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The Application and Applicability of International Humanitarian Law to Peacekeeping Operations: the Case Study of The UN Intervention Brigade in DRC

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INTRODUCTION

The United Nations Charter establishes that maintaining international peace and security is the primary goal of the United Nations. It entrusts the United Nations Security Council with the main responsibility for achieving this goal (Art. 24).[1]

The expanded use of armed force in the new peacekeeping operations raised the issue of the application of international humanitarian law to United Nations forces and the responsibility of the members of such forces in case of bad behavior on the field. Since 1956, the International Committee of the Red Cross found that humanitarian law applies to the United Nations emergency forces. This statement has met resistance from the United Nations itself and its Member States, and remains controversial for both political and legal reasons. Indeed, it is not the United Nations as such but its Member States that are signatories to the Geneva Conventions and their Additional Protocols. Similarly, these conventions have not anticipated the specific cases of peacekeeping operations. For years, the compromise has been to include clauses relative to the respect of the spirit and the principles of international humanitarian law in the mandates of these operations. This reference includes the 1949 Geneva Conventions, their 1977 Additional Protocols, and the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict. Since 1992, this clause has been included in most agreements signed between the UN forces and the government of the country in which they were deployed.[2]

Some of the recent agreements provide that the UN must ensure that the mission is conducted in order to meet not only the "principles and spirit" but also the "principles and rules" of international conventions relating to the conduct of military personnel. Following the attacks and violence against

[1] United Nation Charter, Articles 1.1 and 24.
[2] The Practical Guide to Humanitarian Law, available at *https://guide-humanitarian-law.org/content/search/,* accessed on September 20, 2020.

peacekeepers on the field, the Convention on the Safety of United Nations and its Associated Personnel, eventually confirmed indirectly that humanitarian law does apply to these operations.[3] Even if Article 2.2 of the text states that the Convention does not apply to UN forces deployed in peacekeeping operations mandated by the Security Council under Chapter VII of the Charter, Article 20 recalls, however, that this Convention shall not affect the applicability of humanitarian law to the actions perpetrated by UN personnel.[4]

As it was written by Pacholska, 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[5], the peacekeepers are seen as the protectors of victims of armed conflicts, and harbinger of transition to sustainable peace.

In November 2012, the M23 rebel group in the Democratic Republic of the Congo (DRC) captured the city of Goma despite the presence of 1,500 troops from the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo and 7,000 Congolese army soldiers based in the city.[6] The seizure and human rights violations that followed were the latest in a familiar pattern in the DRC; the largest UN peacekeeping mission had once again been unsuccessful in deterring a rebel advance and, in this case, in fulfilling its commitment to defend Goma. Faced with international disapprobation and a pressing need to take decisive action in the DRC, in March 2013 the UN secretary-general adopted a radical proposition to address the rebel threat: the United Nations would deploy an *Intervention Brigade* to fight back and conduct offensive military operations against the rebels.[7]

After nearly fourteen years of peacekeeping in the Democratic Republic of the Congo, the United Nations established a new, more aggressive kind of force for the conflict-stricken nation in March 2013: the *Intervention Brigade*. Situated within the existing United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), this offensive combat

[3] UN General Assembly, *Convention on the Safety of United Nations and Its Associated Personnel*, adopted on 9 December 1994 (A/rés./49 / 59) and entered into force on 15 January 1999.
[4] UN General Assembly, *Supra n° 3.*
[5] 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.
[6] UN Defends Performance in Eastern DRC, available at http://m.voanews.com/a/1550868.html, last consulted July 15, 2020.
[7] The UN Intervention Brigade in the Democratic Republic of the Congo, available at www.ipinst.org, last consulted July 15, 2020.

force is designed to break the persistent cycles of violence in Democratic Republic of the Congo and protect civilians by carrying out targeted operations to neutralize rebel forces.[8]

While this new initiative could improve the United Nations' efforts to protect civilians, particularly by deterring rebel attacks through a show of force, it also raises a number of risks and challenges for MONUSCO, the Democratic Republic of the Congo, and the region as a whole.

MONUSCO's peacekeepers are already authorized to use military force to restore peace and security under their Chapter VII mandate, with rules of engagement that allow them to conduct offensive operations in the protection of civilians. The extent of these operations is, however, contested among troop contributors, and the formation of the Intervention Brigade highlights the reluctance of some to implement the mandate to its fullest extent.

The present analyses will turn around the following questions: in which circumstances International Humanitarian Law can be applied to peacekeeping operations? Does the Intervention Brigade of MONUSCO was party to the armed conflict in Democratic Republic of the Congo? What can be the character of an armed conflict involving peace operations?

I. PEACE OPERATIONS AS PARTIES TO AN ARMED CONFLICT[9]

The application of humanitarian law is generally premised on the existence of an armed conflict. Hence, once a situation of armed conflict arises, the law applies. It makes no difference which side resorted to force in the first place. Rather, international law clearly distinguishes between the *jus ad bellum* (the law on the use of force) and the *jus in bello* (the law of armed conflict or humanitarian law). The strict distinction between both regimes has been widely accepted, because it follows a sound logic: if the primary rule (the *jus ad bellum*) is violated, there are still remedial rules (the *jus in bello*) that ensures the protection of war victims on both sides. This principle can also be found in the preamble of Additional Protocol I, which calls on the parties to apply the rules 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.[10]

[8] *Ibidem*

[9] Cornelius Wiesener, *The Application and Interplay of Humanitarian Law and Human Rights Law in Peace Operations, with a Particular Focus on the Use of Force,* Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute, 2015, p.p. 50-58, available at *https://cadmus.eui.eu,* last consulted on August 24, 2020.

[10] *Ibidem*.

Therefore, in a situation of armed conflict, humanitarian law applies equally to both parties to the conflict irrespective of who is considered the aggressor. When it comes to peace operations, however, this clear distinction between *jus ad bellum* and *jus in bello* has not always been upheld – both by representatives of states and the United Nations, and among academics. Indeed, in the wake of the Korea campaign, the American Society of International Law made the following statement[11]:

The Committee agrees that the use of force by the United Nations to restrain aggression is of a *different nature from war-making* by a State. The purposes for which the laws of war were instituted *are not entirely the same* as the purposes of regulating the use of force by the United Nations. This we may decide without deciding whether the United Nations enforcement action is *war*, *police enforcement* or *sui generis*. In the present circumstances, then, the proper answer would seem to be, for the time being, that the United Nations should not feel bound by all the law of war, but should *select such of the laws of war* as may seem to fit its purposes.[12]

Therefore, the two types of armed conflict with their respective threshold requirements will be examined in order to clarify the circumstances under which a peace operation may become a party to an armed conflict.

