United Nations Peace Operations
CREATING SPACE FOR PEACE
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Peacekeeping is not a job for soldiers, but only a soldier can do it.¹
DAG HAMMARSKJÖLD, SECOND SECRETARY GENERAL OF THE
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I. Introduction

In 2013, a hundred and twenty countries contributed over 118,000 military, police,
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¹ Dag Hammarskjöld quoted in U.S. DEP'T OF ARMY, FIELD MANUAL 100–23 PEACE
OPERATIONS para. 1 (Dec. 30, 1994). Hammarskjöld is the only U.N. Secretary General to die in
office. Hammarskjöld died in a plane crash in 1961 on the way to negotiate a ceasefire in what is now
the Democratic Republic of the Congo.

statistics/ (follow "Partnerships" hyperlink) (last visited Sept. 11, 2014) [hereinafter Peacekeeping
Statistics]. When equipment and funds are factored in, all 193 U.N. member states support
U.N. peacekeeping efforts, but to varied degrees. Technically under Article 17 of the U.N. Charter
every member state is obligated to pay "their respective share towards peacekeeping" and does so
through "a special scale of assessments under a complex formula that Member States have estab-
(last visited Sept. 11, 2014) [hereinafter Financing Peacekeeping].
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(UN) peace operations missions around the world. Peacekeepers protected civilians, observed ceasefire compliance, monitored elections, trained military and police, cleared mines, and disarmed, demobilized, and reintegrated armed groups socially and economically into society. Peacekeepers also conducted offensive operations using attack helicopters, artillery, and surveillance drones to neutralize recalitrant warring factions.

Peace operations are a growth industry: since 2000 there has been a steady increase in the number of troops and equipment from around the world deployed as part of a U.N. peacekeeping mission. The cost of these efforts for peace totaled $US 7.83 billion in 2013 alone. Of infinitely greater significance, 106 U.N. personnel were killed in 2013 while serving on a U.N. peacekeeping mission.

Despite the number of missions, countries involved, and the cost (both financial and in human lives), not much is known about peace operations. Perhaps this is because for the First World, although peace operations are arguably how the international community endeavors to fulfill the charge of the U.N. Charter "to

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save succeeding generations from the scourge of war," those wars and associated peace operations occur in the Third World. And many U.N. peacekeepers are also from Third World countries, limiting the West, for the most part, to fund operations that, but for occasional media coverage, are out of sight and mind. This chapter seeks to alter, however slightly, the information deficit surrounding peace operations. Whether prompted by concern for the increased number of missions and what that suggests about the human condition, or concern about where and how money is being spent, today's global citizen should know something about U.N. peace operations.

II. U.N. Charter Foundation for Peace Operations

Peace operations "describe a very broad range of peace and security interventions in international conflict management." Peace operations are "crisis response and limited contingency operations conducted by a combination of military forces and non-military organizations." The personnel involved range from military units, to individual military observers, to police, to international and local civilian U.N. workers, to contractors, to volunteers and aid organizations. This chapter follows the common practice of referring to the personnel, including civilian and military, assigned to and participating in any type of U.N. peace operation as peacekeepers.

There are a variety of types of peace operations, including peacekeeping, peace enforcement, peace building, peace making, and conflict prevention. A given mission may involve only one type of peace operation, but more often a mission involves multiple types, sometime occurring sequentially, sometimes in parallel. This chapter begins by explaining the U.N. Charter foundation for two types of peace operations: peacekeeping and peace enforcement. The chapter then explains the historical development of peace operations and their organizational structure. Next the chapter details some challenges in peace operations,

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7 Terms such as "First World" and "Third World" are defined in a variety of ways. This chapter uses "Third World" to refer to the bottom portion of the United Nations Human Development Index, which includes countries such as Pakistan, Ethiopia, Bangladesh, and Rwanda. United Nations Development Programme, Human Development Index and Its Components, https://data.un.org/dataset/Table-1-Human-Development-Index-and-its-components/wxub-q5sk (last visited Sept. 11, 2014) [hereinafter Human Development Index]. These same countries represent four of the top five troop-contributing countries to U.N. peacekeeping missions. Ranking of Military and Police Contributions to U.N. Operations, https://data.un.org/dataset/Table-1-Human-Development-and-its-components/wxub-q5sk (last visited Sept. 11, 2014) [hereinafter UN Troop-Contributing Countries].


9 Joint Chiefs of Staff, Joint Pub. 3-07.3 Peace Operations, VII (Oct. 17, 2007) [hereinafter Peace Operations].
including identifying the applicable law and accountability for peacekeeper misconduct. The chapter then utilizes the U.N. mission in the Democratic Republic of the Congo (DRC) as a case study to explore both how well the United Nations has implemented lessons learned and the ramifications of a peacekeeping force with a mandate to carry out offensive operations.

The international community established the United Nations on October 24, 1945, by ratifying the United Nations Charter. The United Nation's formation followed two world wars that claimed millions of lives within twenty-five years of each other. Unsuccessful efforts to ensure peace following World War I included the League of Nations, an intergovernmental organization designed to maintain world peace, and the Kellogg-Briand Pact's idealistic ban on warfare. Although the United Nation's formal establishment was not until the Charter's ratification after the conclusion of World War II, some fifty states signed the Charter in June 1945 when the war with Japan was still ongoing. In fact, China, the Soviet Union, the United Kingdom, and the United States developed the Charter the preceding summer, in 1944, roughly a year before the end of the war with Germany.

Lest their be any doubt as to the role World War I and II, and the international communities inability to prevent them, on the development of the United Nations, the Charter begins with "we the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind ...." The stated purpose of the United Nations is "to maintain international peace and security and to that end to take effective collective measures for the prevention and removal of threats .... and for the suppression of acts of aggression." The U.N. Charter vests the U.N. Security Council (UNSC) with primary responsibility for maintaining international peace and security. The Security Council issues resolutions (UNSCR), which serve as the mandate for a peace operation. These resolutions specify, often in general terms, the operations size, length, and objectives. But the United Nations has no dedicated military forces and depends on member countries to contribute troops, equipment, and funds.

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11 League of Nations Covenant, available at http://avalon.law.yale.edu/20th_century/leagcov.asp (last visited 11 Sept. 2014). In the preamble, the high contracting parties to the Covenant agreed to accept the obligation not to resort to war.

12 Under the pact, states agreed to not use war to settle "disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them." Kellogg-Briand Pact art. 11, available at http://wwwyale.edu/lawweb/avalon/imt/kbpact.htm (last visited Sept. 11, 2014).


14 Id., art. 1.

15 Almost by definition, any region where a peace operation is needed is to varying degrees chaotic and confusing. As a result the UNSC resolutions authorizing a peace operation are generally not able to specify size of the force, objectives, and expected length. For example, in 1962 the UNSC issued a resolution authorizing a peacekeeping mission in Cyprus. The resolution left the composition and size of the force to the Secretary-General and stated that the objective of the force should be "in the interest of preserving international peace and security, to use its best efforts to prevent a recurrence of fighting and, as necessary, to contribute to the maintenance and restoration of law
Interestingly the U.N. Charter does not contain a single reference to any type of peace operations. Instead, the Charter authority for peace operations is inferred from Chapter VI for peacekeeping and Chapter VII for peace enforcement. The confusing results include peace operations that may be based on one or the other chapter without referring to either, and peace operations’ mandates with aspects of both and the resulting concept of a “Chapter VI and a half” mission. One reason for the lack of clarity in many UNSCR is that the resolutions are the result of a bureaucratic and highly politicized process. The proponents of a resolution lobby for not only what they feel is appropriate language, but language for which there can be sufficient agreement that the resolution passes. Accordingly, strategic ambiguity sometimes plays a role in why UNSCRs often lack explicit reference to Chapter VI or VII.

A. CHAPTER VI AND PEACEKEEPING

Chapter VI of the Charter deals with pacific settlement of disputes and is associated with peacekeeping missions. Chapter VI requires that the parties to a dispute “[s]hall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” Where the parties have determined a peaceful means, a U.N. peacekeeping mission may then

and order and a return to normal conditions.” Finally, the UNSC recommended that “the stationing of the Force shall be for a period of three months.” S.C. Res. 186, 6, U.N. Doc. S/RES/186 (Mar. 4, 1964). As of this writing in 2015, the recommended three-month-long U.N. mission in Cyprus established in 1964 remains ongoing.

