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The UN Mission in Congo and the Basic Principles of Peacekeeping - Revolution or Evolution?

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Abstract

In the absence of a legal basis for peacekeeping operations, the concept has had to evolve from SC practice. This has allowed for the system of collective security to survive the blocking of the Security Council by its permanent members and also permitted for a dynamic approach, facilitating an adequate response to the ever-changing threats to international peace and security. To balance the Member States' sovereignty and the organisation's supranational powers, SC practice and doctrine have developed three basic principles of peacekeeping: impartiality, consent and minimum use of force. Since 2013, the UN mission to the Congo, MONUSCO, has been authorised by the SC to use aggressive force against certain rebel groups. This work examines the basic principles as they appear in resolutions and doctrine, and compares them with the mandate of MONUSCO as expressed in SC resolutions. It is concluded that the new SC practice marks a deviation from all three principles. The thesis also finds that it remains to be seen whether the UN mission to the DRC, despite the denial of the organisation itself, will serve as a precedent for future peacekeeping operations.

Keywords

Force Intervention Brigade – peacekeeping – United Nations – Congo – MONUSCO – use of force – impartiality – consent

Abbreviations

AU	African Union
CIS	Commonwealth of Independent States
DPKO	UN Department of Peacekeeping Operations
DFS	UN Department of Field Support
ECOWAS	Economic Community of West African States
EU	European Union
FIB	Force Intervention Brigade (MONUSCO)
GA	UN General Assembly
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICL	International Customary Law
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo (1999-2010)
MONUSCO	UN Organization Stabilization Mission in the Democratic Republic of the Congo
OAS	Organization of American States
ONUC	UN Operation to the Congo (1960-1964)
ROE	Rules of Engagement
RtoP/R2P	Responsibility to Protect
SADC	Southern African Development Community
SC	UN Security Council
SG	UN Secretary-General
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
TCC	Troop Contributing Country
UN	United Nations

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Introduction

Conflicts between States – especially high-intense conflicts – have seen a significant decline since 1989. There has been less than one interstate conflict per year on average since 2000, compared to almost three during the 1980s.¹ As the Geneva Declaration on Armed Violence has demonstrated, warfare is responsible for less than one in 10 violent deaths in today's world — the large majority result from homicides.²

In parallel, a rise in intrastate wars has taken place. While the total number of people killed in armed conflicts has declined, the number and size of peacekeeping operations have increased significantly since the end of the cold war.³ Since the very first peacekeeping operation was launched in 1948, over 70 more have followed.⁴ As of March 2015, there are 16 on-going peacekeeping operations with a total of 92,000 troops.⁵ If the UN were a country, it would be the world's second largest troop depoler after the United States.⁶

In fact, the UN holds that the decline in armed conflicts depends on the efforts made by the organization itself.⁷ Others take a more sceptical stand, saying that although there have been some successes, in general the use of force by UN peacekeepers has been marked by political controversy, doctrinal vacuousness, conceptual confusion and failure in the field.⁸

Back in 1994 after the UN's failure in Somalia, then Under Secretary-General for Peacekeeping Operations Annan said it would 'be a very long time before the United Nations as an organization takes on a peace enforcement mission and manages it itself'.⁹ Some twenty years

¹ Human Security Report Project, *Human Security Report 2013: The Decline in Global*

² Human Security Report 2013

³ Human Security Report 2013

⁴ UN Peacekeeping Website,

<http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>, accessed on 27 December 2015

⁵ The total number of personnel serving in PKOs, including police, military observers, civilian personnel and UN volunteers, is 126,000. United Nations Peacekeeping Website, accessed 22 July 2015

⁶ Sebastian von Einsiedel & Rahul Chandran, 'The High-Level Panel and the Prospects for Reform of UN Peace Operations', United Nations University Centre for Policy Research, 2015

⁷ Human Security Report, *War and Peace in the 21st Century* (2005)

⁸ Trevor Findlay, *The Use of Force in UN Peace Operations* (OUP, 2002), 351

⁹ Findlay, 315

later, the time has come for the UN to reintroduce the concept of ‘aggressive peacekeeping’ in the DRC.

Is the UN – the guardian of international peace and security – to be engaged in war itself? Some argue that robust military engagement is vital for the UN in order for it to carry out its tasks effectively. Others hold the view that the UN’s use of force beyond self-defence is inconsistent with the Charter and its principles. Even if the UN should go on the offensive, the question remains: to what extent? Being one of the most controversial and debated questions in international law, the international use of force remains as pertinent a subject today as ever before.

First, the thesis will explore the development of the basic principles of peacekeeping. Second, it will analyse the mandate for the UN mission in the Congo and discuss its compliance with the principles. Finally, the thesis will discuss the legal implications of the new Security Council practice in more general terms.

Purpose

UN forces have been using force since the late 1950’s in different contexts and constellations and there has been a general acceptance for the institute of peacekeeping in state practice.¹⁰ However, peacekeepers’ right to use force has been under constant development, and the legal basis for this practice has often been far from clear due to the political character of the subject. As a result, although the core principles may be generally accepted in state practice, the boundaries delimiting the principles remain controversial.

Special attention will be given to an analysis of the latest SC mandate in the Congo, constituting the first ‘aggressive’ mandate for a peacekeeping operation. As peacekeepers become combatants, the basic principles for peacekeeping – consent, impartiality and the limited use of force - no longer suffice to legitimise the operation.

¹⁰ Christine Gray, *International Law and the Use of Force*, (3rd edn, OUP 2008)

The purpose of this thesis is to shed some light over recent development in SC practice in relation to PKO. The case MONUSCO is interesting for several reasons. First of all, the UN has had a military presence in DRC since 1960¹¹ and the country has more than once formed the stage upon which new principles of international law and Security Council practice related to PKOs have first seen the light of day. MONUSCO is also the first UN force ever to explicitly have obtained a mandate from the SC authorising it to use offensive force against named groups, detached from the previous requirement of self-defence. Another interesting aspect is the SC's declaration that the case is not to be seen as a precedent. Finally, there are also some interesting lines in the resolution declaring that the SC reaffirms the basic principles for peacekeeping – a statement not easily combined with the aggressive mandate lined out in the very same document.

Meanwhile, the force has in several ways been rather successful and efficient in executing its mandate in the field, something that suggests the concept is here to stay. The new legal issues rising from the MONUSCO case are therefore likely to remain relevant in relation to future peacekeeping operations, despite the SC's reservations. Hopefully the thesis could shed some light on the most important legal issues associated with the SC's going beyond the basic principles of peacekeeping, and also make contribution to the discussion on the legitimacy of these actions.

Research Question

The thesis will examine the legal consequences of the Security Council's new practice in relation to the basic principles of peacekeeping. The development could either be seen as an evolution of the ever-changing principles, or as a revolution against them. The examination will be conducted by answering the question:

- How does the mandate of the Intervention Brigade within MONUSCO comply with the basic principles of peacekeeping?

This question will be answered by an analysis of the MONUSCO mandate against the backdrop of the three basic principles of peacekeeping.

¹¹ At the time called the Republic of the Congo.

Method and Delimitations

As has been pointed out above, MONUSCO marks a new phase in UN peacekeeping practice. In order to put this recent practice into perspective, the legal basis for peacekeeping operations will be presented in the first part, focusing on the basic principles of peacekeeping in general. This is done through a historical summary of the evolution of the principles, from the first PKO to the MONUSCO of 2015. Since the subject is already widely investigated and commented in doctrine, the focus of the review will be on the most recent times.

The first part will provide the backdrop against which the case of MONUSCO can be examined in the second part. The comparison will focus on the Intervention Brigade and its compliance with the basic principles of PKO and discuss any deviations from these. Finally, the legal implications of this new SC practice and its relevance for the future will be analysed.

As for the material used in the study, focus will mainly be on the mandates issued by the SC in its resolutions, other relevant UN documents and the doctrine on peacekeeping. The formally recognised sources of international law are described in Art 38 of the Statute of the International Court of Justice (ICJ). Although the article remains silent as to the hierarchy between the different norms mentioned in it, treaties (1 (a)) and international customary law (ICL) (1 (b)) are the most important in practise.¹² Being the more specific of the two, the Charter of the UN prevails over ICL according to the *lex specialis* principle.¹³

Given the fact that the institute of peacekeeping is lacking any explicit legal basis in the UN Charter, other sources of law become relevant. In case of dispute as to the interpretation of the Charter, its Art 96 points out ICJ as the judicial organ providing resolution. This is done through advisory opinions, which are not binding on the organisation concerned. However, advisory opinions are normally implemented in practice.¹⁴ Accordingly, statements of the court will be used in the thesis as a complement to the Charter.

¹² John Crawford & Ian Brownlie, *Brownlie's Principles of International Law* (8th edn, OUP 2012), 22

¹³ Crawford & Brownlie, 22

¹⁴ Crawford & Brownlie, 185

Regardless of one's theoretical approach to international law, it can be seen as a system of laws.¹⁵ In the absence of any formal hierarchy in this system, the doctrine of the equality of states has been formed - states that are capable of forming rights and obligations in international law through their practice.¹⁶ Doctrine is often divided into two camps – one advocating a formal view on international law and the Charter, the other holding a more flexible and dynamic view, allowing for a continuous reinterpretation of the sources in the light of current developments. The nature of the topic tends to demand the latter since the concept of PKO is subject to constant development and the author generally leans towards it as well.

It is not possible to analyse all the legal consequences and implications of the new peacekeeping practice in DRC. One interesting issue that will not be fully addressed in this work is the application of international humanitarian law to peacekeeping forces and other aspects related to *jus in bello*.¹⁷ Another interesting subject concerns the UN's use of so-called 'drones' in its operation in DRC.¹⁸ In addition, some aspects related to the UN's protection of human rights will be discussed, but the scope of this work does not allow for a thorough analysis of these issues.

¹⁵ Crawford & Brownlie, 15

¹⁶ Crawford & Brownlie, 15

¹⁷ For a comprehensible review of the aspects of IHL in relation to MONUSCO, see Devon Whittle, 'Peacekeeping in Conflict: The Intervention Brigade, MONUSCO, and the Application of International Humanitarian Law to United Nations Forces' (2015) *Geo J Int'l L*, 837

¹⁸ See for example Kasaija Phillip Apuuli, 'The Use of Unmanned Aerial Vehicles (Drones) in United Nations Peacekeeping: the Case of the Democratic Republic of Congo,' *asil Insights*, vol. 18, issue 13, 13 June (2014)

The Legal Status of Peacekeeping Operations

By the end of WWII, the governments represented in San Francisco created the United Nations in order to ‘save succeeding generations from the scourge of war’.¹⁹ Further, they decided ‘to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest ...’.²⁰ Some even argue that the core purpose of international law itself is the promotion of peace.²¹

The general prohibition of the use of force stated in Article 2(4) of the Charter comes with two exceptions: the right to self-defence as stated in Article 51 and Security Council authorisation. The latter could be the authorisation of states to use force in accordance with Chapter VII, or of regional organisations under Chapter VIII. However, both of these situations will be excluded from the analysis in this thesis. Instead, the focus will be on the use of force in organs established by the SC, namely peacekeeping operations.