I.1. International Armed Conflicts

International armed conflicts were historically initiated by a declaration of war, issued by one State against another. Common Article 2 to the four Geneva Conventions, however, states that declarations of war are no longer required for there to be an armed conflict between states,[13] which is reflective of the fact that such declarations have virtually disappeared and that the notion of armed conflict is essentially based on facts. The term of armed conflict in the law of international armed conflict has been a matter of debate, as all conventional texts failed to provide a definition. The International Committee of the Red Cross Commentary to the 1949 Geneva Conventions states that:

Any difference arising between two States and leading to *the intervention of armed forces* is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes *no difference how long the conflict lasts*, or how much slaughter takes place. The number of victims does not measure the respect due to human personality. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all

[11] *Ibidem.*
[12] ASIL, Report of the Committee on the Study of Legal Problems of the United Nations, 46 ASIL Proceedings, 1952, p. 220.
[13] Common Article 2, Geneva Conventions I-V

depends on circumstances. If there is only a single wounded person as a result of the conflict, the Convention will apply.[14]

This so-called *first-shot approach* sets an explicitly low threshold for conflicts arising between states. It is, however, far from clear whether the *first-shot approach* is supported by state practice, as states seem reluctant to openly acknowledge the application of the law of international armed conflict to isolated and low-intensity incidents involving their armed forces.[15] In light of this, it has been argued by some legal scholars and the Study Group of the International Law Association that a high level of intensity is required in order to trigger an armed conflict between states. However, to subject the law of international armed conflicts to an intensity requirement overlooks the protective purpose of this body of law to provide a coherent legal framework for any form of inter-state use of force.[16] This appears to be also the prevailing view in the legal literature.[17] This is also reflected in the jurisprudence of the *ad hoc* international criminal tribunals, which have played a key role in clarifying and developing the threshold of armed conflict. In its *DuskoTadić* decision on jurisdiction, the ICTY Appeals Chamber held that an international armed conflict exists 'whenever there is a resort to armed force between States'.[18] This standard follows the low threshold suggested by the *first-shot approach* and has been used by the ICRC and the International Law Commission.[19]

I.2. Non-International Armed Conflicts

In non-international armed conflicts, the threshold of application is much higher. The principle of sovereignty has been a major obstacle to promptly applying the law of non-international armed conflict to situations of intra-state violence. It has been in the interest of states to maintain a vertical relationship *vis-à-vis* those challenging their power within their own borders. Common Article 3 to the Geneva Conventions (1949) was the first treaty provision to regulate the conduct of non-international armed conflicts and can be considered a "*convention en miniature"*. It failed, however,

[14] Pictet, *the Geneva Conventions of 12 August 1949, Commentary I,* ICRC, 1952, p. 32.
[15] See Greenwood, 'Scope of Application of Humanitarian Law', in: Fleck (ed.)*, in The Handbook of International Humanitarian Law,* 2nd ed., OUP, 2008, p. 48, para. 202.
[16] See Dahl and Sandbu, 'The Threshold of Armed Conflict', 45 Military Law and War Review, 2006, p. 378; Kleffner, 'Human Rights and International Humanitarian Law: General Issues', *in Handbook of the International Law of Military Operations,* Gill and Fleck, OUP, 2010, p. 52; Dinstein, *War, Aggression and Self-Defence,* CUP, 2005, pp. 17-18.
[17] See Schmitt, 'Classification in Future Conflict', Wilmshurst (ed.), *in International Law and the Classification of Conflicts,* OUP 2012, pp. 459-60; Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts,* Hart Publishing, 2008, pp. 75-76; David, *Principes de Droit des Conflits Armés,* 4th edn, Bruylant, 2008, pp. 122-124, para. 156
[18] ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70. See also: ICTY, *Prosecutor v. Zdravko Mucić et al.*, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 184
[19] ICRC, How Is the Term "Armed Conflict" Defined in International Humanitarian Law?, Opinion Paper, March 2008, p. 5.

to adequately define such conflicts.[20] The scope of the Additional Protocol II (1977) is confined to armed conflicts between state armed forces and armed groups with control over territory and thus very restrictive.[21] The ICTY Appeals Chamber clarified the threshold in the *Tadić* decision, by stating that a non-international armed conflict exists whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

Following this standard, the two essential elements are the level of *intensity* (protracted armed violence) and *organization* (organized armed groups). These elements distinguish a non-international armed conflict from mere internal disturbances, which have to be addressed by law-enforcement measures, usually subject to human rights standards. In the recent *Đorđević* judgment (2011), the ICTY defined the two terms 'intensity' and 'organization', by providing an illustrative list of indicative factors.[22] Accordingly, *intensity* may be reflected by:

The seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed.[23]

On the *organization* of armed groups, the ICTY held that they do not necessarily need to be as organized as state armed forces, but that their leadership must have at least the ability to exercise some control over its members, which may be reflected by different groups of factors:

First, are the factors signaling the presence of a command structure. Secondly, are factors indicating that an armed group could carry out operations in an organized manner. Thirdly, are factors indicating a level of logistics have been taken into account. Fourthly, are factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3. A fifth group includes factors indicating that the armed group was able to speak with one voice.[24]

The test based on intensity and organization is now the most accepted standard of application for those customary humanitarian law rules applicable in non-international armed conflicts.[25]

[20] Moir, *The Law of Internal Armed Conflict*, CUP, 2002, pp. 33-34.
[21] Art. 1 (1) Additional Protocol II.
[22] ICTY, *Prosecutor v. Haradinaj et al.*, Judgement, Case no. IT-04-84-T, 3 April 2008, paras. 49 and 60
[23] ICTY, *Prosecutor v. Đorđević*, Judgement, 23 February 2011, Case no. IT-05-87/1, para. 1523
[24] *Idem,* para. 1526.
[25] Article 8 (2) (c) and (f) of the ICC Statute uses two different thresholds: paragraph (c) essentially follows

The above-mentioned *Customary IHL Study* and the *Sanremo NIAC Manual* found that the vast majority of customary rules of humanitarian law apply to both categories of armed conflict.

