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International Law, Intervention and United Nations Peacekeeping in the Democratic Republic of the Congo

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Abstract

Is peacekeeping intervention? This is the central theme which runs throughout this thesis. Since its conception in the mid-1950s, peacekeeping has significantly evolved from traditional, passive, monitoring and observing operations to robust, multi-dimensional stabilisation operations. This raises questions as to whether this is simply a natural evolution of peacekeeping or whether it marks an expansion of the concept of peacekeeping beyond its boundaries, pushing it into the realm of peace enforcement or intervention. Put simply, has peacekeeping evolved too far?

Focusing on the Democratic Republic of the Congo (DRC), this thesis seeks to understand the relationship between United Nations peacekeeping and the principle of non-intervention. It therefore explores the boundaries between the two, by examining peacekeeping's legal and normative frameworks, questioning whether, at times, peacekeeping becomes a form of intervention. Uniquely applying a Third World Approaches to International Law (TWAIL) lens, it provides new insights into intervention and peacekeeping, contributing to recent trends that seek to reimagine or reinvigorate UN peacekeeping.

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Chapter 1

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1. Introduction

Is peacekeeping intervention? This is the central theme which runs throughout this thesis. Since its conception in the mid-1950s, peacekeeping has significantly evolved from traditional, passive, monitoring and observing operations to robust, multi-dimensional stabilisation operations, with seemingly endless lists of mandated tasks. In recent years, despite the continued existence of some traditional models of peacekeeping operations,¹ the UN has increasingly deployed multi-faceted operations to 'stabilise' complex, fragile settings and enable state institutions to flourish, reflecting a state-centric, stabilisation approach to peacekeeping.² This noticeable drift from the traditional understanding of peacekeeping raises questions as to whether this is simply a natural evolution of peacekeeping or whether it marks an expansion of the concept of peacekeeping beyond

¹ For example: UNFICYP, UNSC Res 2561 (29 January 2021) UN Doc S/RES/2561.

² AC Day and CT Hunt, 'UN Stabilisation Operations and the Problem of Non-Linear Change: A Relational Approach to Intervening in Governance Ecosystems' (2020) 9(1) Stability 1-23, 1.

its boundaries, pushing it into the realm of peace enforcement or intervention. Put simply, has peacekeeping evolved too far?

Focusing on the Democratic Republic of the Congo (DRC), the beating heart of Africa, this thesis seeks to understand the relationship between United Nations (UN) peacekeeping and the principle of non-intervention. That is, it explores the boundaries between peacekeeping and intervention, questioning whether, at times, peacekeeping becomes a form of coercive action designed to influence change in the host state and, therefore, intervention. In order to do this, the thesis begins by examining the history of intervention and the development of the principle of non-intervention, before outlining the evolution of peacekeeping, clarifying its legal and normative frameworks which, together, form a complex red boundary line around peacekeeping, separating it from intervention and thus preventing it from violating the principle of non-intervention. This analysis is then taken further, through an exploration of the interpretation and application of peacekeeping's norms and legal principles in the Congo – the largest arena within which UN peacekeeping has evolved. The aim of the thesis is to attempt to provide an overview of the contemporary peacekeeping frameworks and to understand how the fluidity of these frameworks has allowed peacekeeping to be used (and abused) by dominant powers in the furtherance of their interests and agendas, resulting in peacekeeping being used to legitimate intervention. As such, it will be questioned whether there needs to be a redrawing of peacekeeping's boundary lines, in order to reaffirm the distinction between peacekeeping and intervention. The

purpose of this research, then, is to provide clarification on these issues, with the aim of contributing to recent trends that seek to reimagine or reinvigorate UN peacekeeping.³

2. Methodology

Both the principle of non-intervention and the concept of peacekeeping are ill-defined, with no formal, legal basis rooted in a definitive Charter, Act or body of law. Instead, the principle of non-intervention has developed, predominantly, from UN General Assembly Resolutions and Declarations⁴ and interpretations by the International Court of Justice (ICJ)⁵ and regional organisations.⁶ Similarly, peacekeeping was conceived through interpretations of the UN Charter, the implied powers of the Security Council,⁷ General Assembly,⁸ and Secretary-General,⁹ decisions from the ICJ¹⁰ and is based upon the three fundamental principles of consent, impartiality and non-use of force.¹¹ The thesis will therefore consult and interpret primary sources such as Security Council and General Assembly Resolutions; Secretary-General Reports and Bulletins and case law of the ICJ. It will aim to 'seek out, discover, construct or reconstruct rules and principles'¹² relating to intervention and peacekeeping, in an attempt to

³ Such as the UN Secretary-General's 'Action for Peacekeeping' initiative: UN Peacekeeping, 'A4P+ Priorities for 2021-2023' <https://peacekeeping.un.org/sites/default/files/a4p_background_paper.pdf>

⁴ For example: Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN Doc A/Res/2625 (XXV) (24 October 1970).

⁵ For example: *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 132-169.

⁶ Such as the Organisation of African Unity and African Union.

⁷ See: Articles 24(1), 36(1), 40 UN Charter.

⁸ See: Articles 10, 11(2), 12, 14 UN Charter.

⁹ See: Articles 97-99 UN Charter.

¹⁰ *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151.

¹¹ UNGA, 'Summary Study' A/3943 (9 October 1958) UN Doc A/3943.

¹² R Banakar and M Travers, 'Law, Sociology and Method' in R Banakar and M Travers (eds) *Theory and Method in Socio-Legal Research* (Hart 2005) 7.

clarify the current legal and normative frameworks and to set the basis for further theoretical analysis.

When identifying the legal rules and principles governing intervention and peacekeeping, the thesis will take this doctrinal approach further by adopting a socio-legal approach. In doing so, it will consider the wider, historical and social structures which have influenced the concepts of non-intervention and peacekeeping, rather than just assuming or accepting the legal rules and legal doctrine as autonomous or internally constructed.¹³ Indeed, within Chapters 2 and 3, in particular, as the development of the principle of non-intervention and the concept of peacekeeping are explored, respectively, broader social and historical events which influenced their development are considered. The thesis will therefore examine both the 'intrinsic' and 'extrinsic' history of intervention and UN peacekeeping.¹⁴ That is, it will explore the development of these two concepts within international law (resolutions, declarations, case law) and, simultaneously, the 'extrinsic' history of their relationship to general history and other social phenomena. Allott argues that by examining the history of international law itself ('intrinsic' history) it will 're-form our consciousness of the identity, the functioning, and the potentiality of international law as law'.¹⁵ Whilst writing the 'extrinsic' history 'will re-form our consciousness of the role of international law in the forming, re-forming, and re-making of international

¹³ CM Campbell and P Wiles, 'The Study of Law in Society in Britain' (1976) 10 L&SR 547-578, 553.

¹⁴ P Allott, 'International Law and the Idea of History' (1999) 1 JHistIntLaw 1-22.

¹⁵ *ibid* 20.

society'.¹⁶ Mapping the historical development of the principle of non-intervention and UN peacekeeping will therefore offer a better understanding of how the principle and peacekeeping operate today.

2.1 Third World Approaches to International Law (TWAIL)

The law of international organisation 'is still somewhat immature', in that there is no convincing theoretical framework governing the area.¹⁷ In particular, as Klabbers notes, 'international legal doctrine has a hard time coming to terms with the relationship between an international organisation and the very states which are its members'.¹⁸ Indeed, this is a central issue within this thesis – the relationship between the United Nations, its member states and the state host to a peacekeeping operation. In order to address this matter, this thesis will invoke critical legal theory in order to illuminate this tension within UN peacekeeping. The decision to apply critical legal theory, or to think critically about the law in this area, was inspired by Foucault's insistence that most claims which were presented as 'truth' can be viewed simply as expressions of power by the actor making the claim, who is attempting to shape the knowledge and undermine competing claims.¹⁹ Indeed, it is argued that the UN Charter is a 'living instrument' which is 'like every constitutional instrument, continuously interpreted, moulded and adapted to meet the interests of parties'.²⁰ It therefore follows that as UN peacekeeping stems from interpretations of the Charter,

¹⁶ *ibid.*

¹⁷ J Klabbers, *An Introduction to International Institutional Law* (CUP 2009) 3.

¹⁸ *ibid* 3-4.

¹⁹ See: M Foucault, *Ethics: Subjectivity and Truth: Essential Works of Michel Foucault 1954-1984. Volume I* (Penguin 2000).

²⁰ O Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 118-119.

particularly Chapters VI and VII, peacekeeping can, arguably, also be interpreted, moulded and adapted to meet the needs of the relevant parties, who, as this thesis will demonstrate, are typically the dominant Global North states or the permanent five members of the Security Council. The thesis thus seeks to challenge the dominant Western narrative of international law, opening it up to different interpretations in order to ascertain a true understanding of intervention and UN peacekeeping. As Kennedy notes, it is only after 'pushing past international law's classic self-conception' as the 'highest experience of universal values, the best map of the world's political actors and their powers, and toolkit of policy solutions' that international lawyers will be able to use international legal materials to illuminate global processes.²¹

In adopting this critical lens, the thesis will apply the philosophy of Third World Approaches to International Law (TWAIL). This has been chosen, in part, given that the focus of the thesis – the DRC – is a Global South or Third World state and partly because TWAIL is a scholarly movement committed to challenging the existing international order.²² Whilst there is no coherent and distinctive 'Third World approach' to international law, there are common features or characteristics which may be seen as an overarching 'Third World approach'.²³ Indeed, all TWAIL scholars or 'TWAIL-ers' are united in their opposition to the 'unjust global order' and the

²¹ D Kennedy, 'Law and Political Economy of the World' (2013) 26(1) LJIL 7-48, 37.

²² See: OC Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43(1/2) OHLJ 171-191, 176-177.

²³ K Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (2011) 16(2) WisInt'lJ 353-419, 353.

furtherance of their common goal of eradicating international laws' subordination of the Third World and its peoples.²⁴ As Mickelson notes, such a movement is best imagined as a 'chorus of voices that blend, though not always harmoniously' to make a shared collection of concerns heard.²⁵ TWAIL scholars therefore have a 'shared ethical commitment' to expose and reform features of international law which maintain an unequal order.²⁶ In seeking to expose the 'unjust relationship between the Third World and International Law',²⁷ TWAIL also illuminates the perspective of those who are often unheard – in this instance, the peoples of the Third World. As with other critical theorists, TWAIL scholars therefore strive to give a voice to 'the poor, the disadvantaged, the voiceless, the unrepresented, [and] the powerless'.²⁸

The origins of TWAIL, for some, can be traced to the decolonisation period, in particular, the Bandung Conference of 1955.²⁹ Generally, a distinction can be made between TWAIL I scholarship produced by this first generation of post-colonial international lawyers, such as Georges Abi-Saab and Taslim Elias,³⁰ and post-1996 TWAIL II scholarship.³¹ Regardless of this distinction,

²⁴ M Mutua, 'What is TWAIL?' (2000) 32 ASILProc 31-38, 36-37.

²⁵ Mickelson (n23) 360.

²⁶ Okafor (n22) 177.

²⁷ MA Attar and R Thompson, 'How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination' (2011) 3(1) TradeL&Dev 65-102, 67.

²⁸ E Said, *Representation of the Intellectual* (Vintage 1994) 84.

²⁹ Whilst Mutua argues that 'Bandung was the symbolic birthplace of TWAIL', others such as Gathii consider it to be a more recent phenomenon, tracing its origins to around 1996 at Harvard Law School. See: Mutua (n24) and JT Gathii, 'TWAIL: A Brief History of its Origins, its Decentralised Network, and a Tentative Bibliography' (2011) 3(1) TradeL&Dev 26-64.

³⁰ TO Elias, *New Horizons in International Law* (Springer, 2nd edn, 1992) and G Abi-Saab, *The Development of International Law: An Introduction by the United Nations* in F Snyder & S Sathirathai (eds) *Third World Attitudes to International Law: An Introduction* (Martinus Nijhoff 1987).

³¹ A group of Harvard Law School graduate students initiated a series of meetings. The group consisted of Celestine Nyamu, Balakrishnan Rajagopal, Hani Sayed, Vasuki Nesiah, Elchi Nowrojee, Bhupinder Chimni and James Thuo Gathii.

for all TWAIL scholars, 'international law makes sense only in the context of the lived history of the peoples of the Third World'.³² Two key characteristics of TWAIL thinking then stem from this. Firstly, that colonialism and neo-colonialism have made Third World peoples 'acutely sensitive to power relations among states' and to how international rules and institutions 'will actually affect the distribution of power between states and peoples'.³³ And, secondly, the 'interpretive prism through which these rules of international law are to be evaluated' is the 'actualised experience' of Third World peoples and 'not merely that of states'.³⁴ TWAIL therefore examines international law and the distribution of power from the perspective of the Third World and its peoples. Taking this TWAIL approach, this thesis will seek to question: if international law is 'the principal language in which domination is coming to be expressed in the era of globalisation', can this domination be found within intervention and UN peacekeeping?³⁵ In particular, is peacekeeping used, at times, to legitimate intervention in order to further the interests and agendas of the dominant powers?

In answering these questions, the thesis will apply some important tenets of both TWAIL I and TWAIL II scholarship. Firstly, TWAIL I, *inter alia*, stressed the importance of the principles of sovereignty and non-intervention and focused on colonial international law legitimising the

³² A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in International Conflicts' (2003) 2(1) ChinJIL 77-103, 78.

³³ *ibid.*

³⁴ *ibid.*

³⁵ BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 ICLR 3-7, 3.

subjugation and oppression of the Third World.³⁶ The thesis will therefore generally highlight both the importance of the principle of non-intervention and the use of international law by dominant states to oppress the Third World. Secondly, this thesis will focus on a main proposition of TWAIL II scholarship: that colonialism is not external or incidental to international law but, rather, that it is central to the formation of international law.³⁷ In doing so, the thesis will draw heavily on Antony Anghie's work on imperialism, sovereignty and the making of international law as his combination of theory, history and colonialism, when examining both international law and sovereignty, could arguably be applied to the principle of non-intervention, given that it is a corollary of sovereignty.³⁸ Anghie broadly argues that colonialism was central to the formation of international law, with many of the basic doctrines of international law (in particular, the doctrine of sovereignty) being forged out of the colonial confrontation and the attempt to create a legal system which could manage relations between European and non-European worlds.³⁹ This thesis will therefore take this hypothesis and apply it to the principle of non-intervention and UN peacekeeping to ascertain the extent to which, if at all, colonialism has animated the principle and the concept of peacekeeping.

In adopting this TWAIL approach, the thesis does not seek to deliberate the merits of TWAIL scholarship. That is, it will not engage in discussions about

³⁶ See: RP Anand, *International Law and the Developing Countries* (Banyan Publications 1987).

³⁷ Anghie and Chimni (n32); See also: A Riles, 'Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture' (1993) 106(3) HarvLRev 723-740; A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) 40(1) HarvIntLJ 1-71.

³⁸ A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).

³⁹ *ibid*, 3.

the risk of TWAIL 'simply rehashing, not reimagining old debates'⁴⁰ or its potentially paradoxical argumentative logic that is said to ultimately rely upon the very underlying assumptions of the conservative system which it seeks to transcend.⁴¹ Instead, the thesis will uniquely apply a TWAIL lens to intervention and peacekeeping to provide an alternative view to the prevailing Western-centric narratives. Similarly, it must also be noted that whilst the TWAIL story is one of the frustrations, disappointments and exploitation of the Third World by international law and international institutions, 'it is also a story of hope in the moments of resistance'.⁴² Therefore, the purpose of this thesis' application of the philosophy of TWAIL to UN peacekeeping is not to present a totalising, destructive critique of peacekeeping but, rather, to provide new insights and constructive criticisms in the hope that it will offer a more pluralistic interpretation, contributing to the reimagining and reinvigoration of peacekeeping.

2.2 The Congo

The Democratic Republic of the Congo has been chosen as the focus of this thesis as both peacekeeping and the Congo are arguably inextricably linked. That is, the UN has been deployed within the Congo, intermittently, since 1960 - two weeks after the country gained its independence and a few years into the birth of peacekeeping. As peacekeeping has shaped the Congo, then, so too has the Congo shaped peacekeeping. Indeed, the DRC has

⁴⁰ AG Kiyani, 'Third World Approaches to International Criminal Law' (2016) 109 *AJILUnbound* 255-259, 257

⁴¹ JD Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27(2) *CJLJ* 383-414, 386.

⁴² M Fakhri, 'Law as the Interplay of Ideas, Institutions, and Interests: Using Polyani (and Foucault) to Ask TWAIL Questions' (2008) 10 *ICLR* 455-465.

been used as a test-bed for UN peacekeeping with three operations deployed – ONUC (1960-1964) shortly after the Congo gained independence; MONUC (1999-2010) after the First Congo War and the signing of the Lusaka Ceasefire Agreement and MONUSCO (2010-present day) which was an evolution of MONUC into a stabilisation peacekeeping operation. These operations have been some of the largest and most expensive peacekeeping operations in UN history, with MONUSCO, in particular, continually reinventing itself⁴³ in an attempt to adapt to changing conflict dynamics and demands from the Security Council, Congolese government and regional actors.

Throughout its turbulent history, the Democratic Republic of the Congo has also been known by various names from its independence in 1960 to present day. During colonisation, it was named the Congo Free State and, later, the Belgian Congo; after gaining independence, initially, it was known as the Republic of Congo and then the Democratic Republic of the Congo until 1971 when the then President, Mobutu, changed its name to the Republic of Zaire under his 'Africanisation' programme.⁴⁴ The country remained as Zaire until Mobutu's dictatorship ended in 1997, when it was again renamed as the Democratic Republic of the Congo, as it is still known today. Throughout this thesis, the country will be referred to as 'Congo' or 'DRC' interchangeably. This is not to be confused with the Republic of Congo (or Congo-Brazzaville) which lies across the Congo River from the DRC's

⁴³ Such as deploying the Force Intervention Brigade and engaging in protection of civilian tasks.

⁴⁴ See: M Wrong, *In the Footsteps of Mr Kurtz* (Harper Collins 2000).

capital city, Kinshasa. It must also be noted that the use of 'the' may also be invoked ('the Congo') and whilst this does form part of Congo's official name, it must be recognised that some find it to be problematic, as it denotes colonial remnants.⁴⁵ The usage of 'the Congo' or 'the DRC' within this work, is therefore to be understood not in support of a colonial legacy but simply for grammatical purposes.

Similarly, throughout the thesis whilst the term 'Global South' is predominantly used, it may, at times be interchanged with 'Third World', particularly within Chapter 2 when the historical development of the principle of non-intervention is explored. In the post-Cold War era, many academics were sceptical of the term 'Third World', and proclaimed that it had ceased to exist as a category.⁴⁶ However, as Chimni argues, a critique of the term is an 'old divide and rule strategy' used by hegemonic states to 'misrepresent and undermine the unity of the Other' in order to exercise their own dominance.⁴⁷ Other commentators have also stressed the importance of understanding the term as a direct attack on Western hegemony in the world order.⁴⁸ Therefore, the category of 'Third World' remains crucial, provided that it is not fixed to a geographical space, and peoples continue to self-identify with the term.⁴⁹

⁴⁵ See, for example, S Autesserre, *The Trouble with the Congo* (CUP 2010) 36.

⁴⁶ See: D Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5(3) SocLegStud 337-364, 353.

⁴⁷ Chimni (n35) 6.

⁴⁸ Mutua (n24) 36.

⁴⁹ Okafor (n22) 175.

2.3 Empirical Research

The doctrinal, socio-legal, theoretical and jurisprudential research within this thesis is also supported by qualitative empirical research, in the form of semi-structured interviews, which is interwoven throughout the thesis.⁵⁰ That is, rather than containing a separate chapter of research findings, data from the interviews is dispersed throughout the thesis, informing how the law is applied in practice and providing an external perspective which will be compared and contrasted with the author's analysis of intervention, peacekeeping and the frameworks which govern the two concepts. The purpose of this empirical research is to provide an additional layer of analysis, potentially fill any gaps left by the theoretical and doctrinal parts of the thesis and to, ultimately, provide a more nuanced appreciation of the UN decision making process for peacekeeping both in general and specifically within the DRC.

Participants for this research consisted of United Nations personnel from various departments and organs of the UN within the organisation's headquarters in Geneva and New York, including: the Department of Peace Operations, the Office of Legal Affairs, UN Development Programme, Office of the High Commissioner of Human Rights and Office of the Special Representative on Conflict Related Sexual Violence. Furthermore, beyond the UN headquarters, numerous current and former MONUSCO personnel were also interviewed, including personnel within the Office of the Special

⁵⁰ See: JM Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2013); FL Leeuw & H Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar 2017).

Representative of the Secretary-General to MONUSCO, former Deputy and Force Commanders, current and former senior military personnel within MONUSCO's Force component, and numerous civilian personnel, such as: gender and child protection advisers and political affairs and human rights officers. Outside of the UN, interviews were also conducted with personnel from International Organisations, such as the International Committee of the Red Cross, non-governmental organisations and independent experts, including Congolese actors.

This combination of UN and non-UN actors was chosen as a data sample as it this ecology of 'First UN' (member states), 'Second UN' (staff members of international secretariats) and 'Third UN' (supportive non-state actors such as NGOs and consultants) which, together, formulate and refine ideas and decision making on UN policies, including peacekeeping matters.⁵¹ Focusing on a mixture of these actors therefore provides a greater understanding of the politics of knowledge and norm production which shape UN directives on peacekeeping and the ideas and narratives which drive or underpin them.⁵²

Whilst a number of interviewees were selected for their knowledge or work in fields relating to intervention and UN peacekeeping in the DRC, 'snowball sampling' or the 'chain-referral sampling' method was also undertaken.⁵³ The exponential non-discriminative snowball sampling method was used to

⁵¹ TG Weiss, T Carayannis and R Jolly, 'The "Third" United Nations' (2009) 15(1) GG 123-142.

⁵² T Carayannis and TG Weiss, *The "Third" United Nations: How a Knowledge Ecology Helps the UN Think* (OUP 2021) 1-2.

⁵³ SC Parker and A Geddes, 'Snowball Sampling' in P Atkinson, S Delamont, A Cernat, JW Sakshaug and RA Williams (eds) *SAGE Research Methods Foundations* (SAGE 2019) 3-13.

allow for multiple referrals, providing greater access to networks within the UN system. This method was also chosen as, in-line with this thesis' aim of understanding knowledge, norm and policy production in the UN, snowballing sampling can generate a unique type of social knowledge, which is 'emergent, political and interactional'.⁵⁴ That is, it can provide a deeper understanding of the intricacies of UN decision making on peacekeeping matters as interviewees identify and refer others within their network whom they deem to be key or influential actors within peacekeeping. This then creates a patchwork of differing interpretations, views and understandings on how and why peacekeeping's norms and principles are interpreted and applied.

Thus, the aim of these interviews and the broader purpose of the thesis is to seek to ascertain the 'what', 'why' and 'how's' of peacekeeping – what constitutes the peacekeeping frameworks, why are they peacekeeping's boundaries and how are they interpreted and applied in practice? Whilst the author offers an interpretation of these questions, the interviews with personnel who engage in these frameworks at the institutional and field level provides further views on both their interpretations of these frameworks and their understanding of the UN's interpretations. Furthermore, fieldwork for this thesis has focused on interviews with actors at the institutional level, rather than at the field level, as it these actors who set the legal and normative frameworks which govern intervention and

⁵⁴ C Noy, 'Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research' (2008) 11(4) JSRM 327-344, 327.

peacekeeping and which this thesis seeks to clarify. Interview questions therefore focused on ascertaining what frameworks the individuals perceived themselves to be operating within, what they believed to be the high and low points or strengths and weaknesses of the UN's current operation in the Congo (MONUSCO) and whether they believed that there are any lessons which could be learnt from the UN's experiences in the Congo.⁵⁵

All interviews were conducted in a private location, either face-to-face (predominantly at the UN headquarters in New York) or via online technologies such as Skype and Zoom.⁵⁶ The latter was used in order to overcome any temporal, financial or geographical constraints, thereby permitting access to key informants and increasing participation.⁵⁷ Interviews were then recorded using a digital voice recorder, accessed only by the researcher. All participants consented to their data potentially being used in the thesis and any future presentations, projects or publications authored by the researcher. Interviewees have also all been anonymised (except one participant who requested to be named) and are simply identified as either 'interviewee' or by some nondescript reference to their occupation, such as 'senior UN personnel' or 'former military personnel'. Data from the interview, including participants' personal information and transcripts of the interview, have been stored on an encrypted USB and in

⁵⁵ See: I Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (3rd edn, Teachers' College Press 2006).

⁵⁶ NG Fielding, RM Lee and G Blank, *The SAGE Handbook of Online Research Methods* (2nd edn, SAGE Publishing 2016).

⁵⁷ R Janghorban, R Roudsari and A Taghipour, 'Skype Interviewing: The New Generation of Online Synchronous Interview in Qualitative Research' (2014) 9(1) IJQSHW 24152.

password protected files accessible only to the researcher. From this, the data has been condensed into a 70-page, thematic dataset which has been published in the University of Nottingham Research Data Management Repository in order for the findings to be discoverable, visible and citable.⁵⁸

3. Structure of the Thesis

The structure of this thesis can be likened to a three-tiered pyramid with intervention or the principle of non-intervention forming the top of the pyramid, whilst UN peacekeeping forms the second layer, with peacekeeping in the Congo constituting the third and final layer. Chapter 2 will therefore begin by providing a definition of intervention and an examination of the historical development of the principle of non-intervention. It will highlight how the concept and practice of intervention has been somewhat cyclical, with a constant fluctuation in intervention and non-intervention rhetoric, often coupled with a disparity between rhetoric and practice. That is, whilst the principle of non-intervention may have been emphatically supported, in practice interventions have often occurred. The Chapter therefore argues that these cycles of interventionist practice have had the impact of either supporting or undermining the principle of non-intervention. When exploring contemporary interventions, the Chapter noted that UN peacekeeping, as a form of collective security intervention is the most prevalent form of intervention today.

⁵⁸ J Giblin, 'United Nations Peacekeeping Raw Interview Data' (University of Nottingham Research Data Management Repository, June 2021) DOI: <<http://doi.org/10.17639/nott.7119>>.

As such, Chapter 3 moves on to explore the second layer of the pyramid – UN peacekeeping – finding that, despite the lack of an explicit framework, there exist legal principles and norms which, together, form a complex peacekeeping framework. It identifies the ‘holy trinity’ of consent, impartiality and non-use of force as the three legal principles which formulate peacekeeping’s legal framework, whilst arguing that the newer, more controversial norms of democracy promotion, protection of civilians (PoC) and the prohibition of sexual exploitation and abuse (SEA) form part of peacekeeping’s normative framework. The Chapter argues that the legal framework sits at the core of peacekeeping and is surrounded by the much broader normative framework. However, Chapter 3 notes that these frameworks do not exist in total isolation but, rather, overlap at certain points, particularly when the norms invoke elements of international humanitarian, criminal and human rights law, thereby providing a secondary contribution to peacekeeping’s legal framework. Furthermore, the Chapter argues that these principles and norms do not exist harmoniously and instead ‘exist in a competitive arena’ with the normative composition of a peacekeeping operation being ‘rebalanced each time’.⁵⁹ As such, an interpretation and application of one norm or principle may have an impact on another. Indeed, Chapter 3 highlights how the six principles and norms are continually re-interpreted and re-shaped which results in peacekeeping’s frameworks being repeatedly contracted and expanded.

⁵⁹ J Karlsrud, ‘Special Representatives of the Secretary-General as Norm Arbitrators? Understanding Bottom-up Authority in UN Peacekeeping’ (2013) 19(4) GG 525-544, 527.

That is, where the principles and norms are interpreted narrowly, generally, this results in a constriction of the peacekeeping frameworks, thereby firming the boundary between peacekeeping and intervention and consequently reinforcing the principle of non-intervention. However, when the principles and norms are interpreted more broadly, as is frequently the case with contemporary, multi-dimensional stabilisation operations, this expands peacekeeping's frameworks, blurring the line between peacekeeping and intervention and therefore undermining or, at times, potentially contravening the principle of non-intervention.

Following this, Chapters 4 and 5 take this analysis further by examining peacekeeping in practice, through an exploration of the UN's operations in the Congo. Whilst Chapter 4 focuses on the interpretation and application of peacekeeping's legal frameworks in the DRC, Chapter 5 examines the normative frameworks. Both chapters again demonstrate how these frameworks are constantly re-interpreted, re-imagined and contorted, resulting in a continual fluctuation of peacekeeping's boundaries and the dividing line between peacekeeping and intervention. It is argued that, at times, ONUC, MONUC and MONUSCO have expanded peacekeeping's frameworks to their very limits and beyond, resulting in peacekeeping becoming intervention. As such, the thesis argues that there may need to be a narrowing or retraction of some of peacekeeping's principles and norms, and therefore the peacekeeping frameworks, in order to shrink the invisible red boundary line surrounding peacekeeping and to re-affirm the boundaries between peacekeeping and intervention.

Chapter 2

The Principle of Non-Intervention

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1. Introduction

In the broadest sense of the term, everything that anyone does which has an effect or influence on another is an intervention. Indeed, intervention is a 'continuum, ranging from criticism to coercion'¹ and is both a legal and political concept.² Within international law, intervention is a contentious concept, directly linked to the principles of sovereignty, self-determination and non-use of force, and is a 'corollary of every state's right to sovereignty, territorial integrity and political independence'.³ The purpose of this Chapter is to critically analyse the development of the principle of non-intervention and to ascertain its current status within international law. In subsequent Chapters this concept of intervention will then be applied to UN peacekeeping in order to understand the relationship between peacekeeping and intervention. That is, when exploring the development of peacekeeping and its principles, this thesis will question to what extent these principles may support or breach the principle of non-intervention, resulting in peacekeeping potentially becoming a form of unlawful intervention.

Defining Intervention

Within international law, there is no singular, authoritative definition of intervention. It is an ambiguous, 'blurred, controversial and disputed' legal term,⁴ and, as a concept, is described as 'one of the vaguest branches of

¹ MNS Sellers, 'Intervention under International Law' (2014) 29(1) Maryland JIL, 6.

² For a discussion on the legal and political aspects of intervention, see: H Bull (ed) *Intervention in World Politics* (Clarendon 1984).

³ RY Jennings and AD Watts, *Oppenheim's International Law* (9th edn, OUP 2008) 428.

⁴ G Hafner, 'Sub-group on Intervention by Invitation, Preliminary Report, 26 July 2007' (2007) Yearbook of the Institute of International Law, Sanitago Session 226, 236.

international law'.⁵ As Argentinian jurist Carlos Calvo wrote in 1870, on the matter of intervention 'there are almost as many opinions as there are authors'.⁶ This remains true today. The definition is also further complicated by states' frequent use of the term in political rhetoric, condemning the acts of other states as intervention in their internal affairs.⁷

Within the United Nations system, a practical, working definition of intervention is adopted, with intervention defined as any 'action along a wide continuum from the most pacific to the most coercive' by one state against another.⁸ However, for the purposes of this Chapter, as the thesis is examining the legal norms or principles within UN peacekeeping, a normative definition will be taken instead. 'Intervention' will therefore be defined as any situation where coercive action is taken by a state, state actor, or international organisation to try to enforce a change in the internal affairs of another state. This definition follows the general definition stated by Oppenheim, that 'intervention is dictatorial interference by a State in the affairs of another State'.⁹ It is also in-keeping with the International Court of Justice's (ICJ) understanding of the principle of non-intervention, which it stated in *Nicaragua* 'involves the right of every sovereign State to conduct

⁵ PH Winfield, 'The History of Intervention in International Law' (1922-3) 3 BYIL 130.

⁶ Translation quoted in: A Heraclides and A Diaila, *Humanitarian Intervention in the Long Nineteenth Century: Setting the Precedent* (MUP 2015) 14.

⁷ Such as the Trump administration's foreign policy dialogue. See: S Siddiqui, 'Donald Trump Praises Syria Strikes and Declares: 'Missions Accomplished'' (*The Guardian*, 14 April 2018) <<https://www.theguardian.com/us-news/2018/apr/14/donald-trump-syria-strikes-mission-accomplished>> Accessed 15 April 2018; M Zenko, 'Donald Trump is a Magical (Foreign Policy) Realist' (*Foreign Policy*, 7 June 2016) <foreignpolicy.com/2016/06/07/donald-trump-is-a-magical-foreign-policy-realist/> Accessed 1 March 2018.

⁸ UN Press Release, 'Secretary-General Presents his Annual Report to General Assembly' (SG/SM/7136, GA/9596).

⁹ IL Oppenheim, *International Law: A Treatise* (Longmans, Green and Co 1905) 221.

its affairs without outside interference'.¹⁰ The Court also went on to note that the principle 'forbids' intervention either 'directly or indirectly in internal or external affairs of other States', which includes political, economic, social, cultural and foreign policy matters, and confirmed that intervention is 'wrongful when it uses methods of coercion'.¹¹

For the remainder of this thesis, then, when examining both the principle of non-intervention and, later, UN peacekeeping, 'intervention' will be any action taken by a state, state actor or international organisation such as the UN, that may be deemed coercive, in order to force change within the host state. In particular, there will be a focus on action taken by the UN, predominantly through peacekeeping, to coercively influence change within the DRC. Coercive action will be further understood as activities which override the element of voluntariness. That is, pressure on the host state, (either directly or indirectly) to change or demand a change to their behaviour, without the state being able to reject the change or to decide whether or not to comply. Coercion is therefore distinguishable from persuasion, criticism, public diplomacy and propaganda as they are aimed at a voluntary change, unlike coercion which removes this element of voluntarism. For example, a peacekeeping operation which instructs a host state to remove certain personnel from its armed forces or it will withdraw its support could amount to direct coercive action as the ultimatum removes the element of voluntarism from the UN's request. Similarly, indirect

¹⁰ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 202.

¹¹ *ibid* 205.

coercive action may occur through the development of sub-economies around peacekeeping bases as these create host state dependency or reliance on the peacekeeping operation which, in turn, may result in subsequent UN ultimatums becoming coercive. Indeed, it is this concept – UN peacekeeping as intervention – which will run as the red thread throughout this thesis. That is, when examining the development of UN peacekeeping and then, more specifically, UN peacekeeping in the DRC, this thesis will highlight instances in which it appears that peacekeeping has crossed the threshold into intervention. More profoundly, it will explore how the functions of contemporary stabilisation peacekeeping operations may amount to intervention.

Furthermore, as outlined in the introduction, this Chapter, like the whole of the thesis, will also be informed by Third World Approaches to International Law (TWAIL). As previously explored,¹² for TWAIL scholars, 'international law makes sense only in the context of the lived history of the peoples of the Third World'.¹³ Applying TWAIL, the Chapter will focus on the importance of the principle of non-intervention and the use of international law by dominant states to oppress the Third World or Global South. It will also focus on the role colonialism has played in shaping the principle of non-intervention.¹⁴ In particular, it will draw upon Anghie's work on imperialism, sovereignty and the making of international law to ascertain the extent to

¹² Chapter 1, Section 2.1.

¹³ A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in International Conflicts' (2003) 2(1) Chinese JIL 77-103, 78.

¹⁴ *ibid*; See also: A Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture* (1993) 106 HarvLR 723; A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) 40(1) HarvIntLJ 1.

which, if at all, colonialism has animated the principle of non-intervention.¹⁵ More specifically, this Chapter will highlight the power relations embedded both within the principle and within its application, focusing on the concept of 'othering'¹⁶ – distinguishing between 'us' and 'them'/'others', with the latter group viewed as lesser, thereby justifying domination by the enlightened 'us'.¹⁷ Anghie argues that 'over the centuries' international lawyers have maintained a basic dichotomy between 'the civilised and the uncivilised' and have 'continually developed techniques' to civilise the uncivilised.¹⁸ As other scholars have noted, the civilising mission or the 'standard of civilisation' identified 'those that belong to [a] particular society from those that do not' and those nations that did not measure up were excluded 'as 'not civilised' or possibly 'uncivilised''.¹⁹ Throughout the early development of international law, this division resulted in those deemed to be 'uncivilised' as falling 'outside the bounds of international society and thus lacking equal recognition in international law'.²⁰ These 'uncivilised' societies were either rejected from the remit of international law or given a quasi-legal status – partially subjected to international law but afforded only minimal protection. The classical standard of civilisation was therefore 'well and truly entrenched in the annals of international law'.²¹ This endless process of creating a gap between two cultures ('demarcating one as

¹⁵ A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).

¹⁶ See: E Said, *Orientalism* (Penguin Books 2003).

¹⁷ See: E Said, *Culture and Imperialism* (Vintage 1994) (For contemporary discussion in international law, see: A Orford (ed) *International Law and its Others* (CUP 2006)).

¹⁸ Anghie (n15) 4.

¹⁹ GW Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984) 3.

²⁰ B Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization' (2005) 7 JHIL 1-23, 20.

²¹ *ibid.*

'universal' and civilised and the other as 'particular' and 'uncivilised') and then seeking to close this gap by normalising the 'aberrant society' is what Anghie refers to as the 'dynamic of difference'.²² He argues that this dynamic animated the development of core doctrines of international law, in particular, sovereignty doctrine and continues to operate within international law today. Anghie further argues that this characterisation of 'non-European societies as backward and primitive legitimised European conquest of these societies' and justified intervention.²³ It is this concept that this Chapter, and the remainder of the thesis, will therefore build upon. Indeed, this Chapter will highlight how the principle of non-intervention, like sovereignty, also acquired its character through colonialism and was shaped, and continues to be shaped, by the 'dynamic of difference'. It will note examples of when this dynamic has been created and then used to justify intervention, primarily on the basis of needing to bridge the gap between the civilised and uncivilised or, more recently, the developed and developing. The Chapter will therefore employ Anghie's theory and a broader TWAIL lens to highlight the contradictions and inherent power biases throughout the evolution of the principle of non-intervention (the North-South divide), its uneven application (both past and present) and the potential for it to be used as a tool by dominant powers (including the UN as an autonomous actor) to extend their self-interests.

²² Anghie (n15) 4.

²³ *ibid.*

Taking this theoretical approach and the previously discussed definition, this Chapter will examine the legal development and application of the principle of non-intervention. The aim of the Chapter will be to analyse this development and application with reference to the broader global issues and its impact on the Democratic Republic of the Congo (DRC), where relevant. The Chapter will begin by examining the historical development of non-intervention and, then, its advancement through international organisations, conventions, charters and case law, before examining the principle in the modern era. It will identify key tipping points or periods throughout this evolution, such as colonialism, the Bandung conference, decolonisation and, more recently, the War on Terror. The Chapter will examine various forms and justifications for intervention, such as collective security intervention, and will identify examples of Anghie's dynamic of difference throughout the development and operation of non-intervention. It will conclude by summarising the principle of non-intervention today before the thesis moves on to explore UN peacekeeping as a specific form of intervention. Throughout this exploration, it must be noted that whilst a critical lens is applied, this is not a totalising critique aimed at dismantling the principle of non-intervention. As noted in the introduction to this thesis, the adoption of a critical lens is a constructive critique, designed to clarify the legal and normative boundaries of the principle – the red elastic band which surrounds the principle- and to explore the justifications or legitimisations which puncture this red line, thereby challenging or undermining the principle of non-intervention. This Chapter therefore

provides a greater understanding of the principle of non-intervention which will be taken further in subsequent Chapters when examining the concept of peacekeeping.

2. Historical Development

During the 'Age of Discovery' in the fifteenth century intervention occurred on a grand scale in the form of conquest and discovery. Led by Portuguese and Spanish explorers, the 'discovery' of the 'New World' facilitated European expansion and laid the foundations for the subsequent colonial project.²⁴ It was during this period that the DRC was subject to external intervention for the first time. In 1482 Portuguese explorer, Diogo Cão 'discovered' the Congo, claiming the land on behalf of King João II of Portugal, despite the pre-existing Kingdom of Kongo which is thought to have been established at least 100 years prior to European intervention.²⁵ Although the Portuguese were said to have 'grudgingly recognised in the Kingdom a sophisticated and well-developed state',²⁶ it was disregarded on the basis of the Europeans' belief in their superior ontological status and divine or natural right to hegemonic power – a mentality which has seemingly endured throughout history, as this Chapter will highlight. Indeed, it could be argued that within this exploration of the principle of non-intervention, this is the first example of Anghe's dynamic of difference. That is, the first occasion, in relation to intervention, in which the 'other' is

²⁴ See: E Hobsbawm, *The Age of Empire: 1875-1914* (Abacus 1989).

²⁵ See: SH Broadhead, 'Beyond Decline: The Kingdom of the Kongo in the Eighteenth and Nineteenth Centuries' (1979) 12(4) *IJAHS* 615-650; J Vos, *Kongo in the Age of Empire, 1860-1913: The Breakdown of a Moral Order* (University of Wisconsin Press 2015).

²⁶ A Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (Pan Books) 9.

created and a distinction is drawn between the hegemonic Western powers and the newly 'discovered' Congolese state.

Prior to the nineteenth century intervention was therefore a common method for dealing with foreign affairs and, in particular, enforcing impartial and papal rules in the Middle Ages.²⁷ As European exploration intensified, questions arose as to how the 'New World', 'which was not part of the *'respublica Christiana'*, but also not classed as the 'enemy', should be perceived.²⁸ Again, the issue of how to deal with the 'other' and address the dynamic of difference was problematic.

2.1 Peace of Westphalia

This changed in 1648 with the Peace of Westphalia – a trinity of treaties which ended the Thirty Years War in Europe and marked a turning point in international relations and the law of nations. It is generally argued that the Peace established the concept of sovereignty and a 'Westphalian system' of equal, sovereign states who refrained from intervening in each other's domestic affairs.²⁹ Westphalia is therefore crucial for the principle of non-intervention as it established the concept of sovereignty within international law and, by corollary, non-intervention. However, as Milton argues, by including France and Sweden's 'foreign crowns' in the treaties, 'a right to intervene for the protection of constitutional and religious rights within

²⁷ See: W Preiser, 'History of International Law, Ancient Times to 1648' (Max Planck Encyclopedia of Public International Law, 2008) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e716>> Accessed 20 June 2017.

²⁸ G Baars, 'From the Dutch East India Company to the Corporate Bill of Rights: Corporations and International Law' in U Mattei and J Haskell (eds) *Research Handbook on Political Economy and Law* (Edward Elgar 2015) 263.

²⁹ See: D Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (PUP 2001) 4, 30, 85; cf D Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *Int Hist Rev* 569; S Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?' (2000) 2 *JHIL* 148-177.

another state was enshrined in positive treaty law'.³⁰ The Westphalian treaties therefore legalised intervention in a foreign state in order to protect the legal rights of subjects. Similarly, the concept of sovereignty and therefore this tentative principle of non-intervention, was only applicable to the European powers, as such, intervention in non-European territories was perceived as more permissible. This is epitomised in the sixteenth century when Francisco de Vitoria discussed the legitimacy of intervention in the form of European colonisation in the 'New World'.³¹ In *On the Indians Lately Discovered*,³² Vitoria denied the natives or 'Indians' sovereignty, on the basis that this was a right reserved only for Christians.³³ This purported lack of sovereignty, combined with European claims to free trade and the absence of any Western legal systems denoted a lack of civilisation in the 'New World' and justified European intervention and conquest. The Europeans believed that these 'uncivilized' or 'primitive' societies required the expansion of European (international) law;³⁴ again, providing another justification for extensive intervention. For Anghie, this exemplifies the formulation and operation of the dynamic of difference 'at the very beginning of the discipline of international law' as the Indian's are firstly characterised as the primitive other and then a series of legal principles are

³⁰ P Milton, 'Guarantee and Intervention: The Assessment of the Peace of Westphalia in International Law and Politics by Authors of Natural Law and of Public Law c. 1650-1806' in S Zurbuchen (ed) *The Law of Nations and Natural Law 1625-1800* (Brill 2019) 186-226, 199.

³¹ W Bain, 'Vitoria: The Laws of War, Saving the Innocent, and the Image of God' in S Recchia and J.M. Welsh (eds) *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill* (CUP 2013) 70-95.

³² F de Vitoria, *De Indis et De Ivre Belli Relectiones* (first publication 1532, Ernest Nys tr, Oceana 1964).

³³ See: Anghie (n15) 13-31.

³⁴ Bowden (n20) 13.

outlined to justify intervention on the basis of the need to 'civilise' the other and close the gap between the two cultures.³⁵

Similarly, whilst European lines of hegemony were being demarcated across the globe in the sixteenth and seventeenth centuries, trading companies became increasingly important interventionist actors in aiding states' attempts to colonise any unclaimed land.³⁶ Corporations such as the Dutch and British East India Companies became key components of the colonial expansion as their 'indistinct legal status' made them 'perfect agents to police' the 'transitional' colonialism.³⁷ In the Congo, its position in the centre of the central African trade network allowed for expansive trade in ivory and other natural resources, particularly with Portuguese merchants who often traded directly with provincial nobles.³⁸ Corporations were therefore significant interveners, with their interventionist activities moulding the earliest formations of international law. As Grewe notes, whilst states used these actors, who were considered more or less independent, to annex conquered territories, they consequently constructed a 'particularly elastic system of colonial international law'.³⁹ At the same time as corporations and states were exploring and expanding, the Trans-Atlantic slave trade – the most illustrative and interventionist form of colonial violence – was spreading across Africa. For the Congo, the slave trade began in the Kingdom of Kongo as early as the fifteenth century as relations between

³⁵ Anghie (n15) 9.

³⁶ C Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press 2006), 182; W Grewe, *The Epochs of International Law* (Walter de Gruyter & Co; Rev Ed 2000) 181.

³⁷ *ibid*, Miéville 182.

³⁸ A Hilton, *The Kingdom of the Kongo* (OUP 1985) 58.

³⁹ Grewe (n36) 346.

the Portuguese explorers and Kongo rulers increased.⁴⁰ Whilst the Kingdom initially only enslaved and deported foreign-born captives, with natives of the Kongo largely protected from enslavement, this distinction soon eroded and all peoples became subject to enslavement.⁴¹ This expansion of the slave trade contributed to the weakening of the Kingdom and allowed for European colonies to take root.⁴²

The slave trade also perfectly exemplifies Anghie's dynamic of difference. The trade solidified the dichotomy of 'civilised' and 'uncivilised' and crystallised the concept of the 'other'.⁴³ Western intervention in the 'New World' was then justified on the basis of 'civilising' the 'barbarians' or 'savages' thereby seeking to close the gap in Anghie's so-called dynamic of difference.⁴⁴ The slave trade was therefore animated by the European belief, in particular, in African's 'inferiority' and 'backwardness', resulting in a lasting effect on how Europeans viewed and treated Africans.⁴⁵ This narrative also perpetuated the concept of the 'White Man's burden'⁴⁶ within international relations. That is, the belief that powerful, predominantly Western states are tasked with the 'burden' of 'civilising' the 'barbarous' Third World and therefore intervention in these states is a necessary and legitimate task. This rhetoric of enlightened civiliser and uncivilised natives

⁴⁰ Hilton (n38).

⁴¹ L Heywood, 'Slavery and Its Transformation in the Kingdom of Kongo: 1491-1800' (2009) 50(1) JAH 1-22; DL Wheeler, 'Nineteenth-Century African Protest in Angola: Prince Nicolas of Kongo (1830? – 1860)' (1968) 1(1) AHS 40-59, 7.

⁴² *ibid* 7.

⁴³ See: E Said, *Orientalism* (Penguin Books 2003); Orford (n17).

⁴⁴ These terms are in quotation marks as they were part of the ordinary discourse of many international lawyers, commentators and actors from the fifteenth to nineteenth century, such as Francisco de Vitoria and James Lorimer. See, for example: J Lorimer, *The Institutes of the Law of Nations Vol 1* (Adamant Media Corporation 2001).

⁴⁵ K Somerville, *Africa's Long Road Since Independence: The Many Histories of a Continent* (Penguin 2017) 6.

⁴⁶ R Kipling, *The White Man's Burden: A Poem* (Doubleday and McClure Co 1899).

was also furthered during the Age of Discovery by Christian missionaries who sought to convert natives to Christianity. Within the Congo, Christian missionaries were particularly prevalent, providing the 'vanguard of European colonisation in the Congo'.⁴⁷ During this period, intervention therefore occurred extensively and was predominantly based or justified on a sense of moral righteousness –the European belief in their duty to enlighten the inferior 'new world'- a theme which has arguably permeated the principle of non-intervention and remains embodied within it today. It is within this context that international law and the principle of non-intervention emerged.

2.2 Formulating a Principle of Non-Intervention

In the seventeenth-century, scholars such as Hugo Grotius, began to support the notion of intervention (within European states) to protect individuals within another state from violations of natural law, on the basis that they were unable to defend themselves from their sovereign.⁴⁸ However, others such as Wolff believed that intervention within the concept of natural law was impermissible, arguing that to interfere in another state 'is opposed to the natural liberty of nations'.⁴⁹ Post-Westphalia, the principle was therefore still subject to much debate. Indeed, overall, whilst the Peace of Westphalia established a system of sovereign states and, by extension, an unofficial agreement of non-interventionism, rather than curtailing

⁴⁷ M Markowitz, 'The Missions and Political Development in the Congo' (1970) 40(3) IAI 234-247, 234.

⁴⁸ See: GP van Nifterik, 'Religious and Humanitarian Intervention in Sixteenth and Early Seventeenth Century Legal Thought' in R Lesafer and G Macours (eds) *Sovereignty and the Law of Nations (16th-18th Centuries)* (Peeters Publishers 2006).

⁴⁹ Quoted in J Pitts, 'Intervention and Sovereign Equality: Legacies of Vattel' in S Recchia and J.M. Welsh (eds) *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill* (CUP 2013) 143.

internal interventions, Westphalia 'strengthened them by increasing the scope of the basis upon which interventions could take place'.⁵⁰ The Westphalian system therefore seemingly established a system which favoured non-intervention, on the basis of sovereignty, but permitted intervention if a legal basis existed. This formulation of a general prohibition of intervention but with specific legal justifications or exceptions has persisted throughout the development of the principle of non-intervention.

During this period, it is Emer de Vattel, a founding father of modern international law,⁵¹ who is often credited with being the first to formulate the principle of non-intervention in 1758 in his work *Le droit des gens*.⁵² Within this, Vattel 'inaugurated the terms in which we continue to carry on debates about intervention'; that is, a system of 'legally equal and independent sovereign states that warrant protection from outside intervention in order to develop autonomously'.⁵³ However, despite some codification of the principle,⁵⁴ in the midst of the French Revolution, France, for example, failed to limit its own interference in the internal affairs of other states, with the French government claiming a right to intervene in all cases where interference was necessary to assist people's struggle for liberty.⁵⁵ Even during its early conception, then, the paradox within the

⁵⁰ Milton (n30) 201.