For an example of a traditional Chapter VI mission that was not clearly stated as such for some time, consider the United Nations Mission for the Referendum in Western Sahara (MINURSO). The UNSC established MINURSO in 1991, “under its authority” while never specifying the authority. S.C. Res. 690, 4, U.N. Doc. S/RES/690 (Apr. 29, 1991). The role and mission of MINURSO in monitoring a ceasefire and with the consent of the former warring factions is very much aligned with Chapter VI. Yet it was not until 2003 that the UNSC issued a MINURSO resolution that clearly stated that it was “[a]cting under Chapter VI of the Charter of the United Nations.” S.C. Res. 1495, preamble, U.N. Doc. S/RES/1495 (July 31, 2003). Although there have been any number of peace operations thought of as “Chapter VI” missions, it is rare for a UNSCR to identify Chapter VI as a stated basis of authority. Examples of a Chapter VII mission are easier to find and include the most recent U.N. peacekeeping mission in the Central African Republic, MINUSCA. The UNSC establishing MINUSCA states the UNSC is “acting under Chapter VII of the Charter of the United Nations.” S.C. Res. 2149, preamble, U.N. Doc. S/RES/2149 (Apr. 10, 2014). Additionally, UNSCR 2149 authorizes MINUSCA to “take all necessary means to carry out its mandate.” Id. 529. For those resolutions, which, unlike 2149, lack a clear reference to Chapter VII, the use of “all necessary means” conveys that the mission is more properly thought of as a Chapter VII mission in which force may be more readily used other than in self-defense.

Security Council decisions on other than procedural issues require affirmative votes by nine of the fifteen members, and the absence of a veto by any of the permanent members (China, France, Russia, the United Kingdom, and the United States). The Security Council is comprised of the five permanent members and ten representatives from other U.N. member states elected for two-year. See UN Charter, supra note 10, at art. 27.

U.N. Charter, supra note 10, at art. 33.
assist in maintaining that peace. This is done through a UNSCR establishing the peacekeeping mission.\footnote{Although outside the scope of this chapter, there is a debate as to whether resolutions based on Chapter VI are legally binding. See generally Hans Köchler, The Concept of Humanitarian Intervention in the Context of Modern Power (2001) (arguing that measures adopted under Chapter VI are nonbinding); but see Rossalyn Higgins, The Advisory Opinion on Namibia:\cite{Higgins}, Which UN Resolutions Are Binding under Article 25 of the Charter?, 21 INT'L & COMP. L.Q. 270 (1972) (arguing that under Article 25 of the U.N. Charter, "[]the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Judge Higgins notes that Article 25 is not located in, and does not make any reference to, either Chapter VI or Chapter VII of the U.N. Charters, so member states are obligated to carry out the decisions of the Security Council period, regardless upon which Chapter they are acting).}

Unhelpfully, such a resolution generally does not mention Chapter VI. As the United Nations reminds, “the Security Council need not refer to a specific Chapter of the Charter when passing a resolution authorizing the deployment of a UN peacekeeping operation and has never invoked Chapter VI.”\footnote{Mandates and the Legal Basis for Peacekeeping, \url{http://www.un.org/en/peacekeeping/operations/pkmandates.shtml}, (last visited Sept. 11, 2014).} For example, in 1993 the United Nations established a U.N. observer mission to verify the ceasefire between the Republic of Georgia and forces in Abkhazia.\footnote{S.C. Res. 858, U.N. Doc. S/RES/858 (Aug. 24, 1993).} Although this is a traditional peacekeeping mission whose authority derives from Chapter VI, the resolution makes no reference to that chapter.

Peacekeeping can and does take a variety of different forms. The United Nations categorizes peacekeeping missions as:

- Observer missions, consisting of unarmed officer observers who monitor the implementation of cease-fire agreements
- Peacekeeping forces, consisting of lightly armed troops generally organized on conventional unit lines and
- Combined observer/force missions\footnote{United Nations Department of Peacekeeping Operations, United Nations Peacekeeping Training Manual, 15 (undated).}

More broadly, peacekeeping operations

Consist of military operations undertaken with the consent of all major parties to a dispute, and are designed to monitor and facilitate implementation of an agreement to support diplomatic efforts to reach a long-term political settlement. Before peacekeeping operations begin, a credible truce or ceasefire must be in effect and the parties to the dispute must consent to the operation. Peacekeeping operations take place following diplomatic negotiation and agreement among the parties to a dispute, the sponsoring organization, and the potential troop-contributing nations.\footnote{Peace Operations, supra note 9, at xi (emphasis added).} On a traditional peacekeeping mission, peacekeepers may use force only in self-defense, of themselves and designated others. Observer and peacekeeping
missions are difficult and risky endeavors performed by lightly armed U.N. personnel in relatively small numbers. The degree of difficulty and risk often depend on how much the reality on the ground corresponds with the definition of when peacekeeping operations are appropriate, notably a credible truce or cease fire and all major parties consenting to the presence and role of the United Nations. When there is not even a transitory peace to keep or consent of the parties, the United Nations turns to peace enforcement. Peace enforcement is a different kind of mission requiring different force size, equipment, and mandate.

B. CHAPTER VII AND PEACE ENFORCEMENT

Chapter VII addresses "action with respect to threats to the peace, breaches of the peace, and acts of aggression."

Chapter VII outlines the measures not involving the use of armed force, including "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." But Chapter VII also provides that if the Security Council considers those measures inadequate, the council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

As with peacekeeping, a UNSCR initiates the operation and provides the mandate and objectives. Unlike peacekeeping, the UNSCR for contemporary peace enforcement missions generally does make specific reference to the U.N. Charter Chapter upon which the mission is based. For example, the 2000 UNSCR expanding the U.N. mission in the DRC states that the United Nations was "[a]cting under Chapter VII of the Charter of the United Nations." Another indication of whether a peace operation falls under Chapter VII is language authorizing the mission to use "all necessary means or measures." That is the most robust grant of authority the UNSCR can confer, and allows a U.N. mission to use force in situations other than in self-defense.

Peace Enforcement Operations (PEO)

are generally coercive in nature and rely on the threat of or use of force; however, PEO may also be co-optive in nature, relying on the development of working relationships with locals. PEO may include the enforcement of sanctions and exclusion zones, protection of personnel conducting foreign

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24 U.N. Charter, supra note 10, at Chapter VII.
25 Id. at art. 41.
26 Id. at art. 42.
27 As challenging as interpreting contemporary UNSCR is, their historical predecessors are even more perplexing. For example, in 1950 the UNSC authorized members states to respond to North Korea's invasion of South Korea, and while finding that North Korea had breached the peace, never mentioned Chapter VII. S.C. Res. 83, U.N. Doc. S/RES/1511 (June 27, 1950).
humanitarian assistance missions, restoration of order, and forcible separation of belligerent parties or parties to a dispute. However, the impartiality with which the [peace operations] force treats all parties and the nature of its objectives separates PEO from major operations.\textsuperscript{29}

An overarching challenge surrounding peace operations is while the Chapter VI/VII dichotomy is rigid, the operating environment tends to be fluid. Missions can and do morph, peace develops and erodes, and parties change alliances and withdraw previously provided consent. When the United Nations has encountered difficulties in peace operations, more often than not, the problems stem from either misidentifying a peace enforcement mission as peacekeeping or failing to timely alter a mission that was at the outset peacekeeping but that has eroded to peace enforcement. As the history of U.N. peace operations demonstrates, there is nothing more damaging to the United Nation’s credibility or dangerous to the lives of peacekeepers and civilians alike than calling and resourcing a peace enforcement mission as a peacekeeping operation.\textsuperscript{30}

III. Historical Development of Peace Operations

The United Nation’s first experience with peace operations came in 1948 with the United Nations Truce Supervision Organization (UNTSO), an unarmed observer mission initially established in order to supervise a truce between Israel and several Arab countries, and that subsequently supported the implementation of an armistice.\textsuperscript{31}

The first armed U.N. peacekeeping force was the United Nations Emergency Force (UNEF), established in 1956 by the first emergency session of the U.N. General Assembly to “secure and supervise the cessation of hostilities, including the withdrawal of the armed forces of France, Israel and the United Kingdom from Egyptian territory and, after the withdrawal, to serve as a buffer between the Egyptian and Israeli forces.”\textsuperscript{32}

\textsuperscript{29} Peace Operations, supra note 9, at 1-7.

\textsuperscript{30} Some of the more glaring examples include U.N. efforts in Bosnia and Rwanda. Both are discussed later in this chapter. In each, there was a classic mismatch between reality on the ground and the type and kind of peace operations. The U.N. force, in size, equipment, and mandate, was based on the utterly flawed premise that there was peace to keep; there was not. In both Bosnia and Rwanda, thousands (in the case of Srebrenica) and hundreds of thousands (in the case of Rwanda) died with U.N. peacekeepers already deployed to the respective countries. The size, equipment, and mandate needed to enforce peace is exceedingly different than to keep peace that already exists.

\textsuperscript{31} The Early Years, http://www.un.org/en/peacekeeping/operations/early.shtml (last visited Sept. 11, 2014). This first mission, begun in 1948, was followed in early 1949 by the U.N. Military Observer Group in India and Pakistan to supervise the ceasefire between those two countries. Both these missions have continued to present day.