The institute of peacekeeping was never provided for in the Charter. The UN therefore had to find its ways to protect and promote international peace and security. In many cases, peacekeeping is perhaps the most efficient means at the organization’s disposal.²² Naturally, the use of force by the guardian of peace and security will remain highly controversial – especially when performed against the will of the States involved.

A general definition of peacekeeping can be found in the so-called Capstone Doctrine:²³

Peacekeeping is 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 years, peacekeeping has evolved from a primarily military

¹⁹ United Nations, The Charter of the United Nations, Preamble (UN Charter)

²⁰ UN Charter, Preamble

²¹ See Anna Spain, ‘Deciding to Intervene’ (2014) 51 Houston Law Review 847, 891ff

²² At least it has been rather popular. UN Peacekeepers were awarded the Nobel Peace Prize in 1988 with the motivation that “the Peacekeeping Forces through their efforts have made important contributions towards the realization of one of the fundamental tenets of the United Nations. Thus, the world organization has come to play a more central part in world affairs and has been invested with increasing trust.”

²³ DPKO, ‘United Nations Peacekeeping Operations – Principles and Guidelines’, 2008 (Capstone Doctrine)

model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace.²⁴

By peacekeeping operation, this thesis refers to international military forces under the control of the UN.²⁵ The institute of peacekeeping has been affirmed by the ICJ in its *Certain Expenses Case*. Furthermore, the ‘Safety Convention’²⁶ applicable to United Nations personnel defines a United Nations operation as an operation established by the UN Charter and under the UN’s ‘authority and control’, where ‘the operation is for the purpose of maintaining or restoring international peace and security’.²⁷

In addition to such operations, the Security Council also authorises other types of military operations under chapter VIII of the UN Charter, often called ‘regional peacekeeping’ since they are undertaken by regional organizations, namely OAS, AU, ECOWAS, SADC, EU and CIS.²⁸ However, these operations do not operate under the control of the UN and therefore fall outside the scope of this thesis.²⁹ Excluded are also armed forces of singular states with Security Council authorization to use force for specific purposes.³⁰ Even though the Security Council equally mandates these operations, the command and control structure remains exclusively with the mandated State. Therefore, these forces do not constitute organs of the UN and hence are not forces of the organisation.³¹

The purpose of the UN is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for

²⁴ Capstone Doctrine, 18

²⁵ For a distinction between international and multilateral forces, see International Military Forces, Marten Swanenburg (MPEPIL 2013), para 5-6

²⁶ Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363 (The Safety Convention)

²⁷ The Safety Convention, Art 1(a)(i)

²⁸ See for example EUFOR ‘Althea’: Bosnia and Herzegovina, UNSC Res 1551 (2004) UNSC Res 1575 (2004)

²⁹ For a discussion on the use of force in regional peacekeeping operations, see Gustaf Lind, *The Revival of Chapter VIII of the UN Charter: Regional Organisations and Collective Security* (PrintCenter, Stockholm 2004), 258ff

³⁰ For a distinction between peacekeeping and mandated military enforcement action, see Bruno Simma (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012), 1179 (Simma)

³¹ Simma, 1193

the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The Charter is written in a time when inter-state conflicts were posing the greatest threat to international peace and the system for collective security is designed accordingly.³² Since then, the geopolitical landscape has changed dramatically as former colonies have declared their independence and the Cold War has come to an end. Despite the fact that the Charter has more or less remained the same, the deployment of peacekeeping missions have had to evolve in order to meet the changing – and increasing – demands of international peace and security.

Apart from prohibiting the unilateral use of force by states, the drafters of the UN Charter also wanted to centralise control of the use of force in the SC under chapter VII.³³ However, there is no legal provision for peacekeeping operations in the Charter.³⁴ Or, as SG Boutros-Ghali put it, ‘peacekeeping can rightly be called the invention of the United Nations’.³⁵ The drafters of the Charter did set up a system where the member States, in order to support the UN in maintaining international peace and security, were to make armed forces available to the organization through ‘special agreements’ (Art 43 of the UN Charter).

Although such a solution was advocated by the Secretary General in his ‘An Agenda for Peace’, it was never implemented in practice. He later stood back from the idea in his following Supplement to An Agenda for Peace and Art 43 was soon to be known as a “dead letter” of the Charter since no Member State was willing to conclude such an agreement.³⁶ Instead of the standing UN forces envisaged in Art 43, peacekeeping operations have been established *ad hoc*, i.e. for a limited period or for a particular operation.³⁷ Furthermore, the antagonistic relations between the permanent members have also blocked the system for collective security. The UN responded by inventing a number of substitutes. It introduced the

³² Gray, 7

³³ Gray, 254

³⁴ Gray, 261

³⁵ SG An Agenda for Peace, UN Doc A/47/277, para 46 (Agenda for Peace)

³⁶ Gray, 254

³⁷ Marten Zwanenburg, ‘International Military Forces’, *Max Planck Encyclopedia of Public International Law* (2013), para 3

mechanism of authorisation whereby the SC authorises coalitions of the willing to take enforcement action and also invented peacekeeping as a non-coercive security instrument. Peacekeeping has become a predominately UN tool in crisis management and allowed the UN to attain its purpose of securing peace. Peacekeeping can therefore be said to represent the conceptual modification of the UN collective security system.³⁸

Following the failure of the collective security system prescribed in the Charter, the UN invented the concept of peacekeeping in an attempt to preserve some relevance in the area of peace and security. The system of collective security is based on organized enforcement against recalcitrant states. However, the UN is dependent on the cooperation of member states and consensus between the permanent members in the Security Council in order for it to be able to enforce its will.

Different explanations have been put forth suggesting the legal basis for peacekeeping operations. The power of the GA to establish subsidiary organs, under chapter VI as a pacific settlement of disputes, or under Article 40 as a provisional measure.³⁹ Although both peacekeeping and peaceful settlements of disputes are based on the consent of the parties, the idea of comparing the two has been criticized. Since peacekeeping comprises deployment of military forces who have a right to use military force, not only to defend themselves but also their mandate, calling it peaceful would undermine the very meaning of the word.⁴⁰ Even though all of the mentioned explanations may be possible in theory, in practice, however, there has been no express reference to any of them in the resolutions establishing peacekeeping forces.⁴¹

The early PKOs, often referred to as ‘traditional peacekeeping’, were launched during the Cold War and based upon Chapter VI. Since the Security Council is limited to adopt ‘recommendations’ under Chapter VI, resolutions adopted under that Chapter are not

³⁸ Nicholas Tsagourias, ‘Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension’, 11 J. Conflict & Sec. L. (2006) 465f

³⁹ Simma, 648

⁴⁰ Lind, 216f

⁴¹ Gray, 262, referring to the fact that neither UN Books on Peacekeeping nor the UN Peacekeeping website mention the problem.

binding.⁴² This means that these types of operations cannot, per definition, use any force beyond self-defense, at least not against any state.

The first two peacekeeping operations deployed by the UN were the UN Truce Supervision Organization (UNTSO) and the UN Military Observer Group in India and Pakistan (UNMOGIP).⁴³ Both of these missions are based on Art 40 and continue operating to this day. Their tasks consist of observation and monitoring and their authorized strengths are in the low hundreds. However, the UN military observers in these missions are unarmed.⁴⁴ The first armed UN force was UNEF, deployed in Suez as a response to the crisis in 1956.

Despite the fact that the legal basis for the institute might be quite vague, peacekeeping operations are definitely here to stay. In 1992, a separate Department for Peacekeeping Operations (DPKO) was established with its own under secretary-general as chief, allowing a gathering of the expertise in the area for the first time.⁴⁵ After the experiences from the difficult operations in the 90's and on recommendation by the Brahimi Report, the DPKO was later separated into two: DPKO and Department of Field Support (DFS). These departments continue to support and develop UN peacekeeping operations of today and the DPKO provides us with summaries of the most generally accepted norms and principles governing the institute.⁴⁶

⁴² A recommendation may, however, become binding if it is accepted as such by the party concerned. See Simma, 1186

⁴³ For a detailed review of all peacekeeping operations up until 1996, see UN, *The Blue Helmets: A Review of United Nations Peace-keeping* (3rd ed. 1996)

⁴⁴ UN Peacekeeping Website, accessed 9 July 2015

⁴⁵ Findlay, 12

⁴⁶ See for example the Capstone Doctrine.

The Role of the Security Council

Apart from the cases of self-defence covered by Art 51 of the Charter, the Council has been given a use-of-force monopoly by the member States through the Charter. Being the sole organ deciding whether there is a threat to international peace and security and also what measures are to be taken in order to deal with these threats, it has been given very broad powers.

Yet, there are limits to the powers of the SC. It is bound to act within its powers in accordance with the principle of attribution,⁴⁷ meaning that the organisation has to act within the limits provided by its member states in the Charter.⁴⁸ These limits comprise Art 24(2) stating that the SC shall act in accordance with the Purposes and Principles of the United Nations.⁴⁹ Although the SC is not bound by international law in general when taking measures of collective security under Chapter VII,⁵⁰ it is probably bound by peremptory norms, meaning it cannot impose obligations on member states in violation of e.g. the United Nations Convention against Torture.⁵¹ Other limitations to the SC's powers are strictures of necessity and proportionality.⁵²

Being an organ of an international organization, the SC, apart from the explicit powers stated in the Charter, also has implied powers. One of these is the power to establish peacekeeping operations.⁵³ In its *Certain Expenses* case the ICJ was asked about the constitutional basis for the UNEF and ONUC missions and stated:

It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.

⁴⁷ Crawford & Brownlie, 184

⁴⁸ Niels Blokker and Nico Schrijver (eds), 'International Organizations or Institutions, Implied Powers', MPEPIL (2009), 8; Crawford, 762

⁴⁹ Crawford & Brownlie, 762, referring to Frowein & Kirch; Simma (2n edn 2002) 701, 710-12

⁵⁰ Simma, 1245. However, it should be noted that the Council must observe international law when taking action in dispute settlement according to Art. 1(1) of the Charter, although those issues will not be discussed here.

⁵¹ Crawford & Brownlie, 762 and Simma, 1260

⁵² Crawford & Brownlie, 762

⁵³ Blokker and Schrijver, para 6

Articles of Chapter VII of the Charter speak of “situations” as well as disputes, and it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a State.⁵⁴

A third factor is the lack of a mechanism of judicial review to monitor and intervene when the SC might have exceeded its powers.⁵⁵ There simply is no effective sanction against the Council, would it go beyond its mandate.

As to the practice of the SC, the ICJ in its *Nuclear Weapons* advisory opinion of 1996 stated:

[The] constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which parties entrust the task of realizing common goals.⁵⁶

Thus, UN organs can themselves determine their competences when it is not determined in the Charter. Resolutions and other documents issued by the different organs can therefore offer some guidance on the boundaries of their respective decision power.

As mentioned above, the principle of attribution from a general perspective limits the decision power of the organ at hand in relation to its member states. Seen from the other side, once acting within the competence attributed to it, the SC has been left with a very large margin of appreciation when acting under Chapter VII, in which the member states have given up all their authority.

