.

3.3.1. The Equal Application of International Humanitarian Law to Combatants

Qualifying as an active party to the conflict in the DRC, the *Intervention Brigade* is bound by Common Article 3 and customary IHL on the ground of the principle of equal application of IHL to combatants. Set out by the AP I, and subsequently codified in CIL Rule 139[169], this important notion marks the distinction of the *ius in bello* from the *ius ad bellum* regime. It accordingly outlines that IHL

> must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict *or on the causes espoused by or attributed* to the Parties to the conflict [emphasis added].[170]

Such distinction of *ius in bello* from *ius ad bellum* proves especially relevant for MONUSCO's *Intervention Brigade*, as it is installed by the legitimacy of international community through unanimous approval of the UN SC[171], serving to maintain international peace and security It follows that IHL to IAC binds a warring party, regardless of them not having ratified the GCs (as outlined previously, this is the case for the UN), and despite any justifications voiced for its resort to force. In another wording, customary IHL Rule 139 expects all parties to a conflict to "respect and ensure respect for [IHL] by its armed forces."[172] However, it can be questioned how "equal" the application of IHL to peacekeepers as opposed to other parties to the conflict really is. While the 1999 Bulletin outlines such applicability *only* for the limited time and duration they are directly taking part in hostilities[173], its narrow scope allows to question whether the mandate of the *Intervention Brigade* already sets the required the framework of "extent and duration", as the fundamental idea behind its deployment is the active engagement in the conflict as combatants in support of the government. Indeed, if the narrow scope would apply, the *Intervention Brigade* would reserve their protected status under Customary Rule 33[174] for the majority of their deployment and their entitlement to the civilian protection as set out in ICL, rendering their intentional targeting a war crime.[175] Further, in line with the 1994 Convention, their direct killing would be criminalized any time, unless the law of IAC begins to apply. Such an interpretation of

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[167] Secretary General's Report on MONUSCO, *supra* note 74, p. 15, §75.
[168] Ferraro, "The Applicability and Application", *supra* note 38, p. 562.
[169] Henckaerts et.al., *Customary International Humanitarian Law*, *supra* note 110, p. 495.
[170] Additional Protocol II, *supra* note 110, §5.
[171] "Unanimously Adopting Resolution 2409 (2018)", *supra* note 65.
[172] Henckaerts et.al., *Customary International Humanitarian Law*, *supra* note 110, p. 495.
[173] 1994 Convention, *supra* note 21, Art. 2(2); 1999 Bulletin, *supra* note 38, Art. 1(1).
[174] "Customary IHL - Rule 33", *supra* note 29.
[175] Rome Statute, *supra* note 30, Art. (8)(2)(e)(iii); *RUF Trial*, *supra* note 32; *Abu Garda*, *supra* note 33.

both documents would favour the personnel of the *Intervention Brigade* clearly over other parties to the conflict, and fundamentally contradicts the principle of equal application of IHL. However, taking into account the overarching interest of TCCs to know their troops safe and well, and accounting for the customary nature of the protection of peacekeepers through CIL Rule 139, their continous protection almost appear deliberate. Yet, while it is generally established that the Intervention Brigade is *equally obliged* to follow IHL, at least for the time they engage in combat, it is valid to investigate further whether the current framework regulating troop-contributions and UN immunities allows also for the *equal enforcement* thereof.

3.4. Conclusion of Part 3

It follows that by the end the third part of this thesis, it was clarified that IHL must apply to the MONUSCO mission, at least for the time and duration that its personnel is actively engaged as participants in the respective hostilities. Moreover, with regard to the *Intervention Brigade's* presence in the DRC, who is acting in support of the Congolese government and qualifies as a party to the conflict, peacekeepers must observe Common Article 3 of the GCs, AP II, as well as customary IHL, for the period that they are actively engaged in hostilities, for the extent and duration of such engagement. Moreover, despite contradictory wording of the 1994 Convention, despite their engagement in a conflict "only" of non-international nature, the application of IHL to military-peacekeepers of the *Intervention Brigade* in the DRC is crucial for the principle of equal application of IHL to belligerents.[176] More consideration will be given in the next chapter to the enforceability of grave breaches of IHL, considering whether personnel of the *Intervention Brigade* are, or at least can be, held accountable individually for grave breaches of IHL, either nationally or internationally, in light of the current UN system for accountability, the legal framework governing troop-contributions, as well as the complementary nature of the ICC jurisdiction.

