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The Force Intervention Brigade—United Nations Forces beyond the Fine Line Between Peacekeeping and Peace Enforcement

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Abstract

As United Nations (UN) peacekeeping evolved from interposition forces to multidimensional missions, the UN adjusted its peacekeeping principles and allowed a wider use of force. As the latest adjustment, the Security Council adopted a new mandate for UN Organization Stabilization Mission in the Democratic Republic of the Congo creating the 'Force Intervention Brigade', described as the first contingent of troops to conduct targeted offensive operations against armed groups. However, this role of the UN as an enforcement actor within a non-international armed conflict was not prepared by an assessment of the rules applicable to UN missions. These rules provide the Force Intervention Brigade with an ambiguous double status being at the same time a specially protected peacekeeping force and a party directly engaged in hostilities. As a consequence, peacekeeping missions as a whole are put at a higher risk of failing to perform their assigned mediation between the conflict parties and of themselves becoming the target of attacks. As a preliminary policy advice, I propose a clear distinction between peacekeeping and peace enforcement troops with a view to protect the peacekeeper's perceived legitimacy and to reconcile the status of peace enforcement troops with the law applicable to the conflicts they, in fact, became a party to.

Nearly 15 years after the Brahimi Report,[1] the Secretary-General announced that he is currently conducting the next substantial review of UN peacekeeping driven by new capabilities and increasing challenges faced within its areas of deployment.[2] The UN has, indeed, become ever more involved in non-international armed conflicts as UN peacekeeping evolved from interposition forces to multidimensional military and civilian missions directly providing governance

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1 Report of the Panel on UN Peace Operations (21 August 2000) UN Doc A/55/305-S/2000/809.

2 Record of the 7196th Meeting of the Security Council (11 June 2014) UN Doc S/PV.7196, 3.

services the Host State became unable to provide due to the conflict. Perhaps the most essential of these services is the provision of security to the civilian population. Especially since Rwanda and Srebrenica, the UN perceives its role as an external actor with at least the moral duty[3] to intervene and protect civilian populations from armed violence. To do so, the UN has adjusted its peacekeeping principles from neutrality to impartiality, allowed a wider use of force by its troops, and intensified its partnership with non-UN forces. As the latest stage in this development, the Security Council adopted (and extended) a new mandate for the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and created the 'Force Intervention Brigade',[4] described as the first contingent of troops to conduct targeted offensive operations against armed groups.[5] Instead of merely protecting itself and civilians from violence already emerging from the conflict parties, this Force may take the initiative and track down armed groups to prevent their expansion, disarm and ultimately neutralize them. MONUSCO, thus, becomes actively engaged in favour of one party to an ongoing armed conflict, disregarding the peacekeeping principles of party consent, impartiality and a limited use of force.

The Security Council deliberately pushed the mission beyond the fine line between peacekeeping and peace enforcement. Yet, this intensified role of the UN as an enforcement actor within a non-international armed conflict was not prepared by an assessment and adjustment of the rules and principles applicable to UN missions. However, as I will show in this article, these legal instruments do not provide a way to accommodate the double status of the Force Intervention Brigade, being at the same time a specially protected peacekeeping force and a party to an armed conflict. Moreover, the UN failed to recognize the implications that a wider use of force by elements of a recognized peacekeeping mission has on the principles of peacekeeping, thus endangering such peacekeepers and humanitarian actors, who still rely on these principles for their perceived legitimacy and protection. As a consequence, peacekeeping missions as a whole are put at a higher risk of failing to perform their assigned mediation between the conflict parties and of themselves becoming the target of retaliatory attacks.

The Security Council's rush to protect civilians from armed violence is comprehensible. It does so by making use of non-UN forces, as for example, the

[3] The Secretary-General describes the responsibility to protect civilians as 'a fundamental – and, *for parties to the conflict*, legal – responsibility' (emphasis added), Report of the Secretary-General on the protection of civilians in armed conflict (22 November 2013) UN Doc S/2013/689, para 65. The concept of the responsibility to protect will not be discussed here any further, since MONUSCO is already engaged in the protection of civilians, raising no longer the question whether the UN must intervene but rather the subsequent question of the legal framework for its operations, which is addressed in this article.

[4] SC Res 2098 (28 March 2013); SC Res 2147 (28 March 2014); SC Res 2211 (26 March 2015).

[5] SC Res 2098 (28 March 2013) para 12(b); SC Res 2147 (28 March 2014) para 4(b); SC Res 2211 (26 March 2015) para 9(e).

French troops intervening in support of the UN Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA),[6] or by reinforcing its own missions' capabilities as in the case of MONUSCO. But every deeper military involvement has legal implications. The UN recognized this for its partnership with non-UN forces and issued the Human Rights Due Diligence Policy containing the obligation for UN entities to assess their partner's compliance with international humanitarian law, human rights and refugee law.[7] The offensive use of force by troops directly forming part of a peacekeeping mission, by contrast, still lacks legal analysis. As preliminary policy advice, I propose a clear distinction between peacekeeping and peace enforcement troops with a view not only to protect the peacekeeper's perceived legitimacy, but also to reconcile the status of peace enforcement troops with the law applicable to the conflicts they, in fact, became a party to.

1. Development of the Force Intervention Brigade: A Deliberate Decision against Partnership with a Non-UN Force

The development of the Force Intervention Brigade as a new level of enforcement within a peacekeeping mission is surprising given the prospect of a regional non-UN force performing enforcement tasks in support of MONUSCO. The legal and operational consequences of the integration of that force have either been insufficiently explored or were considered to be outweighed by the advantages of a unified command structure led by the UN.

This development was presumably provoked by the threat posed by the armed group Mouvement du 23 mars (M23), which has been described as a major concern and incentive for the creation of the Force Intervention Brigade.[8] The group formed in April 2012 out of former members of another armed group, the Congrès national pour la défense du peuple (CNDP). These members were previously integrated into the armed forces (Forces armées de la Républic démocratique du Congo – FARDC) as a result of the peace agreement between the government of the Democratic Republic of the Congo (DRC) and CNDP,[9] but mutinied in April 2012, denouncing their conditions within the armed forces

[6] See for an analysis J Labbé and A Boutellis, 'Peace Operations by Proxy: Implications for Humanitarian Action of UN Peacekeeping Partnerships with Non-UN Security Forces' (2014) 95 Intl Rev Red Cross 539.

[7] Human rights due diligence policy on UN support to non-UN security forces (5 March 2013) UN Doc A/67/775-S/2013/110, Annex; see H Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2015) 20 JCSL 61.

[8] SC Res 2098 (28 March 2013) preamble and paras 7, 8.