In its resolutions regulating the first peacekeeping operations, the Security Council did not specify under which legal basis it was acting.⁵⁷ Even though it still does not specify under which provision, at least it uses to state that it is acting under Chapter VII.⁵⁸ Many have noted this problem and called for increased clarity and consistent terminology in SC resolutions. Even though the idea seems appealing, it may however prove impracticable as other

⁵⁴ Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p. 151 (Certain Expenses Case), para 20

⁵⁵ Blokker and Schrijver (eds), 9

⁵⁶ Blokker and Schrijver (eds), 9, at fn 30

⁵⁷ Simma, 1186

⁵⁸ Simma, 1186

apparently sensible suggestions for reform have in the past.⁵⁹ The unclear references to the legal grounds for its decisions can be seen as a reflection of the political sensitivity of the subject and a common lowest denominator among the members of the Council.

Legally, peacekeeping operations are created as subsidiary organs of the UN organ creating them (i.e. the GA or the SC).⁶⁰ Although it is now considered an established practice that the SC has an exclusive power to create peace operations, it was actually the General Assembly who created the first armed peacekeeping operation in Suez in 1956.

The division of powers between the Security Council and the General Assembly can be found in Art 24 of the Charter, stating that the former has the primary responsibility for the maintenance of international peace and security. Meanwhile, according to Art 11, the powers of the General Assembly cover all activities of the UN, including the maintenance of international peace and security. It has turned out that these powers are to a certain extent limited by the prerogatives of the SC.⁶¹ As the ICJ expressed it in its *Certain Expenses* case, the Council has the ‘primary’, but not the exclusive, responsibility for the maintenance of international peace and security.⁶² Therefore, the GA was able to step in when Council action in the Korea crisis was being blocked by the veto of the Soviet Union adopting the “Uniting for Peace” resolution⁶³ allowing the UN to launch a peacekeeping force without a decision in the SC.

SC resolutions are further binding for all member states according to Arts 25, 103 and Chapter VII, while decisions taken in the GA consist recommendations. The system of collective security ultimately relies on the use of coercive measures against a state, provided for in Chapter VII. In relation to PKOs, their legal basis has shifted over the years.

On 3 January 1995, the SG presented a Supplement to an Agenda for Peace (‘Supplement’) on the occasion of the 50th anniversary of the United Nations. The Supplement mentions the three principles of peacekeeping and their relation to successful and failed missions. It further states that peace-keeping and the use of force (other than in self-defense) should be seen as

⁵⁹ Gray, 325

⁶⁰ Simma, 1183

⁶¹ Simma, 1186

⁶² *Certain Expenses Case*, 163

⁶³ UNGA Res 377A, (1950)

alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other.

The Brahimi Report and the Millennium Summit of the Security Council in 2000 introduced the concept of ‘robust peacekeeping’. It was defined in the Capstone Doctrine as the use of force by a PKO at the tactical level, with the authorization of the Security Council, to defend its mandate against spoilers whose activities pose a threat to civilians or risk undermining the peace process.⁶⁴ The SC has since adopted several provisions relating to peacekeeping following the report, in its Resolution 1327 (2000).

In defence of the SC’s reluctance to specify the legal grounds of its resolutions, linking UN peacekeeping with a particular Chapter of the Charter can also be misleading for more practical reasons in terms of operational planning, training and mandate implementation.⁶⁵ In assessing the nature of each peacekeeping operation and the capabilities needed to support it, TCCs and PCCs should be guided not only by the tasks assigned by the Security Council mandate, but also the concept of operations and accompanying mission Rules of Engagement (ROE). Therefore all sources must be considered in order to fully understand the scope and character of a PKO. Recently, the developments have led to a new type of peacekeeping operation characterized by broader, not only military but also political and humanitarian mandates.⁶⁶

Thus, the legal foundation of the SC’s decision-making power is fairly clear. However, the *legitimacy* of its decisions has been subject to extensive doctrinal debate. Ever since the establishment of the first peace operation, it has been debated whether the Charter needs to be changed in order to better meet the security demands of today’s world. One argument put forth is that the SC is lacking quality and objectivity when taking decisions, and that States or international organizations other than the UN therefore be better suited for the task of providing international security. That political discussion is too extensive to be offered any more room here, but it can be noted that the High-Level Panel on Threats, Challenges and Change considered the SC to be ‘fully empowered under Chapter VII to address the full range of security threats with which States are concerned’, and that instead of seeking to replace the

⁶⁴ Capstone Doctrine, 98

⁶⁵ Blokker and Schrijver, 15

⁶⁶ Hanspeter Neuhold, *An Agenda for peace*, MPEPIL (2013)

SC as a source of authority, the task should rather be to ‘make the Council work better than it has’.⁶⁷

This view was also supported by SG Annan in his report *In Larger Freedom* where he held the view that the SC must be a forum for resolving differences rather than a mere stage for acting them out, and further argued that the Charter is offering a good basis for the understanding that we need, as it stands today.⁶⁸ The discussion may be of a political nature, rather than legal, but is still relevant as the Security Council – a political organ - is ultimately taking the decision to establish a PKO.

In an attempt to enhance the legitimacy of the Council, the High-Level Panel on Threats, Challenges and Change recommended some ‘basic criteria of legitimacy by which to decide when the use of force is justified’ for the Council to use when considering authorizing the use of force.⁶⁹ These are: seriousness of threat, proper purpose, last resort, proportional means and balance of consequences. The Panel was hoping that they should significantly improve the chances of reaching international consensus on what have been in recent years ‘deeply diverse issues’. In conclusion, the Panel of experts declared that:

The maintenance of world peace and security depends importantly on there being a common global understanding, and acceptance, of when the application of force is both legal and legitimate. One of these elements being satisfied without the other will always weaken the international legal order - and thereby put both State and human security at greater risk.⁷⁰

Despite the fact that the Council has in many cases refrained from using force where the above criteria have been met, they could perhaps to some extent make up for the arbitrariness resulting from the lack of more precise legal guidance. At least they provide an alternate ground for SC decisions on the use of force, which could give the UN some needed

⁶⁷ *A More Secure World*, para 197-198

⁶⁸ Report of the Secretary-General, ‘*In Larger Freedom: Towards Development, Security and Human Rights for All*’, UN Doc. A/59/2005 (2005), para 123.

⁶⁹ *A More Secure World*, para 207 (a-e)

⁷⁰ UN High-Level Panel on Threats, Challenges and Change, ‘*A More Secure World: Our Shared Responsibility*’ (2005), para 184

legitimacy in cases where the doctrine cannot keep up with the ever-changing demands for security in the field.

Peacekeeping and Peace Enforcement

The legal basis upon which the mandate of a peace operation is founded is important since it sets the limits for how much force a particular operation can be authorized to use. It also affects the need for consent by the host state. Whereas peacekeeping operations under Chapter VI require consent, Chapter VII missions do not. The latter have therefore historically been categorised as examples of enforcement missions. Enforcement has been defined as any action that involves the use of force and is directed against a state with the aim of overcoming its will.⁷¹ Thus, traditional peacekeeping differs from peace enforcement as long as it does not use force against a state.

According to the ‘Brahimi Report’ from 2000, the UN does not wage war.⁷² At least not directly, that is. The Security Council has established a practice of delegating enforcement action to so-called mandated forces, authorizing them to ‘use all necessary means’ or ‘take the necessary actions/measures’ to achieve the purposes set out in the resolution. Commentators have referred to this practice as ‘outsourcing’ by the UN of its enforcement actions, leaving the more aggressive part of the use of force to particular states to perform.⁷³ An important difference between the two types of operations is that, although both are acting under mandates from the SC, the ones involving peace enforcement are lacking UN command and control.⁷⁴ However, in practice the line between the two has not been so clear since, in some cases, the Council has also authorized peacekeeping forces to use this kind of force.⁷⁵

Lately, the SC has started to refer to Chapter VII in its resolutions establishing PKO’s, while recognizing the basic principles of peacekeeping at the same time. At a first glance this might

⁷¹ Certain Expenses Case, 177

⁷² Report of the Panel on United Nations Peace Operations, ‘Comprehensive review of the whole question of peacekeeping operations in all their aspects’ UN Doc A/55/305-S/2000/809 (2000), para 53 (Brahimi Report)

⁷³ For a recent example, see MINUSMA in Mali where the UN forces have been backed up by France who has been given a more extensive mandate to use force, UNSC Res 2227 (2015)

⁷⁴ Blocker and Schrijver, 16

⁷⁵ For examples, see Simma, 1183

appear as an impossible contradiction, but there are still some factors separating the two types of operations. A peace enforcement operation points out a culpable party – a state -against whom action is taken. The action is neither neutral nor impartial. However, the use of force against sub-state authorities or private individuals is not enforcement.⁷⁶ Peace enforcement makes peace by imposing a solution through the medium of force. In contrast to PKO's, they are not employed to facilitate dispute settlement but coerces parties to submit to the political solution chosen by the enforcer. In other words, in a PKO with enforcement components, coercion is not the primary aim of the mission but incidental thereto.⁷⁷

The Basic Principles of Peacekeeping

In order to understand the legal basis for PKO, it is necessary to examine the basic principles governing the institute of peacekeeping. As we are about to see, they are all crucial in the process of drafting SC resolutions regulating these operations since they offer important guidance as to how a balance of the powers of the different stakeholders can be achieved in the conflict at hand. The major stakeholders, apart from the UN itself, are the host state in which the operation is to take place and the states contributing troops to the mission.⁷⁸

As set out by SG Hammarskjöld in relation to UNEF during the Suez crisis, there are three basic principles of peacekeeping: consent, impartiality and the use of force in self-defence.⁷⁹ The latter is sometimes also called the principle of minimum use of force.

More recently, international courts have also relied on the three principles when defining the 'peacekeeping nature' of such operations. In 2009, the Special Court for Sierra Leone relied on the fundamental principles for peacekeeping operations when it examined rebel attacks against peacekeepers in Sierra Leone. Describing the criteria of a peacekeeping force, it

⁷⁶ Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', 11 J. Conflict & Sec. L. (2006) 465f

⁷⁷ Tsagourias, 8

⁷⁸ The latter are often referred to as "TCCs" in the doctrine, which stands for Troop Contributing Countries.

