

# The Evolution of United Nations Peacekeeping in the Congo

*From ONUC, to MONUC, to MONUSCO and its Force Intervention Brigade*

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## Abstract

The United Nations has been engaged in peacekeeping in the Democratic Republic of the Congo since the period of the country's independence. First it was the *Opération des Nations Unies au Congo* (ONUC), then the *Mission de l'Organisation des Nations Unies au Congo* (MONUC), and the most recent UN peacekeeping force is called *Mission de l'Organisation des Nations Unies pour la Stabilisation au Congo* (MONUSCO). Most recently, MONUSCO acquired a Force Intervention Brigade (FIB). In this contribution, an analysis is made of how the bedrock principles of peacekeeping – impartiality, consent, and a restricted use of force – have evolved in the Congo. To do so, the journey begins in the 1960s, and ends in early 2015. For each principle, we will look at its traditional meaning, as well as its application to ONUC, MONUC, and MONUSCO with its Force Intervention Brigade.

## Keywords

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

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## 1 Introduction

Equipped not with heavy arms but with legal principles, the United Nations entered a most violent world when it set foot in the Congo in the early 1960s. This was the time when the *Opération des Nations Unies au Congo* (ONUC) began its peacekeeping, and nobody could possibly predict how a troubled country, lacking an effective government, would react to such UN presence. Could the peacekeepers, just by being there, secure peace and security? Fast-forward fifty-five years, and the United Nations is still there. But things have changed. Most notably, the UN's weapons have become bigger, and the mandate more robust.

Initially, the presence of the UN was symbolic, as traditional peacekeeping missions always were. The peacekeepers were there, not to enforce a peace, but to remind the parties that the conflict was a matter of international concern, that the world was watching. To serve as symbol of the international community, the UN peacekeepers had to remain impartial, their presence depended on an explicit and continuing invitation from the Congolese Central Government, and the peacekeepers could only shoot when being fired at.

One year after their deployment in the country, the UN already let go of this traditional idea of peacekeeping. Since then, the mission has become bigger, and the mandate more robust. The name changed as well, from ONUC, to MONUC, and most recently to MONUSCO. Since a year or so, MONUSCO has a Force Intervention Brigade. In this contribution, a critical analysis is made of how the bedrock principles of peacekeeping evolved in the Congo. To do so, the journey begins in the 1960s, and ends in early 2015. Since much has been written already about the early days, the focus in this contribution is on the most recent times.

Each principle has its own section: impartiality (section 2), consent (section 3), and a restricted use of force (section 4). And each section is structured in the same way: the traditional meaning of each principle will be briefly introduced, followed by its application to ONUC, MONUC, and MONUSCO with its Force Intervention Brigade.

The aim of this contribution is to map the evolution of the legal principles underpinning peacekeeping, and to reflect critically on this evolution. The research methodology applied is that of an international lawyer: the UN Charter, relevant subsequent practice and the UN Security Council resolutions that define the peacekeeping mission's mandate, will be the main object of study. The latter documents are analyzed on their compatibility with (traditional) peacekeeping theory, and their effect on the evolution of this theory.

This contribution does not assess the peacekeeping missions' actual successes and failures on the ground, or critically evaluate the mandate from the point of view of a political scientist or military strategist. It has been persuasively argued that the UN's peacekeeping efforts in the Congo, albeit done with the best of intentions, have only prolonged and exacerbated the problems; but to evaluate such allegations is not the aim of this contribution.<sup>1</sup>

It is not possible in this short contribution to analyze *all* the legal consequences and implications of the evolving mandate of peacekeeping missions. Much has been written about how this evolution might affect the application of international humanitarian law (*jus in bello*) to the peacekeeping force: if you play the war game, if you cease to be a referee and become a player, you have to play by the rules.<sup>2</sup> And the legality of some of the means employed – such as the use of drones – by the Force Intervention Brigade's operations also deserves critical analysis.<sup>3</sup> Another interesting topic for further research is the actual and potential cooperation between the International Criminal Court and the UN peacekeeping force in the Congo.<sup>4</sup>

## 2 Impartiality

### *Traditional Peacekeeping*

The conflict in the Democratic Republic of the Congo (DRC) is essentially a civil war between the Central Government and various rebel groups, albeit with much involvement of neighboring States. A traditional United Nations

1 See Séverine Autesserre, 'Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences,' *African Affairs*, 2012. See also Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge: Cambridge University Press, 2010).

2 This issue is raised and discussed elsewhere. See *e.g.*, Bruce 'Ossie' Oswald, 'The Security Council and the Intervention Brigade: Some Legal Issues,' *ASIL Insights*, vol. 17, issue 15, published 6 June 2013 on ASIL website (<http://www.asil.org>); Stephanie Chalout, 'From Passive to Aggressive: The Use of Force in Modern Peacekeeping Operations and Challenges in the Laws of Armed Conflict,' *International Law Yearbook*, vol. 6, 2013, especially pp. 84–86.

3 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; and Alexander Nicoll and Jessica Delaney (eds.), 'DRC Sets Precedents for UN Forces,' *Strategic Comments*, vol. 20, no. 1, 2014.

4 On this issue, see Margherita Melillo, 'Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo,' *Journal of International Criminal Justice*, vol. 11, 2013, especially pp. 780–782 (specifically on the Brigade).

peacekeeping mission is not allowed to get involved in a civil war, not even if it has the consent of the government concerned.<sup>5</sup> That was the UN's position in the early days, and this was based on a particularly rigid interpretation of the UN Charter. Article 2(7) of the UN Charter says that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State." Civil wars were considered to be such domestic affairs. Article 2(7) continues by allowing one exception to this rule, namely that "this principle shall not prejudice the application of enforcement measures under Chapter VII." But traditional peacekeeping, as we shall see below, is not an enforcement measure under Chapter VII. The rationale behind this rigid interpretation of 2(7) UN Charter is that the United Nations only deals with *international* issues. In a way, Article 2(7) must be read as a warning to all domestic governments: the UN is not created to resolve your internal issues for you.

If a particular conflict ceases to be an essentially internal matter, because of its regional effects for example, then the UN *can* get involved. When it gets involved, it must remain impartial: the UN mission cannot choose sides. Brian Urquhart, once Under-Secretary-General of the United Nations, explained why Ralph Bunche, one of the intellectual architects of traditional peacekeeping, insisted so much on the UN's impartiality:

One of the things [Bunche] insisted on was that the observers must never favor either side, they must be absolutely impartial, no matter what their personal feelings were. And in fact, if they began to get too popular in the newspapers on one side or the other, they would get a tremendous blast from Bunche saying, "What's all this about being so popular, what are you doing? It's not at all the point. Being popular is not the point, being fair is the point."<sup>6</sup>

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5 Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), pp. 40–44. For some very early academic commentary, see e.g. Finn Seyersted, 'United Nations Forces: Some Legal Problems,' in the *British Year Book of International Law*, vol. 37, 1961; and E.M. Miller, 'Legal Aspects of the United Nations Action in the Congo,' in the *American Journal of International Law*, vol. 55, 1961, pp. 1–28.

6 Quote from the transcript of an interview of 19 March 1996 in the series called "Conversations with History," organized by the Institute of International Studies, UC Berkeley. The interviewee was Brian Urquhart. See: <http://globetrotter.berkeley.edu/UN/Urquhart/urquhart6.html>.

In short, traditional peacekeepers were meant to function as a human wall, to separate the warring parties.<sup>7</sup>

### ONUC

On 14 July 1960, the UN Secretary-General was asked by the Security Council “to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary.”<sup>8</sup> The necessary step was the establishment of ONUC, the peacekeeping mission. The justification for this mission – keeping in mind the remarks made above regarding the prohibition of UN involvement in essentially domestic affairs – was that it would facilitate the withdrawal of Belgian colonial troops, and prevent the arrival of other foreign elements.<sup>9</sup> The conflict in the Congo was clearly an international affair.

ONUC was explicitly tasked to assist the government. So what about the impartiality requirement outlined above? The Security Council proclaimed that ONUC “will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise.”<sup>10</sup> The Secretary-General of the United Nations at that time, Dag Hammarskjöld, explained:

We cannot, we will not, and we have no right to raise any resistance to any move made by the Central Government to assert its authority in Katanga [a rebellious province in the DRC]. The other thing is that we cannot lend our active support [...] to efforts of the Central Government.<sup>11</sup>

7 Impartiality should be distinguished from independence. Peacekeepers are not independent. Their functioning depends in particular on the demands of the troop contributing States, and the permanent members of the Security Council. Peacekeeping missions are paid from the regular UN budget, which means they are not dependent on particular financial donors.