4. ACCOUNTABILITY FOR GRAVE BREACHES OF INTERNATIONAL HUMANITARIAN LAW

Under their mandate, the MONUSCO mission holds special responsibility to shield the civilian society from violations of their human rights and breaches of IHL resulting from the ongoing armed conflict.[177] In line with this duty, the mandate is charged with the identification of perpetrators of war crimes and crimes against humanity committed in the DRC in order to hold them accountable accordingly.[178] With respect to its deployment in the DRC, the UN has faced criticism when in a number of occasions their PKOs failed to fulfil their mandate for civilian protection, such as in 2012, when MONUSCO remained inactive when the M23 rebel group committed large-scale violations of HR and IHL in Goma, and in 2014, when MONUSCO did nothing to prevent a massacre in Mutarule, despite receiving crucial information that killings

[176] Ferraro, "The Applicability and Application", *supra* note 38, p. 567.
[177] Resolution 2098 (2013), *supra* note 49, Art. 12(a)(i).
[178] *Ibid.*, Art. 12(d).

were about to happen.[179] In this respect, the accountability of the UN itself to harm caused under its control is a field for further consideration, which, however, lies beyond the scope of this thesis to address. Moreover, while the previous mentioned cases bear witness of MONUSCO's neglect to mandate obligations, it must be considered how the UN responds when their own personnel would become direct violators of IHL. Overall, criminal accountability of peacekeepers has widely been discussed in academic literature[180], as allegations against peacekeepers for sex crimes on the host population and their subsequent immunity, as well as lacking accountability have questioned the disciplinary system and the morale of the UN.[181] While most such reports of impunity for crimes do not necessarily relate to breaches of the laws armed conflict, the fact that the 1999 Bulletin equally allocates exclusive jurisdiction to TCCs for the prosecution of violations of IHL[182] allows for the assumptions that accountability mechanisms should be similar to those of domestic law enforcement.

Indeed, the core feature of a war crimes is the environment in which they are perpetrated, namely in the context of and in connection with an armed conflict.[183] Article 8 of the Rome Statute distinguishes between war crimes committed during IACs and NIACs, nonetheless prohibiting in internal conflicts serious violations of Common Article 3 to the GCs, including the prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment" against civilians.[184] Acknowledging that the authorization of the *Intervention Brigade* to engage in an armed conflict and engage in combat, it further reflects the potential to cause great damage during missions that would inevitably stand in connection with the armed conflict, a consideration that cannot exclude grave breaches of IHL and their perpetrators' individual criminal responsibility.[185] For the effective functioning of PKOs the domestic jurisdiction of the respective host-country is mainly excluded from the prosecution of military-personnel. Indeed, it is said that the functioning of the UN peacekeeping-system would be hindered if peacekeepers were subjected to local jurisdictions, under which prosecution often is suspected to be "politically motivated".[186]Thus in the following, the systems for accountability for crimes committed by military-peacekeepers will be investigated by directing attention to the UN, TCCs, and the role of the ICC in bringing potential violators of IHL to trial.

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[179] Sheeran et.al., "The Intervention Brigade", p. 17.

[180] Melanie O'Brien, "Protectors on Trial? Prosecuting Peacekeepers for War Crimes and Crimes against Humanity in the International Criminal Court", *International Journal of Law, Crime and Justice* (2012), p. 25; Lewis, "Human Rights Abuses in U.N. Peacekeeping", *supra* note 128, p. 606; Jain, "A Separate Law for Peacekeepers", *supra* note 15, pp. 240-241; Shayna Ann Giles, "Criminal Prosecution of UN Peacekeepers: When Defenders of Peace Incite Further Conflict through Their Own Misconduct", *American University Journal of International Law and Policy United States*, Vol. 33, No. 1 (2017), p. 148-185.

[181] "Missbrauchsvorwürfe Gegen UN: Mädchen Klagt an – Sex Mit 50 Friedenssoldaten", *Die Welt*. April 13, 2017. Available on https://www.welt.de/politik/ausland/article163671173/Maedchen-klagt-an-Sex-mit-50-Friedenssoldaten.html. Accessed March 12, 2018; "UN Peacekeepers: Congo Leads World in Sex Abuse Allegations", *AP News*. Available on https://apnews.com/abbc13a929264889a110d2bb2cccf01f. Accessed March 12, 2018.

[182] 1999 Bulletin, *supra* note 38. Art. 4.

[183] Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library: Elements of Crimes under International Law*, Vol. II (New York: Cambridge University Press, 2008), pp. 232–33.

[184] Rome Statute, *supra* note 30, Art. 8 (2)(c)(ii).

[185] Sheeran et.al., "The Intervention Brigade", *supra* note 5, p.16.

[186] Jimena M. Conde Jiminian, "Allocating Individual Criminal Responsibility to Peacekeepers for International Crimes and Other Wrongful Acts Committed during Peace Operations", *Tilburg Law Review* Vol. 17 (2012), pp. 109, 121.

4.1. The United Nations System of Accountability

Upon establishment of the Special Court of Sierra Leone in 2000, the UN SG stated that the UN would not grant amnesty for grave violations of IHL, such as genocide, crimes against humanity, and war crimes, implying that no person, and peacekeeping personnel neither, should be immune from such crimes.[187] However, the UN lacks the judicial power and the prison facilities necessary for the prosecution and enforcement of this principle. Despite the duty of MONUSCO peacekeepers to comply with the applicable IHL in the DRC, the very nature of the UN peacekeeping system has reflected difficulties to hold individual peacekeepers accountable for serious crimes. [188] Indeed, the 1994 Convention and the Model SOFA the that military-peacekeepers are, for "any criminal offence […] committed […] in the host country", forwarded to be prosecuted by their respective TCC who reserves exclusive jurisdiction over them.[189] Thus, the UN's core role in holding accountable peacekeepers are the prevention and reporting mechanisms for such crimes.