Yet, despite this convergence, there is still an important difference between international and non-international armed conflicts, the most essential being the lack of a combatant status in internal armed conflicts.[26] In other words, fighters involved in a non-international armed conflict have no *combatant privilege* – i.e. the right to participate directly in hostilities.[27] Quite the opposite, states have reserved the right to hold members of armed groups criminally responsible for their participation in hostilities.

II. FARMED CONFLICTS INVOLVING PEACE OPERATIONS

On the basis of the two types of armed conflict just outlined, it is apt to consider how they apply to the reality of peace operations. This analysis is crucial, as both regimes strongly differ on the threshold requirement, namely the level of intensity to trigger the application of humanitarian law. Depending on the operational circumstances, the nature of the armed conflict thus has an impact on the question as to whether and when humanitarian law becomes applicable in the course of a peace operation. Moreover, as concerns the scope of protection, the most crucial difference between both regimes remains the lack of combatant status in non-international armed conflicts. Given these important differences, this section will examine different nature of armed conflicts involving peace operations.

II.1. Armed Conflicts with States

As far as the sending states are concerned, any military engagement of the peace operation with the armed forces of another state would fall squarely within the international armed conflict regime, subject to the low threshold requirement outlined above. The case is, however, more challenging for international organizations, as the notion of international armed conflict contained in the Geneva Conventions (1949) and interpreted in recent jurisprudence is essentially based on states as opponents. Consequently, only the regime of non-international armed conflicts appears to be

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Common Article 3, while paragraph (f) mirrors the *Tadić* test, using 'protracted armed conflict'. Despite the different wording, however, both paragraphs are materially the same, supporting the claim that there is only one body of the law of non-international armed conflict; See Fleck, 'The Law of Non-International Armed Conflict', Fleck (ed.)*, in The Handbook of International Humanitarian Law,* 2nd ed., OUP, 2008, 581-610, pp. 587-589; Cullen, 'Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law', *in 183 Military Law Review*, 2005, p.p. 66-109.

[26] Hellestveit, 'The Geneva Conventions and the Dichotomy Between International and Non-International Armed Conflict: Curse or Blessing for the 'Principle of Humanity'?', in: Mujezinović Larsen et al. (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law,* CUP, 2012, p. 103.

[27] Art. 43 (2) Additional Protocol I.

available to international organizations.[28] This would lead, however, to a rather *absurd* solution, which seems to have no support in international practice. Indeed, it is rather unlikely that states would treat forces belonging to an international organization any differently from state armed forces or question their *combatant privilege* if captured. Set up initially by states, such organizations have their grounding in the sovereign powers of states and enjoy privileges and immunities to accomplish their mandates. Hence, from the perspective of states who engage in fighting with the forces of an international organization, it would seem reasonable to apply the same logic as to conflicts with other states. In the same vein, the international organization has little interest in applying the law of non-international armed conflict.[29]

To argue otherwise would imply a hierarchically higher status for the international organization as opposed to the state in question, which we have rightly rejected herein before. Hence, the concept of international armed conflicts applies equally to the United Nations and other international organizations as it does in relation to states. Based on this determination, it seems reasonable to conclude that any use of armed force between a peace operation and the armed forces of a state will trigger an international armed conflict between them. A single exchange of fire or the capture of enemy forces will be enough for that matter. Hence, peacekeeping forces will become involved in an international armed conflict when they come under hostile fire from state armed forces, however unprovoked this incident may be. Whether they return fire in self-defense has no bearing on the existence of an armed conflict in that case. The mandate may give an indication on the likelihood and the extent to which the operation may resort to force; but the determination of whether or not an armed conflict exists will depend on the facts on the ground. By the same token, a Chapter VII mandate is in itself not enough to trigger the application of an international armed conflict in the absence of hostilities with state armed forces.[30]

[28] See Cornelius Wiesener, *Supra n° 9*, p. 60; According to the wording and logic of the Geneva Conventions, armed conflicts between a state and an international organization do not amount to an IAC within the meaning of Common Article 2. Consequently, they would only be regulated by Common Article 3 as a 'case of armed conflict not of an international character'.

[29] Cornelius Wiesener, *Supra n° 9*, p.p. 60 and 61.

[30] Cornelius Wiesener, *Supra n° 9,* p. 61. As commented Cornelius, it could perhaps be argued that Security Council resolutions authorizing enforcement operations against an aggressor state – as in the case of Korea (1950-1953) and Iraq (1991) – qualify as a *declaration of war* and thus as a self-standing ground for the application of the law of international armed conflicts within the meaning of Common Article 2. However, the declaration of war would *sensu stricto* be made by the United Nations rather than the relevant states (or regional organization) carrying out the operations (as in case of Korea and Iraq). It is also unclear whether there is an armed conflict between states if the declaration of war is not followed by hostilities. A textual interpretation would lead to an affirmative answer to this question. Nevertheless, it could be argued that in the absence of ensuing hostilities, the duration of the armed conflict is reduced to almost nothing – similar to a single, isolated air strike in an otherwise peaceful situation – which raises the issue of the temporal scope of application of humanitarian law, which will be considered further below.