Both UNTSO and UNEF are examples of types of peacekeeping, unarmed military observers in UNTSO and an armed U.N. force in UNEF. But in each, the former warring factions had agreed to a ceasefire and to the presence and role of the United Nations. Arguably peacekeeping was the only peace operation the international community could agree on in the early days of the United Nations.

The start of the Cold War not long after the United Nation’s founding resulted in the peace enforcement measures envisioned by the Charter being unrealized. Permanent members of the Security Council—the United States, France, Great Britain, China, and Russia—were unable to agree on issues, and each was able to veto any proposed action. 33

Additionally, Chapter VII established a Military Staff Committee to “advise and assist the Security Council on all questions relating to the Security Council’s military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.” 34 The committee, consisting of the military Chiefs of Staff of the permanent members of the Security Council, also proved ineffectual. 35

The response to the seemingly intractable political problems flowing from the permanent members of the Security Council, according to the second U.N. Secretary-General (UNSG), Dag Hammarskjöld, was an “alternative method of maintaining the peace” that fell under “Chapter VI and a half.” 36 This theory was based on Language in Chapters V 37 and VII. 38

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34 U.N. Charter, supra note 10, at art. 47.


36 See Henry Wiseman, UN Peacekeeping: An Historical Overview, in PEACEKEEPING: APPRAISALS AND PROPOSALS (Henry Wiseman ed., Pergamon 1983). Wiseman credits Hammarskjöld with developing the term “Chapter VI and a half.” Some contend that Hammarskjöld was simply “referring to the absence of UN Charter references to armed peacekeeping missions rather than inserting combat troops to impose international will on belligerents.” David S. Alberts & Richard E. Hayes, COMMAND ARRANGEMENTS FOR PEACE OPERATIONS (1995). Others are more critical, claiming that “[t]he popular phrase, ‘Chapter VI and a half operation,’ seemingly a cute way to note the clever ambiguity of international diplomacy, was in fact a recipe for disaster in which members of the international community inserted themselves into a conflict situation with the mindset, forces, and posture of a peacemaker.” Id. (quoting from Center for Advance Command Concepts Workshop on Combined and Coalition Peace Operations).

37 Chapter V of the U.N. Charter provides that the Security Council “may establish such subsidiary organs as it deems necessary for the performance of its functions.” U.N. Charter, supra note 10, at art. 29.

38 Chapter VII states that prior to resorting to enforcement, the Security Council may “call on the parties concerned to comply with such provisional measures as it deems necessary or desirable
This approach, termed the interposition model, is essentially peacekeeping, meaning that parties to the conflict must consent and cooperate with the UN’s involvement. And, of course, there must be a peace to keep. Under or through this approach, the majority of the peacekeeping operations the United Nations established during the Cold War were comprised of lightly or even unarmed military observers monitoring ceasefires.

Although never saying “Chapter VI and a half” the United Nations has explained the area between Chapter VI and VII operations as:

In certain volatile situations, the Security Council has given UN peacekeeping operations “robust” mandates authorizing them to “use all necessary means” to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order.

Although on the ground they may sometimes appear similar, robust peacekeeping should not be confused with peace enforcement, as envisaged under Chapter VII of the United Nations Charter.

- Robust peacekeeping involves the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict.
- By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military 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.

Despite the United Nation’s inability to keep the peace, its early peacekeeping efforts were largely perceived as successful. As the Cold War ended in 1989, that...
perception proved problematic as it fostered a belief that peacekeeping could be effective in resolving a widening array of conflicts. Dangerously, this included conflicts where there was no peace to keep, as the conflict was ongoing and the parties to the conflict not only did not cooperate but hindered and even targeted peacekeepers. Horrific U.N. failures in Somalia, Bosnia, and Rwanda in the 1990s were the price of failing to recognize and align the reality in a conflict area with a corresponding peace operation's size, equipment, and mandate. But those same failures did prompt significant institutional reform in how the United Nations organizes peace operations.


IV. Peace Operations Organizational Structure

United Nations Secretary-General Boutros Boutros-Ghali created the Department of Peace Keeping Operations (DPKO) in 1992. The DPKO provides political and executive direction to UN Peacekeeping operations around the world and maintains contact with the Security Council, troop and financial contributors, and parties to the conflict in the implementation of Security Council mandates. The Department works to integrate the efforts of UN, governmental and non-governmental entities in the context of peacekeeping operations. DPKO also provides guidance and support on military, police, mine action and other relevant issues to other UN political and peace-building missions.46

Four main offices make up DPKO: Office of Operations, Office of the Rule of Law and Security Institutions, Office of Military Affairs, and the Policy Evaluation and Training Division. Prior to DPKO, the United Nation’s Office of Special Political Affairs coordinated peacekeeping missions. Establishing DPKO would ultimately prove a positive and significant step. But in the years immediately following DPKO’s establishment the United Nation’s failed efforts (notably Somalia, Bosnia, and Rwanda) called the concept of peacekeeping into question.

Following those failures, and likely because of them, the next most significant milestone came in 2000 when the UNSG appointed a panel to evaluate the U.N. peace operations system. The panel created what is known as the “Brahimi Report” named after Lakhdar Brahimi, an Algerian U.N. envoy who chaired the panel.47 The report stated at the outset that between 1990 and 2000 the United Nations had “repeatedly failed” to meet the challenge of the U.N. Charter to “save succeeding generations from the scourge of war.” The report also noted that

There are many tasks which United Nations peacekeeping forces should not be asked to undertake and many places they should not go. But when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence, with the ability and determination to defeat them.48

The report reiterated that “[a]s the United Nations has bitterly and repeatedly discovered . . . no amount of good intentions can substitute for the fundamental ability to project credible force if complex peacekeeping in particular is to succeed.”49 To

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48 Id. at viii.
49 Id.
better ensure "clear, credible, and properly resourced Security Council mandates," Brahimi called for:

- renewed political commitment on the part of Member States;
- significant institutional change;
- increased financial support.

One of the most significant aspects of the report was that its recommendations focused on concrete "operational and organizational areas of need" more than nebulous policy and strategy. This led to the United Nations increasing efforts to systematize and standardize a number of aspects of peacekeeping operations. This entailed adopting common terminology and understanding of what that terminology means. Numbers of troops or police or observers of course matter, but clarifying what activities they need to be able to perform and equipment they do or not need to bring (and whether that equipment will remain with the peace operation or return to the troop-contributing country) is equally or possibly more important. From there DPKO was able to develop reimbursement rates for troop-contributing countries and develop baseline standards for troops, police, and military observers.50

More recently, the UNSG restructured DPKO in 2007 to strengthen the United Nation's capacity to manage and sustain new peace operations.51 This restructuring created the Department of Field Support (DFS), which is responsible for "for delivering dedicated support to United Nations field operations, including on personnel, finance, procurement, logistical, communications, information technology and other administrative and general management issues." The DFS is separate from DPKO, though as the organizational chart reflects, DFS shares capacities with DPKO. The organization chart also demonstrates the administrative complexity and challenges of peace operations.52

The DPKO continues to evolve, developing a capstone doctrine that provides peacekeeping principles and guidelines.53 Far from the basic logistical problems that plagued early peace operations, the United Nations now seeks to identify capability gaps and improve its force generation process.54 Nonetheless, peace operations encounter a wide range of challenges. Some are inherent in multinational operations, others brought on by the United Nation's increased assertiveness in how peace operations are conducted.

V. Peace Operations Challenges

A. WHAT LAW APPLIES?

An overarching question that has an unsatisfyingly vague answer is: What law applies during a peace operation? First, one must consider the range of options of possible law and legal relationships. There is the domestic law of the state in which the peace operation is occurring, and whether and to what extent it could or should apply to U.N. peacekeepers. As a general proposition, if there is a peace operation occurring in a state, its rule of law is either not well developed and/
or implemented. Hence a Status of Forces Agreement (SOFA) between the United Nations and the host country answers the question of relevant legal framework.

The SOFA is "one of the key documents that govern a U.N. peace operation." A SOFA for a given peace operation derives from the model SOFA, which the UNSG developed in 1990 in response to a General Assembly request. A SOFA is a "negotiated formal agreement between the UN and the host country that defines the legal status of both the peace keeping mission and the individual peace keeper . . . . [SOFAs] grant the facilities and rights, including privileges and immunities, required by peacekeepers to enable them to fulfill the peace operations mandate."

Second is the extent that the law of armed conflict (LOAC) or international humanitarian law applies to peace operation. Imbedded in this question are several subordinate questions or issues, such as the triggering event for the LOAC to apply. The LOAC is triggered by armed conflict. The International Criminal Tribunal for the Former Yugoslavia defined when this threshold is reached as being when a state resorts to the use of armed force with another state, or when there is "protracted armed violence between governmental authorities and organized armed groups or between such groups in a State."