Despite the UN's efforts for improvement, reporting mechanisms have been labelled as "deficient" and "biased", as review bodies for crimes are set up by the UN on an ad-hoc basis after a need-assessment which is evaluated, similarly, by the UN.[190] Furthermore, witnesses of crimes are deterred by the organization's weak whistle-blower protection, that does not even reprieve high ranking UN officials from expulsion, as witnessed in 2015 in the *Anders Kompass Case*.[191] In 2014, Anders Kompass, Director at the Office of the High Commissioner for Human Rights (OHCHR), leaked a report of confidential investigative notes to national authorities, in this case France, of the perpetrators of child abuse in the CAR, which included "identifying information […] to the child-victims". [192] In March 2015, the Under-Secretary General of the DPKO requested Kompass' resignation, and later placing him on administrative leave to "avoid any interference with the investigation".[193] While it has not been established that the respective crime had taken place in connection with an ongoing armed conflict, nor that the child-abusers committed a grave breach of the GCs, it reflects that the UN has not always been successful in adequately responding to its personnel's criminal conduct, nor in providing victims with fair remedy or justice.[194]

Even though MONUSCO, and with it the *Intervention Brigade*, stands under the control of the UN (under the MONUSCO Force Commander), the organization can at most expell military-personnel from the respective contingent, but has no competence to hold perpetrators individually

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[187] "Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone", *United Nations Security Council*, October 4, 2000. Section B.1; Giles, "Criminal Prosecution of UN Peacekeepers", *supra* note 180, p. 168.
[188] Saura, "Lawful Peacekeeping", *supra* note 37, p. 503.
[189] "Model Status-of-Forces Agreement", *supra* note 17, Art. 47(b).
[190] Lewis, "Human Rights Abuses in U.N. Peacekeeping", *supra* note 128, p. 606.
[191] Kompass v. Secretary-General of the United Nations, No. UNDT/GVA/2015/126 (United Nations Dispute Tribunal), May 5, 2015.
[192] *Ibid.*, p. 3, § 8.
[193] *Ibid.*, p. 4, § 12.
[194] Kelly Askin, "Ending Impunity for Crimes Committed by UN Peacekeepers", *International Bar Association*. Available on https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=cebc5f69-a238-49bb-b85a-5e8d878fe485. Accessed March 11, 2018.

criminally responsible.[195] For severe crimes, the UN's legal personality merely authorizes it, in line with the 1946 Convention on the Privileges and Immunities for its personnel, to "institute legal proceedings"[196] and to "waive the immunity of its representative in any case [it] would impede the course of justice", regardless of the initial purpose of the immunity.[197] Such cases would consequently be forwarded to the respective TCCs.

Recently, however, as a response to high allegations of unpunished crimes committed by peacekeepers, the UN has made efforts to enforce compliance duties outlined in SOFAs and MoUs to adequately prosecute perpetrators of crimes committed while on mission. It follows that with the establishment of SC Resolution 2272 (2016), the SG may expell an entire contingent from a mission if the respective personnel is found to repeatedly commit crimes, and the respective TCC failed to provide adequate punishment.[198] The Resolution further emphasises the TCC's primary responsibility to investigate and prosecute, but also to implement vetting processes and pre-deployment training for the soldiers they are going to send on mission. [199]While the resolution focuses primarily on sex-crimes, it clearly reflects that the UN has taken efforts to enforce its HR and IHL standards. Indeed, with merely Egypt abstaining, fearing this step would amount to practices of collective punishment to TCCs[200], the resolution was adopted with 14 votes in favour, setting a clear sign for willingness to improve for disciplinary measures for the sustainability of missions' efforts and preservation of UN reputation.[201] Yet, the actual prosecution of commissioners of international crimes remains with the respective TCCs.

4.2. National Prosecution of Grave Breaches of International Humanitarian Law

In order to effectively enforce compliance and the respect for the laws of armed conflict, the GCs demand High Contracting Parties to put in place adequate law to provide "effective penal sanctions for persons committing, or ordering to be committed, any crime of the grave breaches of [IHL]."[202] As outlined, the UN does not possess such legislative power, and it follows that the enforcement of IHL depends on state willingness and capability to discipline and prosecute their military-contingents.[203] Respectively, the MoU provides that

> military members […] are subject to the Government's exclusive jurisdiction in respect of *any crimes* or offences that might be committed by them while they are assigned to the