[9] Peace Agreement Between the Government and the Congrès National pour la Défense du Peuple, Goma, 23 March 2009, arts 1.1(a) and 12.8 <http://peacemaker.un.org/drc-peace-agreement-cndp2009> accessed 28 April 2015.

and the government's insufficient commitment to the peace agreement.[10] This was followed by a serious deterioration of the security situation in the eastern DRC as M23 occupied parts of North Kivu, attacked the civilian population and caused 320 000 internally displaced persons and refugees.[11]

At the same time, the idea of a special force evolved in the International Conference of the Great Lakes Region (ICGLR), a regional organization with 12 Member States and the aim to promote peace and development in the region. ICGLR directed its own structures to work with the AU und the UN for an immediate establishment of a neutral International Force to 'eradicate existing armed groups'.[12] Despite their strong political will, the ability of the region's states to set up such a force was met with scepticism by outside observers.[13] The main concerns related to anticipated difficulties in finding states willing to contribute troops for counterinsurgency operations in the jungles of eastern DRC, their financing and a realistic timeframe for their deployment. Nevertheless, ICGLR received pledges by Tanzania, South Africa and the Southern African Development Community (SADC) to provide resources, troops and a Force Commander for this proposed 'Neutral International Force'.[14]

On 20 November 2012, the Security Council in Resolution 2076 expressed its deep concern regarding the security and humanitarian crisis in eastern DRC and requested the Secretary-General to report on options to improve MONUSCO.[15] The Resolution made reference to another regional mission, the Expanded Joint Verification Mechanism established by the ICGLR to control the border between Rwanda and the DRC, but not to the idea of a Neutral International Force.[16] As part of his proposals to improve MONUSCO, the Secretary-General

[10] Report of the Secretary-General on the UN Organization Stabilization Mission in the Democratic Republic of the Congo (23 May 2012) UN Doc S/2012/355, para 17.

[11] SC Presidential Statement 22 (19 October 2012) UN Doc S/PRST/2012/22, 1.

[12] Declaration of the Heads of State and Government of the Member States of the ICGLR at the Fourth Ordinary Summit and Special Session on Sexual and Gender Based Violence, Kampala (15–16 December 2011) para 1; Declaration of the Heads of State and Government of the Member States of the ICGLR on the Security Situation in Eastern DRC—Extraordinary Summit, Addis Ababa (15 July 2012) preamble and para 4.

[13] See for example, J Stearns, 'Resolving the Kivu Crisis: Beyond Khartoum and Kampala?' (*Congo Siasa*, 5 August 2012) <http://congosiasa.blogspot.de/2012/08/resoliving-kivus-crisis-beyond-khartoum.html> accessed 12 February 2015; International Peace Institute '*The UN Intervention Brigade in the Democratic Republic of the Congo*' (Issue Brief, July 2013) 5.

[14] Declaration of the Heads of State and Government of the Member States of the International Conference of the Great Lakes Region on the Security Situation in Eastern DRC – 5th Extraordinary Summit, Kampala (24 November 2012) paras 10–12.

[15] SC Res 2076 (20 November 2012) preamble and para 9.

[16] ibid para 6; although the Security Council already took note of the ongoing efforts within the ICGLR and the AU regarding the deployment of such a Neutral International Force in a Presidential Statement one month earlier, SC Presidential Statement 22 (19 October 2012) UN Doc S/PRST/2012/22, 2.

informed the Security Council that he has sent the UN Military Adviser to meet the Chairs of SADC and ICGLR to convene on the harmonization of these regional and UN initiatives as well as on the possibility of 'incorporating the troops earmarked for the regional Neutral International Force under the mandate and authorized strength of MONUSCO'.[17] As the Security Council considered the following report of the Secretary General on MONUSCO, both the Head of the mission and the representative of the DRC expressed the necessity to deploy an additional military force with peace enforcement capabilities.[18] Just two months later, on 28 March 2013, the Security Council adopted Resolution 2098, extending the mandate of MONUSCO until 31 March 2014 and creating the Intervention Brigade.

The UN thus had the option of conducting its operations in the DRC in partnership with a regional organization leaving enforcement tasks to non-UN forces, as it did, for example, in MINUSMA. But it deliberately decided against this division of labour and instead integrated these forces into its own peacekeeping mission. The corresponding resolution was adopted unanimously but faced considerable criticism by some Member States within the Security Council concerning the legal implications of the new force.[19]

2. A Force Beyond the Fine Line Between Peacekeeping and Peace Enforcement

At first glance, this integration into MONUSCO suggests a force within the framework of peacekeeping, guided and limited in its actions by the peacekeeping principles, which the Security Council explicitly mentioned in the mandate.[20] These principles gradually developed to allow an extensive range of tasks. Yet, they also point out the lasting differences between peacekeeping and peace enforcement. As a consequence, the Brigade's mandate cannot be considered a peacekeeping mandate and should not be treated as such.

The concept of UN peacekeeping comprises two defining features: from an organizational perspective, these missions form subsidiary organs of the Security Council according to Article 29 UN Charter and fall under its command and control.[21] These missions can usually be distinguished from typical military

[17] Letter dated 27 December 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2013/42.

[18] SC Verbatim Record (22 February 2013) UN Doc S/PV.6925, 4 and 7.

[19] See especially the statements made by the representatives of Guatemala, Argentina and Pakistan following the adoption of Resolution 2098, SC Verbatim Record (28 March 2013) UN Doc S/PV.6943.

[20] SC Res 2098 (28 March 2013) preamble; SC Res 2147 (28 March 2014) preamble; SC Res 2211 (26 March 2015) preamble.

[21] M Bothe, 'Peacekeeping Forces' para 27, in Max Planck Encyclopedia of Public International Law, April 2011; in the single case in which the General Assembly created a peacekeeping mission (UNEF I), it became the Assembly's subsidiary organ according to Art 22 UN Charter; see also Report of the Secretary-General,

enforcement by states acting under their own command and responsibility, with the Security Council merely providing an authorizing mandate under Chapter VII of the UN Charter.[22]

The second defining feature of peacekeeping is the 'trinity' of principles under which these missions operate, namely party consent, impartiality and non-use of force, except in self-defence and defence of the mandate. These principles still allow a clear distinction between peacekeeping and enforcement action as modes of operation. Accordingly, former Secretary-General Boutros-Ghali described in the context of the UN missions in Somalia (UNOSOM I and II): 'Peacekeeping, in contrast with peace enforcement, is not intended to achieve its objectives through the use of force. When peacekeepers are deployed, they make every effort, by peaceful persuasion, to stop the fighting between warring parties or to carry out other aspects of their mandates; they do not force belligerents to cease their hostilities.'[23]

The Security Council has constantly reaffirmed these principles, but their content has gradually changed.