⁷⁹ See the Report of the Secretary-General on Basic Points for the Presence and Functioning in Egypt of the United Nations Emergency Force, UN Doc. A/3302 (1956); and UNEF: Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General, UN Doc A/3943 (1958), 9

looked at consent, impartiality, and non-use of offensive force.⁸⁰ The ICC has also defined the concept of a peacekeeping operation in a similar way in 2010, looking at the three principles of consent, impartiality and use of force only in self-defence.⁸¹

The UN itself has, through its DPKO and DFS in 2008, affirmed the basic principles of peacekeeping in its document entitled *United Nations Peacekeeping Operations: Principles and Guidelines* (the Capstone Doctrine).⁸² The document itself states that it sits at the ‘highest-level’ of the current doctrine framework for United Nations peacekeeping and that it prevails over any subordinate directives, guidelines, standard operation procedures, manuals and training materials issued by DPKO/DFS.⁸³ The principles should not be viewed as independent indices, but inter-related and mutually reinforcing.⁸⁴

Opinions differ as to the legal status of these principles. Some, relying on the doctrinal sources, note that they are ‘consequently affirmed and reaffirmed in UN documents or academic definitions of peacekeeping’ and that they have therefore acquired a constitutional status and continue to apply even if the peacekeeping context has radically changed.⁸⁵ Others, taking a more practical view, argue that the UN holds on to these increasingly stretched-out principles as a means to legitimize its operations, and that they do no longer correspond to the actual conduct of these missions. When PKOs have been more coercive and are using force beyond self-defence, we should rather talk about a ‘militarisation of peacekeeping’ where the line separating it from enforcement operations is becoming increasingly blurred.⁸⁶

Although they have all been modified over the years in order to keep up with the changes in international politics and the field, the principles have constantly been reaffirmed in UN documents and academic doctrine.⁸⁷ One reason that these principles have lasted may be that they play an important ontological and semantic role, describing the essence of peacekeeping as a

⁸⁰ *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, paras 225, 233 (Special Court for Sierra Leone 2009)

⁸¹ *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, para 89 (2010)

⁸² Capstone Doctrine, para 3.1

⁸³ Capstone Doctrine, 9

⁸⁴ Capstone Doctrine, 31

⁸⁵ Tsagourias

⁸⁶ James Sloan, *Militarization in the Twenty-First Century* (Hart Publishing 2011), Chapter 4

⁸⁷ See for example: *The Blue Helmets*, 7

distinct tool for the resolution of conflicts.⁸⁸ Another is that they have constantly been modified in order to keep up with the changes in the field and demands of the member States.

Consent of the parties

The need for consent is related to the sovereignty of states. Unlike in a collective security system where state sovereignty is not protected against organised enforcement, in a similar system organised around peacekeeping, state sovereignty is protected and forces cannot be deployed without state consent.⁸⁹ Any peacekeeping operation not established as a mandatory enforcement measure under Art 41 or 42, or a mandatory provisional measure under Art 40, requires the consent of the parties.⁹⁰

The Secretary-General outlined the principle for the UNEF I in Suez in 1948. The force should be deployed under a clear-cut mandate ‘which has entirely detached it from involvement in any internal or local problems, and which therefore enables it to maintain its neutrality in relation to international political issues’. A force of the UNEF I type, he wrote, ‘should not be used to enforce any specific political solution of pending problems or to influence the political balance decisive to such a solution’. 129 Even joint operations with government forces were to be abjured lest the force’s neutrality be damaged. The consent was later revoked by Egypt in 1967, forcing the UN troops to withdraw.⁹¹ Another example is UNAMIR in Rwanda that was terminated as a result of the Rwandan government revoking its consent.

In the early days of peacekeeping, the parties in this context consisted of two or more states that in one way or another were engaged in a conflict or were about be. Since the end of the Cold War, however, the perspective has shifted from inter-state to intra-state conflicts, taking place within the borders of a single state. Therefore, the doctrine of today rather discusses ‘*host-state consent*’.

⁸⁸ Tsagourias, 3

⁸⁹ Tsagourias, 3

⁹⁰ Sloan, 177

⁹¹ Report of the Secretary-General on the Withdrawal of the United Nations Emergency Force, UN Doc. A/6730 (1967)

Furthermore, a UN force made up of foreign military forces needs the consent of the host state in order to be legal. Regardless of its mandate to use force, its mere presence would otherwise be a violation of the principle of non-intervention. Article 2(7) of the Charter prohibits UN intervention in ‘matters which are essentially within the domestic jurisdiction of any state’ (with the exception of enforcement measures under Chapter VII). The full sovereignty of the host State is also the basic principle underlying the Status of Forces Agreements, i.e. the agreements regulating the roles and responsibilities of the troop contributing state and the host state.⁹²

As mentioned above, the consent criterion makes a fork in the road separating peacekeeping operations from enforcement operations. As soon as a host state does not consent to a UN operation taking place on its territory, the SC is per definition relying on its enforcement powers when establishing a mission. The absence of consent also risks turning the PKO into a party to the conflict, drawing it away from its role of keeping the peace and towards enforcement action.⁹³ Even though the Council has the power to impose a peacekeeping operation in a given country by a binding resolution under Art 25 of the UN Charter, the agreement of the parties is still sought since this remains a part of the concept of peacekeeping as a consent-based instrument.⁹⁴

However, consent of the main parties to the deployment of a PKO does not necessarily guarantee that there will also be consent at the local level, especially if the main parties are internally divided or have weak command and control systems.⁹⁵ Armed groups not under the control of any of the parties or other individuals or groups may be opposing the operation. The latter are often referred to as ‘spoilers’.

⁹² Simma, 1188

⁹³ UN Peacekeeping website, accessed on 29 December 2015

⁹⁴ Simma, 1183

⁹⁵ UN Peacekeeping website, accessed on 29 December 2015

Impartiality

The second basic principle for peacekeeping stating that the force must be impartial is closely related to the one mentioned above – it is crucial to maintaining the consent and cooperation of the main parties and other stakeholders. The principle is often, and mistakenly, used interchangeably with the principle of neutrality, although they cover different aspects of a PKO. While former refers to the character of the PKO, the latter is refers to the conduct of the operation.⁹⁶ Impartiality implies that a PKO must implement its mandate without favour or prejudice to any party.⁹⁷ This should not be confused with neutrality or inactivity, a lesson learned from, e.g., UNAMIR in Rwanda where peacekeepers were forced to stand by as the genocide took place in front of them. To sum up, UN peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate.⁹⁸

Furthermore, in PKO's there is no enemy designated and no solution imposed. Instead all parties should be treated even-handedly against the mission's mandate and be encouraged to reach a mutually agreed settlement.⁹⁹ However, UN forces are not supposed to stand by when someone violates the agreement. The Capstone Doctrine notes that UN peacekeepers could punish any party that fails to respect the peace agreement that the peacekeeping force is meant to protect. The report refers to such parties as 'spoilers', defined as individuals or groups that may profit from the spread or continuation of violence, or have an interest to disrupt a resolution of a conflict in a given setting.¹⁰⁰

From a legal point of view, impartiality may or may not be a requirement, depending on the legal basis upon which the resolution is taken.¹⁰¹ Nevertheless, it is still vital that the parties conceive the operation impartial. If they do not, the operation's legitimacy and credibility is at risk and the parties might revoke their consent.¹⁰²

⁹⁶ Tsagourias, 12

⁹⁷ Capstone Doctrine, 33

⁹⁸ Capstone Doctrine, 33

⁹⁹ Tsagourias, 12

¹⁰⁰ Capstone Doctrine, 99

¹⁰¹ Sloan, 132

¹⁰² Capstone Doctrine, 33

Limited Use of Force

According to the DPKO itself, the peacekeeping operations are not an enforcement tool. With the authorization of the Security Council, if acting in self-defence and defence of the mandate, peacekeepers may use force at the tactical level.

The right of UN forces to use force in self-defence is to be distinguished from the right to self-defence of states in art. 51 UN Charter, and also from the right to individual self-defence included in domestic criminal and sometimes private law codes.¹⁰³ The right may have started as a similar principle but has, within the concept of peacekeeping, evolved to have a definition of its own. Originally, the UN interpreted this to mean that the UN force may never take the initiative in the use of armed force, but is entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the commander.¹⁰⁴

The right of peacekeepers to use self-defence has been interpreted extensively in UN practice.¹⁰⁵ Although its original form has been universally accepted, the later extensions of it have been subject to criticism.

As to its legal status, the principle of the right to personal self-defence of peacekeepers finds support in both the legal system of the host state and that of the sending state. Therefore, it seems to be a general principle of international law.¹⁰⁶ It also seems to be inherently possessed of a customary law nature since it has been accepted without opposition in every peacekeeping mission.¹⁰⁷

Historically, the use of force in these operations had to be limited to self-defence, since the GA does not have the authority to take coercive action, a power that rests exclusively with the SC according to Articles 24 and 25 of the Charter.¹⁰⁸ Although the mandate was defined by

¹⁰³ Zwanenburg, para 22

¹⁰⁴ Zwanenburg, para 22

¹⁰⁵ Lind, 259

¹⁰⁶ Lind, 259

¹⁰⁷ Lind, 259

¹⁰⁸ On the use of force, see: Simma p. 1183. Notes 53 and 54

the GA (and in succeeding operations by the SC), the detailed regulation of the use of force was not spelled out in the resolutions and the regulation of it remains vague in SC practice.

The SC has not explicitly authorised a PKO to use force. Rather, it has mandated missions to 'use all necessary means' to accomplish its mandate. Up until the end of the Cold War, PKOs were implicitly mandated to use force in self-defence under chapter VI. Lately, the SC has offered chapter VII mandates to what has been considered PKO. Findlay provides us with three reasons for this development. First, it may demonstrate an attempt by the UN to reinforce the right to self-defence, something Findlay finds unnecessary since it is already provided for under chapter VI.¹⁰⁹ Second, it might be a way of facilitating the transition of a PKO into an enforcement mission, an upgrade to a chapter VII mandate usually performed following a deterioration of the situation on the ground. Third, a PKO may be given a chapter VII mandate to allow it to perform tasks, which in effect belong to an enforcement mission.

All the way from the Security Council down to the soldier in the field there are several different levels of command, all possessing different mandates to regulate the use of force. Accordingly, there are as many written sources governing the issue as there are levels in the chain of command. The SC is responsible for the command and control of military forces put at the control of the UN by its member states.¹¹⁰ Even though Art 47 of the Charter mentions a Military Staff Committee that is to exercise this command and control, as has been mentioned above, this article has never been implemented in practice. Instead, ever since Secretary-General took the initiative to launch UNEF I, he has become the de facto commander-in-chief of UN peace operations,¹¹¹ clarifying the details of the regulating the use of force in his reports.¹¹²

At the lowest tactical level, the use of force of any kind by a member of a peacekeeping contingent is defined by the rules of engagement (ROE).¹¹³ 'Self-defence' is a well-

¹⁰⁹ Findlay, 9

¹¹⁰ Findlay, 9

¹¹¹ Findlay, 10

¹¹² Gray, 302

¹¹³ DPKO, *Handbook on United Nations Multidimensional Peacekeeping Operations* (UN 2003) 140f. (DPKO Handbook)

recognized concept and is thoroughly defined in United Nations rules of engagement.¹¹⁴ These are formulated by the force commander and issued in written form to troops in the field.¹¹⁵ According to US military doctrine where the term first emerged, ROE are defined as ‘directives specifying the circumstances and limitations under which military forces will initiate and/[or] maintain combat with the enemy’.¹¹⁶ The ROE are tailored to the specific mandate of the mission and the situation on the ground. Contingent commanders are responsible for ensuring that all troops comply with the mission-specific ROE.¹¹⁷ The specific rules for individual missions are not published in publicly available documents. However, there is no need to go into such detail for the purposes of this thesis.