⁵¹ There are numerous histories of international law (such as Chinese international law or Islamic international law) but it is European law, now known as modern international law, which has come to dominate.

⁵² E Vattel, *Droit des gens ou principes de la loi naturelle* (Londres 1758) I para 37

⁵³ Pitts (n49) 132.

⁵⁴ For France, non-intervention was integrated in Article 4 of its Constitutional Act and in its Declaration of the Rights of Man and of the Citizen. See: RR Ludwikowski, 'The Beginning of the Constitutional Era: A Bicentennial Comparative Study of the American and French Constitutions' (1989) 11(1) MJIL 167.

⁵⁵ See: WE Lingelbach, 'The Doctrine and Practice of Intervention in Europe' (1900) 16 AnnAmAcadPolSocSci 1-32.

intervention principle is evident. This contradiction between intervention in theory and intervention in practice or, more specifically, the dominant powers' manipulation of a caveated principle of non-intervention, has persisted throughout the evolution of the principle. That is, states arguably purport to be non-interventionist yet intervene extensively under various auspices. Indeed, the French justification for intervention – the protection of nationals and individual liberties⁵⁶ has arguably persisted throughout the development of the principle of non-intervention and can be seen in contemporary justifications such as humanitarian intervention and the responsibility to protect. All of which seek to protect the rights of individuals and invoke a similar sense of moral righteousness, as espoused during the Age of Discovery, albeit in a different context. For TWAIL scholars, the creation of international law during this period was based on European and Christian values, with 'Europe as the centre, Christianity as the basis for civilisation, capitalism as innate in humans and imperialism as a necessity'.⁵⁷ The selective use of intervention by the dominant European powers therefore exemplifies these European and Christian origins of international law.

Whilst the concept of a non-intervention principle was discussed again by scholars such as Kant in the late 18th Century,⁵⁸ states continued to

⁵⁶ *ibid.*

⁵⁷ M Mutua, 'What is TWAIL?' (2000) 94 ASILPROC 31-38, 33.

⁵⁸ See for example: FH Hinsley, *Power and the Pursuit of Peace* (CUP 1963); FR Tesón, 'The Kantian Theory of International Law' (1992) 92(1) ColumLRev 53-102; A Franceschet, 'Kant, International Law and the Problem of Humanitarian Intervention' (2010) 6(1) JIntPolTheory 1-22.

intervene extensively in other nations. In Europe, the Holy Alliance⁵⁹ claimed the right to intervene in situations involving European revolutionary governments, on the basis of protecting the legal establishment⁶⁰ - a justification arguably similar to today's Rule of Law. Beyond Europe, the right of intervention was also established in multilateral treaties such as the Treaty of Berlin 1878, which permitted European powers to interfere in the internal affairs of Turkey and Africa, primarily based on a form of 'humanitarian' intervention, to guarantee a minimum of rights of the inhabitants.⁶¹ In international legal scholarship, Oppenheim's classic commentary on international law also addressed the issue of intervention.⁶² Following Lauterpacht's approach, Oppenheim noted that intervention was 'as a rule, forbidden by the Law of Nations' but only if it was 'forcible or dictatorial interference'.⁶³ Interference 'pure and simple' was not enough to be considered as illegal intervention.⁶⁴ Oppenheim also noted that, in addition to forceful or dictatorial interference, intervention could be justified on the basis of protecting a state's nationals, humanitarian reasons or collective intervention in the general interest.⁶⁵ It is this concept of intervention which has generally prevailed.

⁵⁹ See: WP Cresson, *The Holy Alliance: The European Background of the Monroe Doctrine* (OUP 1922); A Brisku, 'The Holy Alliance as 'An Order of Things Conformable to the Interests of Europe and to the Laws of Religion and Humanity' in T Hippler and M Vec (eds) *Paradoxes of Peace in Nineteenth Century Europe* (OUP 2015).

⁶⁰ Austrian intervention was justified in the Troppau Proposal of 19 November 1821. See: P.W. Schroeder, *The Transformation of European Politics, 1763-1848* (OUP 1994) 610-612.

⁶¹ Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East (13 July 1878).

⁶² Oppenheim (n9).

⁶³ *ibid* s134, 221.

⁶⁴ Jennings and Watts (n3) 428.

⁶⁵ *ibid*.

The principle of non-intervention eventually began to gain significant support from states, with the introduction of numerous doctrines in the late nineteenth century.⁶⁶ This change in approach to intervention was a direct reaction to the excess and abuse of intervention which occurred with the emergence of new nation states. In particular, the Latin American Wars of Independence forced a shift in the colonial global power order and marked the first wave of decolonisation, with most Latin American states gaining their independence by 1825.⁶⁷ During this time policies such as the Monroe Doctrine were proclaimed, in this instance, as a United States' policy against opposing European colonialism in the Americas, appearing to declare a strong non-interventionist stance.⁶⁸ However, in practice the doctrine was used by the United States to exert American hegemony over Latin America and justify intervention.⁶⁹ The Monroe Doctrine could be viewed, then, as an agreement between dominant states in the Global North to mutually respect each other's sovereignty and, in particular, to refrain from intervening in each other's spheres of influence – namely, the Global South. It therefore was a selective form of the principle of non-intervention, supporting the notion that both non-intervention and sovereignty were only applicable to select states, thereby marginalising and excluding the 'other' states who were not granted the protection of the principles and, again, re-creating Anghie's dynamic of difference. Indeed, the United States'

⁶⁶ For example, the Calvo Doctrine/Calvo Clause (1868); Monroe Doctrine (1823) and Drago-Porter Convention (1907).

⁶⁷ See: R Harvey, *Liberators: Latin America's Struggle for Independence* (Overlook Books 2002).

⁶⁸ See: J Sexton, *The Monroe Doctrine: Empire and Nation in Nineteenth-Century America* (Farrar, Straus and Giroux 2011).

⁶⁹ See: MR Gilderhus, 'The Monroe Doctrine: Meanings and Implications' (2006) 36(1) PSQ 5-16.

application of the Monroe Doctrine has been referred to as 'imperial anticolonialism';⁷⁰ that is, whilst the Doctrine rejected European colonialism, it simultaneously permitted American imperialism. Again, the development and application of the Monroe Doctrine supports Anghie's argument that doctrines of international law grew out of and were shaped by the colonial encounter, with the endless dynamic of difference creating gaps between states.⁷¹ The Treaty of Berlin and the Monroe Doctrine are therefore two examples of a legal instrument and a political instrument having a legal effect which both contributed to the development of the principle of non-intervention and simultaneously permitted intervention, primarily within the context of colonialism.

2.3 Colonialism

The contradictory development of the principle of non-intervention is exemplified by the fact that during the mid-late nineteenth century, whilst Latin America was gaining its independence and the United States was emerging as a great power, throughout the African continent, colonialism was at its height with the 'Scramble for Africa', culminating in the Berlin Conference of 1884-1885.⁷² Therefore, whilst the Global North states enjoyed the full protection and benefits of the principles of sovereignty and non-intervention (including the protection of their nationals when in the Global South), Latin American states seemingly gained a quasi-form, whilst

⁷⁰ A term used by historian William Appleman Williams in his work 'The Tragedy of American Diplomacy', see: HW Berger (ed) *A William Appleman Williams Reader: Selections from His Major Historical Writings* (Ivan R Dee 1992).

⁷¹ Anghie (n15).

⁷² See: Thomas Packenham, *The Scramble for Africa* (Abacus New Ed 1992).

colonised states fell outside the remit of the principles and were instead subject to extensive intervention. This reflected the hierarchy of states (and states' rights) which was prevalent at that time; that is, the distinction between civilised, semi-civilised and uncivilised states with each of these, respectively, enjoying either full, limited or no international legal personality.⁷³ The principle of non-intervention at this point could therefore arguably be compared to an exclusive club which was still in its infancy, with the terms of its membership, including who qualifies for admittance, still undecided.

The colonial era marks the height of Western intervention, with states occupying and exploiting vast amounts of territory in the non-Western world in order to expand their Empires or boost their state's economy. During this period, international law arguably permitted, legitimated and legalised extensive intervention through, for example, legal instruments or institutions such as treaties or trade agreements and, more profoundly, the Berlin Conference of 1884-1885.⁷⁴ Colonial conquest therefore represented 'the first pertinent *global* model of intervention' which was a 'manipulated and purposeful penetration of foreign peoples and their cultures'.⁷⁵ Through explorers or private chartered companies,⁷⁶ treaties between native tribal leaders and Western States were established and used exploitatively to

⁷³ See: Lorimer (n44) and G Simpson, 'Great Powers and Outlaw States: Unequal Sovereignty in the International Legal Order (CUP 2004) 116.

⁷⁴ See: M Craven, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3(1) LRIL 31-59.

⁷⁵ HJ Richardson III, 'Critical Perspectives on Intervention' (2014) 29 Maryland JIL 12-49, 14.

⁷⁶ By the conclusion of the Berlin Conference, or Scramble for Africa, over 75 percent of British acquisition in sub-Saharan Africa had been acquired by chartered companies. See: M Koskeniemi, *The Gentle Civilizer of Nations* (CUP 2009) 117-121.

allow Western States to formally obtain land. In the Congo, Henry Morton Stanley explored the local area and negotiated with local tribe leaders for the sale of their land to the International Association of the Congo (IAC).⁷⁷ The IAC was, ostensibly, a charitable association founded by King Leopold of Belgium, yet through this, Stanley acquired vast amounts of land in the name of the IAC for the benefit of King Leopold.⁷⁸ These unequal treaties were a common use of the law to ensure Leopold was granted 'everything';⁷⁹ they were also used during the Berlin Conference as a basis for Leopold's claim to the Congo. These treaties, again, highlight a striking paradox within the law. Whilst Europeans acknowledged that the natives were capable of entering into legal obligations to grant Western powers sovereignty over their territory, within international law the natives were also characterised as lacking any form of legal status.⁸⁰ Indeed, Anghie notes how the natives were granted a 'quasi-sovereignty for the purposes of enabling them to *transfer* rights, property and sovereignty' to the Western imperial powers.⁸¹ The law was therefore used by the hegemonic powers to transfer partial rights to natives, whilst simultaneously limiting their rights and affording them little protection. For the principle of non-intervention, natives were evidently capable of falling within the ambit of international law in order to transfer their property or sovereignty but did

⁷⁷ For an example of a treaty see: H Sanford, 'Declaration by the International Association of the Congo. April 22, 1884' (1909) 3(S1) AJIL 5.

⁷⁸ On Stanley's travels through the Congo see: R Slade, *King Leopold's Congo* (OUP 1962) 24-29.

⁷⁹ A Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (Pan Books 2012) 71.

⁸⁰ A Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) TWQ 739-753, 745.

⁸¹ *ibid* 745.

not qualify to obtain the protection of the principle as they were subject to extensive intervention from the West. It is within this arguably two-tiered level of international law, with its uneven evolution and application of sovereignty, that the principle of non-intervention developed.

At the Berlin Conference this power differential between the Western colonisers and the native peoples was exacerbated further, with international law again permitting and legitimising such actions. The conference determined the future of Africa, dividing the continent into artificial countries which could be more easily controlled by European states, with not one African involved in the process. Indeed, 'the most irrelevant factor in deciding the fate of the continent was the Africans themselves'.⁸²

As occurred with the early European explorers, the Western States showed complete disregard for any pre-existing Kingdoms, systems of governance, or ethnic, tribal or national interests. The arbitrary boundary lines, pencilled on a map by Leopold and Stanley,⁸³ divided Kingdoms and ethnic groups and contrived an 'unnatural division of Africa'.⁸⁴ In the Congo, people who lived 750 miles apart instantly became compatriots, with an alien identity forced upon them.⁸⁵ These colonial borders still have a profound influence on contemporary African politics, as is particularly evident with the ethnic tensions in the Great Lakes region.⁸⁶ It could therefore be argued that intervention, in this instance, has had a significant, long-term impact, again

⁸² UO Umozurike, *International Law and Colonialism in Africa* (Nwamife 1979) 26.

⁸³ D Van Reybrouck, *Congo: The Epic History of a People* (Fourth Estate 2015) 58-59.

⁸⁴ R Anand, *New States and International Law* (Vikas 1972) 33.

⁸⁵ Reybrouck (n83) 58-60.

⁸⁶ As seen with the conflict between the Tutsi and Hutu tribes in Rwanda and its neighbouring countries: See: M Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (PUP 2002).

based on the superiority of Western standards and interests which were forced upon the non-Western world, with international law providing a veneer of legitimacy to these interventionist activities.

In particular, the process of intervening and dividing the African continent was addressed through the rhetoric of free trade and 'civilising' which were enshrined in the subsequent 'General Act of the Berlin Conference Respecting the Congo'.⁸⁷ The Act focused on ensuring the provision of free trade for the European states operating in the area and pledged to 'civilize' the native population, making them 'understand and appreciate the advantages of civilization'.⁸⁸ Again, Anghie's dynamic of difference is presented here through the 'civilising mission', with the Europeans presented as the 'civilisers' or 'saviours' in contrast to the 'barbaric' or 'uncivilised' non-Europeans.⁸⁹ Grewe notes that the term 'civilisation' 'embodied an attempt to place the global political supremacy and colonial mission of the white man on a new basis of legitimacy' which corresponded with the changing conditions of the nineteenth century.⁹⁰ Indeed, the General Act, and other international treaties at that time, 'included a pathetic invocation of the European powers' mission to promote civilization'.⁹¹ This rhetoric of free trade and civilising simply allowed Western states, leaders and corporations to 'pursue contradictory and

⁸⁷ (signed 26 February 1885) (1885) 165 CTS [485]; see especially the preamble: 'Wishing to regulate in a spirit of good mutual understanding the conditions most favourable to the development of commerce and of civilization in certain regions of Africa...'.
⁸⁸ *ibid* Article 6.

⁸⁹ Again, quotation marks are used here to denote terms frequently invoked at that time. See: Frantz Fanon, *The Wretched of the Earth* (Penguin Classics 2001); Said (n16).

⁹⁰ Grewe (n36) 455.

⁹¹ *ibid*, 451.

inconsistent goals'.⁹² In particular, within the Congo, the General Act and the IAC opposed the slave trade and promoted the 'civilising mission', yet in practice Leopold enslaved the native population by imposing rubber collection quotas on communities.⁹³ In order to exploit Congo's natural resources, particularly rubber and ivory, Leopold forced the local population to collect resources using the native army, the *Force Publique*, as a 'tool of colonial coercion'.⁹⁴ This resulted in the mutilation or killing of civilians who failed to meet the quotas with estimates of up to ten million people killed during the time of the Congo Free State.⁹⁵

Within the Congo, for Leopold, who recognised that 'a colonial push would require a humanitarian veneer',⁹⁶ the civilisation project therefore offered the perfect cover to allow him to pursue his colonial interventions. Through the IAC, which was likened to the Red Cross,⁹⁷ Leopold astutely created the appearance that he was morally superior to imperialist states who were vying for control of Africa.⁹⁸ The professed aim of the IAC was to 'establish a powerful Negro state'⁹⁹ by 'suppressing slave trade and introducing legitimate commerce into the Congo Basin, while strongly supporting the principles of free trade'.¹⁰⁰ Leopold was therefore praised for his purported humanitarian goals and received significant support even after he had

⁹² P Ala'i, 'Leopold & Morel: A Story of 'Free Trade' and 'Native Rights' in the Congo Free State' 37 (2005) *Stud Transnat'l Legal Pol'y* 33-46, 33.

⁹³ Reybrouck (n83) 87-90.

⁹⁴ R First, *The Barrel of a Gun: Political Power in Africa and the Coup d'État* (Allen Lane 1970) 78.

⁹⁵ RG Weisbord, 'The King, the Cardinal and the Pope: Leopold II's Genocide in the Congo and the Vatican' (2010) 5(1) *J Genocide Res* 35-45.

⁹⁶ Hochschild (n79) 43.

⁹⁷ *ibid* 66-67.

⁹⁸ Ala'i (n92) 35.

⁹⁹ A Berriedale Keith, *Belgian Congo and the Berlin Act* (Clarendon Press 1919) 40.

¹⁰⁰ Slade (n78) 39.

gained control of the Congo and had imposed a brutal regime. In particular, the Catholic missionaries, who had arrived with the first explorers in the fifteenth century, 'were the most steadfast champions of the king'.¹⁰¹ These missionaries did much to further the 'civilising mission' and 'were inclined to turn a blind eye to Leopold's excesses' as they believed they were 'bringing the blessings of true Christianity to the heart of Africa.'¹⁰² Evidently, intervention during this period was again based on a sense of moral righteousness and the colonial or imperialistic narrative of the 'civilised self' against the 'savage', 'barbaric' other which TWAIL scholars seek to challenge.¹⁰³ This polarisation was then arguably glossed over by international law, with instruments such as the General Act of the Berlin Conference legitimating these justifications for intervention and thereby perpetuating the civilised-barbaric narrative.

The Congo was therefore host to a multitude of interventions – economic intervention from Leopold; 'humanitarian' intervention from both state and non-state actors; and a religious or moral based intervention from missionaries. This latter intervention, in particular, whilst a soft form of intervention (in comparison to the hard forms of economic and humanitarian intervention) has proved to be particularly penetrative and enduring. Within the Congo today, the Catholic Church, who were significantly involved in the early stages of Leopold's colonial projects,¹⁰⁴

¹⁰¹ Weisbord (n95) 42.

¹⁰² *ibid.*

¹⁰³ M Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) *HarvIntLJ* 201-245.

¹⁰⁴ J Lopes Pereira, 'The Catholic Church and the Early Stages of King Leopold II's Colonial Projects in the Congo (1876-1886)' (2019) 21(1-2) *SSMiss* 82-104.

are one of the most influential non-state actors,¹⁰⁵ particularly through the National Conference of Congolese Catholic Bishops (CENCO).¹⁰⁶ Over half of the Congolese population are Roman Catholic and the Church has a vast infrastructure of schools, hospitals and private businesses,¹⁰⁷ the roots of which can be traced back to the colonial era and Catholic missionaries such as the 'White Fathers' who supported Belgian civilising missions.¹⁰⁸

As with the arbitrary colonial boundaries drawn at the Berlin Conference, the effects of colonial interventions in the Congo have therefore had long-term impacts; thus, highlighting that historical interventions and colonial activities still animate present-day practices.

Furthermore, when examining the history of international law, in this instance the principle of non-intervention, the discipline's inextricable ties with colonialism and imperialism are evident. Indeed, for TWAIL scholars, imperialism is said to be 'ingrained in international law as we know it today'.¹⁰⁹ In particular, Anghie's dynamic of difference – the clash between two cultures- is both animated and justified by international law.¹¹⁰ Understanding both this relationship between international law and colonialism and the use of international law to subjugate and oppress Third

¹⁰⁵ See for example: G Prunier, 'The Catholic Church and the Kivu Conflict' (2001) 31(2) JRA 139-162.

¹⁰⁶ See: R Okitafumba Lokola, 'The Self-Understanding of the Congolese Church During War: CENCO in the Grip of the Greatest Modern Humanitarian Crisis' (2020) 44(2) JReligHist 187-211.

¹⁰⁷ K Attiah, 'Can the Catholic Church Save Democracy in Congo?' (*The Washington Post*, 6 January 2017) <https://www.washingtonpost.com/news/global-opinions/wp/2017/01/06/can-the-catholic-church-save-democracy-in-congo/?utm_term=.b1afb8fad052> Accessed 10 March 2017.

¹⁰⁸ A Shorter, *Cross and Flag in Africa: The "White Fathers" During the Colonial Scramble (1892-1914)* (Orbis Books 2006).

¹⁰⁹ JT Gathii, 'Neoliberalism, Colonialism, and International Governance: Decentering the International Law of Governmental Legitimacy' (1999-2000) 98 MichLRev 1996-2065, 2020.

¹¹⁰ Anghie (n15).

World peoples is a central objective of TWAIL.¹¹¹ Mutua notes how European states justified the colonisation of independent, non-European lands, whether by military conquest, fraud or intimidation, through international law.¹¹² As colonisation was viewed as 'part of the manifest destiny of Europeans and 'good' for non-Europeans', 'any method deployed in its pursuit was morally and legally just'.¹¹³ In an age of 'frenetic' expansion, international law therefore provided 'an ethical rationalisation' of the European will for global power.¹¹⁴ Fisch notes that although 'the colonial acquisition of Africa needed no justification', as the right of conquest was 'widely accepted both in theory and state practice', it was understood that there should be proper justification¹¹⁵ – hence the conference and subsequent General Act. Koskenniemi also argues that the Berlin Conference marked a shift in the European approach to intervention. He contends that the Conference was a result of a 'new imperialism' whereby European powers 'suddenly took active steps for the creation of formal empires'.¹¹⁶

The colonial period was therefore a crucial time for both the delimitation of the principle of non-intervention and the development of international law more broadly. In particular, it established the principle of non-intervention between European states but not between European states and non-

¹¹¹ See for example: Mutua (n57); K Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (2011) 16(2) *WisIntLJ* 353-419; B Rajagopal, 'International Law and Its Discontents: Rethinking the Global South' (2012) 106 *ASILPROC* 176-181.

¹¹² M Mutua, 'Why Redraw the Map of Africa: A Moral and Legal History' (1995) 16 *MichJIntL* 1113-1176.

¹¹³ Mutua (n57) 33.

¹¹⁴ M Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (Penguin 2012) 67.

¹¹⁵ J Fisch, 'Africa as *Terra Nullius*: The Berlin Conference and International Law' in Förster et al (eds) *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (OUP 1988) 360.

¹¹⁶ Koskenniemi (n76) 117.

European territories, once again reflecting the balance (or imbalance) of power during that period. As the remainder of this Chapter will demonstrate, the influence of colonialism on shaping international law and the colonial dichotomy of civilised and uncivilised have remained firmly entrenched within international law, particularly the principle of non-intervention.

2.4 Into the 20th Century

During the start of the twentieth century, a wealth of international conventions were produced after the First World War which endorsed the principle of non-intervention. After many years of battling with the concept, firm commitments were made to recognise the importance of non-intervention and respect for sovereign equality of states. Regional and international treaties were created, alongside international institutions, which further solidified the status of the principle within international law. It is during this period that the principle of non-intervention began to firmly take shape and states which had previously been excluded from the principle's ambit now fell within the protection of the law as they gained sovereign status.

The first affirmative condemnation of intervention came in 1933 with Article 8 of the Montevideo Convention which proclaimed that 'no State has the right to intervene in the internal or external affairs of another'.¹¹⁷ The subsequent Additional Protocol Relative to Non-Intervention also affirmed

¹¹⁷ The Montevideo Convention of 1933 on Rights and Duties of States 159 LNTS 199. For the events of the Montevideo Conference, see also: D Jones, *Code of Peace: Ethics and Security in the World of the Warlord States* (UCP 1991) 79-82.

the principle.¹¹⁸ Parties to the Protocol declared inadmissible 'the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal of external affairs of any other of the Parties'.¹¹⁹ In the Americas, the Good Neighbour Policy, which favoured anti-imperialism, economic internationalism and political non-interventionism,¹²⁰ appeared to reaffirm sovereignty for Latin American States.¹²¹ However, similar to the application of the Monroe Doctrine, non-intervention was only restricted within the boundaries set by the political elites in the United States. This later became evident with the United States' numerous Cold War interventions, despite Latin American states' attempts to challenge US intervention through coordinated diplomatic manoeuvring.¹²² The principle of non-intervention was therefore tentatively but unevenly developing. In particular, there remained a significant gap between the West and 'the rest', with the latter, non-Western states typically falling outside of the remit of the principle, thereby remaining subject to intervention and perpetuating Anglie's dynamic of difference.

In addition to this distinction, there was also a difference in approaches to intervention amongst Western states, with the language or justifications put forward for intervention varying between Europe and the USA. Whilst European countries favoured the 'monopolistic protectionism' of colonies as

¹¹⁸ Affirmed Protocol Relative to Non-Intervention 1936 188 LNTS 31.

¹¹⁹ *ibid.*

¹²⁰ RD Johnson, 'Anti-Imperialism and the Good Neighbour Policy: Ernest Gruening and Puerto Rican Affairs, 1934-1939' (1997) 29(1) *JLatAmStud* 89-110, 93.

¹²¹ See: IF Gellman, *Good Neighbour Diplomacy. United States Policies in Latin America, 1933-1945* (JHUP 1979).

¹²² MP Friedman and T Long, 'Soft Balancing in the Americas: Latin American Opposition to US Intervention, 1898-1936' (2015) 40(1) *IntSecur* 120-156.

exclusive sources of raw material, the USA advocated for freedom of commerce unfettered by territorial or sovereign claims of control.¹²³ This distinction was exemplified in the Congo where Belgium colonised the territory, extracting its numerous natural resources (e.g. rubber)¹²⁴ and the USA engaged in 'unrestricted free trade' and freedom of navigation on the Congo which implied that the river was 'free from the claims of jurisdiction by the participating countries'.¹²⁵ As TWAIL scholar Gathii notes, whilst the USA's approach implied they were an 'enlightening power' and in opposition to European territorial expansion and intervention, it 'effectively legitimised the very colonial occupation it regarded as illiberal' – as occurred in the Congo.¹²⁶ Indeed, this approach to intervention in the Congo arguably persisted post-independence, when the USA significantly supported Mobutu's 30 year dictatorship through financial aid in exchange for Cold War alliances and access to resources.¹²⁷

Again, to use the analogy of the principle of non-intervention as a club – the club's handbook had begun to be drafted (by the hegemonic powers) but, as colonialism still existed, membership was still limited and reserved for the most dominant states. It is only with the formation of the United Nations and the body of law which it and the International Court of Justice produced, that the principle of non-intervention began to solidify and be

¹²³ JT Gathii, 'How American Support for Freedom of Commerce Legitimized King Leopold's Territorial Ambitions in the Congo' (2005) 37 *StudTransnat'l Legal Pol'y* 97-107.

¹²⁴ See: Hochschild (n79).

¹²⁵ Message from President of the United States to the House of Representatives on the Congo Conference at Berlin, 48th Cong (2nd Sess, 1884-1885) 29 HR Exec Docs No 247 at 179. Quoted in: Gathii (n123) 102.

¹²⁶ *ibid* 103.

¹²⁷ B Kasuka, *Prominent African Leaders Since Independence* (Bankole Kamara Taylor 2012) 178-179.

more uniformly applied. At the end of the Second World War, an increase in state cooperation and the rise of internationalism led to the further development of the principle. Non-intervention was defined as prohibiting intervention through use of force but also interference through economic, political and diplomatic means,¹²⁸ thereby laying the foundations of the principle which is prevalent today. This broader understanding of intervention also reflected the political climate at that time. As co-operation between states increased, interference was possible in a more subtle and effective manner without the need for the use of force.

2.4.1 The United Nations

Perhaps one of the most illustrious examples of increased co-operation between states, post-Second World War, was the creation of the United Nations, which also marked a turning point for the principle of non-intervention. Whilst the International Law Commission was the first institution to stipulate non-intervention as a duty of states,¹²⁹ the establishment of the United Nations in 1945 set the stage for what would later become a pivotal institution for the principle of non-intervention. Whilst non-intervention is 'not, as such, spelt out in the Charter' of the United Nations, it is a 'corollary of the principle of the sovereign equality of States' contained in Article 2(1) of the UN Charter.¹³⁰ It is therefore generally implied that if a state has sovereign powers, by extension, it is

¹²⁸ See: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14.

¹²⁹ Article 3, UNGA Res 375 (IV) Draft Declaration on Rights and Duties of States (6 December 1949) UN Doc A/RES/375.

¹³⁰ *Nicaragua* (n128) para 202.

granted the protection of the principles of non-use of force and non-intervention.¹³¹ Conversely, without the prohibition on intervention, the principle of sovereignty, with its 'two complementary and mutually dependent dimensions' of 'internal sovereignty' (the power to make decisions on domestic matters) and 'external' sovereignty (that 'a sovereign power obeys no other authority')¹³² cannot be realised. Within the UN Charter, the principle of non-intervention can therefore be viewed as being enshrined in Article 2(1), as a corollary of sovereignty, and is also read into Articles 2(4) and 2(7) of the Charter. Thus, the introduction of the UN and its founding Charter encapsulated the principle of non-intervention into a legal document on a much broader scale than ever before. Indeed, it went further than its predecessor, the League of Nations, whose Covenant contained weaker provisions that indirectly supported the early conception of non-intervention by abolishing the 'right of conquest' for members of the league,¹³³ protecting members from 'external aggression' and preserving their 'domestic jurisdiction'.¹³⁴ Therefore, whereas non-intervention had previously only been found in *ad hoc* conventions and policies, predominantly at a regional level,¹³⁵ now, it had gained a global and somewhat 'universal' recognition through the UN.

¹³¹ For a discussion on the concept of sovereignty and its relationship with international law see, for example: G Kreijen, M Brus et al, *State, Sovereignty and International Governance* (OUP 2002).

¹³² B Fassbender, 'Purposes and Principles, Article 2(1)' in B Simma et al, *The Charter of the United Nations: A Commentary Vol 1* (OUP 3rd edn 2012) 136.

¹³³ Q Wright, 'Effects of the League of Nations Covenant' (1919) 13(4) APSR 556-576, 559.

¹³⁴ Articles 10 and 15(8) The Covenant of the League of Nations (28 April 1919).

¹³⁵ Such as: the Calvo and Monroe Doctrines (n66).

Whilst the prohibition on the use of force, contained within Article 2(4), can be seen within the principle of non-intervention in the prohibition on the use of armed or military intervention (including military occupation of a territory, naval blockades, seizure of assets and embargos),¹³⁶ the only direct reference to intervention within the Charter is found in Article 2(7). This states that the Charter does not authorise the UN to 'intervene in matters which are essentially within the domestic jurisdiction of any state', excluding enforcement measures under Chapter VII.¹³⁷ Although this could be viewed as a notable development for the principle of non-intervention, as it enshrined the concept within the Charter of an international institution, for some, no other Article within the Charter 'has caused more trouble than this one' as 'its relatively simple terms contain a dual danger'.¹³⁸ That is, the UN is prohibited from intervening but only in 'domestic' matters and neither 'intervention' nor 'domestic jurisdiction' have been sufficiently defined as to clarify what forms of intervention this encompasses. This has then lead to different constructions of the Article which makes its 'content elusive' and results in contradictions or self-negating outcomes.¹³⁹ For some, the Charter's focus on the 'limits instead of the forms of intervention' avoid 'the intractable problem of distinguishing intervention from the legitimate and necessary efforts of states to influence the behaviour of other

¹³⁶ See: M Kunig, *Prohibition of Intervention* (MPEPIL 2008).

¹³⁷ Charter of the United Nations (26 June 1945) Article 2(7).

¹³⁸ DR Gilmour, 'The Meaning of "Intervene" within Article 2(7) of the United Nations Charter – An Historical Perspective' (1967) 16 ICLQ 330-351, 331.

¹³⁹ N Tsagourias, 'Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity' (2011) 24 LJIL 539-559, 549.

states'.¹⁴⁰ There has also been debate as to whether this provision is applicable only to the UN or whether it also applies *a fortiori* to member states.¹⁴¹ Therefore, what initially appears to be a development in the strengthening of the principle of non-intervention is, arguably, not as significant as first appears.

The contribution of Article 2(7) to the development of the principle of non-intervention is further weakened by the inclusion of the caveat that it does not preclude enforcement measures under Chapter VII. As such, Article 2(7) is effectively placed into the hands of the UN's executive body – the Security Council – as it is the Council who determines the exercise of Chapter VII measures. This is problematic when the composition of the Security Council, in particular, the permanent five members' veto power is considered.¹⁴² Gifted to the most dominant states at the time of the UN's creation,¹⁴³ the veto power of the five permanent members (P5) has been referred to as 'the mother of all powers of the UN' as it provides the P5 with a right to veto proposed resolutions or decisions.¹⁴⁴ A disproportionate amount of power therefore lies with these dominant five states who are able to act in their own self-interests, using the veto power to protect their agendas, often at the detriment of smaller states, thus maintaining a level of

¹⁴⁰ NG Onuf, 'The Principle of Non-Intervention, the United Nations and the International System' (1971) 25(2) *IntOrgan* 209-227, 214-215.

¹⁴¹ *ibid* and UN Documents A/AC.119/SR.26, pp6-8; A/AC.119/SR.3-, pp4-6; A/AC.119/SR.31, pp11-12.

¹⁴² J Wouters & T Rhys, 'Security Council Reform: A New Veto for a New Century?' (2005) *Egmont Paper* 9, 1-35.

¹⁴³ See: B Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer 1998).

¹⁴⁴ I Arias, 'Humanitarian Intervention: Could the Security Council Kill the United Nations?' (1999) 23(4) *Fordham Intl L J* 1005-1027, 1020.

inequality amongst member states of the UN.¹⁴⁵ The veto power, then, is arguably a permanent reminder of the North-South divide and the domination of hegemonic powers, which TWAIL opposes. Indeed, 'TWAIL regards the structure of the UN, and in particular its Security Council, as 'completely indefensible', with scholars such as Mutua arguing that the UN legitimises Western global hegemony through 'the cloak of universality'.¹⁴⁶ The veto power could also be viewed as a perpetual example of Anghie's dynamic of difference both in its fundamental composition (the five dominant states advantage against the remaining members) and in its operation – in this instance, in its potential to be implemented in relation to Article 2(7). Indeed, this was an issue which was considered during the drafting of this provision, in particular, in relation to the interpretation of 'domestic jurisdiction'. As international lawyer and TWAIL scholar, Abi-Saab, has noted, when drafting the provision, smaller states attempted to widen the scope of 'domestic jurisdiction' both to safeguard their own independence and 'as a bar and a limitation to the extensive powers that could be exercised by the directorate' of the permanent five members.¹⁴⁷ The creation of the UN and the inclusion of the principle of non-intervention within the UN Charter therefore assisted with the development of the principle of non-intervention but this was limited by the inherent power imbalances within the UN system. It is only with decolonisation and the

¹⁴⁵ B Simma, (ed) (in collaboration with H Mosler, A Randelzhofer, C Tomuschat, R Wolfruh) *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 508.

¹⁴⁶ Mutua (n57) 37.

¹⁴⁷ G Abi-Saab, 'The Newly Independent States and the Scope of Domestic Jurisdiction' (1960) 54 ASILPROC 84-90, 86.

inclusion of more Global South states that the UN became a greater tool or instrument for the development of the principle of non-intervention, albeit with the enduring and ever-looming hegemony of the Security Council.

3. Decolonisation and the Rise of the Global South

Decolonisation marked a significant shift in the history of intervention and the formation of the principle of non-intervention. It is during this period that the principle expanded from essentially a European/Western principle to an international doctrine, starting with the Bandung Conference, and then primarily through the United Nations and the body of law which it produced predominantly from 1960 until 1985. The creation of the UN, combined with the decolonisation period resulted in an expansion of sovereign states and consequently an increase in states who were subject to the principle of non-intervention. This led to an expansion of the geographical scope of the principle and also required a re-balancing within the 'international community' as the Northern or Western states domination within global politics and international law was now challenged by the newly sovereign Third World states.¹⁴⁸ As Grewe has argued, this period became 'an oscillation between international community and the hegemony of a single superpower'.¹⁴⁹ That is, both international law and the international community¹⁵⁰ were adjusting to the new world order – learning how to balance the newly independent states of the Third World, the reduction in

¹⁴⁸ See: Richardson (n75) 24.

¹⁴⁹ Grewe (n36) 703-706.

¹⁵⁰ In this Chapter the term 'international community' will be used to refer to the community of states. For a discussion on the term see: G Abi-Saab, 'Whither the International Community?' (1998) 9 EJIL 248-265 and E Lagrange, 'The Thoughts of René-Jean Dupuy: Methodology or Poetry of International Law?' (2011) 22(2) EJIL 425-440.

Western hegemonic power, and the body of UN and ICJ law on the principle of non-intervention.

As has been a recurring theme throughout the development of the principle, during this period there was a paradox between non-intervention rhetoric and interventionist activities. Whilst colonial intervention ended and the principle was emphatically supported, intervention still occurred but in a less obvious, more subtle form.¹⁵¹ States moved from overt, unilateral military intervention to multilateral intervention or proxy interventions through insurgents, armed groups, mercenaries and private military and security companies (PMSCs).¹⁵² Similarly, within the Congo, intervention was once again used to counter intervention, with a UN peacekeeping operation deployed in 1960 to remove Belgian forces within the country.¹⁵³ Reverting back to the analogy of the principle of non-intervention as a club – membership had expanded to include almost all states but sub-groups had begun to grow resulting in a fracturing of the forms of intervention, with seemingly just as many interventionist activities albeit in a less invasive form.

3.1 Bandung and Decolonisation

In 1955, against the 'backdrop of crumbling European colonies', representatives from twenty-nine Asian and African states gathered in Bandung (Indonesia) and sought to use new norms of non-intervention to

¹⁵¹ For example, Belgium granted the Congo independence but retained significant control within the mineral-rich province of Katanga. See: Reybrouck (n83).

¹⁵² See for example: PW Singer, *Corporate Warriors: The Rise of the Private Military Industry* (Cornell University Press 2003).

¹⁵³ UNSC Res 143 (14 July 1960) UN Doc S/RES/143.

regain their sovereignty.¹⁵⁴ The conference represented approximately two-thirds of the world's population and became viewed as an 'event'¹⁵⁵ or, more abstractly, a 'spirit'¹⁵⁶ which has influenced numerous contemporary movements and institutions. Indeed, within international law scholarship, it is considered to be the 'symbolic birthplace' of TWAIL.¹⁵⁷ More broadly, it sparked the 'Afro-Asian movement', leading, in the early 1960s, to 'the Non-Aligned Movement' before the birth of the 'Group of 77' (G-77).¹⁵⁸ The latter of these saw the Latin American states joining the Asian and African states who shared the same economic and political predicaments. The Bandung Conference was therefore a key catalyst for mobilising non-Western states to oppose the agenda of the dominant hegemonic powers. More specifically, in relation to the principle of non-intervention, those states at the conference, who had already gained independence, sought to challenge history's most illustrious form of intervention – colonialism. Noting the 'evils arising from the subjection of peoples to alien subjugation, domination and exploitation', these newly-independent states declared that 'colonialism in all its manifestations is an evil which should speedily be brought to an end'.¹⁵⁹ This demand was then later reiterated in the General Assembly in its 1960 Declaration on the Granting of Independence.¹⁶⁰ Thus, these Global South states were challenging the long-standing practice of

¹⁵⁴ L Eslava, M Fakhri and V Nesiah (eds) *Bandung, Global History and International Law* (CUP 2018).

¹⁵⁵ S Pahuja, 'Decolonisation and the Eventness of International Law' in F Johns et al (eds) *Events: The Force of International Law* (Routledge 2011) 101.

¹⁵⁶ V Prashad, *The Darker Nations: A People's History of the Third World* (New Press 2008) 45-46.

¹⁵⁷ Mutua (n57).

¹⁵⁸ The group was established by the 'Joint Declaration of the Seventy-Seven Developing Countries made at the Conclusion of the United Nations Conference on Trade and Development' (Geneva, 15 June 1964).

¹⁵⁹ --, 'Final Communiqué of the Asian-African Conference' (2009) 11(1) *Interventions* 94-102, 99.

¹⁶⁰ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960).

Western domination and simultaneously expanding the scope of the principle of non-intervention to now include the Global South.

For TWAIL scholars, this decolonisation period, beginning with the Bandung Conference, marked 'the emergence of a new voice and the quest for a new paradigm'.¹⁶¹ Third World states were therefore contesting 'the universality and legitimacy of the international legal system' which had been developed without their participation and used to justify their subjugation.¹⁶² This did not, however, mean that the 'new' Asian-African states rejected the whole body of international law; rather, 'the occasional outbursts' and 'demand for its adaptation' reflected only protests against the inequities within the system.¹⁶³ Again, this reflected the broader TWAIL initiative of opposing the global hegemony of the West and advocating for the full representation of all voices, particularly those who constitute the 'Third World'.¹⁶⁴ These 'new' states therefore wished to actively participate in international law and assist in its transformation into a more equitable body of law. Indeed, Anand argues that the newly independent states believed international law to be a protection for them as 'weaker members of international society', despite recognising that the system was developed by 'Western Christian civilisation' in accordance with their cultures and philosophies.¹⁶⁵ No more so is this tension arguably evident than with the development of the

¹⁶¹ G Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation Behind Enemy Lines' (2016) 37(11) *TWQ* 1957-1971, 1959.

¹⁶² *ibid* 1960.

¹⁶³ RP Anand, 'Role of the "New" Asian-African Countries in the Present International Legal Order' (1962) 56 *AJIL* 383-406, 388.

¹⁶⁴ Mutua (n57) 37.

¹⁶⁵ *ibid* 388-389.

principle of non-intervention, which, during this period, was transformed from a 'European into a universal rule of international law'.¹⁶⁶ That is, as Global South states gained independence they entered the international arena as sovereign states, falling within the ambit of international law. Thus, they ostensibly gained the same status as their former colonial rulers and also obtained the benefits of this status, including the protection of the principle of non-intervention.

Decolonisation therefore marked a tipping point for the concept of non-intervention and it was 'professed equally emphatically in the East, West and Third World'.¹⁶⁷ Where the principle had previously only been applicable to the West, it was now also applicable to the Global South, thereby representing 'the utilisation of existing international law to craft a more pluralistic, tolerant international system'.¹⁶⁸ In this instance, international law was effectively used by Third World states to reject colonial intervention and protect their own legal, political and cultural interests. However, whilst the principle of non-intervention was now applicable to both the North and South, this did not necessarily translate into an equal application. Indeed, the dichotomy of the colonial relationship did not instantly vanish when colonised states gained their independence and became sovereign entities. For some, the decolonisation period was viewed as a 'Revolt against the West'¹⁶⁹ - a term loaded 'with a sense of dismay and disapproval at anti-

¹⁶⁶ Grewe (n36) 40.

¹⁶⁷ *ibid* 654.

¹⁶⁸ *ibid*.

¹⁶⁹ The phrase emerged in Britain in the late 1950s, see: H Seton-Watson, *Neither War nor Peace: The Struggle for Power in the World* (Kessinger Publishing 2010) and G Barraclough, *An Introduction to Contemporary History* (Penguin 1990).

colonialism, decolonisation and the emergence of a demanding, unsettled and unruly 'Third World'.¹⁷⁰ Whilst decolonisation eliminated military occupation and sovereign control over African territories by European powers, it has been argued that 'political influence, economic preponderance, and cultural conditioning' remained.¹⁷¹ Whilst states granted their former colonies their independence, in reality they simply fostered a transition from formal control to informal control through less conspicuous means of intervention.¹⁷² This was particularly the case in the Congo where Belgium, after granting the Congo its independence, retained a significant amount of influence in the country, particularly within the mineral-rich province of Katanga which proclaimed its secession shortly after Congo's independence day.¹⁷³ Although Katanga was never formally recognised by a single state, it received significant support from Belgium who bankrolled white mercenaries, funded the local regime and manned the military, administrative and economic infrastructures.¹⁷⁴ All the while, Belgium maintained its grasp on the mining industries and protected their economic interests. As Reybrouck notes, colonialism did not cease in Katanga as it formally did in the rest of the country, with colonial practices and rituals – such as segregation and ruling Belgian elite- remaining in place throughout the province.¹⁷⁵ Similar to how Leopold used international law

¹⁷⁰ I Hall, 'The 'Revolt against the West Revisited' in T Dunne and C Reus-Smit, *The Globalization of International Society* (OUP 2017) 346.

¹⁷¹ W Zartman, 'Europe and Africa: Decolonization or Dependency?' (1976) 54 *Foreign Affairs* 325-343.

¹⁷² S Metz, 'American Attitudes Toward Decolonization in Africa' (1984) 99(3) *PolSciQ* 515-533, 515.

¹⁷³ See for example: L Devlin, *Chief of Station, Congo* (Public Affairs 2007); C Othen, *Katanga 1960-63: Mercenaries, Spies and the African Nation that Waged War on the World* (History Press 2015).

¹⁷⁴ Reybrouck (n83) 311.

¹⁷⁵ *ibid* 311-313.

to obtain land from the native leaders, Belgium also entered into 'Treaties of Friendship' with the Congo, which permitted Belgian troops to continue to be stationed at two bases (Kitona and Kamina) until agreements were made to have them taken over by Congolese authorities.¹⁷⁶ These 'Treaties of Friendship' therefore marked a move towards, arguably, a consensual intervention or intervention by invitation, which appeared to be more acceptable but could still be used to disguise coercion – such as the continued Belgian presence in Katanga. Once again, law was therefore used to legitimate extensive intervention, supporting the TWAIL assertion that international law provides powerful states with a legal pretext to exercise its domination over the weak. More specifically, it could also be viewed as a recreation of Anghie's dynamic of difference, this time between the newly independent state and the former coloniser, rather than the colonial dichotomy of 'uncivilised' and 'civilised'. That is, the former colonial power creates the narrative of a gap between themselves and the newly independent 'other' states, thereby justifying intervention as a means to close this gap and alter the 'other' to align with the hegemonic agenda. Put differently, whilst the Global South had gained the same rights and protections as the Global North, the playing field was not levelled, with the North-South divide maintained even as the South entered the international law arena.

¹⁷⁶ Treaty of Friendship between Belgium and the Congo, reprinted in EW Lefever, *Crisis in the Congo: A United Nations Forces in Action* (Brookings Institution 1965) 199-200.

3.2 Non-Intervention through the UN

This battle or readjustment between the North and South states also unfolded within the UN system as almost a third of the world's population (750 million people) and more than 80 former colonies gained their independence through decolonisation.¹⁷⁷ This subsequently led to a significant increase in UN membership, with the original 51 members growing to 127 by 1970 with 44 states admitted during the high point of decolonisation.¹⁷⁸ Membership to the UN provided newly independent states with a seat in the General Assembly, thereby also providing them with voting powers and a platform to promote their interests. For some TWAIL scholars and Third World states, the UN was therefore viewed as a 'shield for the protection of the small Powers'.¹⁷⁹ These newly independent states were also said to have adopted a 'very liberal and functional interpretation of the Charter'¹⁸⁰ and powers of the UN organs to 'change the *status quo*' and strive to 'restructure their societies and the international society to reach a more equitable situation'.¹⁸¹ As such, the UN system offered Third World states a tool to challenge the dynamic of difference and attempt to reduce the gap between themselves and the Global North through their engagement in the development of international law. From a TWAIL perspective, membership in the UN could therefore have been viewed as an opportunity for the newly independent Global South states to contest the

¹⁷⁷ See: UN and Decolonisation, 'List of Former Trust and Non-Self Governing Territories' <<https://www.un.org/dppa/decolonization/history/former-trust-and-nsgts>> accessed 1 May 2020.

¹⁷⁸ See: UN, 'Growth in United Nations Membership, 1945-present' <<https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html#1960s>> accessed 1 May 2020.

¹⁷⁹ Abi-Saab (n147) 90.

¹⁸⁰ *ibid* 88-90.

¹⁸¹ Anand (n163) 390.

dominant states' monopoly and to influence international law-making 'through participation in debates, decisions and cooperate activities' undertaken in the UN.¹⁸² This influx of Global South states thus challenged the domination of the Global North, particularly within the General Assembly as, for the first time, Global South states held the voting majority.

For the principle of non-intervention, this growing presence of the Global South meant these states could engage in the development and formation of the principle, promoting their interests and therefore making the principle ostensibly more universal, rather than a European or Western creation. In particular, as the Cold War 'precluded the potential directorate' of the five permanent members of the Security Council, the General Assembly (GA) became 'the stronghold of the small Powers' as they enjoyed 'absolute equality' with the big Powers and 'numerical superiority'.¹⁸³ Therefore, when the inherently biased hegemonic organ of the Security Council was paralysed, the playing field was levelled somewhat, with the Global South able to promote their agendas without having to compete with the P5 and their all-pervading veto power. This was epitomised in the adoption of the UN's pivotal 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples which declared the need to bring colonialism to a 'speedy and unconditional end'.¹⁸⁴ It expressly stated many of the concerns identified during the Bandung conference and reflected the informal alliance

¹⁸² DP Fidler, 'Revolt Against or From Within the West?: TWAIL, The Developing World, and The Future Direction of International Law' (2003) 2(1) CJIL 29-76, 38.

¹⁸³ Abi-Saab (n147) 87.

¹⁸⁴ UNGA Res 1514 (XV) (14 December 1960).

between these states, the non-aligned Bloc and the Group of 77, thus signalling a shift in the majority within the UN General Assembly. Whilst the General Assembly's 'Essentials of Peace' could be viewed as the UN's first postulation of non-intervention,¹⁸⁵ it is the Assembly's 1960 Declaration on Independence which was the first UN document to significantly contribute to the principle of non-intervention by explicitly and vehemently rejecting the most prevalent form of intervention at that time – colonialism – 'in all its forms and manifestations'.¹⁸⁶ This then established a platform which allowed the broader UN system to more coherently develop the principle of non-intervention through Declarations and Special Committees, which remain active today.¹⁸⁷

Building upon the 1960 Declaration on Independence, the UN's main contribution to the principle of non-intervention came with the 1965 Declaration on the Inadmissibility of Intervention, which provided a more authoritative elaboration of the norm of non-intervention.¹⁸⁸ This declared that 'no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'.¹⁸⁹ During General Assembly debates, the Declaration was viewed as 'one of great importance, particularly for the smaller countries, which did not feel safe from intervention by more powerful countries', in spite of the Charter

¹⁸⁵ 'Essentials of Peace' called upon every state to 'refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any state or at fomenting civil strife and subverting the will of the people in any State'. UNGA Res 290 [V] (1 December 1949) para 2.

¹⁸⁶ Declaration on Independence (n160).

¹⁸⁷ See: Special Committee on Decolonisation (C-24) UNGA Res 1654 (XVI) (27 November 1961); International Decade for Eradication of Colonialism in 1990-2000, 2001-2010 and 2011-2020.

¹⁸⁸ UNGA Res 2131 (XX) (21 December 1965).