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[195] Giles, "Criminal Prosecution of UN Peacekeepers", *supra* note 180, p.167.
[196]"Convention on the Privileges and Immunities of the United Nations" (1946), Art. 1 (c).
[197] *Ibid.*, Art. IV, Section 14.
[198] Jeni Whalan, "Dealing with Disgrace: Addressing Sexual Exploitation and Abuse in UN Peacekeeping." *International Peace Institute*. (August 2017), p.1; "Resolution 2272 (2016)", *United Nations Security Council.* March 11, 2016. Art. 2.
[199] Askin, "Ending Impunity", *supra* note 194; Whalan, *ibid.*; Resolution 2272 (2016), *ibid*., Art. 8, Art. 11.
[200] "The War Against War - What Is Peacekeeping?" *YouTube*, March 12, 2016. Available on https://www.youtube.com/watch?v=40EihLq1aAo. Accessed March 11, 2018.
[201] "Sexual Violence by Peacekeepers against Children and Other Civilians: A Practical Guide for Advocacy", *Child Rights International Network* (2017), p. 9.
[202] III Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Art. 129; IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Art. 146. In the Geneva Conventions, *supra* note 96, pp. 132, 201.
[203] Saura, "Lawful Peacekeeping", *supra* note 37, p. 503.

> military contingent of [UN PKO]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes or offences [emphasis added].[204]

Further in the MoU, the TCCs pledge to cooperate in the prosecution of their personnel, which includes to report serious crimes to the UN as well as allocates to them the primary responsibility to investigate.[205] While the MoU does not specify on the nature of the crime, the 1999 Bulletin affirms that this exclusive jurisdiction equally covers violations of IHL which must be brought before the national courts of TCCs.[206] From a victim's perspective these provisions can pose obstacles to pursue trial, as the TCCs' reservation on exclusive jurisdiction poses hindrances of geographical[207], political, and legal nature.[208] When a perpetrator is prosecuted for crimes committed while on duty, it is often done in safe geographical distance from the crime scene's victims, witnesses, and decisive evidence, rendering proceedings costly and lengthy.[209] It follows that impunity for crimes committed while on mission does not necessarily have to be caused by a TCC's bad faith, nor does this have to be the reason for which cases may be dismissed or not reported back to the UN.[210]

Indeed, as a sign of good practice, peacekeepers have been prosecuted by their national military tribunals, often applying Military Codes[211] In order to hold their MONUSCO contingents accountable effectively in the DRC, South Africa has established a mobile military court Kinshasa, which has been been praised a good initiative in the struggle against impunity.[212] Indeed, South Africa sends a strong message to other TCCs, favours victims by bringing proceedings closer to the crime-scene and allows peacekeepers to continue their mission with legitimacy.[213] While the cases heard were not registered as international crimes, and no information is available as to whether the defendants were members of the *Intervention Brigade*, a MONUSCO spokesperson evaluated the court as more "practical, less costly and more attentive to […] victims", and as an essential part in the struggle against impunity.[214] Overall, the preservation of TCCs' exclusive jurisdiction over military-contingents is fundamental for their

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[204] "Memorandum of Understanding", *supra* note 17, Art. 7(22).
[205] *Ibid.*, Article 7quater.
[206] 1999 Bulletin, *supra* note 38, Art. 4.
[207] Kate Cronin-Furman, "UN Peacekeepers: Keeping the Peace or Preventing It?", *Al-Jazeera.* Available on https://www.aljazeera.com/indepth/opinion/2017/04/peacekeepers-keeping-peace-preventing-170430102118379.html. Accessed March 12, 2018.
[208] Zsuzsanna Deen-Racsmány, "'Exclusive' Criminal Jurisdiction over Peacekeepers and the UN Project(s) on Criminal Accountability: A Self-Fulfilling Prophecy?" *Grotius Centre Working Paper*, No. 1–2 (August 2014), p. 2.
[209] Cronin-Furman, "UN Peacekeepers", *supra* note 207.
[210] Fiona Tate, "Impunity, Peacekeepers, Gender and Sexual Violence in Post-Conflict Landscapes: Challenges for the International Human Rights Agenda", *Law, Crime and History*, Vol. 2 (2015), p. 89.
[211] Giles, "Criminal Prosecution of UN Peacekeepers", *supra* note 180, pp. 169-177.
[212] Aaron Ross, "South African Court to Try Misconduct Cases against Peacekeepers in Congo", *Reuters*, Available on https://www.reuters.com/article/us-congodemocratic-safrica-peacekeeping/south-african-court-to-try-misconduct-cases-against-peacekeepers-in-congo-idUSKCN0WD1SV. Accessed on March 11, 2016.; "SA Military Court Sitting in the DRC", *defenceWeb*. Available on http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=42729:sa-military-court-sitting-in-the-drc&catid=111:sa-defence&Itemid=242. Accessed on March 11, 2018
[213] "The War Against War", *supra* note 200.
[214] "SA Military Court", *supra* note 212.

willingness to cooperate[215] – which in turn is the very core for the for functionality of peacekeeping.[216]

4.3. The Forum of the International Criminal Court

While this has not manifested yet in practice, the ICC has been labeled as the "most logical mechanism" to prosecute peacekeepers in the international criminal justice system when national remedies prove inadequate.[217] Indeed, the ICC may prosecute over crimes committed by or in the territory of a Signatory State to the Rome Statute, or in a territory which has been forwarded to the jurisdiction of the ICC, as it is the case in the DRC.[218] Furthermore, for crimes committed by a peacekeeper belonging to a TCC which is not a Signatory to the Rome Statute, the SC has by Resolution 1422 (2002)[219] prohibited the Court to exercise the jurisdiction, unless it is expressly authorized by the SC.[220] Both possibilities, the ICC's jurisdiction over peacekeepers from Signatory States, as well as from non-Signatory States to the Rome Statute will be shortly outlined subsequently.