Gray points out the fact that there is a slight deviation in the Capstone Doctrine compared to previous doctrine: ‘It reaffirms the need for consent and impartiality, but proposes an alteration in the basic principle that peacekeeping forces should not use force except in self-defense. Instead it calls for ‘restraint in use of force’.¹¹⁸

Defence of the Mandate

The strict interpretation, i.e. the use of force only in self-defense, was later loosened. Following the experiences of ONUC in the 60’s, the notion of self-defence has come to include resistance to attempts by forceful means to prevent the PKO from discharging its duties under the mandate of the SC.¹¹⁹ In theory this definition sets the bar for the use of force relatively low. But even in the absence of authorization under Chapter VII, UN forces are in practice reluctant to use force as this might compromise their impartiality. Another more practical reason is their often-limited capabilities.

The principle of defence of the mandate developed in Congo 1960-64 has also been called ‘active self-defence’ or ‘defence of the mission’. It was subsequently applied again in Somalia

¹¹⁴ Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people, UN Doc. GA A/70/95 (2015), SC S/2015/446 (2015) para 128

¹¹⁵ Findlay, 14

¹¹⁶ Findlay, 14

¹¹⁷ DPKO Handbook, 140f.

¹¹⁸ Gray, 324

¹¹⁹ See para 5 of the Report of the SG on the Implementation of Security Council resolution 340, UN Doc. S/11052/Rev.1 (1973)

1992-95. These types of operations partly had Chapter VII mandates.¹²⁰ Later in 1973 the second UN force in Sinai, UNEF II, again contributed to the development of the principle. The force had a mandate where self-defence was interpreted by the Secretary-General to include ‘resistance to attempts by forceful means to prevent [the force] from discharging its duties under the mandate of the Security Council’.¹²¹ This time, the Council in its resolution 341 also explicitly approved the definition.¹²²

Another standing task of peacekeepers is protection of civilians. The targeting of civilians in armed conflict and the denial of humanitarian access to civilian populations afflicted by war may themselves constitute threats to international peace and security and thus be trigger for SC action.¹²³ Peacekeepers are often deployed into such unstable political and security environments and the problem has been recognised in many of today’s operations through the authorization of peacekeepers to protect civilians under imminent threat.¹²⁴ Two SC resolutions, 1265 and 1296, mention the responsibility of peacekeepers to protect civilians. They have been seen as an attempt by the SC to define guidelines for its action in an abstract manner, detached from specific situations.¹²⁵ Ever since, the protection of civilians has become part of the peacekeepers’ regular duties and is often included in their mandates to use force.¹²⁶

The Member States gathered at the Peacekeeping Summit at the White House in 2015 also addressed the issue. They underlined that the protection of civilians is a solemn responsibility we all share. Failure to protect civilians not only risks lives, but also undermines the credibility and legitimacy of UN peacekeeping.’ Furthermore, they stated their commitment to ‘ensuring that [their] uniformed personnel deployed in peacekeeping operations are properly trained on UN policies and guidance on the protection of civilians, including on the use of force consistent with the operation’s mandate and rules of engagement.’ Finally, they

¹²⁰ Lind, 259

¹²¹ UN Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 340 (1973)*, UN Doc. S/11052/Rev.1 (1973)

¹²² UNSC Res. 341 (1973)

¹²³ Brahimi Report, para 50

¹²⁴ Blokker and Schrijver, 97

¹²⁵ Simma, 1242f

¹²⁶ See the Report of the Office of Internal Oversight Services, UN Doc A/68/787 (2014)

underlined their commitment to ‘investigate and, as appropriate, discipline uniformed personnel if they fail to fulfil their mandate to protect civilians.’¹²⁷

Thus, in modern PKOs it has become practice to include protection of civilians in the mandate, and to extend the right to use force to defend civilians. The last passage on the above commitment to investigate and even discipline any violation of this principle marks an important step towards enforcing the duty of peacekeepers to protect civilians.

In practice, peacekeepers have been very reluctant to using force to protect civilians, despite explicit support for it in the UNSC mandates. According to a report from the Office of Internal Oversight Services, the concept of ‘defence of the mandate’ requires clarity as to which tasks within the mandate may require the use of force.¹²⁸ The report argues that this should always include the responsibility to protect civilians and missions should be proactive in doing so. It continues by referring to the principle of proportionality, stating that different threats must be met with the appropriate use of military force, ranging from containment via deterrence and coercion to direct confrontation, particularly when civilians or peacekeepers are at risk. It concludes that ‘the actual use of force may not be necessary if the potential attackers perceive and know UN troops have the determination and capabilities to respond forcefully in case of attack’.

Criticism

Since the early days of peacekeeping, the concept has been criticized. At the beginning its opponents consisted mainly of developing states, some not yet members of the organisation, fearing that the UN would turn into a tool for former colonial powers to continue their oppression of the former. The Non-Aligned Movement consisting of some 120 members was created in a response to the east-west power balance of the Cold War. It has since strived to promote the national independence, sovereignty, territorial integrity and security of non-aligned countries. The Movement along with many developing states have criticized the

¹²⁷ Press Release from the White House, Declaration of Leaders' Summit on Peacekeeping, <https://www.whitehouse.gov/the-press-office/2015/09/28/declaration-leaders-summit-peacekeeping>, accessed on 10 October 2015

¹²⁸ Report of the Office of Internal Oversight Services, UN Doc A/68/787 (2014)

Capstone Doctrine and their support for the traditional principles of peacekeeping.¹²⁹ On a more general level, many have contested the UN's use of force on the grounds that it goes against the purpose and principles of the Charter. The natural response remains that the alternative is always worse; if the UN does not step in using a minimum of force, others will. And others seldom respect the principles of the Charter and proportionality.

The Duty to Protect and Promote Human Rights

The protection and promotion of human rights may not have been an urgent issue in traditional peacekeeping operations since these operated under quite narrow mandates with only a smaller number of tasks. However, it has become more relevant as peacekeepers have been obliged to carry out an ever-rising number of tasks in the fields of policing, justice and corrections and rule of law.¹³⁰ Furthermore, the issues of human rights abuse and international security are closely interlinked. Compromised respect of these fundamental rights often comes with inferior security for the individual. In parallel with the increasing awareness and debate in the last two decades, peacekeeping forces have come to play a key role in addressing these issues. This chapter will give a background to the doctrinal development in this area and also discuss its impact on the regulation of the force used by peacekeepers in relevant cases.

Even though the UN is not bound by any human rights treaties, Art 1 (3) of the Charter provides that the UN “shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all”. As a goal of the organization as a whole, it also encourages UN organs, like the Council and the Secretariat, to respect them. Further, customary human rights law is widely recognized to bind the UN in itself.¹³¹ Ultimately, SC resolutions may explicitly oblige UN operations to follow specific regulations such as human rights law and humanitarian law – an increasingly occurring trend in the Council's practice.

¹²⁹ Gray, 336

¹³⁰ See the website of the Peacekeeping Law Reform Project at the University of Sussex <<http://essex.ac.uk/plrp/project/default.aspx>>, accessed on 25 July 2015.

¹³¹ Simma, 1189

Back in the mid 90's, the international community failed to respond to severe human rights violations during the genocide in Rwanda in 1994 and the massacre in Srebrenica the following year – right under the watch of UN forces present on the ground. This raised the question whether the principles of sovereignty and non-interference really should prevail over the defence of human rights. In 2000, SG Annan¹³² discussed the concept of so-called humanitarian intervention in his report “We the peoples”, arguing that ‘surely no legal principle – not even sovereignty – can ever shield crimes against humanity’.¹³³ After having underlined that armed intervention must always be the option of last resort, he concluded ‘in the face of mass murder it is an option that cannot be relinquished.’¹³⁴

Later in the same year, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) to answer Annan’s question: ‘...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?’¹³⁵ In 2001, ICISS released its report ‘The Responsibility to Protect’, widely referred to as R2P or RtoP¹³⁶. The title represented a new approach, questioning the definition of state sovereignty by shifting the perspective from states’ *right* to sovereignty to their *duty* to protect its population from violations of human rights.¹³⁷

The report pointed out the SC to be the best and most appropriate body to authorize military intervention for human protection purposes,¹³⁸ making the reports’ suggestions applicable to peace operations. The report further set out the conditions under which a military intervention could come into question. To be warranted, there would have to be serious and irreparable harm occurring to human beings, or imminently likely to occur, large scale loss of life which is the product either of deliberate state action, or state neglect or inability to act, or a failed

¹³² At the time of these events he was under Secretary-General for DPKO.

¹³³ UNGA, ‘Report of the Secretary-General 54/2000’ (2000) UN Doc A/54/2000, para 219

¹³⁴ UNGA, ‘Report of the Secretary-General 54/2000’ (2000) UN Doc A/54/2000, para 219

¹³⁵ UNGA, ‘Report of the Secretary-General 54/2000’ (2000) UN Doc A/54/2000

¹³⁶ International Commission on Intervention and State Sovereignty, ‘*The Responsibility to Protect*’ (Ottawa International Development Research Centre 2001)

¹³⁷ For an overview of the responsibility to protect and its implications on peacekeeping, see for example: Sabine Hassler, ‘Peacekeeping and the Responsibility to Protect’ (2010) 14 J Int’l Peacekeeping 134.

¹³⁸ The Responsibility to Protect, XII, at (3) A.

state situation; or large scale ‘ethnic cleansing’.¹³⁹ The report also addressed the question of the use of force to be authorized in such interventions, by stressing the “acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.”¹⁴⁰ It also specifically mentioned ROE, holding that they should “fit the operational concept; [be] precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.”¹⁴¹

The report went on to state that “military intervention operations – which have to do whatever it takes to meet their responsibility to protect – will have to be able and willing to engage in much more robust action than is permitted by traditional peacekeeping”.¹⁴² Although it underlines that the objective of such military interventions always is to achieve quick success with as little cost as possible in civilian lives and inflicting as little damage as possible, the report still admits that they “require the use of as much force as is necessary, which may on occasion be a great deal, to protect the population at risk”.¹⁴³

Furthermore, the report speculates that these types of military operations, as a result of the specific nature of their task to protect, may over time lead to the evolution of a new type of military operation, carried out in new ways.¹⁴⁴ This might suggest a support for an expansion of the mandate to use force for peacekeeping missions deployed under the circumstances set out in the report. Some argue that PKO in their current form will not suffice, since the R2P puts higher demands in terms of better equipment and more robust mandates.¹⁴⁵

At the 2005 World Summit, gathering the largest number of heads of state and government in the history of the UN, the responsibility to protect was unanimously adopted in “2005 World Summit Outcome”¹⁴⁶. Paragraph 138 and 139 of the document reaffirmed the principle, although narrowing it down to only apply in situations of genocide, war crimes, ethnic cleansing and crimes against humanity. A year later, SC Res 1674 (2006) reaffirmed the

¹³⁹ The Responsibility to Protect, XII, at (1)

¹⁴⁰ The Responsibility to Protect, XIII, at (4) B.

¹⁴¹ The Responsibility to Protect, XII, at (4) D

¹⁴² The Responsibility to Protect, para 7.2

¹⁴³ The Responsibility to Protect, para 7.1

¹⁴⁴ The Responsibility to Protect, para 7.3

¹⁴⁵ See S Hassler, ‘Peacekeeping and the Responsibility to Protect’, (2010), 14 J Intl PK, 134ff

¹⁴⁶ GA *World Summit Outcome* (2005) UN Doc. A/60/L1

provisions of the above paragraphs regarding the responsibility to protect populations from “genocide, war crimes, ethnic cleansing and crimes against humanity and commits the Security Council to action to protect civilians in armed conflict”.