¹⁸⁹ *ibid* para 1.

provisions on self-determination and 'categorical assurances and virtuous professions'.¹⁹⁰ The Declaration could therefore be viewed as an important development within international law not only for the principle of non-intervention but also for the promotion of the Third World voice as it built upon Bandung and the 1960 Declaration by including recommendations from the former colonised states. This again demonstrated how, through General Assembly debates, newly independent states, who had struggled against colonial intervention, were able to voice their concerns and interests.¹⁹¹ Ghana, for example, noted that the emergence of new states from colonisation 'revealed other more subtle forms of intervention in the internal affairs of those States'.¹⁹² This included economic dependence resulting in political pressure and foreign military bases which enabled external states 'to run the affairs of other States from the sidelines in their own interests'.¹⁹³ As such, it was recognised that the Declaration needed to include these forms of intervention as prohibited acts. Again, from a TWAIL perspective, these resolutions were 'momentous' as they concerned matters 'of utmost interest to the Third World' and, as they were developed within the UN General Assembly, newly independent states could play a significant role in 'renegotiating the rules' and developing international law.¹⁹⁴

¹⁹⁰ UNGA First Committee (20th Session, 1402nd Meeting) (8 December 1965) UN Doc A/C.1/SR.1402, para 1.

¹⁹¹ On the importance of the UN General Assembly for the Global South, see NA Adams, *Worlds Apart: The North-South Divide and the International System* (Zed Press 1993) 53-55.

¹⁹² UNGA 6th Committee (28th Session, 1402nd Meeting) (1 October 1973) UN Doc A/C.6/SR.1402, para 13.

¹⁹³ *ibid.*

¹⁹⁴ Abi-Saab (n147) 1959.

Within the UN system, the development of the principle of non-intervention was also supported by the General Assembly's establishment of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States in 1963.¹⁹⁵ This committee was concerned with 'the principles of peaceful coexistence' – non-use of force, the settling of disputes by peaceful means, 'the duty not to intervene in matters within the domestic jurisdiction of any State' and the principle of sovereign equality.¹⁹⁶ This culminated in the Friendly Relations Declaration of 1970, which expressly stated that the principles of the UN Charter, which were embodied in the Declaration, including non-intervention, 'constitute basic principles of international law'.¹⁹⁷ Within the preamble, it also developed the principle of non-intervention further by linking non-intervention and international peace and security, noting that a 'strict observance by States' not to 'intervene in the affairs of any other State' is an essential condition for nations to live in peace.¹⁹⁸ It also re-emphasised the overlap between the principles of non-intervention and non-use of force by stating that forceful or 'armed' intervention and 'all other forms of interference or attempted threats' against the personality of the state violate international law.¹⁹⁹ The Declaration then went on to maintain a somewhat broader interpretation of non-intervention by stating that 'No State may use or encourage the use of economic, political or any other type of measures to

¹⁹⁵ UNGA Res 1966 (XVIII) (16 December 1963).

¹⁹⁶ *ibid.*

¹⁹⁷ UNGA Res 2625 (XXV) (24 October 1970) section 3.

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

coerce another State' in order to 'obtain from it the subordination' of any of its sovereign rights and secure advantages.²⁰⁰ Therefore, the Declaration clarified that intervention amounted to more than merely forceful or military intervention, simultaneously reinforcing the notion that coercion is the essence of intervention.

In addition to these notable legal contributions to the development of the principle, the Declaration again highlighted the Global South states newfound ability to contribute to the development of international law. As with the 1960 Declaration, during committee meetings on the core principles of the Friendly Relations Declaration, statements on self-determination were included, largely at the insistence of newly independent African and Asian states.²⁰¹ The Declaration, like the earlier GA resolutions and declarations, therefore demonstrated both the development of the principle of non-intervention and the reconfiguration of the relationship between the North and South, with an increased involvement of the Global South. However, as has been identified as a common pattern within the development of the principle, all is not as first appears with discourse not matching practice. Whilst the principle was being legally and normatively strengthened, in practice the UN was intervening extensively in the Congo with its largest and most forceful peacekeeping operation to date;²⁰² thus, again highlighting the recurring contradiction between the principle of non-

²⁰⁰ *ibid.*

²⁰¹ UNGA, 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States' (24th Session, Supplement No 19 A/7619) (October 1969) UN Doc A/AC.125/L.24, para 4(c).

²⁰² See: J Boulden, 'United Nations Operation in the Congo (ONUC)' in JA Koops, T Tardy, N MacQueen and PD Williams (eds) *The Oxford Handbook of United Nations Peacekeeping Operation* (OUP 2015).

intervention in theory and in practice. Furthermore, whilst there had been an increase in states entering the international system, and thereby a greater possibility of them contributing to the development of the principle, this did not necessarily translate into a counterhegemonic narrative to juxtapose that of the dominant states. This was highlighted in 1981, ten years after the Friendly Relations Declaration when a General Assembly Resolution containing a Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States was issued.²⁰³ Whilst this resolution provided a much more comprehensive definition of intervention than previous resolutions, it was opposed by most Western states.²⁰⁴ Again, reflecting the lingering dynamic of difference between the West and the rest and, arguably, a reluctance by the dominant states to place limitations on their powers and close the dynamic gap.

This then leads us to the broader and inescapable issue of the intrinsic power relations embedded within the UN system. As noted earlier, the Security Council holds a disproportionate amount of power within the UN and for TWAIL scholars 'the primacy of the Security Council' over the General Assembly makes 'a mockery of the notion of sovereign equality among states'.²⁰⁵ It is further argued within TWAIL scholarship that the UN was used as a front by the big powers and 'simply changed the form of European hegemony, not its substance'.²⁰⁶ Indeed, Mazower goes as far as

²⁰³ UNGA Res 36/103 (9 December 1981).

²⁰⁴ AV Lowe, 'The Principle of Non-Intervention: Use of Force' in V Lowe and C Warbrick (eds) *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge 1994) 69.

²⁰⁵ Mutua (n57) 34.

²⁰⁶ D Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc&LegStud 337-364, 340.

to argue that the UN was created both to promote liberal internationalism and to preserve the interests of Empire.²⁰⁷ He argues that at the founding of the UN, many believed the organisation was deeply hypocritical, viewing its 'universalising rhetoric of freedom and rights as all too partial'.²⁰⁸ Mazower proposes, therefore, that the UN may not have begun as an instrument to end colonialism but, rather, 'at least in the minds' of some of the drafters, as a means to preserve it.²⁰⁹ Arguably, this is reflected in the development of the principle of non-intervention with, for example, the Western opposition to the most comprehensive proposed definition of intervention and the continual, uneven application of the principle between North and South states. Further, as the remainder of this thesis will highlight, UN peacekeeping is a prime example of both this tension and the use of selective intervention, based on the dominant states' agenda. That is, if the UN can be viewed as being taken 'hostage by powerful states and exploited for their geo-political and economic interests',²¹⁰ with the Security Council holding a disproportionate power, then, as it is the Security Council who sets the peacekeeping agenda, by extension it could be argued that peacekeeping, as a form of intervention, is driven by a Western dominant agenda. Building upon the TWAIL perspective that interventions are staged on a tableau of Western justifications (such as human rights), yet espoused

²⁰⁷ M Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (PUP 2009).

²⁰⁸ *ibid* 7.

²⁰⁹ *ibid* 31, 19-21, 28-65.

²¹⁰ TV Ananthavinayagan, 'Uniting the Nations or Dividing and Conquering? The United Nations' Multilateralism Questioned – A Third World Scholar's Perspective' (2018) 29 *IrishStudIntAff* 1-17, 2.

to be part of a 'universal progress narrative',²¹¹ the subsequent Chapters will therefore explore how peacekeeping, as a form of intervention, has developed in this same vein. Put simply, is peacekeeping another example of Western-led intervention in the Global South, based on the interests of the dominant powers?

3.3 Evolution in the International System

Whilst the UN is the main institution within the international system to have contributed to the development of the principle of non-intervention, other entities such as the International Court of Justice (ICJ) and regional organisations have also contributed to the development. The creation of regional entities such as the Organisation of American States (OAS), Association of Southeast Asian Nations (ASEAN)²¹² and Organisation of African Unity (OAU)²¹³ reinforced the interests of the Global South and further developed the principle of non-intervention through their constitutive acts and charters. This essentially provided the principle with greater legal and normative support and created a more nuanced understanding of its composition. In particular, it also explored the application of the principle to the Global South, which began to highlight a somewhat new form of intervention – intervention by the Global South within the Global South- which started to become more prevalent in the late Cold War and Post-Cold War era.²¹⁴

²¹¹ V Nesiah, 'The Specter of Violence that Haunts the UDHR: The Turn to Ethics and Expertise' (2009) 24(1) MJIL 135-154, 148.

²¹² See: AC Wilgus, 'James G Blaine and the Pan American Movement' (1922) 5(4) HAHR 662-708.

²¹³ Charter of the Organisation of African Unity (25 May 1963).

²¹⁴ Such as: The Economic Community of West African States (ECOWAS) intervention in Liberia and Sierra Leone. See: W Ofuatye-Kodjoe, 'Regional Organisations and the Resolution of Internal Conflict: The ECOWAS

3.3.1 International Court of Justice

Within the ICJ, Articles 62 and 63 of the Court's Statute envisage the possibility of third state intervention in specific circumstances. That is, when a 'legal interest' may affect the intervening party²¹⁵ or for the purposes of interpreting a multilateral treaty to which the intervening state is a party.²¹⁶ The Statute could therefore be deemed to take a relatively strong non-interventionist stance, rendering intervention permissible only within these limited circumstances. Indeed, within its judgments in cases pertaining to intervention, the Court's refusal to permit intervention in *Corfu Channel* and the *Continental Shelf Cases* reflects a non-interventionist stance,²¹⁷ thereby buttressing the principle of non-intervention. Similarly, the Court also reiterated the understanding of intervention outlined in the Friendly Relations Declaration, namely that there must be an element of coercion and the intervention must bear on matters which each state is freely permitted to decide, including political, economic, social, cultural systems and 'the formulation of foreign policy'.²¹⁸ The decisions by the Court solidified the understanding of non-intervention, with its discussions on the use of force and self-defence in *Nicaragua* crystallising the law in this area and remaining valid today in regards to humanitarian and collective security intervention.²¹⁹ In defence of the principle and its boundaries, the ICJ also

Intervention in Liberia' (2007) 1(3) IntPeacekeep 261-302 and PA Dumbuya, 'ECOWAS Military Intervention in Sierra Leone: Anglophone-Francophone Bipolarity or Multipolarity?' (2008) 25(2) JThirdWorldStud 83-102.

²¹⁵ Statute of the International Court of Justice (1946), Article 62(1).

²¹⁶ *ibid* Article 63(1).

²¹⁷ See: *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 132-169; LF Del Duca, 'Reviewed Work(s): L'Intervento davanti alla Corte Internazionale di Giustizia by Angelo Davi' (1987) 81(2) AJIL 465-467, 466; *Nicaragua* (n128) 14-150.

²¹⁸ *ibid* 202, 288-89.

²¹⁹ M Kohen, 'The Principle of Non-Intervention 25 Years after the Nicaragua Judgment' (2012) 25(1) LJIL 157-164.

noted it would 'certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State'.²²⁰ More specifically, it argued that it would 'be difficult to see what would remain of the principle of non-intervention in international law' if intervention, which is already allowable at the request of the host state government, were also to be allowed at the request of the opposition.²²¹ It was believed that this would 'permit any State to intervene at any moment in the internal affairs of another State', either at the request of the government or the opposition.²²² The ICJ therefore clarified and reaffirmed the boundaries of the principle of non-intervention, highlighting its importance within international law. Furthermore, as the subsequent Chapter will explore, this assertion of state sovereignty and state consent for intervention is also replicated within UN peacekeeping, whereby the host state must consent to the presence of a peacekeeping operation. Therefore, this notion of state sovereignty and consent within the principle of non-intervention is carried through into collective security intervention. More specifically, as will be explored in Chapter 4, this interpretation has been upheld when, for example, in the DRC consent for the presence of peacekeepers is only requested from the host state and not from the prevalent non-state actors or armed groups, who have significant territorial control.

²²⁰ *Nicaragua* (n128) 246.

²²¹ *ibid.*

²²² *ibid.*

Once again, the ICJ reasserted the boundaries of the principle of non-intervention and applied the principle to support the Global South states, thereby cultivating its universal application and demonstrating how the international arena had expanded in the post-Second World War era. Furthermore, the court's decision in *Nicaragua* could also be viewed, applying a TWAIL perspective, as a defence of the Global South (Nicaragua) against a hegemonic power (USA). As Richardson argues, *Nicaragua* was important not only for reaffirming the principle of non-intervention but also for condemning the 'hegemonic subordination of small, regional 'other' states and peoples'.²²³ Returning to the analogy of non-intervention as a club – whereas the Global South had gained membership through decolonisation and the UN system, there was still disparity between its members (the North and South) and the application of the principle to these members. However, this changed slightly through the decisions of the ICJ which applied the principle of non-intervention to all members of the club, including the Global South, and elaborated on the conditions of their membership.

Indeed, the ICJ developed the application of non-intervention in the Global South further in *Democratic Republic of Congo v Uganda*,²²⁴ where it reaffirmed the principle of non-intervention after the DRC accused Uganda of performing acts of armed aggression in violation of both the UN Charter and the Charter of the Organisation of African Unity. In its judgment, the

²²³ Richardson (n75) 23.

²²⁴ *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment of 19 December [2005] ICJ Rep 168-283.

Court found that Uganda's use of force in the DRC was not self-defence but instead constituted an 'unlawful military intervention' in 'grave violation' of the Article 2(4) prohibition on use of force found in the UN Charter.²²⁵ It also found that 'by actively extending military, logistic, economic and financial support to irregular forces' in the DRC, Uganda had violated both the principle of non-use of force and the principle of non-intervention.²²⁶ By determining that Uganda had violated the norm of non-intervention, the Court again contributed to the understanding of what constitutes direct or indirect intervention within customary international law. Furthermore, for the principle of non-intervention, the case is unique as it is one of the first examples of the international system engaging in a debate on intervention within the Global South by the Global South, instead of the typical pattern of Northern intervention in the South. This therefore, again, reflects the broadening of the application of the principle of non-intervention and the increased engagement of the Global South in the international system. More specifically, for the DRC, the decision could be viewed as a recognition that the extensive involvement of its neighbours in its internal affairs amounted to intervention, thereby condemning the actions of Congo's neighbours and reaffirming Congo's sovereignty. As the subsequent Chapters will explore, the involvement of Congo's neighbours in its internal affairs, particularly after the Second Congo War, has been an ongoing, major concern and,

²²⁵ *ibid* paras 148-165.

²²⁶ *ibid* para 345.

alongside the presence of UN peacekeeping operations, is one of the most significant examples of contemporary intervention in the DRC.

3.4 Diversifying Forms: From Theory to Practice

Despite the significant development of the principle of non-intervention through the UN system and the ICJ, the instability and conflicts during the decolonisation period created an opening for a diverse range of Cold War interventions.²²⁷ These interventions differed from the typical, direct military interventions and instead took the form of proxy wars (often involving private military contractors), economic interventions, and a small number of UN peacekeeping operations. It could therefore be argued that, during this period, as the composition of the international community had shifted with the inclusion of the Global South, the rules of the game began to change. That is, whilst the principle of non-intervention had been firmly established and the most illustrious form of intervention had ceased, in practice, intervention continued to occur but in more subtle forms. Arguably, a splintering occurred whereby intervention, instead of taking the form of direct, military action, began to occur in less overt but numerous different forms which, in turn, continued to perpetuate the long-standing power imbalances and dynamics of difference. Again, as has been highlighted throughout this Chapter, within the development of the principle of non-intervention a gap between theory and practice remained. Thus,

²²⁷ E Schmidt, *Foreign Intervention in Africa: From the Cold War to the War on Terror* (CUP 2013) 22-29.

whilst the principle had gained strong legal underpinnings and there was a significant non-intervention rhetoric, this did not translate in its application.

3.4.1 Peacekeeping as Collective Security Intervention

Perhaps the most notable of these 'new' forms of intervention is collective security intervention through UN peacekeeping which, amongst other things, highlights the dichotomy between intervention in theory and intervention in practice. As was discussed in the previous section, the UN has been a key actor in developing and strengthening the principle of non-intervention through its organs, particularly the General Assembly. However, in somewhat of a contradiction to this, whilst espousing non-intervention and producing resolutions and declarations, it simultaneously began to develop peacekeeping as a tool for maintaining international peace and security. The UN was therefore creating a new form of intervention whilst also supporting the creation of the principle of non-intervention. This was done through the concept of collective security intervention – something which was 'not unique to the twentieth century' but has since become synonymous with the UN.²²⁸

Indeed, when the Cold War geo-political tensions paralysed the UN Security Council, peacekeeping was invented as a mechanism to ensure that the UN could fulfil its role of maintaining international peace and security.²²⁹ Thus, a 'new' form of intervention was introduced based upon multilateral action through an international organisation, ostensibly on the basis of the

²²⁸ AJ Bellamy and PD Williams, *Understanding Peacekeeping* (2nd edn, Polity Press 2010) 71.

²²⁹ M Goulding, 'The Evolution of United Nations Peacekeeping' (1993) 69(3) *IntAff* 451-464; JA Koops, T Tardy, N MacQueen and PD Williams, *The Oxford Handbook of United Nations Peacekeeping Operations* (OUP 2015).

collective interests of the international community. Traditionally, peacekeeping began as simple observation and monitoring operations, designed to oversee ceasefire agreements as part of the UN's 'preventive diplomacy' to avoid local conflicts escalating into global confrontations.²³⁰ Whilst the UN deployed personnel to the Balkans, Middle East, Kashmir and Korea, mostly to monitor adherence to armistice agreements or ceasefires, it is UNEF I that is generally considered to be the first UN peacekeeping operation.²³¹ UNEF, deployed in the Sinai to help diffuse the Suez Crisis of 1956, established the traditional model of UN peacekeeping operations, contributing to the establishment of the core peacekeeping principles of host state consent, impartiality and non-use of force.²³² As the following Chapter will explore in detail, this 'new' form of intervention seemingly adopted a tentative, non-interventionist stance as the three fundamental principles placed a limit on the extent of peacekeeping as an intervention in the host state. That is, the principles, together, created a red boundary line around peacekeeping, similar to that which had developed around the principle of non-intervention. In particular, the need to obtain host state consent for a peacekeeping's presence mirrored the emphasis on state sovereignty which had been evident throughout the development of the principle of non-intervention. As such, the initial peacekeeping operations could be characterised as a passive, non-threatening, disinterested form of

²³⁰ Bellamy and Williams (n**Error! Bookmark not defined.**) 85.

²³¹ UNGA Res 998 (ES-I) (4 November 1956).

²³² See: UN Peacekeeping, 'Principles of Peacekeeping' < <https://peacekeeping.un.org/en/principles-of-peacekeeping> > accessed 1 June 2020; N Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2007) 11 JCSL 3, 465-482.

intervention which did not penetrate, interfere or seek to impose any changes within the host state. Instead, they simply played a supportive role, aiding the host state in the implementation of ceasefire agreements and thereby contributing to the maintenance of international peace and security. For the principle of non-intervention, the creation of peacekeeping, justified under the umbrella of collective security intervention, could perhaps have been viewed, at this point, as an acceptable exception to or justifiable expansion of the principle of non-intervention.

However, the exception to this was the UN's peacekeeping operation in the Congo – ONUC – which was deployed in 1960, during the height of decolonisation, a mere two weeks after the country gained independence. Unlike the UNEF-style peacekeeping operation, ONUC was a larger, highly robust, more complex and multifaceted operation composed, at its peak, of almost 20,000 troops, alongside civilian components.²³³ Although initially deployed as a traditional peacekeeping operation, it rapidly evolved into a more robust, forceful peace enforcement-style operation in an attempt to fulfil its mandate and address the disintegrating security situation in the Congo.²³⁴ In doing so, ONUC used high levels of force, essentially engaged in armed conflict,²³⁵ and became embroiled in the country's internal affairs, including the claims to legitimate government and the Katangan secession.²³⁶ ONUC was therefore highly interventionist, broadly

²³³ See: A James, 'The Congo Controversies' (1994) 1(1) *International Peacekeeping* 44-58 and G Abi-Saab, *The United Nations Operation in the Congo 1960-1964* (OUP 1978).

²³⁴ See: R Dayal, *Mission for Hammarskjöld: The Congo Crisis* (OUP 1976).

²³⁵ See: M Kennedy and A Magennis, *Ireland, the United Nations and the Congo* (Four Courts Press, 2014).

²³⁶ See: Abi-Saab (n233).

interpreting the fundamental principles that acted as a boundary around peacekeeping and consequently expanding the interventionist nature of peacekeeping – a recurring theme within peacekeeping which will be explored in the subsequent three Chapters. In addition, this expansion of peacekeeping also had the consequential effect of constricting or narrowing the principle of non-intervention by creating a broader exception to the principle, which was at odds with the non-intervention narrative that the UN was espousing during that period. Furthermore, it also created significant tensions within the UN, particularly between the two Cold War superpowers, with the Soviet Union arguing that ONUC was a proxy for the US, rather than an agent of the Security Council.²³⁷ This, again, highlights the problematic unfair representation within the Security Council, as noted earlier, and the risk that the concentration of power within the Council may result in the UN being used for the benefit of the dominant powers. In particular, it supports the TWAIL view that the UN legitimises Western hegemony through the ‘cloak of universality’²³⁸ and TWAIL scholars’ assertions that dissemination functions of international institutions are ‘steered by the dominant coalition of social forces and States to legitimise their vision of world order’.²³⁹

Indeed, Simpson argues that the UN (like the Concert of Europe and League of Nations which came before it) is predicated on a ‘legalised hierarchy’,

²³⁷ Bellamy and Williams (n228) 87; UNGA (15th Session, 882nd Plenary Meeting) (3 October 1960) UN Doc A/PV.882, paras 24-25.

²³⁸ Mutua (n57) 37.

²³⁹ BS Chimni, ‘Marxism and International Law: A Contemporary Analysis’ (1999) 34(6) EPW 337-349, 345.

whereby the international community conferred special rights and responsibilities upon the great powers and enshrined them in law – such as through the UN Charter.²⁴⁰ The purpose of this legalised hierarchy within the UN, then, was to ‘preserve substantial sovereign equality’.²⁴¹ It is then further posited that the dominant powers have a special responsibility to maintain international peace and security.²⁴² Again, this is enshrined within the organ of the Security Council and, more specifically, the five permanent members who hold the veto power. As discussed earlier, it is this rationale and power imbalance which TWAIL seeks to challenge. As international institutions, such as the UN, are ‘ideologically charged to validate and legitimate world order norms’,²⁴³ they are able to include Global South leaders and absorb counter-hegemonic initiatives.²⁴⁴ International institutions can therefore play a crucial role in levelling the playing field and developing international law. Whilst the inclusion of the Global South within the UN system during decolonisation seemed to offer a counter to Western domination, as was previously noted, this did not necessarily translate into practice during the development of the principle of non-intervention. The same could also be said for the creation and early development of peacekeeping, highlighted by ONUC and the Congo crisis.

The inherent power dynamics and North-South divide which animated the principle of non-intervention and the creation and expansion of the UN

²⁴⁰ Simpson (n73) 170-171.

²⁴¹ *ibid.*

²⁴² Bellamy and Williams (n228) 91.

²⁴³ Ananthavinayagan (n210) 4.

²⁴⁴ RW Cox, ‘Gramsci, Hegemony and International Relations: An Essay in Method’ in S Gill (ed) *Gramsci, Historical Materialism and International Relations* (1st ed, CUP 1993) 49-66.

during decolonisation can also be said to have filtered down into the concept of peacekeeping. This is, again, based upon the inherent power dynamics and unequal distribution of power within the Security Council. That is, as peacekeeping was created as a means for maintaining international peace and security, it was, ostensibly, a legitimate form of intervention at the disposal of the dominant powers to fulfil this role. As it is the Security Council who, under the UN Charter, is charged with ensuring international peace and security, by extension, it is primarily responsible for determining when and where a peacekeeping operation is deployed, which has predominantly been in the Global South. Put simply, it is the Global North (in particular the veto-wielding P5) who set the peacekeeping agenda, deploying peacekeeping operations (and therefore interventions) in the Global South. Thus, the North-South divide is maintained within peacekeeping, as is Anghe's dynamic of difference. Indeed, it could be argued that the dominant powers recognise a gap between the dominant (North) and weaker (South) states, creating a division of 'us' (UN peacekeeping) and 'them' (the host state), with the former sent to the latter in an attempt to bridge the gap by normalising or transforming the 'other' to meet the dominant powers agenda. This is then further exacerbated by the fact that these operations predominantly consist of troops from the Global South, whilst the Global North primarily fund and dictate peacekeeping activities. In contemporary peacekeeping this division is stark with Global South states providing approximately 92 percent of all military and police personnel for operations, contributing only 15 percent to the

peacekeeping budget.²⁴⁵ For some, this results in the inclusion of these Global South armed forces into the global military systems of the imperial powers, constituting a sort of 'dependent militarisation'.²⁴⁶ Whilst there may be many explanations for this disparity, including Global South states' desire to advance their public image, gain recognition and prestige, benefit financially or support regional cooperation,²⁴⁷ there are some who perceive it as 'racism in peacekeeping'.²⁴⁸ Indeed, this North-South divide or 'colour line' within peacekeeping, results in the Global South troops predominantly taking the risks, whilst the Global North adopt senior or management positions – a case of 'you lead, we bleed'.²⁴⁹

As UN peacekeeping is driven by the P5 or hegemonic agenda, its deployment within a host state could therefore be viewed as an attempt to alter or force change within the host state, in order to meet hegemonic interests. Whilst the nuances of this argument will be explored in more detail in the subsequent Chapters, for the development of the principle of non-intervention, the birth of peacekeeping created a further justification for intervention which was legitimated by international law and, arguably, had the consequence of narrowing the principle of non-intervention.

²⁴⁵ TG Weiss and G Kuele, 'The Global South and UN Peace Operations' (*E-International Relations* 3 Feb 2019) <https://www.e-ir.info/2019/02/03/the-global-south-and-un-peace-operations/#_ftn2> Accessed 8 May 2020.

²⁴⁶ P Cunliffe, *Legions of Peace: UN Peacekeepers from the Global South* (C Hurst & Co Publishers Ltd 2013) 155-163.

²⁴⁷ Weiss and Kuele (n245).

²⁴⁸ D Malone and R Thakur, 'Racism in Peacekeeping' (*Global and Mail* 30 October 2000) <<https://www.theglobeandmail.com/opinion/racism-in-peacekeeping/article1340656/>> Accessed 4 June 2020.

²⁴⁹ UNA-UK, 'The Colour Line' (*UNA-UK Magazine* 19 October 2018) <<https://una.org.uk/magazine/2018-1>> Accessed 4 June 2020.

3.4.2 Cold War Interventions and Regional Organisations

The introduction of peacekeeping as a new form of intervention, under the umbrella of collective security, therefore permitted the UN to continue to fulfil its role in maintaining international peace and security during the Cold War. In a similar vein, as the Cold War superpowers refrained from engaging in direct conflict other forms of intervention evolved. During this period, intervention began to take the form of proxy wars, with external, allied powers supporting internal actors, such as Cuba's involvement in Angola and Ethiopia,²⁵⁰ and its attempted intervention in the Congo (then called Zaire) in support of Congolese independence.²⁵¹ The Cold War and decolonisation period also brought about a revival of mercenaries²⁵² who found 'opportunities in the power vacuums created by colonial transitions'.²⁵³ Within the DRC, mercenaries were particularly prominent in Katanga during its attempted secession, with many mercenaries recruited, trained and deployed by Belgian officers, to ensure the foreign states' interests in the region.²⁵⁴ Thus, again, highlighting how the colonial dynamics did not instantly vanish when colonial rule formally ended. It also marked another form of military intervention but one which differed from the usual direct state intervention and therefore fell into a grey area within

²⁵⁰ See: P Gleijeses, 'Moscow's Proxy? Cuba and Africa 1975-1998' (2006) 8(4) J Cold War Stud 98-146.

²⁵¹ --, 'From Cuba to Congo, dream to disaster for Che Guevara' (*The Guardian*, 12 August 2000) <<https://www.theguardian.com/books/2000/aug/12/cuba.artsandhumanities>> accessed 1 March 2019.

²⁵² See: M Hoare, *Congo Warriors* (Paladin Press 1991) and M Hoare, *The Road to Kalamata: A Congo Mercenary's Personal Memoir* (Paladin Press 2008).

²⁵³ A McIntyre and T Weiss, 'Weak governments in search of strength' in S Chesterman and C Lehnardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007) 68.

²⁵⁴ SJG Clarke, 'The Congo Mercenary: A History and Analysis' (South African Institute of International Affairs 1968) 4.

international law²⁵⁵ - raising questions as to how the principle of non-intervention could or should apply in these instances.

Indeed, the principle of non-intervention, was arguably challenged by these changing forms of intervention throughout the Cold War. From a TWAIL perspective, it could also be viewed as a loss of some of the gains that had previously been made – a classic example of one step forward and two steps back. That is, it could be argued that just as the principle of non-intervention had been substantially developed in the UN and ICJ and Global South states had managed to gain independence from the most illustrious form of intervention, the rules of the game changed again. Therefore, the Third World's challenge of the North's dominance and shaping of international law and its principles (including non-intervention) was arguably stalled. Despite the Global South states ostensibly gaining the same rights and protections as Northern states, the Global North, particularly the two Cold War superpowers, continued to intervene to maintain their dominance, this time fighting to gain spheres of influence in the South.²⁵⁶ Intervention thus offered a 'potentially attractive means to pursue relative gains', particularly in the "grey zones' of the Third World'.²⁵⁷ The United States, in particular, viewed Africa 'through the prism of white-minority rights and the Cold War and considered radical nationalist

²⁵⁵ See: PW Singer, 'War Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2003-2004) 42 ColumJTransnatlL 521-550; C Lehnardt, 'Private Military Companies and State Responsibility' (2007) in Chesterman and Lehnardt (n253) 155.

²⁵⁶ See: D Richterova and N Telepneva, 'An Introduction: The Secret Struggle for the Global South – Espionage, Military Assistance and State Security in the Cold War' (2021) 43(1) IntHistRev 1-11.

²⁵⁷ SN MacFarlane, 'Intervention During the Cold War' (2002) 42(350) AdelphiPapers 33-45.

movements to be Soviet proxies'.²⁵⁸ This narrative was therefore used to justify extensive intervention in order to protect hegemonic interests and maintain benefits gained through the colonial encounter – in essence maintaining significant elements of colonialism. Indeed, it is noted that 'some of these interventions resembled past imperial practices with more powerful nations attempting to exploit Africa and its riches for their own ends.'²⁵⁹ This was particularly evident within the Congo when Belgium sought to maintain its interests in the Eastern province of Katanga and the USA provided significant financial donations and aid in exchange for allegiance.²⁶⁰ Similarly, the assassination of the Congo's first democratically elected President, Patrice Lumumba, seven months after his appointment, was allegedly carried out by Congolese forces with the support of a Belgian execution squad and following plans devised by American and Belgian governments.²⁶¹ Applying a TWAIL lens, the West's involvement, in particular, in the removal of Lumumba, an individual who openly challenged Western dominance and championed state sovereignty, national unity, economic independence and pan-African solidarity,²⁶² could be interpreted as a deliberate attempt to maintain the North-South power divide and hegemonic interests, all through the use of intervention. More specifically, it could be viewed as an example of what TWAIL scholar Chimni refers to

²⁵⁸ Schmidt (n227) 23.

²⁵⁹ *ibid* 8.

²⁶⁰ G Ayittey, *Africa Unchained: The Blueprint for Africa's Future* (Palgrave Macmillan 2006) 213.

²⁶¹ See: E Gerard and B Kuklick, *Death in the Congo: Murdering Patrice Lumumba* (HUP 2015); T Butcher, 'Both Belgium and the United States should be Called to Account for the Death of Patrice Lumumba' (*The Spectator*, 7 March 2015) <<http://www.spectator.co.uk/2015/03/both-belgium-and-the-united-states-should-be-called-to-account-for-the-death-of-patrice-lumumba/>> accessed 1 December 2019.

²⁶² See: K Bouwer, *Gender and Decolonization in the Congo: The Legacy of Patrice Lumumba* (Palgrave Macmillan 2010) 4.

as a 'Northern subversive strategy' designed to undo regimes which were not favourable to Western hegemonic states.²⁶³ This, consequently, prevents an 'effective Third World coalition from emerging as a counterweight to the unity of the First World'.²⁶⁴ Therefore, for the principle of non-intervention, this arguably has the knock-on effect of limiting the ability of the Global South to both meaningfully contribute to its development and seek its protection when faced with the prospect of an intervention from the Global North. These hegemonic interventions during the Cold War can, arguably, also be viewed as another example of Anghie's every-changing dynamic of difference – on this occasion, the hegemonic powers identified the Global South states as siding with the Cold War opposition, thereby justifying intervention in order to close the gap and alter the 'other' to prevent them from joining the adversary. In other words, again using the Congo as an example, the USA demarcated themselves and the Congo as two separate cultures, with the former as the 'civilised' Western state and the latter as the 'other' 'uncivilised' state, at risk of siding with the Soviet Union, thereby once again requiring the Global North to alter, influence or normalise the aberrant Global South.

South-South Intervention

These Cold War interventions also led to further interventions in the form of regional and neighbouring interventions;²⁶⁵ that is, intervention in the

²⁶³ BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 ICLR 3-27, 6.

²⁶⁴ *ibid.*

²⁶⁵ Such as: African Union interventions (regional) and ECOWAS interventions (neighbouring). See: S Bamidele, 'Regional Approaches to Crisis Response, the African Union (AU) Intervention in African States: How Visible Is It?' (2017) 73(1) IndQuart 114-128; Ofuatey-Kodjoe (n214) and Dumbuya (n214).

Global South by the Global South. The influx of weapons and money within the newly independent states throughout the Cold War and its proxy wars,²⁶⁶ 'entrenched power differentials and rendered local conflicts far more lethal'.²⁶⁷ At the end of the Cold War, unstable, post-colonial states were therefore left with a wealth of weapons 'that fuelled new competition for riches and power'.²⁶⁸ This then resulted in intervention between these states; thus, intervention by the Global South within the Global South. Within the Congo, for example, President Mobutu's 32-year dictatorship, which had been supported by the USA during the Cold War, was ended in 1997 by a rebel insurgency led by Laurent Kabila and supported by Rwanda.²⁶⁹ This escalated into the 'First Congo War'²⁷⁰ which marked the beginning of an extensive period of intervention within Africa's Great Lakes region, particularly, within the Congo. Indeed, shortly after Kabila took power, the Congo faced numerous interventions from its neighbours. Whilst Angola, Namibia, Chad and Zimbabwe supported the Kabila government, Uganda and Rwanda supported the opposing rebels, with Tutsi's occupying Katanga in the East and attempting to remove Kabila in a bid for control of the DRC. These interventions escalated into a brutal armed conflict in what became known as 'Africa's World War' or the 'Second Congo War', one of the deadliest conflicts since the Second World War, with five million deaths

²⁶⁶ See: P Gleijeses, 'Moscow's Proxy? Cuba and Africa 1975-1998' (2006) 8(4) J Cold War Stud 98-146.

²⁶⁷ Schmidt (n227) 11.

²⁶⁸ *ibid.*

²⁶⁹ M Deibert, *The Democratic Republic of Congo: Between Hope and Despair* (Zed Books Ltd 2013) 63.

²⁷⁰ See for example: T Turner, *The Congo Wars: Conflict, Myth and Reality* (Zed Books 2007); T Cooper, *Great Lakes Holocaust: First Congo War, 1996-1997* (Hellon and Company 2013).

from 1998 to 2003.²⁷¹ Rwanda and Uganda, in particular, had a significant presence in the conflict and intervened extensively in the DRC's internal affairs – intervention which still persists today.²⁷² Indeed, the Rwandan Tutsi Government initially entered the Congo on the basis of searching for Hutu *genocidaires*, who had fled to Eastern DRC after the 1994 Rwandan genocide.²⁷³ However, even after this justification ceased to be relevant, Rwanda, along with Congo's other neighbours continued to intervene in the DRC, resulting in continual cycles of violence within the East, exacerbated by the looting of Congo's natural resources, with the DRC's neighbours supporting or opposing various armed rebel groups, partaking in numerous proxy wars.²⁷⁴ In addition to military intervention, Rwanda and Uganda's support of rebel armed groups and political leaders²⁷⁵ and disputes over the porous border (with formal crossings often sporadically closed based on diplomatic disputes, security concerns, health precautions or economic considerations)²⁷⁶ could all be perceived as subversive²⁷⁷ or diplomatic²⁷⁸ forms of intervention. Indeed, the Congo's neighbours have frequently engaged in these forms of intervention, as opposed to direct military or forceful interventions, in order to influence change in the DRC and freely

²⁷¹ See: G Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press 2011).

²⁷² S Neiman, 'The Dangers of Deteriorating Relations Between Rwanda and Uganda' (*World Politics Review*, 17 October 2019) <<https://www.worldpoliticsreview.com/articles/28272/the-dangers-of-deteriorating-relations-between-rwanda-and-uganda>> accessed 1 March 2020.

²⁷³ See: J Stearns, *Dancing in the Glory or Monsters* (Public Affairs 2012).

²⁷⁴ Crisis Group, 'Averting Proxy Wars in the Eastern DR Congo and Great Lakes' (Crisis Group Africa Briefing No 150) (ICG 2020).

²⁷⁵ See for example: UNSC, 'UN Group of Experts Report on the DRC' (15 November 2012) UN Doc S/2012/843; M McNulty, 'The Collapse of Zaire: Implosion, Revolution or External Sabotage?' (1999) 37(1) JMAS 53-82.

²⁷⁶ For example: I Ssuuna and V Doshi, 'Panic and Confusion as Rwanda Closes Border with DRC Over Ebola Outbreak' (*The Guardian*, 1 August 2019) <<https://www.theguardian.com/global-development/2019/aug/01/rwanda-closes-border-with-dr-congo-over-deadly-ebola-outbreak-goma>> Accessed 1 May 2020.

²⁷⁷ See: H Lauterpacht, 'Revolutionary Propaganda by Governments' (1927) 13 *GrotiusSocTrans* 143-64.

²⁷⁸ See: K Fierke, *Diplomatic Interventions: Conflict and Change in a Globalizing World* (Palgrave Macmillan 2005).

exploit the DRC's natural resources through illegal exploitation networks.²⁷⁹ In particular, Rwanda's support of M23, has included establishing alliances to facilitate targeted assassinations of opposition rebel movements and supporting post-electoral mutinies within the Congolese armed forces.²⁸⁰ As will be explored in subsequent Chapters, this external neighbouring intervention has persisted to such an extent that the DRC's current President, Tshisekedi, has contemplated inviting Burundi, Rwanda and Uganda to conduct joint military operations with DRC troops against rebel groups.²⁸¹

This Congolese example therefore highlights the 'new' form of neighbouring or inter-African intervention which emerged at the end of the Cold War. In particular, it was during this period that the notion of 'African solutions to African problems' began to occur, legitimising the practice of inter-African interventions.²⁸² That is, the notion that 'long-term-solutions could only come from Africans themselves'; thus, internal, African solutions were preferable over imported, dictated or external foreign solutions and interventions.²⁸³ This therefore juxtaposed the typical patterns of Northern intervention in the South that had significantly shaped the principle of non-intervention up until this point.

²⁷⁹ M Schneider, 'Examining the Role of Rwanda in the DRC Insurgency' (Crisis Group 19 September 2012) <<https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/examining-role-rwanda-drc-insurgency>> Accessed 18 May 2020.

²⁸⁰ UNSC, 'Addendum to Interim Report of the Group of Experts on the Democratic Republic of the Congo' (27 June 2012) UN Doc S/2012/348/Add.1, paras 37-38. See also: UNSC, 'Final Report of the Group of Experts on the Democratic Republic of the Congo' (23 January 2014) UN Doc S/2014/42.

²⁸¹ Crisis Group (n274).

²⁸² A Mazuri, *Towards a Pax Africana: A Study of Ideology and Ambition*. (UCP 1967) 203.

²⁸³ See: GBN Ayittey, 'The Somalia Crisis: Time for an African Solution' (1994) CATO Institute, Policy Analysis No 205.

This initiative and the practice of Global South intervention was then given further weight with the development of regional organisations, such as the African Union (AU). Officially launched in 2002 as a successor to the OAU, the AU developed an 'elaborate institutional framework to implement the right to intervene'.²⁸⁴ Whereas the AU's predecessor, the OAU, had no legal power to intervene in internal conflicts within the continent, Article 4(h) of the AU's Constitutive Act gave the AU the right to intervene unilaterally and forcefully if one of its member states is subject to war crimes, genocide, and crimes against humanity.²⁸⁵ It also permits the AU to intervene when a member state requests intervention to restore peace and security.²⁸⁶ The AU's approach to intervention thereby significantly contributed to the development of the principle of non-intervention, being realistic of the needs of its member states. The AU was also the first regional institution to propose a comprehensive collective security and intervention regime which was normatively more advanced than any other regional organisation, including NATO (North Atlantic Treaty Organization).²⁸⁷ Furthermore, this could therefore be viewed, not only as a development for the principle of non-intervention and its regional application, but also an example of the Global South making a notable contribution to the international system and the shaping of international law. Indeed, the AU's development of the principle of non-intervention could be viewed as an example of what TWAIL

²⁸⁴ International Refugee Rights Initiative, 'From Non-Interference to Non-Indifference: The African Union and the Responsibility to Protect' (September 2017) 4 <<https://reliefweb.int/sites/reliefweb.int/files/resources/AU%20R2P%20-%20final.pdf>> accessed 7 May 2020.

²⁸⁵ Constitutive Act of the African Union (11 July 2000).

²⁸⁶ *ibid.*

²⁸⁷ O Emeka, 'Analyzing Humanitarian Intervention From an African Point of View' (2012) 1 Vestnik RUDN IR 22-26, 24.

scholar, Abi-Saab, referred to as the Third World states 'renegotiating the rules'.²⁸⁸ That is, the Global South states, who had entered an international legal system which had been formed without their input,²⁸⁹ were now attempting to redress the balance and re-define principles and norms to meet their interests.²⁹⁰

Furthermore, AU intervention again supports the concept of 'African solutions to African problems', promoting intervention by the Global South over intervention by the Global North.²⁹¹ The OAU, in particular, was said to have 'guarded' Article 33 of the UN Charter,²⁹² strongly advocating that African solutions should be sought first, before conflicts were referred to the UN Security Council.²⁹³ This became known as 'try Africa first'²⁹⁴ – the origins of the norm of African solutions to African problems – which was legitimised through the notion of 'continental jurisdiction', with the concept of *Pax Africana* asserting that 'the peace of Africa is to be assured by the exertions of Africans themselves'.²⁹⁵ A distinction was therefore drawn between illegitimate foreign intervention and inter-African intervention which, through Mazuri's understanding of 'racial sovereignty' was a more legitimate form of intervention.²⁹⁶ Whilst these forms of intervention therefore further developed the principle of non-intervention, by creating a

²⁸⁸ Abi-Saab (n161).

²⁸⁹ See: JT Gathii, 'International Law and Eurocentricity' (1998) 9 EJIL 184-211.

²⁹⁰ See: T Maluwa, 'International Law Making in Post-Colonial Africa: The Role of the Organisation of African Unity' (2002) 49 NILR 81-103.

²⁹¹ See: TM Mays, 'African Solutions for African Problems: The Changing Face of African-Mandated Peace Operations' (2003) 23(1) JConfStud 106-125; L Gelot, *Legitimacy, Peace Operations and Global-regional Security: The African Union-United Nations Partnership in Darfur* (Routledge 2013)

²⁹² UN Charter (n137) Article 33.

²⁹³ Gelot (n291) 47.

²⁹⁴ *ibid.*

²⁹⁵ Mazuri (n282) 203.

²⁹⁶ *ibid.*

more nuanced understanding of intervention in the Global South, it also raises concerns about the applicability of the principle and how to reconcile this form of intervention with the TWAIL narrative that intervention is predominantly exercised by the Global North. Indeed, as Adebajo notes, these interventions were simply an 'African 'Monroe Doctrine';²⁹⁷ that is, it prohibited intervention from external actors (essentially those from outside the continent) whilst simultaneously permitting intervention by internal actors (neighbours or those within the continent). Consequently, it perpetuated as great a level of intervention as Western or foreign interveners, which arguably risked contravening the principle of non-intervention, as was seen in the ICJ's case of the *DRC v Uganda*.²⁹⁸ The concept of 'African solutions to African problems' and its usage to justify or legitimate interventions, is therefore as 'problematic and riddled with hidden agendas as traditional interventions'.²⁹⁹ Thus, the TWAIL narrative which has ran throughout this exploration of the development of the principle of non-intervention is seemingly challenged. However, it could be argued that if these interventions are considered more broadly, they could be reconciled with a TWAIL perspective if viewed as a consequence of Western intervention. That is, it could be argued that the Cold War proxy wars in the Global South, which were initiated, supported and influenced by the dominant hegemonic powers, as previously noted, led to an influx of

²⁹⁷ A Adebajo, 'The Revolt Against the West: Intervention and Sovereignty' (2016) 37(7) TWQ 1187-1202, 1188.

²⁹⁸ *DRC v Uganda* (n224).

²⁹⁹ C Ero, 'The Problems with "African Solutions"' (*International Crisis Group*, 2 December 2013) <<https://www.crisisgroup.org/africa/problems-african-solutions>> accessed 7 June 2020.

weapons, heightening local conflicts.³⁰⁰ These Cold War, Global North-led interventions could therefore be viewed as forming the basis for these neighbouring interventions. Put differently, interventions during the Cold War, which were driven by the hegemonic powers' interests and agendas, arguably formed the foundations or evolved into these Global South interventions. Thus, whilst these South-South interventions appear to stray from the typical pattern of North-South interventions, it could be argued that they were not necessarily a new form of intervention but, rather, an altered or hybrid form of Global North interventions. The influence of the hegemonic powers therefore seemingly prevailed, maintaining the North-South divide and the narrative of the dominant North driving interventions. For the principle of non-intervention, then, these interventions developed further nuances within the principle but still within the overall power structure of a hegemonic North.

Similarly, taking this argument further, it could be argued that some neighbouring interventions have been a consequence of or have been shaped by colonialism – a form of Global North intervention – again attributing some neighbouring interventions to earlier Western interventions. For example, within the Great Lakes Region, colonialism is charged with racialising the ethnic identities of Tutsi and Hutu and embedding the dynamic within institutional structures, reproducing institutional privilege.³⁰¹ By extension, it could be argued that the Tutsi-

³⁰⁰ Schmidt (n227) 11.

³⁰¹ Mamdani (n86).

Hutu division which resulted in the Rwandan genocide and the subsequent overspill into the DRC (including Rwandan interventions in the Congo) can be linked back to this colonial dynamic and thus Western intervention. Again, for the principle of non-intervention this supports the notion that the North-South divide and power dynamics are maintained within these South-South interventions. That is not to say, of course, that colonialism or the Global North is solely to blame for all South-South, neighbouring interventions, such as the ongoing conflicts in Congo. Rather, as Anghie argues that colonialism has animated international law, in particular sovereignty, so too could it be said to have influenced the principle of non-intervention, in this instance, inter-African intervention. This is also compounded by the fact that these interventions have led to further Western intervention as a remedy to the problematic neighbouring intervention – as occurred with the deployment of a UN peacekeeping operation in the Congo during the Second Congolese conflict. Thus, it could be argued that there had been a cyclical evolution within intervention in the post-decolonisation period. That is, as decolonisation began, intervention was predominantly undertaken by the North, this was then followed by a rise in the Global South's voice and a shift to interventions by the South, within the South, which, in turn, led back to Global North-directed interventions, this time, predominantly, in the form of multilateral interventions such as UN peacekeeping. For the principle of non-intervention, then, the decolonisation period was a tipping point in its

development with the inclusion of the Global South rapidly developing the principle into a much more nuanced, universally applicable norm.

4. The Empire Strikes Back

Decolonisation and the Cold War were therefore pivotal periods in the development of the principle of non-intervention. Similarly, as the Cold War ended, the nature of intervention once again altered, albeit within the framework or boundaries of the principle which had been set predominantly within the UN system during decolonisation. Intervention in the post-Cold War era, then, undertook another oscillation period, this time as interventions shifted from predominantly unilateral interventions to multilateral interventions. The collapse of the Soviet Union and Western 'victory' changed the Cold War consensus which had sanctioned intervention³⁰² and led to increased optimism about the potential for the UN and the international community to ensure peace.³⁰³ Intervention therefore became reliant on a 'coalition of partners, shared costs and UN-led multilateral forces',³⁰⁴ as opposed to direct and unilateral intervention. As Falk notes, 'the renunciation of [unilateral] intervention' did 'not substitute a policy of non-intervention'; rather, it involved the development of some form of collective intervention.³⁰⁵ Indeed, towards the end of the Cold War, there was a revival of UN peacekeeping, with more operations undertaken

³⁰² RJ Barnet, *Intervention and Revolution: America's Confrontation with Insurgent Movements Around the World* (Meridan 1968).

³⁰³ See, for example, the optimism within: UNGA, 'Report of the Secretary-General. An Agenda for Peace: Preventive, Diplomacy, Peacemaking and Peacekeeping' (31 January 1992) UN Doc A/47/277-S/24111.

³⁰⁴ WQ Morales, 'US Intervention and the New World Order: Lessons From Cold War and Post-Cold War Cases' (1994) 15(1) TWQ 77-101, 78.

³⁰⁵ R Falk, *Legal Order in a Violent World* (PUP 1968) 339.

between 1988 and 1993 than in the previous forty years.³⁰⁶ In the subsequent decades, peacekeeping rapidly developed from traditional peacekeeping to 'robust' peacekeeping operations and, more recently, multidimensional or 'stabilisation' operations.³⁰⁷ Arguably, these developments of peacekeeping, in turn, created further nuances within the principle of non-intervention by permitting broader, more ambiguous forms of intervention, legitimised under the auspices of UN peacekeeping. Furthermore, as collective security intervention (which typically takes the form of UN peacekeeping) has now replaced unilateral intervention as the main method of intervention in the modern era, then an understanding of the legal and normative boundaries of peacekeeping is essential in order to understand the boundaries or composition of intervention today. Indeed, it is this very issue which the subsequent Chapters will explore – how the legal principles and norms, which constitute a peacekeeping framework, may support or contravene the principle of non-intervention.