A. Incomplete Party Consent

The consent of the affected parties finds its importance as a legal and as a strategic basis of a peacekeeping operation. According to Article 2(7) UN Charter, the deployment of UN troops on the territory of the Host State is prohibited, unless the operation is vested with a mandate from the Security Council under Chapter VII of the UN Charter.[24] The Host State's consent, however, precludes the wrongfulness of this intervention regardless of such a mandate. But the idea behind the requirement of consent by the affected parties actually goes beyond this legal effect. The principle of consent must be regarded in conjunction with the principles of impartiality and non-use of force. The peacekeeper's traditional aim of separating the warring parties was not to be achieved by overwhelming force but by the parties' willingness to make concessions as long as the adverse party does likewise and a third party, the UN, dutifully observes and reports. Thus, at least within the traditional concept, the peacekeeping mission needs the ongoing acceptance and respect of the parties to execute its functions. In this regard, the relevance of consent by all

Draft model agreement between the UN and Member States contributing personnel and equipment to the UN peacekeeping operations (23 May 1991) UN Doc A/46/185, Annex, para 4.

[22] UN Department of Peacekeeping Operations, Peacekeeping Best Practices Unit, *Handbook on UN Multidimensional Peacekeeping Operations* (2003) 56.

[23] Boutros-Ghali, Introduction, in United Nations, *The United Nations and Somalia 1992-1996* (1996) 24, also cited in T Findlay, *The Use of Force in UN Peace Operations* (OUP 2002) 143–44.

[24] A Orakhelashvili, 'The Legal Basis of United Nations Peace-keeping Operations' (2003) 43 Virginia J Intl L 485, 497, 519.

affected parties does not change when peacekeeping forces are deployed into non-international armed conflicts, although it is debatable whether there is also a *legal* requirement to seek non-state actors' consent for a peacekeeping mission.[25] Yet, as MONUSCO is mandated under Chapter VII of the UN Charter, neither party's consent is required from a legal perspective.

In practice, the ideal conception of consent has often taken the form of 'coerced consent',[26] meaning that at least one of the parties to the conflict was pushed into accepting the presence of these troops. Then again, agreements in the context of an armed conflict necessarily convey a certain degree of coercion. In the case of MONUC/MONUSCO, the parties repeatedly expressed their consent in agreements to cease hostilities or end the conflict. The deployment of MONUC was explicitly called for in the Lusaka Agreement of 10 July 1999 between the DRC, five of its neighbours and several armed groups.[27] A renewal of the DRC's and its neighbours' consent might be seen in the Peace, Security and Cooperation Framework (PSC Framework) of 24 February 2013, which reiterated that MONUSCO 'shall be part of the solution',[28] and to which the Security Council made several references in Resolutions 2098, 2147 and 2211. Armed groups, however, did not sign the PSC Framework. Would MONUSCO, or for that part the Intervention Brigade, still constitute a traditional peacekeeping mission, consent should have been sought from all the conflict parties directly affected by its new mandate, ie those armed groups explicitly mentioned in Resolutions 2098 (M23, FDLR, APCLS, ADF, Mayi-Mayi Gedeon, Mayi-Mayi Kata-katanga and LRA), 2147 (FDLR, ADF, LRA, Bakata-Katanga and Mayi-Mayi groups) and 2211 (FDLR, ADF, LRA and 'all other armed groups'). Of course, such consent would have been highly improbable given the Force Intervention Brigade's mandate.

The distinction between defending a peacekeeping mandate and operating under an enforcement mandate can, therefore, be made along the parties' ongoing acceptance on the strategic level of the presence and operation of the UN mission. In the case of the Force Intervention Brigade, the UN has not even sought such acceptance by armed groups involved in the conflict and created a mandate, which inherently lacks the chance to gain their consent and can only be achieved by enforcement.

B. Partial Mandate in Favour of the State

The notion of impartiality was already expressed in connection with the first UN Emergency Force (UNEF I) in 1957, when the Secretary-General declared that

[25] ibid 521.
[26] Findlay (n 23) 17.
[27] Lusaka Ceasefire Agreement, Art III(11) and Annex A, ch 8, Lusaka (10 July 1999) UN Doc S/1999/815.
[28] Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the region, Art 11, Addis Ababa (24 February 2013).

impartial use of force 'does not serve as a means to force settlement, *in the interests of one party*, of political conflicts or legal issues recognized as controversial'.[29] Yet, the Department of Peacekeeping Operations stresses that impartiality 'should not be confused with neutrality or inactivity'.[30] Hence, even before Resolution 2098 the impartial role of peacekeeping forces did not make them entirely passive and dependent on the cooperation of the parties to the conflict. Military neutrality is sometimes understood to amount to inaction even in cases involving unilateral violations of Security Council provisions.[31] Impartiality, on the contrary, requires that both parties are treated not on grounds of who they are, but in accordance with their commitment to the peace process as laid down in an agreement between the parties to the conflict or in Security Council resolutions. It is the violation of their respective obligations, which potentially triggers the use of force by the peacekeeping mission against the non-compliant party. However, allowing a peacekeeping mission such impartial behaviour towards the conflict parties requires that the mandate issued by the Security Council is not already biased against one party.

In this sense, the new MONUSCO mandate perfectly demonstrates the difference between impartial peacekeeping and one-sided peace enforcement. While MONUSCO is authorized to 'take all necessary measures' on the one hand, to protect civilians from 'violence emerging from *any* of the parties engaged in the conflict',[32] the Force Intervention Brigade shall, on the other hand, 'carry out targeted offensive operations… either unilaterally or *jointly with the FARDC*… to prevent the expansion of all *armed groups*, neutralize these groups and to disarm them in order to contribute to the objective of reducing the *threat posed by armed groups on state authority*'.[33] Military operations by the regular forces of MONUSCO are thus conditional on a certain behaviour, in which any party to the conflict—state armed forces or non-state armed groups—might engage. The additional authorization for the Force Intervention Brigade, by contrast, is biased in every aspect. It allows offensive operations explicitly and exclusively against one party (or group of parties) to the conflict, ie armed groups; it allows conducting these operations jointly with the opposing party to the conflict, ie the state armed forces; and it declares the objective of these operations to be a reduction of armed groups' threat towards state authority.

[29] Report of the Secretary-General in pursuance of General Assembly Res 1123 (XI) (24 January 1957) UN Doc A/3512, cited in Findlay (n 23) 29; emphasis added.

[30] UN Department of Peacekeeping Operations, *United Nations Peacekeeping Operations – Principles and Guidelines* (2008) 33.

[31] D Donald, 'Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century' (2002) 9 Intl Peacekeeping 21, 22; Report of the Panel on UN Peace Operations (n 1) 9.

[32] SC Res 2098 (28 March 2013) para 12 (a)(i); SC Res 2147 (28 March 2014) para 4 (a)(i); SC Res 2211 (26 March 2015) para 9(a); emphasis added.

[33] SC Res 2098 (28 March 2013) para 12(b); SC Res 2147 (28 March 2014) para 4(b); SC Res 2211 (26 March 2015) para 9(e); emphasis added.