In 2009 a SG Report¹⁴⁷ set out three pillars based on paragraphs 138 and 139. In its paragraph 40, it suggests peacekeeping operations as a means to supporting a state with military assistance. The report underlines that military interventions are to be used only in last resort and further upholds different examples of preventive deployment, such as the United Nations Protection Force in the former Yugoslav Republic of Macedonia 1992-1999. Furthermore, it mentions that the UN previously has undertaken more coercive military operations “with more mixed results”. There is no specific mentioning of the amount of force to be used in the operations under these circumstances.

In his report to the GA¹⁴⁸, the SG held that the doctrine for the possible use of peacekeeping and military assets in the context of preventing, deterring or responding to atrocities is not well developed. Later in 2012, the SG in his report on R2P added what has been called the third pillar: timely and decisive response. In its paragraph 37, he takes a more pacifist stand, stressing the fact that “While military enforcement must remain part of the toolbox, our primary aim should be to respond early and effectively in non-coercive ways and thereby reduce the need for force.”

As PKOs have started to cooperate with local forces and offer them support, new questions have arisen when the latter have been accused of violating human rights. Is the UN in such cases indirectly *supporting* these violations, rather than combatting them? In an attempt to prevent this from happening, the SG promulgated a policy on Human Rights Due Diligence (HRDDP) which includes steps to be taken by UN forces providing support to non-UN security forces in order to ensure that such support is consistent with the Charter and international humanitarian and human rights law.¹⁴⁹ The application of the policy is not without challenges for UN PKOs, especially in balancing the political, human rights, military

¹⁴⁷ SG Report ‘Implementing the Responsibility to Protect’, (2009), UN Doc. A/63/677

¹⁴⁸ SG Report to the GA, A/65/877, para 35

¹⁴⁹ This policy also applies to United Nations support to regional peacekeeping forces such as AMISOM and AFISMA.

and administrative support concerns in the implementation of the policy.¹⁵⁰ The HRDPP is also mentioned in S/RES/2155 (2014)¹⁵¹, outlining the responsibility of the UN force to monitor and investigate human rights. This suggests that, although it is still quite new, the policy seems likely to play an integrated and fundamental part in future UN operations.

Some argue that it may nowadays be seen as an expression of the ‘rules of the organization’ in the sense of Article 5 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Convention on treaties concluded between states and international organizations and among the latter. As have been mentioned above, settled practices and agreed interpretations of an international organization may develop into rules of the organization, according to Art 2(1)(j) of the 1986 Convention. As for its status as established practice of the UN, the mere formulation of the HRDDP in itself will probably not suffice. However, its implementation might contribute to the emergence of such a practice and could further clarify the obligations of the UN in the fields of human rights law, humanitarian law and refugee law.¹⁵²

Conclusion

Although the discussion of the R2P – especially in its early years – has nourished hopes for more robust operations, it does not seem to have had a great impact on the doctrine of the non-use of force in PKO.¹⁵³ Some argue that it rather belongs to the concept of peace enforcement. While the responsibility to protect could reinforce the protective and humanitarian aspects of a PKO, it cannot become the aim of a PKO since the conditions for exercising such responsibility rather require a peace enforcement operation.¹⁵⁴

The Human Rights Due Diligence Policy is an important practical tool, offering peacekeepers guidance in the borderland between enforcing their mandate with the help of local forces on

¹⁵⁰ ‘Human Rights Due Diligence Policy – a Challenge for UN Peacekeeping’, Zif Centre for International Peacekeeping Website <<http://www.zif-berlin.org/en/about-zif/news/detail/article/human-rights-due-diligence-policy-eine-zentrale-herausforderung-fuer-das-un-peacekeeping.html>> , accessed on 2 January 2016

¹⁵¹ UNSC Res 2155 (2014) para 4 (a)

¹⁵² Helmut Philip Aust, ‘The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?’, J Conflict Security Law (2014)

¹⁵³ For a discussion on the use of force of peacekeepers in relation to the responsibility to protect, see S Hassler, in International Humanitarian Legal Studies 1 (2010), at 209ff

¹⁵⁴ See Tsagourias

the one hand, and avoiding (indirect) support of human rights violations committed by the same groups on the other.

MONUSCO and its Force Intervention Brigade

The SC resolutions regulating MONUSCO and its FIB constitute a major change in peacekeeping (and –enforcement) practice. Therefore, the case of DRC will be examined below in an attempt to point out the differences from previous SC practice arising in this new setting. As we have seen above, the basic principles governing peace operations are closely interlinked with one another in order to keep the institute of peacekeeping within the boundaries of international law. What happens to the legal status of a PKO when one or more of these principles are drastically changed?

When MONUSCO was given an extensive mandate to use force not only to defend itself, its mandate and civilians but also to “neutralize” rebel groups in DRC, this marked a significant deviation from the principle of the minimum use of force. Furthermore, peacekeepers executing this kind of offensive mandates inevitably take an active part in armed conflicts, actualizing international humanitarian law.¹⁵⁵ Since active participation in the hostilities implies taking a stand in the conflict against one or more parties, the practice also marks a deviation from the principle of neutrality. Finally, the third principle of host state consent becomes relevant. Although the government of the DRC has given its blessing to the UN force, the reason for the force’s being there emerges from the governments’ lack of control over its own territory. This raises questions as to the ability of the Government to represent all groups and individuals living on DRC’s territory.

Despite the major changes in SC practice since the first PKO, the UN has continued to maintain that the three basic principles of peacekeeping apply even to these hybrid forms of operations, as seen in the Congo.¹⁵⁶ The controversies related to this development will also be commented below.

¹⁵⁵ For an analysis, see Whittle

¹⁵⁶ Sloan, 3

Background

UN peace operations in the DRC are anything but new. As we have seen above, the organization has been present in the DRC since the beginning of the 60s. The current crisis of eastern Congo could be seen as a result of the Rwandan genocide in 1994.¹⁵⁷

Like ONUC in the 60's, the country has once again become the scene upon which the UN launches a peace operation with an expanded and yet untried mandate to use force. Last time, it was highly controversial and subject to strong critique by many, in large due to the UN's lack of sufficient military power, planning and resources. This time, although still highly controversial from a legal point of view, the operation has been quite successful in practice as it has succeeded in achieving at least some of its objectives when it has forced one of the targeted rebel groups to surrender.

After the Lusaka Ceasefire Agreement of 1999, the SC established MONUC by its resolution 1279.¹⁵⁸ The purpose of the operation was initially to plan for the observation of the ceasefire and disengagement of forces and to maintain liaison with all parties to the Ceasefire Agreement.¹⁵⁹ The Council later expanded the mandate through new resolutions to include the supervision of the implementation of the Ceasefire Agreement and also assigned other related tasks.¹⁶⁰ In 2006, the country's first free and fair elections in 46 years were held, the election process being one of the most complex votes ever organized by the UN. After the elections MONUC continued to have several tasks, i.e. political, military, rule of law and capacity-building tasks, including attempting to resolve on-going conflicts in several provinces of the DRC.¹⁶¹

¹⁵⁷ For a background on the conflict in Congo, see Christopher Williams, 'Explaining the Great War in Africa: How Conflict in the Congo Became a Continental Crisis', *The Fletcher Forum of World Affairs*, Vol. 37, No. 2, 81-100 (2013)

¹⁵⁸ UNSC Res 1279 (1999)

¹⁵⁹ UN, MONUSCO website

<<http://www.un.org/en/peacekeeping/missions/monusco/background.shtml>> accessed 17 July 2015

¹⁶⁰ UN MONUSCO website

¹⁶¹ UN MONUSCO Website

By its resolution 1925¹⁶² the SC wanted to underline the new phase reached in the country by renaming MONUC the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)¹⁶³. This time the mission was authorized to use ‘all necessary means’ to carry out its mandate. Among other things, the mandate related to the protection of civilians, humanitarian personnel and human right defenders under imminent threat of physical violence. Moreover, the force was tasked to support the Government of the DRC in its stabilization and peace consolidation efforts.¹⁶⁴ To this end, the SC decided that MONUC would comprise of a maximum of 19,815 military personnel (760 military observers, 391 police personnel, 1,050 members of formed police units and appropriate civilian, judiciary and correction components).

In order to address the underlying causes of conflict and ensure that sustainable peace takes hold in the country and the wider region, the Peace, Security and Cooperation Framework for the DRC and the region (The PSC Framework)¹⁶⁵ was signed by representatives of 11 countries in the region, the Chairs of the African Union, the International Conference on the Great Lakes Region, the Southern African Development Community and the United Nations Secretary-General on 24 February 2013 in Addis Ababa, Ethiopia.

On the 27 of February 2013, the SG in his Special Report on the Democratic Republic of the Congo and the Great Lakes Region proposed that a dedicated intervention brigade be established within MONUSCO.¹⁶⁶ The report explicitly suggested that the brigade would have peace-enforcement tasks consisting of preventing the expansion of, neutralizing and disarming armed groups.¹⁶⁷

¹⁶² UNSC Res 1925 (2010)

¹⁶³ Originally in French: Mission de l'Organisation des Nations Unies pour la stabilisation en République démocratique du Congo

¹⁶⁴ UN MONUSCO Website

¹⁶⁵ Letter dated 4 March 2013 from the Secretary General to the President of the Security Council S/2013/131

¹⁶⁶ Special report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region, UN Doc S/2013/119, para 60-64

¹⁶⁷ For a brief background of the Intervention Brigade see Naomi Kok, 'From the International Conference on the Great Lakes Region-led negotiation to the Intervention Brigade', *African Security Review*, vol. 22, issue 3, 2013, 175-180

One month later that year, on 28 March, the SC unanimously adopted resolution 2098¹⁶⁸ to support the objectives of the PSC Framework agreement. Apart from extending the mandate of MONUSCO,¹⁶⁹ the resolution also created a specialized ‘intervention brigade’ to support and strengthen the peacekeeping operation. This was its first-ever “offensive” combat force, intended to carry out targeted operations to ‘neutralize and disarm’ the notorious 23 March Movement (M23), as well as ‘other Congolese rebels and foreign rebel groups in strife-driven eastern Democratic Republic of Congo.’¹⁷⁰ In contrast to earlier peace-enforcement missions where the enforcement tasks were delegated to ‘mandated forces’ outside of the UN, this intervention brigade would operate under the direct operational command of the MONUSCO Force Commander.¹⁷¹

The mandate to use force is regulated in the following paragraph of the resolution:

Art. 12 authorizes MONUSCO ... to take all necessary measures to perform the following tasks, through its regular forces and its Intervention Brigade as appropriate;

(a) Protection of civilians

(b) Neutralizing armed groups through the Intervention Brigade

The following year, on the 28th of March 2014, the SC adopted its resolution 2147,¹⁷² prolonging the mandate of the force with another year until 31 March 2015. It opens with a reaffirmation of the basic principles of peacekeeping, “including consent of the parties, impartiality, and non-use of force, except in self-defence and defence of the mandate...”