8 United Nations Security Council, Resolution 143, adopted 14 July 1960.

9 For an early legal critique, see Thomas M. Franck, ‘United Nations Law in Africa: The Congo Operation as a Case Study,’ *Journal of Law and Contemporary Problems*, vol. 27, 1962, pp. 632–652. For a collection of the early documents and a commentary, see Rosalyn Higgins, *United Nations Peacekeeping: Documents and Commentary*, Volume 3: Africa, 1946–1967 (Oxford: Oxford University Press, 1980).

10 United Nations Security Council, Resolution 146, adopted 9 August 1960.

11 Address of Dag Hammarskjöld to the Security Council at the 888<sup>th</sup> meeting of the Security Council, held on 21 August 1960, UN Doc. S/PV.888, para. 99. Katanga is a province in the east of the Congo, where a secessionist movement was operative.

Hammarškjöld left open the possibility of departing slightly from impartiality, but only at the explicit request of the Council.<sup>12</sup>

In February 1961, Prime-Minister Patrice Lumumba was captured then killed, and Katangese secessionists were the prime suspects. The ONUC peacekeepers did not do anything to protect Lumumba, and Hammarškjöld defended this inaction by stressing that “the United Nations had neither the power nor the right to liberate Mr. Lumumba from his captors by force.”<sup>13</sup>

On the 17th of September, 1961, Dag Hammarškjöld himself died in a plane crash.<sup>14</sup> This and other unfortunate events appear to have had an influence on the Security Council’s interpretation and application of the impartiality principle. In a Resolution of 24 November 1961, the Council “strongly deprecates the secessionist activities illegally carried out by the provincial administration of Katanga.” Then the Security Council

Declare[d] full and firm support for the Central Government of the Congo and the determination to assist that Government [...] to maintain law and order and national integrity [...]<sup>15</sup>

ONUC was now clearly fighting on the side of the Central Government against the Katangese secessionists, and the new UN Secretary-General U Thant did not seem to have a problem with that.<sup>16</sup>

In conclusion, we can say that, by assisting the Central Government in its fight against rebel groups in the country, ONUC was intervening in domestic

12 Address of Dag Hammarškjöld to the Security Council at the 887<sup>th</sup> meeting of the Security Council, held also on 21 August 1960, UN Doc. S/PV.887, para. 44.

13 Address of Dag Hammarškjöld to the Security Council at the 935<sup>th</sup> meeting of the Security Council, held on 15 February 1961, UN Doc. S/PV.935, para. 10, as included in Thomas M. Franck, *The Legal Aspects of the United Nations Action in the Congo: Background Papers and Proceedings of the 2<sup>nd</sup> Hammarškjöld Forum* (New York: Dobbs Ferry, 1963).

14 For an extraordinary book on the life of Hammarškjöld, see Brian Urquhart, *Hammarškjöld* (New York: Alfred A. Knopf, 1972); and the relevant parts of Brian Urquhart, *A Life in Peace and War* (London: Weidenfeld and Nicolson, 1987).

15 United Nations Security Council, Resolution 169, adopted 24 November 1961.

16 According to Secretary-General U Thant, the ONUC mandate “necessarily implies a sympathetic attitude of a part of ONUC toward the efforts of the Government to suppress all armed activities against the Central Government and secessionist activities.” See his address at the 982<sup>nd</sup> meeting of the Security Council, held on 24 November 1961, UN Doc. S/PV.982, para. 104, as cited on p. 77 of Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press, 2002).

matters of the Congo, and acting against the traditional peacekeeping principle of impartiality by choosing sides.

### MONUC

The reaction to the events described above, and subsequent experiences with other peacekeeping missions, was not so much to change practice, but rather to call for the change of the legal principles. In August 2000, a Commission under the leadership of the Algerian politician Lakhdar Brahimi, was asked to write a report about peacekeeping. The report gave an updated interpretation of the three bedrock principles of peacekeeping. How was the principle of impartiality reinterpreted? This is what the Brahimi report said:

Impartiality for such operations [modern day peacekeeping] must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement.<sup>17</sup>

Impartiality thus meant choosing to defend the UN Charter's principles. And if one party to a dispute acted in accordance with these principles and the other breached them, the peacekeepers could effectively choose sides. The Brahimi report argued that "[I]n some cases, local parties consist not of moral equals but of obvious aggressors and victims, and peacekeepers may not only be operationally justified in using force but morally compelled to do so."<sup>18</sup>

The legal solution, according to the Brahimi report, was firstly to base future peacekeeping missions on Chapter VII, so that article 2(7) of the UN Charter would no longer be an obstacle. And secondly, to allow such missions to intervene when grave violations of international law, especially of the UN Charter itself, were committed.<sup>19</sup>

How did the *Mission de l'Organisation des Nations Unies au Congo* (MONUC) implement this new interpretation of impartiality?<sup>20</sup> Very early on, Chapter

17 *Report of the Panel on United Nations Peace Operations* (Brahimi report), UN Doc. A/55/305, 21 August 2000, para. 50.

18 *Idem*.

19 See also United Nations Department of Peacekeeping Operations (DPKO), *United Nations Peacekeeping Operations: Principles and Guidelines* (United Nations, 2008), pp. 13–14. There it is suggested that it does not really matter on which Chapter or provision in the Charter peacekeeping is based.

20 United Nations Security Council, Resolution 1279, adopted 30 November 1999.

VII was invoked by the Security Council to provide it with a robust mandate, especially for the protection of civilians.<sup>21</sup> This can be seen as a precursor to the Responsibility to Protect doctrine, embraced by the UN Member States in 2005, according to which the international community, through the United Nations, has the responsibility to help States to protect their own population from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>22</sup> Since then, many peacekeeping operations have such a strong mandate to assist in the protection of civilians trapped in an armed conflict.<sup>23</sup> The problem is that this is not always followed by equally robust action.<sup>24</sup>

In any case, the direct protection of civilians by the peacekeeping force is relatively uncontroversial, because it does not require the peacekeeping force to choose sides, so that it can stay impartial. Only if MONUC chooses the side of the Central Government can it be considered a party to the conflict. Some of the later resolutions did in fact urge MONUC to work closely with the Central Government.<sup>25</sup> For example, in a resolution adopted on the first of October, 2004, the Security Council,

Acting under Chapter VII of the Charter of the United Nations [...] urges the Government of National Unity and Transition to develop without further delay a plan for the disarmament of foreign combatants, and to entrust its implementation to the Armed Forces of the Democratic Republic of the Congo, with the support of MONUC.<sup>26</sup>

MONUC could thus provide support in the disarmament of rebel groups.<sup>27</sup> Could such support include the use of force? Yes, it could: “to support operations to disarm foreign combatants led by the Armed Forces of the Democratic Republic of the Congo,” the Security Council “authorize[d] MONUC to use all

21 United Nations Security Council, Resolution 1291, adopted 24 February 2000.

22 General Assembly, Resolution 60/1 (2005 World Summit Outcome), adopted 16 September 2005, Paras. 138–139.

23 See also Thierry Tardy, ‘The Dangerous Liaisons of the Responsibility to Protect and the Protection of Civilians in Peacekeeping Operations,’ *Global Responsibility to Protect*, vol. 4, 2012, pp. 424–448; Julian Borger, ‘When UN’s Peaceful Warriors Go Marching In,’ *The Guardian*, 6 May 2013.

24 See the *Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations*, Report of the Office of Internal Oversight Services, UN Doc. A/68/787, distributed 7 March 2014.

25 See already United Nations Security Council, Resolution 1493, adopted 28 July 2003.

26 United Nations Security Council, Resolution 1565, adopted 1 October 2004.

27 See also United Nations Security Council, Resolution 1493, adopted 28 July 2003.



necessary means, within its capacity and in the areas where its armed units are deployed.” And there were other tasks the MONUC mission was mandated to fulfil that were solely to support the Central Government of the Congo. Thus MONUC more or less served, while fulfilling some of its tasks, as the Government’s iron hand in a Charter glove.