The Security Council, therefore, already issued a one-sided mandate for the Brigade, leaving it no space to appear impartial towards the parties to the conflict.

C. Force Beyond Defence

The use of force by peacekeeping operations is generally framed as an exceptional case, committing the troops to the non-use of force except in self-defence or defence of the mandate.

While the self-defence rule was already developed during UNEF I, the notion of 'defence of the mandate' was first mentioned in the Secretary-General's report on the establishment of UNEF II in 1973, in which he suggested that UNEF II 'shall not use force except in self-defence [which] would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council'.[34] The implementation of such a mandate necessarily depends on the mission's specific duties and has often proven difficult in practice. Nevertheless, by limiting the use of force to self-defence or defence of the mandate, however, wide this is interpreted in any mission, peacekeepers are conceptually restricted to a reactive approach to the use of force.[35] Defence requires an armed attack or an imminent threat, even if it is merely evidenced by preventing peacekeepers from discharging their duties. Defence of a peacekeeping mandate, thus, was not conceived and should not be used to introduce enforcement action through the backdoor. The difference between them can be discerned even more clearly by taking party consent into account.[36] Defence operates under the assumption of consent, ie the assumption that the peacekeepers will not necessarily meet armed resistance against the discharge of their duties. Enforcement, in contrast, is by definition always against the will of its addressee. Accordingly, even if consent has not been fully attained before deployment, peacekeeping can be used if there is reasonable hope that the parties will at least acquiesce when faced with the mission. If this presumption is groundless, enforcement becomes necessary and peacekeeping inappropriate.

The allowed measure of force of the Force Intervention Brigade seems to depend on the term 'neutralize'. Resolutions 2098, 2147 and 2211 give no definition or list of operations thus authorized. As the Secretary-General proposed

[34] Report of the Secretary-General on the Implementation of Security Council resolution 340 (1973) (27 October 1973) UN Doc S/11052/Rev.1, para 4(d). Approved by SC Res 341 (27 October 1973).

[35] Described by Dag Hammarskjöld as a 'prohibition against any *initiative* to use force', First Report by the Secretary-General on the Implementation of Security Council Res S/4387 of 14 July 1960 (18 July 1960) UN Doc S/4389, 5.

[36] Comparable approach in G Oliver, 'The Other Side of Peacekeeping: Peace Enforcement and Who Should Do It?' in *International Peacekeeping: The Yearbook of International Peace Operations*, vol 8 (Brill 2002) 99, 113.

the establishment of the Force, he used the term rather ambiguously, suggesting that it could include 'effective demobilization packages as well as opportunities for social and political reintegration', but also that it will require a 'military enforcement capability'.[37] Also in the military sphere, the term seems very broad: the US Department of Defense defines 'neutralize' as 'to render ineffective or unusable' or 'incapable of interfering with a particular operation'.[38] NATO defines 'neutralize fire' as 'fire delivered to render a target temporarily ineffective or unusable'.[39] The mentioned development of the Force Intervention Brigade instead hints at a very strong approach directed at actual military defeat, as the initial Neutral International Force of the ICGLR was designed to 'eradicate' armed groups. Likewise, when UNOSOM II was mandated to 'neutralize armed elements', the Secretary-General only proposed the rules of engagement to be limited by necessity, which is already a fundamental principle for any military attack under the law of armed conflicts.[40] The further wording of the Resolutions 2098, 2147 and 2211 suggests a similar approach: the force is authorized to carry out 'targeted offensive operations' in a 'robust' manner. The aim of disarming the armed groups is mentioned separately from their neutralization, implying that the latter goes further. Finally, the task is given under the authorization to 'take all necessary measures', which is generally understood to allow the use of force within the limits of the law of armed conflict.

In conclusion, the mandate could have several meanings and seems to be deliberately vague. But it is certainly broad enough to cover the use of force beyond the traditional limits of self-defence and defence of the mandate. The Brigade is in this sense not only allowed to use force, if it is itself the target of an armed attack by one of the conflict parties or if civilians located in its protected areas are such a target,[41] but also to actively track down and fight armed groups.

D. Classification as Enforcement Action

The Security Council explicitly created the Intervention Brigade as part of MONUSCO, ie as part of its peacekeeping mission in the DRC.[42] It is also

[37] Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region (27 February 2013) UN Doc S/2013/119, paras 51, 52.

[38] Department of Defense, Joint Publication 1-02, DOD Dictionary of Military and Associated Terms, as amended through 15 March 2014 <http://www.dtic.mil/doctrine/dod_dictionary/> accessed 13 February 2015.

[39] NATO Standardization Agency, Glossary of Terms and Definitions (1 April 2008) pt 2.

[40] Further Report of the Secretary-General submitted in pursuance of paras 18 and 19 of Res 794 (1992) (3 March 1993) UN Doc S/25354, para 88; J Sloan, 'The Use of Force in U.N. Peacekeeping: A Cycle of Boom and Bust?' (2007) 30 Hastings Intl Comp L Rev 385, 415.

[41] This competence is already provided by para 12(a) of SC Res 2098, para 4(a) of SC Res 2147 and para 9(a) of SC Res 2211.

[42] SC Res 2098 (28 March 2013) para 9.

'under direct command of the MONUSCO Force Commander' and the Secretary General is requested to review and update the mission concept, concept of operations and rules of engagement of the Intervention Brigade.[43] The Security Council, thus, decided against issuing a mandate to UN Member States or 'coalitions of the willing' to use armed force, as it can do under Chapter VII of the UN Charter, and also against authorizing enforcement by a regional organization according to Chapter VIII, despite a corresponding proposal from the ICGLR and SADC. Instead, it incorporated the Intervention Brigade under the command structure of a recognized peacekeeping force. Therefore, the Intervention Brigade clearly meets the concept of peacekeeping from an organizational perspective.

But this means nothing else than the institutional integration of the respective troops into the UN system as a component of an existing subsidiary organ (MONUSCO) of the Security Council. As the analysis has shown so far, the operating principles and substantial function of the Intervention Brigade are, however, in sharp contrast to that of most other peacekeeping forces, including MONUSCO itself.[44] Nevertheless, some controversial previous missions allow a classification of the new mandate.

To begin with, despite the constant appeal to a limited use of force, it was already mandated in a much broader sense in 1961, allowing the first UN mission on the territory of the DRC, the UN Operation in the Congo (ONUC) 'to take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel' and 'take all necessary measures to prevent the entry or return of such elements'.[45] Then Secretary-General U Thant declared the measures taken under this mandate to be acts of self-defence, an assessment at the time already criticized for exceeding the permissible use of force by peacekeeping forces.[46] Similarly, UNOSOM II had been mandated to 'neutralize armed elements that attack, or threaten to attack, [installations or equipment of the United Nations and its agencies, ICRC as well as NGOs] and personnel'.[47] It was also allowed to 'take appropriate action against any faction that violates or threatens to violate the cessation of hostilities'.[48] Less than three months later, its mandate was reaffirmed and extended to allow the neutralization of 'radio broadcasting systems that contribute to the violence

[43] ibid paras 9, 33.