Apart from the cases of Korea and Iraq, peace operations will usually not get involved in protracted and large-scale hostilities with state armed forces. Such confrontations are rather rare and short-lived, as usually neither side has an interest in prolonged hostilities and further escalation. Two more recent exceptions to this rule are the NATO air strikes carried out against pro-Gaddafi forces in Libya in 2011, and actions taken by the United Nation mission in Ivory Coast (UNOCI) and French troops against forces loyal to Laurent Gbagbo in spring of the same year.[31]

What complicates the characterization of these actions was the question of whether at the time of the events the regimes of Colonel Muhammad Gaddafi and Laurent Gbagbo could still be regarded as *legitimate governments* of Libya and Ivory Coast, respectively. Only some states participating in the NATO-led air campaign had recognized the Benghazi-based National Transitional Council as the legitimate government of Libya. By contrast, Laurent Gbagbo was no longer considered the president of Ivory Coast after the elections and a resolution by the Security Council.[32]

II.2. Armed Conflicts with Non-State Armed Groups

As we have seen previously, armed confrontations are much more likely to occur between the peace operation and members of non-state armed groups. On some occasions, international forces provide direct support to the armed forces of the host states or even carry out joint manoeuvres with them. Practice from earlier peace operations that had gotten involved in heavy fighting with members of armed groups is rather inconclusive as to the nature of the conflict, because the United Nations or the states involved often denied that they had become a party to an armed conflict. The *Secretary-General's Bulletin* (1999) acknowledges at least that the United Nations may be engaged in hostilities, but fails to distinguish between the two categories of armed conflicts, which has led to different interpretations.[33] In the section on the treatment of detained persons, the Bulletin deems numerous provisions of Geneva Convention III applicable; these are, however, limited to treatment only and do not mention prisoner-of-war status at all. In other words, captured fighters do not necessarily enjoy combatant privilege, which leaves open the question of the nature of armed conflict. It was traditionally held among most scholars and the International Committee of the Red Cross that any conflict involving the United Nations or other peace operations would be, by default,

[31] Cornelius Wiesener, *Supra n° 9*, p. 61.
[32] Cornelius Wiesener, *Supra n° 9*, p. 61.
[33] *Idem,* p. 62.

international in nature and may even in certain cases internationalize the pre-existing armed conflict between the local parties.[34]

As a rule of interventional conflicts, the classification depends rather on the adversary of the intervening force. Only armed conflicts with state armed forces or forces of another intervening state are considered international, while armed conflicts with insurgents are to be considered non-international in nature.[35] The same logic should be applied to conflicts between a peace operation and an organized armed group. This position has found increasing support in recent years among legal scholars[36] and has been adopted by the International Committee of the Red Cross, as expressed in its 2011 Challenges Report.[37]

There are a number of reasons that have facilitated this development. First, as we have seen above, a great number of customary humanitarian rules are today considered equally applicable in non-international armed conflicts. This has effectively removed the bias among scholars and the International Committee of the Red Cross in favor of the law of international armed conflicts. At the same time, states have remained reluctant to grant fighters of non-state armed groups the *combatant* privilege, that is to say a *licence to kill* members of the states' own armed forces. This is one of the main reasons why states and international organizations involved in peace operations have often been unwilling to acknowledge the existence of an armed conflict altogether, running the risk of undermining the application of humanitarian law in such situations.[38] Moreover, the increased clarification of the threshold of non-international armed conflicts has made sure that armed conflicts with armed groups will normally only start once the violence reaches a high level of intensity.

Despite this development, there remains a group of legal scholars that adheres to the traditional view, whereby armed conflicts between international forces and non-state armed groups are by default

[34] Bouvier, *Convention on the Safety of United Nations and Associated Personnel*, 35 ICRC,1995, p. 664; See also: Benvenuti, *The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping*, 1 Law in International Crisis, 1995, p. 96; David (2008).

[35] Schindler, 'United Nations Forces and International Humanitarian Law', in: Swinarski (ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, Martinus Nijhoff, 1984, 521-530, p. p. 150-55.

[36] Cho, 'International Humanitarian Law and United Nations Operations in an Internal Armed Conflict ', *in 26 Korean Journal of International and Comparative Law,* 1998, 85-111, p. 93; McCoubrey and White, *International Organizations and Civil Wars,* Dartmouth Publishers, 1995, p. 172; Tittemore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations', *in 33 Stanford Journal of International Law,* 1997, 61-117, p. 110; Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights,* Intersentia, 2010, pp. 478-92.

[37] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report Prepared for the 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November – 1 December 2011, p. 31.

[38] Cornelius Wiesener, *Supra n° 9*, p. 64.

international in nature.[39] According to a major argument advanced by them, the distinction between both types of armed conflicts has its origin in the principle of sovereignty. Since peace operations do not enjoy territorial sovereignty over the area of deployment, they cannot invoke the right to put down any form of rebellion and punish the insurgents, which is inherent in the law of non-international armed conflicts. Consequently, only the international armed conflict regime would be available to them.[40]

This argument seems, however, to overlook that many peace operations do indeed embark on combat missions alongside the armed forces of the host states. Illustrative case is the United Nation operation in the Democratic Republic of Congo (MONUC and later MONUSCO) with his Intervention Brigade. Captured fighters are usually handed over to the local authorities and prosecuted for their acts. It is precisely the respect for the sovereignty of the host state that would seem to prevent the granting of prisoner-of-war status to such detainees, who in the eyes of local authorities are mere criminals. Admittedly, the case becomes more challenging where any form of central government has collapsed in the host state. A case in point is the United Nation presence in Somalia following the overthrow of the Barre regime in 1991 and where none of the local groups could be considered to represent the state as such. However, in view of the broad mandate peace operations usually enjoy in such cases, it is fair to say that they assume the role of a quasi-sovereign.[41] Consequently, just like state governments, the mission is entitled to enforce law and order and if necessary to crack down on civil unrest. If the violence reaches a higher level of intensity and involves organized armed groups, the law of non-international armed conflicts becomes applicable.

Nevertheless, there are a number of exceptions to the general rule just outlined. For instance, the non-state armed group opposing the peace operation may claim to be a ***national liberation movement*** within the meaning of Article 1 (4) Additional Protocol I holds, as it was the case of M 23 in the DRC, which would mean that the armed conflict would have an international character, including the full combatant privilege for the freedom fighters and subject to the low intensity threshold. However, it is highly questionable whether Article 1 (4) can really be considered a rule of customary law, rather than only binding on those states party to Additional Protocol I.[42] Hence, any use of force between the peace operation and members of such armed groups would trigger an international armed conflict.

[39] La Haye, *War Crimes in Internal Armed Conflicts,* CUP, 2008, p. 19-21.
[40] Glick, 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces', *in 17 Michigan Journal of International Law,* 1995, 53-108, p. 91.
[41] Cornelius Wiesener, *Supra n° 9*, p. 65.
[42] Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', *in International Law and the Classification of Conflicts,* OUP, 2012, 32-79, p.49.