In a similar vein, alongside this shift in military or forceful intervention, there was also a further diversification of the forms which intervention took, namely economic intervention. During the 1990s, as globalisation brought states closer together, foreign intervention into African economies became 'the critical backdrop to the crises of the 1980s and 1990s, which stimulated a new wave of external political and military intervention in the

³⁰⁶ Twenty peacekeeping operations during this period. See: UN Peacekeeping Website <<https://peacekeeping.un.org/en>> accessed 1 June 2020.

³⁰⁷ See: A Gilder, 'The Effect of 'Stabilization' in the Mandates and Practice of UN Peace Operations' (2019) 66 NILR 47-73.

continent'.³⁰⁸ Intervention therefore took the form of humanitarian aid, market expansion investments such as Chinese investment in the Congo's electricity Grand Inga Dam project,³⁰⁹ and the extraction of natural resources through mining companies,³¹⁰ which has, again, been prolific within the Congo.³¹¹ The latter of these interventions, in particular, has proved to be extremely controversial with numerous fatalities as a result of poor conditions, resulting in lawsuits against large, international companies.³¹² For the principle of non-intervention, whilst these interventions may appear to have marked a shift from the typical patterns of intervention which had been prevalent up until this point, they were arguably not a new form of intervention. That is, the practice of intervening to exploit natural resources for the intervening states benefit was a historic practice which had been a key feature of colonial intervention (such as King Leopold of Belgium's exploitation of the Congo's rubber)³¹³ and this had been recognised and included within the concept of intervention as it developed in the UN system. Indeed, as noted earlier, as the principle of non-intervention evolved through UN General Assembly Resolutions and Declarations, the definition of intervention was expanded, often at the

³⁰⁸ Schmidt (n227) 10-11.

³⁰⁹ J Vidal, 'Construction of World's Largest Dam in DR Congo Could Begin Within Months' (*The Guardian*, 28 May 2016) <<https://www.theguardian.com/environment/2016/may/28/construction-of-worlds-largest-dam-in-dr-congo-could-begin-within-months>> accessed 1 July 2020.

³¹⁰ D Stringer and T Biesheuvel, 'Tesla Strikes Deal to Buy Cobalt From Glencore for EV Plants' (*Bloomberg*, 16 June 2020) <<https://www.bloomberg.com/news/articles/2020-06-16/glencore-agrees-deal-to-sell-cobalt-to-tesla-for-new-car-plants>> accessed 1 July 2020.

³¹¹ Involving mining companies such as: Glencore GLEN.L, Randgold RRS.L and Ivanhoe IVN.TO. See: A Ross, 'How Congo Faced Down Some of the World's Biggest Mining Firms' (*Reuters*, 15 March 2018) <<https://www.reuters.com/article/us-congo-mining-insight-idUSKCN1GR2HD>> Accessed 6 May 2020.

³¹² A Kelly, 'Apple and Google Named in US Lawsuit Over Congolese Child Cobalt Mining Deaths' (*The Guardian*, 16 December 2019) <<https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths>> Accessed 16 June 2020.

³¹³ Reybrouck (n83).

insistence of the Global South states, to include these subtler forms of intervention. It could therefore be argued that the main framework for the principle of non-intervention had been set during the decolonisation period. More contemporary interventions then simply added further nuances to the understanding of the principle in practice, rather than adding any significant, new developments to its boundaries. Returning, once again, to the analogy of the principle as a club – membership to the club was now open to all, with a well-established handbook or manual to guide proceedings. However, in order to keep up-to-date with changing practices, interpretations of the handbook and additional appendices were possible. Whilst some of these amendments remained within the club's boundaries, others contravened the club rules, falling outside the boundaries and thereby undermining the values of the club.

4.1 Consensual Intervention: A Humanitarian Veneer

Whilst the principle of non-intervention significantly developed during the decolonisation and Cold War period, with a relatively strong rhetoric of non-intervention, this began to soften at the end of the twentieth century and beginning of the twenty-first century. As the Cold War ended and the concept of an 'international community' took root, intervention again became more acceptable but within the framework or justification of collective security action, such as UN peacekeeping. From a TWAIL perspective, this changing attitude towards intervention was reflected in the shift in power dynamics within the UN system. That is, as the Security Council's Cold War paralysis dissolved, the General Assembly, which had

allowed the newly independent Third World states to play a significant role during decolonisation, 'lost its own as legal oracle of the international community'.³¹⁴ Therefore, whilst the Global South had been able to play a greater role in the development, interpretation and application of international law, including the principle of non-intervention, thus challenging the dominance of the Global North, the latter began to re-take some of their dominance, effectively silencing the Third World again. Indeed, prominent TWAIL scholar, Georges Abi-Saab, refers to this immediate post-Cold War period as 'the empire strikes back' – the second act in the three-part 'psychodrama' of the North-South confrontation.³¹⁵

4.1.1 A Return of the Civilising Mission?

This re-balancing of the global order was highlighted in the 1990s as the international community received criticism for failing to intervene in atrocities such as the Rwandan genocide and the Srebrenica massacre.³¹⁶ Therefore, whilst Global North intervention in the Global South had been strongly condemned during decolonisation, there was now a general consensus that dominant states should be intervening in weaker states, on the basis of humanitarian needs. This was then legitimised within international law in the form of the 'responsibility to protect' doctrine³¹⁷ – the notion of 'coercive action against a state to protect people within its

³¹⁴ Abi-Saab (n161) 1960.

³¹⁵ *ibid* 1959.

³¹⁶ See: S Stein, 'The UN and Genocide: A Comparative Analysis of Rwanda and the Former Yugoslavia' in F Attinà (ed) *The Politics and Policies of Relief, Aid and Reconstruction* (Palgrave Macmillan 2012).

³¹⁷ See for example: S Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2001) and A Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2008).

borders from suffering grave harm'.³¹⁸ Thus, the intervention rhetoric shifted from one which supported the independence of the Global South against hegemonic interventions, to one which now welcomed intervention in the South, based on a perceived duty of the dominant states to protect vulnerable citizens of the world, through collective intervention.³¹⁹ The principle of non-intervention, then, was constricted or eroded during this period as these potentially broad humanitarian-based justifications chipped away at the red boundary line that had demarcated the principle and limited intervention. Indeed, it was similarly recognised that these interventions had eroded state sovereignty, particularly within African states, who were forced to 'dilute notions of absolute sovereignty to allow military interventions for humanitarian purposes'.³²⁰

From a TWAIL perspective, these forms of intervention arguably also raise numerous issues. Firstly, it could be argued that the basis or criteria for a humanitarian-based intervention is essentially based on European or Western standards and ideals. That is, determining what constitutes a gross human rights violation, and an affront on civilised standards (thus justifying intervention) involves the imposition of a standard of 'civilised' behaviour which 'to some degree is likely to reflect culturally specific values'.³²¹ As collective intervention is primarily carried out by the UN, it follows that decisions on when and where to intervene are determined by the UN and

³¹⁸ G Evans and M Sahnoun, 'The Responsibility to Protect' (2002) 81(6) *Foreign Affairs* 99-110, 99.

³¹⁹ See for example the multinational operations in Libya and Cote d'Ivoire: UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 and UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975.

³²⁰ Adebajo (n297) 1187.

³²¹ TM Franck, 'Humanitarian Intervention' in S Besson and J Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 531-532.

thus, ultimately, the veto-wielding members of the Security Council. Decisions on humanitarian-based interventions are therefore ultimately determined by the dominant Global North states and, as such, are based upon Western rather than universal values. This, in turn, leads to criticisms about the selectivity of these interventions, with the 'international community' accused of determining targets selectively, 'ignoring human rights violations of equal or even greater magnitude elsewhere'.³²² Again, applying a TWAIL lens, humanitarian intervention and R2P can be critiqued as a form of European/Western standard setting which is presented as 'supposedly universal values' but is used 'to conquer and colonise parts of the Third World'.³²³ Indeed, both concepts have been identified as tools which could be 'indirectly used as an intervention instrument'³²⁴ or a 'weapon of imperial intervention at will'.³²⁵ Thus, international law has once again provided a veneer of legitimacy to hegemonic intervention in the Global South, simultaneously legitimising 'the intrusion of international law in the internal affairs of a state'.³²⁶ Put simply, humanitarian-based interventions permit Global North intervention in the Global South on the basis of standards set by the dominant states.

This then leads to the similar, second notable issue with these types of intervention, from a TWAIL perspective. It could be argued that these forms

³²² M Ayoob, 'Humanitarian Intervention and International Society' (2001) 7 GG 225-230, 225.

³²³ R Bachand, 'Critical Approaches and the Third World. Towards a Global and Radical Critique of International Law' (Speech at University McGill, 24 March 2010).

³²⁴ Mazower (n114) 396.

³²⁵ N Chomsky, 'Statement by Professor Noam Chomsky to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect' (UN, 23 July 2009) 4 <<https://www.un.org/en/ga/president/63/pdf/calendar/20090723-resptoprotect.pdf>> accessed 5 July 2020.

³²⁶ Anghie (n80) 749.

of intervention are comparable to the colonial civilising mission as both are based on the notion of 'the White Man's burden',³²⁷ with an enlightened dominant state civilising or altering a weaker state to match the standards of the former. For some, this points to the broader evolution and purpose of international law in the modern era. As Koskenniemi notes international law instead of 'being dressed as a project for civilisation' now 'appears as a modernising project, a state-building project, a project for economic and technological development, for human rights protection, for conserving natural resources and seeing to global security'.³²⁸ Thus, the same themes and power structures are arguably present but are simply re-packaged into a more palatable form. Furthermore, humanitarian-based interventions could also be viewed as a replication of Anghie's dynamic of difference as it is, once again, an example of the hegemonic powers identifying a gap with the 'other' and then using that gap as a justification for intervention in order to alter the 'other'. As Anghie argues, as the international system changes, so too does the dynamic of difference, which continuously acquires a new form.³²⁹ In the modern era, then, 'the familiar pattern of the colonial encounter, the division between civilised and uncivilised' is replicated as the developed and the developing or the Global North and the Global South.³³⁰ In this instance, the dynamic is replicated within these humanitarian-based interventions. This, in turn, also has the effect of maintaining the North-

³²⁷ Kipling (n46).

³²⁸ M Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 *Rechtsgeschichte* 152, 159.

³²⁹ Anghie (n15) 203.

³³⁰ *ibid* 244.

South divide and hierarchical power structures which have been prevalent throughout the development of the principle of non-intervention. As a result, despite the increased involvement of the Global South in the development and application of the principle, the power dichotomy remains.

4.2 From Military to 'Security', through Peacekeeping?

Alongside these humanitarian-based interventions, further nuances have developed within the principle of non-intervention through a revival of UN peacekeeping³³¹ and a shift towards a 'security' culture following the 9/11 terrorist attacks and the subsequent 'war on terror'.³³² At the turn of the century, the 'war on terror' led to an increase in Global North interventions, such as the United States-led war in Iraq which, for some, changed the 'way the world viewed international military action'.³³³ Therefore, as noted within the previous discussion of humanitarian interventions, whereas the decolonisation period could be characterised as having a strong non-interventionist rhetoric, this softened within the post-Cold War era, particularly after the 9/11 attacks, when numerous justifications for intervention began to arise. Whilst decolonisation was a tipping point for the principle of non-intervention, it could also be argued that the 9/11 attacks and the subsequent 'war on terror' were a further tipping point for the principle. However, whilst decolonisation promoted non-intervention and the Global South voice, the war on terror promoted intervention and

³³¹ See: A Adebajo and C Landsberg, 'Back to the Future: UN Peacekeeping in Africa' (2000) 7(4) *IntPeacekeep* 161-188.

³³² H Duffy, 'Terrorism' in International Law' in H Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2015) 29-74. See also: ND White and C Henderson, *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar 2013).

³³³ JT Gathii, 'Humanizing the Pax-Americana Global Empire' (2005) 4(1) *GlobalStudLRev* 121-134.

the dominance of the Global North. Thus, through a TWAIL lens, the war on terror era, offers a further example of the empire striking back, with the North seeking to regain and retain its prominence in the international arena. It is within this backdrop, as intervention became more permissible again, that the reinvigorated UN peacekeeping operations were increasingly expanded and used as a primary tool for engaging in collective security intervention in the twenty-first century. As the strategic context for peacekeeping operations shifted, peacekeeping adapted, with significant internal assessments on its limits and potential undertaken at the turn of the century to strengthen its capacity to create peace and stability in complex environments.³³⁴ Put simply, peacekeeping evolved in-line with interventionist trends (such as humanitarian intervention and security interventions) which were, again, dictated by the dominant powers.

4.2.1 Multi-Dimensional Peacekeeping

The move towards a security culture was therefore reflected in the development of peacekeeping in the post-Cold War era, which simultaneously further exemplified the underlying Western dominance and North-South divide within both the concept of peacekeeping and the principle of non-intervention. As the deployment of peacekeepers became more frequent at the end of the Cold War, peacekeeping operations also began to evolve from the traditional, passive model to multi-faceted operations which engaged in numerous activities that typically fell within

³³⁴ Such as: UNGA, 'Report of the Panel on United Nations Peace Operations' ("Brahimi Report") (21 August 2000) UN Doc A/55/305-S/2000/809.

the host state's jurisdiction, thereby resulting in a greater or deeper level of intervention in the host state. These multidimensional operations were mandated to not only maintain peace and security but also to facilitate peace processes, protect civilians, assist in disarmament, demobilisation and reintegration of former combatants, promote human rights and support democratisation.³³⁵ In addition to the expansion of peacekeeping to include these tasks, the concept of 'robust peacekeeping' was also introduced during this period.³³⁶ This permitted peacekeeping to use force to defend both the mission's components and the operation's mandate, including the ever-growing list of operational tasks.³³⁷ Within the UN's operation in the Congo, for example, the protection of civilians was introduced within MONUC's mandate, resulting in the operation using extensive levels of force to fulfil the task, consequently expanding the interventionist nature of the peacekeeping operation.³³⁸ Whilst the subsequent Chapters (in particular Chapter 5) will explore the interventionist nature of some of these tasks, more generally, as the following Chapter highlights, this evolution began to raise concerns as it became a 'mix of peacekeeping, peacebuilding and peace enforcement',³³⁹ thereby blurring the boundaries between peacekeeping and intervention. More specifically, it expanded the possibility of intervention (coercive action to influence change in a state), simultaneously contracting the principle of non-intervention. Indeed, this

³³⁵ See: UN, *United Nations Peacekeeping Operations: Principles and Guidelines* ("The Capstone Doctrine") (DPKO 2008) Chapter 2.

³³⁶ Brahimi Report (n334).

³³⁷ *ibid.*

³³⁸ UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291; UNSC Res 1417 (14 June 2002) UN Doc S/RES/1417.

³³⁹ J Reynaert, 'MONUC/MONUSCO and Civilian Protection in the Kivus' (IPIS 2010) 14.

development of robust peacekeeping and the introduction of protection of civilians as an operational task fit within the broader intervention rhetoric at the time as it came after the UN was criticised for failing to intervene in the numerous atrocities of the 1990s.³⁴⁰ The discourse of humanitarian-based interventions, which was previously discussed, had therefore permeated the concept of peacekeeping, primarily through concepts such as robust peacekeeping and the protection of civilians. Again, this, in turn, expanded the remit of peacekeeping, consequently expanding the concept of collective security intervention and thereby constricting the principle of non-intervention.

Put differently, if there is an invisible red boundary line which surrounds the principle of non-intervention, collective intervention could be viewed as a main gateway which permits an opening of this boundary. Peacekeeping could then be viewed as a central vessel which runs from this, creating space for further intervention, with the varying tasks contained within a peacekeeping mandate seen as additional interventionist threads. If collective intervention is the overarching exception to non-intervention, then peacekeeping and its complex mandates with its numerous tasks are the arteries, veins and capillaries which extend UN intervention into the host state even further. This is compounded by the fact that, often, UN peacekeeping operations are deployed simultaneously with the imposition

³⁴⁰ UNSC, 'Chairman of Independent Inquiry into United Nations Actions During 1994 Rwanda Genocide Presents Report to Security Council' (14 April 2000) Press Release SC/6843.

of UN sanctions – a form of economic intervention.³⁴¹ Under Article 41 of the UN Charter, the Security Council is authorised to impose sanctions to maintain or restore international peace and security. This may include economic and trade sanctions or more targeted measures such as arms embargoes, travel bans and asset freezes, as have been imposed on groups and individuals within the DRC since 2004 in an attempt to force these actors towards peace.³⁴² An additional layer of intervention is therefore imposed upon the host state, in an attempt to coerce change within the host state, simultaneously buttressing military, collective security intervention which also attempts to alter the state. For the principle of non-intervention, whilst this may appear to be another form of contemporary intervention, it is arguably best viewed as simply a replication of pre-existing interventionist practices. That is, the sanctions can be categorised as simply another form of economic intervention, alongside the extraction of natural resources, investments or trading which, as previously discussed, have also typically occurred together with military or forceful intervention. However, what makes the UN sanctions a more significant form of intervention is that they stem from the UN, thereby carrying with it the weight of the organisation, and are often imposed alongside the deployment of a peacekeeping operation, as is the case in the Congo. The sanctions therefore add additional pressure to coerce the host state into altering as the UN sees fit; thus, amounting to an additional layer of intervention

³⁴¹ Economic intervention may take various forms, such as the imposition of sanctions, embargos, counter-measures or trade restrictions between states. The difficulty with economic intervention lies in determining whether or not it is legitimate under international law.

³⁴² UNSC Res 1533 (12 March 2004) S/RES/1533; UNSC Res 2478 (26 June 2019) S/RES/2478.

designed to force a change in behaviour which is, ultimately, based on the agenda of the UN Security Council.

Both the expansion of peacekeeping into multi-dimensional operations and the use of sanctions therefore lead back, once again, to the TWAIL narrative of a regime of domination and subordination. As discussed in previous sections, the inescapable, disproportionate hierarchy of power which underpins the UN results in the veto-wielding P5 states ultimately determining both the deployment and general composition of a peacekeeping operation and the imposition of UN sanctions. Therefore, as with the humanitarian-based interventions, two further issues arise with these multi-dimensional operations; firstly, the list of mandated tasks and, secondly, the selectivity of deployment. For the former, it could be argued that, like humanitarian interventions, the prioritisation of certain tasks within a peacekeeping mandate, including the advancement of human rights³⁴³ and democratisation,³⁴⁴ are based upon Western values and standards. As TWAIL scholars such as Mutua have argued, human rights and democracy are 'the universalised version of the other', both of which are projects that are devoid of the input of Third World states and are 'essentially infinite, open-ended, and highly experimental in nature'.³⁴⁵ Thus, the inclusion of these within peacekeeping tasks arguably creates not only an ambiguous and potentially open-ended justification for intervention,

³⁴³ Mutua (n103).

³⁴⁴ See: B Jahn, 'The Tragedy of Liberal Diplomacy: Democratization, Intervention, Statebuilding (Part II)' (2007) 1(2) *JIntervStatebuilding* 211-229.

³⁴⁵ *ibid* 593.

but also a potentially limitless justification for the Global North's dominance over the Global South. Similarly, the decision on where and when to deploy a peacekeeping operation is, as with humanitarian-based interventions, premised on the interests, values and motivations of the hegemonic powers within the Security Council. Once again, reinforcing the power dynamics and North-South divide and offering another example of Anghie's dynamic of difference – the dominant actor identifies a gap in the subordinate other and subsequently sets about closing the gap, in this instance, by deploying a peacekeeping operation. Indeed, this is strongly evidenced within UN peacekeeping with the predominance of operations in Africa and the frequent clashes between members of the P5 over the deployment of peacekeepers to countries such as Syria – a crisis which has invoked the use of the veto by Russia and China on numerous occasions, thereby also highlighting the differing views on intervention within the P5 of the Security Council.³⁴⁶

For the principle of non-intervention, then, these multi-dimensional peacekeeping operations represent both a broadening and deepening of intervention which contracts the boundaries of the principle but which, in turn, is limited by the selectivity of the deployment of peacekeeping operations. That is, the expansion of peacekeeping to multi-dimensional operations undoubtedly increases peacekeeping's interventionist possibilities, thereby widening or broadening the gateway that opens the

³⁴⁶ See: UNSC, 'Belgium and Germany: Draft Resolution' (10 July 2020) UN Doc S/2020/667 and (13 July 2020) UN Doc S/2020/693.

non-intervention boundary line. However, this opening is narrowed again by the fact that the operations are predominantly only deployed within one geographical location. The shift to multi-dimensional peacekeeping could therefore be best described as a deepening, rather than a broadening, of intervention as it permits greater levels of intervention but within a narrower geographical scope. This therefore creates a further nuance or dimension within the development of the principle of non-intervention but one which, ultimately, continues to support the TWAIL narrative of a system predicated on subordination and domination.

4.2.2 Stabilisation Peacekeeping: Intervention by Invitation?

These multi-dimensional peacekeeping operations were given a further interventionist veneer in 2010 when some were re-packaged into 'stabilisation' peacekeeping operations– now one of the most prevalent forms of intervention in contemporary peacekeeping. Peacekeeping therefore evolved again, with operations now able to take numerous forms - traditional, multi-dimensional, robust or stabilisation. Since 2010, the Security Council's new generation of 'stabilisation' peacekeeping operations have been mandated to support the host government, protect civilians and combat armed groups, often in joint operations with the host state forces, such as MONUSCO's Force Intervention Brigade, which Chapter 4 explores in great detail.³⁴⁷ Despite the increased use of the term 'stabilisation' and its inclusion in the title of peacekeeping operations in the DRC, Mali and the

³⁴⁷ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098 and UNSC Res 2502 (19 December 2019) UN Doc S/RES/2502, para 29(i)(e); S Sheeran and S Case, 'The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo' (IPI 2014).

Central African Republic (CAR), it is undefined within the UN,³⁴⁸ creating a flexibility that opens a window for a broad range of interventionist activities to be undertaken, as the subsequent Chapters will explore. Generally, four main elements have been identified as forming part of these operations – ‘robustness’, counter-terrorism, cooperation with the host state, extending state authority and control, and entrenching the rule of law and ending impunity.³⁴⁹ Again, as with multi-dimensional operations, the same TWAIL lens could be applied, with arguments made about how these tasks or components stem from a Western-dominated agenda, with only the element of cooperation with the host state seemingly invoking the input of the Global South.

Indeed, this apparent cooperation with the host state raises further questions for peacekeeping’s legal basis or framework. Whilst stabilisation operations could be viewed as an evolution or extension of UN peacekeeping from its traditional or robust models, some have argued that these types of operations ‘should be understood as a qualitatively distinct form of UN-mandated intervention by invitation’.³⁵⁰ That is, whilst peacekeeping’s legal basis is generally found under Chapter VI (consensual peacekeeping) or Chapter VII (non-consensual enforcement) of the UN Charter, Labuda argues that the legal basis for stabilisation operations could be tied to host state consent rather than Chapter VII.³⁵¹ This is based on the fact that the

³⁴⁸ See: A Gilder (n307) 47-73.

³⁴⁹ *ibid.*

³⁵⁰ PI Labuda, ‘United Nations Peacekeeping as Intervention by Invitation: Host State Consent and the Use of Force in Security Council-Mandated Stabilisation Operations’ (2020) JUFIL 1-37, 3.

³⁵¹ *ibid.*

Security Council cannot order the host state to provide troops, use force or conduct joint operations with a peacekeeping operation in its territory, regardless of how broadly its powers are interpreted.³⁵² Therefore, when peacekeepers are 'authorised' to conduct joint operations with the host government forces, it implies that the Security Council is permitting or mandating host troops to use force alongside peacekeepers, which is a power that the Council does not possess.³⁵³ As such, Labuda argues that where a host state plans and conducts joint operations with a stabilisation operation, as has occurred within MONUSCO in the DRC, this should instead be viewed as 'a function of the host state's consent' for UN intervention;³⁵⁴ thus, the government's support for external intervention or an invitation to intervention. This, in turn, raises numerous issues pertaining to the use of force, the invocation of rules of international humanitarian law, and the traditional peacekeeping principles of impartiality and consent – all of which will be discussed in further detail in the subsequent Chapters. For the principle of non-intervention, it also creates a further nuance within the concept and creates a complex paradox of extensive, consensual intervention, which renders the boundaries of the principle of non-intervention unclear, thereby leaving room for extensive, potentially unlawful, intervention. The evolution of peacekeeping to these stabilisation operations therefore, again, highlights a key theme of this thesis – whether contemporary peacekeeping operations, such as MONUSCO in the DRC, are,

³⁵² *ibid*, 32.

³⁵³ *ibid*, 32-33.

³⁵⁴ *ibid*, 33.

at times, intervention, and thereby contravene or, at the very least, constrict the boundaries of the principle of non-intervention. Indeed, it could be argued that as peacekeeping has created a justified or legitimate gap in the invisible red boundary line around the principle of non-intervention, every evolution of peacekeeping expands this gap further. It arguably follows, then, that there must reach a point where this gap cannot be expanded anymore without snapping the red elastic band boundary, resulting in a violation of the principle of non-intervention and eroding its validity. As such, it is essential to establish the framework or boundaries surrounding peacekeeping in order to assess how today's most prevalent form of intervention impacts the principle of non-intervention in the modern era.

5. Intervention as Peacekeeping

An exploration of the development of the principle of non-intervention highlights how intervention is best characterised as a concept or practice which has been cyclical in nature. That is, whilst intervention was overt and extensive during colonialism, the decolonisation period saw a decline in intervention, only for it to increase again in the post-Cold War/'War on Terror' era. There has been a constant fluctuation, then, in intervention and non-intervention rhetoric, with, at times, rhetoric failing to match practice. During decolonisation, for example, when the concept of non-intervention was supported emphatically, intervention was still occurring in the form of UN peacekeeping operations and economic or political interventions by

colonial powers in their former colonies – as occurred in the Congo. All the while, as these patterns of intervention have occurred, the principle of non-intervention has been developed, primarily through international institutions such as the UN and ICJ. Indeed, it is during the decolonisation period, when the Cold War paralysed the hegemonic powers and intervention was at a low point (except within the superpowers' spheres of influence), that the newly independent Global South states gained a seat at the table, thereby being able to contribute to the development of the principle. This period was therefore a significant tipping point for the principle of non-intervention, firmly establishing its legal framework and importance as a principle of international law. It could be argued, then, that this creation of the red boundary line around the principle of non-intervention has remained in place ever since, even when interventions began to increase again. That is, once established as a principle of international law during this period, subsequent interventionist practices have provided a more nuanced understanding of the concept of non-intervention and its application, which has arguably had the duplicitous effect of both supporting and undermining the principle but, ultimately, not eradicating it as an established principle of international law. Therefore, regional organisations, humanitarian-based interventions and UN peacekeeping have all contributed to the development of the principle of non-intervention, not through adding anything substantially new to the principle but, rather, by providing a greater understanding of the pre-existing elements of the principle.

This then leads to further noticeable dynamics which have arisen throughout the development of the principle. From a TWAIL perspective, the unequal global order, the lack of a Third World voice within the international system and the use of international law to maintain these hierarchies, in particular, the North-South divide are all present within the principle of non-intervention and interventionist practices.³⁵⁵ Indeed, TWAIL scholars such as Tzouvala argue that international law is simultaneously 'a locus of oppression' and a 'constant promise for liberation'.³⁵⁶ No more so is this dichotomy evident than within the principle of non-intervention whereby the principle has both protected the Global South from intervention, whilst simultaneously permitting intervention by the Global North within the Global South, primarily through the justification of collective security intervention. Furthermore, as Anghie argues, international law is animated by colonialism with the colonial dichotomy of civilised and uncivilised continually replicated in what Anghie refers to as a 'dynamic of difference'.³⁵⁷ Again, both the influence of colonialism and the replication of the dynamic of difference can be found within the development of the principle of non-intervention and contemporary interventions, as this Chapter has demonstrated. In particular, it is arguable that some elements of colonialism or, rather, practices which occurred during colonialism, remain within the concept of intervention today, in particular, through UN peacekeeping. Thus, comparisons may be drawn

³⁵⁵ See, for example: Mutua (n57).

³⁵⁶ N Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2015) 109 AJIL Unbound 266-270.

³⁵⁷ Anghie (n15).

between the two forms of intervention. Indeed, just as colonialism was the most illustrious form of intervention in the nineteenth and twentieth century, so too is peacekeeping the most illustrious form of intervention in the twenty-first century. Both invoke elements of domination and subordination, both highlight the North-South divide, both are largely motivated or led by the interests and will of the hegemonic powers (the Global North), both invoke justifications based on notions of values or standards which are predominantly Western-centric and both have gained varying degrees of legitimacy through international law. This comparison, however, is not to condemn peacekeeping and its purported well-intentioned efforts. Rather, it is to join the TWAIL movement in exposing or acknowledging the 'imperial character' of international law and the remnants of colonial practice which linger within the international system,³⁵⁸ in order to then promote or increase the Global South's participation, creating a truly universal international law.

Having tracked the development of the principle of non-intervention, then, the following Chapter will take this analysis a level deeper by examining today's most prevalent form of intervention (and therefore the greatest contemporary challenge to the principle) – UN Peacekeeping. It will explore how interpretations of peacekeeping's legal principles and norms either expand or contract the boundaries of peacekeeping and thus undermine or support the principle of non-intervention. That is, if peacekeeping is a form

³⁵⁸ BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) EJIL 1-37, 1-2.

of intervention, thereby constituting an exception to the principle of non-intervention, the form which peacekeeping takes arguably has a direct impact on the boundaries of the principle of non-intervention. As this Chapter has demonstrated, whilst the traditional concept of peacekeeping did not pose a significant challenge to the principle, the same cannot be said for contemporary, multi-dimensional operations, particularly the stabilisation operations which some consider to be intervention by invitation.³⁵⁹ The following Chapter will therefore outline the evolution of peacekeeping, identifying its legal and normative frameworks. Chapters 4 and 5 will then go on to examine these principles and norms in practice in the DRC, with the purpose of providing specific examples of how peacekeeping in reality may impact the principle of non-intervention, possibly, at times, even contravening it and, thus, amounting to intervention.

³⁵⁹ Labuda (n350).

Chapter 3

Peacekeeping: In Search of a Legal Framework

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1 Introduction

As the most prevalent form of intervention in the modern era, UN peacekeepers are now one of the largest military forces deployed abroad, second only to the United States' military.¹ Following on from the previous Chapter's exploration of the principle of non-intervention, this Chapter will therefore examine the evolution of peacekeeping as a form of collective security intervention.² The purpose of this analysis is to clarify the legal and normative boundaries which constitute peacekeeping's framework, in order to then establish its impact on the principle of non-intervention. It will identify peacekeeping's 'legal' framework (the fundamental legal principles), that sit within what could be viewed as a wider 'normative' framework composed of norms which may have commonalities with principles of law but are, ultimately, not underpinned by law and therefore do not amount to legal principles.³ Whilst identifying these laws and norms, the Chapter will continually explore how they intersect with the principle of non-intervention noting where, at times, a broader interpretation or application of these may result in peacekeeping becoming intervention, thereby contravening the principle of non-intervention. Put differently, if collective security is the main gateway opening the red boundary line around intervention, then peacekeeping is an extension of this, an

¹ There are over 78,000 military personnel and 25,000 civilians in 14 countries, see: UN Peacekeeping Website: <<https://peacekeeping.un.org/en>> Accessed 1 June 2021. See also: S Autesserre, 'The Crisis of Peacekeeping' (2019) *Foreign Affairs* 101-116.

² See: N Tsagourias and ND White, *Collective Security Theory, Law and Practice* (CUP 2013).

³ On legal normativity, see generally: JL Coleman, KE Himma and SJ Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004).

additional gateway that permits intervention. Its principles and norms then act as veins, arteries and capillaries that further expand a peacekeeping operation's interventionist potential; thus, simultaneously undermining or contravening the principle of non-intervention.

1.1 Searching for a Peacekeeping Framework

As the UN Charter makes no reference to peacekeeping, there is no pre-determined constitutional, institutional or normative framework or guidelines governing peacekeeping. Instead, it has developed from interpretations of the Charter, the implied powers of the Security Council,⁴ General Assembly,⁵ and Secretary-General,⁶ decisions from the International Court of Justice⁷ and is based upon the three fundamental principles of consent, impartiality and non-use of force.⁸ Therefore, as with the principle of non-intervention, peacekeeping has evolved through international organs which have established a piecemeal red boundary line around the concept that separates peacekeeping from intervention. That is, it creates a line between, on the one hand, peacekeeping, as a form of collective security intervention and thus a justified exception to the principle of non-intervention, and, on the other hand, intervention in the form of coercive action designed to influence change within a state, which violates the principle of non-intervention. It is therefore important to clarify what

⁴ See: Articles 24(1), 36(1), 40 Charter of the United Nations (24 October 1945) ("UN Charter").

⁵ See: Articles 10, 11(2), 12, 14 UN Charter.

⁶ See: Articles 97-99 UN Charter.

⁷ *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151.

⁸ UNGA, 'Summary Study' A/3943 (9 October 1958) UN Doc A/3943.

the legal and normative frameworks surrounding peacekeeping are in order to ascertain the interventionist nature of peacekeeping and the extent to which peacekeeping's principles and norms may reinforce or undermine the principle of non-intervention. Continuing the approach taken in the previous Chapter's exploration of non-intervention, this Chapter will identify instances in which peacekeeping's red boundary line has been expanded, contorted and, at times, stretched to its limits. It will then note how this, in turn, has a direct impact on the principle of non-intervention as, if peacekeeping breaches its limits, it risks crossing the intervention line, becoming a form of coercive action and thereby violating the principle of non-intervention.

Furthermore, identifying the legal and normative frameworks is also important for both the operation and function of peacekeeping. In particular, clarifying peacekeeping's legal framework is important as 'in general, third party activity is much less likely to raise objection if it rests on legal authority and is brought within the framework' of the UN Charter.⁹ Similarly, it is argued that a peacekeeper may find invoking legal obligations and prescriptions persuasive when facilitating negotiations or undertaking tasks,¹⁰ with a 'legal foundation for the necessary activities' proving to be 'essential to effective performance'.¹¹ Peacekeeping's legal framework is therefore essential both for relations with the host state, the legitimacy and

⁹ O Schachter, 'The Uses of Law in International Peacekeeping' (1964) 50(6) VLR 1096-1114, 1098.

¹⁰ O Schachter, 'Dag Hammarskjöld and the Relation of Law to Politics' (1962) 56(1) AJIL 1-8, 5-6.

¹¹ Schachter (n9) 1099.

legality of the operation and for regulating and guiding the peacekeepers during the deployment of an operation.

1.2 Peacekeeping's Legal Basis

Generally, peacekeeping finds its constitutional basis within Chapters IV, VI and VII of the UN Charter, although it has been argued that the more fitting categorisation is 'Chapter VI and a half operations'.¹² Similarly, as seen in Chapter 2, some have suggested that the legal basis for contemporary stabilisation operations could be tied to host state consent, thereby a form of intervention by invitation.¹³ Whilst Chapter IV deals with the powers of the General Assembly, it is only on very rare occasions that the Assembly has mandated peacekeeping operations.¹⁴ Instead, the GA undertakes a key role in the financing of operations and monitoring peacekeeping performance through its Special Committee on Peacekeeping Operations, with the Security Council tasked with establishing peacekeeping operations.¹⁵ Within Chapter VI, the Security Council is authorised to deal with the 'peaceful settlement of disputes' that may endanger international peace and security, including recommending 'appropriate measures or methods of adjustment'.¹⁶ Peacekeeping operations authorised under this Chapter therefore follow the traditional, passive, consensual model, such as

¹² See: JF Hillen III, 'UN Collective Security: Chapter Six and a Half' (1994) 24(1) *Parameters* 27-37.

¹³ See: Chapter 2, Section 4 and PI Labuda, 'United Nations Peacekeeping as Intervention by Invitation: Host State Consent and the Use of Force in Security Council-Mandated Stabilisation Operations' (2020) *JUFIL* 1-37, 3.

¹⁴ UNEF: UNGA Res 377 (V) (3 November 1950); ONUC: UNGA Res 1474 (ES-IV) (20 September 1960).

¹⁵ See: UN Peacekeeping, 'Role of the General Assembly' <<https://peacekeeping.un.org/en/role-of-general-assembly>> Accessed 5 March 2020.

¹⁶ Article 36(1) UN Charter. Confirmed by the ICJ in *Certain Expenses* (n7).

UNEF and UNFICYP,¹⁷ and thus reinforce the principle of non-intervention. Through Chapter VII, the Council is given broad powers to determine breaches or threats to peace and then to take military, coercive action to combat these in order to 'maintain or restore international peace and security'.¹⁸ Operations mandated by the Council under Chapter VII are thus, typically, non-consensual enforcement operations,¹⁹ such as ONUC, MONUC and MONUSCO, which, at times, blur the boundaries between peacekeeping and peace enforcement and thus undermine the principle of non-intervention by pushing peacekeeping closer to the interventionist boundary line.²⁰

Despite this general distinction, in reality, the constitutional basis of peacekeeping operations is not as clear-cut, with recurrent, inconclusive debates about the Charter basis of peacekeeping,²¹ leading to an uncertainty about the coercive or interventionist nature of peacekeeping. For some, peacekeeping operations may be initiated on the basis of recommendations made by the Security Council on 'procedures or methods of adjustments' under Article 36(1); thus, Chapter VI may provide a legal

¹⁷ UNGA Res 998 (ES-I) (4 November 1956); UNSC Res 186 (4 March 1964) UN Doc S/RES/186.

¹⁸ Articles 39-42 UN Charter.

¹⁹ Articles 39 and 40 envisage recommendations and provisional measures as well as decisions and therefore a Chapter VII operation is not automatically non-consensual. On the legality and enforceability of Security Council powers, see, for example: D Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action' (2015) 26(3) EJIL 671-698 and E De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004).

²⁰ UNSC Res 143 (14 July 1960) UN Doc S/RES/143; UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279; UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925.

²¹ See, for example: ND White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues', (1996) 3(4) *IntPeacekeep* 43-63; A Orakhelashvili, 'The Legal Basis of the United Nations Peace-Keeping Operations' (2003) 43 *VaJIL* 485-524; D Ciobanu, 'The Power of the Security Council to Organize Peacekeeping Operations' in A Cassese (ed) *United Nations Peacekeeping: Legal Essays* (Springer 1978) 15, 17, 40.

basis for the establishment of a peacekeeping operation.²² However, for others, it is impossible for peacekeeping's constitutional foundations to lie in Chapter VI as the potential use of force by peacekeepers is not an element of the pacific settlement of disputes contained within the Chapter.²³ Instead, it is argued that peacekeeping's basis lies in Chapter VII, in particular, Article 39 which permits the Security Council to 'take coercive measures or make recommendations'.²⁴ Further, although the International Court of Justice stressed that peacekeeping operations are not enforcement actions, and, as such, cannot find their legal basis in Articles 41 and 42,²⁵ there remain debates as to whether measures can be taken by peacekeeping operations pursuant to these two Articles.²⁶

To further complicate matters, within contemporary peacekeeping, the multi-dimensional, stabilisation or 'third generation' operations are frequently deployed with a Chapter VII mandate in complex, intra-state conflicts.²⁷ However, the explicit reference to the Charter often comes in the form of a singular phrase - 'Acting under Chapter VII'- which is invoked in the introductory clause or chapeau of the resolution.²⁸ This then creates the misleading impression that peacekeeping and peace enforcement have become one (with some even referring to these stabilisation operations as

²² H Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Frederick A Praeger 1964) 401; Orakhelashvili (nError! Bookmark not defined.).

²³ Ciobanu (nError! Bookmark not defined.).

²⁴ Orakhelashvili (n21).

²⁵ *Certain Expenses* (n7) 166, 171. Ciobanu (n21) 18.

²⁶ Orakhelashvili (n21) 492-493.

²⁷ MW Doyle and N Sambanis, 'Peacekeeping Operations' in TG Weiss and S Daws (eds) *The Oxford Handbook on the United Nations* (OUP 2007) 325.

²⁸ Such as in MONUSCO: UNSC Res 2502 (19 December 2019) UN Doc S/RES/2502.

'Chapter VII and a half' operations) when, instead, the invocation of Chapter VII is to authorise the use of force for specific tasks, such as the protection of civilians.²⁹

Today's operations are therefore a complex infusion of Chapter VI and VII elements, exploiting the space between the two Chapters.³⁰ This Chapter will not, however, engage in these well-trodden debates over peacekeeping's Charter basis.³¹ Instead, it will focus on the legal principles and norms of peacekeeping as it is these norms or principles which arguably determine the interventionist nature of peacekeeping as they form peacekeeping's frameworks and thus peacekeeping's boundary line. The Chapter will therefore explore the evolution and inter-connected nature of, firstly, the fundamental principles of peacekeeping, often referred to as the 'Holy Trinity', and, secondly, three new, controversial norms: democracy promotion, protection of civilians (PoC) and the prohibition of sexual abuse and exploitation (SEA). These latter three norms have been identified as they encompass numerous elements within peacekeeping operations and are three norms which have been most prevalent in the UN's operations in the DRC – as the subsequent two Chapters will examine. They also reflect some of the main justifications or motivations for contemporary

²⁹ *ibid.* On Chapter VII and a half: J Karlsrud, 'United Nations Stabilization Operations: Chapter VII and a Half' (2019) 18(5) *Ethnopolitics* 494-508.

³⁰ ND White, 'Peacekeeping Doctrine: An Autonomous Legal Order?' (2019) 88(1) *NJIL* 86-110, 94.

³¹ See, for example: ND White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues', (1996) 3(4) *IntPeacekeep* 43-63; A Orakhelashvili, 'The Legal Basis of the United Nations Peace-Keeping Operations' (2003) 43 *VaJIL* 485-524; D Ciobanu, 'The Power of the Security Council to Organize Peacekeeping Operations' in A Cassese (ed) *United Nations Peacekeeping: Legal Essays* (Springer 1978) 15, 17, 40.

interventions, which Chapter 2 explored; namely, humanitarian or security-based interventions.

Indeed, whilst examining this relationship between peacekeeping and non-intervention, a TWAIL lens will also continue to be applied. As with the previous Chapter, examples of Anghie's dynamic of difference,³² the North-South divide and the use of international law to maintain hierarchies will all be identified within the evolution of peacekeeping. Furthermore, this analysis of the evolution of peacekeeping and establishment of its frameworks, rather than relaying a textbook history of peacekeeping, will be done through the lens of the UN Secretary-General (SG), as it is the SG who has been a key 'norm entrepreneur' helping to shape peacekeeping and its principles.³³ That is, it will focus on the influence of the SG to create, institutionalise or interpret norms in, what Johnstone refers to as a three-stage 'diffuse process'.³⁴ These three, non-sequential stages include, firstly, the SG helping to create norms, by influencing interactions between state and non-state actors in the UN; secondly, institutionalising these norms within the UN and its organisational structure; and, thirdly, interpreting norms, whether implicitly or explicitly, helping to 'render existing norms operational'.³⁵ Taking Johnstone's application of organisational sociology and constructivist international relations theory to the role of the Secretary-General as norm entrepreneur, the Chapter will examine this within the

³² See: A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).

³³ I Johnstone, 'The Secretary-General as Norm Entrepreneur' in S Chesterman, *Secretary or General? The UN Secretary-General in World Politics* (CUP 2007) 123-138.

³⁴ *ibid*, 124, 131.

³⁵ *ibid*, 137.

context of peacekeeping. However, whereas Johnstone's article focused on the individual, in particular, Kofi Annan, this Chapter will focus on the office of the Secretary-General (and by extension the Special Representative of the Secretary-General (SRSG)) as an institutional position within the UN system. In doing so, it will be purposefully selective, focusing on Secretaries-General and issues which have had greater impact on the normative and legal development of peacekeeping, particularly if occurring within the DRC. Peacekeeping will therefore be examined through a unique blend of TWAIL and Johnstone's theory of norm entrepreneurship. In marrying these two theories together, it will challenge the typical, state-centric, Western narratives of peacekeeping and will allow for a more realistic understanding of the internal structures of the UN and peacekeeping.

The Chapter will therefore begin by applying this Secretary-General lens to explore a brief history of the development of peacekeeping, before turning to focus on the six legal or normative principles. It will consider how these, whether taken individually or combined, may restrict or permit peacekeeping as intervention, depending on how they are interpreted, thereby reinforcing or undermining the principle of non-intervention. That is, if the three fundamental principles are interpreted narrowly, the peacekeeping operation is arguably non-interventionist, thereby supporting the principle of non-intervention. However, as the next two Chapters will explore, as peacekeeping has evolved and these principles have been

interpreted broadly, they permit a greater level of intervention and thus undermine or threaten to contravene the principle of non-intervention. Similarly, the three new norms, found within contemporary, multi-dimensional operations, even if interpreted narrowly, are arguably much more interventionist than the 'Holy Trinity' and, again, as these are interpreted more broadly, the red line around peacekeeping, which limits its interventionist nature, is also expanded. An examination of these norms will then be taken further in Chapters 4 and 5 which will examine each within the context of the UN's peacekeeping operations in the DRC; thereby providing a much more nuanced understanding of peacekeeping – the most dominant form of contemporary intervention- and its relationship with the principle of non-intervention.

2 Peacekeeping's Norm Entrepreneur

Whilst it is well-established that peacekeeping operates (or should operate) according to the three fundamental principles and other important norms, these are rarely found to coexist harmoniously and consistently. Rather, these norms are said to 'exist in a competitive arena' and, within the context of a peacekeeping operation, 'the normative composition is re-balanced each time'.³⁶ For each peacekeeping operation, these norms are re-interpreted, re-defined or re-actualised in order to meet the realities on the ground, the demands of the Security Council mandate and the resources

³⁶ J Karlsrud, 'Special Representatives of the Secretary-General as Norm Arbitrators? Understanding Bottom-up Authority in UN Peacekeeping' (2013) 19(4) GG 525-544, 527.

provided for the operation. Indeed, there is an ongoing battle about what peacekeeping ought to be and do³⁷ and, as such, practices and normative reasonings which back these are significant when tracing how the norms of peacekeeping operations 'wax and wane'.³⁸ Comparisons could therefore be drawn here with the development of the principle of non-intervention. That is, as the previous Chapter outlined, interventionist rhetoric waxed and waned throughout the principle's development, often in direct correlation with the dominance of the hegemonic powers and their agenda. From a TWAIL perspective, then, similar arguments can be made about how the re-balancing of norms and this battle between what peacekeeping is or ought to be, is, like the principle of non-intervention, set within the dynamics of the North-South divide. Just as Chapter 2 identified how elements of the principle of non-intervention (such as contemporary justifications for intervention) are based on Western values and standards, the same arguments could be made about the norms of peacekeeping, as this Chapter will explore. In particular, Chapter 2 identified the inherent power imbalances within the UN Security Council and how this could influence the shaping of laws, norms and practices, such as the principle of non-intervention.³⁹ As the Security Council plays a key role in peacekeeping, again, the same arguments made about the principle of non-intervention - the powers of the veto-wielding P5 and the prevalence of Western hegemony - could be extended and applied to peacekeeping.

³⁷ AJ Bellamy and P Williams, *Understanding Peacekeeping* (2nd edn, Polity Press 2010).

³⁸ Karlsrud (n36) 527.

³⁹ Chapter 2, Section 2.4.1.

Indeed, within the UN system, there is a complex interaction between the Security Council (composed of member states who are tasked with maintaining international peace and security and therefore set the peacekeeping agenda) and the Secretariat (the body of international staff who carry out the substantive and administrative work of the UN).⁴⁰ Head of the Secretariat is the Secretary-General, the 'chief administrative officer of the Organisation', who, 'more than anyone else', 'stands for the United Nations as a whole.'⁴¹ They are a 'living symbol and embodiment' of the UN,⁴² a manager, an investigator and a chief mediator diplomat.⁴³ Within this multifaceted role, the Secretary-General is also 'commander in chief' of UN peacekeeping and, as Johnstone argues, a 'norm entrepreneur'⁴⁴ who plays a significant part in developing and shaping peacekeeping. This Chapter, then, will examine the evolution of peacekeeping through the SG lens in order to offer a greater understanding not just of what UN peacekeeping is or does but, rather, how UN peacekeeping works or has worked over the past seventy-two years. Therefore, examining the development of peacekeeping through the SG lens offers an even deeper analysis to assist with the overall aim of understanding peacekeeping's relationship with the principle of non-intervention.

⁴⁰ Article 97, UN Charter.

⁴¹ Report of the United Nations Preparatory Commission, December 23, 1945 (HM Stationary Office, London, 1946).

⁴² KJ Kille, 'Moral Authority and the UN Secretary-General's Ethical Framework' in KJ Kille (ed) *The UN Secretary General and Moral Authority: Ethics and Religion in International Leadership* (GUP 2007) 11.

⁴³ EJ Ravndal, "'A Force for Peace": Expanding the Role of the UN Secretary-General Under Trygve Lie, 1946-1953' 23(3) (2017) GG 443-459, 445.

⁴⁴ Johnstone (n33).

2.1 Creating Norms

For Johnstone, the Secretary-General is not only an administrative or political actor within the Secretariat, but also a central figure in the creation, institutionalisation and interpretation of norms within peacekeeping.⁴⁵ Johnstone notes that the language in the UN Charter, 'opens space for the Secretary-General to play the role of norm entrepreneur'.⁴⁶ Indeed, Article 99, in particular, authorises the Secretary-General to notify the Security Council of 'any matter which in his opinion may threaten the maintenance of international peace and security'⁴⁷ – a power which is rarely used but was invoked most notably in 1960 during the Congo crisis.⁴⁸ Whilst this does not provide the SG with the power to launch an observer mission or peacekeeping operation on his own, it does not preclude them from playing a key role in the internal structures of peacekeeping operations.⁴⁹ This includes coordinating the establishment of a force, reporting to the Security Council on its progress⁵⁰ and exercising command and control over the operation.⁵¹ Within the field, the office of the Secretary-General is embodied in the Special Representative of the Secretary-General (SRSG) who is head of each peacekeeping operation. Operating under the authority of the Security Council mandate and the SG, the SRSGs have significant discretion

⁴⁵ *ibid.*

⁴⁶ *ibid.*, 124.

⁴⁷ Article 99, UN Charter.

⁴⁸ UNSC Record, Annual Report from 16 July 1958 to 15 July 1959 (13 July 1960) UN Doc S/4381; UNSC Verbatim Record (13/14 July 1960) UN Doc S/PV.873.

⁴⁹ B Simma et al, *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 686.