The relationship between MONUC and the Central Government of the DRC became closer. Later on, the Security Council also authorized MONUC to “provide assistance to the Congolese authorities [...] in the organization, preparation and conduct of local elections.”<sup>28</sup> Assisting in the organization of elections might be considered a relatively harmless assignment, but it did involve MONUC in local politics, and it did intensify the collaboration or relationship between MONUC and the formal authorities of the Congo.<sup>29</sup>

As said, MONUC was authorized by the Security Council to use “all necessary means” to protect civilians.<sup>30</sup> MONUC was equally authorized to use all necessary means to “deter any attempt at the use of force to threaten the Goma and Nairobi [peace] processes from any armed group, foreign or Congolese, particularly in the eastern part of the Democratic Republic of the Congo.”<sup>31</sup> The *Forces Armées de la République Démocratique du Congo* (FARDC), the Congo’s official army, was not included in the list of military actors that could threaten the peace processes. MONUC was authorized to use all necessary means to assist the Armed Forces of the DRC in their attempts to, *inter alia*, disarm “recalcitrant local armed groups” and “foreign armed groups,” as well as to prevent the provision of support to “illegal armed groups.”<sup>32</sup> Later on, these groups were referred to collectively as “illegal foreign and Congolese armed groups.”<sup>33</sup>

As time passed, MONUC alienated itself more and more from the rebel groups. The Security Council’s references to the armed groups became more and more negative, whilst cooperation between MONUC and the Central Government and its army intensified, especially in efforts to disarm the rebel

28 United Nations Security Council, Resolution 1797, adopted 30 January 2008.

29 Various elections, for various functions and at various levels, have taken place in the DRC in recent times. For a critical review of the presidential and parliamentary elections of 28 November 2011, see Theodore Trefon, ‘Uncertainty and Powerlessness in Congo 2012,’ *Review of African Political Economy*, vol. 40, no. 125, 2013, 141–151. In 2016, new Presidential elections are expected. Incumbent President Joseph Kabila cannot be reelected a third time, unless constitutional changes are adopted.

30 This was reiterated in United Nations Security Council, Resolution 1856, adopted 22 December 2008, paras. 3 (a)–(e).

31 *Idem*, para. 3 (f).

32 *Idem*, para. 3(g).

33 *Idem*, para. 14.

movements. On this type of cooperation, and the effect it might be perceived to have on the UN's impartiality, Lieutenant General Babacar Gaye, United Nations Military Adviser for Peacekeeping Operations, said the following:

When we are asked to provide the Congolese army with support in disarming armed groups, some consider that we become parties to the conflict. But at some stage, it becomes necessary to be a party to the conflict in order to resolve it. So there is no obstacle to becoming involved in a conflict as long as that involvement is in conformity with the law.<sup>34</sup>

The Brahimi report held that sometimes local parties consist not of moral equals but of obvious aggressors and victims. Can the Central Government be labeled a "victim"? That might justify MONUC's close relationship with the Central Government. At the same time, it must be noted that the Central Government and its army have consistently been accused of committing various crimes and human rights violations themselves as well.<sup>35</sup> It appears the only real "victim" in this conflict is the people of the DRC.

#### *MONUSCO and Its Force Intervention Brigade*

MONUC was criticized, especially because the situation in the east of the DRC did not improve. "As bad as this situation is," wrote Anthony Gambino in a report of 2008 calling for more US support for MONUC, "it would be worse without the presence of the UN peacekeeping mission in the DRC."<sup>36</sup> That is one of the most optimistic assessments of MONUC one could find these days. But the UN clearly wanted to do more than prevent an already terrible situation from getting worse, and the international community and the civilians in the eastern part of the Congo rightly expected it to do more.

Around the same time, a new report was issued which revisited or took stock of the peacekeeping principles, as Brahimi had done in 2000. In this new report of 2008, peacekeeping was defined as "a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in

34 Vincent Bernard and Mariya Nikolova, 'Interview with Lieutenant General Babacar Gaye, United Nations Military Adviser for Peacekeeping Operations,' *International Review of the Red Cross*, vol. 95, 2013, pp. 490.

35 For a recent example of such criticism, see *DR Congo: Deadly Crackdown on Protests, Halt Unlawful Shootings, Arrests*, published 24 January 2015 on the website of Human Rights Watch. URL: <http://www.hrw.org/news/2015/01/24/dr-congo-deadly-crackdown-protests>.

36 Anthony W. Gambino, 'Congo: Securing Peace, Sustaining Progress,' *Council on Foreign Relations' Special Report*, no. 40, October 2008, p. 4.

implementing agreements achieved by the peacemakers.<sup>37</sup> The importance of an impartial mission was emphasized, impartiality being defined as the implementation of the mandate “without favor or prejudice to any party.”<sup>38</sup> Like any impartial referee, the report noted that UN peacekeepers could punish any party that failed to respect the peace agreement the peacekeeping force was meant to protect. The report appropriately referred 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.”<sup>39</sup>

We will now look at how this renewed interpretation of impartiality played out in practice in the DRC. In 2010, the Security Council changed MONUC’s name into *Mission de l’Organisation des Nations Unies pour la Stabilisation au Congo* (MONUSCO).<sup>40</sup> Like its predecessor, MONUSCO was authorized to use all necessary means to “ensure the effective protection of civilians, including humanitarian personnel and human rights defenders.” And it was also authorized to use military force to “support the efforts of the Government of the Democratic Republic of the Congo to bring the ongoing military operations against [various] armed groups, to a completion.”<sup>41</sup> But in practice, and despite the many calls for the strengthening of the UN’s presence in the Congo, MONUSCO was a scaled down version of MONUC, with less troops and less resources.

Criticism increased as the situation on the ground did not improve.<sup>42</sup> One of the rebel groups – *Mouvement du 23-Mars*, or M23 – began to seize towns and cities while peacekeepers stood by and watched.<sup>43</sup> In November 2012, they took the capital of the eastern Congo, Goma, and committed a massacre there.

37 DPKO, *United Nations Peacekeeping Operations*, p. 18.

38 *Idem*, p. 33.

39 *Idem*, p. 99. In a note in the same report, a slightly different description is proposed: “Spoilers are individuals or parties who believe that the peace process threatens their power and interests, and will therefore work to undermine it.” *Idem*, p. 43, Endnote 21.

40 United Nations Security Council, Resolution 1925, adopted 28 May 2010. On MONUSCO and its mandate, see also Janine Natalya Clark, ‘UN Peacekeeping in the Democratic Republic of Congo: Reflections on MONUSCO and Its Contradictory Mandate,’ *Journal of International Peacekeeping*, vol. 15, 2011, pp. 363–383.

41 *Idem*, paras. 11–12.

42 See e.g., Anna Ridout, ‘Peacekeeping Forces Fail to Protect Congolese,’ *New Internationalist Magazine*, issue no. 443, 30 June 2011; or Lindsay L. Wright, ‘Fails so Good: An Examination of the United Nations’ Ineffective Implementation of Resolution 1820 in Democratic Republic of Congo,’ *Suffolk Transnational Law Review*, Winter 2012.

43 Nicoll and Delaney, ‘DRC Sets Precedents for UN Forces.’

In response, and persuaded by a group of regional States,<sup>44</sup> the Security Council gave MONUSCO its so-called Force Intervention Brigade (FIB).<sup>45</sup> Established especially to sanction “spoilers” such as M23, the FIB was a different kind of referee, one that came on the pitch only to sanction the players that broke the rules.

When establishing the FIB, the Security Council reaffirmed the traditional principles of peacekeeping.<sup>46</sup> A senior UN official remarked that the Security Council was “careful to say it was not a precedent, but every time you say that, that’s exactly what you’re making.”<sup>47</sup> And indeed, in the press, the Force Intervention Brigade was already referred to both as an “unparalleled gamble for the United Nations that challenges the basic principles of peacekeeping,” and as “a possible model for defusing crises in other chaotic parts of the world.”<sup>48</sup> Some commentators did 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.<sup>49</sup>

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44 The International Conference on the Great Lakes Region (ICGLR), an inter-governmental organization uniting the States in the African Great Lakes Region, was ready to send its own Neutral Intervention Force, with the approval of, and in close cooperation with, the African Union. See the *Declaration of the Heads of State and Government of the Member States of the ICGLR on the Security Situation in the Eastern DRC*, adopted at the 3rd Extraordinary Summit of the Heads of State and Government of the ICGLR, in Kampala (Uganda) on 8 September 2012, and the *Decision on the Security Situation in Eastern Democratic Republic of Congo (DRC) and the Deployment of a Neutral International Force in this Region*, already adopted by the Peace and Security Council of the African Union (AU), on 19 September 2012. For a (very) brief prehistory of the 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, pp. 175–180.

45 United Nations Security Council, Resolution 2098, adopted 28 March 2013. See also Borger, ‘When UN’s Peaceful Warriors Go Marching In.’

46 This was done at the request of China and Russia, both permanent members of the Security Council, and thus their approval was required. See Borger, ‘When UN’s Peaceful Warriors Go Marching In.’

47 Nicholas Kulish and Somini Sengupta, ‘New UN Brigade’s Aggressive Stance in Africa Brings Success, and Risks,’ *New York Times*, 13 November 2013.

48 Sudarsan Raghavan, ‘UN Fights for Peace in Congo,’ *Washington Post*, 3 November 2013.

49 See *e.g.*, ‘The Art of the Possible: Peace Operations Under New Conditions,’ *Challenges Forum Policy Brief*, issue 1, April 2013. See also ‘Force Intervention Brigade: A Sea Change for UN Peace Operations?’, *Challenges Forum Policy Brief*, issue 1, March 2014; and Nicoll and Delaney, ‘DRC Sets Precedents for UN Forces’; 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.