Even though an armed conflict between a peace operation and a non-state armed group will under normal circumstances take a non-international character, both parties are free to agree by means of special agreements to mutually apply (some or all of the) additional rules of the law of international armed conflicts. Such agreements may grant full prisoner-of-war status (including full combatant privilege) to captured fighters and may thus prove useful in cases where a considerable number of the peace operation's own personnel have been captured.[43]

Yet, given the great number of different actors involved – namely the contributing states, international organizations and the host state – the question remains as to who is entitled to recognize belligerency in the case at hand. Moreover, both options are obviously only available where the level of violence has already reached the intensity required for the existence of a non-international armed conflict and thus do in no way affect the threshold requirement.

In sum, it appears more reasonable to apply the law of non-international armed conflict to situations of armed conflict between a peace operation and non-state armed groups. In other words, where the peace operation in question is involved in fighting of sufficient intensity with well organized armed groups, as it is the case of the United Nation Intervention Brigade with certain armed groups in the Democratic Republic of Congo, there is a non-international armed conflict. Conversely, where one or both of these requirements are not met, humanitarian law does not apply.

III. THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO PEACEKEEPING

III.1. The 1994 Convention

The Convention on the Safety of United Nations and Associated Personnel in 1994 (1994 Convention), allocates immunities to "members of military, police, or civilian components of a [UN] operation." Further, it reads that specific privileges and immunities must be concluded between the United Nations and the host-country of a respective Peacekeeping Operations, which is done through Status of Forces Agreements. Essentially, in a Status of Forces Agreements the host-countries accept the peacekeepers privileges and immunities as Peacekeeping Operations are subsidiary organs to the United Nations, and thus permanently immune from the prosecution for any act performed during the official capacity.[44]

[43] Cornelius Wiesener, *Supra n° 9*, p. 65.
[44] Convention on the Safety of United Nations and Associated Personnel", 1994, preamble, articles 1 (a) (i) and 4.

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. 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".[45]

As outlined above, the 1994 Convention was introduced with the intention to protect peacekeepers form becoming targets of attacks in armed conflict, rendering aggressions towards them illegal. Case law refined the temporal limit of protection to peacekeepers under International Humanitarian Law. 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 identifying whether, at the very moment of attack, the peacekeepers retained their protected status or whether they were taking active part in hostilities, which would have qualified their targeting legitimate.[46] Furthermore, while the 1994 Convention emphasizes in Article 20(a) that the provided immunities and privileges shall not interfere with the applicability of International Humanitarian Law. 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."[47] Indeed, the wording of the 1994 Convention overlooks the fact that Peacekeeping Operations are rarely deployed in situations of ongoing International Armed Conflicts and are more likely to become engaged in Non International Armed Conflicts[48], 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 Non International Armed Conflicts would create a double standard for military-peacekeepers. On the one hand, it would continuously criminalize of their direct targeting, despite their active engagement in hostilities of non-international nature[49], while, on the other hand, it would provide continuous immunity for military-peacekeepers as Troop contributing country's reserve their exclusive

[45] *Idem,* articles 2 (2) and 15.
[46] *Prosecutor v. Bahar Idriss Abu Garda* (Abu Garda), Case No. ICC-02/05-02/09 (International Criminal Court), February 8, 2010, p. 26, §56.
[47] 1994 Convention, *supra n°44,* Articles 2(2) and 20-21.
[48] Tristan Ferraro, The Applicability and Application of International Humanitarian Law to Multinational Forces, *in International Review of the Red Cross*, Multinational Operations and the Law, 95, No. 891/892 (2013), p. 583.
[49] Magdalena Pacholska, (Il)Legality of Killing Peacekeepers: The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals. *In Journal of International Criminal Justice.* Vol. 13, No. 1 (March 1, 2015), p. 71; Whittle, Peacekeeping in Conflict: The Intervention Brigade, MONUSCO, and the Application of International Humanitarian Law to United Nations Forces, *in Georgetown Journal of International Law* 46 (2015 2014), p. 872.

jurisdiction for "any criminal offence […] committed […] in the host country" of deployment.[50] Responding with concern to the lacking clarity of the 1994 Convention with respect to situations of Non International Armed Conflicts, it has been criticized by scholars as allowing for "privileging one particular group of soldiers over others."[51]

III.2. The 1999 Bulletin

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-defense, can in situations of armed conflict become "actively engaged therein as combatants".[52]

In acknowledging that robust peacekeeping-mandates have moved closer to the domain of International Humanitarian Law, 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."[53] Such wording reads as if the Bulletin does not, as opposed to the 1994 Convention, limit the necessary observance of International Humanitarian Law 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 International Humanitarian Law 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.[54]

This provision appears narrow in scope indeed, limiting the applicability of International Humanitarian Law 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.[55] Accordingly, as opposed to the 1994 Convention, peacekeepers having become engaged in hostilities in the Democratic Republic of the Congo, be it through enforcement action or for defense-purposes, are deprived of their status as non-combatants, qualify as legitimate targets, and are bound to follow

[50] 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, Art. 47(b).
[51] Adam Roberts, the Equal Application of the Laws of War: A Principle under Pressure, *in International Review of the Red Cross.* Vol. 90, No. 872 (December 2008), p. 955.
[52] Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law (1999 Bulletin), August 6, 1999. Art. 2(2)
[53] The 1999 Bulletin, *supra n° 52,* Art. 1.2.
[54] *Idem,* Art. 1.1.
[55] *Ibidem.*

International Humanitarian Law "for the extent and […] duration" they are actively deploying force. Such narrow scope allows questioning whether the mandate of the *Intervention Brigade* itself sets the framework of "extent and duration", or whether International Humanitarian Law really binds Intervention-peacekeepers 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 International Humanitarian Law rules in a non-exhaustive list for conducting Peacekeeping Operations. Essentially, the outlined rules closely resemble the applicable portion of International Humanitarian Law to Non International Armed Conflicts[56], which is, as identified previously, already relevant regarding the armed conflict in the Democratic Republic of the Congo. 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 International Humanitarian Law if a conflict situation requires it. For the enforceability of International Humanitarian Law, the Bulletin outlines that breaches of the outlined provisions and for violations of International Humanitarian Law, primary jurisdiction over military-peacekeepers is allocated to their respective Troop Contributing Countries.[57] This provision reminds once again of the reservation of exclusive jurisdiction over military-contingents by Troop Contributing Countries, as outlined previously, which are set out in Status of Forces Agreements and Memorandum of Understandings for troop-contributions. In line with the 1999 Bulletin, the accountability for violations of International Humanitarian Law 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 International Humanitarian Law again and back in to their entitlement to civilian protection.