So the first challenge is whether the threshold to trigger the application of the LOAC has been reached in a host country. Further complicating things is that there is different law for different types of armed conflict. So if there is a state-on-state conflict, this international armed conflict (IAC) triggers one body of law, notably the Hague and Geneva Conventions and their Protocols. Peace operations though tend to occur more often amid the other category of armed conflict, that is armed conflict not involving state against state. This non-international armed conflict (NIAC) could be in the form of government forces fighting one or more insurgent or rebel groups, or it could be various insurgent or rebel groups fighting other such groups. Such NIACs draw from a subset of the Geneva Conventions and Additional Protocols. Somewhat perversely although NIACs occur with far greater frequency than IACs, there is far less law applicable to NIAC than IAC.


57 UN Documents, supra note 55, at 34. "The model SOFA develops the principles of law articulated in 104 and 105 of the Charter of the United Nations . . . . These articles provide that the UN shall enjoy legal capacity, and such privileges and immunities in the territory of each of its Members as are necessary for the fulfillment of its purposes." Id.


59 See Yoram Dinstein, Non-International Armed Conflicts in International Law (2014).

60 Article 3 of the 1949 Geneva Conventions applies to NIAC, and NIAC is the subject of Additional Protocol II.

61 For example, according to the North Atlantic Treaty Organization (NATO), in 2000 there were twenty-five armed conflicts around the world. NATO Statistic on Armed Conflicts around
This discussion deals with the law applicable to the parties in different kinds of armed conflicts. Historically the United Nations was not thought of as a party to the conflict, but that view is changing.\textsuperscript{62} As discussed in this chapter, the U.N. force operating in the DRC is most certainly a party to that NIAC.\textsuperscript{63} There the United Nations is allied with the DRC in fighting various militia groups, so even though the United Nations is a party to the armed conflict, its classification remains NIAC.\textsuperscript{64} But under different circumstances, the United Nations as a party to a conflict could transform the classification from NIAC to IAC, and with it, the applicable laws governing the conduct of hostilities.\textsuperscript{65}

In terms of legal analysis, the U.N. Charter recognizes the United Nations has legal capacity,\textsuperscript{66} and the International Court of Justice has held that the United Nations is an "international person,"\textsuperscript{67} meaning that it can be subject to international law, such as the LOAC. Indeed the United Nations has recognized as much and issued guidance as to the application of the LOAC to U.N. forces conducting

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\textsuperscript{62} Tristan Ferraro, The Applicability and Application of International Humanitarian Law to Multinational Forces, 561 INT’L REV. RED CROSS 95 (2013)

\textsuperscript{63} (reiterating that "no IHL provisions preclude multinational forces from becoming a party to an armed conflict" and that "[t]he argument that multinational forces may not be deemed a party to an armed conflict . . . does not rest on any firm basis.") Ferraro goes on to quote from various military field manuals that "expressly qualify peace forces as a party to an armed conflict.").

\textsuperscript{64} According to one noted commentator, referring to MONUSCO,

whether a UN peacekeeping force engaged in armed conflict with opposing forces should be considered a party to the conflict (for the purposes of applying international law) has been controversial for a number of decades. The UN has never publicly admitted that its peacekeepers are parties to the conflicts in which they engage, notwithstanding the fact that on a number of occasions it has acknowledged that its peacekeeping forces have engaged in offensive operations against armed groups. As a matter of law, it is difficult to conclude that the Brigade would not be a party to the conflict in situations where it conducts offensive operations. As a party to the conflict, the Brigade would be required to abide by international humanitarian law.


\textsuperscript{65} See id. and Ferraro, supra note 62.

\textsuperscript{66} Id.

\textsuperscript{67} U.N. Charter, supra note 10, at art. 104 (stating that "[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.").

\textsuperscript{68} See Peter F. Chapman, Ensuring Respect: United Nations Compliance with International Humanitarian Law, 17 HUM. RTS. BRIEF 2 (2009) both generally and for citation to Interpretation of the Agreement of 25 March 1951 between the Who and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89–90 (Dec. 20) (quoting that "[i]nternational organizations [such as the UN] are subjects of international law, and as such, are bound by any obligation incumbent upon them under general rules of international law.").
operations under U.N. command and control. That guidance, titled "Observance by United Nations forces of international humanitarian law" states that

The fundamental principles and rules of [LOAC] set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self defense.68

The United Nation’s guidance is then broken down in sections titled “Protection of the civilian population,” “Means and methods of combat,” “Treatment of civilians and persons hors de combat,” “Treatment of detained persons,” and “Protection of the wounded, the sick, and medical and relief personnel.”69 But the “UN has not clarified exactly what constitutes ‘actively engaged’ in combat or what applicable ‘to the extent and for the duration of their engagement’ means.”70 And the guidance recognizes that it does not “prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound through the operation.”71

The confusing result is that

[d]ifferent instruments regulate each Member State of the UN, depending on the state’s accession to different IHL instruments. Indeed, because the UN has not ratified any IHL instrument, the organization cannot clearly dictate what applies to its forces. While some Member States may be subject to additional regulations, the UN itself likely is subject to those provisions of IHL that are classified as customary law.72

This merely restarts the legal inquiry down another path without a definitive answer as to what part of LOAC is customary law. Different states/troop-contributing countries answer that question differently.73 The end result is the very real possibility that different components of a U.N. peace operation would be subject to different legal regimes and restrictions, posing additional challenges for a U.N. force commander.74 For example, such a commander may

65 Id.
66 Chapman, supra note 67.
67 UNSG’s IHL Bulletin, supra note 68.
69 And although not definitive, the International Committee of the Red Cross provides its perspective on the portions of LOAC that may be customary international law. JEAN-MARIE HENCKAERTS & LOUISE DOWSALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES (2009).
have one or more troop-contributing countries that have signed the Convention on Cluster Munitions participating in a peace operation with one or more countries that have not.\textsuperscript{75} Hence the dilemma for the commander is whether that U.N. force can permissibly employ cluster munitions.\textsuperscript{76}

Likewise, there is likely to be a difference in attitudes toward Additional Protocols I and II to the Geneva Conventions among troop-contributing countries. Additional Protocol I applies to IACs while AP II applies to NIAC in which the nonstate group controls territory, so regardless of which type of conflict the peace operation is occurring in, at least one of the protocols will be at issue. Here the analysis is even more convoluted than with the Convention on Cluster Munitions. With the Additional Protocols one has the first problem of whether a troop-contributing country has or has not ratified and is thus bound by the protocol. But even in peace operations in which all the troop-contributing countries are signatories to whichever of AP I and/or AP II was deemed to apply, the differences in the reservations, understandings, and declarations submitted by the various countries results in the protocols meaning something very different for each signatory.\textsuperscript{77}

These legally based interoperability issues have not been a significant issue in U.N. peace operations. But that is only because the United Nations for the last several decades has not conducted offensive operations for a sustained period of time. As discussed later, that is changing. And with that change, the U.N. force commander may encounter similar frustrations akin to the NATO force commander in Afghanistan. In that conflict, different troop-contributing countries assert different national caveats or operational restrictions on the forces they provide NATO.\textsuperscript{78} United States Army General John Craddock, former NATO

\textsuperscript{75} Given that the Convention on Cluster Munitions has been signed by approximately 113 countries, and not signed by some 80 others, having troop-contributing countries with different legal obligations is quite possible, even likely. Particularly when one considers that none of the top four troop-contributing countries to U.N. peace operations are signatories (Pakistan, India, Ethiopia). See U.N. Troop-Contributing Countries, supra note 7, and United Nations Office at Geneva, Signatories and Ratifying States, http://www.unog.ch/80256EE600585943/(httpPages)/67DC5063EB50E02C5274F800ED9E497OpenDocument (last visited Sept. 11, 2014). Other notable non-signatories include Brazil, China, Russia, and the United States.

\textsuperscript{76} The answer may lie in the difference between can and should, or law and policy. A commander from a country that is not a signatory to the Convention on Cluster Munitions could lawfully order their use. But that would mean the other troop-contributing countries that are not members could no longer participate in the mission. And the United Nations itself, the originator of the Convention, would be very unlikely to approve such use.

\textsuperscript{77} See Julie Gaudreau, The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims, 84\textsc{Int'l Rev. of the Red Cross} 143 (2003).