4.3.1. The Prosecution of Peacekeepers from Parties to the Rome Statutes

Since the start of its investigation in 2004, the ICC has opened its Office of the Prosecutor in the DRC[221] it has rendered valuable judgements for crimes committed in connection with the conflict in eastern DRC.[222] While it must be acknowledged that peacekeepers could become violators of IHL, the limits to the Courts jurisdiction might pose hindrances in prosecuting the commissioners of similar crimes in the same territory equally. Due to the ICC's complementarity, it may only decide on cases where national trials have proven inadequate, provided the respective state is a member to the ICC.[223] While all three TCCs to the *Intervention Brigade*, South Africa, Malawi, and Tanzania, are Signatories of the Rome Statute[224], the Court may become engaged only in cases when domestic prosecution has failed.[225] However, these peacekeepers can, at least in theory, be held individually criminally accountable before the ICC, as the Court's admissibility criteria, once a crime falls into his jurisdiction, do not depend upon official capacity, or immunities from foreign prosecution.[226] Yet, if a peacekeeper were to commit a crime of sufficient gravity and in connection with an armed conflict, such as a breach of the GCs, the Court would only be permitted to investigate and prosecute if respective TCCs were "unwilling

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[215] "Security Council Adopts Resolution on Sexual Abuse by UN Peacekeepers", *Ambassador Samantha Power, YouTube*. March 11, 2016. Available on https://www.youtube.com/watch?v=YTd04mQ9hWI. Accessed March 11, 2018.
[216] Deen-Racsmány, "'Exclusive' Criminal Jurisdiction over Peacekeepers", *supra* note 208, p. 21.
[217] Giles, "Criminal Prosecution of UN Peacekeepers", *supra* note 180, p. 179.
[218] *Ibid.*, 182.
[219] "Resolution 1422 (2002)", *United Nations Security Council.* July 12, 2002. Art. 1.
[220] Giles, "Criminal Prosecution of UN Peacekeepers", *supra* note 180, p. 182.
[221] ICC, "Situation in the Democratic Republic of the Congo", *supra* note 116.
[222] *Ibid.;* ICC, "Ntaganda Case", *supra* note 120.
[223] Giles, "Criminal Prosecution of UN Peacekeepers", *supra* note 180, p. 179.
[224] "The States Parties to the Rome Statute," *International Criminal Court*. Available on https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. Accessed May 14, 2018.
[225] Giles, "Criminal Prosecution of UN Peacekeepers *supra* note 180, 179.
[226] Jiminian, "Allocating Individual Criminal Responsibility to Peacekeepers", *supra* note 186, p.112.

or unable" to do so themselves.[227] As previously outlined, South Africa, as a TCC to the *Intervention Brigade*, has reflected sufficient willingness and ability.[228]

4.3.2. The Prosecution of Peacekeepers from Countries not Parties to the Rome Statute

Indeed, in the past, the SC has found it important to emphasise the ICC's complementarity and non-universality with respect to PKOs.[229] The SC adopted Resolution 1422 (2002) upon the creation of the ICC, restated that neither all member states to the UN nor all TCCs to PKOs are parties to the Rome Statute. In this respect, the SC underlined that it is in the interest of international peace and security "to facilitate Member States' ability to contribute to operations."[230] Consequently, for PKOs authorized under Chapter VII, which is the case for the MONUSCO mission, the UN prohibits the ICC to prosecute crimes perpetrated by peacekeepers from TCCs not party to the ICC.[231] Accordingly, 1422 (2002) reads that

> if a case arises involving current or former officials or personnel from a [TCC] not a Party to the Rome Statute over acts or omissions relating to a [PKO], shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, *unless the Security Council decides otherwise* [emphasis added].[232]

Similarly, in Resolution 1497 (2003) on the establishment of a multinational force in Liberia, authorized under Chapter VII, the SC recites the TCCs' reservation on exclusive jurisdiction. Yet, it provides further for the possibility that such immunities can be "expressly waived" by the respective TCCs over officials and peacekeeping personnel for all crimes arising out of or are related to this operation.[233] It follows that even military-peacekeepers from TCCs not party to the Rome Statute (e.g. India as a TCC to the MONUSCO military-contingent[234]) *could* be tried for grave breaches of IHL in the forum of the ICC, provided the TCC and the SC expressly allow for it. However, there does not appear to be evidence of such practice from TCCs, nor does it seem likely to materialize in the near future.