[44] For the difference between institutional and substantial aspects of a peacekeeping mandate, see eg Orakhelashvili (n 24) 503, who describes a 29 UN Charter as a mere 'institutional or procedural background for the establishment of peace-keeping operations' and as 'insufficient to explain the legal basis for a peace-keeping operation, as the justification for a peace-keeping operation transcends questions of procedure'.

[45] SC Res S/5002 (24 November 1961) paras 4, 5; see Findlay (n 23) 77.

[46] Findlay (n 23) 79.

[47] SC Res 814 (26 March 1993) para 5 with reference to Further Report of the Secretary-General Submitted in Pursuance of paragraphs 18 and 19 of Res 794 (1992) (3 March 1993) UN Doc S/25354, para 57 (f).

[48] ibid, para 57 (b).

and attacks directed against UNOSOM II' and to take all necessary measures against violators of the cease-fire and 'against those responsible for publicly inciting such attacks' and, most remarkably, 'to establish the effective authority of UNOSOM II throughout Somalia'.[49] Accordingly, the use of force was mandated beyond defence in Somalia. Prior attacks and cease-fire violations still served as the reason for military action, but not as its limit, since it did not require a certain attack or imminent threat anymore. In this manner, it was a peace enforcement mandate that the Security Council issued, as it expected UNOSOM II already from the outset to achieve its objectives through the use of force.

In some cases, mandates were explicitly directed against one party to the conflict. Thus, UNOSOM II arguably received a partial mandate, when it was directed against 'radio broadcasting systems' and 'those responsible for publicly inciting [attacks on UNOSOM II]'. Even more apparent, in Resolution 1313 the Security Council named RUF as the party against which its mission in Sierra Leone (UNAMSIL) may 'respond robustly'.[50] In such cases, the mandates already included partial language and could not leave any room for the mission to act and appear impartial on the ground.

To accommodate the broadening mandates of peacekeeping forces regarding the use of force, the UN began labelling these operations as 'complex' or 'robust' peacekeeping.[51] These labels avoid the term 'enforcement' but they fail to explain how such offensive mandates could be considered impartial or how they could be considered to fall under the inherently reactive concept of defence—exactly the peacekeeping principles, which have been reaffirmed by the Security Council in its resolutions establishing and extending the mandate of the Force Intervention Brigade.[52]

The Force Intervention Brigade is set apart from UN peacekeeping missions by its lack of prior consent by the affected parties, its use of force beyond even the vague concept of defence of the mandate, and its use of force primarily or only against one faction (several armed groups). Moreover, the Security Council expressly derogated from all these principles without couching the target of its action in terms of 'the violators of the cease-fire' or the purpose of its force in terms of 'the establishment of a secure environment'. Instead it named armed groups as those responsible for the current crisis and allowed their neutralization. In this way, the Security Council deliberately differed from peacekeeping principles and apparently felt compelled to expound its view that this were 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping'.[53] However, to prevent any such prejudice, the Force Intervention Brigade should have been created as a distinct operation

[49] SC Res 837 (6 June 1993) paras 3, 5.
[50] SC Res 1313 (4 August 2000) para 3(b).
[51] See for example, Report of the Panel on UN Peace Operations (n 1) xi.
[52] SC Res 2098 (28 March 2013) preamble; SC Res 2147 (28 March 2014) preamble; SC Res 2211 (26 March 2015) preamble.
[53] SC Res 2098 (28 March 2013) para 9.

and outside the realm of peacekeeping as either a new kind of UN enforcement mission; an operation under the command and control of one or several states with a Security Council mandate under Chapter VII of the UN Charter; or as a regional enforcement mission under Chapter VIII, as ICGLR and SADC had proposed. Otherwise, the ongoing disregard for the peacekeeping principles has implications within the law applicable to UN forces and on the perception of MONUSCO in its area of operation.

3. Legal Consequences of the Peace Enforcement Mandate

The lack of distinction between peacekeeping and enforcement on the conceptual level and on the ground—troops under the Force Intervention Brigade wear the same blue helmets and drive the same white painted vehicles as those from traditional peacekeeping operations—is highly relevant in the law of armed conflicts and international criminal law, as it provides the Force with the double status of combatants and of protected persons.

A. Combatant Status under the Law of Armed Conflicts

The Security Council apparently provided for a broader application of the law of armed conflicts than in other peacekeeping missions. To accommodate the so-far limited situations of peacekeeping forces acting as combatants, the Secretary General issued a Bulletin on Observance by UN forces of international humanitarian law.[54] Section 1.1 of this Bulletin renders certain rules of the law of armed conflicts applicable 'when in situations of armed conflict [UN forces] are actively engaged therein as combatants, to the extent and for the duration of their engagement', which is subsequently described in the second sentence as 'in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence'. If this section would be applied word-by-word, every peacekeeping mission of the last decades would fall under the scope of the Bulletin, as the right to use force in self-defence is a fundamental principle of peacekeeping itself.[55] Section 1.2, however, safeguards non-combatant status 'as long as [members of peacekeeping operations] are entitled to the protection given to civilians under the international law of armed conflict'. Such protection is lost according to Article 51(3) AP I 'for such time as they [civilians] take a direct part in hostilities'.[56] Thus, while the second sentence of Section 1A suggests applicability according to the mandate given by the Security Council, the

[54] Secretary-General's Bulletin, Observance by UN forces of international humanitarian law (6 August 1999) UN Doc ST/SGB/1999/13.

[55] See § 2 C.

[56] Protocol Additional to the Geneva Conventions of 2 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 8 June 1977, UNTS Vol 1125, No I-17512.

first sentence ('*actively* engaged') and section 1.2 draw on the actual engagement of forces on the ground. This is further complicated by reference in section 1.2 to the Convention on the Safety of UN and Associated Personnel from 1994 (Safety Convention), which has its own application requirements in its Articles 1 and 2.[57] Commentators have criticized these conditions for their ambiguity and that they only lead to the application of a certain set of rules and not of the law of armed conflicts in its entirety.[58] The UN held for a long time that it is unable to fulfil some of the obligations of this body of law, as they require judicial and administrative powers which it does not possess.[59] Yet, according to the Security Council resolutions the Force Intervention Brigade is required to carry out its operations 'in strict compliance with ... international humanitarian law'.[60] The Security Council thereby abstained from any reference to the Bulletin or to rather uncertain principles of humanitarian law but seemingly declared the whole area of law applicable. This is another indication that the Council itself considered the authorization of the Force Intervention Brigade to go beyond that of previous missions under UN command and control. But above all, it confirms that forces under the Intervention Brigade are, in the wording of the Bulletin, 'actively engaged as combatants'. Similarly, Article 43 AP I defines combatants as members of the armed forces of a party to a conflict. The Force Intervention Brigade renders the UN a party to the conflict or as fighting in favour of such a party because of its offensive and partial mandate to carry out offensive operations unilaterally or jointly with the FARDC against armed groups.[61] Consequently, the Force Intervention Brigade should be treated as combatants under the law of armed conflicts. Nevertheless, its integration in MONUSCO runs afoul of this assessment.