⁵⁰ The first Secretary General, Trygve Lie, set a precedent by using the report as an opportunity to outline his reactions to events and to record the successes and failures of the Organisation; thus, creating the space for the SG to act as a norm entrepreneur, highlight specific issues or promote their agendas. See: T Lie, *In the Cause of Peace: Seven Years with the United Nations* (Macmillan Co 1954).

⁵¹ Article 98, UN Charter.

on the trajectory of the operation and the implementation of the mandate.⁵²

Indeed, the priorities and success of a peacekeeping operation can differ greatly, depending on the background or orientation of the SRSG as 'each SRSG has a different vision of what the mission would be like'.⁵³

For the UN's operation in the Congo, the managerial role of the SRSG and their relationship with the Force Commander, who is delegated military command and control, has proved pivotal in shaping the operation. For example, during MONUSCO's most robust phase, when the Force Intervention Brigade was introduced, it was led by the then SRSG, Martin Kobler, who 'was largely using a stabilisation doctrine', concerned with 'clearing whole [scores] of armed groups'.⁵⁴ Kobler, in his position as SRSG, therefore took a more military, forceful interpretation of the mandate, which was viewed by many as 'very problematic' and one that 'has been largely debunked by the scholarship'.⁵⁵ In contrast, whilst Kobler was therefore much more forceful, he was also said to have had 'poor political leverage and entry points', unlike his successor, Maman Sidikou who had 'much better political entry points but very little leverage because he wasn't really using the rest of the mission'.⁵⁶ Thus demonstrating how the SG's norm entrepreneurship is, as with other powers, delegated to the SRSGs, allowing them to create, interpret and institutionalise norms and practice within their

⁵² See: C de Coning, 'Mediation and Peacebuilding: SRSGs and DSRSGs in Integrated Missions' (2010) 16(2) GG 281-299.

⁵³ Interview with Independent Expert and Former UN Political Adviser ('Interviewee 8') (New York, 26 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 13.

⁵⁴ *ibid.*

⁵⁵ *ibid.* See also: T Mueller, 'MONUSCO: Kobler's Likely Departure Signals Post-FIB Era for Peacekeeping in Congo' (*African Arguments*, 25 February 2015) <<https://africanarguments.org/2015/02/monusco-kobblers-likely-departure-signals-post-fib-era-for-peacekeeping-in-congo-by-timo-mueller/>> Accessed 29 May 2020.

⁵⁶ *ibid.*

peacekeeping operation. Indeed, the role of the SRSG and senior leadership within the operation, or 'adaptive leadership', has begun to be explored within academic and policy research.⁵⁷ This examination of 'adaptive peace operations' is a new normative and functional approach to peacekeeping designed to 'cope with complexity and uncertainty' and to balance 'the dynamics that drive international interventions to contain violence and stimulate peace' with 'the space and time needed for resilient local capacities to sustain peace to emerge'.⁵⁸ The norm entrepreneurship of the office of the SG, then, in somewhat of a bottom-up approach, adds a further nuance to the normative peacekeeping frameworks and, by extension, magnifies the interventionist potential of peacekeeping, as it arguably creates a space for further justifications for intervention to be put forward. Put differently, the ability of the SG and their office to mould peacekeeping, consequently means that they are, indirectly, able to shape the principle of non-intervention, depending on how they choose to interpret mandates and conduct peacekeeping operations.

Furthermore, from a TWAIL perspective, the ability of the SG and SRSG to potentially shape peacekeeping also presents an opportunity to increase the Third World voice and challenge the hegemonic states within the Security Council. That is, if the Global North dominates decision making on the peacekeeping agenda (predominantly within the P5 of the Security Council)

⁵⁷ See C de Coning, 'Adaptive Peacebuilding' (2018) 94(2) *IntAff* 301-317; L Howard, *Power in Peacekeeping* (CUP 2019).

⁵⁸ C de Coning, 'Adaptive Peace Operations: Navigating the Complexity of Influencing Societal Change Without Causing Harm' (2020) 27(5) *IntPeacekeep* 836-858, 837.

and Global South states struggle to challenge this through the organs of the Council and Assembly, then the Office of the Secretary-General may provide an alternative avenue. As the SRSG, in particular, has the power and influence to 'muster and align' the resources of agencies, donors and countries to support peacebuilding efforts,⁵⁹ then it follows that through the SRSG, Global South states may lobby or petition their interests and agendas within a given context. Therefore, if they are able to contribute to the relevant peacekeeping operation this, in turn, could influence broader peacekeeping practices, such as PoC activities or practices for the prohibition of sexual exploitation and abuse. If the purpose of TWAIL 'rhetoric' is to open the mind to possibilities and widen the focus 'beyond a narrow consideration of technical and legalistic issues',⁶⁰ then the role of the SG and SRSG in adapting peacekeeping could present an opportunity to take a different approach to peacekeeping and one which increases the Global South voice. In particular, if the SRSG is both an individual from the Global South (as is the current SRSG in Congo, Bintou Keita) and the office of SG/SRSG adopts an adaptive leadership approach, which includes steering the operation towards supporting grassroots or local initiatives in order to create peace, then this, arguably, expands the Global South voice within peacekeeping. For TWAIL, this then offers a counter to the dominance of the Global North, particularly the Security Council, in peacekeeping decision making. More broadly, it also begins to move

⁵⁹ De Coning (n52).

⁶⁰ K Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (2011) 16(2) *WisInt'lJ* 353-419, 417.

peacekeeping towards a more bottom-up approach as opposed to a top-down, outsider led approach which, for some, is the key to creating sustainable peace.⁶¹

It is the Secretary-General's 'embeddedness', then, which Johnstone argues is a source of influence as they hold a privileged, central position within the UN system, in part because they are able to communicate with a multitude of actors.⁶² This does not mean, however, that the SG is a 'normative free agent' who is able to strike out in 'entirely new normative directions' but, rather, that they are most effective when they use the UN 'to crystallise emerging understandings' amongst state and non-state actors.⁶³ This norm entrepreneurship can occur in three, non-sequential phases – helping to create norms, institutionalising them and then interpreting them. When norms are created, Johnstone argues that they do not 'find their genesis in the mind of some individual' but are shared through interactions between states and other actors, with the UN acting as a platform for this and the SG as a central figure in mediating this creation.⁶⁴ No more so is this form of entrepreneurship evident than with the creation of peacekeeping as a form of collective security intervention and a tool for maintaining international peace and security. Whilst the second Secretary-General Dag Hammarskjöld, alongside Canadian minister Lester Pearson, are credited with establishing peacekeeping, the idea 'did not just spring from the brain

⁶¹ S Autesserre, *The Frontlines of Peace: An Insider's Guide to Changing the World* (OUP 2021).

⁶² Johnstone (n33) 137-138.

⁶³ *ibid*, 124, 137.

⁶⁴ *ibid*, 127-128.

of Hammarskjöld'.⁶⁵ Instead, in a classic example of norm creation, peacekeeping emerged following the work of Hammarskjöld's predecessor, Trygve Lie, alongside a growing support for the concept amongst member states. In the early 1950s, Lie presented his vision for peace in his *Twenty Year Program for Achieving Peace Through the United Nations*.⁶⁶ Lie, in arguably the first example of a Secretary-General acting as norm entrepreneur, produced a ten point memorandum on his programme in which he proposed, *inter alia*, the establishment of a UN force, which could be deployed to prevent the outbreak of localised violence.⁶⁷ It was his belief that such a force 'would greatly enhance the ability of the Security Council to bring about peaceful settlements' and he set out to convince member states of this benefit.⁶⁸ This proposal was based upon his earlier experience during the Palestine crisis where he noted that the UN 'set a first precedent for armed international police action in the field'⁶⁹ when he orchestrated the commission of a police unit to be deployed in Jerusalem in 1948. Whilst this was not the formal peacekeeping operation that we know of today, Lie's proposal for a UN force arguably pathed the way for his successor, Hammarskjöld, to oversee the creation and institutionalisation of the norm. Similarly, it is also through the Korean War that Lie began to shape peace enforcement, by supporting and assisting in the establishment of an

⁶⁵ UN Oral History Project, 'Interview with O Schachter' (11 October 1985) 7.
<<http://dag.un.org/bitstream/handle/11176/89608/SchachterTranscript.pdf?sequence=3&isAllowed=y>>
[Accessed 2 January 2021.](#)

⁶⁶ UNSG Bulletin (28 March 1951) UN Doc ST/AFS/SCB/92; UNSG, 'Memorandum by the Secretary General (Lie) on Points for Consideration in the Development of a Twenty-Year Program for Achieving Peace Through the United Nations' (1950) 4(3) IntOrg 547-550.

⁶⁷ *ibid.*

⁶⁸ Lie (n50) 280.

⁶⁹ *ibid.*, 323.

international military force in Korea. The 'Unified Command' (USG),⁷⁰ authorised under Security Council Resolution 84,⁷¹ was organised by the Government of the United States of America, with the discretionary use of the United Nations flag 'in the course of operations' and required to produce regular reports to the Security Council.⁷² Arguably, through shaping peace enforcement, Lie inadvertently helped to mould peacekeeping by offering its diametric opposite. The requirement of annual reports to the Security Council, and the use of the UN flag, are also subtle norms which Lie established and which remain in place within peacekeeping practice today. His insistence that the SG should be 'a force for peace'⁷³ also set the climate for the establishment of UN peacekeeping as a permanent tool for securing international peace and security. Lie's tenure as Secretary-General therefore highlights the ability of the officeholder to act as a norm entrepreneur and, simultaneously, undermine the principle of non-intervention which, at that time, was also beginning to develop in the UN system. That is, by setting the foundations for UN peacekeeping, Lie created an opening or the start of a thread, under the umbrella of collective security intervention, which broadened both the potential interventionist activities of the UN and the collective security sphere.

⁷⁰ Cablegrams Dated 14 July 1950, from the Secretary-General to Certain Member Governments Concerning the Security Council Resolutions of 25 and 27 June, 7 July 1950 (S/1501, S/1511, S/1583) UN Doc S/1619 (21 July 1950).

⁷¹ UNSC Res 84 (7 July 1950) UN Doc S/1588: "Having recommended that Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." "Recommends that all Members providing military forces and other assistance...make such forces and other assistance available to a unified command under the United States of America."

⁷² *ibid.*

⁷³ Lie (n50) 88.

In addition, linking Johnstone's theory of norm entrepreneurship with Anghie's dynamic of difference, it could be argued that the SG's norm entrepreneur role fits or exists within the dynamic. As previously discussed, if the act of deploying a peacekeeping operation to a purposefully selected state is viewed as an example of Anghie's dynamic of difference (a Global North state identifying a gap with the 'other' state and seeking to close it),⁷⁴ then it follows that the SG's norm entrepreneur role is exercised within this gap. Therefore, whilst Anghie's dynamic exists at the macro-level, in the form of a peacekeeping operation sent to the host state to bridge the gap between the dominant North and weaker Global South states, Johnstone's norm entrepreneur SG is engaged at the meso-level, inside this identified gap. Through the level of autonomy, embeddedness and norm entrepreneurship that they possess, the Office of the SG can then influence the closing, broadening or maintenance of this gap. Put simply, as the SG or SRSG manage a peacekeeping operation, they are able to shape or control the very tool which has been sent by the dominant states in order to normalise or transform the 'other' and close the gap. Therefore, the SG, through their norm entrepreneurship role, is able to engage in and influence the dynamic of difference.

2.2 The Birth of the 'Holy Trinity'

Building upon the foundations laid by Lie, Hammarskjöld exercised his role as norm entrepreneur, becoming central to the formation and

⁷⁴ Chapter 2, Section 3.4.1.

institutionalisation of peacekeeping. The first UN peacekeeping operation, UNEF, was a lightly armed, several thousand-strong monitoring and observing operation deployed to the Sinai in 1956 to oversee the Suez peace agreement and act as a buffer between the four formerly hostile states.⁷⁵ Following UNEF, Hammarskjöld set out the 'basic principles and rules which would provide an adaptable framework' for peacekeeping operations in his *Summary Study* report.⁷⁶ Within this, Hammarskjöld, again in an act of norm creation, set out the three fundamental principles of peacekeeping, the 'Holy Trinity' of consent, impartiality and non-use of force. Initially, these principles were narrowly interpreted and therefore, cumulatively, suggested a non-interventionist approach which echoed the UN's agenda at that time and epitomised Hammarskjöld's own personal, philosophical beliefs.⁷⁷ Indeed, this formulation of peacekeeping was occurring during the height of the decolonisation period which, as explored in the previous Chapter,⁷⁸ was also a pivotal time for the development of the principle of non-intervention, with a general non-interventionist rhetoric dominating the international system. The principles, then, created a red boundary line around the concept of peacekeeping, similar to that surrounding the principle of non-intervention. Peacekeeping operations which maintain this narrow interpretation of the principles, such as UNEF, are therefore classified as traditional models of peacekeeping and are

⁷⁵ UNGA Res 998 (ES-I) (n17); UNGA Res 1000 (ES-I) (5 November 1956).

⁷⁶ UNSG, 'Address by Secretary-General Dag Hammarskjöld at University of California Convocation, Berkeley' (13 May 1954) Press Release SG/382.

⁷⁷ See: B Urquhart, *Hammarskjöld* (Alfred A Knopf 1972) 17-45.

⁷⁸ Section 3.

typically consensual, non-interventionist and non-coercive. However, as the remainder of this Chapter will explore, these principles have been significantly expanded over the years, thereby widening both the boundaries and the interventionist nature of peacekeeping. Indeed, this expansion or interpretation of the principles began even during Hammarskjöld's tenure with the deployment of ONUC in the DRC in 1960. Whilst ONUC initially began as a traditional model of peacekeeping, following a narrow reading of the fundamental principles which Hammarskjöld had only recently laid out, escalating conflict, demands from the host state and pressure from UN members forced Hammarskjöld to interpret his principles more broadly. As later sections will explore, Hammarskjöld, in his position as SG, struggled to balance the maintenance of his original understanding of the fundamental norms with the complexities of the Congo crisis, leading to a somewhat inevitable expansion and re-interpretation of the norms, again in an act of norm entrepreneurship. This broadening of the peacekeeping norms also, simultaneously, stretched the thin red boundary line surrounding peacekeeping, expanding the sphere of collective security intervention, and thereby undermining or perhaps contravening the principle of non-intervention.

Furthermore, throughout UNEF and ONUC's deployment, the Secretary-General also acted as norm entrepreneur through their creation and interpretation of other norms and practices within peacekeeping operations, as the Cold War paralysis allowed the SG to enjoy 'a great degree of

independence'.⁷⁹ Therefore, as the previous Chapter noted how the Cold War paralysis of the Security Council allowed the General Assembly to play a greater role within the UN,⁸⁰ particularly in the shaping of the principle of non-intervention, it similarly created the space for the SG to undertake a larger role within peacekeeping. For example, at the conception of UNEF, key logistical and operational decisions, such as how and where the force was to be set up and when or how it would withdraw, were all made by the Secretary-General⁸¹ - all of which could also be viewed as examples of the SG engaging in or influencing the dynamic of difference. Similarly, when ONUC was deployed, Hammarskjöld had only one permanent special peacekeeping advisor and no permanent management team, leaving the interpretation of the mandate, and therefore the principles, almost solely to the Secretary-General.⁸² This independence and broad power was heavily criticised by some states, most notably by the Soviet Union who claimed that Hammarskjöld had 'always been prejudiced in his attitude towards the socialist countries', which they believed was epitomised in his 'deplorable role' in the Congo.⁸³ These difficulties were said to have had a 'notable impact on the formulation of subsequent mandates for peacekeeping forces'.⁸⁴ These critiques highlight how the politicised nature of intervention and the inherent power dynamics within the UN, which were explored in

⁷⁹ Simma (n49) 687.

⁸⁰ Chapter 2, Section 3.2.

⁸¹ UNGA Res 997 (ES-I) (2 November 1956).

⁸² See: E.H. Bowman and J.E. Fanning, 'The Logistics Problems of a UN Military Force' (1963) 17(2) IntOrg 355-376.

⁸³ UNGA (15th Session, 882nd Plenary Meeting) (3 October 1960) UN Doc A/PV.882, paras 24-25.

⁸⁴ Simma (n49) 687.

Chapter 2,⁸⁵ seep through into the office of the Secretary-General. Whilst the SG is an independent civil servant, they are evidently not spared the accusations of bias and pressure from dominant Member States, which seemingly intensifies the more the SG's powers and reach broaden. Regardless, the SG has maintained a significant, independent role within both the UN Secretariat and, in particular, within peacekeeping, thanks to the norm entrepreneurship of the first two Secretary-Generals – Lie and Hammarskjöld – who created the space to allow for the office of the SG to act as a creator, institutional-maker and interpreter of norms. This has allowed their successors to prioritise agendas, initiatives and policies to create or shape peacekeeping norms, simultaneously expanding and retracting the boundaries of the principle of non-intervention depending on the situation.

As the remainder of this Chapter will explore, successive Secretaries-General have re-interpreted the fundamental principles, helping to drive the evolution of peacekeeping operations, as Chapter 2 noted,⁸⁶ from the traditional model to multi-dimensional, robust operations, with an expanded use of force, questionable impartiality and dubious host state consent. Similarly, the office holders have introduced new norms within peacekeeping which, again, have emerged from a general consensus or understanding of interventionist practices, that were highlighted in the previous Chapter, and have then been crystallised by the Secretary-

⁸⁵ Chapter 2, Section 2.4.1.

⁸⁶ Chapter 2, Section 3.4.1.

General. In the post-Cold War optimism, with the re-emergence of peacekeeping and the rise of liberal democracy in a post-ideological world,⁸⁷ under Secretary-General Boutros Boutros-Ghali democracy promotion was introduced into peacekeeping operations and is now a common feature within peacekeeping operations.⁸⁸ Shortly after, when the post-Cold War optimism began to fade and the UN was embroiled in a series of catastrophic failures in the 1990s, Boutros-Ghali's successor, Kofi Annan, championed the concept of 'responsibility to protect', leading to the introduction of protection of civilians within peacekeeping mandates.⁸⁹ Again, the introduction of this norm reflected a broader consensus within the international community and amongst member states for humanitarian-based interventions. More recently, following numerous allegations of sexual exploitation and abuse (SEA) by UN peacekeepers and calls for action to be taken to eradicate this from peacekeeping operations, a 'zero tolerance policy' against SEA was introduced.⁹⁰ Cumulatively, these norms form a patchwork framework upon which peacekeeping operations are based and, as will be explored, as they have evolved they have both limited and expanded the interventionist nature of peacekeeping, arguably often in

⁸⁷ F Fukuyama, *The End of History and the Last Man* (Penguin 2020).

⁸⁸ See: UNGA, 'Report of the Secretary-General. An Agenda for Peace: Preventive, Diplomacy, Peacemaking and Peacekeeping' (31 January 1992) UN Doc A/47/277-S/24111 and UNGA, 'Supplement to An Agenda for Peace' (25 January 1995) UN Doc A/50/60-S/1995/1.

⁸⁹ See: UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 and UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270.

⁹⁰ See: UNGA, 'Report of the Secretary-General. Sexual Exploitation and Abuse: Implementing a Zero Tolerance Policy' (15 February 2018) UN Doc A/72/751.

line with the trends or fluctuating interventionist rhetoric espoused in relation to the principle of non-intervention.⁹¹

3 The 'Holy Trinity'

Evidently, the three fundamental principles or the 'holy trinity' are an important part of the peacekeeping frameworks. Together, they support the principle of non-intervention by acting as a red boundary line around the concept of peacekeeping which places limits on peacekeeping's activities and therefore its ability to intervene. Within peacekeeping debates, member states, such as Russia and China, are said to frequently invoke the fundamental principles in part for political reasons but also 'to establish clear boundaries' linked to the fact that peacekeeping can become an intrusive tool 'wielded by the West in particular to sort of dictate what should happen in some sovereign countries'.⁹² Thus, again, emphasising how the principles draw a line between peacekeeping and intervention, supporting the principle of non-intervention. Further, from a TWAIL perspective, the 'holy trinity' could also be viewed as a useful tool for limiting the power of the hegemonic states and therefore limiting their ability to use peacekeeping to push their agenda or use coercive action to influence change in host states (in other words, to intervene). Once again, it also highlights how the power dynamics, which the previous Chapter

⁹¹ Such as the shift to robust peacekeeping in line with humanitarian intervention, as seen in Chapter 2, Section 4.1.

⁹² Interview with Senior Political Affairs Officer, UN DPO ('Interviewee 16') (New York, 10 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 42.

identified as prevalent within the UN and the principle of non-intervention evidently also exist within peacekeeping.

The fundamental principles therefore form part of peacekeeping's boundary line. Consequently, if one or more of these principles are either broadened or violated then this, in turn, has an impact on the non-intervention principle. It could be argued that, at best, an expansion of a fundamental principle of peacekeeping (such as the use of force beyond self-defence to pro-active force) would result in a contraction of the principle of non-intervention, as it is permitting coercive action in order to alter the host state, thus permitting an act of intervention, under the auspices of peacekeeping. At worst, a breach of a principle of peacekeeping (such as an operation's failure to exit after the withdrawal of host state consent) could be an instance in where peacekeeping has crossed the fine line between peacekeeping and intervention, resulting in a violation of the principle of non-intervention. Therefore, taking the definition of intervention outlined in the previous Chapters (coercive action to influence change within the host state)⁹³ this section will explore how the fundamental principles of peacekeeping may support, undermine or even contravene the principle of non-intervention. The subsequent section will then continue this by examining how the newer norms of peacekeeping – democracy, PoC and SEA, may also reinforce or weaken the non-intervention principle.

⁹³ Chapter 2, Section 1.

3.1 Consent

Consent is a cornerstone of international law and plays a key role in generating legal obligation,⁹⁴ based on the notion that the rules which bind sovereign states 'must emanate from their own free will'.⁹⁵ It has also long been established that consent must be 'internationally attributable to the State'; that is, it must come from a person 'whose will is considered, at the international level, to be the will of the State' and such a person must be 'competent to manifest that will'.⁹⁶ It is usually accepted, then, that it is the government who may provide such consent, based on a long-standing presumption that governments have 'effective control over the territory and people of the state' and therefore 'possesses the exclusive authority to express the will of the state in its international affairs'.⁹⁷ As the subsequent Chapter will explore, however, where there is a weak or failed state, or competing claims to effective control over certain territories, the matter of who may provide consent becomes less clear.

Nevertheless, as Orakhelashvili argues, consent 'is even a factor capable of validating behaviour which would otherwise be illegal'.⁹⁸ In this instance, the behaviour which is validated (and would otherwise be illegal) is intervention in the form of UN peacekeeping. Consent, therefore, 'is an inevitable element in the legal basis of peacekeeping forces'.⁹⁹ Indeed, as

⁹⁴ F Teson, *A Philosophy of International Law* (Westview 1998) 73.

⁹⁵ 'Lotus' Case ([*France v Turkey*]) PCIJ Rep Series A No 10, 18.

⁹⁶ Eighth Report on State Responsibility, UN Doc A/CN.4/318 and Add.1-4, 2 (1979) Y.B. Int'l L. Comm'n 3 (1980) 36.

⁹⁷ D Whippman, 'Military Intervention, Regional Organisations, and Host-State Consent' in B Kondoch (ed) *International Peacekeeping* (Ashgate 2007) 113-114.

⁹⁸ Orakhelashvili, (n21) 518.

⁹⁹ *ibid.*

was discussed in the previous Chapter,¹⁰⁰ the ICJ noted that state consent and an assertion of state sovereignty are embedded within the principle of non-intervention, in that, intervention is only allowable at the request or permission of the host state. It therefore follows that as peacekeeping is a form of collective security intervention, a justified or legitimate intervention under the principle of non-intervention, the elements of consent which are embedded within the principle extend to peacekeeping. Consent is thus considered to be a 'legal prerequisite for the entry and presence of a peacekeeping operation within a state and its granting makes Article 2(7) inapplicable'.¹⁰¹ Again, the overlap or intertwined relationship with the principle of non-intervention is evident. That is, as was discussed in section two of the previous Chapter, Article 2(7) of the UN Charter contains the only direct reference to intervention within the Charter, specifically prohibiting states from intervening in a state's domestic jurisdiction.¹⁰² Consent to the presence of a peacekeeping operation therefore prevents peacekeeping from violating Article 2(7) and becoming intervention. It could be argued, then, that as peacekeeping is a form of collective security intervention, deployed with the host state consent, if this element of consent is lost, the peacekeeping operation becomes illegal intervention, in violation of Article 2(7). Peacekeeping can therefore be viewed as interventionist behaviour which would be considered illegal, if not for the

¹⁰⁰ Chapter 2, Section 3.

¹⁰¹ N Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2007) 11(3) JCSL 465-482, 469.

¹⁰² Article 2(7) UN Charter.

validating consent. However, this argument begins to blur when considering contemporary peacekeeping operations which utilise Chapter VII. In light of the exception contained within Article 2(7), which states that the provision 'shall not prejudice the application of enforcement measures under Chapter VII',¹⁰³ then if Chapter VII is invoked, Article 2(7) is not violated. Therefore, if the Security Council mandates a peacekeeping operation under Chapter VII it may disregard Article 2(7) and intervene in the domestic affairs of the host state, without its consent. This does not mean that the Council derogates from the norm of non-intervention contained within Article 2(7), rather, in declaring a situation to be a threat or breach of international peace, under Article 39 of Chapter VII, the Council adjudicates the matter to be non-domestic and therefore within the remit of their jurisdiction.¹⁰⁴ As such, if a peacekeeping operation's mandate invokes Chapter VII, as do some contemporary operations such as MONUSCO,¹⁰⁵ then, in theory, the operation could continue without host state consent, without violating Article 2(7), but would then become peace-enforcement, not peacekeeping. The Council's use of the phrase 'Acting under Chapter VII' within peacekeeping mandates, as noted earlier, therefore further muddies the water, blurring the boundaries between peacekeeping and peace-enforcement and the legal requirement for host state consent. Despite this, consent is still considered to be 'indispensable' for the deployment of an operation, otherwise a forceful operation would be peace enforcement, not

¹⁰³ *ibid.*

¹⁰⁴ TM Franck, *Fairness in International Law and Institutions* (OUP 1998) 222.

¹⁰⁵ UNSC Res 2556 (18 December 2020) UN Doc S/RES/2556.

peacekeeping.¹⁰⁶ It is thus the 'primary distinction' between peace enforcement and peacekeeping;¹⁰⁷ thereby playing an important role in establishing the legal basis 'for the emplacement and presence of a peacekeeping force within a state'.¹⁰⁸ Without consent, then, the peacekeeping operation becomes intervention.

Recognising this importance of consent, Hammarskjöld institutionalised the norm as one of the three fundamental principles of consent.¹⁰⁹ Again, this was arguably not an act of solo entrepreneurship but, rather, built upon the well-established significance of consent within international law and the growing importance of the principles of sovereignty and non-intervention within the Global South as the world entered the decolonisation period. Furthermore, from a TWAIL perspective, the inclusion of consent as a principle of peacekeeping could be seen as crucial for maintaining newly independent states' sovereignty and consequently their control over processes or actions within their state.¹¹⁰ Therefore, both the principle of non-intervention and the principle of consent within peacekeeping, protect states' sovereignty, ostensibly providing these Global South state's with a shield against hegemonic intervention, in this instance, in the form of UN peacekeeping. However, as this Chapter and Chapter 4 will go on to examine, in practice, it is doubtful as to how much these concepts can be

¹⁰⁶ Orakhelasvili (n21) 519.

¹⁰⁷ Interview with Mona Ali Khalil, former Senior Legal Officer of the UN Office of the Legal Counsel, Director of MAK LAW International and an Affiliate of the Harvard Law School Program on International Law and Armed Conflict ('Interviewee 12') (New York (Skype) 5 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>>.

¹⁰⁸ Tsagourias (n101) 469.

¹⁰⁹ Summary Study (n8) p9, pg 4.

¹¹⁰ On sovereignty, see: S N'zatioula Grovogui, *Sovereigns, Quasi Sovereigns and Africans: Race and Self-Determination in International Law* (Minnesota University Press 1996).

used by the Global South to advance their own interests. Indeed, as TWAIL scholars such as Anghie argue, sovereignty, in particular, is 'a flexible instrument that readily lends itself to the powerful imperatives of the civilising mission' and is thus a Euro-centric concept.¹¹¹ As will be explored, similar arguments can also be made about the concept of peacekeeping, and by extension the principle of consent, with the enduring North-South divide again creating a dichotomy between discourse and practice in peacekeeping.

Regardless, in line with the non-intervention rhetoric at the time, Hammarskjöld included the pre-requisite of host state consent within peacekeeping's legal framework, also drawing a distinction between operations mandated by the General Assembly and actions taken by the Security Council under Chapter VII¹¹² - again highlighting the Charter-basis arguments previously discussed. Operations of 'Forces' mandated by the General Assembly were said to have required host state consent in order to be 'stationed or operate on the territory of a given country'.¹¹³ Hammarskjöld then went on to note that this did not exclude the possibility of the Council establishing 'such a Force within the wider margins provided under Chapter VII'.¹¹⁴ This suggests that consent is either not necessary or was less important for peacekeeping operations mandated under Chapter VII, thereby placing a question mark over the principle of consent and its

¹¹¹ A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) 40(1) *HarvIntLJ* 1-71, 71.

¹¹² Summary Study (n8) paras 167, 177, 179-180.

¹¹³ *ibid*, para 5.

¹¹⁴ *ibid*, paras 179-180.

ability to limit peacekeeping as a form of intervention. However, Hammarskjöld refused to expand upon this, arguing that it was not 'necessary to elaborate this point further, since no use of the Force under Chapter VII' 'has been envisaged'.¹¹⁵ At the point in which peacekeeping was created and institutionalised, its creators did therefore not envisage it to be a forceful, potentially interventionist tool, highlighting how far peacekeeping has since evolved, with contemporary operations perhaps going beyond the concept of peacekeeping and breaching the intervention line, as will be explored in the subsequent Chapters.

3.1.1 De Jure v De Facto

Whilst it is well-established, then, that consent is essential for the creation and deployment of a peacekeeping operation, what is less clear is the role and legal necessity of continuing consent throughout the duration of the operation's deployment. That is, whether a withdrawal of consent results in the operation having to exit the country immediately or whether it is only to exit at the end of its mandate period, if consent is still withdrawn. A distinction can, again, be drawn here between operations depending on their Charter basis. For the traditional model of peacekeeping operations, deployed under Chapter VI, consent must be maintained in order for the operation to remain deployed.¹¹⁶ If consent is withdrawn then the operation must exit the host state, as occurred with UNEF in 1967 when Egypt revoked

¹¹⁵ *ibid.*

¹¹⁶ As occurred with UNEF: UNGA, 'Report of the Secretary-General on the Withdrawal of the United Nations Emergency Force' (26 June 1967) UN Doc A/6730. See: SS Malawer, 'The Withdrawal of UNEF and a New Notion of Consent' (1970) 4(1) CILJ 25-36; JI Garvey, 'United Nations Peacekeeping and Host State Consent' (1970) 64(2) AJIL 241-269; R Higgins, 'A General Assessment of United Nations Peacekeeping' in A Cassese (ed) *United Nations Peacekeeping: Legal Essays* (Springer 1978) 5

its consent.¹¹⁷ Similarly, when Croatia and Rwanda withdrew their consent to UNPROFOR¹¹⁸ and UNAMIR,¹¹⁹ respectively, the UN operation was either replaced by a smaller operation¹²⁰ or removed from the country completely.¹²¹

For Chapter VII operations, however, it appears that once an operation has been consensually deployed, host state consent becomes important for the operational or practical effectiveness of the mission, rather than a legal requirement for its continued presence.¹²² Put differently, if the host state effectively withdraws their consent, this does not necessarily result in the operation having to exit nor does it turn the peacekeeping operation into an illegal intervention, as it was initially deployed with consent. As the former Head of the Peacekeeping Department in the Office of Legal Counsel (UNOLC), Mona Ali Khalil noted, a host state can maintain consent but withdraw effective consent.¹²³ That is, there is a '*de jure* consent v *de facto* consent' - 'legally, the *de jure* consent cannot be withdrawn within a mandate, only at the end of it.'¹²⁴ Therefore, a host state consents to an operation being deployed but cannot request its withdrawal during the operation's mandate – for MONUSCO, for example, this has typically been

¹¹⁷ UNGA, 'Report of the Secretary-General on the Withdrawal of the United Nations Emergency Force' (26 June 1967) UN Doc A/6730. See also: R Higgins, *United Nations Peacekeeping: Documents and Commentary. Vol III: Africa* (OUP 1980) 361-362.

¹¹⁸ UNSC Res 743 (21 February 1992) UN Doc S/RES/743. See also: T Tardy, 'United Nations Protection Force (UNPROFOR)' in JA Koops, T Tardy, N MacQueen and PD Williams (eds) *The Oxford Handbook of United Nations Peacekeeping Operations* (OUP 2015) 371-82.

¹¹⁹ UNSC Res 997 (9 June 1995) UN Doc S/RES/997.

¹²⁰ UNCRO; UNGA-SC, 'Letter dated 12 January 1995 from the Permanent Representative of Croatia to the United Nations addressed to the Secretary-General' (12 January 1995) UN Doc A/50/64 - S/1995/28, 4; UNSC Res 981 (31 March 1995) S/RES/981.

¹²¹ As was the case with UNAMIR in Rwanda.

¹²² Tsagourias (n101).

¹²³ Interviewee 12, Mona Ali Khalil (n107).

¹²⁴ *ibid.*

a 12 month period. As Ali Khalil points out, in this instance, at the mandate renewal date, there needs to be 'either a re-definition of the mandate to appease the host and/or some kind of political pressure'; once again it 'comes down, like everything else, to the will of the Council'.¹²⁵ Thus, the TWAIL narrative, which was established in the previous Chapter, of a hierarchical power structure embedded within the UN system can be applied. That is, if peacekeeping operations are beholden to the veto-wielding P5 of the Security Council, then this once again reinforces the patterns of dominance and subordination which TWAIL seeks to highlight and counteract.¹²⁶ Furthermore, the inability of the host state to eject a Chapter VII peacekeeping operation from its territory during its mandate period supports the previously made argument that the principle of consent may not be a shield for protecting the Global South host states and their ability to control actions within their state. Rather, it could be viewed as a 'flexible instrument', like sovereignty, which lends itself to the dominant, hegemonic powers, in particular the P5, and their agendas.¹²⁷

However, whilst maintaining consent throughout the operation's deployment may not be legally necessary, it does remain important. As will be demonstrated in the next Chapter's examination of consent in the DRC, in practice, 'without host government consent, there is very little you can

¹²⁵ *ibid.*

¹²⁶ See, for example: M Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) *HarvIntLJ* 201-245; JT Gathii, 'International Law and Eurocentricity' (1998) 9 *EJIL* 184-211 and BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *ICLR* 3-27.

¹²⁷ Anghie (n32).

do'.¹²⁸ That is, although consent may only be legally required for deployment, once within the country it is still required, practically, to allow the operation to function. This issue has been recognised in key peacekeeping documents such as the *Capstone* doctrine which notes that whilst a host state may initially consent to the deployment of the operation, it may 'subsequently seek to restrict the operation's freedom of action, resulting in a *de facto* withdrawal of consent'.¹²⁹ *Capstone* states that this challenges the rationale for the peacekeeping operation and would alter the international community's approach to supporting the peace process. The maintenance of relations with the host state is therefore essential and as the *Capstone Doctrine* notes, a UN peacekeeping operation 'must work continuously to ensure that it does not lose the consent of the main parties'.¹³⁰

Furthermore, recent peacekeeping studies have found that an 'absence of genuine host-state consent represents one of the greatest threats to the success of modern peacekeeping missions'.¹³¹ Indeed, a Senior Political Officer within the UN Department of Peace Operations (DPO) noted that 'even the most 'dysfunctional state' still has multiple tools at its disposal to basically bring the mission to its knees or stop it from carrying out its basic functions'.¹³² Obtaining and then maintaining host state consent is therefore

¹²⁸ Interview 16 (n92).

¹²⁹ UN, *United Nations Peacekeeping Operations: Principles and Guidelines* ('Capstone Doctrine') (DPKO 2008) 32.

¹³⁰ *ibid*, 33.

¹³¹ S Sebastián and A Gorur, 'UN Peacekeeping & Host-State Consent: How Missions Navigate Relationships with Governments' (Stimson Centre March 2018) 5.

¹³² Interview 16 (n92).

'an absolute must'.¹³³ As such, strategies may be devised in order to manage deteriorating consent and establish shared expectations.¹³⁴ This may primarily be undertaken by the Secretary-General and, by extension, the SRSGs, who play a key norm entrepreneurship role in the interpretation and application of the principle of consent. That is, within the UN Secretariat, General Assembly and Security Council, it is the role of the Secretary-General to work with member states to ensure host state consent is maintained or, if withdrawn, to apply political pressure to ensure it is retained by the mandate renewal. As previously noted, this could, again, be viewed as an example of the SG engaging in the dynamic of difference and reducing the apparent gap between the dominant UN and the 'other' host state, through the peacekeeping operation. Similarly, within the field, it is the SRSG who has to maintain relationships between the peacekeeping force and the host state.¹³⁵ However, it could be argued that this, in itself, is coercive action designed to alter the state and therefore a form of intervention. That is, it could be viewed as diplomatic or political intervention as UN personnel are applying pressure or attempting to persuade the host state to change their opinion on the presence of an external, dominant entity - the UN peacekeeping operation, being deployed within their state. Thus, in this instance, peacekeeping arguably crosses the

¹³³ *ibid.*

¹³⁴ I Johnstone, 'Managing Consent in Contemporary Peacekeeping Operations' (2011) 18(2) *IntPeacekeep* 168-182.

¹³⁵ See: Karlsrud (n36).

divide and becomes intervention, thereby contravening the principle of non-intervention.

3.1.2 The Dividing Line?

The principle of consent within peacekeeping is perhaps the most crucial of the three fundamental principles, as it acts as a thin red boundary line between peacekeeping and peace enforcement or intervention. However, where consent is dubious or withdrawn during the mandate period, then, the line between peacekeeping and intervention becomes blurred. Maintaining consent is therefore essential for a peacekeeping operation, as is evidenced by the efforts which the UN goes to in order to repair relationships with the host state. Whilst this could, again, in itself be viewed as intervention, it signals the importance of the principle of consent for maintaining peacekeeping's non-interventionist status. Indeed, as a senior political officer in the UN Secretariat noted, 'no matter what the mandate says' there is no real prospect of the UN 'charging off and doing its own military operations without there being a degree of consent from the Government- so the principles very much apply to peacekeeping'.¹³⁶

The principle of consent therefore forms a central part of peacekeeping's legal framework, demarcating its boundaries and acting as a thin red line between peacekeeping and intervention. It follows, then, that when the principle is expanded, contorted or re-interpreted, this alters peacekeeping's boundaries and, consequently, supports or undermines the

¹³⁶ Interviewee 16 (n92) pg 51.

principle of non-intervention. This is further compounded by the fact that consent is one third of the 'holy trinity' and as the principles cohabit in a competitive, constantly evolving arena, when there is an alteration or expansion of one, this has a knock-on effect on the others, as the remainder of this Chapter and subsequent Chapters will highlight.

3.2 Impartiality

The second principle in the holy trinity, impartiality, is often considered to be the 'lifeblood of peacekeeping', providing it with its distinctiveness.¹³⁷ Whilst consent is concerned specifically with the host state and establishes the dividing line between peacekeeping and peace enforcement, or intervention, impartiality is focused on the peacekeepers and their behaviour. It requires peacekeepers to be unbiased in their dealings with the parties to the conflict and in the execution of their mandate.¹³⁸ This is not, however, the same as neutrality, despite the often confused and inconsistent use of both terms by UN personnel.¹³⁹ Whilst neutrality 'refers to the character of a peacekeeping operation', impartiality 'is an operational term and refers to the conduct of the operation'.¹⁴⁰ That is, peacekeeping operations should not hold any prejudices against parties to the conflict, nor should they influence events within the host state.¹⁴¹ More broadly, for the principle of non-intervention, in theory, impartiality arguably acts as

¹³⁷ A James, *Britain and the Congo Crisis 1960-1963* (Macmillan 1996) 211.

¹³⁸ Capstone (n129).

¹³⁹ D Donald, 'Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century' (2002) 9(4) *IntPeacekeep* 21-38, 24-26.

¹⁴⁰ Tsagourias (n101) 478.

¹⁴¹ Summary Study (n8) 8-10; S/RES/743 (n118) 10.

somewhat of a barrier or protective bubble for the internal affairs of the host state; again, a red boundary line around peacekeeping.

However, the difficulty with the principle of impartiality is that it is an 'elusive goal',¹⁴² whilst it is widely recognised as a necessary norm or principle, it is unclear what it actually means. The concept itself is not a given, it is a claim and, as such, is disputable.¹⁴³ This, in turn, leads to questions about the legal basis or legal validity of the principle, with some debating whether it amounts to a 'general principle of law' in the sense of Article 38(1)(c) of the ICJ Statute or whether it gains legal effect through, for example, a binding Security Council resolution or the UN Charter.¹⁴⁴ For peacekeeping, then, the principle of impartiality, arguably still forms a part of its legal framework but could, perhaps, be viewed as a principle which is not as robust as the other two principles.

3.2.1 Evolution

As with the other principles and norms of peacekeeping, the application of impartiality or the understanding of impartiality in practice has evolved over time, in line with changes to peacekeeping and interventionist practices. The concept of impartiality stems from a 'particularly rigid interpretation' of the UN Charter, in particular Article 2(7) which, as previously discussed, prohibits the UN from intervening in national matters, except when acting

¹⁴² DN Gibbs, 'The United Nations, International Peacekeeping and the Question of 'Impartiality': Revising the Congo Operation of 1960' (2000) 38(3) JModAfrStud 359-382, 359.

¹⁴³ See: E Paddon Rhoads, *Taking Sides in Peacekeeping: Impartiality and the Future of the United Nations* (OUP 2016).

¹⁴⁴ K Macak, 'A Matter of Principle(s): The Legal Effect of Impartiality and Neutrality on States as Humanitarian Actors' (2015) 97(897/898) IRRC 157-181.

under Chapter VII.¹⁴⁵ Spijker suggests that Article 2(7) should therefore be read as a 'warning to all domestic governments' that the UN is not created to resolve their internal issues for them.¹⁴⁶ The principle of impartiality can therefore be said to support the principle of non-intervention as it flows directly from the prohibition on intervention in domestic affairs in Article 2(7). Furthermore, 'the idea that the UN could act impartially' is also found in Article 40 of Chapter VII of the UN Charter,¹⁴⁷ which provides that the provisional measures which the Council may authorise 'shall be without prejudice to the rights, claims or position of the parties concerned'.¹⁴⁸ It is based upon these notions, that Hammarskjöld included impartiality as a fundamental principle of peacekeeping when acting as norm entrepreneur in creating peacekeeping.¹⁴⁹ Initially, however, impartiality was not defined or made explicit, instead impartiality within these operations was predominantly found or maintained through the composition of the force, as the permanent members (P5) of the Council or interested parties were excluded from providing troops.¹⁵⁰ From a TWAIL perspective, this application of impartiality could be viewed as both a challenge to and a maintenance of the imbalance of powers within the UN and the dominance of the hegemonic states which Chapter 2 outlined. On the one hand, it could be viewed as a challenge to hegemony as it places a limitation on the

¹⁴⁵ O Spijkers, 'The Evolution of United Nations Peacekeeping in the Congo' (2015) 19(1-2) *IntPeacekeep* 88-117, 91.

¹⁴⁶ *ibid.*

¹⁴⁷ J Boulden, 'Mandates Matter: An Exploration of Impartiality in United Nations Operations' (2005) 11 *GG* 147-160, 148.

¹⁴⁸ Article 40, UN Charter.

¹⁴⁹ Summary Study (n8).

¹⁵⁰ This was a particular request by President Nasser of Egypt before the deployment of UNEF, see: B Urquhart, *A Life in Peace and War* (WW Norton 1987) 132-133.

dominant Global North states of the Security Council, preventing them from contributing troops to the operation and thus removing their ability to potential intervene or alter the operation, via its troops, in the field to promote their interests and agendas. By extension, this restriction on the P5 to physically intervene in the host state, could also be viewed as further reinforcement for the principle of non-intervention, as Chapter 2 highlighted how these power dynamics also animate intervention, with the principle vulnerable to being used by the dominant states. Therefore, prohibiting the P5 from contributing troops could be seen as limiting the risk of the principle of non-intervention being contorted or expanded by these powers in practice. However, on the other hand, this limitation on the P5 does not negate the fact that the Council is the organ which sets the peacekeeping agenda, producing the peacekeeping operation's mandate.¹⁵¹ Therefore, whilst the P5 may not be able to contribute troops, they have ultimate control over deciding when and how the other states' troops are deployed and what tasks they undertake during this time. In essence, then, as the majority of troop contributing nations today are from the Global South, the application of impartiality in this manner maintains the North-South divide as the dominant Global North sets the peacekeeping agenda, with the subordinate Global North implementing it.¹⁵² That is, the dominant states control the direction of peacekeeping, whilst displacing 'the military,

¹⁵¹ See: P Wallensteen and P Johansson, 'The UN Security Council: Decisions and Actions' in S von Einsiedel, DM Malone and B Stagno Ugarte (eds) *The UN Security Council in the 21st Century* (Lynne Rienner 2015) 27-56.

¹⁵² As of January 2021, the top 5 contributing states were: Bangladesh, Rwanda, Ethiopia, Nepal and India. UN Peacekeeping, 'Troop and Police Contributors' <<https://peacekeeping.un.org/en/troop-and-police-contributors>>.

political and strategic risks and personnel costs of labour-intensive peacekeeping onto the poorer and weaker states of the Global South'.¹⁵³

This, in turn, has also had a practical effect on peacekeeping, as subsequent Chapters within this thesis will explore, with some debating how this effects the 'quality' of peacekeeping.¹⁵⁴

Furthermore, highlighting how the 'normative composition' of peacekeeping operations is 're-balanced each time',¹⁵⁵ impartiality has differed depending on what model of peacekeeping the operation adopts. Hammarskjöld argued that the use of force in non-Chapter VII operations must be 'impartial, in the sense that it does not serve as a means to force settlement, in the interests of one party, of political conflicts or legal issues recognised as controversial'.¹⁵⁶ For traditional peacekeeping operations, such as UNEF, impartiality therefore meant being passive, with peacekeepers obliged to 'maintain normal relations with a party whose behaviour was being censured by most of the international community'.¹⁵⁷ Thus, peacekeepers were essentially a referee, overseeing the implementation of agreements and restricted by the parties, the modest mandates and the dynamics of the Cold War. As such, it was arguably easier for peacekeepers to maintain impartiality as the tasks which they were required to undertake were relatively simple, monitoring and observation

¹⁵³ P Cunliffe, 'The Politics of Global Governance in UN Peacekeeping' (2009) 16(3) *IntPeacekeep* 323-336, 324.

¹⁵⁴ See: J Levin, J MacKay and A Nasirzadeh, 'Selectorate Theory and the Democratic Peacekeeping Hypothesis: Evidence From Fiji and Bangladesh' (2015) 23(1) *IntPeacekeep* 107-132; F Haas and N Ansorg, 'Better Peacekeepers, Better Protection? Troop Quality of United Nations Peace Operations and Violence Against Civilians' (2018) 55(6) *JPeaceRes* 742-758.

¹⁵⁵ Karlsrud (n36) 527.

¹⁵⁶ Summary Study (n8).

¹⁵⁷ M Goulding, 'The Evolution of United Nations Peacekeeping' (1993) 69(3) *IntAff* 451-464, 455.

tasks, in less complex or less volatile post-conflict settings. For the principle of non-intervention, then, impartiality, in this instance, supported the principle as it limited peacekeeper's activities, thereby limiting peacekeeping's interventionist nature.

However, this changed as peacekeeping evolved, in line with changing conflict dynamics. As the previous Chapter outlined, as the global order and international relations evolved, so too did interventionist practice, including peacekeeping. For impartiality, a re-imagining of the concept was required as peacekeeping moved to a robust model and began to undertake joint operations with the host state forces. These joint operations have included activities such as capacity building, justice reform and military operations, with peacekeepers involved in planning, logistical support and/or the execution of the operation.¹⁵⁸ As such, it is questionable how these joint operations can be reconciled with the principle of impartiality and, beyond this, the principle of non-intervention. Indeed, when initially shaping peacekeeping, Hammarskjöld explicitly stated that UN operations 'must be separate and distinct from activities by any national authorities',¹⁵⁹ specifically noting that ONUC could not exercise their authority either in competition or in cooperation with the host state.¹⁶⁰ Joint operations therefore certainly contravene this traditional understanding of impartiality;

¹⁵⁸ See, for example: S/RES/1925 (n20) which mandated MONUSCO to support the DRC Government in strengthening the capacity of the judicial institutions; UN Peacekeeping, 'MONUSCO Plans to Boost the Operational Capacity of the FARDC Against the ADF Rebels' (25 October 2020) <<https://peacekeeping.un.org/en/beni-monusco-plans-to-boost-operational-capacity-of-fardc-against-adf-rebels>> Accessed 5 February 2021.

¹⁵⁹ UNSC 'Report of the Secretary-General' (18 July 1960) UN Doc S/4389, 5.

¹⁶⁰ *ibid.*

however, the same cannot be said for the post-Cold War, expanded interpretation of impartiality. More recently, it has been argued that joint operations are not 'necessarily a violation of the impartiality principle' as 'you can still be impartial' and undertake such operations.¹⁶¹ In particular, one senior political advisor noted that 'it's pretty obvious now, the interpretation of the principles has evolved over time' so that 'it's very clear that impartiality doesn't mean neutrality'.¹⁶² Therefore, 'the fact that you're impartial doesn't prevent you from taking action to neutralise or to diminish the ability of those actors to derail a peace process or a political process'.¹⁶³ Indeed, for the fulfilment of tasks such as the protection of civilians, which permits an extensive level of force, impartiality is, again, considered to be maintained as the Council mandates permit force to be used against any actor which poses a threat to civilians, thereby including both state and non-state actors.¹⁶⁴ However, impartiality becomes dubious when a peacekeeping operation becomes engaged in joint operations, particularly military endeavours. That is, it becomes 'harder to sustain the notion of impartiality of the UN mission, if its military component is engaged in military assistance to one of the parties to the conflict'.¹⁶⁵ The notion of impartiality 'can be respected, however, while the civilian component is assisting the government in other mandated activities such as judicial

¹⁶¹ Interviewee 8 (n53) pg 45.