The SC continues by expressing its deep concern regarding the security and humanitarian crisis in eastern DRC due to on-going destabilizing activities of foreign and domestic armed groups, and stresses the importance of “neutralizing all armed groups”.¹⁷³ After having stressed the importance of permanently addressing this threat, the SC again welcomes the plans by the FARDC, supported by MONUSCO, to neutralize the FDLR.

¹⁶⁸ UNSC Res 2098 (2013)

¹⁶⁹ UNSC Res 2098, para 9.

¹⁷⁰ UNSC Press Release, UN Doc. SC/10964 (2013)

¹⁷¹ UNSG Report S/2013/119 (2013), para 60

¹⁷² UNSC Res 2147 (2014)

¹⁷³ UNSC Res 2147 (2014)

Resolution 2211, adopted on 26 of March 2015, renewed the mandate of MONUSCO, including its force intervention brigade (FIB), until 31 March 2016. MONUSCO is still authorised to carry out targeted offensive operations through the FIB in cooperation with the whole of MONUSCO, either unilaterally or jointly with the FARDC, to neutralise armed groups. The resolution asks MONUSCO to maximise its interoperability, flexibility and effectiveness in the implementation of its mandate.¹⁷⁴

In relation to the contingent's mandate to use force, the report of the Secretary-General on the strategic review of MONUSCO, requested by the Council, contained criticism regarding the poor performance of some of MONUSCO's contingents, recommended a more proactive approach and called for all contingents to show willingness to use force to protect civilians.¹⁷⁵

Analysis

It is now time to investigate how the practice of the SC in the DRC complies with the basic principles of peacekeeping.

To begin with, the SC itself keeps referring to the basic principles of peacekeeping in its resolutions concerning MONUSCO.¹⁷⁶ In the preamble however, the Council opens for a less strict interpretation, 'recognizing that the mandate of each peacekeeping mission is specific to the need and situation of the country concerned'.¹⁷⁷ Although the resolution's compliance with the basic principles may be questioned, a benevolent critic may argue that the faith in peacekeeping is kept intact, but the exceptional situation in eastern Congo calls for an exceptional – and unprecedented – type of peacekeeping mission.¹⁷⁸ In addition, the resolution underlines that it is not to be seen as a precedent – a statement that will be analysed in the final part below.

¹⁷⁴ Security Council Report, Monthly Forecast July 2015 (www.securitycouncilreport.org) p. 13-15, accessed on 3 January 2016

¹⁷⁵ Report of the Secretary General, UN Doc. S/2014/957 (2014)

¹⁷⁶ Actually, it was rather China and Russia who insisted on including this paragraph in the resolution, see Borger, 'When un's Peaceful Warriors Go Marching In', The Guardian (UK) (07/05/2013)

¹⁷⁷ Most recently in UNSC Res 2211, Preamble

¹⁷⁸ Spijkers, 100

Impartiality

The FIB was created in response to the deteriorated security situation on the ground in eastern Congo, escalated especially by the atrocities committed by the M23 rebel group under the watch of a passive MONUSCO. The main purpose of the establishment of the Brigade was to sanction such spoilers. This distinguishes the FIB as a new type of referee, created only to sanction the actors that break the rules.¹⁷⁹

In article 12 of the resolution, the Council has given the FIB a mandate to collaborate with the Congolese Army to ensure the protection of civilians and the protection of UN personnel and facilities. Furthermore, the resolution also allows the FIB to cooperate with the DRC Army in combatting the rebel groups. This clear encouragement to take a stance in the conflict – with the Government and against certain rebel groups - marks a deviation from the traditional requirement of PKO's to treat all parties to the conflict even-handedly.

Even if the FIB would be separated from the rest of the MONUSCO, its actions may still affect the abilities of UN to perform its tasks related to the peace process. The organisation may face difficulties in encouraging the fighting parties to return to the negotiation table. On the one hand, the rebels could fear that the rest of the UN would hunt them down as the Brigade has done. On the other, the Government might not take the negotiations so seriously when the UN is already fighting for or with them against their counterparty.¹⁸⁰

Issues related to human rights violations make for another debated aspect of the UN's presence in the Congo. The Government of DRC, the main party cooperating with the UN forces in its operations, has repeatedly been alleged of committing serious human rights violations.¹⁸¹ Commentators have asked when the legitimate cooperation between the UN and local security forces does turn into complicity? This question has become particularly acute in the context of the Democratic Republic of the Congo.¹⁸²

¹⁷⁹ Otto Spijkers, 'The Evolution of United Nations Peacekeeping in the Congo', *Journal of International Peacekeeping* 19 (2015) 88-117

¹⁸⁰ Spijkers, 102

¹⁸¹ Sijuade Sunday Kayode, "'Intervention Brigade" for the Congo: A Precedent for UN Peace Enforcement?' *Review of International Law and Politics*, vol. 10, issue 38, (2014), 106

¹⁸² See the UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces? *J Conflict Security Law* 20 (1): 61-73 (2015)

Consent

Since the SC is acting under chapter VII of the Charter consent of the DRC is not legally required. Nevertheless, host state consent is widely held as a key success factor for peace operations in general, regardless of their type. In any case, the SC has declared that it reaffirms the principle in the MONUSCO resolution.

The purpose of the principle is to provide PKO's with the necessary freedom of action, both political and physical, to carry out its mandated tasks. In the absence of such consent a PKO risks becoming a party to the conflict and being drawn towards enforcement action.¹⁸³ As we have seen above, the UN has become a party to the conflict regardless of the Government's consent, since it is mandated to take action against specific groups. However, the mission's political freedom of action is anything but guaranteed in the DRC.

The previous UN mission, MONUC, was actually scaled down as a result of the Congo Government's threat to revoke its consent.¹⁸⁴ Consent may be contemporarily withdrawn from one of the parties without forcing the mission to leave. But in reality, this compromises the UN's ability to be impartial. When the Congo Government can dictate the conditions of the present mission's renewed mandate, it becomes hard for the peacekeepers to live up to the demands of impartiality. Furthermore, it becomes hard for them to effectively implement their mandate as negotiators for a peace agreement when they are so dependent on the consent of one of the parties to the conflict.

In sum, it can be argued that the principle of consent has drifted away the most from its original meaning.¹⁸⁵

¹⁸³ Capstone Doctrine, 32

¹⁸⁴ Spijkers, referring to Theo Neetling, 'From MONUSCO and Beyond' SAJoIA, vol. 18, issue 1, 2011.

¹⁸⁵ Spijkers, 108

Use of Force

As we have seen above, the offensive mandate of the MONUSCO raises the question whether it is really a PKO – as the SC itself is claiming – or rather an enforcement operation in disguise? The evolution of the principle of the minimum use of force of peacekeeping operations has constantly moved towards a more permitting and extensive mandate. However, some boundaries are hard to breach if any distinction between the two types of operation is to be kept.

Looking at the well-established doctrine of peacekeepers' right to use force in self-defence and in defence of the mandate, the question is what the limits to such a mandate are. Using force in defence of the mandate is not the same as enforcing peace. Peace enforcement may, in contrast to peacekeeping, involve the use of force at the strategic international level, which is normally prohibited for Member States under Art 2 (4) of the Charter unless authorized by the SC.¹⁸⁶ Furthermore, the ultimate aim of peacekeepers' use of force is to influence and deter spoilers working against the peace process or seeking to harm civilians; and not to seek their military defeat.¹⁸⁷

Since MONUSCO's Intervention Brigade is explicitly authorized to carry out targeted offensive operations, regardless of its counterparty's actions, its use of force can hardly be squeezed into the otherwise ever-expanding notion of PKO's traditional right to use force. On the contrary, the force successfully used by the FIB against the M23 resulting in its military defeat rather states a clear example of a strategic use of force, belonging to a peace enforcement mission.¹⁸⁸

Conclusion

In short, the Intervention Brigade does not hold to any of the three principles used to identify peacekeeping missions.¹⁸⁹ In the sections below, the effects of this new SC practice will be analysed and discussed.

¹⁸⁶ Capstone Doctrine, 19

¹⁸⁷ Capstone Doctrine, 35

¹⁸⁸ Spijkers, 114

¹⁸⁹ Whittle, 867

Peacekeeping or Peace Enforcement?

It has been suggested that the IB and the rest of MONUSCO be separated, to clarify the distinction between peacekeeping and peace enforcement. Some even argue that the FIB – being combatants – are not allowed to use UN symbols. Even though the resolution was unanimously approved, several states expressed their concerns already at the press release following its adoption.

Britain defended the resolution and held the view that the force ought to be a single unit. Its representative stressed that MONUSCO's troop contingents — whether part of the intervention brigade or not — must be willing and able to implement its entire mandate. He underlined that 'this is one Mission with one mandate, one Special Representative and one Force Commander. MONUSCO must conduct all its tasks in an integrated manner, whether or not those performing them were in uniform, he said, declaring: "This is the recipe for success."¹⁹⁰

Others were of a different opinion. Guatemala's representative questioned "Council actions that could involve the United Nations in 'peace-enforcement' activities. Such a move might compromise the neutrality and impartiality so essential to peacekeeping work, he cautioned. Indeed, the Organization should always be seen as an 'honest broker', he said, and while he understood the logic behind the proposed deployment, he would have preferred the brigade to be a self-standing unit with specific duties distinguishable from those of MONUSCO's other brigades."¹⁹¹

Yet others present at the same press conference, like Argentina, warned that MONUSCO now risked indirect conversion into a peace-enforcement mission. Argentina's representative said that although the text stated clearly that the brigade would not set a precedent, the idea of 'enforcing peace rather than keeping it' required deep reflection, certainly more than a week of negotiations.

¹⁹⁰ SC Press Release (2013) UN Doc. SC/10964

¹⁹¹ SC Press Release (2013) UN Doc. SC/10964

A New Precedent?

MONUSCO marks a new step in the on-going development of SC practice. In its resolution extending the mandate of MONUSCO and its FIB, the Council starts by declaring that it is acting ‘on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping’.¹⁹² This is rather interesting, since the SC has constantly been developing the concept of peacekeeping since the first operation. Does it, *e contrario*, indicate that the SC considers itself to be bound by its precedents as long as nothing else is explicitly said? This can hardly be the case, since the SC has constantly developed its own practice since the first PKO.

Despite its controversial mandate, MONUSCO has been effective in executing it, not least with regards to the surrender of M23. However, this might be on the expense of the legitimacy of the UN. Given the successes for the IB so far, it has been argued that such types of aggressive UN operations will become more typical in the future.¹⁹³ Some have gone even further, speculating in a new ‘UN Special Forces’, based on the successes recorded in relation to the defeat of the M23.¹⁹⁴

After the rather successful operations carried out by the FIB in eastern Congo resulting in the defeat of the M23 rebel group, the UN seized the opportunity to issue a warning to other armed groups where it urged them to surrender or face military operations.¹⁹⁵ While some commentators do not see the Force Intervention Brigade as a revolution in peacekeeping at all, but as one further and inevitable step in the unstoppable evolution towards more robust peacekeeping.¹⁹⁶

¹⁹² UNSC Res 2147, para 1.