The Council “reaffirm[ed] the basic principles of peacekeeping, including consent of the parties, impartiality, and non-use of force, except in self-defense and defense of the mandate,” while at the same time “recognizing that the mandate of each peacekeeping mission is specific to the need and situation of the country concerned.”<sup>50</sup> The reasoning is clear: faith in peacekeeping is not lost, but the situation in the eastern Congo is so exceptional that an exceptional – and unprecedented – type of peacekeeping mission is needed.

So what exactly is this Force Intervention Brigade, and what can it do? This is its mandate:

[MONUSCO shall] on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping, include an ‘Intervention Brigade’ [...] with the responsibility of neutralizing armed groups [...] and the objective of contributing to reducing the threat posed by armed groups to State authority and civilian security in eastern DRC and to make space for stabilization activities.<sup>51</sup>

More specifically, the Security Council authorized the Force Intervention Brigade to “take all necessary measures” to “carry out targeted offensive operations”, and do so “either unilaterally or jointly with the [Central Government] to prevent the expansion of all armed groups, neutralize these groups, and to disarm them.”<sup>52</sup> The rebel groups were all named explicitly, but the rebel group referred to the most in the Council’s resolution was the M23.<sup>53</sup>

M23 was quickly defeated. In a subsequent resolution, the Council could already welcome the end of M23.<sup>54</sup> This “unexpectedly quick win” was widely celebrated in the media,<sup>55</sup> and in scholarship – one scholar even saw it as a “golden opportunity for peace and stability in the DRC and the Great Lakes

50 United Nations Security Council, Resolution 2098, adopted 28 March 2013, Preamble.

51 *Idem*, para. 9.

52 *Idem*, para. 12(b).

53 The groups included the *Forces démocratiques de libération du Rwanda* (FDLR), the Allied Democratic Forces (ADF), the *Alliance des patriotes pour un Congo libre et souverain* (APCLS), the Lord’s Resistance Army (LRA), and the National Force of Liberation (FNL).

54 United Nations Security Council, Resolution 2147, adopted 28 March 2014, Preamble.

55 The quote is from Christoph Vogel, ‘Assessing the Performance of MONUSCO’s Force Intervention Brigade,’ *African Arguments*, July 2014. See also Peter Fabricius, ‘Is the Force Intervention Brigade Neutral?’ published on <http://www.issafrica.org/> on 27 November 2014; Nicholas Kulish, ‘A Reason for Hope in Congo’s Perpetual War,’ *New York Times*, 27 October 2013; and Raghavan, ‘UN Fights for Peace in Congo.’

region.”<sup>56</sup> The UN was equally enthusiastic. The local UN spokesperson put it as follows:

Everybody is impatient [...] The atrocities going on, the rapes of women and the use of child soldiers, this is just unacceptable. That’s why it’s a good development to have the intervention brigade here. This is teeth.<sup>57</sup>

The peacekeeping force had thus effectively sanctioned, even neutralized, one of the spoilers.

But can such a referee with teeth remain impartial, and more importantly: is the referee *perceived*, by all the players, to be impartial? The facts on the ground show the question must be replied to in the negative. In the same resolution celebrating the victory over M23, the Council expressed its concern about increasing attacks on UN peacekeepers.<sup>58</sup> And humanitarian aid workers were also increasingly targeted. The local head of Doctors without Borders had a clear explanation for this: “When the population sees a white car, they don’t differentiate between whether it is us, the UN or FIB [the Force Intervention Brigade]. It makes us military targets.”<sup>59</sup> The same problem – perceived loss of impartiality – has also been noted in the literature and the media.<sup>60</sup> And it was noted by India, the biggest troop contributor to MONUSCO, and to peacekeeping missions in general.<sup>61</sup>

56 Sadiki Koko, ‘The *Mouvement du 23 Mars* and the Dynamics of a Failed Insurgency in the Democratic Republic of Congo,’ *South African Journal of International Affairs*, vol. 21, issue 2, 2014, p. 266. For a more cautious opinion, see Emily K. Maiden, ‘Transformative Peace in the Democratic Republic of the Congo,’ *Journal of International Peacekeeping*, vol. 18, 2014, p. 118.

57 Raghavan, ‘UN Fights for Peace in Congo.’

58 United Nations Security Council, Resolution 2147, adopted 28 March 2014, Preamble.

59 Quoted in Raghavan, ‘UN Fights for Peace in Congo.’ See also Kulish and Sengupta, ‘New UN Brigade’s Aggressive Stance in Africa Brings Success, and Risks,’ a Report by Enough Project, as quoted in Raghavan, ‘UN Fights for Peace in Congo,’ Jessica Hatcher, ‘UN Gears up for DRC Offensive as Goma Laments Escalating Violence,’ *Guardian* (online edition), 1 August 2013.

60 See *e.g.*, Major General Patrick Cammaert, ‘The UN Intervention Brigade in the Democratic Republic of the Congo,’ *Issue Brief of the International Peace Institute*, July 2013; Michiel Hofman, ‘The Evolution from Integrated Missions to ‘Peace Keepers on Steroids’: How Aid by Force Erodes Humanitarian Access,’ *Global Responsibility to Protect*, vol. 6, 2014, esp. p. 247 (reference to DRC); Nicholas Kulish, ‘After Outside Pressure, Rebels in Congo Lay Down Their Arms,’ *New York Times*, 6 November 2013. See also Raghavan, ‘UN Fights for Peace in Congo.’

61 ‘India Calls for More Transparency in Security Council’s Working Methods,’ editorial, *Sarkaritel*, 22 November 2014.

If the M23's response to the establishment of the Force Intervention Brigade is any indication, then violent attacks on a peacekeeping force might occur more frequently in the future. Just before being defeated by the Brigade, the leadership of M23 told the UN that "If they attack we will respond very quickly and with full force."<sup>62</sup> And there are indications that M23 began to train itself to directly target the UN after the establishment of the Brigade.<sup>63</sup> Such developments worried especially the citizens in the region, who feared the aggressive stance of the UN, and the aggressive response from those targeted by the UN, would only exacerbate the conflict. "We have an African proverb," explained one of the locals: "when two elephants fight, the grass gets trampled."<sup>64</sup> The UN had become one of the elephants.

Of course, it could be argued that besides this newly arrived referee targeting the spoilers (FIB), we still have the traditional referee on the pitch (MONUSCO). But in practice, that is an unworkable scenario. The partiality of the Brigade indeed endangers the chances of success for the more neutral or conciliatory tasks of MONUSCO, and the UN more generally. The Head of MONUSCO explained, shortly after the Brigade defeated M23, that "MONUSCO is willing to facilitate the repatriation of former combatants of M23."<sup>65</sup> It remains to be seen how much faith the M23 combatants and other rebel groups have in MONUSCO, after being defeated by its Force Intervention Brigade. In the same way, the Brigade also potentially affects the credibility of the UN as mediator or facilitator of peace talks. It might scare off the rebels to engage in such UN-facilitated talks, but it can also demotivate the Central Government of the DRC to take the negotiations seriously. Peace negotiators are always taught to keep their eyes on the BATNA – Best Alternative to a Negotiated Agreement – and if the UN is fighting the war for or with them, it might be very attractive for the Government to continue the fighting instead of taking the negotiations seriously.<sup>66</sup>

62 Pete Jones, 'We'll Fight UN Force, Say Congolese Rebels: M23 Unbowed by Creation of Intervention Brigade (Analysts Hope Arrival Will Boost Faltering Talks),' *Guardian*, 6 May 2013. The quote is from M23's military spokesman.

63 *Idem*. The soldiers apparently even received Kung Fu training. For some background on the M23, and the support they are presumed to receive from Rwanda, see Alphonse Muleefu, 'Beyond the Single Story: Rwanda's Support to the March 23 Movement (M23),' *Amsterdam Law Forum*, vol. 5, 2013. The author is skeptical about this supposed Rwandese assistance.

64 *Idem*.

65 Kobler, as quoted by Joseph Tshimanga, in his untitled article in *Echos de la MONUSCO*, No. 39 (October 2014), p. 11.