B. Protected Status and Criminalization under the Safety Convention and the ICC Statute

Peacekeepers are usually assigned a special protected status in armed conflicts. This status derives from treaties specifically concerned with their status and from

[57] UNTS Vol 2051, No 35457.

[58] See for example, O Engdahl, *Protection of Personnel in Peace Operations* (Nijhoff 2007), 101; O Thielen, *Le recours à la force dans les opérations de maintien de la paix contemporaines* (LGDJ 2013), 108 and fn 23, 127; M Zwanenburg, 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory?' (2000) 39 Military L L War Rev, 13, 15, 21.

[59] UN Office of Legal Affairs, 'Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims' in *UN Juridical Yearbook* (New York 1972) 153.

[60] SC Res 2098 (28 March 2013) para 12(b); SC Res 2147 (28 March 2014) para 4(b); SC Res 2211 (26 March 2015) para 9(e).

[61] According to T Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 Intl Rev Red Cross 561, 593 there is a presumption that UN forces are considered a party to the armed conflict, when UN forces are drawn into hostilities reaching the threshold of armed conflict.

the law of armed conflicts in general. The first specific treaty in this regard is the Convention on the Privileges and Immunities of the UN from 1946,[62] which in Articles V, VI and VII accords certain privileges and immunities to UN officials and experts on mission for the UN. The most pertinent treaty concerned with the safety of UN personnel, though, is the Safety Convention, which in its Article 7(1) provides that UN and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate. Additionally, the UN sometimes concludes special Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs) with the Host State of the mission. To provide a basis for their drafting, the Secretary-General prepared a Model SOFA,[63] although the majority of subsequent agreements did not follow the structure of this Model.[64] The UN concluded a SOMA with the DRC in 2000 (MONUC-SOMA),[65] which was amended by a protocol in 2006 (Protocol).[66]

(i) Applicability of the Safety Convention

The main requirements for the application of the Safety Convention can be found in its Article 2, according to which it applies to operations as defined in its Article 1(c), ie an operation 'established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control' and 'for the purpose of maintaining or restoring international peace and security'. MONUSCO has been established by the Security Council to address the threat to international peace and security posed by the situation in the DRC and acts under the command and control of the Special Representative of the Secretary-General. Yet, the Convention does not apply to an operation 'authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict

[62] UNTS Vol 1, No. 4.

[63] Secretary-General, Model status of forces agreement for peace-keeping operations (9 October 1990) UN Doc A/45/594, Annex.

[64] UN Peacekeeping Law Reform Project, School of Law, University of Essex, *UN Peacekeeping and the Model Status of Forces Agreement* (2010) Annex 1.

[65] Agreement between the UN and the Democratic Republic of the Congo on the status of the UN Mission in the Democratic Republic of the Congo, Kinshasa (4 May 2000) UNTS Vol 2106, I-36644 (MONUC-SOMA). Although this SOMA was concluded in relation to MONUC, it remains in force until the departure of the final element of MONUC, para 63 MONUC–SOMA. Since SC Res 1925 (28 May 2010) para 1 merely changed the title of the mission from MONUC to MONUSCO, this SOMA is still in force.

[66] Protocol amending the Agreement between the UN and the Democratic Republic of the Congo on the status of the UN Mission in the Democratic Republic of the Congo, Kinshasa (6 June 2006) UNTS Vol 2375, A-36644.

applies'. The paragraph at least excludes protection under the Safety Convention for the so-called 'coalitions of the willing' authorized by a mandate from the Security Council to 'use all necessary means' to achieve certain goals by the use of force. But such coalitions are already excluded by the requirement of UN authority and control found in Article 1(c), as such operations are usually conducted under the control of a lead nation or regional organization. Thus, the idea behind this paragraph is to exclude operations under UN command and control that engage in enforcement action in a way that their members must be described as combatants.

The Force Intervention Brigade appears to meet these requirements. Both the Secretary-General's Bulletin and the Security Council mandate declare international humanitarian law applicable to the Force Intervention Brigade. Furthermore, the mandate renders the Force a party to the conflict and its members' combatants within the meaning of Article 43 AP I as it can unilaterally conduct operations against armed groups. The Force is also under the command and control of the MONUSCO Force Commander. It thus seems to meet the conditions of Article 2(2) Safety Convention, rendering the Convention and its protection regime inapplicable. And that would appear quite reasonable, as its members should not be regarded as protected persons and combatants at the same time. In addition, though, this provision does not allow for an individual assessment of single units but excludes 'a United Nations operation… in which any of the personnel are engaged as combatants'. This would exclude every unit of the Mission from the special protection once the Force is considered a combatant force to which the law of international armed conflict applies.[67] While this would again seem quite consistent with the lack of visual distinction between the different troops, it would also constitute a significant recess in the protection of such peacekeeping units that are not even mandated to engage in offensive military operations.[68]

Nevertheless, the Protocol amending the MONUC-SOMA explicitly requires the protection regime of the Safety Convention to be applied in respect of MONUC/MONUSCO. Attacks against its personnel, including those engaging as combatants, are therefore prohibited under Article 7(1) and considered a crime under Article 9 Safety Convention.[69] The troops under the Force

[67] D Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations' (2013) 95 Intl Rev Red Cross 613, 625.

[68] According to SC Res 2098 (28 March 2013) para 12(b), only the Force Intervention Brigade may carry out targeted offensive operations against armed groups. In its most recent extension of the mandate, the Security Council inserted in the Brigade's mandate, that it shall carry out its targeted offensive operations 'in cooperation with the whole of MONUSCO', thus further blurring the distinction between the peacekeeping and peace enforcement elements of its mission, SC Res 2211 (26 March 2015) para 9(e).

[69] According to Ferraro (n 61) 598, some delegates during the drafting of the Safety Convention 'clearly stated that, when UN forces were involved in a [non-international armed conflict], the 1994 Safety Convention continued to apply and the forces in question continued to enjoy the protection provided by that instrument'; K

Intervention Brigade do thus, indeed, hold a double status of combatants and of protected persons.