However, it appears that the Bulletin, at its time of drafting, did not consider Peacekeeping Operations 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 International Humanitarian Law rules when engaged in hostilities during an International Armed Conflicts are straight forward, while the 1994 Convention allows for uncertainty as to whether it continues to provide for immunities and

[56] *Idem,* Art. 3; see also Katharina Grenfell, Perspective on the Applicability and Application of International Humanitarian Law: The UN Context, *in International Review of the Red Cross*, Vol. 95, No. 891/892, 2013, p. 648

[57] The 1999 Bulletin, *supra n° 52,* Art. 4.

privileges when peacekeepers are engaged in Non International Armed Conflicts, and whether their direct targeting continues to be unlawful.[58]

III.3. Why about the Application of International Humanitarian Law to the *Intervention Brigade*

It was established that United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) was deployed in the territory of an ongoing-armed conflict between the Democratic Republic of the Congo and non-state organized armed groups. The conflict has been identified as a Non-international armed conflict during which the main warring parties, the Armed Forces of the Democratic Republic of the Congo (FARDC) and militias, must respect the International Humanitarian Law of Non-international armed conflict when engaging in hostilities against one another. However, the simple presence of a Peacekeeping Operation, in the territory of an ongoing Non-international armed conflict does not qualify their peacekeepers, be their mandate robust or not, as combatants. Thus, in order to establish whether and for what extent the *Intervention Brigade* is bound by International Humanitarian Law, 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 of the Geneva Convention IV.[59]

In advocating for a broad applicability of International Humanitarian Law, the International Committee of the Red Cross (ICRC) has judged the mandate of a Peacekeeping Operation to be irrelevant for the applicability of International Humanitarian Law in situations when United Nation contingents resort to force.[60] Nonetheless, Resolution 2409 (2018) proves valuable in assessing the role the *Intervention Brigade* plays in the Democratic Republic of the Congo. As outlined previously, the UN SC has deployed the *Intervention Brigade* since its creation "in support of the authorities of the Democratic Republic of the Congo" 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 Democratic

[58] Sophia Gajan, Conflicting Peacekeepers: The Applicability of International Humanitarian Law to the UN Mission in the Democratic Republic of the Congo, available at *https://dspace.lu.lv/dspace/bitstream/handle/7/46402/Gojan_Sophia.pdf*, last consulted July 15, 2020.

[59] "The Geneva Conventions of 12 August 1949", *The International Committee of the Red Cross*. 1949, p.82, Art. 4(2); "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. 2(2); see also Tristan Ferraro, "The Applicability and Application of International Humanitarian Law to Multinational Forces", *in International Review of the Red Cross*, Multinational Operations and the Law, 95, No. 891/892 (2013), p. 575; Whittle, *supra n°49*, p.p. 846 and 851.

[60] 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.

Republic of the Congo.[61] A statement as straightforward as this, pledging support to the state-actor in a Non-international armed conflict, has been interpreted as qualifying the *Intervention Brigade* as a party to the conflict. Indeed, in further reading of the mandate, the deployment of offensive force is exercised "with the *support* of the whole of UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)" 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 United Nations Organization Stabilization Mission in the Democratic Republic of the Congo mission as a party to the conflict.[62] Such uncertainty leaves International Humanitarian Law 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 non-state groups in the country, which establishes that it is a party to the conflict. Such support has manifested in form of specific operations on the Congolese ground. Reports reflect that continuous cooperation between the mission and Armed Forces of the Democratic Republic of the Congo (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, as well as the Intervention Brigade's direct involvement in two large-scale operations against the ADF, "*Usalama I and II*".[63]

Moreover, the *Intervention Brigade* reflects all requirements set out by the Art. 2 of Additional Protocol II, but also Art. 4 of the Third Geneva Convention on the protection of prisoners of war. Indeed, the *Intervention Brigade* seems best caught by Art. 4 of the Third Geneva Convention, qualifying them for the prisoners of war status as "[m]embers of other militias […], belonging to a party to the conflict and operating in or outside their own territory" 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 International Humanitarian Law.[64] Command responsibility for Peacekeeping Operations is provided for by respective

[61] "Resolution 2348 (2017)", United Nations Security Council. March 31, 2017. Art. 34(i)(d); "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 on June 19, 2020.

[62] See Scott Sheeran et.al., "The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo," *in International Peace Institute,* 2014, p. 3; Ferraro, *supra n° 20*, p. 562; "Unanimously Adopting Resolution 2409 (2018)", *supra n° 22*.

[63] See Peter Fabricius, "Africa: Is the Force Intervention Brigade Still Justifying Its Existence? Available at *http://allafrica.com/stories/201706220262.html*, accessed on May 22, 2020; Whittle, *supra n° 49*, p. 858.

[64] Geneva Conventions, *supra n° 59*, p. 82, Art. 4(2).

Memorandum of Understandings and Status of Forces Agreements[65], charging Contingent Commanders (that is for the Intervention Brigade Malawi, Tanzania, and South Africa) with the primary obligation to ensure compliance and respect of laws.

The issue of distinction between the Intervention Brigade and the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo 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, as the Intervention Brigade shares the same facilities as the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, and the convoys are used interchangeably. This situation can prove problematic as it might endanger United Nations Organization Stabilization Mission in the Democratic Republic of the Congo's personnel not part of the *Intervention Brigade,* and thus should be entitled to the civilian protection even when the Brigade resorts to force.[66] Furthermore, in line with United Nations Organization Stabilization Mission in the Democratic Republic of the Congo's mandate, the *Intervention Brigade* is expected to engage in military operations under strict "compliance with international law, including international humanitarian law."[67] 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 Non-international armed conflict, thus MONUSCO's identification as a party therein should be sufficient to bind them by the Common Article 3 and Customary International Humanitarian Law. 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.

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."[68] Thus, accounting for the *Intervention Brigade'*s involvement in the Democratic Republic of the Congo, it is only reasonable that its personnel must comply with the International Humanitarian Law applicable to the respective conflict.