Indeed, according to the ICRC not only the equal application, but also the equal enforcement of IHL obligations is crucial for the integrity and credibility of the laws of war[235] as protection from IHL to victims of armed conflict must be applied without adverse distinction.[236] An exclusion of

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[227] *Ibid*.
[228] Ross, "South African Court to Try Misconduct", *supra* note 212; "SA Military Court", *supra* note 212.
[229] Resolution 1422 (2002), *supra* note 219, Preamble, Art. 3-4.
[230] *Ibid*., Preamble, § 7.
[231] *Ibid*., Art. 1.
[232] *Ibid*.
[233] "Resolution 1497 (2003)", *United Nations Security Council*. August 1, 2003. Art. 7.
[234] "Contributors to UN Peacekeeping Operations by Country and Post". *United Nations Peacekeeping*. March 31, 2018.
[235] Ferraro, "The Applicability and Application of International Humanitarian Law to Multinational Forces", *supra* note 38, p. 568.
[236] Additional Protocol II, *supra* note 76, Art. 4 (1).

individual responsibility of peacekeepers of grave breaches of IHL and for reparations would fundamentally weaken the purpose of the laws of armed conflict.[237]

4.4. Conclusion of Part 4

In the fourth part of this thesis, it was addressed whether the personnel of the *Intervention Brigade*, once obliged to follow IHL, can also be held accountable the breaches thereof. As the 1999 Bulletin attributes exclusive jurisdiction to TCCs for their military-personnel's violations of IHL, it appears that the same obstacles appear as if peacekeepers were prosecuted for crimes not related to the ongoing armed conflict. Consequently, the UN may merely exonerate criminals, but heavily relies upon TCCs' cooperation to enforce accountability with IHL by bringing commissioners of international crimes to justice. South Africa's practice has shown that it is practically possible to exercise trial close to the crime scene and compensate victims. As all three TCCs to the *Intervention Brigade* (South Africa, Malawi, Tanzania) are Signatories of the Rome Statute, the ICC may serve as a complementary forum in cases where the national prosecution of grave violations of IHL have proven inadequate. It follows that the complexity of the functioning of PKOs in general, highly dependent upon TCCs' willingness to implement IHL standards into their military and criminal codes, according to which most military-personnel will be prosecuted for crimes commited while on mission. Further, practical obstacles of insufficient reporting and investigative mechanisms during volatile environments renders it difficult to hold peacekeepers accountable for crimes committed during their deployment in the host-country.[238] Indeed, it appears that initiatives to close the accountability gap for crimes committed by military-peacekeepers must come from TCCs themselves, further ensuring the equality of belligerents also before the law, and granting equal access to justice to victims. Indeed, initiatives such as South Africa's mobile court as well as the SC Resolution 2272 (2016) might be a step into the right direction.

5. A Future Outlook for Peacekeeping

Already with the establishment of the *Intervention Brigade* in 2013, the UN acknowledged the *Intervention Brigade'*s characteristics as unique to prior peacekeeping-practice[239], repeatedly including in following MONUSCO mandates that the establishment of an offensive force is a *sui generis* and created "on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping"[240]. Indeed, MONUSCO's robst capabilities have been regarded a success. South Africa has referred to the *Intervention Brigade* as "a credible example of success" as it confronted threats that were infringing the mission's effectiveness, which is especially important.[241] Indeed, in emphasising that non-military tools not always reflect the

[237] Melanie O'Brien, "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold", *Journal of International Criminal Justice* Vol. 10 (2012), p. 533.
[238] Sheeran et.al., "The Intervention Brigade", *supra* note 5, p. 16.
[239] *Ibid*., p. 16.
[240] Resolution 2348 (2017), *supra* note 150, Art. 9.
[241] "Statement by Mr. Mahlatse Mminele, Deputy Permanent Representative of the Republic of South Africa to the United Nations on Security Council Open Debate: Peacekeeping Operations-Facing Asymmetrical Threats.,"

capacity to ensure the operability of PKOs in high-threat environments, South Africa further welcomes robust mandates, furnished with sufficient resources and equipment, to realize obligations as the protection of civilians and deployed peacekeeping-personnel.[242] It appears that a better preparedness and responsiveness to dangers and an increased mobility of missions is seen as a priority for contemporary peacekeeping.[243] Special concern appears to be the protection of peacekeepers from becoming targets of direct attacks, as fatalities have risen in high-threat environments of deployment, as the *de Santos Cruz Report* to the SG in 2017 reflects.[244] The concern with the safety of contributed personnel is both, anchored as a customary norm, as well as a core precondition for the cooperation of TCCs. Overall, the *de Santos Cruz Report* draws attention to an increased number of peacekeeper-casualties that have resulted from lacking mobility, little deterrence capabilities, and unpreparedness of personnel resort to force when necessary[245], thus welcoming an strengthened missions as a necessity for the successful execution of mandates.