¹⁶² Interviewee 16 (n92) pg 44.

¹⁶³ Interviewee 16 (n92).

¹⁶⁴ See: F Blyth and P Cammaert, 'Using Force to Protect Civilians in United Nations Peacekeeping Operations' in H Willmot, R Mamiya, S Sheeran and M Weller (eds) *Protection of Civilians* (OUP 2016); M Ali Khalil, 'Legal Aspects of the Use of Force by United Nations Peacekeepers for the Protection of Civilians' in H Willmot, R Mamiya, S Sheeran and M Weller (eds) *Protection of Civilians* (OUP 2016).

¹⁶⁵ Interviewee 12 (n107).

sector reform and human rights reform'.¹⁶⁶ The expansion of impartiality to include joint operations, then, is not a violation of the principle but simply an evolution, yet it remains questionable how far the principle can evolve before it is no longer a legal principle and is simply practice. Similarly, it could be argued that this expansion of the principle of impartiality to include joint operations undermines the principle of non-intervention as it presents an opportunity for the peacekeeping operation to coerce the host state government in situations involving military, political and humanitarian matters and also reduces the likelihood of peacekeepers being even handed in protecting civilians. Thus, it is possible to view the joint operations as a potential form of intervention.

3.2.2 Impartial Complicity

Closer cooperation with the host state also raises further implications, beyond a potential expansion or contravention of the principle of impartiality. In particular, a deeper military involvement has resulted in legal and practical implications, such as the potential invocation of international humanitarian law and the possible complicity of the UN in violations of international law.¹⁶⁷ The latter issue, in particular, has proved to be most problematic, leading to the UN attempting to create safety nets or assurances, in order to distance itself from such acts and thereby maintain the UN's legitimacy, credibility and impartiality. Of these initiatives, the most significant has been the UN's Human Rights Due

¹⁶⁶ *ibid*, pg 45.

¹⁶⁷ UNSG, 'Secretary-General Bulletin: Observance by United Nations Forces of International Humanitarian Law' (6 August 1999) UN Doc ST/SGB/1999/13.

Diligence Policy (HRDDP), which requires the UN to assess whether their partners comply with international humanitarian law, human rights and refugee law before joint operations commence.¹⁶⁸ The policy began as a conditionality policy, specific to the Congo, before being expanded to the HRDDP and made applicable to all UN missions, offices, agencies, funds and programmes which deal with non-UN forces. According to senior UN personnel, 'there was a sense of urgency, that we could no longer support operations that inflicted harm on civilians' and 'ultimately, we needed to apply that same policy across the board'.¹⁶⁹ As such, in late 2010 the UN Policy Committee decided that the conditionality policy 'should apply globally and system-wide, and launched an internal inter-agency process', led by the Department of Peacekeeping Operations and the Office of the High Commissioner for Human Rights, 'to work on the development of a new policy'.¹⁷⁰ From this, the UN Human Rights Due Diligence Policy (HRDDP) was developed and officially adopted as an internal policy in July 2011¹⁷¹ before being made public in March 2013.¹⁷² For some, it can be viewed as a 'faithful implementation of existing legal obligations of the UN' and a procedural mechanism which requires a balancing act between not contributing to violations of international law and the need to fulfil the goals of the operation.¹⁷³ Indeed, as Mona Ali Khalil, a former Senior Legal Officer

¹⁶⁸ UNGA-SC, 'Human Rights Due Diligence Policy' (5 March 2013) UN Doc A/67/775-S/2013/110 ('HRDDP')

¹⁶⁹ Interview with Senior UN DPO Personnel, Policy, Evaluation and Training Division ('Interviewee 10') (New York, 3 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 47.

¹⁷⁰ J Labbé and A Boutellis, 'Peace Operations by Proxy: Implications for Humanitarian action of UN Peacekeeping Partnerships with Non-UN Security Forces' (2013) 95(891/892) IRRC 539-559, 554-555.

¹⁷¹ UN Secretary-General, Decision No 2011/18 (13 July 2011).

¹⁷² HRDDP (n168).

¹⁷³ HP Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2015) 20(1) JCSL 61-73.

of the UN Office of Legal Counsel (UNOLC) noted, the full and prompt implementation of the HRDDP has been impeded by 'the constant fear that the host government will stop cooperating with the UN mission altogether and/or ask the UN mission to leave its country'.¹⁷⁴ Ali Khalil advises, however, that the proper implementation of the HRDPP is not only 'the right thing', it is also 'the practical thing' because 'if you lose your moral credibility, it will inevitably undermine your operational effectiveness'.¹⁷⁵ The HRDDP thus highlights both the nuances within the principle of impartiality and the interconnectedness of the fundamental principles. That is, to place strict conditions on the host state in order to maintain impartiality, may have a negative impact on relations with the state and therefore the principle of consent. Similarly, as was argued in relation to the maintenance of consent, it may also be possible to view the HRDDP as coercive action designed to influence change in the host state, as the UN is exerting pressure on the government to make alterations in order to meet their standards or agenda. More specifically, the UN peacekeeping operation is coercing the host state government to make changes to their national armed forces by presenting them with an ultimatum – to make the proposed changes or the UN will withdraw its support. Thus, the HRDDP could be viewed as a form of political or diplomatic intervention. In addition, applying a TWAIL lens, regardless of the well-intentioned motives of the HRDDP, as was seen in Chapter 2's discussion of humanitarian-based interventions,

¹⁷⁴ Interviewee 12 (n107).

¹⁷⁵ Interviewee 12 (n107).

the standards of behaviour and human rights values which underpin the policy are, ultimately, based on Western-centric ideals. Therefore, as occurred with the principle of non-intervention, the dominance of the Global North state is, again, subtly reinforced within the concept of peacekeeping through the HRDDP.

In a similar vein, some have critiqued the policy for serving 'the more limited purpose of shielding the UN mission from accusations of complicity in war crimes', rather than significantly reducing the occurrence of crimes by the host state forces.¹⁷⁶ Indeed, a former military commander within MONUSCO noted that they did not understand why the UN 'should be extremely strict in conditioning [their] support' as they 'have these conditions on the table' but then 'continue to play with the people who are the real sponsors of instability'.¹⁷⁷ They argue that 'it's a total contradiction'; 'you cannot blame this general or these people who are corrupt', instead 'it is a collective responsibility'.¹⁷⁸ Indeed, it is arguable that there may be a need for impartiality to simply return to a more traditional concept, whereby, in the spirit of the UN Charter, all actors are reprimanded for their violations, rather than simply those who the UN peacekeeping operation may be working alongside. As the subsequent Chapter will explore, then, the implementation of the HRDDP can present numerous issues, not least its seemingly selective application which, applying a TWAIL lens, could be

¹⁷⁶ T Vircoulon, 'After MONUC, Should MONUSCO Continue to Support Congolese Military Campaigns?' (Crisis Group, 19 July 2010) <<https://www.crisisgroup.org/africa/central-africa/chad/after-monuc-should-monusco-continue-support-congolese-military-campaigns>> Accessed 7 May 2020.

¹⁷⁷ Interview with Former Senior Military Commander ('Interviewee 11') (New York (Skype) 3 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 47.

¹⁷⁸ *ibid.*

viewed as another example of a concept being wielded as a tool by the dominant powers to protect their interests – as previously noted for the concept of sovereignty and the principle of consent. That is, it could be argued that the HRDDP is predominantly used by the UN as a form of protection from implication in violations of international law, rather than as a tool to protect peoples of the Global South state from such violations. Put differently, as former UN personnel have noted, the policy does little to alter the human rights situation within the host state;¹⁷⁹ rather, it attempts to remove a select few personnel from the host state's armed forces, whilst acting as a shield for the UN against accusations of complicity.

3.2.3 An Elusive Goal?

An exploration of the evolution of impartiality also highlights how there is a subjective element to impartiality and, within peacekeeping, this is two pronged. Firstly, for the peacekeeping operation and the UN, impartiality is based on the fundamental values of the UN, which were formulated predominantly by Global North states. As seen in Chapter 2, applying a TWAIL lens highlights how the UN was created with very little involvement from the Global South, hence the values promulgated within the UN Charter and which underpin the organisation are based on Global North standards.¹⁸⁰ It therefore follows that if the understanding of impartiality within peacekeeping is based upon these values and standards then they are based upon the values and interests of the hegemonic Global North

¹⁷⁹ See: Interviewee 11 (n177).

¹⁸⁰ See, for example: Mutua (n126); M Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (PUP 2009).

powers. This then leads to the second level of understanding of impartiality; that there is perhaps a presumption that all peacekeepers subscribe to these 'universal' values and, therefore, neutrally apply this understanding of the principle of impartiality in practice.¹⁸¹ However, peacekeepers will undoubtedly bring with them values from their home country and their own personal beliefs.¹⁸² Indeed, numerous studies have been conducted on the psychology of peacekeepers, particularly in the Post-Cold War era as the increase in multi-dimensional operations places different demands on peacekeeper's behaviour and ethos, in comparison to the traditional models of peacekeeping.¹⁸³ That is, multi-dimensional peacekeeping operations require peacekeepers to make decisions about who is right and wrong and to act accordingly.¹⁸⁴ The differing approaches to this is revealed in practice in, for example, the varying appetites to engage in conflict to protect civilians¹⁸⁵ and the sexual exploitation and abuse of civilians by peacekeepers.¹⁸⁶ This raises two key issues with the principle of impartiality. First, it highlights how there is a distinction or disconnect within impartiality between the broader understanding of what impartiality is within peacekeeping and what it means in practice. At the Security Council,

¹⁸¹ Such as: 'Ten Rules Codes of Personal Conduct for Blue Helmets' and 'No Excuse' cards, see: UN Peacekeeping, 'Standards of Conduct' <<https://peacekeeping.un.org/en/standards-of-conduct>> Accessed 1 January 2021.

¹⁸² See: PA Poole and TW Britt, *The Psychology of the Peacekeeper: Lessons from the Field* (Praeger 2003).

¹⁸³ HJ Langholtz, 'The Psychology of Peacekeeping: Genesis, Ethos, and Application' (1998) 4(3) *PeaceConfIJPP* 217-236.

¹⁸⁴ See: Paddon Rhoads (n143).

¹⁸⁵ Interview with Former MONUSCO Military Personnel ('Interviewee 4') (Shrivenham, UK, 28 October 2019) DOI: <<http://doi.org/10.17639/nott.7119>>.

¹⁸⁶ See, for example: BBC News, 'DR Congo: UN Peacekeepers Face Fresh Sexual Abuse Claims' (*BBC News*, 28 April 2017) <<https://www.bbc.co.uk/news/world-africa-39745357>> Accessed 2 January 2021; For current data see: UN Conduct in Field Missions, 'Sexual Exploitation and Abuse: Table of Allegations' <<https://conduct.unmissions.org/table-of-allegations>> Accessed 1 June 2021.

mandating level, impartiality is a concept based on the values of the UN, which establishes the requirement for peacekeepers to be unbiased and unprejudiced in their dealings with parties to the conflict and execution of the mandate. However, in reality, when carrying out the mandate, it appears that an application of impartiality carries with it the subjective beliefs of the individual peacekeepers. Therefore, it is the individual and their TCN commanders who ultimately interpret what it means to be impartial, and then act accordingly. From this stems the second issue – that it is then these individuals who are ultimately determining peacekeeping actions and, therefore, in essence, the interventionist nature of the peacekeeping operation. Put differently, it could be argued that if the decision to use force to protect civilians falls to individuals or groups of peacekeepers, then whether or not they act then determines both the interpretation of impartiality and the extent to which the operation is interventionist. Indeed, as will be seen in Chapter 4, these nuances within impartiality have been particularly prevalent within the UN's peacekeeping operation in the Congo.

The contemporary, expanded version of the principle of impartiality, then, renders the very concept of impartiality even more dubious and unattainable. If impartiality is taken to be an 'elusive goal', then joint endeavours which are undertaken in contemporary multi-dimensional operations seemingly push this goal further away. Furthermore, as will be explored in the subsequent Chapter, this expanded interpretation and application of impartiality has numerous problematic implications such as:

a risk to peacekeeper's safety, UN complicity in violations of international law, and the operation's potential engagement as a party to the conflict. Arguably, on these occasions, it places the UN in a very grey area, where peacekeeping could perhaps be viewed as intervention in all but name. Undertaking military operations alongside state forces or engaging in capacity building activities could, thus, all be viewed as coercive action designed to alter the state and, therefore, intervention. Despite this, the operation seemingly retains its non-interventionist status here, not by the principle of impartiality, but by the single thread of host state consent. Indeed, the consent of the state, as explored in the previous section, appears to be key in preventing the peacekeeping operation from becoming both peace enforcement and intervention. As will be explored in the following Chapter, there may therefore be a need for a re-imagining or clarification of the concept of impartiality in order to re-establish its relevance and position as a legal principle within contemporary, multi-dimensional operations, which have expanded the principle to its very limits, if not beyond.

3.3 Limited Use of Force

Traditionally, the principle of non-use of force was interpreted narrowly to mean force only in self-defence. Peacekeepers therefore had a 'right' to use force in response to an armed attack upon themselves or attempts to make them withdraw from their positions.¹⁸⁷ Again, within his Summary Study,

¹⁸⁷ Summary Study (n8) 70, 179.

Hammar skjöld, as norm entrepreneur, set out the principle of non-use of force, explicitly noting that it should be 'exercised under strictly defined conditions'.¹⁸⁸ Whilst Hammar skjöld did not expand upon the 'certain cases' in which self-defence may be used, it was made clear that peacekeepers were not permitted to take the initiative or proactively use force.¹⁸⁹ The traditional peacekeeping operations therefore followed this narrow concept of self-defence, based on the inherent right of self-defence of an individual.¹⁹⁰ The exception to this, however, was ONUC. As will be explored in the subsequent Chapter, ONUC used a significant level of force and is considered to be the first 'case of a transition from peacekeeping to peace-enforcement'.¹⁹¹ Whilst ONUC therefore greatly expanded the principle of non-use of force, this can be viewed as somewhat of an anomaly for that period, with the UN quickly retreating back to the traditional, passive operations. However, despite this retreat, the precedent had now been set, with the possibility of force beyond self-defence no longer improbable. Similarly, it could also be argued that for the principle of non-intervention, this expansion of the use of force created a similar precedent within the principle, creating the possibility for peacekeeping's interventionist nature to be expanded, thereby undermining the principle of non-intervention. Indeed, Hammar skjöld's successors began to gradually include a creeping expansion of the concept of self-defence, through their interpretations of

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

¹⁹⁰ See: T Findlay, *The Use of Force in UN Peace Operations* (OUP 2002) 20-49.

¹⁹¹ Goulding (n157) 453.

the norm. In a report on the UN's operation in Cyprus, SG U Thant broadened self-defence to include defence 'necessary in the discharge of its function' and the defence of 'UN posts, premises and vehicles' and other personnel under attack'.¹⁹² U Thant's successor then similarly expanded the concept, again demonstrating the norm entrepreneurship of the SG to interpret principles. SG Waldheim extended the definition of self-defence to include 'resistance to attempts by forceful means to prevent it [the force] from discharging its duties under the mandate of the Security Council'.¹⁹³ Thus, Waldheim established the broader concept of self-defence which still exists today – defence of the self, the mission and its components and the mandate. Whilst the Security Council has upheld the UN mission's inherent right of self-defence, that right 'has been interpreted broadly to include not only defence of the personnel, premises, property and freedom of movement of the UN operation but also defence of the mandate itself'.¹⁹⁴ By expanding the latter concept to include any impediment to the fulfilment of the mandate, some have rendered the concept of self-defence 'meaningless'.¹⁹⁵ By extension, it could then be argued that it has also had the same effect on the principle of non-use of force and, therefore, the boundaries of peacekeeping and non-intervention. That is, the broadened concept of self-defence creates numerous potential opportunities for the use of force, thereby potentially expanding peacekeeping's boundaries,

¹⁹² UNSC, 'Note by the Secretary-General' (11 April 1964) UN Doc S/5653, 10, 16-19.

¹⁹³ UNSC, 'Report of the Secretary-General on the Implementation of Security Council Resolution 340' (27 October 1973) UN Doc S/11052/Rev.1, para4.

¹⁹⁴ Interviewee 12 (n107).

¹⁹⁵ *ibid.*

taking it closer to intervention and simultaneously constricting the principle of non-intervention.

3.3.1 Robust or Enforcement?

The second most notable shift in the principle of non-use of force came with the move to robust peacekeeping which emerged in the late 1990s in response to the UN's failures to prevent mass atrocities.¹⁹⁶ As outlined in the previous Chapter,¹⁹⁷ this marked somewhat of a tipping point for attitudes towards intervention, whereby, the hesitancy within peacekeeping after ONUC began to change. This shift 'began with norm entrepreneurs advocating Chapter VII to protect civilians in conflict'.¹⁹⁸ Indeed, the then Secretary-General, Kofi Annan, building upon this, commissioned the Brahimi report,¹⁹⁹ which aimed to 'improve the creaking peacekeeping function whose credibility had suffered greatly in the mid-1990s'.²⁰⁰ Annan sought to challenge those 'who clung to a vision of the UN Charter that, in their view, said that the use of force was unacceptable', arguing that protagonists of conflict must be confronted and stopped 'through force if necessary'.²⁰¹ As such, the Brahimi report expanded the use of self-defence within peacekeeping from defence of the individual to defence of the mission. It also introduced the concept of 'robust peacekeeping', whereby peacekeepers could use force to defend both the mission's components and

¹⁹⁶ T Tardy, 'A Critique of Robust Peacekeeping in Contemporary Operations' (2011) 18(2) *IntPeacekeep* 152-167.

¹⁹⁷ Section 4.2.

¹⁹⁸ LM Howard and AK Dayal, 'The Use of Force in UN Peacekeeping' (2018) 72 *IntOrgan* 71-103, 72.

¹⁹⁹ UNGA, 'Report of the Panel on United Nations Peace Operations' ("Brahimi Report") (21 August 2000) UN Doc A/55/305-S/2000/809.

²⁰⁰ ND White, 'Peace Operations' in V Chetail (ed) *Post-Conflict Peacebuilding: A Lexicon* (OUP 2010) 215.

²⁰¹ K Annan, *Interventions: A Life in War and Peace* (Penguin 2013) 78-79.

the operation's mandate.²⁰² In recognition of the potential implications of this increased level of force, Annan also issued a SG Bulletin on the observance by UN forces of international humanitarian law (IHL).²⁰³ This concept of robust peacekeeping was then further developed by Annan's successor, Ban Ki Moon, with the *Capstone Doctrine* defining it as peacekeeping which involved the use of force at the tactical level, whilst peace enforcement involved the use of force at the strategic level.²⁰⁴ This was further reiterated by the Special Committee on Peacekeeping Operations (C-34) who vehemently argued that robust peacekeeping is 'not peace enforcement', reiterating the strategic and tactical distinction.²⁰⁵ It could be argued, then, that Annan's acknowledgement of the potential triggering of IHL and Ban Ki Moon's distinction of robust peacekeeping and peace enforcement indicate that this expansion took the principle of non-use of force much closer to the intervention line. That is, it is arguable that the Secretary-General's recognised that robust peacekeeping could potentially go beyond the boundaries of peacekeeping and therefore attempted to clarify the concept and attempt to set some form of boundary. Indeed, the 'dividing line between peace enforcement and peacekeeping operations with coercive components is very fine'.²⁰⁶ As Tsagourias notes, within peacekeeping operations that have Chapter VII elements, 'coercion is not the primary aim of the mission but incidental thereto', with no

²⁰² Brahimi Report (n199).

²⁰³ SG Bulletin on IHL (n129).

²⁰⁴ Capstone (n129); Chapter 2, Section 4.2.

²⁰⁵ UNGA Special Committee on Peacekeeping Operations (C34), 'Draft DPKO/DFS Concept Note' (February 2010 Substantive Session) 3.

²⁰⁶ Tsagourias (n101) 472.

designated enemy and no solution imposed; therefore, all parties are 'treated even-handedly'.²⁰⁷ Thus, whilst this broad authorisation to use force goes beyond the traditional or reasonable concept of self-defence, thereby moving peacekeeping 'into the realms of peace enforcement',²⁰⁸ a distinction can seemingly be drawn between these robust peacekeeping operations and peace enforcement.

However, this boundary between peacekeeping and peace enforcement grew even thinner in the early 2010s, when the principle of non-use of force was expanded even further. During this period, the concept of robust peacekeeping widened to include terms such as 'stabilisation' and a greater emphasis on PoC, in what some refer to as 'peace-enforcement mandates'.²⁰⁹ From 2013, peacekeeping operations in the Central African Republic and Mali were given mandates to 'stabilise' territory,²¹⁰ whilst the Force Intervention Brigade (FIB) was launched in the DRC as part of MONUSCO to use 'all necessary means' to 'neutralise' and 'disarm' armed groups in 'targeted offensive operations'.²¹¹ In this latter operation, in particular, as Chapter 4 will elaborate upon, the concept of robust peacekeeping was expanded even further as the FIB clearly designated an enemy and 'purposefully did not treat all parties equally'²¹² – all of which have been identified as hallmarks of peace enforcement. Robust

²⁰⁷ *ibid*, 471-2.

²⁰⁸ C Henderson, *The Use of Force and International Law* (CUP 2018) 193.

²⁰⁹ J Karlsrud, 'The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN Peacekeeping Operation in the CAR, the DRC and Mali' (2015) 36(1) TWQ 40-54.

²¹⁰ See: CAR UNSC Res 2149 (10 April 2014) UN Doc S/RES/2149; Mali UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100

²¹¹ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098.

²¹² Henderson (n208) 194.

peacekeeping, then, has a 'clearly interventionist quality',²¹³ arguably because of the element of coercion contained within the broad interpretation of non-use of force and self-defence. As such, robust peacekeeping takes peacekeeping into the realm of peace enforcement which, in turn, takes peacekeeping much closer to the intervention line. However, it arguably undermines but ultimately does not contravene the principle of non-intervention on the basis that it was initially deployed with host state consent. Again, then, as with impartiality, consent seemingly saves the principle of non-use of force from becoming intervention when it is interpreted broadly.

Regardless, UN peacekeeping operations have continued to adopt a much more robust posture which was optimised in the 2017 'Cruz Report', directed by Secretary-General Antonio Guterres.²¹⁴ Within this, it was argued that 'the era of 'Chapter VI-style' peacekeeping is over' and both the UN and troop or police contributing nations needed to 'change their mindsets, take risks and show a willingness to face these new challenges', rather than be 'gripped by a 'Chapter VI Syndrome'.²¹⁵ Indeed, military personnel within MONUSCO's Force component note that the recommendations from the Cruz report are used as guidelines for the mission's operational planning.²¹⁶ This posture and discourse could

²¹³ Gibbs (n142) 360.

²¹⁴ CA Dos Santos Cruz, WR Phillips, S Cusimano, 'Improving Security of United Nations Peacekeepers: We Need To Change The Way We Are Doing Business' ("Santos Cruz Report") (19 December 2017) <https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf> Accessed 1 June 2020.

²¹⁵ *ibid*, Executive Summary.

²¹⁶ Interview with Senior MONUSCO Military Personnel ('Interviewee 17') (Skype, 9 February 2020).

therefore be viewed as broadening the principle of non-use of force to its limits, once again taking it much closer to peace enforcement and the intervention line, thus simultaneously undermining the principle of non-intervention. In particular, the pressure on peacekeepers to adopt a more forceful stance invokes a much stronger interventionist rhetoric within peacekeeping and creates the possibility for the peacekeeping operation to become a form of armed intervention. That is, it takes peacekeeping much closer to being perceived as 'an intervention which uses force',²¹⁷ which, as seen in the previous Chapter, was identified by the ICJ as one of the most obvious forms of prohibited intervention.²¹⁸

This insistence on the need to take more forceful risks, from a TWAIL perspective, could also be perceived as being uncomfortably similar to colonial civilising missions, whereby force was often used by external actors to effect change in the host state and fulfil its mission which, in turn, reinforced the colonial patterns of domination and subordination.²¹⁹ In a similar vein, then, as peacekeeping operations have a mandate designed to make alterations within the host state, albeit with consent, the use of heightened levels of force to fulfil these tasks may be viewed as reminiscent of colonial practices. Again, underlining arguments made in the previous Chapter, particularly by TWAIL scholars such as Anghie,²²⁰ that colonialism animates international law and contemporary practices, including

²¹⁷ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 205.

²¹⁸ Section 3.3.1.

²¹⁹ Such as the *Force Publique* in the Congo, see: D Van Reybrouck, *Congo: The Epic History of a People* (Fourth Estate 2015).

²²⁰ Anghie (n32).

peacekeeping, may perpetuate colonial dichotomies and practices. Indeed, robust peacekeeping has proved problematic for many in the Global South, with the Non-Aligned Movement, in particular, criticising it for its lack of clarity, calling into question its underlying assumptions, such as the notion that more robustness leads to greater effectiveness.²²¹ This, in turn, raises questions about the logistical or practical problems which robust peacekeeping presents. As Sloan argues, the UN is 'fundamentally ill-suited to undertake militarised peacekeeping'.²²² This is evident in the numerous criticisms which UN peacekeeping operations have faced in recent years for failing to fulfil tasks,²²³ not least the UN's operations in the Congo. Similarly, this expanded use of force also triggers concerns about the invocation of IHL, the safety of peacekeepers, the perception of the operation and the reliance on peacekeeping operations to exercise force –all matters which will be explored in detail in the subsequent sections.

As a result, given robust peacekeeping's expansion of the principle of non-use of force, potential unintended consequences and impingement of the thin red line between peacekeeping and intervention, it is questionable: 'all necessary means' to what ends?²²⁴ That is, it could be argued that the negatives of the turn to robust peacekeeping far outweigh any positives; therefore, the necessity of this expanded use of force and the turn to robust

²²¹ C de Coning, A Stensland, T Tardy, 'Beyond the 'New Horizon': A Seminar on the Future Challenges of UN Peacekeeping' (NUPI 2010) 19.

²²² J Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Hart Publishing 2011) 282.

²²³ See: R Gowan, 'The Peacekeeping Quagmire' (2015) 16(2) *GeorgeJIntAff* 31-38; T Oladipo, 'The UN's Peacekeeping Nightmare in Africa' (*BBC News*, 5 January 2017) <<https://www.bbc.co.uk/news/world-africa-38372614>> Accessed 15 May 2020.

²²⁴ CT Hunt, 'All Necessary Means to What Ends? The Unintended Consequences of the 'Robust Turn' in UN Peace Operations' (2016) 24(1) *IntPeacekeep* 108-131.

peacekeeping is debatable. Indeed, this continued expansion of peacekeeping's robust mandates is said to be 'in danger of getting 'out of its depth' and biting off more than it can, or indeed, should, chew'.²²⁵ Thus, there should arguably be a limit to how far the principle of non-use of force, along with the other fundamental principles, can be expanded and contorted before they no longer remain relevant to peacekeeping. Once again, this, in turn, would have implications for the principle of non-intervention as, if the peacekeeping principles are broadened almost to their limits (as the use of force is at times) then this erodes the boundary between peacekeeping and intervention, thereby undermining or even contravening the principle of non-intervention.

4 An Expanding Normative Framework

The 'holy trinity' of principles, buttressed by policy developments such as the *Capstone Doctrine* and *Brahimi Report*, therefore form a general legal framework for UN peacekeeping, albeit one which is constantly stretched, reinterpreted and, on occasions, pushed to its limits. This framework surrounds peacekeeping like a red elastic band, forming an invisible boundary line between peacekeeping and intervention which contracts and retracts as peacekeeping continually evolves or the fundamental principles are reinterpreted within each peacekeeping operation. If the fundamental principles are viewed as the core of peacekeeping, the closest peacekeeping has to a beating legal heart, then the norms of peacekeeping – such as

²²⁵ Henderson (n208) 200.

democracy promotion, protection of civilians and the prohibition of sexual violence and exploitation – could be seen as the ribcage which surrounds peacekeeping's heart. That is, these norms form part of a wider normative framework which the legal framework sits within. Together, the two distinct but occasionally overlapping frameworks form part of peacekeeping's overall framework, providing somewhat of a guidance for UN peacekeeping. Furthermore, for the principle of non-intervention, as with the fundamental principles, how these norms are interpreted and applied alters the peacekeeping frameworks and the thin, elastic, red boundary line between peacekeeping and intervention. It therefore follows that, as was seen with the fundamental principles, a narrow interpretation of these norms and principles constricts the peacekeeping framework, thereby reinforcing the principle of non-intervention. Whereas a broad interpretation of the principles and norms expands peacekeeping's frameworks, consequently undermining and potentially contravening the principle of non-intervention.

4.1 Democracy Promotion

Based on the age-old notion that 'democracies do not wage war on each other', international law and international institutions have been developed 'so as to reinforce democratic governance'.²²⁶ For peacekeeping, this has resulted in peacekeeping operations undertaking democracy promotion – tasks embedded within the operation's mandate to support the furtherance

²²⁶ J Crawford, 'Democracy and International Law' (1993) 64(1) BYIL 113-133.

of democracy within the host state. As with the other 'new' norms of peacekeeping, democracy promotion was primarily introduced, institutionalised and interpreted by the Secretary-General, who built upon a growing consensus for 'democratic governance'.²²⁷ It could be viewed, then, not only as an illustration of SG norm entrepreneurship but also as a prime example of the norm entrepreneur SG engaging in and influencing a dynamic of difference. That is, it is the dominant, democratic Northern states who recognised a need for the promotion of democracy, having identified a gap between themselves and the non-democratic Global South, setting about to close the gap through the promotion of democratic governance. As such, a dynamic of difference was created, with the Secretary-General, as head of the UN, engaged in closing this gap and altering the dynamic, through their norm entrepreneur role.

Indeed, in 1989, the Security Council, following reports from Secretaries-General Kurt Waldheim²²⁸ and Javier Perez de Cuellar,²²⁹ established the United Nations Transition Assistance Group (UNTAG) to help supervise the electoral process in Namibia.²³⁰ This marked the first occasion in which UN peacekeeping engaged in democratisation tasks. The norm then became formally introduced into UN peacekeeping and peacebuilding in the early 1990s, in line with the rise of democratisation within international law in

²²⁷ See: R Mani and J Krause, 'Democratic Governance' in V Chetail, *Post-Conflict Peacebuilding: A Lexicon* (OUP 2010) 105-122.

²²⁸ UNSC, 'Secretary-Report, Proposals for Namibia. Supplement for April, May and June 1978' (10 April 1978) UN Doc S/12636

²²⁹ UNSC, 'Further Report of the Secretary-General Concerning the Question of Namibia' (23 January 1989) UN Doc S/20412.

²³⁰ UNTAG recommended in: UNSC Res 435 (29 September 1978) UN Doc S/RES/435 and eventually established in UNSC Res 629 (16 January 1989) UN Doc S/RES/629.

the post-Cold War era and the shift in interventionist practice as was noted in the previous Chapter.²³¹ In his inaugural speech as Secretary General, Boutros-Ghali stressed the importance of the 'United Nations role in strengthening fundamental freedoms and democratic institutions' and noted that 'if there is no development without democracy, there can also be no democracy without development.'²³² A notion which could perhaps be viewed as a peacebuilding version of 'democracies do not wage war'. This set the tone for the rest of his tenure, which focused significantly on furthering the norm of democracy promotion or 'democratisation' within the UN system, in particular, within peacekeeping.²³³ Boutros-Ghali viewed the end of the Cold War as presenting a historic opportunity for changing the world and the nature of international affairs and introduced both the concept of democracy and the term peacebuilding into UN terminology and practice.²³⁴ Once again, the Secretary-General was acting as norm entrepreneur but not in an act of solo volition. Rather, Boutros-Ghali built upon a growing consensus, drawing international attention to an 'issue' and then proposing the norm as a solution, simultaneously connecting the new norm with well-established principles, 'thereby ensuring that it resonates with its intended audience'.²³⁵ Indeed, in *An Agenda for Peace* Boutros-Ghali institutionalised the norm of democracy promotion, arguing that there was

²³¹ See: Crawford (n226) and H Charlesworth, 'Democracy and International Law' in H Charlesworth (ed) *Recueil des Cours 371: Collected Courses of the Hague Academy of International Law 2014* (Brill 2015) 43-152.

²³² UNGA (46th Session, 59th Meeting) (5 December 1991) UN Doc A/46/PV.59, 16.

²³³ B Boutros-Ghali, *Unvanquished: A US-UN Saga* (Random House 1999) 318-319.

²³⁴ *ibid.*

²³⁵ S Rushton, 'The UN Secretary-General and Norm Entrepreneurship: Boutros Boutros-Ghali and Democracy Promotion' (2008) 14 GG 95-110, 100.

'an obvious connection between democratic practices [...] and the achievement of true peace and security'.²³⁶ Therefore, the introduction of the principle within UN peacekeeping was evidently premised on the theory of liberal democratic peace that democracies do not go to war with one another and, as such, 'liberalism is rationalised and presented as the only form of political rationality capable to meeting the challenges of the modern world'.²³⁷

4.1.1 Civilising Mission?

This presumption that liberal democracy is the most ideal form of governance and the inclusion of democracy promotion within peacekeeping raises numerous issues. Firstly, for the principle of non-intervention, the inclusion of the norm has the potential to undermine the principle of non-intervention as it expands peacekeeping's normative framework by broadening the tasks which a peacekeeping operation is required to undertake. That is, as was seen in the previous Chapter,²³⁸ as peacekeeping evolved from traditional to multi-dimensional operations, their mandates and operational tasks grew, consequently expanding both peacekeeping's boundaries and its interventionist potential. In particular, whereas the traditional model of peacekeeping focused on conflict or post-conflict management, the inclusion of democracy promotion pushed peacekeeping into the realm of statebuilding.²³⁹

²³⁶ *ibid.* Agenda for Peace (n88).

²³⁷ M Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (Penguin 2012) 11-12.

²³⁸ Section 4.2.1.

²³⁹ See: KZ Marten, *Enforcing the Peace: Learning From the Imperial Past* (Columbia University Press 2004).

Furthermore, for many peacekeeping operations, establishing or supporting democracy is a key part of the exit strategy and criterion for measuring the success of the operation; an operation may only be considered a 'success' and therefore leave the host state if a sufficient level of democratic governance is established.²⁴⁰ As such, it could be argued that democracy promotion, in this instance, is a form of intervention as it invokes an element of coercion as it is, essentially, an implicit ultimatum – the host state must establish a system of democratic governance, which meets the standards of the external actor, before the actor withdraws from their territory. In essence, the norm of democracy promotion could be viewed, then, as a form of coercive action designed to influence change or alter the host state and, thus, intervention or, more specifically, political intervention.

From a TWAIL perspective, democracy promotion could also be viewed as problematic as it invokes notions of 'civilisation' and, as was seen with humanitarian-based interventions in Chapter 2,²⁴¹ is based on Western standards and values. That is, the very concepts of sovereignty and statehood, for TWAIL scholars, are deeply rooted in colonial standards and were crafted 'without pre-colonial Africa in mind'.²⁴² Therefore, the Global South, when gaining independence, were subscribing to an international legal system which they played no part in creating and it is arguable that

²⁴⁰ See: B Heldt and P Wallenstein, *Peacekeeping Operations: Global Patterns of Intervention and Success, 1948-2004* (3rd edn, Folke Bernadotte Academy Publications 2007).

²⁴¹ Section 4.1.

²⁴² M Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16(4) *MichJIntL* 1113-1176, 1120.

the same arguments could also be made for democracy promotion. It is indisputable that 'civilisation', in particular, played an important role in shaping international law, particularly through colonial intervention during the Age of Empire, as the previous Chapter demonstrated. Whilst this narrow concept of 'civilisation' ended in the new post-1945 world order, if 'civilisation' is instead considered as an argumentative pattern, 'one that constantly oscillates' between the two interconnected logics of 'conditional inclusion and perpetual exclusion or deferral of inclusion', then 'civilisation' persists.²⁴³ As TWAIL scholars, such as Anghie and Tzouvala, have argued, the concept of 'civilisation' remains and has simply been reinvented in, for example, the 'war on terror'²⁴⁴ or global capitalist expansion.²⁴⁵ It could similarly be argued that 'civilisation' is also replicated in democratisation and, more specifically, the norm of democracy promotion within UN peacekeeping operations as it invokes the same notions of inclusion and exclusion. Indeed, it is 'regarded as axiomatic in the western world that the most civilised form of government' is the 'western form of democracy'.²⁴⁶ As such, non-democratic states are seemingly viewed by the West as adopting a less civilised form of governance; in other words – uncivilised. Similar to the discussion on humanitarian-based interventions in the previous Chapter, democracy, like human rights, is therefore a concept

²⁴³ N Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP 2020) 5.

²⁴⁴ Anghie (n32).

²⁴⁵ Tzouvala (n243).

²⁴⁶ BK Nehru, 'Western Democracy and the Third World' (1979) 1(2) TWQ 53-70, 53.

based on Western ideals which are devoid of the input of the Third World and 'essentially infinite' and highly ambiguous.²⁴⁷

Whilst the UN is said to have recognised this Western-centric nature of democracy, reflected in its un-willingness 'to develop a substantive notion of democracy',²⁴⁸ the concept has still been promoted within the UN system, not least through its inclusion in peacekeeping mandates. Furthermore, given that the UN is dominated by Global North or Western states (as was laid out in Chapter 2) the presumption of democracy as the most ideal form of governance has prevailed and has filtered into UN peacekeeping through the inclusion of the norm of democracy promotion. It appears that this has then been somewhat accepted by both the host state and those within the Council who seek to counter Western democracy promotion,²⁴⁹ because of the consensual nature of peacekeeping. Therefore, because a peacekeeping operation is deployed with the host state's consent, it follows that they consent to the operation's mandate and the tasks contained within it, including democracy promotion. However, as previously noted, in practice a distinction can be drawn between *de jure* consent (consent to the deployment of the operation which cannot be withdrawn) and *de facto* consent (consent to tasks or changes during the mandate period). As will be discussed in later chapters, it then becomes debatable as to how much

²⁴⁷ M Mutua, 'The Ideology of Human Rights' (1996) 36 VaJIntl 589-658, 593.

²⁴⁸ H Charlesworth, 'International Legal Encounters with Democracy' (2017) 8(6) GlobalPolicy 34-43, 36.

²⁴⁹ Russia and China, see: A Kendall-Taylor and D Shullman, 'How Russia and China Undermine Democracy' (*Foreign Affairs*, 2 October 2018) <<https://www.foreignaffairs.com/articles/china/2018-10-02/how-russia-and-china-undermine-democracy>> Accessed 18 May 2020.

the host state consents to the democracy promotion tasks in reality and to what extent they are able to voluntarily accept or reject such endeavours. Regardless of this debate, the argument remains that the pattern of 'civilisation' – conditional inclusion versus exclusion or deferral – is found within UN peacekeeping, in this instance when the host state is required to adopt a democratic system, under the supervision of a peacekeeping operation. The dominant Western actor thereby requires the subordinate Global North state to conform to their standards, often despite the fact that democracy may neither answer the latter's needs nor be in line 'with their native traditional pattern of the exercise of governmental authority'.²⁵⁰ As a result, these peacekeeping operations become comparable with colonial civilising missions, as they invoke similar patterns of domination, subordination and conformity to hegemonic standards, which is legitimised by international law. Indeed, for some TWAIL scholars, the UN's shaping of post-conflict states through constitutional support, such as democracy promotion, 'serves as a classic instance' of the 'imperial project at work'.²⁵¹ Moreover, it could be further argued that this is, again, a replication of Anghie's dynamic of difference, as previously noted. Here, a gap between two cultures is identified (non-democratic system) with the dominant actor (the UN peacekeeping operation) seeking to close that gap by altering or normalising (democratising) the 'other' (the host state). Thus, simultaneously justifying intervention for, in theory, an indefinite period of

²⁵⁰ Charlesworth, (n231) 57.

²⁵¹ V Sripathi, 'The United Nation's Role in Post-Conflict Constitution-Making Processes: TWAIL Insights' (2008) 10(4) ICLR 411-420, 420.

time as (not withstanding host state consent to mandate renewals) it is the hegemonic power who determines the standard which must be met and, therefore, whether the gap has been closed, with the subordinate 'other' having acquired a sufficient level of democratisation. Again, as was previously noted, this altering of the 'other' includes an element of coercion – an implication that a certain standard of democratisation is a pre-requisite for the withdrawal of an operation- resulting in peacekeeping amounting to a form of political intervention.

4.1.2 A Pipedream?

The inclusion of democracy promotion within peacekeeping's normative framework, then, raises questions about the apparent presumption that the Western-centric notion of democracy is the most desired form of governance and one which is necessary for achieving peace. This becomes even more problematic given that its inclusion expands peacekeeping boundaries and interventionist potential of a peacekeeping operation, thereby taking peacekeeping closer to the intervention line, simultaneously undermining the principle of non-intervention.

Nevertheless, following its introduction, subsequent Secretaries-General have continued to emphasise the importance of democracy,²⁵² and the Security Council has routinely mandated its operations to include democratisation tasks.²⁵³ These have taken numerous forms, such as

²⁵² K Annan, 'Democracy as an International Issue' (2002) 8(2) GG 135-142; UNGA, 'Report of the Secretary-General: In Larger Freedom: Towards Security, Development and Human Rights for All' (21 March 2005) UN Doc A/59/2005.

²⁵³ Such as in Haiti: UNSC Res 2313 (13 October 2016) UN Doc S/RES/2313; and Mali: S/RES/2100 (n210).

providing technical assistance, monitoring and observing elections or ensuring security to allow for the organisation of elections.²⁵⁴ More broadly, it has also included the development of bureaucracies and administrations, justice and the rule of law and security sector reform.²⁵⁵ Therefore, as peacekeeping has evolved to robust, multi-dimensional peacekeeping operations, its democratisation tasks have simultaneously expanded.²⁵⁶ As such, elections have now become a key part of many peacekeeping operations, in particular, the UN's two operations in the DRC, which have supported three democratic elections.²⁵⁷ As noted earlier, then, this inclusion of democratisation within UN peacekeeping signalled a shift of focus from one of peacebuilding and securing a peaceful post-conflict environment to one of statebuilding²⁵⁸ - a task which some argue should not be undertaken by UN peacekeeping as it is a very poor tool for achieving such matters.²⁵⁹ Indeed, senior personnel within the UN Secretariat suggest that 'a serious question which needs to be asked' is how realistic or helpful it is 'to expect a peacekeeping operation, that operates on the basis of consent, impartiality, to essentially play the role of an arbiter in an electoral process'.²⁶⁰ Similarly, it is questionable whether 'turning a peacekeeping operation into a tool for democracy promotion' is a true reflection or

²⁵⁴ See: Mani and Krause (n227).

²⁵⁵ *ibid.*

²⁵⁶ See, for example, the UN's peacekeeping operations in: Liberia (UNSC Res 866 (22 September 1993) UN Doc S/RES/866 and UNSC Res 1020 (10 November 1995) UN Doc S/RES/1020) and Democratic Republic of the Congo (UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291).

²⁵⁷ In 2006, 2011 and 2018.

²⁵⁸ B Reilly, 'Elections in Post-Conflict Societies' in E Newman and R Rich (eds) *The UN Role in Promoting Democracy: Between Ideals and Reality* (UN University Press 2004) 188.

²⁵⁹ Interviewee 8 (n53).

²⁶⁰ Interviewee 16 (n92) pg 3.

expression of the Council's will and their main aim of addressing threats to international peace and security.²⁶¹ As Marten argues, 'the notion of imposing liberal democracy abroad is a pipedream' and peacekeepers should therefore limit their goals to providing stability, rather than trying to transform societies.²⁶² It could therefore be argued that in addition to the problem of whether democracy should be imposed as the desired or preferable form of governance, there is a second notable problem of whether democratisation by UN peacekeepers is both appropriate and logistically possible and, if so, how it is to be quantified.

That is, it is unclear what the benchmark is for 'successful' democracy or democratic elections and what it means for a peacekeeping operation if these elections are not 'successful'.²⁶³ As will be explored in later Chapters, the elections which UN peacekeepers have supported in the DRC have been highly controversial, with numerous allegations of corruption and election fraud.²⁶⁴ This then exemplifies the the argument made by some TWAIL scholars that 'international law does not take global democracy seriously' as it imposes certain obligations on states (such as the need to hold democratic elections) but does not hold it responsible for any further deepening or development of the concept.²⁶⁵ It appears that simply obtaining the level of 'democratic state' or fulfilling the basic requirements

²⁶¹ *ibid.*

²⁶² Marten (n239) 155.

²⁶³ B Heldt, 'Peacekeeping Operations and Transitions to Democracy' in H Fjelde and K Höglund (eds) *Building Peace, Creating Conflict* (Nordic Academic Press 2011) 47-71

²⁶⁴ J Burke, 'Congo Election Runner-Up Rejects Tshisekedi Victory as 'Electoral Coup' (*The Guardian*, 10 January 2019) <<https://www.theguardian.com/world/2019/jan/10/congo-election-felix-tshisekedi-declared-winner-in-contentious-result>>.

²⁶⁵ Chimni (n126) 8.

of holding elections suffices for meeting the international community's standards imposed to transform the non-democratic state. In a similar vein, the UN's emphasis on democracy is perhaps somewhat ironic, given that the organ which sets the peacekeeping mandate, and thus the democracy promotion tasks, is the Security Council. As seen in Chapter 2, the Council is highly undemocratic, given the disproportionate amount of power which the permanent five members hold; therefore, there is, once again, somewhat of a disconnect between rhetoric and practice – the UN promotes democracy yet is dominated by an extremely undemocratic organ.

The norm of democracy promotion within UN peacekeeping therefore continues to highlight the same patterns of domination and subordination and the furtherance of hegemonic ideals and agendas, as was seen in the development of the principle of non-intervention in the previous Chapter. Thus, supporting the notion that many features of both international law and international institutions or legal systems 'acknowledge and reinforce the substantial power differentials between its participants'.²⁶⁶ Furthermore, applying a TWAIL lens to the concept of democracy and its inclusion within peacekeeping also highlights how democracy is based upon ideals and standards (specifically Western ideals), thereby lacking any legal underpinning beyond the Security Council mandate. As such, it is a norm, rather than a legal principle, thereby contributing to peacekeeping's normative, but not legal, framework. For the principle of non-intervention,

²⁶⁶ Charlesworth (n248) 34.

the norm of democracy promotion is also problematic as its ambiguous nature expands peacekeeping's red boundary line, permitting a peacekeeping operation to undertake ill-defined and potentially limitless interventionist activities, under the justification of democracy promotion which, in turn, severely undermines and potentially contravenes, at times, the principle of non-intervention.

4.2 The Protection of Civilians

Unlike the norm of democracy promotion, the protection of civilians (PoC) has much clearer legal underpinnings in international humanitarian and human rights law.²⁶⁷ Indeed, it is argued that UN peacekeeping operations are obliged to comply with human rights standards and prevent or halt violations of human rights, regardless of whether the operation has a PoC mandate.²⁶⁸ PoC therefore invokes or reflects some principles and obligations under international law, such as compliance with international humanitarian law when engaged in armed conflict.²⁶⁹ As such, whilst PoC primarily forms a key part of peacekeeping's broader normative framework, it could also be said to contribute to peacekeeping's legal framework, where it leads to a peacekeeping operation invoking these elements of international law.

As with democracy promotion, the protection of civilians (PoC) is, again, a classic example of how norms are incubated and created within the UN

²⁶⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949) (75 UNTS 287); JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law. Volume 1: Rules* (CUP 2005) Rules 87-195, pp299-379.

²⁶⁸ A Clapham, 'Protection of Civilians under International Human Rights Law' in H Willmot, R Mamiya, S Sheeran and M Weller (eds) *Protection of Civilians* (OUP 2016) 141-159.

²⁶⁹ SG Bulletin on IHL (n167).

System, with the support of, or driven by, the Secretary-General. Of the three 'new' norms explored within this thesis, it is also, arguably, the most interventionist as it has now evolved to permit a substantial, seemingly endless level of force in order to protect civilians. Thus, expanding the legal and normative boundaries surrounding peacekeeping and, by extension, contracting the principle of non-intervention. Described by former Secretary-General Ban Ki Moon as a 'defining purpose of the UN in the twenty-first century',²⁷⁰ PoC has become a centre of gravity for peacekeeping operations with over 95% of peacekeepers now mandated to protect civilians.²⁷¹ This has arisen through a rapid expansion of the concept over the past twenty years, with noticeable changes almost every five years as pressure to ensure peacekeepers protect civilians has increased.

The UN's first involvement in the protection of civilians within a peacekeeping operation can be traced back to the UN's Operation in the Congo (ONUC) in 1960. Whilst ONUC did not have a POC mandate from the Security Council,²⁷² an Operational Directive permitted the peacekeepers to afford 'where feasible [...] every protection' to 'unarmed groups' who may be subjected to violence, 'using armed force if necessary'.²⁷³ For some, this has been read to include the protection of civilians and should be marked as the start of the UN's foray into such operations. Indeed, Mona Ali Khalil,

²⁷⁰ UN News, 'Responsibility to Protect: Ban Urges Action to Make UN-backed Tool 'A Living Reality' (*UN News*, 18 January 2012) <<https://news.un.org/en/story/2012/01/400702>> Accessed 1 May 2019.

²⁷¹ UN Peacekeeping, 'Protecting Civilians' <<https://peacekeeping.un.org/en/protecting-civilians>> Accessed 5 May 2019.

²⁷² See the Security Council Resolutions on PoC (n89).

²⁷³ Operations Directive No 8 (untitled), February 1961, UN Archives DAG/13/1.6.5.0.0; Operations Directives August 1960-January 1964, Box 3, pp2-3.

argues that this was the first POC mandate, 'not by virtue of the design of the mandate' but on the basis of the then SG, Hammarskjöld's announcement that he would be reading the mandate as allowing ONUC 'to have the authority to step in to save civilian lives'.²⁷⁴ Whilst there was 'of course' some objection from members of the Council, 'his interpretation of ONUC's mandate prevailed'.²⁷⁵ This therefore demonstrates the power and freedom of the office of the SG to interpret peacekeeping norms and influence practice; in this instance, through an interpretation of the SC mandate. Whilst it was nearly forty years later when the first PoC mandate was introduced, Hammarskjöld's interpretation here created a precedent for SG's to interpret mandates and pathed the way for the possibility of peacekeeping to undertake protection tasks. Indeed, in the early 1990s, the UN again began to experiment with the concept of protection of civilians with the UN protection forces in the Former Yugoslavia.²⁷⁶ These were tasked with an indirect PoC focusing on humanitarian space and access and protection of safe areas.²⁷⁷

Following this, the UNSC authorised a specific PoC mandate for the peacekeeping operation in Sierra Leone in 1999.²⁷⁸ It is at this point that the Council began to insert the language of 'imminent threat' into mandates, stating that peacekeepers were to protect civilians who were 'under imminent threat of physical violence'.²⁷⁹ This introduction of PoC,

²⁷⁴ Interviewee 12 (n107),

²⁷⁵ *ibid.*

²⁷⁶ See: S/RES/743 (n118).