¹⁹³ See Whittle

¹⁹⁴ See Kayode

¹⁹⁵ SG Report, UN Doc S/2014/157, para 18.

¹⁹⁶ See for example *The Art of the Possible: Peace Operations Under New Conditions*, *Challenges Forum Policy Brief*, issue 1, April (2013), as quoted in Spijkers.

Armed Conflict?

Seen from the perspective of customary international law, it can sometimes be questioned whether a peace operation is participating in an armed conflict or not. Peacekeeping operations are, mainly because of their limited use of force, usually not characterized as parties to an armed conflict.¹⁹⁷ Nevertheless, peacekeeping forces have found themselves drawn into fighting, and have thus been obliged to act under customary law of armed conflict vis-à-vis the adverse party. The SG has on several occasions acknowledged that peacekeeping forces have indeed engaged in offensive operations against armed groups.¹⁹⁸

The Secretary General addressed this question in his 'Bulletin' issued in 1999, where he accepted that the UN is bound by the customary law of armed conflict.¹⁹⁹ He stated that the principles of international humanitarian law were to be applied by UN forces when they are actively engaged in situations of armed conflict as combatants, to the extent and for the duration of their engagement.²⁰⁰ Accordingly, these principles are applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.²⁰¹

The question arises whether UN forces in the DRC are to be seen as actively engaged in the armed conflict. There are two cumulative conditions required for IHL to apply to a UN operation.²⁰² First, there must exist an armed conflict in the area of its deployment. Second, there must be an active engagement of the force in the conflict as combatants to the extent that they are taking a direct part in the hostilities.

¹⁹⁷ Simma, 1190

¹⁹⁸ See for example Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, 37, U.N. Doc. S/2013/96 (2013)

¹⁹⁹ UNSG 'Observance by United Nations Forces of International Humanitarian Law' UN Doc ST/SG/1999/13 (1999)

²⁰⁰ UNSG, Secretary-General's Bulletin Observance by United Nations forces of international humanitarian law, UN Doc. ST/SG/1999/13 (1999), sec 1.1

²⁰¹ UNSG Bulletin, sec 1.1

²⁰² Elizabeth Wilmshurst, *International Law and the Classification of Conflicts* (OUP, 2012), 192

Accordingly, peacekeepers operating under conditions similar to the ones in eastern Congo risk losing their protection under IHL.²⁰³ Although the UN maintains that its Bulletin is applicable to UN forces acting under a Chapter VII mandate like MONUSCO's, it is not binding and it remains to be seen what the legal effects will be when the force faces harder resistance and engages in battle on a greater scale.²⁰⁴

Furthermore, peacekeepers risk losing their unique protection under the Safety Convention if they are considered to be combatants.²⁰⁵ This does not only concern the members of the FIB. Art 3 of the Convention requires UN military and police components to bear distinctive identification and ensure their facilities and vehicles are 'appropriately identified'.²⁰⁶ The purpose of this regulation is presumably to facilitate for parties to a conflict to identify and avoid harming protected UN personnel.²⁰⁷

Since both MONUSCO and the Intervention Brigade use the same UN insignia, it is not clear whether this provision is complied with in the DRC.²⁰⁸ Neither is the legal effect of such a violation clear since there are no explicit consequences to be found within the Safety Convention.²⁰⁹ One cannot exclude the possibility that legal responses to the actions of the FIB might harm also peacekeepers in other parts of MONUSCO. It remains to be seen which one has the strongest legal protection – the peaceful peacekeepers being mixed up with their combatant colleagues, or the rebels acting in self-defence against the UN force.

Finally, the resolutions regarding MONUSCO clearly condemn listed rebel groups for their violation of human rights and humanitarian law.²¹⁰ However, they remain silent as to the obligations of the FIB in this regard. This is interesting since the peacekeeper's loss of their impartiality might lead to the UN being seen as aiding or assisting the DRC.²¹¹ If so, the

²⁰³ Stephanie Chaloult, 'From Passive to Aggressive – The Use of Force in Modern Peacekeeping Operations and Challenges in the Laws of Armed Conflict (2013) 6 Ybk Intl L 75ff.

²⁰⁴ Chalout, 85 f.

²⁰⁵ See Ola Engdahl's *Protection of Personnel in Peace Operations: The Role of The Safety Convention Against the Background of International Law* (Repro, University of Örebro 2005)

²⁰⁶ Safety Convention, art 3

²⁰⁷ Devon Whittle, 872

²⁰⁸ Devon Whittle, 872

²⁰⁹ Devon Whittle, 872

²¹⁰ SC Res 2098, para 8

²¹¹ Spijkers, 103

allegations directed against the national Army of the DRC accusing it of violating human rights and committing war crimes might engage the UN's responsibility under international law.²¹²

Conclusions

After its being paralyzed during the Cold War and failing completely in Somalia and Rwanda in the early 90's, seeing States taking their own initiatives in Iraq and Kosovo - has the UN in DRC finally retaken the initiative as the leading provider of international peace and security?

Some would argue yes - otherwise others would do it. In the case of DRC, the AU was ready to step in before the UN took over. Advocates of this development would perhaps say that the development towards a more aggressive UN lies within the purpose of the organization and constitutes a natural evolution of the ever-changing principles of peacekeeping. Although not explicitly stated in the Charter, the end of achieving peace justifies the means of enforcing it when all alternatives have proved impossible.

Others would oppose and argue that the UN has become too aggressive and that its recent practice is not in line with the peaceful settlement of disputes and the general prohibition of the international use of force. Perhaps even against the purpose and principles of the organisation, that is after all supposed to lead by example in its promotion of international peace. In this view, MONUSCO's mandate would rather amount to a revolution against the bedrock principles of peacekeeping.

²¹² See Article 14 of the *Articles on the Responsibility of International Organizations*, adopted by the International Law Commission (ILC) (2011); and Scott P. Sheeran, 'A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo,' *International Organizations Law Review*, vol. 8, 2011, as referred to by Spijkers.

Legitimacy

Historically, SC practice regarding PKO has gradually evolved towards more permitting mandates to use force. The emphasis has nevertheless, until now, rested on self-defence and defence of the mandate. Constituting one of the three basic principles of peacekeeping, it has been vital for the legitimacy of these operations. Now as the SC has more or less abandoned these principles by taking enforcement action under its own command and control through the FIB, it seems harder to legitimise the operations from this perspective. However, practical benefits from the mix of peacekeeping and peace enforcement can also be found. The UN has had problems with sharing intelligence between the different types of operations before²¹³ and a great advantage of keeping the enforcement within MONUSCO is that the forces can share their intelligence between themselves.

Meanwhile, many commentators agree that MONUSCO has in some aspects been rather successful in obtaining the goals set out in its mandate. This may in itself serve as a new form of legitimization, as it has helped the DRC take steps towards a better security environment in some areas. If not legitimizing, the successes of the MONUSCO force in carrying out its mandate have at least proven that an 'aggressive' PKO can be efficient. Perhaps even necessary under extreme circumstances like the ones seen in today's Congo.

In sum, on the one hand the legitimacy of the PKO in DRC according to the basic principles of peacekeeping may have declined. On the other hand, the new practice of the SC may be just what the UN needs to finally be able to efficiently execute its duties under the Charter. In contrast, the relatively successful results on the ground of the Intervention Brigade could be seen as proof of increased efficiency of PKO. Also, while the legitimacy of PKOs as a concept might have been weakened by the recent practice, the UN as a whole could be considered to have attained an increasing legitimacy, especially in the eyes of the people who have been offered some security by peacekeeping forces.

²¹³ See for example UNISOM in Somalia where the enforcement tasks were 'outsourced on a Member State and the different units' intelligence was not shared among themselves. See also the recently established UN intelligence unit within MINUSMA in Mali.

Future Developments

The recommendations of the High-Level Independent Panel on Peace Operations were handed over in a report²¹⁴ to the SG on 16 June 2015, and will be available for consideration by the General Assembly and the Security Council.²¹⁵ The report coins the term ‘conflict management’ as a description of ‘missions being deployed into more violent settings without the enabling frameworks that have previously driven success’.²¹⁶ The report argues that clarity is needed on the use of force and urges a flexible and progressive understanding of the core peacekeeping principles. The Panel does not mention problems of combining the use of force to eliminate some parties to a conflict and a mission’s impartiality or the principle of consent.²¹⁷ In a comment on related to peace enforcement, the Panel says only that such military operations should be ‘exceptional and ‘time-limited’. Although much anticipated, it seems most the questions raised in this work will remain unanswered.

As for the future, the exit strategy of MONUSCO is currently subject to discussion. Despite the fact that the security situation has not improved – or even deteriorated – in 21 territories out of 28 territories affected by armed conflict in the DRC, the UN is currently discussing a three-phase process based on Resolution 2211 with the Congolese government that will launch MONUSCO’s exit strategy.²¹⁸ It remains to be seen if the plan will be followed. Anyways, the fact that the FIB’s mandate has already been prolonged twice since its introduction, each time for another year, can be considered a success in itself since it proves the political support of the mission in the face of successes as well as backlashes.

²¹⁴ Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people, UN Doc. GA A/70/95 (2015), SC S/2015/446 (2015)

²¹⁵ SG Statement, ‘Secretary-General's remarks on the occasion of the hand-over of the Report of the High-Level Independent Panel on Peace Operations [as prepared for delivery]’, 16 June 2015 <<http://www.un.org/sg/statements/index.asp?nid=8728>> accessed 2 August 2015

²¹⁶ Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people, UN Doc. GA A/70/95 (2015), SC S/2015/446 (2015) para 109, (c)

²¹⁷ Patryk I. Lambuda, ‘UN Peace Operations: Tracking the Shift from Peacekeeping to Peace Enforcement and State-Building’ EJIL Analysis (2015)

²¹⁸ Statement of SRSRG Martin Kobler to the Security Council, 7 October 2015

The question is what path the SC is going to take regarding future PKO. Its decision ought to depend on two factors: the political and the success of the Intervention Brigade in its current setting. The latter is hard to assess since the FIB is still operating, at least until 2016 according to the latest SC resolution regulating its mandate.

Turning to the political dimension, consensus between the permanent members of the SC is a prerequisite for any progress in the development of the system for collective security. While people in different regions today find themselves in desperate need of political unity and international provision for peace and security, there is no coincidence that new steps are taken in central Africa. It seems to be the place where national interests weigh less than the demand for international peace and security.

For instance, the situation in Syria has for several years been posing a threat to the security in the region. Yet, the permanent members of the Council have not managed to reach a political solution, mainly opposed by China and Russia. This might explain why the very same states insisted on the writing in the MONUSCO resolution stating that it is not to be seen as a precedent, fearing that it might otherwise be interpreted as a *carte blanche* for the SC to launch similar PKO's in other places where they are not willing to empower UN missions at the expense of their own influence.

Were it to be the call for human security and international peace that motivated the members of the Council, PKOs with wide and effective mandates like to the one of MONUSCO ought to have materialized in areas of armed conflicts elsewhere. Unfortunately for the people suffering in areas located closer to the interests of any of the 'P5', this type of robust peace-keeping rather seems to owe its existence to the lack of national interests in the geographical region.

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