Yet, concern has been voiced that peacekeeping, as a useful tool for the maintenance of international peace and security, might become increasingly confused with international military interventions, which in turn has the potential to threaten the legitimacy of PKOs as well as the UN as a whole.[246] Indeed, the contradictions of the *Intervention Brigade's* mandate with the traditional principles of peacekeeping needs discussion regarding the UN's future role in the execution of their mandates.[247] Yet, other PKOs have voiced the need for an improved responsiveness to threats in volatile environments, and consequently have reflected similar approaches to the *Intervention Brigade* in the DRC. An example is the Forces of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) which has similarly been involved in military confrontations, under the authorization to deploy force for the deterrence of threats in Northern Mali.[248] Following the establishment of MINUSMA's mandate through SC Resolution 2100 (2012), Russia already then voiced its concern for a growing acceptance of authorized use of force in peacekeeping, stating that "what was once the exception now threatens to become unacknowledged standard practice, with unpredictable and unclear consequences."[249]

Permanent Mission of South Africa to the United Nations. November 7, 2016. Available on http://www.southafrica-newyork.net/pmun/index.html. Accessed May 16, 2018.

[242] *Ibid.*

[243] Michele J. Ambassador Sison, "Remarks at a UN Security Council Briefing on UN Peacekeeping Operations," *United States Mission to the United Nations*. March 23, 2017. Available on https://usun.state.gov/remarks/7809. Accessed May 26, 2018; "Statement by Mr. Mahlatse Mminele", *ibid.*; John Karlsrud, "Are UN Peacekeeping Missions Moving Toward 'Chapter Seven and a Half' Operations?" *IPI Global Observatory*. February 12, 2018. Available on https://theglobalobservatory.org/2018/02/peacekeeping-chapter-seven-half/. Accessed May 2016, 2018.

[244] "Improving Security of United Nations Peacekeepers: We Need to Change the Way We Are Doing Business (de Santos Cruz Report)", United *Nations Department of Peacekeeping Operations*. December 19, 2017, pp. 4-5.

[245] *Ibid.*, p.10.

[246] Karlsrud, "Moving Toward 'Chapter Seven and a Half' Operations?", *supra* note 243.

[247] Sheeran and Case, "The Intervention Brigade", *supra* note 5, p. 18.

[248] *Ibid.*, p. 19.

[249] *Ibid.*; "Statement by H.E. Ambassador Vitaly I. Churkin, Permanent Representative of the Russian Federation to the United Nations, during the Security Council Meeting on the Situation in Mali", *Permanent Mission of the Russian Federation to the United Nations.* April 25, 2013. Available on http://russiaun.ru/en/news/sc_mali. Accessed May 14, 2018.

Overall, the deployment of an offensive force in MONUSCO is widely regarded as necessary for the execution of the mission's mandate, but also for the protection of UN personnel, in a volatile environment as the DRC. It appears as if states welcome the equipment of missions with more military capability and might resort to similar measures to strengthen PKOs equally in future. Indeed, states seem to widely acknowledge such development as adeqaute, a certain amount of scepticism is valid in light of uncertainties resulting from the increasing divergence from the traditional peacekeeping principles, neutrality, non-use of force, consent.

FINAL CONCLUSION

In light of an increased legitimization of the use of force during PKOs, this thesis primarily attempted to direct attention to the problems caused when peacekeepers become active in an area regulated by the laws of armed conflict. The *Intervention Brigade*, an offensive military force under the command of the MONUSCO mission in the DRC, was chosen as a specific case study as its is the first military-contingent under a PKO to fight alongside a government in neutralizing armed rebel groups. Witnessing a general development of increasingly robust peacekeeping-mandates, this thesis is dedicated to the relevant contemplations as to whether IHL can be equally applicable, as well as equally enforceable, in situations where UN peacekeepers have been authorized to take up arms for offensive use of force.

In essence, this thesis attempted to answer the research question **whether peacekeepers of the *Intervention Brigade* in the MONUSCO mission are bound by international humanitarian law (IHL), and whether they can be held accountable for grave breaches thereof.** Arriving at the end of this thesis, both elements to the question can be answered positively. Personnel of the *Intervention Brigade* are bound by IHL, at least for the time they actively engage in the ongoing hostilites. Further, members of the *Intervention Brigade* can, theoretically, be held accountable for grave breaches of IHL, however, the prosecution of violaters thereof is heavily reliant on TCCs' willingness to exercise their exclusive jurisdiction in line with IHL standards. Before arriving at these conclusions, however, it was necessary to provide answers to several sub-issues.