²⁷⁷ See: UNSC Res 770 (13 August 1992) UN Doc S/RES/770; UNSC Res 836 (4 June 1993) UN Doc S/RES/836.

²⁷⁸ S/RES/1270 (n89).

²⁷⁹ *ibid.*

championed by the then SG, Kofi Annan, reflected the shifting attitudes towards intervention, as was seen in Chapter 2,²⁸⁰ with member states believing that they had a responsibility to prevent or stop the failures of the 1990s (such as the Rwandan genocide) from occurring again.²⁸¹ When opening a debate on the introduction of PoC, Annan noted that 'enforcement action is a difficult step' which often goes against political or other interests, but these interests are superseded by 'universal values', and PoC is one such value.²⁸² Annan therefore introduced and interpreted the norm of PoC both within UN peacekeeping and the UN system more broadly, recognising that it was a form of intervention but justifying it on a moral or humanitarian basis. Again, similarities can be drawn here with the humanitarian-based interventions which were discussed in the previous Chapter. Indeed, Annan's advocating for PoC, along with the concept of responsibility to protect (R2P), became known as the 'Kofi Doctrine' – a belief that state sovereignty could no longer be a shield against UN intervention on behalf of 'we, the peoples'.²⁸³ This act of norm entrepreneurship by Annan, which built upon the general intervention rhetoric at the time, ambiguously broadened the scope of UN peacekeeping operations by creating a further task within peacekeeping mandates that provided yet another justification for intervention.²⁸⁴ If it was acknowledged that these norms of PoC and R2P

²⁸⁰ Section 4.1.

²⁸¹ UNGA-SC, 'Report of the Secretary-General: The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa' (13 April 1998) UN Doc A/52/871-S/1998/318.

²⁸² UNSC (54th Year, 4046th Meeting) (16 September 1999) UN Doc S/PV/4046, 4.

²⁸³ See: Annan (n201) and J Cooper Ramo, 'The Five Virtues of Kofi Annan' (*Time*, 4 Sept 2000)

<<http://content.time.com/time/world/article/0,8599,2056090,00.html>> Accessed 10 September 2020.

²⁸⁴ See, the first thematic resolution on PoC: S/RES/1265 (n89) and subsequent resolutions, such as: UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296; UNSC Res 1502 (26 August 2003) UN Doc S/RES/1502; UNSC Res

required the relinquishing of an element of sovereignty then, by corollary, it arguably also implied a sacrifice or constriction of non-intervention. This then undermines the principle of non-intervention, particularly as the concept of PoC is ill-defined and, as it is continually evolving, is potentially normatively limitless – thus, in theory, the interventionist nature of the peacekeeping operation in this regard is also limitless. As was seen with the norm of democracy promotion, questions then arise as to how far this norm can be expanded before it crosses the intervention line.

This is further problematic when this broadening of peacekeeping's boundaries is combined with forceful rhetoric (such as Annan's acknowledgement of the need for 'enforcement action'²⁸⁵) or uncertainty about the level of force which could or should be used by peacekeepers in order to fulfil this task. This was particularly the case with the UN's operation in Sierra Leone, which led to debates in the Security Council that highlight the differing approaches to intervention amongst the permanent members and exemplifies the hegemonic political dynamics within the Council which Chapter 2 outlined.²⁸⁶ On the one hand, the UK, fully endorsing the inclusion of PoC in peacekeeping operations, argued that the Council 'should not shy away' from 'more robust mandates if a force needs to act in enforcement mode' to, for example, protect civilians.²⁸⁷ Conversely, whilst China equally supported the protection of civilians,

1894 (11 November 2009) UN Doc S/RES/1894; UNSC Res 2475 (20 June 2019) UN Doc S/RES/2475; UNSC Res 2573 (27 April 2021) UN Doc S/RES/2573.

²⁸⁵ UNSC (54th Year, 4046th Meeting) (16 September 1999) UN Doc S/PV/4046, 4.

²⁸⁶ Chapter 2, Section 2.4.1.

²⁸⁷ S/PV/4046 (n285) 17.

recognising that the Council had an 'unshirkable duty' in maintaining international peace and security, rather than supporting the use of force for peacekeepers, it emphasised the need for PoC to cut across the political, humanitarian, development and assistance fields.²⁸⁸ Thereby arguing that the fundamental way to protect civilians is to 'effectively prevent and do away with conflict' and that the issue of PoC should be 'more appropriately and more thoroughly deliberated' in the General Assembly.²⁸⁹ This therefore highlights, not only the differing approaches to intervention within the Security Council but, more broadly, how the norm of PoC exposes the same patterns of subordination and domination that the previous Chapter identified within the principle of non-intervention. It is also, like democracy promotion and humanitarian-based interventions, a norm which is based upon Western values and standards, again, reinforcing the North-South divide both within international law and international relations. Applying a TWAIL lens, then, the UK's rhetoric of robust intervention could be viewed as promoting a Global North agenda, as the invocation of force and emphasis on the Security Council as the primary decision maker reinforces the dominance of the Council and therefore the Global North. On the other hand, the arguments put forward by China, that the norm of PoC should be debated and decided upon within the General Assembly, challenges this Northern dominance as all member states could participate in moulding the concept of PoC, rather than simply the dominant powers within the Security

²⁸⁸ *ibid*, 21.

²⁸⁹ *ibid*.

Council.²⁹⁰ From a TWAIL perspective, this latter proposal is therefore vital as it offers a counter to hegemony and allows the Global South to play a role in shaping international law and restructuring the international system.²⁹¹ Furthermore, for the principle of non-intervention, it would also limit the concept of PoC, demarcating boundaries for the norm and thereby limiting the interventionist potential of PoC and, by extension, the peacekeeping operation.

4.2.1 Forceful Protection

Despite these initial debates on the normative and practical boundaries of PoC, the concept rapidly evolved, with five subsequent operations mandated to protect civilians.²⁹² There remained, however, a troubling lack of operational guidance as to how these mandates should be implemented, leading to 'widely varying interpretations' by senior mission leadership in the field and a failure to meaningfully implement the mandates.²⁹³ Once again, undermining the principle of non-intervention as the ambiguity of the norm of PoC created unclear boundaries for peacekeeping and, consequently, uncertainty over its interventionist potential.

It is also during this period of the early 2000s, as was seen in Chapter 2,²⁹⁴ that peacekeeping began to shift towards 'robust peacekeeping' which had

²⁹⁰ See the Security Council Resolutions on PoC (n89).

²⁹¹ M Mutua, 'Critical Race Theory and International Law: The View of an Insider-Outsider' (2000) 45(5) *VillRev* 841-854, 852; JT Gathii, 'A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias' (2008) 21(2) *LJIL* 317-349.

²⁹² DRC: S/RES/1291 (n256) para 8 and later S/RES/1925 (n20) paras 11 and 12(a); Liberia: UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509 para 3(j); Cote d'Ivoire: UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528 para 6(i); Haiti: UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542 para 7(i)(f); South Sudan: UNSC Res 1996 (9 July 2011) UN Doc S/RES/1996 para 3(b).

²⁹³ H Willmot and S Sheeran, 'The Protection of Civilians Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices' (2013) 95(891/892) *IRRC* 517-538, 521-22.

²⁹⁴ Chapter 2, Sections 2.4.1 and 3.2.

a direct impact on the implementation of PoC, given that PoC and the use of force are often entwined.²⁹⁵ The language within mandates therefore began to change, with the use of force to protect civilians becoming more acceptable. In particular, the Brahimi Report noted that 'there are situations in which peacekeepers not only should have the right, but are morally obliged to use force'.²⁹⁶ This shift towards the inclusion of PoC in peacekeeping operations became institutionalised and professionalised within peacekeeping during the late 2000s as the Security Council began to mandate PoC as a priority task for many operations,²⁹⁷ with the UN Department of Peacekeeping (DPKO) and the Department of Field Support (DFS) examining the operation of the concept in order to guide mandate implementation.²⁹⁸ This expansion of the use of force in order to protect civilians and PoC as a priority task became further problematic in 2013 when the Security Council expanded the norm even further when it introduced the Force Intervention Brigade (FIB) in the DRC – an issue which will be discussed in Chapter's 4 and 5. The FIB, deployed alongside MONUSCO, was tasked, amongst other things, to 'ensure [...] effective protection of civilians under imminent threat of physical violence'.²⁹⁹ Whilst this may not, initially, appear to differ greatly from other PoC mandates, the FIB was unique as it was authorised to undertake 'targeted offensive operations' to

²⁹⁵ See, for example: Ali Khalil (n164).

²⁹⁶ Brahimi Report (n199).

²⁹⁷ UNAMID (UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769 para 15(a)(ii)); MONUC (UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 paras 3 and 6); MINURCAT (UNSC Res 1778 (25 September 2007) UN Doc S/RES/1778); UNMISS (UNSC Res 2057 (5 July 2012) UN Doc S/RES/2057).

²⁹⁸ UN DPKO/DFS, 'Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations' (2010) <<http://www.peacekeeping.org.uk/wp-content/uploads/2013/02/100129-DPKO-DFS-POC-Operational-Concept.pdf>> Accessed 16 June 2020.

²⁹⁹ S/RES/2098 (n211) operative para 11(a)(i).

'neutralise' armed groups, thereby permitting a significant level of force.³⁰⁰ This force, in turn, could be used to protect civilians, marking a robust, protective modality which was a first for both peacekeeping and PoC. The FIB was then later encompassed within the general mandate of MONUSCO, which was similarly authorised to use force to protect civilians. Indeed, it is now common for the Security Council to act under Chapter VII of the UN Charter, permitting peacekeepers to 'use all necessary means', including the use of force, to 'protect civilians',³⁰¹ with its operations in Mali, Central African Republic and DRC, for example, all containing robust PoC mandates.³⁰² As previously noted, this then causes confusion over the peacekeeping operation's Charter basis and the practical implications of this (such as how much force is permissible), thereby, again blurring the boundaries between peacekeeping and peace enforcement and the non-intervention line.

It could therefore be argued that the norm of PoC creates a double-edged expansion within peacekeeping's frameworks, consequently constricting the boundaries of the principle of non-intervention. Firstly, as it became a firmly established norm of peacekeeping it created a further justification for intervention – similar to the development of the norm of democracy promotion – thereby expanding peacekeeping's normative framework and simultaneously constricting the principle of non-intervention. Secondly, it

³⁰⁰ S/RES/1925 (n20).

³⁰¹ See, for example: S/RES/2556 (n105).

³⁰² UNSC Res 2480 (28 June 2019) UN Doc S/RES/2480; UNSC Res 2499 (15 November 2019) UN Doc S/RES/2499; S/RES/2556 (n105).

also had the effect of expanding peacekeeping's legal framework as it broadened the principle of limited use of force by permitting force to be used to protect civilians, given that force was permitted in defence of the mandate and PoC was now a mandated task. The potential for force to be used in fulfilment of this task thus appears limitless, again, expanding peacekeeping's boundaries and undermining the principle of non-intervention.

4.2.2 A Priority For Whom?

In addition to the overlap with the use of force and the unclear normative and conceptual boundaries of PoC, its evolution into a priority task for peacekeepers is also questionable on two further grounds. Firstly, the very concept of PoC – to protect all civilians – is an impossible task for any actor, not least a UN peacekeeping operation with limited capabilities – as has been evident with the UN's operation in the Congo, which Chapter 5 explores. Whilst peacekeeper's may be able to 'mitigate harm', it is noted that 'you will always have shortcomings and the idea that you won't is illusory'.³⁰³ It has therefore been suggested that a mitigation, rather than a protection, framework would be more preferable as peacekeepers simply 'can't protect'.³⁰⁴

This then leads to the second issue – whether the protection of civilians should even be a task for peacekeeping at all or whether it should be the

³⁰³ Interview with Senior Human Rights Officer in the Office of the UN High Commissioner of Human Rights ('Interviewee 13') (New York, 6 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 59.

³⁰⁴ *ibid*, pg 73.

primary responsibility of the host state.³⁰⁵ This is not to say that peacekeepers should not protect civilians but that protection efforts should ultimately be undertaken by the host government and its forces. Indeed, some UN personnel working with the field argue that the protection of civilians should be removed as a task, especially a priority task, for peacekeeping operations as it should, instead, be undertaken by national actors, with support from other international entities, if necessary, such as the UN country team.³⁰⁶ This would arguably be a desirable move as, for some PoC mandated peacekeeping operations, their prioritisation and development of PoC tools has created a reliance on the UN operation both by local communities and the host state.³⁰⁷ As Chapter 5 will explore, this reliance has been particularly problematic for MONUSCO, with a recent strategic review noting that MONUSCO had worked 'to perfect its own system, strategies and tools' for PoC but had simultaneously 'tended to diminish the primary role of State authorities in assuming their protection responsibilities'.³⁰⁸ There is a risk, then, that the host state may become reliant on a peacekeeping operation to protect civilians, rather than fulfilling the task themselves, which, in turn, raises numerous issues. First, given the temporary nature of peacekeeping, as 'you will be gone tomorrow', a peacekeeper, 'cannot be part of a lasting solution'.³⁰⁹ Therefore, PoC tools

³⁰⁵ See: PI Labuda, 'With or Against the State? Reconciling the Protection of Civilians and Host-State Support in UN Peacekeeping' (IPI 2020).

³⁰⁶ Interview with Personnel in MONUSCO's Stabilisation Support Unit ('Interviewee 19') (Skype, 21 February 2020).

³⁰⁷ J Reynaert, 'MONUC/MONUSCO and Civilian Protection in the Kivus' (IPIS 2010).

³⁰⁸ UNSC, 'Transitioning from Stabilization to Peace: An Independent Strategic Review of MONUSCO' ("Strategic Review") (25 October 2019) UN Doc S/2019/842, para 77.

³⁰⁹ Interviewee 11 (n177) pg 7.

developed and implemented by UN peacekeeping operations, whilst admirable and necessary, may not be creating sustainable protection. Second, it arguably increases the interventionist nature of the peacekeeping operation as it is, in essence, undertaking the role of the state in this area. Indeed, it has been noted that it is a 'very convenient approach' to have the UN in charge of protecting and to default 'on a very inadequate organisation, an outlet to protect', resulting in 'basically substituting to regalian powers that the state cannot implement'.³¹⁰ In this instance, then, if the host state is willing to accept the UN undertaking this protectorate role, it could perhaps be viewed not as intervention in the form of coercive action but, rather, intervention by invitation. That is, it could be likened to the joint operations that were discussed in Chapter 2,³¹¹ which some argue are a form of intervention by invitation because they are 'a function of the host state's consent' for UN intervention.³¹² If PoC is to be viewed as a task which falls within a state's national jurisdiction, then, if it established that the host state actively encourages or explicitly consents to a peacekeeping operation undertaking PoC activities this could also be viewed as a form of intervention by invitation. This, in turn, presents a third issue with the norm of PoC – the creation of the image of the UN and its peacekeeping operations as 'the saviour', who 'would be able to bring protection to every corner of the country'.³¹³ From a TWAIL perspective, it could be argued that

³¹⁰ Interviewee 13 (n303).

³¹¹ Chapter 2, Section 4.2.2.

³¹² Labuda (n305).

³¹³ Interviewee 13 (n303) pg 73.

this idea of the UN as the protectorate or guardian of civilians is synonymous with the civilising mission and the colonial dichotomies of a 'civilised' external actor, enlightening and 'civilising' the subordinate 'other'. The inclusion of PoC as a priority task for peacekeepers may therefore be seen as not only expanding peacekeeping's interventionist nature but as, again, reinforcing the patterns of domination and subordination which have been prevalent throughout the development of the principle of non-intervention and, now, the evolution of peacekeeping. Furthermore, for peacekeeping's frameworks, the norm of PoC once again demonstrates both the ability of the Secretary-General to introduce, institutionalise and interpret norms and the use of this norm to broaden the legal and normative boundaries of peacekeeping. Again, whilst PoC predominantly contributes to peacekeeping's normative framework, its impact on legal principles, such as the use of force, and its potential invocation of international law obligations, such as IHL, result in the norm also contributing to peacekeeping's legal framework. As was discussed with the other principles and norms, the impact or effect the norm then has on peacekeeping's boundaries and the principle of non-intervention is dependent on how it is interpreted and applied. That is, if PoC is interpreted narrowly, it constricts the red elastic boundary line around peacekeeping, consequently reinforcing the principle of non-intervention. On the other hand, if PoC is broadly interpreted and applied, as it is when mandated as a priority task, then this significantly expands peacekeeping's boundaries, permitting

potentially limitless intervention and thereby undermining the principle of non-intervention.

4.3 Prohibition of Sexual Exploitation and Abuse

As with the norm of protection of civilians, the prohibition of sexual exploitation and abuse (SEA) by peacekeepers could also be said to have clear legal underpinnings in international humanitarian, criminal and human rights law. For example, within international humanitarian law (IHL), rape and sexual violence is prohibited in both international and non-international armed conflicts,³¹⁴ whilst international criminal law lists rape and other forms of sexual violence as a crime against humanity.³¹⁵ Therefore, as with PoC, whilst the prohibition of SEA predominantly contributes to peacekeeping's normative framework, it also makes a subsidiary contribution to peacekeeping's legal framework.

The norm of prohibition of SEA, however, differs slightly from the other two concepts within the normative framework. Firstly, whereas democracy promotion and PoC could be generally viewed as positive or proactive norms that focus on altering the state, the prohibition of SEA is concerned with preventing certain acts committed by peacekeepers and therefore attempts to effect change within the peacekeeping operation itself, rather than the state. Secondly, as a result of the controversy of SEA by UN peacekeepers,

³¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (6 June 1977) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977).

³¹⁵ Article 7(1)(g) Rome Statute of the International Criminal Court (last amended 2010) (17 July 1998). See also: Articles 8(2)(b)(xxii) violation in IAC and 8(e)(vi) violation in NIAC. For the first definition of sexual violence, see: *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998).

the norm has been relatively slow to develop, due to a mix of the UN's 'gross institutional failure' to handle allegations³¹⁶ and member states reluctance to prosecute its own troops when they have been found to have committed such acts. This then leads to a culture of impunity and a stagnating norm, with slow progress made in addressing SEA - something which has not occurred with the other two norms, given their rapid expansion in a relatively short timeframe. It therefore highlights how, when acting as a norm entrepreneur, the SG faces a constant battle of convincing member states of the norm's worth, by presenting a problem and demonstrating why the norm is a necessary solution. Finally, in relation to the principle of non-intervention, the prohibition of SEA, as a peacekeeping norm, again differs from the other norms as it is not, in itself, interventionist. Rather, it is attempting to prevent a form of intervention – SEA – and, as such, may be viewed as a norm which reinforces the principle of non-intervention as it attempts to limit peacekeeping's boundaries.

4.3.1 One Case Too Many

As with peacekeeping's other norms, the prohibition of sexual exploitation and abuse emerged within UN peacekeeping in the 1990s when, as Chapter 2 discussed, the Cold War paralysis came to an end and there was a revival of UN peacekeeping. In particular, it developed after numerous allegations of misconduct by UN peacekeepers, particularly in Cambodia and Bosnia,

³¹⁶ --, 'Panel Slams UN for 'Gross Institutional Failure' To Act on CAR Child Sex Allegations' (17 December 2015) <<https://www.dw.com/en/panel-slams-un-for-gross-institutional-failure-to-act-on-car-child-sex-allegations/a-18925783>> Accessed 6 June 2020.

with UN personnel accused of involvement in the use of prostitutes,³¹⁷ trafficking and forced sex work.³¹⁸ Initially, there was a reluctance by the UN 'to recognise the direct and indirect involvement of peacekeepers in trafficking' and other acts of SEA,³¹⁹ with the first attempt to address the issue noted in Secretary-General Kofi Annan's 1999 bulletin on the 'Observance by UN forces of International Humanitarian Law'³²⁰ - again highlighting the norm's legal underpinnings. Within the bulletin, Section 7 noted that forces under the command and control of the UN were 'prohibited from committing acts of sexual exploitation and abuse' and 'have a particular duty of care towards women and children'.³²¹ As has been seen with previous norms, the prohibition on SEA was not an act of solo entrepreneurship on the part of the Secretary-General but, rather, grew out of investigations of the UN High Commission for Refugees (UNHCR) and the Office of Internal Oversight Services (OIOS), which were reported to the General Assembly,³²² who then requested the Secretary-General to promulgate specific rules to prohibit this behaviour and provide annual reports on SEA data.³²³ This culminated in Annan issuing a further bulletin in 2003, this time specifically addressing SEA, in which he set the

³¹⁷ The number of prostitutes within Cambodia rose from 6,000 before the mission to more than 25,000 in 1993. See: S Whitworth, *Men, Militarism and UN Peacekeeping* (Lynne Rienner 2004) 67-68.

³¹⁸ The issue of SEA in Cambodia was further compounded by the shipping of an additional 800,000 condoms to the country to prevent the spread of HIV and other STIs. See: O Simic, *Regulation of Sexual Conduct in UN Peacekeeping Operations* (Springer 2012) 41. See also: K Bolkovac, *The Whistleblower* (Palgrave 2011); J Murray, 'Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina' (2003) 34(2) *ColumHRLR* 475-528, 492-93.

³¹⁹ *ibid*, Simic, 42.

³²⁰ SG Bulletin on IHL (n167).

³²¹ *ibid*, Section 7.

³²² UNGA, 'Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa' (11 October 2002) UN Doc A/57/465.

³²³ UNGA Res 57/306 (22 May 2003) UN Doc A/RES/57/306.

foundations of the norm of prohibition of SEA by clearly defining and elaborating on prohibited acts and identifying the roles and responsibilities of relevant actors.³²⁴ This included member states who were tasked with undertaking criminal prosecutions in their domestic jurisdictions, if a proper investigation amounted to evidence supporting an allegation of SEA. Again, within this bulletin, reference was made to the 1999 SG bulletin on IHL, noting that operations under 'UN command and control are prohibited from committing acts of sexual exploitation and sexual abuse' and 'have a particular duty of care towards women and children', pursuant to section 7 of the 1999 Bulletin;³²⁵ thus, reinforcing the norm's legal underpinnings. Annan then followed this initial bulletin with a commissioned report in 2005, after acknowledging that the procedures in place 'were manifestly inadequate and that a fundamental change in approach was needed.'³²⁶ The Zeid Report, for the first time, provided a comprehensive strategy to eliminate SEA in peacekeeping operations.³²⁷ This included establishing independent investigative teams, curfew setting, and establishing clear lines of communication to allow for local populations to report allegations.³²⁸ These could therefore be viewed as boundary setting initiatives, particularly the imposition of a curfew, as they restricted peacekeeper's behaviour and reaffirmed peacekeeping's boundaries, thereby reinforcing the principle of

³²⁴ UNSG, 'Secretary-General Bulletin: Special Measures for Protection for Sexual Exploitation and Abuse' (9 October 2003) UN Doc ST/SGB/2003/13, sections 1-4.

³²⁵ *ibid.*, 2.2.

³²⁶ UNGA, 'A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations' ("Zeid Report") (24 March 2005) UN Doc A/59/710, 1.

³²⁷ *ibid.*

³²⁸ *ibid.*

non-intervention. The Zeid report also acknowledged that the decision to prosecute peacekeepers was left to the troop contributing nation and was, therefore, a sovereign decision. This then highlights two key problems within the norm of SEA. Firstly, this early formulation of the norm was reactive instead of proactive; that is, it focused upon how to address allegations after conduct had occurred, rather than attempting to prevent the conduct. Secondly, it was (and remains) based on a reliance on the troop contributing country (TCC) to prosecute their troops if they commit SEA whilst acting as a UN peacekeeper.³²⁹ Thus, the norm is beholden to member states' sovereignty, which has led to a culture of impunity as states have been reluctant to prosecute their own troops, as will be further explored later in this section and in subsequent Chapters.

Secretary-General Annan therefore established and began to institutionalise the norm of prohibition of SEA within peacekeeping, labelled as a 'zero tolerance policy'.³³⁰ This was continued by his successors, such as SG Ban Ki Moon, who also issued a bulletin addressing SEA, expanding the norm further by including the prohibition of discrimination, sexual harassment and the abuse of authority within the Secretariat.³³¹ As Annan had done, Ban Ki Moon then commissioned a report from the 'High Level Panel on Peace Operations' (HIPPO Report) in 2014, which undertook an extensive

³²⁹ Per UN Model Status of Forces Agreement (SOFA) peacekeeping troops are under the exclusive authority of their home country, not the UN.

³³⁰ UN News, 'Annan Further Enhances 'Zero Tolerance' of Sexual Abuse by UN Peacekeepers' (*UN News*, 13 October 2006) <<https://news.un.org/en/story/2006/10/196122-annan-further-enhances-zero-tolerance-sexual-abuse-un-peacekeepers>> Accessed 6 May 2020.

³³¹ UNSG, 'Secretary-General Bulletin: Prohibition of Discrimination, Harassment, including Sexual Harassment and Abuse of Authority' (11 February 2008) UN Doc ST/SGB/2008/5.

analysis of the challenges facing peacekeeping.³³² The HIPPO Report concluded that despite the introduction of the norm prohibiting SEA and the 'persuasive rhetoric', the UN was still not putting the norm of zero tolerance policy into practice.³³³ The report therefore recommended, *inter alia*, that states, particularly TCCs 'immediately and vigorously investigate and prosecute all credible allegations'.³³⁴ SG Ban Ki Moon then reiterated this in a report on implementing these recommendations, when he also noted that 'a single substantiated case of [SEA] involving UN personnel is one case too many'.³³⁵ This was then buttressed by a Security Council resolution in 2016 which, *inter alia*, reaffirmed its support for the UN's zero-tolerance policy and endorsed the Secretary-General's decision to repatriate units which had committed SEA and requested the SG to replace any military or police units whose troop or police contributing country had not investigated allegations.³³⁶ Whilst the endorsement of the Council could be viewed as a greater support for the norm, again, the interpretation of the norm during this period was limited to reacting to SEA, as opposed to prevention, and was dependent on member states complicity.

More recently, this approach has also been taken by the current Secretary-General, Antonio Guterres, who launched a high-level task force to prevent

³³² UNGA-SC, 'Report of the High-level Independent Panel on Peace Operations' ("HIPPO Report") (17 June 2015) UN Doc A/70/95-S/2015/446.

³³³ *ibid*, 80.

³³⁴ *ibid*, 86, paras 284-285.

³³⁵ UNGA, 'Report of the Secretary-General: Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (16 February 2016) UN Doc A/70/729, 1; UNGA-SC, 'The Future of United Nations Peace Operations: Implementation of the Recommendations of the High-Level Independent Panel on Peace Operations' (2 September 2015) UN Doc A/70/357-S/2015/682.

³³⁶ UNSC Res 2272 (11 March 2016) UN Doc S/RES/2272, 1-2.

and respond to SEA,³³⁷ along with a 'Zero Tolerance', four-pronged strategy.³³⁸ This, again, aimed to prioritise the rights of victims, end impunity through strengthened reporting and investigations, engage with civil society and improve strategic communication;³³⁹ thus, building upon the same normative frameworks which his predecessors had set. However, Guterres also broadened the norm slightly, reinterpreting it to include a 'Clear Check' system which prevented UN staff who had been dismissed for SEA allegations from being re-employed.³⁴⁰ This developed the norm to be more proactive than it previously had been, by attempting to prevent or mitigate the risk of SEA occurring within peacekeeping operations. For peacekeeping's legal and normative frameworks, then, the prohibition of SEA has added to these frameworks but, unlike the previous two norms, it has not expanded peacekeeping's interventionist boundaries but, rather, has attempted to limit peacekeeper's behaviour and therefore the operation's interventionist nature. As such, it has reinforced, rather than undermined, the principle of non-intervention. The norm is therefore somewhat unique in that whereas a broadening of the other two norms would expand peacekeeping's boundaries and its interventionist potential, consequently constricting the principle of non-intervention, an expansion of

³³⁷ UN Peacekeeping, 'The Secretary-General Announces Task Force on UN Response to Sexual Exploitation and Abuse' (6 Jan 2017) <<https://peacekeeping.un.org/en/secretary-general-announces-task-force-un-response-to-sexual-exploitation-and-abuse>> Accessed 10 March 2020.

³³⁸ See: UNGA, 'Report of the Secretary-General: Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach' (15 May 2017) UN Doc A/71/818 and A/71/818/Corr 1. See also update on the strategy: UNGA, 'Report of the Secretary General: Special Measures for Protection from Sexual Exploitation and Abuse' (20 March 2018) UN Doc A/72/751 and A/72/751/Corr.1.

³³⁹ *ibid.*

³⁴⁰ See: UN Clear Check, 'The UN Efforts to Combat SEA/Sexual Harassment' (21 May 2021) <<https://unsceb.org/sites/default/files/2021-05/2021%20-%20Briefing%20Note%20on%20Clear%20Check.pdf>> Accessed 28 May 2021.

the prohibition of SEA would have the opposite effect. That is, an expansion of the norm would constrict peacekeeping's boundaries by restricting peacekeepers behaviour, and therefore an operation's interventionist potential, whilst simultaneously reinforcing and possibly expanding the principle of non-intervention.

4.3.2 Reverse Intervention

In essence, the norm of prohibition of SEA could be viewed as a form of intervention in reverse. That is, it is not the norm itself which is a form of intervention but, rather, it is the act (SEA) which it aims to prohibit that is the intervention. By extension, it could also be argued that the slow development of the norm could be seen to be a form of indirect intervention; in that, member states are permitting this intervention to continue by being unwilling to take significant action to prevent it occurring. Indeed, despite the development of the norm, which has been continuously led by the Secretaries-General, SEA remains the most problematic issue within UN peacekeeping. There are, perhaps, three main problems with or related to the norm of prohibition which then hinders both its evolution and its sufficient implementation, thereby failing to adequately address or eradicate SEA. Firstly, despite the development of mechanisms for reporting allegations, including a more open dialogue with civilians, many victims are still reluctant to report SEA for numerous reasons, including a fear of retaliation by the perpetrator³⁴¹ or stigmatisation and ostracism from their

³⁴¹ S Lee and S Bartels, 'They Put a Few Coins in Your Hand to Drop a Baby in You' Study of Peacekeeper-Fathered Children in Haiti' (2019) 27(2) IntPeacekeep 177-209.

families and communities.³⁴² This then links with the second notable problem - the power differentials between these vulnerable people and the UN peacekeepers deployed to protect them within volatile post-conflict environments. This occurs, in particular, in the form of gendered power relations, whereby peacekeepers who are trained as combat military men may have social practices towards local women and girls which 'flow from military-masculine identities constructed around the notion of the inferior feminine 'other''.³⁴³ Indeed, research has found that peacekeeping operations with a higher proportion of female peacekeepers and personnel, from TCCs with better records of gender equality, have lower levels of SEA allegations.³⁴⁴ This suggests that gender parity may go some way in reducing SEA but, ultimately, would not address the root cause.³⁴⁵ Similarly, as peacekeeping operations are composed of peacekeepers from a vast array of countries, there are numerous cultural attitudes within the TCCs with differing rules, for example, on the age of consent and the legality of prostitution.³⁴⁶ This therefore creates cultural variance within peacekeeping operations which has been identified as problematic by representatives of major international humanitarian organisations who noted that, 'some troops come in, much more kind of focused, willing to engage and at least try to fulfil the mandate', whilst others 'have no interest or no appetite to

³⁴² C Csáky, 'No One to Turn To: The Under-Reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers' (Save the Children 2008) 12-13.

³⁴³ P Higate, 'Peacekeepers, Masculinities, and Sexual Exploitation' (2007) 10(1) *MenMasculin* 99-119, 101.

³⁴⁴ S Karim and K Beardsley, 'Explaining Sexual Exploitation and Abuse in Peacekeeping Missions: The Role of Female Peacekeepers and Gender Equality in Contributing Countries' (2016) 53(1) *JPeaceResearch* 100-115.

³⁴⁵ *ibid.*

³⁴⁶ C van der Mark, 'Sexual Exploitation and Abuse by UN Peacekeepers – Why the Problem Continues to Persist' (PeaceWomen 2012) 37-38.

engage into an environment that is often alien to them'.³⁴⁷ As such, these latter troops 'make sure they are safe' and then 'you see quite absurd kind of stuff in many of these peacekeeping operations, which is quite discouraging'.³⁴⁸ The norm of prohibition of SEA therefore struggles to impose a normative standard on culturally and sociologically diverse peacekeepers, in order to prohibit the intervention of peacekeepers through SEA. As such, the contribution the norm makes to peacekeeping's normative framework could be said to be patchy or uneven at best. Similarly, this reinforces arguments made earlier about the potential subjectivity of the principle of impartiality within peacekeeping operations which, again, highlights the difficulty in creating clear legal and normative boundaries. Indeed, some have argued that the involvement of peacekeepers in sexual exploitation and abuse is politically advantageous to warring parties in the host state, providing them with financial and propagandist benefits, and thereby breaching the UN's principle of impartiality.³⁴⁹ As with the norm of PoC, then, the prohibition of SEA also has an impact on peacekeeping's other legal principles, demonstrating once again how these norms do not exist harmoniously but, rather, in a competitive arena which is re-imagined for every peacekeeping operation. Despite this, efforts have been made to counter this potential subjectivity with the norm and, thus, the potential impartiality. Operational initiatives

³⁴⁷ Interview with Senior DRC/Great Lakes Coordinator from International Organisation ('Interviewee 2') (Geneva, 12 November 2018) DOI: <<http://doi.org/10.17639/nott.7119>> pg 23.

³⁴⁸ *ibid.*

³⁴⁹ K Grady, 'Sexual Exploitation and Abuse by UN Peacekeepers: A Threat to Impartiality' (2010) 17(2) *IntPeace* 215-228.

have been introduced with, for example, mandatory SEA training for all personnel prior to deployment within a peacekeeping operation³⁵⁰ and a requirement that all deployed personnel carry a 'no excuse card' containing UN code of conduct and ways to report allegations.³⁵¹ However, this has, again, been found to be significantly lacking³⁵² and reports of SEA by UN peacekeepers are still regularly reported.³⁵³ For peacekeeping's frameworks and boundaries, this once again emphasises how the norm offers a contribution to the normative and (indirectly) legal frameworks, albeit in somewhat of a thin or weak manner.

This then leads to the third significant problem within SEA – impunity. As previously noted, when an allegation of SEA has been substantiated it is left to the home state (TCC) to prosecute their peacekeepers,³⁵⁴ which has proved to be 'exceedingly rare'.³⁵⁵ Whilst peacekeepers enjoy functional immunity when acting within their UN role,³⁵⁶ in theory, civilian peacekeepers who are accused of SEA are acting outside of their official functions and therefore should be prosecuted by local authorities, whilst military peacekeepers who commit SEA ought to be prosecuted by their

³⁵⁰ UN Peacekeeping, 'Conduct in UN Field Missions: Training' <<https://conduct.unmissions.org/prevention-training>> Accessed 28 May 2021.

³⁵¹ UN Sexual Exploitation and Abuse, 'No Excuse Card' <<http://dag.un.org/bitstream/handle/11176/400598/2-No-excuse-card-2pages-EN-Form.pdf?sequence=9&isAllowed=y>> Accessed 15 December 2020.

³⁵² See: ICAI, 'Sexual Exploitation and Abuse by International Peacekeepers' (ICAI September 2020) <<https://icaei.independent.gov.uk/wp-content/uploads/ICAI-SEA-Review.pdf>> Accessed 1 February 2021.

³⁵³ For current reports, see: UN Conduct in Field Missions, 'Sexual Exploitation and Abuse: Table of Allegations' <<https://conduct.unmissions.org/table-of-allegations>> Accessed 1 June 2021.

³⁵⁴ See: Z Deen-Racsmány, 'The Relevance of Disciplinary Authority and Criminal Jurisdiction to Locating Effective Control under the ARIO' (2016) 13(2) IOLR 341-378.

³⁵⁵ K Jennings, 'The Immunity Dilemma: Peacekeepers' Crimes and the UN's Response' (E-International Relations 18 September 2017) <<https://www.e-ir.info/2017/09/18/the-immunity-dilemma-peacekeepers-crimes-and-the-uns-response/>> Accessed 10 May 2020.

³⁵⁶ Convention on the Privileges and Immunities of the United Nations (CPIUN) (1946-1947) 1 UNTS, 15.

home state (the TCC).³⁵⁷ However, again, the problem is one of implementation, particularly for acts committed by military peacekeepers as they remain under the command and control of their host state, who has a Memorandum of Understanding with the UN, and it is therefore the TCC who is solely responsible for peacekeepers' accountability.³⁵⁸ This practice is also enshrined within legal instruments such as the Status of Force Agreement (SOFA) which provides that any criminal prosecutions of peacekeepers must be with the TCC, not the host state, thereby protecting peacekeepers by granting them immunity from prosecutions by the host state.³⁵⁹ As such, the complex legal and normative rules surrounding peacekeepers' immunity, combined with a reluctance by member states to prosecute, perhaps based on either a lack of resources or a desire to maintain their reputation and TCC status, has led to a culture of impunity in relation to SEA.³⁶⁰

As TWAIL scholar Chimni has noted, the lack of institutional and individual responsibility means that the UN represents 'the rule of nobody', whereby 'a myriad small decisions are taken and interpretations advance for which no one in particular is responsible'.³⁶¹ This is particularly the case for SEA by peacekeepers, where 'the commitment to accountability by TCC and

³⁵⁷ See: R Freedman, 'UNaccountable: A New Approach to Peacekeepers and Sexual Abuse' (2018) 29(3) EJIL 961-985, 963.

³⁵⁸ See: Z Deen-Racsmány, 'The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Members of National Peacekeeping Contingents?' (2011) 16(2) JCSL 321-355.

³⁵⁹ See: R Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' (2011) 16(1) JCSL 63-104.

³⁶⁰ Freedman (n357) 969-974.

³⁶¹ BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) EJIL 1-37, 22.

member states is not where it needs to be'; 'there is still resistance into having adequate accountability' from these actors and 'as long as that is the case, the UN will only be able to do so much'.³⁶² Again, this therefore marks a relatively weak contribution to both the normative and legal frameworks surrounding peacekeeping. That is, there is the potential for these accountability rules to be established as part of the legal and normative frameworks (again also highlighting SEA's legal underpinnings) but only if member states are willing to apply them. In other words, there is the shadow of a framework or boundary line established here but it is not fully realised because of member states resistance to hold their own troops accountable. For the principle of non-intervention, this arguably treads a fine line between supporting and undermining the principle – the more peacekeepers are held accountable, the stronger the legal and normative frameworks on accountability within peacekeeping become and therefore the greater the support for the principle of non-intervention. On the other hand, the less willing states are to apply these rules, the weaker peacekeeping's frameworks in this area become, with a risk that this impunity would undermine the principle of non-intervention.

Furthermore, from a TWAIL perspective, this could be viewed as another replication of the continual colonial power dynamics of domination and subordination, which is recreated here on two levels. The very act of a peacekeeper committing SEA is arguably an example of a dominant external

³⁶² Interviewee 13 (n303) pg 75.

actor (peacekeepers) exploiting their position to the detriment of the a vulnerable subordinate other (local populations). Whilst member states' reluctance and the UN's inability to prosecute such acts could also be seen to be an example of domination and subordination, with the hegemonic powers unwilling or unable to support the subordinate victims. Indeed, it could be argued further that this exploitation of the Global South peoples by the external actor is reminiscent of the colonial civilising missions and the abuses which were perpetuated during this time, such as King Leopold of Belgium's *Force Publique* in the Congo.³⁶³ Further, the complex accountability rules and the inability of the UN to hold peacekeepers liable is what TWAIL scholars would perceive as international law's complicity in the 'repression and silencing of non-European and other peoples'.³⁶⁴ That is, the structure of the UN and the rules on accountability effectively shields those peacekeepers who commit offensives and, by extension, their TCC, at the expense of the victims. In other words, international law protects the hegemonic powers and TCCs from the Global South whilst silencing the Global South victims of SEA. Indeed, some senior personnel within the UN Secretariat believe that there is a lot more which the UN could be doing to counter this, arguing that 'we could escalate the pressure quite significantly, we could be more public about it, alternatively we could repatriate it'.³⁶⁵ In particular, they note that the Secretary-General has the prerogative to do

³⁶³ See: D Van Reybrouck D, *Congo: The Epic History of a People* (Fourth Estate 2015).

³⁶⁴ JT Gathii, 'Twenty-Second Annual Grotius Lecture: The Promise of International Law: A Third World View' (2021) 114 ASILProc 165-187, 182.

³⁶⁵ Interviewee 10 (n169) pg 74.

this 'but the backlash he would receive in return would be severe'.³⁶⁶ Once again, then, the deeply entrenched political power dynamics within the UN system, which were explored in Chapter 2, reappear again here, with the UN beholden to the member states in somewhat of a deadlock which, ultimately, results in the oppression of peoples of the Global South. However, in somewhat of a softening of this, in 2016 the Security Council granted the Secretary-General the right to repatriate peacekeeper units if the TCC failed to prosecute alleged perpetrators of SEA within six months.³⁶⁷ Whilst this goes some way in clarifying and reinforcing the SG's authority, targeting 'the part of the accountability chain that the Secretariat cannot' and adding 'new impetus and political support' to the UN's ongoing agenda on SEA, there still remain doubts about the operationalisation and practical feasibility of repatriation.³⁶⁸

The norm of prohibition of SEA, then, has the potential to significantly contribute to peacekeeping's normative and legal frameworks and, consequently, reinforce the principle of non-intervention. However, its contribution is limited by member states' reluctance to fully embrace the norm and hold peacekeepers accountable. When this is compared with the rapid expansion of the other two norms of peacekeeping, it, again, highlights the perpetual power dynamics and North-South divide that are embedded within both the UN and international law which were first highlighted in Chapter 2. That is, it appears that the norms of democracy

³⁶⁶ *ibid.*

³⁶⁷ S/RES/2272 (n336).

³⁶⁸ J Whalan, 'Dealing with Disgrace: Addressing Sexual Exploitation and Abuse in UN Peacekeeping' (IPI 2017).

promotion and PoC align with the dominant states' interests and agenda and, therefore, have been developed quite rapidly. Whereas the norm of prohibition of SEA, as it, in essence, challenges the dominant powers and TCCs, has not advanced at the same pace. Thus, the agenda of the Global North has prevailed at the expense, on occasions, of the Global South. The norm of prohibition of SEA has therefore provided a thin contribution to peacekeeping's normative framework, with a subsidiary contribution to peacekeeping's legal framework through its potential to invoke laws on accountability and, as noted earlier, its underpinning in IHL and ICL. This, in turn, both supports and undermines the principle of non-intervention, as the inclusion of the norm within peacekeeping's frameworks reinforces non-intervention, yet, at the same time, states reluctance to support the norm effectively permits SEA, thereby undermining the principle.

5 Peacekeeping as Intervention?

Whilst peacekeeping does not possess an articulated legal or normative framework, as this Chapter has explored, there exists principles and norms which, together, form a complex peacekeeping framework. On the one hand, the fundamental principles of consent, impartiality and limited use of force constitute peacekeeping's legal framework, which lies at the heart of peacekeeping. And on the other hand, the norms of democracy promotion, protection of civilians and prohibition of sexual exploitation and abuse forms peacekeeping's broader normative framework, which surrounds the legal framework. As has been seen within this Chapter, however, these

frameworks do not exist in isolation but, rather, at times, overlap, with the norms of PoC and prohibition of SEA possessing legal underpinnings which introduces elements of international law into peacekeeping's legal framework.

Furthermore, these principles and norms rarely live harmoniously and instead 'coexist in a competitive arena' with the normative composition of a peacekeeping operation being 're-balanced each time'.³⁶⁹ There is therefore, again, a degree of overlap between the principles and norms with an interpretation of one norm impacting the composition of another norm or principle - such as PoC and the use of force or the prohibition of SEA and impartiality. Indeed, this Chapter has demonstrated how these norms have continually evolved and been reinterpreted, typically, in-line with the fluctuating interventionist practices or global trends which were highlighted in Chapter 2. That is, when there has been strong non-intervention rhetoric, such as during decolonisation, the principle and norms have been interpreted narrowly, limiting their scope. Conversely, when there has been increased support for intervention, as occurred in the post-Cold War era, the norms have been interpreted more broadly, thereby expanding the concepts. Peacekeeping's legal and normative frameworks could therefore be imagined as red elastic bands that can continually expand and contract depending on how the principles and norms are re-imagined. The frameworks are therefore fluid which, in turn, means that the boundary

³⁶⁹ Karlsrud (n36) 527.

between peacekeeping and intervention is also fluid. As this Chapter has explored, where the concepts are interpreted narrowly (typically within a traditional peacekeeping operation) then the boundaries of peacekeeping are limited and so too is peacekeeping's interventionist potential. However, when they are interpreted broadly, as with many contemporary multi-dimensional operations, the boundaries are significantly stretched, often to its very limits, if not beyond, thereby undermining or potentially contravening the principle of non-intervention. It could therefore be argued that there must be a limit to how far these concepts evolve before they are no longer peacekeeping principles, acting as a barrier between peacekeeping and intervention, but, instead, become intervention in itself – for example, as is the case, at times, with the principle of limited use of force.

The Chapter has therefore outlined these legal and normative frameworks and has demonstrated how differing interpretations and applications of the norms within these frameworks may result in peacekeeping becoming, on occasions, a form of intervention. That is, a form of coercive action designed to influence change or alter the host state – such as when peacekeeping operations undertake extensive democracy promotion tasks or apply the HRDDP, placing ultimatums on the state to alter their armed forces. It could be argued, then, that in order for the principles to retain their relevance and for the boundary between peacekeeping and intervention to be maintained, there must be a firming up of these frameworks. This would require, in some instances, a retraction of the broad interpretations of

principles, particularly within some of the contemporary multi-dimensional operations, alongside an expansion of norms such as the of prohibition of SEA which seeks to limit peacekeepers behaviour. Chapters 4 and 5 will therefore examine this in more detail, exploring how these principles and norms operate in the UN's largest peacekeeping operation, in order to understand peacekeeping's legal and normative frameworks and the boundary between peacekeeping and intervention in practice.

Furthermore, this Chapter has also highlighted how the unequal power dynamics and colonial legacies which were identified within the principle of non-intervention in Chapter 2 also exist within peacekeeping, particularly through the inherent imbalance within the Security Council, creating continual examples of Anghie's dynamic of difference. In practice, this dynamic then engages the norm entrepreneur Secretary-General who plays a central role in the implementation and shaping of peacekeeping's principles and norms. Peacekeeping's frameworks and an application of these frameworks can therefore, at times, be seen to reinforce or recreate the North-South divide and colonial dichotomies of domination and subordination, particularly where there is an element of coercion or peacekeeping is taken closer to the intervention line. This, again, underlines the argument that many features of both international law and international institutions or legal systems 'acknowledge and reinforce the substantial power differentials between its participants'.³⁷⁰ This, in turn, leads back to

³⁷⁰ Charlesworth (n248) 34.

the notion that international law is based on 'fictions' of state equality and state consent³⁷¹ which leads to the more general debate over whether international law is truly international.³⁷² Therefore, as was seen with the principle of non-intervention in Chapter 2, the influence of colonialism and the persistent power differentials between the Global North and Global South has also permeated the concept of peacekeeping.

If the contents of this thesis can be imagined as a three-tiered pyramid, then, whilst Chapter 2 explored the top of this pyramid – the principle of non-intervention – this third Chapter has explored the second layer – the most prevalent form of intervention today, peacekeeping. Having now established the legal and normative frameworks which demarcate peacekeeping's boundary line, Chapters 4 and 5 will take this further by exploring the third and final layer to the pyramid – peacekeeping in practice. Building upon these explorations of non-intervention and peacekeeping, the subsequent Chapters will examine how peacekeeping's principles and norms have been interpreted and applied in the UN's peacekeeping operation in the DRC. Thus, the analysis into peacekeeping's relationship with the principle of non-intervention will be taken deeper, with the aim of ascertaining specific incidences in which an interpretation or application of the norms and principles may contract or expand peacekeeping's

³⁷¹ G Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (1994) 15 AYIL 103-128.

³⁷² L Eslava and S Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3(1) TradeL&Dev 103-130.

boundaries and therefore support or undermine the principle of non-intervention.

Chapter 4

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1 Introduction

It has been said that 'the fortune of peacekeeping would rise and fall in the Congo'.¹ Indeed, the DRC is often referred to as a laboratory for UN peacekeeping – with others calling it a 'furnace [for] the evolution of peacekeeping'² – providing the 'biggest theatre'³ in which new policies have developed. The Congo operations therefore provide the most prominent example of peacekeeping, ideal for examining the peacekeeping frameworks, which were outlined in Chapter 3, and for exploring the relationship between these frameworks and the principle of non-intervention in practice. Building upon the previous Chapters, this Chapter will focus on peacekeeping's legal framework – the 'holy trinity' of consent, impartiality and non-use of force – whilst the subsequent Chapter will examine peacekeeping's expanding normative framework, exploring how the norms of democracy promotion, protection of civilians and the prohibition of sexual exploitation and abuse have evolved in the UN's peacekeeping operations in the DRC. The purpose of this Chapter, then, is to trace the evolution of peacekeeping's legal principles within the UN's three peacekeeping operations in the Congo, examining whether an application of these principles in the Congo has, at times, resulted in peacekeeping becoming intervention.

¹ Interviewee 9 quoting a former head of peacekeeping. Interview with Senior UN DPPA-DPO Personnel ('Interviewee 9') (New York, 27 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 36.

² Interview with Mona Ali Khalil, former Senior Legal Officer of the UN Office of the Legal Counsel, Director of MAK LAW International and an Affiliate of the Harvard Law School Program on International Law and Armed Conflict ('Interviewee 12') (New York (Skype) 5 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 36.

³ Interview with Former MONUSCO Military Personnel ('Interviewee 4') (Shrivenham, UK, 28 October 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 36.