66 See also Cammaert, 'The UN Intervention Brigade in the Democratic Republic of the Congo,' p. 12.

These are the long-term side-effects of the loss of impartiality. The Council foresaw these side-effects. In the resolution establishing the Brigade, the Council “call[ed] upon all parties in the conflict to respect the impartiality, independence and neutrality of humanitarian actors.” As if to say to the rebel groups: MONUSCO’s Force Intervention Brigade might have lost its impartiality and might thus have become a legitimate target in the armed conflict,<sup>67</sup> but the humanitarian aid workers employed by the UN and other elements of the international community remain impartial.<sup>68</sup>

On “an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping,” the Council extended the Brigade’s mandate for another year in 2014.<sup>69</sup> After having defeated M23, the Brigade and the DRC’s Army focus their attention on other rebel groups. But successes similar to the defeat of M23 have been absent.<sup>70</sup> According to Peter Fabricius, “the overriding impression one gains from talking to non-government people in the region is that the [Force Intervention Brigade] has not done very much for nearly a year.”<sup>71</sup> Also, relations between the DRC’s Army and MONUSCO appear to have worsened. Increasingly often, the Government Army prefers to operate alone. To lead its military operations against another rebel group (FDLR), the DRC Army appointed two generals accused of serious war crimes and crimes

67 See the literature referred to in footnote 2, above.

68 Another important legal consequence of the UN’s (perceived) loss of impartiality is that the UN might be seen as aiding or assisting the DRC. If a UN peacekeeping operation – or an organ thereof, like the Brigade – is assisting elements of an armed force committing serious violations of international humanitarian law and/or international human rights law, then the UN’s responsibility under international law might be engaged. Article 14 of the *Articles on the Responsibility of International Organizations*, adopted by the International Law Commission (ILC) in 2011, states that “an international organization which aids or assists a State [...] in the commission of an internationally wrongful act by the State [...] is internationally responsible for doing so if the organization does so with knowledge of the circumstances of the internationally wrongful act; and the act would be internationally wrongful if committed by that organization.” *Yearbook of the International Law Commission*, 2011, vol. II, Part Two. See also Scott P. Sheeran, ‘A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo,’ *International Organizations Law Review*, vol. 8, 2011. The article deals with the way the main organs of the UN – the Secretary-General and the Security Council in particular – can react to such a situation.

69 United Nations Security Council, Resolution 2147, adopted 28 March 2014, para. 1.

70 Vogel, ‘Assessing the Performance of MONUSCO’s Force Intervention Brigade.’

71 Fabricius, ‘Is the Force Intervention Brigade Neutral?’



against humanity. It is, of course, impossible for the UN to fight side-by-side such forces.<sup>72</sup>

### *Conclusion*

In this section, we have looked at impartiality. The principle of impartiality demands of the United Nations to always defend and promote the principles of the UN Charter in an objective fashion, without becoming an extension of the government in maintaining law and order in the country, or an extension of one of the parties to a conflict. In theory, this is still one of the principles of peacekeeping. But the situation in the DRC has shown how difficult it is to put this principle into practice.

## 3 Consent

### *Traditional Peacekeeping*

In this section on consent, we will again look at the traditional view, and then see how this traditional view evolved through the mandates of ONUC, MONUC, and MONUSCO, and how these and other experiences on the ground influenced conceptual thinking.

According to the traditional view, the United Nations cannot station units on a territory of a Member State without the consent of the State concerned.<sup>73</sup> If a State does not want such a mission on its territory, then the non-consenting State can only be forced to acceptance by international law that is binding upon that State. The UN Charter is binding on most States, but there is no article in that Charter that allows the UN to place troops on a non-consenting State's territory, except perhaps in the case Chapter VII is triggered, which was not the case in old-fashioned, traditional peacekeeping. Thus consent of the State on whose territory the peacekeepers will operate is a legal necessity.<sup>74</sup>

72 Timo Mueller, 'Monusco – Kobbler's Likely Departure Signals Post-FIB Era for Peacekeeping in Congo,' *African Arguments*, 25 February 2015; 'Generals' human rights issues,' editorial in the *Sunday Tribune* (South Africa) of 22 February 2015.

73 See e.g., *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, UN Doc A/3943, 9 October, 1958, para. 155. On consent, see also Christine Gray, 'Host-State Consent and United Nations Peacekeeping in Yugoslavia,' in the *Duke Journal of Comparative and International Law*, vol. 7, 1996, pp. 241–270; and Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension,' in the *Journal of Conflict and Security Law*, vol. 11, number 3, 2006, pp. 465–482.

74 Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, p. 39.

Consent of other parties, such as rebel groups, might be desirable to ensure the impartiality of the mission, but it is not a legal necessity.

#### ONUC

In 1960, the Congo could have gone to the Security Council to bring the situation in its borders to the attention of the Security Council and ask for help.<sup>75</sup> It chose not to go down that road, but instead to request the UN Secretary-General to convene the Security Council on his own initiative. The Secretary-General is allowed to do so.<sup>76</sup>

After Secretary-General Hammarskjöld received the Congolese requests “to protect the national territory of the Congo against the present external aggression which is a threat to international peace,”<sup>77</sup> he was extraordinarily quick in getting a Security Council Resolution and in forming ONUC.

The consent of the Congolese Government to the presence of ONUC on its territory became problematic after the Central Government collapsed on 5 September 1960. Only on 2 August 1961, was there a new civilian government, led by Cyrille Adoula. During the months in between, General Mobutu more or less ruled the country, although many efforts were made, especially by Kasavubu, who somehow remained president through most of the period of constitutional crisis, to reinstall a civilian government. During that time of uncertainty and confusion, the Security Council was unable to make a decision as to how to continue the ONUC mission, and thus it referred the Congo-question to the UN General Assembly.<sup>78</sup> The General Assembly did not discuss the issue of consent, and this is understandable: there was not a civilian government in the Congo, and the Assembly did not want to do business with the unelected military General.<sup>79</sup> General Mobutu did not consent to the presence

75 Article 35(2) of the United Nations Charter.

76 Article 99 United Nations Charter says that “[t]he Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.”

77 *Cable dated 12 July 1960 from the President of the Republic of the Congo and Supreme Commander of the National Army and the Prime Minister and Minister of National Defence Addressed to the Secretary-General of the United Nations*, UN Doc S/4382.

78 UN Security Council resolution 157, adopted 17 September 1960: “[The Security Council] taking into account that the lack of unanimity of its permanent members [...] has prevented it from exercising its primary responsibility for the maintenance of international peace and security, decides to call an emergency special session of the General Assembly [...]”.

79 Franck, *The Role of the United Nations in the Congo*, p. 23.

of ONUC, he more or less opposed to it.<sup>80</sup> This, however, was not a reason for ONUC to leave the country. Cyrille Adoula did work closely together with ONUC, thereby giving his consent to their presence. However, during the period of almost a year, ONUC had no clear consent, but it did not leave the Congo.<sup>81</sup>

A peacekeeping mission needs a State's consent. But who can legitimately claim to represent the State? What if the consenting government collapses and it is unclear whose consent is needed afterwards? Do the peacekeepers then have to go home? These are the questions that the ONUC mission did not find the answer to, at least not within the legal framework of traditional peacekeeping.

### MONUC

Before turning to MONUC, let us turn once again to the Brahimi report. Unfortunately, on problems relating to consent, the report did not say much. All the report said was that "once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully."<sup>82</sup> Can one derive from this sentence that consent is only important when the mission is established, and that it ceases to be a condition afterwards? That would obviously solve most problems encountered by ONUC in the early 1960s.

How did MONUC treat the issue of consent? The problem with consent in traditional peacekeeping was that the consent could suddenly vanish. The solution was to make peacekeepers act under Chapter VII, so that legally the continuous consent of the State on whose territory the peacekeepers were stationed was no longer needed. MONUC was both acting under Chapter VII and it had the consent of the Democratic Republic of the Congo, since the consent was part of the ceasefire agreement that was signed by the DRC in 1999.<sup>83</sup> If, for

80 Findlay, *The Use of Force in UN Peace Operations*, p. 63. During a short period in 1961, the national army actually attacked ONUC peacekeepers.

81 UNEF faced the same problem when Egypt no longer consented to its presence on Egyptian territory. In this case, UNEF decided to leave. See Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, p. 40.

82 *Report of the Panel on United Nations Peace Operations*, para. 49.

83 See the *Lusaka Ceasefire Agreement* of 10 July 1999, annexed to a Letter dated 23 July 1999 from the Permanent Representative of Zambia to the President of the UN Security Council, UN Doc S/1999/815. Paragraph 11(a) is the relevant part: 'The United Nations Security Council, acting under Chapter VII of the UN Charter, shall be requested to constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation of this [Ceasefire] Agreement; and taking into account the peculiar situation of the DRC, mandate the peacekeeping force to track down all armed groups in the DRC.' See also United Nations Security Council, Resolution 1279, adopted 30 November 1999.

some reason, the Central Government changed its mind and withdrew consent, this would not jeopardize the MONUC mission, since it acted under Chapter VII.<sup>84</sup>

### *MONUSCO and Its Force Intervention Brigade*

In the 2008 document referred to earlier, the importance of “consent of the main parties to the conflict” was reiterated.<sup>85</sup> This was important because, “in the absence of such consent, a United Nations peacekeeping operation risks becoming a party to the conflict; and being drawn towards enforcement action, and away from its intrinsic role of keeping the peace.”<sup>86</sup> The importance of consent, and the close relationship between the principles of impartiality and consent, were thus emphasized.