Indeed NATO proposed, and member states passed a resolution calling for the elimination of undeclared caveats and to minimize the use of declared caveats. NATO Parliamentary Assembly Resolution 336 on Reducing National Caveats, available at http://www.nato-pa.int/default.asp?SHORTCUT=828 (last visited November 15, 2009). The resolution is not binding.
Supreme Allied Commander Europe, once said he would gladly forgo additional NATO troops to fight the Taliban in Afghanistan if the troop-contributing countries dropped the caveats on the forces they provided to NATO. Craddock contended that the caveats “increase the risk to every service member deployed in Afghanistan and bring increased risk to mission success.” They are also “a detriment to effective command and control, unity of effort and . . . command.”

B. INHERENT DIFFICULTIES

Bureaucracy at the DPKO level, language, and culture differences among member states amplify problems such as determining the applicable law just discussed and the section that follows on accountability. They also stand alone as challenges in and of themselves. With any bureaucracy comes some degree of politics. The United Nations, being what it is, may be overly blessed with the widest range of inputs and interests from literally every country in the world. More specific to peace operations, as previously discussed affirmative votes by nine of the fifteen UNSC members and the absence of a veto by any of the five permanent members is required for a UNSCR authorizing an operation. The result is that the most important quality a resolution possesses is that it be worded in such a way as to allow for its passage. Similar to domestic legislation, this translates to wording that may not provide the peace operation the clearest or most coherent of mandate or guidance.

Consider for example the 2004 UNSCR establishing a U.N. force in Haiti. Among other mandates, the UNSC charged the force “to protect civilians under imminent threat of physical violence, within its capabilities and areas of deployment, without prejudice to the responsibilities of the Transitional Government and of police authorities.” What exactly does that mean to the force commander in Haiti? And how will a commander translate that into orders for subordinate peacekeepers? How imminent is imminent? What is the United Nation’s understanding of the force’s capabilities? And the last section is particularly opaque. While on patrol in Haiti, a group of U.N. peacekeepers encountered a group of Haitian police severely beating a person in the street. The peacekeepers’ understanding of their mandate was that it was to be without prejudice to the responsibilities of the police. So the peacekeepers did not intercede, and instead watched (and were videotaped watching) the beating.

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71 Borchgrave, supra note 74.
72 Id.
82 See Victoria K. Holt & Tobias C. Berkman, The Impossible Mandate: Military Preparedness, the Responsibility to Protect and Modern Peace Operations (2006). Holt and Berkman describe how during the U.N. mission in Haiti (MINUSTAH) that “[t]he Brazilian contingent . . . appeared to view its role in MINUSTAH as a traditional peacekeeping mission where force is used only in self-defense, while the Chilean and Sri Lankan contingents have engaged in robust combined military/military police operations targeting criminal gangs in Cap Haitien and elsewhere.” Id. at 96. And it was the Brazilian peacekeepers who observed but did not stop the beatings. The combination of the different approaches to the use of the force by
In terms of language, each U.N. peace operation designates one of the six U.N. official languages as the mission language, often English. But whatever the designated language is, there are a number of troop-contributing countries that do not primarily speak that language, and thus a wide range of language comprehension abilities exists within the same mission. Cultural differences also play a role, particularly in differing conceptions of what is considered criminal behavior and the corresponding punishment.

C. ACCOUNTABILITY

Given the difficulty in answering the question of what law applies, and adding language and cultural barriers, it likely comes as no surprise that the response to the question of what law applies to an individual peacekeeper is equally elusive. What happens when a peacekeeper on a peace operation commits a crime in the host country? Accountability for peacekeeper misconduct while on a peace operation remains a challenge for the United Nations.

This question is an offshoot or legal progression of the earlier question asked in this chapter: What law applies collectively to a U.N. peace operation mission and the component troop-contributing country? But as discussed above, absent sustained U.N. combat operations, the broader questions of what applies to missions or countries is largely an abstraction. The question of individual peacekeeper liability, however, is both real and frequently asked. The issue is real in that there are actual victims of harm, whether victims peacekeepers have stolen from, assaulted, raped, or killed. And the issue is, unfortunately, the opposite of abstraction as peacekeeper misconduct occurs. These issues, combined with the inherent difficulty in effectively responding to peacekeeper misconduct committed outside the state in which the peacekeeper resides, yields one of the more contentious aspects of peace operations.

Modern concern for peacekeeper misconduct traces back to 2003, when the UNSG issued a bulletin on 
"[s]pecial measures for protection from sexual exploitation and sexual abuse." This bulletin prohibited sexual abuse and exploitation,

different troop-contributing countries on the same U.N. mission led to the worst of both worlds, "MINUSTAH has been criticized both for being too passive—and failing to fulfill its mandate to protect civilians—and for being too aggressive in its actions and harming too many civilians." Id.


81 U.N. Sec. Gen, Secretary-General's Bulletin Special Measures for Protection from Sexual Exploitation and Sexual Abuse, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003). Some three years later, the United Nations grappled with the issue of making the SG's sexual exploitation and abuse
which the bulletin defined as including sexual activity with persons under the age of eighteen regardless of the local age of consent or majority, as well as any exchange of money, employment, goods, or services for sex.

In 2004, accusations arose of "sexual exploitation and abuse by a significant number of United Nations peacekeeping personnel in the Democratic Republic of the Congo." This led the UNSG to review the nature and extent of peacekeeper sexual exploitation and abuse as well as measures taken in response. The SG asked Prince Zeid Ra'ad Zeid Al-Hussein of Jordan to prepare a comprehensive report on the problem and potential solutions. The SG transmitted the result, commonly referred to as the Zeid report, to the United Nations in March 2005. The Zeid report identified accountability gaps caused by the different categories of personnel who participate in a U.N. peace operation being governed by different rules.

The report focused on four areas of concern: the current rules on standards of conduct; the investigative process; organizational, managerial, and command responsibility; and individual disciplinary, financial, and criminal accountability. The report acknowledged that "troop-contributing countries are responsible for the conduct and discipline of their troops ..." and that "guidelines" and "codes of conduct" were not enforceable because "[r]ules can be made binding on military members of contingents only with the agreement of and action by the troop-contributing country concerned." Ultimately, "[a] decision whether or not to prosecute is an act of sovereignty ...." that must come from the troop-contributing country.

The report noted that the model U.N. SOFA "assumes that the Secretary-General will obtain formal assurances from a troop-contributing country that it will..."

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bulletin binding. This yielded a sixteen-page report with four annexes, but the broader point is that UNSG bulletins, by themselves, are not binding on states. See U.N. Gen. Assembly, Comprehensive Report Prepared Pursuant to General Assembly Resolution 58/526 on Sexual Exploitation and Sexual Abuse, including Policy Development, Implementation and Full Justification of Proposed Capacity on Personnel Conduct Issues, U.N. Doc. A/60/862 (May 24, 2005). This is because while under the U.N. Charter, "[m]embers of the United Nations agree to accept and carry out the decisions of the Security Council," there is no such requirement in relation to the Secretary-General. U.N. charter, supra note 10, at art 25.

85 U.N. Sec. Gen., Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, U.N. Doc A/59/710 (Mar. 24, 2009) [hereinafter Zeid Report]. The peacekeeper misconduct occurred in Bunia, a conflict-ravaged portion of eastern DRC. Among the accusations were that U.N. peacekeepers had sex with minors, bartered food and protection for sex, and had sex with prostitutes. Although the issue of peacekeeper offenses received increasing attention beginning in 2003, earlier reports of sexual abuse and exploitation date to the early 1990s and involve troops from over forty countries serving in peace operations in Bosnia, Cambodia, Haiti, and Southern Sudan. Olivera Simic, Who Should Be a Peacekeeper?, 21 Peace Rev. 396 (2009).

86 Prince Zeid was a permanent Representative of Jordan to the United Nations. Jordan is a significant contributor of both troops and police to U.N. peace operations. Zeid himself served as a civilian peacekeeper on several occasions, including in the former Yugoslavia.

87 Zeid Report, supra note 85.
88 Id. at 12.
89 Id. at 4 and 27.
exercise criminal jurisdiction over its troops in return for the immunity conferred upon them by the host State under the terms of the status-of-forces agreement" but that the United Nations was not obtaining such assurances. The reasons the United Nations was not doing so are unclear. One likely reason is that with the increase of peace operations, the United Nations constantly struggles to secure enough troops from enough countries. Furthermore, adding prerequisites, such as the assurances recommended by the report, only exacerbates the United Nation's force-generation problem.

In terms of the troop-contributing country, one reason for the lack of prosecution for peackeepers misconduct is that the domestic law of that country has no extraterritorial application. So for example, in Bangladesh (the largest troop contributor to the United Nations), it is against Bangladeshi law for anyone to steal, to rape, or to murder within the territory of Bangladesh. But it is not against Bangladeshi law for a Bangladeshi peackeepers to steal, to rape, or to murder while deployed on a U.N. peacekeeping mission in, say, Sierra Leone. And Bangladesh is certainly not alone in not having extraterritorial application of its domestic law.