[65] "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 on April 14, 2020.
[66] Sheeran et.al. *Supra n° 62,* p. 9; Whittle, *supra n° 49*, p. 862.
[67] "Unanimously Adopting Resolution 2409 (2018)", *supra n° 61*, Art. 20.
[68] Ferraro, "The Applicability and Application", *supra n° 59*, p. 562.

IV. SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

IV.1. TEMPORAL SCOPE OF APPLICATION

The question that are asked in this situation are how long humanitarian law applies, once its application has been triggered, and on which requirements the end of application depends. These questions are particularly pertinent in the context of peace operations, for which states and international organizations involved have been trying to limit the application of humanitarian law and thus the target ability of their own forces. The Secretary-General's Bulletin states that it applies to: "United Nations forces when in situations of armed conflict they are *actively engaged* therein as combatants, to the extent and for *the duration of their engagement"*.

The last part of the provision seems to imply that a United Nation peace operation can switch between belligerency and non-belligerency from one moment to another, depending on whether they are actively engaged in actual combat or not.[69] This interpretation was indeed supported by Daphna Shraga, then principal legal officer at the United Nation Office of the Legal Advisor, who claimed that humanitarian law as a whole – not only the Bulletin – only applies for the short duration of combat involving the United Nation peace operation.[70]

However, humanitarian law does not allow for such a flexible concept of intermittent belligerency. The temporal scope of application is essentially linked to its material scope. In other words, humanitarian law applies whenever and for so long as there is a situation triggering its application: an armed conflict or an occupation. Hence, it generally applies from the beginning until the end of such situations.

The full picture is even more complex and perhaps best illustrated by Article 3 of Additional Protocol I (1977). While it only defines the temporal scope of the Protocol I and the four Geneva Conventions with regard to international armed conflicts and occupations, it shows the full complexity of the temporal scope of application, which is equally relevant for customary humanitarian law and situations of non-international armed conflict:

Without prejudice to the provisions which are applicable at all times[71]:

[69] Cornelius Wiesener, *Supra n° 9*, p. 85.
[70] Shraga, 'The Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law: a Decade Later', *in 39 Israel Yearbook on Human Rights*, 2009, 357-77, pp. 359-360
[71] Art. 3 of AP I, emphasis added. This provision is essentially modelled on Article 6 of Geneva Convention IV.

(a) The Conventions and this Protocol shall *apply from the beginning* of any situation referred to in Article 1 of this Protocol;

(b) The application of the Conventions and of this Protocol *shall cease*, in the territory of Parties to the conflict, *on the general close of military operations* and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

The *chapeau* reminds us that certain rules have to be observed at all times, even in times of peace.[72] Yet, the full set of humanitarian law only applies from the beginning of an armed conflict or an occupation. In the territories of the parties to the conflict the application ends on the *general close* of military operations, whereas in occupied territories humanitarian law ceases to apply on the *termination of the occupation*.

As a special case, the instruments continue to apply, even after the general end of their application, to persons pending 'final release, repatriation or re-establishment', for instance, prisoners of war or civilian internees.[73] Additional Protocol II (1977) contains a similar provision with regard to persons whose liberty has been restricted in the context of a non-international armed conflict.[74] It is already here where the wording of the *Secretary-General's Bulletin* appears too restrictive; if humanitarian law only applied for the duration of combat, captured enemy forces would lose their protection immediately once the engagement ends.[75] Hence, what needs to be stressed is that also in the context of a peace operation humanitarian law continues to apply to persons until their final release, repatriation or re-establishment.

IV.2. GEOGRAPHIC SCOPE OF APPLICATION

Closely related to the temporal scope of application is the question of where humanitarian law applies once there is a situation of armed conflict. This issue is especially relevant in the context of a peace operation, which has become a party to an armed conflict. Is the *jus in bello* only applicable where armed confrontations take place, or does it also apply in the entire theatre of operation or even

[72] Sandoz et al., *Commentary on the Additional Protocols,* ICRC, 1987, pp. 66-67, para. 149.
[73] Articles 5 GC I, 5 (1) GC III and 6 (4) GC IV.
[74] Art. 2 (2) AP II. ('At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty').
[75] Zwanenburg, *Accountability of Peace Support Operations,* Martinus Nijhoff, 2005, p. 190.

beyond? So far, these questions have received rather limited scholarly attention.[76] This is somewhat surprising, given the direct impact they might have on a number of related operational and legal issues, such as the exact geographical location where peace forces may have to observe the humanitarian law rules in their targeting decisions and where they may themselves be targeted by enemy forces under such rules.

It is thus not surprising that states and international organizations have tried to restrict the geographical scope of armed conflicts in which their forces may become involved in the course of a peace operation to limit the application of humanitarian law. For instance, the *Secretary-General's Bulletin* (1999), besides its temporal limitation already discussed above, also seems to suggest a spatially limited application when it states that its principles and rules are applicable to: "United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to *the extent* and for the duration of their *engagement"*.[77]

Treaty-based humanitarian law is rather silent on the precise geographical scope of application, but the provisions discussed above in relation to the temporal reach seem to provide some guidance.

Both Article 6 (2) of Geneva Convention IV and Article 3 (b) of Additional Protocol I stipulate that humanitarian law ceases to apply in *the territories of the parties to the conflict* on the general close of military operations. By reverse logic, this implies that humanitarian law must have previously been applicable in these territories. The ICTY Appeals Chamber used the same legal construction in the *Tadić* case, in which it held that humanitarian law applies: "in the *whole* territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, *whether or not actual combat* takes place there".[78]

The position that humanitarian law applies to the whole territory of the parties to the conflict finds support in the legal literature.[79] Reference is generally made to Article 29 of the Vienna Convention on the Law of Treaties (1969), which states that '[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'.

[76] Sams, 'IHL Obligations of the UN and other International Organizations Involved in International Missions' in: Odello and Piotrowicz (eds.), *International Military Missions and International Law,* Martinus Nijhoff, 2011, 45-71, p.p. 65-66.
[77] The 1999 SG Bulletin, Sect. 1.1.
[78] ICTY, *Prosecutor v. Dusko Tadic* (1995), *supra n° 18*, para. 70,
[79] Greenwood, 'Scope of Application of Humanitarian Law', in: Fleck (ed.), *The Handbook of International Humanitarian Law,* 2nd ed.., OUP, 2008, 45-78, p. 59; See also Kolb, *Ius in Bello: Le Droit International des Conflits Armés,* 2nd ed., Bruylant, 2009, pp. 218-19.