How did MONUSCO approach the issue? The Kabila Government threatened to withdraw the DRC’s consent to MONUC’s presence in 2010. Apparently, this threat was motivated by a desire to show the people in the DRC – the rebels included – that the Central Government was strong enough to continue without the UN. In other words, it was to convince the local actors that the government was capable of governing the entire State, leaving no parts of the territory to be governed either by rebel groups or the UN. Indeed, it has been suggested that the continued international presence in the parts of the Congo where the reach of the Central Government is limited – ONUC, MONUC and MONUSCO have generally focused their operations in the east of the country – did more damage than good to the legitimacy of the Central Government, by exposing and perpetuating its lack of control over these areas.<sup>87</sup>

MONUC was scaled down and renamed into MONUSCO more or less at the request of the DRC Government; this effectively persuaded the DRC not to withdraw its consent to the presence of the peacekeepers.<sup>88</sup> From this incident can be concluded that the State’s consent in practice comes down to the Central Government’s consent. The difference is clear. When Kabila was

84 See Eliav Lieblich, ‘Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements,’ *Boston University International Law Journal*, vol. 29, no. 2, 2011, especially pp. 373–376.

85 DPKO, *United Nations Peacekeeping Operations*, p. 31.

86 *Idem*, p. 32.

87 Denis M. Tull, ‘When They Overstay Their Welcome: UN Peacekeepers in Africa,’ *Journal of International Peacekeeping*, vol. 17, 2013, especially pp. 189–192. And see Theo Neethling, ‘Rebel movements in the DRC,’ *African Security Review*, vol. 23, no. 4, 2014, p. 347.

88 Theo Neethling, ‘From MONUC to MONUSCO and Beyond: Prospects for Reconstruction, State-building and Security Governance in the DRC,’ *South African Journal of International Affairs*, vol. 18, issue 1, 2011, pp. 23–41.

threatening to withdraw his consent, he did not have the interest of the State in mind, but his own personal interests. A Head of State does not always ask: “what can the UN do for my country?,” but rather: “what can the UN do for me?”<sup>89</sup>

### *Conclusion*

The principle of consent asks of the UN to assure itself of the continuous approval of the State on whose territory the mission is operating. The incident, in which the Central Government threatened to withdraw its consent unless the UN peacekeeping mission made some changes in its composition and mandate, showed how this principle might actually jeopardize the impartiality of the mission. It makes the UN peacekeeping mission too much dependent on the continuous approval of one party to the conflict. It is perhaps for this reason that, of all three principles, the principle of consent has drifted away the most from its original meaning. According to the broader notion of consent that the Brahimi report and subsequent reports adhere to, the UN peacekeeping mission should always try to ensure the continuous commitment, by all parties involved, to the peace process that the peacekeeping mission aims to facilitate by its presence. The UN mission should also do its utmost to secure the continuous acceptance, by all parties, of its presence on the ground. In practice, consent is often uncertain and unreliable, as the Congo experience has shown. Consent may be withdrawn temporarily by one of the parties. But this is not a reason for the UN mission to immediately pack its bags and go home.

## 4 Use of Force

### *Traditional Peacekeeping*

Article 2(4) UN Charter prohibits all UN Member States to use force in their international relations. This prohibition does not apply to the UN itself, but that does not mean the UN is itself free to use force, for whatever reason, in and against its Member States. The UN can only do so if such competence can be derived, explicitly or implicitly, from its constitutional document, the UN Charter.

It could be argued that Chapter VII authorizes the UN to use force,<sup>90</sup> but traditional peacekeeping is not based on Chapter VII. The traditional rule on the use of force in peacekeeping was thus, understandably, very strict:

<sup>89</sup> Tull, ‘When They Overstay Their Welcome: UN Peacekeepers in Africa,’ p. 199.

<sup>90</sup> Article 41 United Nations Charter refers primarily to measures taken by the UN Members, not the UN itself; and it refers specifically to non-military measures. Article 42 gives the

“Men engaged in the [peacekeeping] operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms [...] The basic element involved is clearly the prohibition against any initiative in the use of armed force.”<sup>91</sup>

This means that peacekeepers may only defend themselves if they were the victim of an actual armed attack.

### ONUC

Much has been written about the use of force of the ONUC peacekeepers, and the violent response they encountered. ONUC did start out peacefully, and with a very restricted use of force mandate. But this very quickly changed, and then things got completely out of control. It is still the peacekeeping operation in which most peacekeepers died: 135 of ONUC died at the cause of malicious acts,<sup>92</sup> still the highest figure in UN history.<sup>93</sup>

In August 1960, the Security Council authorized the Secretary-General to take “all necessary action” to restore order after the hasty withdrawal of the Belgian colonial troops.<sup>94</sup> It was more or less up to Dag Hammarskjöld to interpret this mandate: whatever the Secretary-General believed was “necessary action,” was necessary. He decided to send a traditional peacekeeping force. The clearest expression of the intention of Hammarskjöld on the use of force can be found in his report of 14 July 1960, in which he explained that “men engaged in the operation may never take the initiative in the use of armed force, but are entitled to

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Council the right to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” This could be read as providing a legal basis for a peacekeeping mission, but from the next sentence in that same Article it can be derived that Article 42 is referring to “forces of Members of the United Nations” and not “forces of the United Nations itself.” Of course, this could be interpreted as referring to forces placed at the disposal of the UN by the Members of the UN, which is the case for peacekeeping forces.

91 *Summary Study of the Experience Derived from the Establishment and Operation of the Force*, para. 179.

92 Seventy people died in an accident, and forty-one died of illness. The United Nations Interim Force of Lebanon (UNIFIL) has more fatalities, 307. However, UNIFIL has been established in 1978 and is still in Lebanon today. ONUC needed only four years to reach its high number of fatalities. And out of the 307 peacekeepers that died in Lebanon, only 92 died because of hostile acts (most others died because of an accident).

93 *Fatalities by Mission and Incident Type up to 30 November 2014*, available at <http://www.un.org/en/peacekeeping/>.

94 United Nations Security Council, Resolution 143 and 145, adopted 14 July and 9 August 1960.

respond with force to an attack with arms.”<sup>95</sup> This text is a literal quotation of the report Hammarskjöld wrote about the United Nations Emergency Force (UNEF) mission. The SG thus made it very clear that he intended a traditional use of force.

Initially, this was faithfully implemented on the ground. Those who were listening to the Congolese radio on 26 July 1960, could hear Ralph Bunche explain that ONUC troops “will bear arms, but will only use them in self-defense.”<sup>96</sup>

A few months later, it became clear that the facts on the ground did not go well with such rigid rules. At the end of February 1961, the Security Council, “deeply concerned at [...] the danger of widespread civil war and bloodshed in the Congo and the threat to international peace and security [...] Urges that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo [...] including [...] the use of force, if necessary, in the last resort.”<sup>97</sup>

Around August 1961, but especially in December of that same year, that is three months after the death of Hammarskjöld, the Katangese secessionist army of Moïse Tschombé was basically engaged in a war with the ONUC peacekeeping force.<sup>98</sup> This war was fought with the approval of the Security Council, given in a resolution of 24 November 1961.<sup>99</sup> The fighting included United Nations air strikes. Twenty-one ONUC peacekeepers died and two-hundred-and-six Katangese.<sup>100</sup> In 1962, ONUC defeated the secessionist army in an operation tellingly called Operation Grand Slam.

Clearly, if ONUC began as a peacekeeping mission based on the principle that no use of force can be used except when the peacekeepers are under immediate attack, and it ends with an operation called “Operation Grand Slam,” something has gone badly wrong. In fact, the dramatic evolution of the ONUC operation was such a shock to the United Nations, that it did not engage in any major peacekeeping operations until the 1990’s, when again things went horribly wrong in the Former Yugoslavia (the United Nations Protection Force,

95 *First Report by the Secretary-General on the Implementation of Security Council resolution S/4387 of 14 July 1960*, UN Doc. S/4389, para. 15. The title of this report refers to resolution 143 (1960). In the past, different reference systems were used.

96 Findlay, *The Use of Force in UN Peace Operations*, p. 53. See also Operations Directive No. 6, paras. 4, 7 and 8, published as annex to Findlay’s book.