(ii) Ambiguity in international criminalization

This applicability of Article 7(1) Safety Convention appears to be in line with the (lack of) rights of non-state armed groups under the law of non-international armed conflicts. This body of law does not grant a combatant privilege in the sense of regular combatants having the right to participate in hostilities without having to fear criminal prosecution on the national level for taking up arms. Article 6(5) AP II only requires that amnesties shall be endeavoured. Members of armed groups might, therefore, be prosecuted on the national level without having committed actual war crimes. By contrast, the criminalization on the international level in Article 9 Safety Convention is in clear conflict with the system of war crimes under Article 8 ICC Statute.[70] Within this system, attacks on peacekeepers are not considered a war crime unless the targeted peacekeepers are entitled to the protection given to civilians (Article 8(2)(e)(iii) ICC Statute) or if they are combatants who have laid down their arms or are placed hors de combat (Article 8(2)(c) ICC Statute). Under the Safety Convention in conjunction with the Protocol even attacks against units engaged as combatants would constitute a crime. The Protocol removes any doubts in this regard by explicitly providing that 'the Government undertakes to prosecute, *without exception* and without delay persons subject to its jurisdiction who are accused of having committed … a murder, kidnapping or other attack upon the person or liberty of *any members of MONUC*'.[71]

Despite that, even the Secretary-General holds the view that the applicability of the special protective regime of the Safety Convention should not be determined by the nature of the conflict, 'but whether in any type of conflict, members of United Nations peacekeeping operations are actively engaged therein as combatants, or are otherwise entitled to the protection given to civilians under the international law of armed conflicts'.[72] The Force Intervention Brigade is, thus, mired in legal ambiguities being at the same time combatants under the law of armed conflicts and protected persons under the Safety Convention in conjunction with the Protocol. These incoherencies in the legal assessment of belligerent acts of armed groups against the Brigade will certainly not enhance the security of peacekeeping troops, as it provides no clear guidance for armed

Grenfell, 'Perspective on the Applicability and Application of International Humanitarian Law: The UN Context' (2013) 95 Int Rev Red Cross 645, 650 draws the same conclusion regarding Art 2(2) Safety Convention.

70 See also Ferraro (n 61) 572.

71 Emphasis added.

72 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of UN and Associated Personnel (21 November 2000) UN Doc A/55/637, fn 3.

groups on how to behave.[73] Problems arising from the Safety Convention have recently been downplayed, as none of the Host States of peacekeeping forces is also a Member State of this Convention.[74] The Protocol amending the MONUC-SOMA, however, explicitly provides for the Safety Convention to be applied.

C. Right to Use Peacekeeping Insignia

If the usual distinction would be drawn between persons engaged in hostilities and those who are not, the question arises whether the former were still allowed to use the special signs of peacekeepers. Peacekeepers do not only use signs identifying them as UN personnel, they also wear blue helmets and drive white-painted vehicles, both of which have become the symbols of peacekeeping over time. The law of armed conflicts ascribes a legal value to UN signs, for example, in Article 37(1)(d) AP I which prohibits the feigning of protected status by the use of signs, emblems or uniforms of the UN. As already mentioned beforehand, the Force Intervention Brigade is part of the UN and thus allowed to wear respective uniforms. But the question is whether the UN uniform (or a national uniform with an added emblem of the UN) by itself conveys protected status or whether it is an additional feature like the blue helmets and white-painted vehicles. While UN troops are typically engaged in peacekeeping operations, suggesting that a UN uniform is tantamount to these operations, they have also engaged in enforcement operations and even the military forces under US command in the Korean War were allowed 'to use the United Nations flag in the course of operations against North Korean forces'.[75] Although this use of UN insignia for a 'coalition of the willing' was an exception, operations under UN command with an enforcement component bore UN signs despite their non-compliance with peacekeeping principles. This casts doubt on the protective effect of the UN uniform as such and advises a distinction between the uniform and additional features.

Accordingly, the idea to distinguish between the UN emblem on the one hand and blue helmets and white-painted vehicles on the other, had already been suggested by the UN itself. With Resolution 998 the Security Council established the Rapid Reaction Force within the UN Protection Force (UNPROFOR), which operated 'under the United Nations flag and insignia but without blue helmets and without painting its vehicles white'.[76] Thus, opposing forces could differentiate between actual peacekeepers and other forces that

[73] See for the same conclusion Thielen (n 58) 129.
[74] Ferraro (n 61) 571.
[75] SC Res 84 (7 July 1950) para 5.
[76] SC Res 998 (16 June 1995) paras 9, 11 with reference to Letter dated 9 June 1995 from the Secretary-General addressed to the President of the Security Council, Annex: Proposed rapid reaction force for the UN Protection Force (9 June 1995) UN Doc S/1995/470, (f).

were meant to engage in more offensive military operations.[77] The concept of protected persons does not only assign a special status to certain groups of persons, but it also ensures its effective implementation by requiring these persons to distinguish themselves by certain signs and by penalizing the abuse of such signs by persons not provided with the respective status. Accordingly, troops of a peacekeeping mission that engage in enforcement operations and, therefore, might have lost their protection should be prohibited from bearing peacekeeping insignia.

On the contrary, it is questionable whether this necessarily leads to a second conclusion, namely that troops under the Brigade act in violation of the prohibition of perfidy. In fact, Article 37(1)(d) AP I is applicable to the military components of MONUSCO as the UN declared to perform its mandate in full respect of the law of armed conflict, including AP I.[78] The first difficulty lies within the prohibition being directed against the killing, injuring or capturing of the adversary. If the Brigade performed its mandate of 'neutralizing' armed groups by merely disarming them and/or destroying their materiel, it would not breach the prohibition. Moreover, it requires the intent to betray, which presupposes that the troops understand the difference between peacekeeping insignia, which provide protected status and a simple UN emblem on their uniform, which might not. But these issues show that there is a great need for the Secretary-General to establish clarity on the protected or combatant status of the Force.[79]

I propose that actual peacekeepers should indeed be separated and protected, first of all, simply because they are not mandated to perform offensive operations. Yet, perhaps even more significantly, this could also enhance the overall respect of armed groups for the law of armed conflicts. A frequently advanced reason for their disrespect for this area of law is that it does not provide them with any way to legally engage in hostilities with armed forces while sparing civilians. Thus, it is argued, they have no legal incentive to not attack civilians and particularly protected persons, as their behaviour will be judged as illegal in any case.[80] In the same way, assigning every peacekeeper—including those

[77] Although the Rapid Reaction Force in the end operated under the same rules of engagement as the other military components of UNPROFOR, ibid; see on the division within the international community regarding the tasks and competences of the Rapid Reaction Force: C Gray, 'Host-State Consent and United Nations Peacekeeping in Yugoslavia' (1996) 7 Duke J Comp Intl L 241, 263.

[78] See § 6 MONUC–SOMA and SC Res 2098 (28 March 2013) para 12(b).