In analysing to what extent and which which rules of IHL are applicable in the conflict in the DRC, it was essential to identify the characteristic of the ongoing hostilities as either being of international or non-international nature. In doing so, it was established that neither the presence of the MONUSCO mission, nor are warring parties "effectively controlled" by neighboring states to qualify the conflict as an IAC. It follows that IHL applies to the Congolese armed forces, the FARDC, as well as to various rebel groups, provided they meet the criteria of sufficient organization and exercise the hostilities meeting the required treshhold of intensity. Consequently, it was established that the laws of NIACs must apply, which comprise, in essence, Common Article 3 of the GCs, Additional Protocol II, but also customary IHL rules. Those rules are enforced insofar as very serious violations of these norms have been prosecuted before the ICC, who is since 2014 authorized to exercise its jurisdiction regrad to crimes committed in relation with the respective conflict. Directing the attention back to peacekeeping, it was established that the UN has recognized that its personnel might become engaged in activities relevant to IHL. By investigating under what circumstances and to what extent UN peacekeepers can be bound by

IHL, the relevant 1994 Convention as well as the 1999 Bulletin provide answers, but also controveries valuable for futher analysis, as to whether they define with sufficient clarity the IHL applicability to the *Intervention Brigade.*

Indeed, it was established that the *Intervention Brigade* qualifies as a party to the conflict, and thus must also abide by the rules applicable to the respective hostilities, at least for the time that they are actively engaged therein as combatants. This conclusion is additionally supported by the principle of equal application of the laws of armed conflict, which provides that belligerents, once party to a conflict, must be bound by IHL equally, regardless of any justification or legitimacy for their resort to force. However, it follows that the UN framework on the applicability of IHL to peacekeepers fails to specify several points, which would need further clarifications. Accordingly, it is unclear whether the protection provided for by the 1994 Convention continues to apply throughout the *Intervention Brigade'*s engagement in the NIAC, as its limits its scope merely for military-peacekeepers who have become active in hostilities of international nature. As a result, it is unclear whether provided immunities and privileges, as well as the criminalization of the direct targeting of peacekeepers under this Convention, continue to exist throughout their engagement in a NIAC. Furthermore, the 1999 Bulletin provides a very narrow scope regarding peacekeepers' obligation to abide by the laws of armed conflict, namely only for the specific "extent and for the duration" they are combatants. With respect to the *Intervention Brigade* under MONUSCO, this wording leaves room for interpretation as for which specific time frame MONUSCO's military-contingents can be understood as exercising combat functions. Again, it follows that neither the mission's mandate nor the UN Bulletin provide a clear answer to the question whether the *entire* MONUSCO mission or only the *Intervention Brigade* can be considered as a party to the conflict in the DRC. Overall, further specification on the temporary scope for the applicability of IHL to UN-forces would prove valuable, as it appears unclear whether the *Intervention Brigade* is considered as engaging in the respective hostilities throughout the entirety of their deployment, or merely for the specific time of the launching of a military operation. Such uncertainty poses not only a challenge to the respect for the laws of armed conflict, but directly endangered peacekeepers and their missions themselves, as they could be understood as belligerents in situations they are not.

Having established that the *Intervention Brigade,* at least for the time acting as combatants, must abide by the GCs Common Article 3, AP II, as well as Customary IHL Rules, it was further analyzed whether its personnel can be held accountable for breaches thereof. As a result of the peacekeeping-system's reliance on troop-contributions, practical and legal challenges are likely to arise for the adequate prosecution of peacekeepers who have committed grave breaches of IHL. It follows that the accountability of personnel heavily depends on the TCCs cooperation to implement and enforce IHL standards for the criminalization of grave breaches. As an example of a TCC to the *Intervention Brigade*, the practice of South Africa, having established a mobile-military court in Kinshasa, reflects a good example of such cooperation. In the case a TCC proves unwilling or unable to prosecute military-personnel for grave breaches of IHL, peacekeepers can face international criminal accountability before the ICC. With regard to the *Intervention Brigade*, all TCCs (Malawi, South Africa, and Tanzania) are Signatories to the Rome Statute, and thus allow for the Court's supplementary jurisdiction in the prosecution of war criminals.

The increased legitimacy allocated to the use of force under peacekeeping mandates has received both welcoming and sceptic responses. Overall, the UN and its TCCs acknowledge a growing need to sharpen PKOs threat-responsiveness in volatile environments, both for the successful execution of mandates as well as for the safety of peacekeeping-personnel. While such concerns justify the authorization of robust mandates, and as trends appear to continue into this direction, it is crucial that the UN clarifies its military-personnel's status under IHL once they are mandated to become an active part in a conflict. In order to live up to its standards, the UN must urge its TCCs to "respect and ensure respect for [IHL]", in terms of abidance by the applicable rules to a conflict, but also in the adequate prosecution when contingents have committed grave breaches of the laws of war. Furthermore, for the safety of a PKO as a whole, with an offensive force under its command, like the *Intervention Brigade* under MONUSCO, the UN should draw a visible line between peacekeepers authorized to become engaged in hostilities as combatants and peacekeepers who are, for the entirety of their deployment, entitled to the protection of civilians. If, however, the UN fails to do so while continuously allowing for the emerge of a new "aggressive" generation of peacekeeping, unpredictability and uncertainty for the equal application of the laws of war might await in the future.

ANNEX I: MAP OF MONUSCO, MAY 2015.

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