Furthermore, the approach based on the unity of territory also prevents fragmentation of the applicable law and thus ensures greater legal certainty for the actors involved.[80]

By contrast, the *ratione loci* application in the mission area may be more challenging. Certainly, if the host state is also involved in the armed conflict in question – either against the peace mission forces or together with them against insurgents – humanitarian law applies in the whole territory of that state. The picture becomes, however, more complicated where there is an armed conflict without the involvement of the host state, like in Somalia in the early 1990s, when international forces were engaged in hostilities with several armed factions. In areas of the host state that cannot be considered to be under the control of either the armed groups or the peace mission, humanitarian law does not apply, which seems to defeat the purpose of the expansive 'in the whole territory' formula.[81]

The shortcomings of the territory-based approach become even more apparent when hostilities extend beyond state borders. As widely accepted in the literature, the law has to follow the facts. In other words, the *jus in bello* also applies to the high seas, where naval battles usually occur, as well as to the territories of third states to the extent that actual hostilities take place there. Nevertheless, this extension is subject to additional constraints from other branches of international law. Such an extension of the reach of humanitarian law seems unproblematic for an international armed conflict, since any military engagement between state armed forces, regardless of its intensity, duration or location, would in itself be enough to trigger a separate, freestanding-armed conflict.[82]

Yet, what remains unclear is whether the same logic also applies beyond spillover cases to scenarios involving an even greater geographical disjunction between the initial battlefield and the new location (of parts) of the armed group. In other words, can a non-international armed conflict also stretch across the borders of a number of different states or even across continents?

An example of significant relevance for peace operations is the Lord's Resistance Army (LRA), which has been roaming the territory of a number of African states, including Uganda, the Central African Republic, South Sudan and the Democratic Republic of the Congo. Would humanitarian law still govern the actions of the LRA and its opponents, including MONUSCO and its Intervention Brigade, specifically tasked with neutralizing the group[83], if the group was present in a location not

[80] Cullen, *The Concept of Non-international Armed Conflict in International Humanitarian Law,* CUP, 2010, p. 133.
[81] Cornelius Wiesener, *Supra n° 9*, p. 97.
[82] *Ibidem*.
[83] S/RES/2211 (DRC), 26 March 2015, para. 28 ('*Recognizes* the ongoing contribution of MONUSCO in the fight against the LRA, encourages further efforts of the African Union Regional task force, and *urges* greater cooperation, including operational cooperation, and information-sharing between MONUSCO, other United Nations Missions in the LRA-

directly affected by any fighting? Giving an affirmative answer to this question is just a small step away from the United States view that the United States is involved in an armed conflict of global dimension with Al-Qaeda and associated forces.[84] This position has been strongly rejected by the International Committee of the Red Cross. The International Committee of the Red Cross position finds support among a number of commentators that are concerned with the effects of an ever-increasing battlefield.[85] However, these concerns are already addressed by other fields of international law, including the *jus ad bellum* and international human rights law, both of which may provide additional limitations to an otherwise unrestricted application of humanitarian law.

The position of the International Committee of the Red Cross and a number of legal scholars in favor of a spatial limitation of humanitarian law along state borders also seems to overlook the fact that the term 'armed conflict' denotes a functional *relationship* between two opposing actors. In other words, the law of armed conflict governs *that relationship* whenever these actors meet, regardless of the exact location of the encounter.

CONCLUSION

The characterization of the armed conflict in which a peace operation may become involved has to be based on the ordinary test. Hence, when states and international organizations acting as part of a peace operation engage in fighting with state armed forces, however sporadic and short-lived this may be, there will be an international armed conflict. By contrast, violence with non-state armed groups may (only) qualify as a non-international armed conflict, if it reaches a high level of intensity and that the group in question is sufficiently organized. Even though the law of non-international armed conflict is more limited and does not guarantee a combatant immunity to captured enemy fighters, there are circumstances under which the full set of rules may become applicable, most notably by mutual agreement between the parties. Becoming parties to an armed conflict triggers the application of their respective humanitarian law obligations, which they have to observe neatly while carrying out their own military actions.

affected region, the AU-RTF, regional forces, national governments, international actors and non-governmental organizations, as appropriate, in tackling the threat of the LRA').

[84] US DoJ, 'White Paper on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force', available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf, last accessed on May 22, 2020.

[85] O'Connell, Combatants and the Combat Zone, *in 43 University of Richmond Law Review*, 2009, 845-63, p. 857-859; Heinsch, Unmanned Aerial Vehicles and the Scope of the "Combat Zone": Some Thoughts on the Geographical Scope of Application of International Humanitarian Law, *in 25 (4) Journal of International Law of Peace and Armed Conflict,* 2012, 184-192, p. 192.

With the establishment of the *Intervention Brigade* under the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in 2013, the United Nations 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, is placed under the direct command of the MONUSCO mission.[86]

The *Intervention Brigade*'s deployment makes the United Nations a party in the conflict, which many member states fear taints the United Nations' neutrality with future consequences for peacekeeping operations worldwide.

Making the United Nations a party in the fight increases the risks to the civilian components of MONUSCO, who may become targets of rebel reprisals to Intervention Brigade operations. MONUSCO's core troops must be perceived as effective in order to deter such attacks and display a willingness to counter rebel incursions with decisive action and the use of force beyond self-defense.[87] This may also increase the risks to the population in the Democratic Republic of the Congo, which may experience casualties from the fighting.

What follows from the above is that the forces of a peace operation that has become a party to an armed conflict in the mission area have to observe the rules of humanitarian law for the full duration of that conflict or for as long as they are a party thereto. Humanitarian law not only applies in areas directly affected by hostilities, but also governs the actions of peace forces in other areas. It may even apply outside the mission area to the extent that they have a nexus with the armed conflict in question.[88]

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[87] The UN Intervention Brigade in the Democratic Republic of the Congo, available at www.ipinst.org, last consulted July 15, 2020

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