97 United Nations Security Council, Resolution 161, adopted ... 1961. This required a new Directive: Operations Directive no. 10, 30 March 1961 (also available as annex to Findlay, *The Use of Force in UN Peace Operations*).

98 Stanley Meisler, ‘Peacekeeping and Humanitarian Aid,’ in Barbara Benton (editor), *Soldiers for Peace: Fifty Years of United Nations Peacekeeping* (Facts on File, 1996), p. 109.

99 United Nations Security Council, Resolution 169, adopted 24 November 1961.

100 Stanley Meisler, ‘Peacekeeping and Humanitarian Aid,’ p. 113.

or UNPROFOR) and Somalia (the United Nations Operation in Somalia, or UNOSOM).<sup>101</sup>

### MONUC

What if it turns out that the peacekeepers no longer find themselves in a situation of high tension, but in an actual civil war? Do the peacekeepers then still have to use force only to defend themselves, or can they act more robustly? These were the questions that emerged from the unfortunate experiences at the end of ONUC's existence, but also from the equally unfortunate experiences in the 1990's in Rwanda, Somalia and Srebrenica.

Again, on the use of force, the Brahimi report was very cautious. It noted that

The United Nations does not wage war [and that] where enforcement action is required, it has consistently been entrusted to coalitions of willing States, with the authorization of the Security Council, acting under Chapter VII of the Charter.<sup>102</sup>

At the same time, the report did call for more robust peacekeeping. To avoid any misunderstandings, then UN Secretary-General Kofi Annan said that he did "not interpret any portions of the [Brahimi] report as a recommendation to turn the United Nations into a fighting machine or to fundamentally change the principles according to which peacekeepers use force."<sup>103</sup>

Despite these words of caution, the Brahimi report did suggest an important change. Self-defense, according to the Brahimi report, included not only the defense of the peacekeeper's own life and that of others, but also the defense of the mission. Clearly this was not a small change. It could be said that deterrence had replaced symbolism. Peacekeepers were no longer a symbolic and non-threatening presence, *i.e.* they would no longer walk around the area on foot, or ride around on their bicycles like they did before. From now on, they would drive around in tanks equipped with rocket launchers, not necessarily to shoot at people or to destroy buildings, but just in case and for the deterrent effect. To serve as a credible deterrent, a peacekeeping force "must be viewed as a credible military force, willing to carry out offensive operations to counter the

<sup>101</sup> See Findlay, *The Use of Force in UN Peace Operations*, p. 87.

<sup>102</sup> *Report of the Panel on United Nations Peace Operations*, para. 53.

<sup>103</sup> United Nations, *Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations*, UN Document A/55/305, 21 August 2000. See Findlay, *The Use of Force in UN Peace Operations*, p. 338.



threat of violence.”<sup>104</sup> This had little to do with old-school peacekeeping. Perhaps this was an unavoidable adaptation to modern times. The traditional – the idealist – approach to peacekeeping appeared forever lost this way. Remember that Ralph Bunche said to his peacekeepers:

If you carry a pistol, you’re identified as a military man with the capacity to shoot, and that is very unsafe for you and very bad for the mission. You have to be unarmed. It may be risky, but you do it.<sup>105</sup>

This philosophy seems to have been completely forgotten. If the peacekeepers may use force to defend the mission, they need Chapter VII mandates.<sup>106</sup> It is thus not difficult to conclude that modern day peacekeeping missions can avoid a lot of legal trouble by acting under Chapter VII.

What about MONUC’s use of force mandate? In one of MONUC’s first resolutions, Chapter VII is invoked to permit MONUC to “take the necessary action, in the areas of deployment of its infantry battalions,” *inter alia* to “protect civilians under imminent threat of physical violence.”<sup>107</sup> MONUC’s mandate was at the time the most robust mandate ever given to a peacekeeping mission.<sup>108</sup> Despite the robust mandate, MONUC has in fact been surprisingly reluctant in the use of force.<sup>109</sup> The practice of MONUC has shown that the real problem is not the mandate, but the unwillingness of peacekeepers to actually use their guns, and the sad fact that there will probably never be enough guns and troops for MONUC to effectively act.<sup>110</sup>

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104 Cammaert, ‘The UN Intervention Brigade in the Democratic Republic of the Congo,’ p. 10. Cammaert was referring to MONUSCO here.

105 Brian Urquhart, ‘Conversations with History.’

106 It could be argued that nothing in the UN Charter gives the Security Council the competence, even under Chapter VII, to authorize a peacekeeping mission to use force, since none of the provisions in Chapter VII refer even implicitly to peacekeeping forces. But UN practice has overruled such a rigid interpretation; instead, peacekeeping missions are based on so-called “Chapter VI ½” of the Charter.

107 United Nations Security Council, Resolution 1291, adopted 24 February 2000.

108 See United Nations Security Council, Resolution 1493, adopted 28 July 2003, para. 20; and Resolution 1565, adopted 1 October 2004.

109 Somini Sengupta, ‘Warring Militias In Congo Test UN Enforcement Role,’ *New York Times*, 11 April 2004. ‘Is This the World’s Least Effective UN Peacekeeping Force?’, *Economist*, 2 December 2004.

110 When lots of people are involved in the decisionmaking, it is often the most cautious and conservative opinion that prevails. See Hugh Breakey and Sidney Dekker, ‘Weak Links in the Chain of Authority: The Challenges of Intervention Decisions to Protect Civilians,’ *International Peacekeeping*, vol. 21, issue 3, 2014, especially p. 319.

In such circumstances, there appear to be two solutions: to return to traditional peacekeeping, but only in those places where this is appropriate, *i.e.* where the warring parties agree to make peace. Or to let go of the idea of a peacekeeper as a symbol, and see peacekeepers as fighters, using military force to *make* peace. That would mean providing them with the same rights and obligations – and resources! – as regular armies engaged in an armed conflict.

### *MONUSCO and Its Force Intervention Brigade*

In the report of 2008, peacekeeping – “a technique designed to preserve the peace where fighting has been halted” – was distinguished from peace enforcement operations, defined as operations “involv[ing] the application, with the authorization of the Security Council, of a range of coercive measures, including the use of military force.”<sup>111</sup> This could be read as a warning, a plea not to blur the distinction between *peacekeeping* and *peacemaking*. According to the report, a peacekeeping operation may use force “with the authorization of the Security Council, if acting in self-defense and defense of the mandate.”<sup>112</sup> But using force in defense of a peacekeeping mandate is not the same as using force to make peace. So what was the difference between the two types of operations *exactly*? Robust peacekeeping and peace enforcement were distinguished as follows:

While robust peacekeeping involves the use of force at the tactical level with the consent of the host authorities and/or the main parties to the conflict, peace enforcement may involve the use of force at the strategic or international level, which is normally prohibited for Member States under Article 2 (4) of the Charter unless authorized by the Security Council.<sup>113</sup>

The report is very clear about the implication this distinction has in practice: “the ultimate aim of the use of force [in peacekeeping missions] is to influence and deter spoilers working against the peace process or seeking to harm civilians; and not to seek their military defeat.”<sup>114</sup>

The latter type of operation, a military operation meant to defeat a particular enemy, is usually left to States, and organized in coalitions of the willing.

<sup>111</sup> DPKO, *United Nations Peacekeeping Operations*, p. 18.

<sup>112</sup> *Idem*, p. 34.

<sup>113</sup> *Idem*, p. 19, and pp. 34–35. The report hereby introduced “robust peacekeeping” into the jargon, technical terminology, or terms of art, of peacekeeping. See also *idem*, p. 98.

<sup>114</sup> DPKO, *United Nations Peacekeeping Operations*, p. 35.

These coalitions are authorized by the Security Council to use all necessary means to curtail a threat to international peace and security. The UN itself normally does not engage in such actions, referred to as peace enforcement operations.<sup>115</sup>

So what about MONUSCO and its Force Intervention Brigade? As explained above, the Force Intervention Brigade is mandated to carry out targeted offensive operations, and such a mandate is much more similar to that of a coalition of the willing than a traditional peacekeeping mission.<sup>116</sup> The force used by the FIB against M23, for example, was to secure the rebel group's military defeat, and this aim was successfully accomplished. This is a clear example of a strategic use of force, belonging to a peace enforcement mission.

### *Conclusion*

The principle on the use of force requires of UN peacekeepers to use force only in self-defense, or in defense of the mission's mandate. Especially the latter option can be interpreted in various ways. It all depends on the mandate. If the mission's mandate calls upon the peacekeepers to neutralize an armed group, then a military operation to defeat this group falls within the category of uses of force in defense of the mission's mandate. But a peacekeeping mission, established to preserve the peace where fighting has been halted, should not be mandated to change the *status quo* on the battlefield, at least not by force. This should be done at the negotiating table. The use of force to neutralize one of the parties to the conflict, regardless of whether it falls within the mandate or not, is a clear departure from the usual peacekeeping doctrine.