The 6th Committee to the United Nations is the forum for legal considerations. A 2009 meeting of the 6th Committee on the topic of criminal accountability of U.N. personnel addressed whether various member states' domestic law did or did not have any extraterritorial application. This question in essence asked "if a peackeepers from your country commits a crime while on a peace operation in another country, would you possess jurisdiction to criminally prosecute him/her?" Several countries, after expressing "zero tolerance" for peackeepers misconduct and stressing the need for accountability not impunity, acknowledged that their domestic law does not apply extraterritorially. This means they are unable to take criminal action against a peackeepers from their country who commits a crime during a peace operation in another country.

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90 Id. at 6.
93 Indeed seven of the top ten troop-contributing countries have no extraterritorial application of their domestic criminal code for ordinary crimes (India, Nepal, Nigeria, Ghana, Senegal, and Egypt). Id.
95 Which is not to say the troop-contributing country could not do anything, just that their actions would be limited to administrative ones, such as sending the offender home, fines, demotions, and/or administrative separation from the military.
And even where a troop-contributing state has extraterritorial application of its law, some of the "crimes" committed during a peace operation may not be a crime per the troop-contributing country’s laws. For example, although the SG’s directive banned sex with anyone under eighteen, in many countries the age of majority is under eighteen, meaning a seventeen-year-old could consent to sex. Although the directive notes that even where the age of majority is under eighteen sex is still forbidden, it is the sending state, and only the sending state, which may take criminal action. So if sex with a seventeen-year-old is not against say the law of the Dominican Republic, even if the U.N. directive applies to a Dominican Republic peacekeeper serving in Africa, there is little to nothing authorities from the Dominican Republic could do if one of its peacekeepers abides by its laws and not by the U.N. directive, at least in the criminal justice arena. A similar problem exists in those countries that do not criminalize prostitution.

Both the UNSC and General Assembly endorsed the Zeid report. Endorsed, however, does not mean that U.N. member states agreed to implement the Zeid report’s recommendations. But the report led to reforms and improvements, including mandatory pre-deployment training on the U.N.’s Code of Personal Conduct for Blue Helmets. Additionally the United Nations established the Conduct and Discipline Unit (CDU) in 2007 to strengthen accountability.

The CDU “maintains global oversight of the state of discipline in all peacekeeping operations and special political missions. It provides overall direction for conduct and discipline issues in field missions, including formulating policies, training and outreach activities and handling allegations of misconduct.” The CDU represents a substantial step forward for the United Nations in terms of accountability and transparency. Key to this is the statistics page, which provides quantitative data on investigations, allegations, and U.N. follow-up with troop-contributing countries.

For example, below are U.N. figures for allegations of sexual exploitation or abuse made against all categories of U.N. personnel on peace operations from 2007 through July 31, 2014:

The United Nations also tracks and reports the status of investigations into those allegations as substantiated, unsubstantiated, or pending.

But the last statistical category, U.N. follow-up, graphically demonstrates the U.N.’s limitations. The website displays the number of times the United Nations sent a “note verbale” to a troop-contributing country requesting information

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99 Id.

100 A note verbale is a form of diplomatic communication. Generally, a note verbale is written in the third person and is not signed. See Department of General Assembly Affairs and Conference Section, United Nations Correspondence Manual, A Guide to the Drafting, Processing and Dispatch of Official United Nations Communications (2000).
about disciplinary action the national authorities took following a substantiated allegation of misconduct by a peacekeeper from that country. Since 2007, the United Nations has sent some 520 notes verbale following substantiated allegations of sexual exploitation and abuse offenses. Troop-contributing countries responded to the United Nations only 223 times, approximately 43 percent.

Amazingly, the 43 percent response rate exceeds that for crimes not involving sexual exploitation and abuse. Since 2007, the United Nations sent 575 notes verbale to troop-contributing countries seeking information about disciplinary action taken in response to substantiated allegations of nonsexual offenses. States responded to the United Nations 241 times, approximately 40 percent.

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The Zeid report identified a number of deficiencies but also a corrective strategy. Although the United Nations has embraced the report and made progress toward improving peacekeeper accountability, ultimately there will only be as much accountability as member and troop-contributing states afford. Moreover, the United Nation’s challenges regarding accountability and peacekeeping are not limited to lower-ranking soldiers but extend to those in leadership positions, and even questions at a normative level. For example, despite “credible evidence” that Rwandan military units under General Emmanuel Karenzi Karake committed “gross human rights violations” the United Nations selected Karake to serve as the deputy commander of the U.N. mission in Darfur. A Fijian Army
officer, Filipo Tarakinikini, commanded a peacekeeping force in Lebanon before returning to Fiji where he played a central role in a military coup of the Fijian government.\textsuperscript{106} The United Nations condemned the coup, but later employed Tarakinikini in, of all jobs, a chief security advisor for the U.N.'s Department of Safety and Security.\textsuperscript{107}

And although the United Nations has made individual accountability a focus area, questions are now arising concerning an entire mission, UNAMID, operating in Darfur. In the spring of 2014, Foreign Policy magazine published the results of an investigation into systemic failures, of UNAMID not even trying to protect civilians and systematically covering up incidents against both civilians and U.N. peacekeepers.\textsuperscript{108} This in turn led the Prosecutor of the International Criminal Court to call on the UNSG to investigate UNAMID, which the United Nations agreed to do.\textsuperscript{109} The UNAMID report which that investigation generates may herald the next set of strategic reforms at and within the United Nations. In terms of how current U.N. peace operations reflect changes in peacekeeping at the operational and tactical level, the mission in the DRC is instructive.

VI. DRC Case Study

Extending back to the mid 1990s, armed conflict and its destructive and destabilizing effects have ravaged the DRC.\textsuperscript{110} The conflict, really a series of conflicts, are sometimes referred to as the First and Second Congo Wars or as Africa's first world war. The fighting, however styled, has claimed the lives of several million people\textsuperscript{111} and displaced several million more, making it the deadliest conflict


\textsuperscript{110} The origins of the conflicts are rooted in the genocide that occurred in neighboring Rwanda in 1994. After the genocide, over a million Rwandan Hutus fled to the DRC, then called Zaire. Tutsi forces, from Zaire as well as Rwanda and Uganda fought the Hutus and the military of Zaire across the country; captured the capital, Kinshasa; and renamed the country the Democratic Republic of the Congo. MONUSCO Background, http://www.un.org/en/peacekeeping/missions/monusco/background.shtml (last visited Sept. 11, 2014).

\textsuperscript{111} According to the International Rescue Committee, "[l]ess than 10% of all deaths were due to violence, with most attributable to easily preventable and treatable conditions such as malaria, diarrhoea, pneumonia, and malnutrition." International Rescue Committee, \textit{Mortality in the Democratic Republic of the Congo: an Ongoing Crisis}, available at http://www.rescue.org/sites/default/files/
since World War II. The conflicts in the DRC have involved at least eight African countries and more than twenty armed groups with varying, and alternating, allegiances and backing.

In 1999 the UNSC established the United Nations Organization Mission in the Democratic Republic of the Congo or MONUC\textsuperscript{112} to monitor the Lusaka ceasefire agreement\textsuperscript{113} between the DRC and Angola, Namibia, Rwanda, Uganda, and Zimbabwe. The UNSCR establishing MONUC did not make specific reference to the legal basis for establishing the force. Rather the UNSCR noted the role the ceasefire agreement requested the United Nations play in implementing the agreement.

The role the agreement requested was that

[the United Nations Security Council, acting under Chapter VII of the UN Charter ... constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation of this Agreement; and taking into account the peculiar situation of the DRC, mandate the peacekeeping force to track down all armed groups in the DRC. In this respect, the UN Security Council shall provide the requisite mandate for the peace-keeping force.]