[79] The Security Council requested the Secretary-General to update *inter alia* the concept of operations and rules of engagement to reflect the tasks of the Intervention Brigade, SC Res 2098 (28 March 2013) para 33. As the Secretary-General explicitly referred to the Force Intervention Brigade in his announcement of his new review of peacekeeping (see SC Verbatim Record (11 June 2014) UN Doc S/PV.7196, 3), it will hopefully include an assessment of the law applicable to enforcement components within peacekeeping missions.

[80] See for example, O Bangerter, 'Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not' (2011) 93 Int Rev Red Cross 353, 377; C

engaged as combatants—a special protected status could further reduce the respect for the law and confirm members of armed groups in their opinion that they have no advantage in making a distinction between different groups of persons and objects of attack.

4. Confounded Tasks of Coercion and Negotiation

As the literature on compliance in non-international armed conflicts is increasingly becoming aware of, it requires a set of coercive and non-coercive measures to induce compliance in armed groups with the law of armed conflicts.[81]

Accordingly, in several cases before MONUSCO and also during MONUSCO itself, some parties to the conflicts displayed such disrespect for traditional peacekeeping tasks and the peacekeepers, that enforcement action appeared to be essential for the UN to ensure the protection to civilians and aid workers. Military force proved to be necessary and sometimes successful in deterring defying conflict parties and in fact, deterrence had been an essential strategy of armed peacekeeping from the beginning.[82] But at the same time, the UN is trying to 'achieve an enduring political solution to conflicts'.[83] Moreover, the UN constantly recites the established peacekeeping principles, including impartiality and it has every reason to do so as the recent crisis in the DRC demonstrates: M23 fighters explained their mutiny with the government's failure to fully implement the Peace Agreement of 23 March 2009. Whether this holds true or not, it highlights the typical failure of conflict parties of having recourse to mechanisms that monitor and mediate during the conflict. As it is quite usual that one party will at some point claim that the other is not fully committed to the peace process, it needs an international mediator, who is perceived by all the parties to be impartial to observe the situation and provide ways for a peaceful settlement.

MONUSCO probably compromised this status when it engaged in military action against one of the opposing parties.[84] Up until now, the Security Council and the Secretary-General most of the time skilfully framed the limited enforcement tasks of peacekeeping missions to potentially target any party to the

Ryngaert and A Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into some Mechanisms' (2011) 16 JCSL 443, 444.

81 H Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP forthcoming).

82 See for example, Findlay (n 23) 83.

83 Record of the 7196th Meeting of the Security Council (n 2) 4. The Security Council described the efforts by UN-bodies in the DRC in support of a political solution as being 'in line with a comprehensive strategy for durable peace and security', SC Presidential Statement 17 (14 November 2013) UN Doc S/PRST/2013/17.

84 See on this risk UN, *Specialized Training Materials Infantry Battalion – MONUSCO Training Module* (2013) 6; see for the same conclusion with regard to UNOSOM II: Findlay (n 23) 205, and with regard to UNPROFOR: Findlay (n 23) 266.

conflict, which does not abide by its settlement agreement or Security Council resolution or which endangers civilians. Thus, while broadening the peacekeepers' right to use force, it still adhered to impartiality as it treated all the parties only on grounds of their commitment to the agreement or resolution. In this sense, resolution 2098 includes in paragraph 12 a respective mandate 'to take all necessary measures' to protect civilians from 'violence emerging from *any* of the parties engaged in the conflict'.[85] However, it also comprises the task to neutralize armed groups. These parties to the conflict are thus no longer treated according to their behaviour towards civilians, but are rather the target of enforcement because of who they are. Even though in most cases it might benefit the security situation in the short term when armed groups are prevented by coercive measures from using force, such an approach disregards the fact that non-international armed conflicts are not only clashes of military force but also of political or cultural ideas and conflicting views on the distribution of power. These root causes will not be addressed by the use of force but rather by negotiation, which often seems to require an outside facilitator who is respected by both parties. As other 'robust' peacekeeping missions have shown, every use of force by those missions puts this perception at risk. With an outright military campaign against one party to the conflict, MONUSCO cannot expect to be accepted as the detached third party and to benefit from any moral authority it may have had before.[86]

It follows, that the different ways to induce compliance cannot be effectively applied by one and the same actor. The UN must at least distinguish between its impartially negotiating peacekeepers and its enforcement units to preserve the former's credibility. Depending on the circumstances, it might be preferable to outsource the enforcement component to regional organizations, as provided for in Chapter VIII of the UN Charter and as was actually offered by ICGLR and SADC in the case of the Force Intervention Brigade.

5. Conclusion—A Need for Distinction in the Law and on the Ground

The establishment of the Force Intervention Brigade certainly marks an important step in the UN's approach to internal armed conflicts. It proved effective in the fight against M23 in eastern DRC and is preparing for further operations against other armed groups. However, the security situation for MONUSCO

[85] Emphasis added.

[86] The UN Department of Peacekeeping Operations states, that 'multi-dimensional United Nations peacekeeping operations enjoy a high degree of international legitimacy and represent the collective will of the international community [which] gives them considerable leverage over the parties. This leverage can be used to build and sustain a political consensus around the peace process, promote good governance and maintain pressure on the parties to implement key institutional reforms' in *United Nations Peacekeeping Operations – Principles and Guidelines* (2008) 24.

apparently deteriorated, with armed groups threatening to retaliate against UN staff and installations in general for FARDC or MONUSCO attacks.[87] This is probably a result of the Force Intervention Brigade, which integrates military enforcement in a peacekeeping mission designed to impartially protect the civilian population and to provide its services for a negotiated settlement of the conflict. Although military coercion can be an effective measure to ensure compliance with the law of armed conflicts, different means to induce compliance should not be undertaken by one and the same actor.

The law applicable to peacekeeping forces was not intended to regulate offensive military operations by such forces against one party to the conflict. An attempt to apply the law results in an ambiguous double status of forces being combatants and protected persons at the same time. If the Safety Convention is applied to these forces, it deviates from the war crimes of Article 8 ICC Statute. If these operations were interpreted as leading to a loss of protected status, it would actually adapt the legal situation of the Force Intervention Brigade to the usual distinction between those engaged in hostilities and those who are not. However, under the current setup of the Force being integrated into MONUSCO, the whole mission would lose that status according to Article 2 Safety Convention. Therefore, to avoid any double status and still protect usual peacekeepers, a distinction must be made between peacekeeping and peace enforcement and it must translate on the ground. This would clear up the applicable law, help armed groups to comply with that law and protect the traditional peacekeepers perceived legitimacy and role as the impartial mediator in the conflict.

[87] Report of the Secretary-General on the UN Organization Stabilization Mission in the Democratic Republic of the Congo (5 March 2014) UN Doc S/2014/157, paras 68–70.