## 5 Concluding Observations

ONUC and MONUC were in their days the biggest and most ambitious peacekeeping operations of the UN. This raised expectations.<sup>117</sup> The same can be said

<sup>115</sup> Borger, 'When UN's Peaceful Warriors Go Marching In.'

<sup>116</sup> United Nations Security Council, Resolution 2098, adopted 28 March 2013, para. 12(b). As noted in the introduction, this raises all sorts of questions relating to the applicability of the laws of war (*ius in bello*). Can one distinguish MONUSCO from the Brigade, or is MONUSCO now also a party to the conflict? Etc. But these questions will not be addressed here. See Cammaert, 'The UN Intervention Brigade in the Democratic Republic of the Congo,' p. 9.

<sup>117</sup> See *e.g.* the testimony by Ambassador Richard C. Holbrooke, United States Permanent Representative to the United Nations, before the US House of Representatives Committee

of MONUSCO and its Force Intervention Brigade: again the stakes are high, and so are the expectations. MONUSCO is, like its predecessors, once again the biggest and most costly peacekeeping operation.

Perhaps a strict adherence to the three bedrock principles of peacekeeping - impartiality, consent of the State on whose territory the mission will be operating, and the use of force restricted to self-defense only - does not help to meet these expectations.

But what is the solution? Should expectations be lowered, or should the peacekeepers deliver more? Few people openly suggest the first option, even though it is probably the one that should realistically be preferred. It is preferable, not because the UN should *want* to do less, but because it should acknowledge it *cannot do more*. But most commentators prefer to insist that the UN ought to do more.<sup>118</sup>

The establishment of the Force Intervention Brigade is driven by a desire to do more. When trying to explain the philosophy behind the new Force Intervention Brigade, the UN representative in the DRC noted: "If there is no peace, there is nothing to keep."<sup>119</sup> One could conclude from this that the Congo is thus no place for a UN peacekeeping mission. But the UN has drawn a different conclusion, namely that the Congo requires a pimped-up peacekeeping force, one that can first *make* peace, and then *keep* it. "To be a peacekeeper doesn't mean you need to be passive," a member of the Force Intervention Brigade explained: "to be a peacekeeper, you need to take action. The way to protect the civilians is to take action. If you see the history of atrocities here, it justifies action."<sup>120</sup>

If, in the future, peacekeeping forces engage in offensive operations more often, this might scare off the usual troop-contributing States. The UN is clearly aware of this. A senior UN official acknowledged that "some of the troop-contributing countries are quite uneasy with what they see as the direction peacekeeping is taking."<sup>121</sup> And Major General Patrick Cammaert, a Dutch general who was the United Nations Force Commander for the Democratic Republic of the Congo, remarked that troop-contributing States were seriously

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on International Relations, Subcommittee on Africa, a meeting held in Washington, on 15 February 2000. (see: <http://www.un.int/usa/ooholo215.htm>).

118 Kulish and Sengupta, 'New UN Brigade's Aggressive Stance in Africa Brings Success, and Risks.'

119 Kulish, 'After Outside Pressure, Rebels in Congo Lay Down Their Arms.'

120 The peacekeeper is quoted in Raghavan, 'UN Fights for Peace in Congo.'

121 Kulish and Sengupta, 'New UN Brigade's Aggressive Stance in Africa Brings Success, and Risks.'

concerned that the Force Intervention Brigade would set a precedent for peacekeeping operations and “a shift toward counterinsurgency-style operations by the United Nations.”<sup>122</sup> States like India, who see peacekeeping as a relatively riskless way of training their own soldiers, might not wish to participate anymore.<sup>123</sup> In 2014, by far the most peacekeepers were provided by Bangladesh (9,275 troops), India (8,141), Pakistan (7,926) and Ethiopia (7,810).<sup>124</sup> Looking specifically at MONUSCO, India (3,719), Pakistan (3,744) and Bangladesh (2,555) together provide more than half of the roughly nineteen thousand troops.<sup>125</sup> Their support is thus crucial. This dependence on just a few States as troop-contributors was a key issue at a recent conference on peacekeeping held in Amsterdam, the Netherlands.<sup>126</sup>

As recently as 21 November 2014, India again brought its concerns to the fore. Its delegate called for

An objective assessment of the implications of robust mandates on the impartial nature of UN peacekeeping. The provisions of the UN Charter do not, in our view, allow such misuse of our peacekeepers. Impartiality and neutrality are key principles for ensuring effectiveness of UN peacekeepers.<sup>127</sup>

It was perhaps to reassure India, and like-minded troop contributing countries, that another peacekeeping operation, the United Nations Multi-dimensional Integrated Stabilization Mission in Mali (MINUSMA), did not get a mandate to directly target so-called terrorists in the country. This was left to

122 Cammaert, ‘The UN Intervention Brigade in the Democratic Republic of the Congo,’ p. 6.

123 See the most insightful article by Mischa Hansela and Miriam Möller, ‘House of Cards? India’s Rationales for Contributing to UN Peacekeeping,’ *Global Change, Peace & Security*, vol. 26, no. 2, 2014, pp. 141–157. See also Richard Gowan, ‘How Africa Outflanked India at the UN,’ *Pragati: The Indian National Interest Review*, 21 June 2013.

124 *Ranking of Military and Police Contributions to UN Operations*, 30 November 2014, available at <http://www.un.org/en/peacekeeping/>.

125 *UN Mission’s Contributions by Country*, 30 November 2014, available at <http://www.un.org/en/peacekeeping/>.

126 See the speech by Minister Koenders at the close of the conference on UN peacekeeping operations, as delivered on 17 February 2015, in Amsterdam. Available at <http://www.government.nl/issues/international-peace-and-security/news/2015/02/15/koenders-conference-will-help-enhance-un-peace-missions.html>.

127 Statement by Ambassador Asoke Kumar Mukerji, Permanent Representative of India to the United Nations, at the UN General Assembly, when the *Annual Report of the UN Security Council to the Assembly* was discussed, 21 November 2014.

a French force, operating in parallel with the UN peacekeepers.<sup>128</sup> Such a combination of a more or less traditional UN peacekeeping force and a military operation carried out by a particular State with the authorization of the UN Security Council might well prove to be the way to go for the future, or at least provide a viable alternative to the Force Intervention Brigade.<sup>129</sup>

Clearly, the discussion as to whether peacekeeping is an “elastic enough term” to encompass the Force Intervention Brigade has only just begun.<sup>130</sup> And we know where the discussion will continue. In October 2014, UN Secretary-General Ban Ki-moon appointed a High-Level Independent Panel on Peace Operations, chaired by Jose Ramos-Horta, the Nobel-prize winner of Timor-Leste. The Panel was tasked to come up with a true successor to the Brahimi report of 2000, *i.e.* a comprehensive assessment of the state of UN peace operations today.<sup>131</sup> The High-Level Panel presented its report, entitled *Uniting our Strengths for Peace – Politics, Partnership and People*, to the UN Secretary-General on 16 June 2015. Only a few paragraphs (paras. 121–126) of the report were explicitly devoted to the three principles of peacekeeping. The Panel called for a “flexible and progressive interpretation of these principles.” The Panel remarked that “the impartiality of UN missions should be judged by [their] determination to respond evenhandedly to the actions of different parties based not on who has acted but by the nature of their actions.” The Panelists further held that consent to the deployment of the peacekeeping mission of the government was “fundamental,” and the consent of the other parties to the conflict – think of rebel groups – should be “pursued to the extent possible.” Finally, the Panelists believed there was a need for clarity as to what type and degree of force the defense of the mandate required. It was suggested that peacekeepers should have the means and mandate to use force “proactively in self-defense and to protect civilians and dissuade spoilers in line with their mandates.” Interestingly, the report does not mention the Force Intervention Brigade at all.

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128 See also Richard Gowan, ‘Diplomatic Fallout: With “Intervention Brigade,” UN Raises Cost of Interference in DRC,’ *World Politics Review*, 2013.

129 See also Vincent Bernard and Mariya Nikolova, ‘Interview with Lieutenant General Babacar Gaye,’ pp. 488–489. In the end, Lieutenant Gaye preferred more robust peacekeeping, with strong regional involvement. See *idem*, p. 492.

130 A report of a high-level discussion on this topic is to be found in ‘Force Intervention Brigade: A Sea Change for UN Peace Operations?’, *Challenges Forum Policy Brief*.

131 Secretary-General Appoints High-Level Independent Panel on Peace Operations, press release of 31 October 2014, UN Doc. SG/SM/16301-SG/A/1521-PKO/451.