The UNSC declined the request to provide a mandate for a force to track down armed groups, at least initially. As the Lusaka Agreement’s attempt at ending the Second Congo War unraveled, the United Nation’s role evolved and expanded from observer to enforcer of the peace.\textsuperscript{114} By 2003 the UNSC issued resolution 1493, which specifically referenced Chapter VII of the U.N. Charter and authorized MONUC to use “all necessary means to fulfill its mandate in the Ituri district, and as it deems within its capabilities, in North and South Kivu.”\textsuperscript{115} Illustrating the significance of word choice, the proceeding paragraph authorized necessary measures (as opposed to all necessary measures) to accomplish other tasks.\textsuperscript{116} The 1999 UNSCR establishing MONUC provided for “up to 500” U.N. military observers;\textsuperscript{117} the 2003 Resolution authorized a U.N. military force of up to 10,800 personnel.\textsuperscript{118}

\textsuperscript{114} Technically the UNSCR establishing MONUC did not assign the force the task of observing the ceasefire agreement. Rather, the Resolution assigned the task to “plan for the observation of the ceasefire and disengagement of forces.” UNSCR 1279, supra note 108, § 6(d) (emphasis added).
\textsuperscript{115} S.C. Res. 1493, § 26, U.N. Doc. S/RES/1493 (July 28, 2003) [hereinafter UNSCR 1493]. The Ituri and North and South Kivu Regions, all in eastern DRC, were, and to a lesser extent remain, the epicenter of the conflicts.
\textsuperscript{116} Id. § 25.
\textsuperscript{117} Id. § 9.
\textsuperscript{118} UNSCR 1493, supra note 111, § 3.
In the fourteen years since the United Nations established MONUC (now called MONUSCO), the U.N. force has grown to over twenty thousand uniformed members at a cost close to $US 1.5 billion a year. In 2013 the UNSC issued another resolution concerning the DRC and the role of MONUSCO. The resolution begins in typical U.N. fashion, recalling previous related resolutions. Interestingly, and maybe even contradictorily given the language that followed, the UNSCR “reaffirms the basic principles of peacekeeping, including consent of the parties, impartiality, and non-use of force, expect in self defence and defence of the mandate.”

This may be contradictory because what follows in the resolution is anything but impartiality. Rather than protecting civilians under a self-defense concept, the resolution establishes an "Intervention Brigade" that is charged with the responsibility of "neutralizing armed groups" by carrying out "targeted offensive operations" in a "robust, highly mobile and versatile manner," either jointly with the Congolese Army or acting unilaterally.

There is an argument to be made that the Intervention Brigade is much ado about, if not nothing, than little. This argument contends that prior to the UNSCR forming the Intervention Brigade, MONUSCO’s mandate already included authority to take all necessary measures, the broadest grant of authority the United Nations may confer. Under this argument, authority to conduct offensive operations and neutralize armed groups was already extant, subsumed within the authority to take all necessary measures. Yet the Intervention Brigade resolution must add something, or why draft it at all? And functionally, there have been a number of U.N. peace operations under Chapter VII and "all necessary measures" authority, and they have looked and operated quite differently than the Intervention Brigade.

The brigade is comprised of three thousand soldiers from South Africa, Tanzania, and Malawi who form three infantry battalions, one field artillery

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119 United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, see S.C. Res. 1925, ¶ 1, U.N. Doc. S/RES/1925 (May 28, 2010). UNSCR 1925 stated that “in view of the new phase that has been reached in the Democratic Republic of the Congo” the name of the U.N. Mission would be changed to reflect a mission to stabilize the relative peace. Id. Given what has unfortunately transpired in the DRC since the 2010 name change, including the U.N. peacekeepers assuming an offensive role in military operations, sadly “stabilization” remains tragically aspirational.


122 Id. at preamble.

123 Id. at 12(b).
battalion, and one special forces and reconnaissance company. Under the auspice of neutralize, “it is reasonable to assume that the Brigade is mandated to target armed groups with lethal force. In line with the usual concept of offensive operations, the Brigade would be able to conduct ambushes, deliberate attacks and hold ground against any armed group.”124

All of which represents a “major departure from the often passive approach that has given peacekeepers a bad reputation.”125 Rather than using force only in self-defense, Lieutenant General Carlos Alberto dos Santos Cruz, the Brazilian Army General in command of MONUSCO’s military force, claims that “[t]he posture now is to go and neutralize the threat ... We go to where the threat is and we neutralize the threat ... We need to take action. It’s a different dynamic, a completely different idea.”126 The Intervention Brigade provided insight into what neutralize per the UNSCR means or looks like in August 2013, when the U.N. force fired artillery at rebels near the Congolese city of Goma.127 The brigade has also employed attack helicopters, and, for the first time in U.N. peace operations, unarmored surveillance drones.128

One commentator claims that “[t]he deployment of drones in the DRC represents a defining moment in UN peacekeeping and aerial surveillance during ongoing conflict.”129 Hervé Ladsous, the head of DPKO, stated that the drones MONUSCO is using are “a very useful tool” that is changing peacekeeping.130 Indeed Ladsousis advocating their use in other U.N. missions, including Mali, the Central African Republic, and South Sudan.131

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124 Oswald, supra note 63.
130 Ladsous, supra note 124.
131 Id. See also Ladsous and Hag: With UAV We Change Peacekeeping, ONU ITALIA, May 28, 2014, available at http://www.onuitalia.org/ladsous-hag-uav-change-peacekeeping/. Ladsous notes the enormity of the challenge MONUSCO faces in the DRC, where there is “just one peacekeeper per 17 square kilometers.” The drones are helping in a variety of ways, including spotting a capsized boat in Lake Kivu in the DRC, allowing MONUSCO to save fourteen passengers.
Although the United Nations is open about MONUSCO’s drone use, other byproducts of the Intervention Brigade and its offensive mandate are not receiving attention.

One result of U.N. forces taking offensive action that has not been much discussed, at least publicly, is the issue of detention. If MONUSCO has the authority to kill members of armed groups, does it possess the authority to detain them?433 With detention comes a legion of difficult issues and questions. Where will they be detained? Who will fund the detention centers? Who will guard them? What would detention standards be? How would transfer, parole, or release work? Noted Australian commentator Bruce Oswald claims that the term “neutralize” may imply that the Brigade has the power to detain, and points to the U.N.’s Interim Standard Operating Procedures for Detention in United Nations Peace Operations for what U.N. detention would look like.434 Oswald contends that it is “reasonable to assume that, consistent with the UN’s past practice, the Brigade will transfer the armed group members that they have captured to the DRC authorities. “Given the DRC’s placement near the bottom of the human development index”435 and level of systemic human rights violations,436 U.N. transfer of detainees to the DRC could result in charges of U.N. complicity and potential liability if (and more likely when) the Congolese mistreat the detainees.437

The longer the Intervention Brigade is taking offensive action, the more likely the issue of detention and other effects will be raised. And according to General Cruz, “[w]e are going to exercise our mandate to the maximum possible, not only against M23, against all the groups. . . . When we finish one problem, we are in our heads thinking about the next step.”438 True to Cruz’s word, the combined U.N. and DRC forces compelled the surrender of the M23 rebel group and are shifting their attention and offensive efforts to other armed groups.439

433 The general answer is that “[d]etention is considered within the nature of, or inherent to, armed conflict and the LOAC reflects that in and for both international and non-international armed conflict. See Jelena Pejic, The Protective Scope of Common Article 3: More than Meets the Eye, 93 Int’l Rev. Red Cross 189, 207 (2011) (stating that “[i]n the ICRC’s view, both treaty and customary [international humanitarian law] contain an inherent power to intern. . . .”)
435 Human Development Index, supra note 7.
438 Kulish, supra note 121.
439 Somini Sengupta, Peacekeepers in Congo to Focus on Another Rebel Group, N.Y. TIMES, A7 Nov. 7, 2013.
VII. Intervention Brigade Effects, and Conclusion

Although the Intervention Brigade has been successful, there are negative consequences of MONUSCO undertaking offensive missions as well. "As a matter of law, it is difficult to conclude that the [Intervention] Brigade would not be a party to the conflict in situations where it conducts offensive operations."\(^{140}\) As a party to the conflict, MONUSCO is seemingly not operating consistent with any of the three U.N. peacekeeping principles: consent of the parties, impartiality, and nonuse of force except in self-defense and defense of the mandate.

Beyond the doctrinal disconnect, the Intervention Brigade creates other issues, particularly for others operating in and around the peace operation as well as for peacekeepers themselves. Some are concerned that the use of the Intervention Brigade could "put [aid] workers at risk because armed groups will not distinguish between soldiers and those who feed, heal and house civilians in war."\(^{141}\) A representative from Doctors Without Borders contended the issue is beyond a blurring of the lines, arguing that "[y]ou can have a helicopter one day used to deliver the Force Intervention Brigade troops to attack a village and next day to deliver aid to that same village."\(^{142}\) He claimed that the presence of the Intervention Brigade "is a problem for all the humanitarian actors . . . [w]hen the population sees a white car, they don't differentiate between whether it is [Doctors Without Borders], the UN or the Intervention Brigade. It makes us military targets."\(^{143}\)

In terms of peacekeepers, they are now "legitimate targets for the extent of their participation in accordance with international humanitarian law."\(^{144}\) Prior to the employment of the Intervention Brigade, killing a member of MONUSCO was a war crime. Tragically that is what happened in May 2013 when assailants attacked a U.N. convoy in eastern DRC and killed a Pakistani peacekeeper. The UNSG "condemned the attack, saying that killing a peacekeeper was a 'war crime'."\(^{145}\)

This is a reference to the Rome Statute of the International Criminal Court (ICC), which defines a war crime as "[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations."\(^{146}\)

\(^{140}\) Oswald, supra note 63.

\(^{141}\) Kulish, supra note 121.

\(^{142}\) Id.

\(^{143}\) Sudarsan Raghavan, In Volatile Congo, a New U.N. Force with Teeth, WASH. POST., Oct. 25, 2013, available at http://www.washingtonpost.com/world/africa/in-volatile-congo-a-new-un-force-with-teeth/2013/11/01/oeda650c-43f1-1e3b-028d-de922d7a4f7_story.html (emphasis added). Legally the Doctors Without Borders vehicle is not a permissible target. But one can see the makings of a possibly legitimate defense of mistaking the impermissible to target white vehicle (or blue-helmeted soldier) for the permissible to target white vehicle (or blue-helmeted soldier).

\(^{144}\) Oswald, supra note 63.

Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict. And there is currently a case before the ICC involving just that—war crimes allegations based on attacking and killing U.N. peacekeepers (albeit in Sudan).

But killing a peacekeeper is only a war crime if the peacekeeper was entitled to the protection given to civilians or civilian objects under the international law of armed conflict. A civilian who directly participated in hostilities by conducting offensive operations would not have protection from the law of war from being made the object of attack. And neither will members of the Intervention Brigade.

The Intervention Brigade's offensive actions also render the 1994 Convention on the Safety of United Nations and Associated Personnel void, at least in part. The Convention begins by stating "bearing in mind that attacks against, or other mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable by whomever committed." The Convention claims that U.N. personnel shall not be the object of attack and requires States to criminalize the intentional murder of U.N. peacekeepers. This point is made clear in the UNSG's 1999 bulletin. While the bulletin refers to the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as noncombatants, it qualifies the status as lasting "as long as [members of peacekeeping operations] are entitled to the protection given to civilians under the international law of armed conflict." But again, the Intervention Brigade, in taking offensive action, is not entitled to the protection given to civilians, thus negating the basis the Convention on the Safety of United Nations and Associated Personnel claims for why, and when, killing a U.N. peacekeeper is illegal.

108 Rome Statute, supra note 141.

110 This is not to say that killing a member of the Intervention Brigade is not a crime; it is. But it is no longer an international or war crime. It would be a violation of the domestic criminal law of the DRC and possibly the country from which the slain peacekeeper originated. And given that the Intervention Brigade falls under the same command structure as the rest of MONUSCO, it is possible that all military members of MONUSCO are no longer immune from being made the object of attack. Moreover, to the extent MONUSCO employs civilian employees or contractors who are directly participating in hostilities by say operating drones or serving as targeting intelligence analysts for the Intervention Brigade, they too are no longer protected from being made the object of attack. See Ferraro, supra note 62 (stating that an intentional attack against U.N. forces and other associated personnel who are participating in the conflict "is not considered a crime under the Rome Statute..."), See also Apunli, supra note 125 (stating that drone operators are directly participating in hostilities and thus "open to attack by enemy forces.").
112 Id. at art 7.
113 UNSG IHL Bulletin, supra note 68.
The United Nations has not publicly acknowledged that the Intervention Brigade’s offensive nature renders its members the permissible object of attack under international law. Does or will DPKO inform members of the Intervention Brigade that targeting them may no longer be a war crime? How will that impact a member state’s willingness to contribute personnel, equipment, and funds in support of PSO? What of the irony that the United Nations through its actions has rendered partially null and void a Convention on the safety of U.N. personnel?

Regardless of these issues, the initial reaction to the Intervention Brigade’s employment has been largely positive. The U.S. special envoy to the Great Lakes region of Africa claimed the brigade represented “a stronger approach that can give peacekeeping operations more strength in the future and help resolve knotty problems.”

But the envoy also acknowledged that the story of the Intervention Brigade, and its legacy, “has yet to be written . . .” Therein lies the question, when the Intervention Brigade’s legacy is determined, will it be one of effective incorporation of lessons learned and augur the future of U.N. peace operations? Or will it be viewed as a sui generis mission not able, or needed, to be repeated? More likely history will view the Intervention Brigade as successfully accomplishing some peacekeeping goals, but sacrificing or compromising others in the process. In the end, MONUSCO and the Intervention Brigade may well prove a bellwether.

155 Kulish, supra note 121.
156 Id. He added that “the first couple chapters are very good.”
APPENDIXES


Surge in Uniformed UN Peacekeeping Personnel from 1991–Present

Jul 1993: 78,444
(Largest missions: UNPROFOR, UNOSOM, UNTAC)

Oct. 2006: 101,976
(MONUC, UNMIL, UNMIS, UNIFIL)

Nov. 2001: 47,778
(UNAMIL, UNTAET)

Mar. 2010: 101,939
(UNAMID, MONUC, UNIFIL)

31 March 2015: 104,668
(MONUSCO, UNAMID, UNIFIL)

FIGURE 20.8
Appendix 2 Past U.N. Peacekeeping Missions

Africa

- United Nations Angola Verification Mission I (UNAVEM I)
- United Nations Angola Verification Mission II (UNAVEM II)
- United Nations Angola Verification Mission III (UNAVEM III)
- United Nations Aouzou Strip Observer Group (UNASOG)
- United Nations Assistance Mission for Rwanda (UNAMIR)
- United Nations Mission in Ethiopia and Eritrea (UNMEE)
- United Nations Mission in Sierra Leone (UNAMSIL)
- United Nations Mission in the Central African Republic (MINURCA)
- United Nations Mission in the Central African Republic and Chad (MINURCAT)
- United Nations Observer Mission in Angola (MONUA)
- United Nations Observer Mission in Liberia (UNOMIL)
- United Nations Observer Mission in Sierra Leone (UNOMSIL)
- United Nations Observer Mission Uganda-Rwanda (UNOMUR)
- United Nations Operation in Burundi (ONUB)
- United Nations Operation in Côte d’Ivoire (MINUCI)
- United Nations Operation in Mozambique (ONUMOZ)
- United Nations Operation in Somalia I (UNOSOM I)
- United Nations Operation in Somalia II (UNOSOM II)
- UN Mission in the Sudan (UNMIS)
- United Nations Operation in the Congo (ONUC)
- United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)
- United Nations Transition Assistance Group (UNTAG)

Americas

- Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP)
- United Nations Civilian Police Mission in Haiti (MIPONUH)
- United Nations Mission in Haiti (UNMIH)
- United Nations Observer Group in Central America (OUNCA)
- United Nations Observer Mission in El Salvador (ONUSAL)
- United Nations Support Mission in Haiti (UNSMIH)
- United Nations Transition Mission in Haiti (UNTMIH)
- United Nations Verification Mission in Guatemala (MINUGUA)

Asia and the Pacific

- United Nations Advance Mission in Cambodia (UNAMIC)
- United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP)

United Nations Peace Operations

- United Nations India-Pakistan Observation Mission (UNIPOM)
- United Nations Mission of Observers in Tajikistan (UNMOT)
- United Nations Mission of Support in East Timor (UNMISET)
- United Nations Security Force in West New Guinea (UNSF)
- United Nations Transitional Administration in East Timor (UNTAET)
- United Nations Transitional Authority in Cambodia (UNTAG)
- UN Integrated Mission in Timor-Leste (UNMIT)

Europe

- United Nations Civilian Police Support Group (UNPSG)
- United Nations Confidence Restoration Operation in Croatia (UNCRO)
- United Nations Mission in Bosnia and Herzegovina (UNMIBH)
- United Nations Mission of Observers in Prevlaka (UNMOP)
- United Nations Observer Mission in Georgia (UNOMIG)
- United Nations Preventive Deployment Force (UNPREDEP)
- United Nations Protection Force (UNPROFOR)
- United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES)

Middle East

- United Nations Emergency Force I (UNEF I)
- United Nations Emergency Force II (UNEF II)
- United Nations Iran-Iraq Military Observer Group (UNIIMOG)
- United Nations Iraq-Kuwait Observation Mission (UNIKOM)
- United Nations Observation Group in Lebanon (UNOGIL)
- United Nations Yemen Observation Mission (UNYOM)
- UN Supervision Mission in Syria (UNSMIS)
Appendix 3 United Nations Peacekeeper Code of Conduct

TEN RULES
CODE OF PERSONAL CONDUCT
FOR BLUE HELMETS

1. Dress, think, talk, act and behave in a manner befitting the dignity of a disciplined, caring, considerate, mature, respected and trusted soldier, displaying the highest integrity and impartiality. Have pride in your position as a peace-keeper and do not abuse or misuse your authority.

2. Respect the law of the land of the host country, their local culture, traditions, customs and practices.

3. Treat the inhabitants of the host country with respect, courtesy and consideration. You are there as a guest to help them and in so doing will be welcomed with admiration. Neither solicit or accept any material reward, honor or gift.

4. Do not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children.

FIGURE 20.9 UN Peacekeeper Code of Conduct.