1.1 The UN's Peacekeeping Laboratory

As was seen in Chapter 2, the start of the UN's peacekeeping endeavours in the DRC began in 1960 when the *Opération des Nations Unies au Congo* (ONUC) was deployed during Africa's decolonisation period, shortly after the country gained independence from Belgium.⁴ However, the popular euphoria prompted by the handover of power soon disintegrated. A mass exodus of Europeans, a breakdown in law and order and a secessionist war in the province of Katanga plunged the Congo into a series of conflicts, dubbed the 'Congo crisis'.⁵ As a result, the newly elected Congolese government requested 'UN military assistance', 'to protect the national territory of the Congo', less than two weeks after gaining independence.⁶ Whilst ONUC was initially deployed as a traditional, benign peacekeeping operation, it quickly evolved to use an unprecedented level of force, in both strategy and tactics, making it 'indistinguishable from a standard military campaign'.⁷ The operation was eventually considered a success when it assisted in the prevention of the Katangan secession, subsequently withdrawing in 1964.⁸ In the years that followed, the Congo endured a thirty-two-year dictatorship and two major armed conflicts, including 'Africa's World War', which led to the return of the UN in 1999 to oversee

⁴ UNSC Res 143 (14 July 1960) UN Doc S/RES/143.

⁵ Within the UN debates on the situation in the DRC was referred to as the 'Congo crisis', see: UNGA (15th Session, 912th Plenary Meeting) (8 November 1960) UN Doc A/PV.912.

⁶ UNSC, 'Cable dated 12 July 1960 from the President of the Republic of the Congo and Supreme Commander of the National Army and the Prime Minister and the Minister of National Defense addressed to the Secretary-General of the United Nations' (13 July 1960) UN Document S/4382.

⁷ T Findlay, *The Use of Force in UN Peace Operations* (OUP 2002) 51.

⁸ As seen in Chapter 2, Section 3.1.

the signing of the Lusaka Ceasefire Agreement.⁹ Initially, as with ONUC, the *Mission de L'Organisation des Nations Unies en République Démocratique du Congo* (MONUC) was a relatively simple, traditional Chapter VI peacekeeping mission composed of 500 military observers tasked with overseeing the fulfilment of the peace agreement.¹⁰ However, with persistent conflict and cycles of violence, the operation rapidly evolved into a much more robust, multi-dimensional operation, eventually changing its name to the *Mission de L'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo* (MONUSCO) in 2010, to recognise the new inclusion of the 'stabilisation' element. Whilst MONUSCO's stabilisation mandate appears similar to ONUC's mandate, particularly through the use of force, the purpose of MONUSCO differs to ONUC in that the (ill-defined) concept of 'stabilisation' is a political strategy, designed to help states restore order and stability in the absence of a peace settlement,¹¹ not to be confused with the re-establishment of state authority.¹²

The evolution of the UN's operations in the Congo have therefore mirrored the cyclical evolution of the principle of non-intervention, which was outlined in Chapter 2, with MONUSCO evolving during intervention's shift

⁹ UNSC, 'Ceasefire Agreement' ("Lusaka Ceasefire") (23 July 1999) UN Doc S/1999/815; G Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press 2011).

¹⁰ UNSC Res 1234 (9 April 1999) UN Doc S/RES/1234; UNSC Res 1258 (6 August 1999) UN Doc S/RES/1258; UNSC Res 1273 (5 November 1999) UN Doc S/RES/1273; UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279; UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291.

¹¹ C de Coning and C Aoi, 'Conclusion: Towards a United Nations Stabilization Doctrine: Stabilization as an Emerging UN Practice' in C de Coning, C Aoi and J Karlsrud (eds) *UN Peacekeeping Doctrine in a New Era Adapting to Stabilisation, Protection and New Threats* (Routledge 2017) 288-310.

¹² A Boutellis, 'Can the UN Stabilize Mali? Towards a UN Stabilization Doctrine?' (2015) 4(1) *Stability* 1-16.

from a military to security approach.¹³ Since then, MONUSCO has become the UN's largest peacekeeping operation, totalling over 20,000 personnel at its peak.¹⁴ In an attempt to adapt to changing conflict dynamics and demands from the Security Council, Congolese government and regional actors, the operation has continually reinvented itself, driven by the Secretary-General and Special Representative to the Secretary General (SRSG), along with key personnel within the mission and the UN Secretariat. Most notably, in 2013 the Security Council mandated the operation to include a 'Force Intervention Brigade', authorised to undertake 'targeted offensive operations' to 'neutralise' armed groups, in cooperation or through joint operations with the Congolese armed forces.¹⁵ In addition to a significant military presence, the operation also has large civilian and police components, thereby differing greatly from ONUC's predominantly military force.¹⁶ Together, the components have undertaken numerous mandated tasks, such as the overseeing of three democratic elections in 2006, 2011 and 2018 (with questionable success),¹⁷ and have been faced with a significant Ebola outbreak, recurring conflicts in the East, the readjustment of the Congolese political power following a coalition government and, more recently, the Covid-19 pandemic.¹⁸

¹³ Chapter 2, Section 4.2.

¹⁴ MONUSCO's current personnel total (as of April 2021) is 17,669. See: UN Peacekeeping, 'MONUSCO Fact Sheet' <<https://peacekeeping.un.org/en/mission/monusco>> Accessed 18 May 2021.

¹⁵ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098.

¹⁶ See MONUSCO facts and figures (n14).

¹⁷ *ibid.*

¹⁸ UNSC, 'Covid-19 Exacerbating Tensions in DRC's Coalition Government' (25 June 2020) Press Release SC/14228.

1.2 Armed with Legal Principles

Peacekeeping in the DRC therefore offers a wealth of examples of numerous aspects of peacekeeping, not least how the three fundamental principles have been interpreted and applied. Indeed, as Spijker notes, when the UN first entered the Congo in the early 1960s it was equipped 'not with heavy arms but with legal principles'.¹⁹ However, tracking the evolution of both the principles and the practice, it is clear to see that the same could not be said for today's robust, multi-functional peacekeeping operations. Whilst many within the Secretariat maintain that the traditional peacekeeping principles are still relevant,²⁰ it is undeniable that they have been expanded and contorted, at times almost beyond recognition, in order to adapt to conditions in the field and, in part, to reflect the interventionist rhetoric or trends which were outlined in Chapter 2. As such, these re-interpretations could be said to expand the scope of peacekeeping as a form of intervention, consequently, contracting the principle of non-intervention. That is, as Chapter 3 highlighted, when the principles are interpreted narrowly then peacekeeping's boundaries are limited and so too is peacekeeping's interventionist potential. However, when they are interpreted broadly, as with the UN's operations in the Congo, the boundaries are significantly expanded, often to its limits, thereby undermining the principle of non-intervention.

¹⁹ O Spijkers, 'The Evolution of United Nations Peacekeeping in the Congo' (2015) 19(1-2) *IntPeacekeep* 88-117, 89.

²⁰ See Interviewee 12 (n2) and Interviewee 16: Interview with Senior Political Affairs Officer, UN DPO ('Interviewee 16') (New York, 10 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 42.

This Chapter will therefore examine how ONUC, MONUC and MONUSCO have all interpreted and applied the fundamental principles and how this, in turn, has altered the fluid, red elastic boundary line which surrounds peacekeeping. In other words, it will examine how an interpretation and application of the 'holy trinity' in the Congo has altered the composition of peacekeeping's frameworks and, consequently, the boundary between peacekeeping and intervention. As was set out in the previous Chapter, this will demonstrate how peacekeeping's principles and norms exist in a competitive arena, constantly evolving and being reimagined with each peacekeeping operation and, even, with each peacekeeping mandate. Indeed, for the UN's current operation in the Congo – MONUSCO – the operation functions on a complex mix of civilians and military parts which, at times, leads to tension and division despite it being a civilian-led operation, with a civilian Special Representative to the Secretary-General (SRSG) as head of the mission. As was seen in Chapter 3, the SG and, by extension, the SRSG play a significant role in the running of a peacekeeping operation, the implementation of the operation's mandate and in the creation, institutionalisation and interpretation of peacekeeping's principles and norms, earning the SG the title of 'norm entrepreneur'.²¹

It could be argued, then, that the SRSG, as an embodiment of the SG within the field, is also a norm entrepreneur or, perhaps more fittingly, a norm interpreter. Within MONUSCO, the role of the SRSG as a norm interpreter

²¹ I Johnstone, 'The Secretary General as Norm Entrepreneur' in S Chesterman, *Secretary or General? The UN Secretary-General in World Politics* (CUP 2007) 123-138.

has been pivotal and highlights both this function of the SRSG and the broader difficulties which arise from implementing Security Council mandates which, again, demonstrates the fluidity of peacekeeping's boundaries. For MONUSCO, the day to day planning and general guidance is one which is led by a civilian strategy 'and the military con-ops are supposed to be embedded in the mission concept and follow the civilian led SC mandate'.²² However, there are often difficulties in coordination and communication between these components with MONUSCO struggling 'enormously, as most missions do, to integrate the military within the broader kind of multi-dimensional mission structure'.²³ In particular, the exclusion of civilians from operational planning has been a recurring source of contention for civilian staff,²⁴ whilst military personnel argue that secrecy of operations is a necessity and was 'one of the conditions of success of the FARDC against M23'.²⁵ Whilst a full exploration of these issues would go beyond the scope of this thesis, it highlights how the functioning of the peacekeeping operations in practice may also create an additional layer of interpretation of the principles of peacekeeping and, thus, potentially broaden its interventionist scope.²⁶ That is, once the Security Council has interpreted the peacekeeping principles and created the mandate, there is

²² Interview with Independent Expert and Former UN Political Adviser ('Interviewee 8') (New York, 26 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 25.

²³ Interview with Senior UN DPO Personnel, Policy, Evaluation and Training Division ('Interviewee 10') (New York, 3 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 66.

²⁴ Interview with Independent Expert and Former UN Political Adviser ('Interviewee 8') (New York, 26 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 25.

²⁵ Interview with Former Senior Military Commander ('Interviewee 11') (New York (Skype) 3 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 26.

²⁶ On the civil-military structure of peacekeeping, see: DPKO, 'Civil-Military Coordination Policy' (9 September 2002) <<https://www.refworld.org/pdfid/451ba7624.pdf>> Accessed 15 May 2020; UN, 'Civil-Military Coordination Specialized Training Materials (UN-CIMIC STM)' (UN DPO-DFS, 2004) <<http://repository.un.org/bitstream/handle/11176/89582/STM%20UNCIMIC.pdf?sequence=1&isAllowed=y>> Accessed 15 May 2020.

a splintering as is this is then re-interpreted and re-actualised in the field by the SRSG and senior leadership within the operation. This may, in practice, result in differing approaches on how to implement the mandate, particularly between the civilian and military components; thereby resulting in differing interpretations of the fundamental principles which are embedded within the SC mandate. As such, it could be argued that each interpretation of the mandate or each exercise of the role of the SRSG as norm entrepreneur creates a further nuance within the concept of peacekeeping and, consequently, the principle of non-intervention. Arguably, each re-interpretation creates a new mark within the red boundary line around peacekeeping, and, if repeated, may build up to create a permanent opening, resulting in an expansion of this boundary line and therefore an expansion of peacekeeping and its interventionist potential. In other words, the SRSG has the ability to interpret peacekeeping's principles and norms, through their application of the mandate and therefore, by extension, may contract or expand peacekeeping's legal and normative frameworks which, in turn can either support or undermine the principle of non-intervention.

This Chapter will therefore explore all of these issues, building upon the analysis of the previous two Chapters and continuing to apply a TWAIL lens in order to demonstrate how the inequalities and power disparities embedded within the peacekeeping frameworks may also transpire in practice. Taking each of the fundamental legal principles in turn – consent, impartiality and limited use of force – the Chapter will take the analysis

from the previous Chapter deeper by exploring specific examples of how these principles are interpreted and applied in practice and how this, in turn, impacts both peacekeeping's frameworks and the principle of non-intervention. The subsequent Chapter will then continue this in-depth examination by unpicking the application of peacekeeping's expanding normative framework, composed of democracy promotion, protection of civilians and prohibition of sexual exploitation and abuse, within the Congo. Once again, it will be argued that when these principles and norms are interpreted narrowly, they constrict the boundaries or frameworks surrounding peacekeeping, thereby supporting the principle of non-intervention. Conversely, when interpreted broadly, they expand peacekeeping's boundaries and consequently undermine or, at times, contravene the principle of non-intervention. In these instances, it then raises the question as to how far these principles and norms can evolve before they no longer remain relevant to peacekeeping. And, similarly, whether there needs to be a limit on the extent to which peacekeeping can evolve before it shifts into the realm of intervention.

2 Consent

As Chapter 3 established, the principle of consent is a cornerstone for peacekeeping, creating a distinction between peacekeeping and peace enforcement and validating what would be illegal intervention.²⁷ Therefore, consent, as was seen at numerous points throughout the previous Chapter,

²⁷ Chapter 3, Section 3.1.

prevents peacekeeping from becoming intervention. Despite its importance, for peacekeeping operations in the DRC, numerous issues have arisen in regards to the principle of consent which highlights the more general problems outlined in Chapter 3. These issues can be loosely categorised into two themes: consent from whom and consent for what. Firstly, at times, the Congo has lacked a clear government or leader, had competing claims for territorial control and has been referred to as a failed state, making it unclear who can or should provide consent.²⁸ Secondly, throughout the UN's 60-year relationship with the DRC, relations between the organisation and the country's political leadership have frequently broken down. This has ranged from veiled threats and criticisms of the operation to explicit statements requesting that the UN operation withdraw from the country. On these occasions, consent has effectively been withdrawn, yet the operation has remained. This calls into question the maintenance of host state consent and whether the host is simply consenting to the deployment of the operation and is not legally required to consent to any changes – substantial, strategic or tactical- once the operation is deployed. If the host state is therefore unable to consent to significant changes to the operation or unable to eject a peacekeeping operation from its territory until the end of its mandate, it is arguable that this may amount to coercive action designed to alter the state; thus, intervention and, consequently, a violation of the principle of non-intervention.

²⁸ See: W Reno, 'Congo: From State Collapse to 'Absolutism', to State Failure' (2006) 27(1) TWQ 43-56, 47.

2.1 Obtaining Consent

After the Congo gained independence and the 'Congo crisis' ensued, the newly independent Congolese government telegrammed the then Secretary-General, Dag Hammarskjöld, requesting the 'dispatch by the United Nations of military assistance'.²⁹ They argued that UN assistance was necessary to protect their territory against 'the present external aggression' which was both a 'threat to world peace' and a 'conspiracy' between 'Belgian imperialists and a small group of Katanga leaders' to execute the secession in Katanga, which they believed was the 'disguised perpetuation of colonialist regime'.³⁰ Therefore, for ONUC, host state consent was clearly established as there had been an explicit request from the President and Prime Minister of the Congo, thus explicit consent for UN intervention. Although there was no violation of the principle of non-intervention, the context and nature of the request highlights broader issues within international law at that time, as explored in the previous Chapters. Firstly, the deployment of the peacekeeping operation was, again, somewhat of an ironic use of intervention to counter intervention, as seen in Chapter 2,³¹ with the USA's imperial intervention to counter European intervention in the colonial era.³² Secondly, the nature of the Congo's request for assistance was both a first for UN peacekeeping and, applying a TWAIL lens, demonstrated the significant power differentials which existed during that period and the beginning of the shift from a

²⁹ S/4382 (n6).

³⁰ *ibid.*

³¹ Section 2.4.

³² See Chapter 2.

dominant Global North to a rising Global South – which Chapter 2 noted was also a tipping point for the principle of non-intervention.³³ That is, at the time the Congolese government made their request, they were not yet a member state of the UN³⁴ and therefore brought their complaint to the Secretary-General, rather than the Security Council. This required the Secretary-General to exercise their Article 99 UN Charter power for the first time in UN history, demonstrating the significant role which the SG may play within intervention.³⁵ The Congo's lack of member status also meant that, despite gaining independence, they had no power or voice within the UN system, arguably leaving them in a vulnerable position for the first few weeks of ONUC's deployment. Indeed, within General Assembly debates it was Congo's former colonial power, Belgium, who were consulted on matters relating to the Congo, thus, from a TWAIL perspective, maintaining the colonial-colonised dichotomy and paternalistic power imbalances.³⁶ It could also be viewed as another example of Anghie's dynamic of difference with the dominant actors (the UN and Belgium) identifying and seeking to bridge the gap between themselves and the 'others' (Congo).

However, despite the Congolese government having no formal voice within the General Assembly before and shortly after ONUC's deployment, it intuitively manipulated the Cold War dynamics to successfully obtain UN

³³ Chapter 2, Section 3.1.

³⁴ UNGA Res 1480 (XV) (20 September 1960) UN Doc GA/RES/1480 (XV); UNGA, 'Resolutions Adopted by the General Assembly During its Fifteenth Session' (20 September – 20 December 1960) 15th Session, UN Doc Supp No 16 (A/4684) 64.

³⁵ See: B Urquhart, *Ralph Bunche: An American Life* (WW Norton 1993) 311 and MGK Nayar, 'Dag Hammarskjöld and U Thant: The Evolution of Their Office' (1974) 7(1) CaseWResJIL 36-83.

³⁶ A/4684 (n34).

support and exercise a degree of influence, culminating in the deployment of ONUC.³⁷ In particular, after Hammarskjöld acceded to the Congolese request and brought the matter before the Security Council, the Congolese government threatened to 'appeal to the Bandung Treaty Powers' – 'a euphemism for Chinese 'volunteers''³⁸ – should there be a delay in UN assistance.³⁹ As Draper noted at the time, 'in terms of *realpolitik*,' this was 'the most telling and operative part' of the Congolese telegrams.⁴⁰ This manipulation of the Cold War dynamics by the Congolese therefore demonstrates the ability of the host state to influence external intervention even when they possess little formal power. Thus, as will be explored later in this section, even when a state appears to be unable to alter the peacekeeping operation, it still has a broad range of tactics or tools which it can use to influence an operation. For the principle of non-intervention, this suggests that even when peacekeeping appears to enter the realm of intervention, becoming coercive action designed to influence change in the host state, the host may still be able to counter this potential intervention, thereby reinforcing the principle of non-intervention. From a TWAIL perspective, this could also be viewed as an example of the Global South exercising their voice and using international law and institutions to challenge the dominance of the hegemonic powers.⁴¹ This example, in

³⁷ S/RES/143 (n4).

³⁸ TM Franck, 'United Nations Law in Africa: The Congo Operation as a Case Study' (1962) 27(4) *L&ContemProb* 632-652, 634.

³⁹ UNGA, 'Annual Report of the Secretary-General on the Work of the Organisation' (16 June 1960 – 15 June 1961) UN Doc A/4800. See also: UN Doc S/4382 (n6) 2.

⁴⁰ GIAD Draper, 'The Legal Limitations upon the Employment of Weapons by the United Nations Force in the Congo' (1963) 12(2) *ICLQ* 387-413, 389.

⁴¹ See: G Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation Behind Enemy Lines' (2016) 37(11) *TWQ* 1957-1971.

particular, arguably epitomises the changing nature of international relations during this period, which Chapter 2 explored.⁴² That is, it demonstrates the rise of the Global South, through the General Assembly, which provided smaller, newly independent states with equal voting power and a platform to express their interests and defend their sovereignty, often through an application of the principle of non-intervention, particularly during the Cold War when the Security Council was paralysed. Indeed, Congo has been described as a 'cockpit of the Cold War', with ONUC an 'arena for Great Power tensions',⁴³ again, reflecting the centrality of the Congo throughout history, as well as in the development of peacekeeping and the principle of non-intervention.

For the UN's later missions in the DRC, MONUC and MONUSCO, the attainment of host state consent has also proved to be complex. Following the traditional model of peacekeeping, MONUC was deployed after the signing of the Lusaka Ceasefire agreement as a simple monitor and observe mission.⁴⁴ However, the Security Council resolution which established MONUC made no reference to host state consent, instead it referred to the Agreement and noted the role that it requested the UN to play 'in the implementation of the ceasefire'.⁴⁵ Within the Lusaka Agreement, the signatory parties, which included the DRC, agreed that the UN Security Council 'acting under Chapter VII of the UN Charter' shall be 'requested to

⁴² Section 3.1.

⁴³ A Doss, 'In the Footsteps of Dr Bunche: The Congo, UN Peacekeeping and the Use of Force' (2014) 37(5) JStradStud 703-735, 706.

⁴⁴ UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279.

⁴⁵ *ibid.*

constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation' of the Agreement.⁴⁶ It therefore appears that host state consent was granted for the deployment of MONUC through the Lusaka Agreement, thereby an indirect or implied consent. Whilst this could perhaps bring the operation closer to violating the principle of non-intervention, as Sloan notes, instead of referring to consent, the resolutions reaffirmed 'the sovereignty, territorial integrity and political independence' of the DRC.⁴⁷ Thus, in emphasising sovereignty and territorial integrity, which are a corollary of non-intervention, it appears that the Council did not perceive MONUC to be intervention and, therefore, their interpretation of the principle of consent here reinforced the principle of non-intervention. This was compounded by repeated assurances from the Congolese government, which the Council took as evidence of their support for the deployment of MONUC and therefore implied consent.⁴⁸ Indeed, as Sloan argues, the Council's recognition of the Congo's support could also reflect the Council's awareness that the host state was in a position to reject any changes to the mandate which were not based within the mandatory provisions of Chapter VII.⁴⁹ As will be discussed later in this section, this then leads to the importance of maintaining host state consent and whether the host state can or should consent to changes in the mandate.

⁴⁶ Lusaka Ceasefire (n9) para 11 (a).

⁴⁷ J Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Hart Publishing 2011).

⁴⁸ UNSC Res 1332 (14 December 2000) UN Doc S/RES/1332. UNSC Res 1341 (22 February 2001) UN Doc S/RES/1341.

⁴⁹ J Sloan (n47).

For MONUSCO, as it was a continuation of MONUC, consent for deployment was not legally required. However, what remains unclear is whether the Congolese government had to (and did) consent to significant changes, namely the re-naming and evolution of the mission to include a stabilisation element. If there was no consent, then it could be argued that the operation's sole legal basis became Chapter VII, thus taking the operation across the line into intervention. Indeed, the UN essentially ignored the host state requests during this period and continued with the stabilisation agenda, which could arguably be perceived as coercive action to alter the host state and, thereby, intervention. In the months leading up to MONUC's evolution into MONUSCO, the DRC's President, Kabila, repeatedly demanded that the UN withdraw from the Congo.⁵⁰ In late 2009, shortly after the Security Council had renewed MONUC's mandate, Kabila requested a detailed draw-down plan for the operation by 30 June 2010.⁵¹ Again, in February 2010, three months before the Security Council authorised MONUSCO, Kabila officially asked the Under-Secretary General for Peacekeeping Operations, Alain Le Roy, to ensure the removal of MONUC by mid-late 2011, with the first drawdown to take place around June 2010 to coincide with the 50th anniversary of Congo's independence.⁵² At this point, it could be argued that consent to the operation had been

⁵⁰ T Vircoulon, 'After MONUC, Should MONUSCO Continue to Support Congolese Military Campaigns?' (Crisis Group, 19 July 2010) <<https://www.crisisgroup.org/africa/central-africa/chad/after-monuc-should-monusco-continue-support-congolese-military-campaigns>> Accessed 7 May 2020.

⁵¹ --, 'Congo-Kinshasa: MONUC Exit is Probable, But Premature' (*Oxford Analytica*, 1 April 2010) <<https://reliefweb.int/report/democratic-republic-congo/congo-kinshasa-monuc-exit-probable-premature>> Accessed 8 May 2020.

⁵² UN News, 'First Set of UN Troops Could Leave DR Congo by June Says Peacekeeping Chief' (*UN News*, 5 March 2010) <<https://news.un.org/en/story/2010/03/331642-first-set-un-troops-could-leave-dr-congo-june-says-peacekeeping-chief>> Accessed 25 May 2020.

revoked, yet the UN remained in the DRC, authorising MONUC's evolution to MONUSCO, which Le Roy argued demonstrated 'a new phase in the Congo'.⁵³ In order to seemingly placate Congolese concerns, the Council did, however, also authorise the withdrawal of up to 2000 personnel by 30 June 2010⁵⁴ but no further plans were made to withdraw the operation in 2011, as Kabila had requested. In essence, then, the host state was arguably ignored by both the UN and the peacekeeping operation, with the external actors continuing to pursue their agenda, regardless of the express desires of the host state. It appears that in this instance, peacekeeping expanded beyond its boundaries, becoming intervention and therefore undermining the principle of non-intervention. Further, from a TWAIL perspective, this could also be viewed as a replication of the dichotomies of the colonial civilising mission, with the enlightened, external, hegemonic power pursuing their agenda and essentially dictating to the subordinate 'other'.⁵⁵

This, again, highlights the precarious interpretations of the principle of consent and raises questions as to whether host state consent is only required for deployment, with the retraction of consent during the operation having little legal or practical effect – a matter which will be explored in subsequent sections. It could also be argued that, more broadly, through a TWAIL lens, this again, reflects the long-standing power differentials within

⁵³ --, 'UN to Withdraw up to 2000 Troops from DR Congo' (*France 24*, 28 May 2010) <<https://www.france24.com/en/20100528-un-withdraw-2000-troops-dr-congo-monuc>> Accessed 27 May 2020.

⁵⁴ UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925, 3.

⁵⁵ Chapter 2, Section 1.

interventionist practice which were outlined in Chapter 2, with the Congo (a Global South state) still struggling to assert its voice against the UN (a Global North led actor), as it did during ONUC's deployment. Indeed, these typical interventionist positions played out in the Security Council, underlining the inherent hierarchy within the organ, and the differing approaches to intervention amongst the P5, which was also outlined in Chapters 2 and 3. Whilst the USA and France pushed for MONUC to remain in the DRC, with the former stating that MONUC was needed for protection of civilians and security sector reform, China took the opposite view.⁵⁶ A usual proponent of non-intervention, China argued that the Congo could not have a new beginning whilst MONUC was deployed, stating that it fully supported Kabila's desire 'to fly his own wings'.⁵⁷ This latter phrase, in particular, demonstrates that the peacekeeping operation was seen as an unwelcome restriction or limitation on the host state's sovereignty and therefore, coercive action amounting to intervention.

2.2 Consent from Whom?

A further issue which has arisen in the UN's operations in the Congo is who is entitled to provide consent, the answer to which has the potential to broaden the principle of consent, as the greater the number of actors who are able to provide consent, the broader the principle and therefore the broader the peacekeeping frameworks. Whilst consent is typically

⁵⁶ Closed-door Security Council meeting, quoted in: Congo Research Group, 'The Future of MONUC (And Debt Relief)' (CRG, 18 March 2010) <<http://congoresearchgroup.org/future-of-monuc-and-debt-relief/>> Accessed 10 May 2020.

⁵⁷ *ibid.*

attributable to the state,⁵⁸ within the DRC there have been numerous competing claims for power within certain areas, which challenges the government's exclusive control of the whole territory. This, in turn, calls into question whether other non-state actors could or should also provide consent to the peacekeeping operation. Where the state's capacity to govern has withered (such as in the East of the country), non-state actors, including armed groups, traditional leaders, churches and civil society groups, have competed to fill these gaps, resulting in Congolese society developing 'new forms of social organisation [...] to compensate for the overwhelming failures of the post-colonial nation-state'.⁵⁹ The 'effective control' doctrine could therefore be applied to ascertain whether or not these non-state actors have exercised 'effective control' over certain parts of the Congo and, as such, should be required to provide consent to the presence of the UN peacekeeping operation in those areas.

Similar to the principle of non-intervention, the effective control doctrine is an ill-defined concept within international law, with no definite source; it is instead pieced together through international treaties, regulations and case law.⁶⁰ Determining whether an actor possesses authority within a territory is generally determined through three factors. Firstly, Article 42 of the Hague Regulations states that territory is occupied when it is 'actually

⁵⁸ Eighth Report on State Responsibility, Document A/CN.4/318 and Add.1-4, 2 (1979) Y.B. Int'l L. Comm'n 3, 36.

⁵⁹ T Trefon, *Reinventing Order in the Congo. How People Respond to State Failure in Kinshasa* (Zed Books 2004) 2.

⁶⁰ See, for example, the two control tests (strict control or agency test and the effective control test) set out in *Nicaragua* which help to determine the attribution of international responsibility to States for conduct of other actors or individuals. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14.

placed under the authority of the hostile army' and where 'authority has been established and can be exercised'.⁶¹ Secondly, the Fourth Geneva Convention notes that the Occupying Power 'exercises the functions of the government in such territory'⁶² and thirdly, in international case law it was found that the occupier's authority is 'to the exclusion of the established government'.⁶³ It could be argued that, at certain points within the DRC's history, these three elements are satisfied; most notably, during the 1960 Katangan secession and, more recently, in Eastern Congo where there are a significant number of armed groups.

Taking the first of these examples, shortly before ONUC's deployment, the authorities in the South East province of Katanga declared its independence from the rest of Congo. The sizeable province operated independently from the rest of the Congolese territory, with its own leadership (Moise Tshombé) and infrastructure, and was vehemently at odds with the Congolese government who explicitly requested UN assistance in preventing the secession.⁶⁴ It could therefore be argued that Tshombé and his party had effective control of Katanga as authority had been established and exercised, with the secession leaders exercising the functions of the government in that area, at the exclusion of the established government. As such, it is debatable whether Tshombé's party should have provided

⁶¹ Article 42, Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (29 July 1899) and Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907).

⁶² Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949) (75 UNTS 287), Article 6.

⁶³ *Hostage Case, United States v List (Wilhelm) and ors* (Trial Judgment) (1950) 11 TWC 757.

⁶⁴ S/4382 (n6); S/RES/143 (n4); UNSC Res 145 (22 July 1960) UN Doc S/RES/145.

consent for the deployment of UN troops within Katanga. For the UN, this was a problematic issue as obtaining the Katangan leadership's consent would have gone against the Congolese government's request and could have been interpreted as *de facto* recognition of the secession's authority. Thus, constituting engagement in the matter of Katanga's independence and, as such, 'an illegal interference in the domestic affairs' of the Congo⁶⁵ - an issue which will be discussed further in this Chapter's section on impartiality. However, by not obtaining consent from the Katangan authorities, there was arguably a risk that the presence of peacekeepers could have been an illegal intervention, instead of a consensual peacekeeping intervention. This notion is perhaps supported by the fact that Hammarskjöld initially refused to permit the deployment of UN peacekeepers into Katanga, fearing that it may have been viewed as an occupying force.⁶⁶ As such, it could be argued that Hammarskjöld's interpretation of the principle of consent required consent from Katanga, resulting in a clash between the fundamental principles of consent and impartiality. That is, to acknowledge consent was needed from Katanga would be to recognise their authority; thus, breaching the UN's impartiality by engaging in internal affairs and going against the explicit instructions of the Congolese government. On the other hand, to not obtain consent from Katanga would have maintained the UN's impartiality but potentially risked amounting to intervention if Katanga established it had effective control,

⁶⁵ N Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2007) 11(3) JCSL 465-482, 475.

⁶⁶ R Bunche, *An American Odyssey* (WW Norton & Company 1998) 130.

as it appears to have had. Whilst Hammarskjöld initially delayed deployment into Katanga, ultimately, the UN did not perceive a need to obtain their consent as troops were deployed in the area in late 1960, with the Security Council stating that it 'strongly deprecates the secessionist activities illegally carried out by the provincial administration of Katanga'.⁶⁷ As such, the UN evidently viewed the Congo as a whole and therefore deploying into Katanga was neither coercion nor intervention. The Katangan secession therefore exemplifies both the key role which the SG may play in interpreting peacekeeping norms and how an interpretation of these principles has a direct impact on the interventionist nature of peacekeeping and, consequently, on the principle of non-intervention. It also highlights how, as the previous Chapter discussed, the fundamental norms do not co-exist harmoniously and have to be interpreted or adapted in order to live together, with the interpretation or application of one principle potentially impacting the others. Again, this highlights the argument established in Chapter 3 - that peacekeeping's frameworks are fluid, with the boundaries constantly expanding and contracting depending on how the principles and norms are interpreted and applied in the field. This, in turn, has the potential to blur the boundaries between peacekeeping and intervention, with an expanded or unclear reading of a principle having the potential to undermine the principle of non-intervention.

⁶⁷ UNSC Res 169 (24 November 1961) UN Doc S/RES/169, 1.

Similarly, for MONUC and MONUSCO, if the effective control doctrine is applied, an argument could, again, be made for the need to obtain consent from regional or local authorities, particularly those in the East of the country where there is little state penetration.⁶⁸ The size of Western Europe, the Congo spans multiple times zones, has hundreds of ethnic groups and languages, with 'distinct political-economic structures and regional orientations', a vast number of political parties and 'more importantly, contains numerous competing power networks.'⁶⁹ In particular, 'the national elites' power base does not critically depend on formal control over the East.'⁷⁰ That is, the government has little authority or presence in the East of Congo and, as such, derives most of its income and influence from other parts of the country. This is in part due to the political exclusion or narrow power base which President Mobutu adopted during the 1970s in the midst of his dictatorship.⁷¹ This led to decentralised nodes of power which were not directly dependent on the 'closed networks of presidential patronage'.⁷² More recently, during Kabila (Jnr)'s regime, the 'presidential patronage network's' control 'remained patchy'; thus, its power did not reach to all corners of the national territory and the same can be said of the current regime under Tshisekedi.⁷³ The central government's penetration is therefore highly uneven and is sometimes

⁶⁸ See, for example, the 2013 Special Report of the Secretary-General, which notes that the Congolese Government has 'limited ability to exert full authority over its territory and to provide basic services and security and security to the population'. UNSC, 'Special Report of the Secretary-General on the DRC and the Great Lakes Region' (27 February 2013) UN Doc S/2013/119, para 9.

⁶⁹ J Verweijen, 'Stable Instability: Political Settlements and Armed Groups in the Congo' (Rift Valley Institute 2016) 14.

⁷⁰ *ibid.*

⁷¹ See: W Reno, *Warlord Politics and African States* (Lynne Rienner 1998).

⁷² Verweijen (n69) 17.

⁷³ *ibid.*, 32.

contested, with local actors continuing to 'exercise influence over the lower echelons of the territorial administration and parts of security agencies.'⁷⁴ This is further complicated by the involvement or interventions of neighbouring states, particularly Rwanda and Uganda, who have repeatedly supported armed groups in Eastern Congo to influence change within the DRC or further their interests, including exploitation of natural resources.⁷⁵ Within the East of Congo, then, it could be argued that where authority is established and exercised by non-state actors, at the exclusion of the government, then these actors have effective control and, therefore, should consent, to the presence of UN peacekeeping in their territory. However, whilst this argument may be compelling in theory, in practice, it is unlikely to be as persuasive. As Roth notes, for 'local impositions', it may be more preferable to engage in 'plausibly democratic or constitutional solutions to recognition contests.'⁷⁶ Therefore, rather than seeking to obtain formal consent from local or regional authorities for its presence in those areas, the peacekeeping operation would do better to engage with these leaders to ensure better cooperation and increased implementation of initiatives; as seen, for example, with the Stabilisation Support Unit in Eastern Congo who works collaboratively with numerous actors, including local

⁷⁴ *ibid.*

⁷⁵ See: *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment of 19 December [2005] ICJ Rep 168; H Tamm, 'Status Competition in Africa: Explaining the Rwandan-Ugandan Clashes in the Democratic Republic of Congo' (2019) 118(472) *AfrAff* 509-530; Human Rights Watch, 'Uganda in Eastern DRC: Fueling Political and Ethnic Strife' (HRW, 1 March 2001) <<https://www.hrw.org/report/2001/03/01/uganda-eastern-drc/fueling-political-and-ethnic-strife>> Accessed 16 May 2020.

⁷⁶ B Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 *MelbJIntL* 393-440, 395.

leadership.⁷⁷ Whilst the interpretation of the principle of consent, in this instance, may not expand or alter peacekeeping's frameworks to any great extent, what this example arguably demonstrates are two broader issues. Firstly, from a TWAIL perspective, the complexities of the Congolese political system and inability of the central government to establish authority in the East could be viewed as a legacy of colonialism, specifically, the Scramble for Africa.⁷⁸ That is, the Congo is a prime example of how Western states demarcated arbitrary borders, carving up the African continent and creating artificial boundary lines which cut across pre-established societies, often resulting in the ethnic tensions which we see today– including this complex mix of ethnic groups and competitions for power within the Congo.⁷⁹ Secondly, it arguably also highlights how peacekeeping and, similarly, peacebuilding focus on the state and adopt a top-down, state-centric approach, rather than a bottom-up, grassroots led approach, which some argue may be more beneficial for creating and sustaining long-term peace⁸⁰ and could, from a TWAIL perspective, render peacekeeping less interventionist as it would magnify the voice of the Global South peoples, thereby challenging the dominant Western-led narrative and agenda.

⁷⁷ MONUSCO, 'Stabilisation Support Unit' <<https://monusco.unmissions.org/en/stabilization-support-unit>> Accessed 18 May 2020.

⁷⁸ T Packenham, *The Scramble for Africa* (Abacus New Ed 1992).

⁷⁹ See: K Hoffman, 'How DRC's Colonial Legacy Forged a Nexus Between Ethnicity, Territory and Conflict' (*The Conversation*, 1 February 2021) <<https://theconversation.com/how-drcs-colonial-legacy-forged-a-nexus-between-ethnicity-territory-and-conflict-153469>> Accessed 22 February 2021; T Karbo and M Mutisi, 'Ethnic Conflict in the Democratic Republic of Congo' in D Landis and R Albert (eds) *Handbook of Ethnic Conflict* (Springer 2012) 381-402.

⁸⁰ S Autesserre, *The Frontlines of Peace* (CUP 2010).

2.3 Consent for Deployment

Once consent has been obtained, two further interconnected issues have arisen within the UN's peacekeeping operations in the DRC, which were noted in Chapter 3 as nuances that have emerged within the principle of consent. The first issue is the scope of the host state consent; that is, whether they have consented only to the deployment of the operation or if this extends to any changes made to the operation whilst it is deployed. The second issue is the maintenance of consent and its impact on the operation will also be considered, including whether a withdrawal of consent requires the peacekeepers to also withdraw.

Prior to ONUC's deployment, the UN's first peacekeeping endeavour – UNEF – was created through the recommendatory powers of the General Assembly's in its 'Uniting for Peace' resolution.⁸¹ As such, whilst the GA was 'enabled to *establish* the force with the consent' of troop contributing countries, 'it could not request for force to be *stationed* or *operate* on the territory of a given country' without the host state's consent.⁸² UNEF's presence was therefore 'consensual or contractual', with host state consent required for any changes or decisions within the operation, such as the composition and stationing of the force.⁸³ However, ONUC was authorised by the Security Council, not the General Assembly and, therefore, was 'not based on contract but on legislation'.⁸⁴ Under Chapter VII of the UN

⁸¹ UNGA Res 377 (V) (3 November 1950).

⁸² UNGA, 'Second and Final Report of the Secretary General on the Plan for an Emergency International United Nations Force' (6 November 1956) UN Doc A/3302, 4.

⁸³ Franck (n38) 638-639.

⁸⁴ *ibid*, 639.

Charter, the powers which the Council may exercise in response to threats or breaches of peace and acts of aggression, are not recommendations but rather are compulsory on Member States.⁸⁵ Indeed, when mandating ONUC, the Council 'affirmed that its decisions were mandatory under Chapter VII of the Charter',⁸⁶ not by express reference to Chapter VII but by calling upon member states 'in accordance with Articles 25 and 49 of the Charter to accept and carry out the decisions of the Security Council'.⁸⁷ This was also reiterated by Hammarskjöld who noted that member states were legally bound to accept and carry out Security Council decisions and was later reaffirmed by the ICJ who stated that decisions of the Council, whether taken within Chapter VI or Chapter VII, are binding on Member States under the terms of Article 25.⁸⁸

ONUC's deployment has therefore been described as a 'legislative intervention', in comparison to UNEF's contractual intervention, with two key consequences.⁸⁹ Firstly, ONUC could be 'altered legislatively', whereas 'a contract can only be altered by the consent of the parties'.⁹⁰ Secondly, it could not be terminated, as a consensual relationship could, by the withdrawal of host state consent.⁹¹ Therefore, throughout ONUC's deployment, SG Hammarskjöld made numerous changes to the operation, without host state consent. This included establishing 'neutral' zones for

⁸⁵ Article 25, Charter of the United Nations (24 October 1945) ("UN Charter").

⁸⁶ EM Miller, 'Legal Aspects of United Nations Action in Congo' (1961) 55(1) AJIL 1-28, 15.

⁸⁷ UNSC Res 146 (9 August 1960) UN Doc S/RES/146, para 5.

⁸⁸ *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16.

⁸⁹ Franck (n38) 638-640.

⁹⁰ *ibid*, 639.

⁹¹ *ibid*.

political refugees⁹² and authorising ONUC to exercise force against the government to protect the territorial immunity of the Ghanaian Embassy and to defend ONUC's control of the port of Matadi,⁹³ which was authorised by the Security Council having previously been recommended by the General Assembly.⁹⁴ As Franck notes, 'the consent of the Congolese authorities was never regarded' by any member state, except perhaps France, 'as a prerequisite to altering the nature of the intervention'.⁹⁵ Indeed, the Security Council's second resolution authorised ONUC to restore law and order,⁹⁶ 'without further caveat about acting "in consultation with the Government of the Congo"'.⁹⁷ Furthermore, Hammarskjöld explicitly reminded the Congolese that the relation between themselves and the UN was 'not merely a contractual relationship in which the Republic can impose its conditions as a host state'.⁹⁸ Rather, it was 'a relationship governed by mandatory decisions of the Security Council' and therefore no government could 'by unilateral action' determine how measures taken by the Council, within this context, should be carried out.⁹⁹ Therefore, as explored in the previous Chapter, it appears that host state consent is only legally necessary for the deployment of a Security Council mandated operation, and not for any subsequent changes. Put differently, the host state cannot determine when an operation's deployment is to end

⁹² Annual Report (n39) 7, 35.

⁹³ Annual Report (n39) 24, 37-39.

⁹⁴ UNGA Res 1671 (XVI) (18 December 1961) UN Doc S/RES/1671/XVI; S/RES/169 (n67).

⁹⁵ Franck (n38) 641.

⁹⁶ S/RES/145 (n64).

⁹⁷ Franck (n38) 641.

⁹⁸ UNSC, 'Exchange of Correspondence Between The Secretary-General and the President of the Republic of the Congo Concerning Matadi' (30 March 1961) UN Doc S/4775, 3.

⁹⁹ *ibid.*

or decide when specific Council measures should be terminated, nor could they determine how the mandated tasks were to be implemented.¹⁰⁰ Whilst there may be an anomaly within this argument, as ONUC was, at one point, mandated by the GA when the Council was deadlocked,¹⁰¹ the Assembly extended ONUC's powers but did not create any significant, new tasks beyond what the Council had already created, thereby arguably maintaining the 'legislative' characterisation.¹⁰² Regardless, the invocation of language such as 'mandatory decisions' of the Council and the express stipulation that the host state cannot, unilaterally, alter these Council measures arguably could be viewed as coercive action. That is, as Chapter 2 set out,¹⁰³ if coercive action is understood as activities which override the element of voluntariness then, arguably, this is one such example, as the host state is unable to voluntarily alter or reject changes to the 'mandatory' Security Council decisions. As such, when a peacekeeping operation is undertaking mandated tasks that the host state may wish to challenge, but cannot, then this arguably amounts to intervention and is therefore an expansion of peacekeeping's legal framework and a violation of the principle of non-intervention.

For the UN's subsequent operations in the Congo, as these were all mandated by the Security Council, it is arguable that the ONUC approach extends and, consequently, these are also legislative interventions. Therefore, the host state is, again, not legally required to consent to any

¹⁰⁰ Miller (n86) 15.

¹⁰¹ UNGA Res 1474 (ES-IV) (20 September 1960).

¹⁰² B Oswald, H Durham and A Bates, *Documents on The Law of UN Peace Operations* (OUP 2010) 22.

¹⁰³ Section 1.

changes to the operation, once it is deployed, as evidenced in the previous section of this Chapter when consent was not needed or obtained for MONUC's stabilisation evolution into MONUSCO. Similarly, consent was not provided when the Security Council authorised the deployment of the Force Intervention Brigade (FIB)¹⁰⁴ – a unique, forceful unit authorised to undertake unprecedented levels of force in tactical operations.¹⁰⁵ For both these substantial changes, it is arguable that, whilst not legally necessary under the UN Charter, consent should have been obtained, particularly for the introduction of the FIB, based on the novelty of the concept and to ensure the peacekeeping force complied with international law and did not violate the norm of non-intervention. It could be argued that the FIB therefore creates a new expansion of peacekeeping and the fundamental principles and, subsequently, the principle of non-intervention. In other words, it creates a new hole or exception within the red boundary lines that demarcate both peacekeeping and non-intervention. As such, it is arguable that such a novel development should have required the explicit consent of the host state. Whilst it could, in turn, be argued that consent was implicit, based on the government's agreement to undertake joint operations with the FIB,¹⁰⁶ the fact remains that the FIB broadened peacekeeping's boundaries, bringing it closer to crossing the threshold into intervention.

¹⁰⁴ UNSC, 'Intervention Brigade' Authorised' (28 March 2013) Meetings Coverage SC/10964.

¹⁰⁵ S/RES/2098 (n15).

¹⁰⁶ See: PI Labuda, 'United Nations Peacekeeping as Intervention by Invitation: Host State Consent and the Use of Force in Security Council-Mandated Stabilisation Operations' (2020) JUFIL 1-37; D Olivier, 'The FIB Goes to War' (*African Defence Review*, 29 August 2013) <<https://www.africandefence.net/the-fib-goes-to-war/>> Accessed 18 June 2020 and UNSC, 'Final Report of the Group of Experts on the DRC' (23 January 2014) UN Doc S/2014/42.

Again, it could also be argued that, from a TWAIL perspective, these substantial alterations, taken without explicit host state consent, reflect the power differentials between the host state and the peacekeeping operation. That is, it could be said that once that element of sovereignty is forgone, and the UN has been allowed to enter the host state, the operation, in essence, retains that part of the sovereignty, using it to make key decisions about the functioning of the operation within the host's territory. Indeed, this could, again, be viewed as another example of Anghie's dynamic of difference with the dominant UN (in particular the mandating Security Council) identifying a gap between themselves and the subordinate 'other' (the host state) and then seeking to reduce that gap by mandating specific tasks which the peacekeeping operation must undertake.

2.4 Maintaining or Coercing Consent?

Although a peacekeeping operation still retains its legality, then, the lack of consent to substantial changes, arguably takes the operation much closer to the intervention boundary line, as it is possible to view these changes as forms of coercive action undertaken by the peacekeeping operation/UN to alter the host state – as occurred, for example, throughout ONUC's deployment, with the shift from MONUC to MONUSCO and with the creation of the FIB. This then leads to the second key issue – the maintenance of host state consent throughout the operations deployment- and the distinction between *de jure* and *de facto* consent in practice, which was set out in Chapter 3.¹⁰⁷ Within the DRC, on numerous occasions the

¹⁰⁷ Section 3.1.1.

Congolese government has withdrawn effective consent and has acted to thwart the activities of the peacekeeping operations. In these instances, *de jure* consent is maintained, as this 'cannot be withdrawn within a mandate' but *de facto* the host Government can rescind its effective cooperation.¹⁰⁸ Sustaining consent, in such instances, becomes a political issue, with 'either a re-definition of the mandate to appease the host government and/or some kind of political pressure' to get the host state to agree to the extension of the operation's mandate.¹⁰⁹

For ONUC, difficulties arose almost immediately between the UN/ONUC and the newly formed Congolese government which were exacerbated by both the decolonisation period and Cold War dynamics which were explored in Chapter 2.¹¹⁰ Indeed, Congo's first Prime Minister, Lumumba, chose to turn to the Soviet Union for assistance after relations with the West broke down, resulting in a tense relationship between Lumumba and the then Secretary-General, Hammarskjöld.¹¹¹ Whilst the government had requested UN support, it was initially very hostile towards ONUC and 'every Congolese political faction considered ONUC the enemy'.¹¹² Even when ONUC was viewed more favourably, Congo's political leaders 'change[d] their views as often as their suits'.¹¹³ Lumumba, in particular, severely criticised the operation, arguing that they were not doing enough to prevent the

¹⁰⁸ Interviewee 12 (n2).

¹⁰⁹ *ibid.*

¹¹⁰ Section 3.

¹¹¹ See: A O'Malley, 'What An Awful Body the UN Have Become!!' Anglo-American-UN Relations During the Congo Crisis, February-December 1961' (2016) 14(1) JTransStud 26-46, 31.

¹¹² WJ Durch, 'The UN Operation in the Congo: 1960-1964' in WJ Durch (ed) *The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis* (St Martin's Press 1993) 315-352, 345.

¹¹³ *ibid.*, 333.

Katangan secession.¹¹⁴ Again, as previously noted, whilst this did not deter Hammarskjöld or his successor, U Thant, from implementing the Security Council mandates as they wished (underlining that this could be deemed to be coercive action and therefore intervention), it created an undesirable tension between the operation and the government. From a TWAIL perspective, this also highlights, again, the North-South divide and remnants of the colonial dynamics which still lingered throughout decolonisation, as was seen in Chapter 2. In particular, Chapter 2 noted how Lumumba's relationship with the UN and the Western states could be viewed as an example of a 'Northern subversive strategy' designed to undo regimes which were not favourable to Western hegemonic states.¹¹⁵

Furthermore, as ONUC became increasingly forceful, the loss of consent – both from the host state and other dominant armed actors in the territory-placed individual peacekeepers at risk. As Hatto notes, ONUC demonstrates that if some non-state groups withdraw their consent to the UN's presence, then the safety of UN peacekeepers may be at risk.¹¹⁶ This arguably demonstrates that whilst *de facto* or effective consent may not be legally necessary, it is evidently important for the operational success and the safety of the peacekeepers. Thus, highlighting the importance of maintaining host state consent throughout deployment and perhaps demonstrating a more practical nuance within peacekeeping's legal

¹¹⁴ B Urquhart, 'Character Sketches: Patrice Lumumba' <<https://news.un.org/en/spotlight/patrice-lumumba-brian-urquhart>> Accessed 18 May 2020.

¹¹⁵ BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 ICLR 3-27, 6.

¹¹⁶ R Hatto, 'From Peacekeeping to Peacebuilding: The Evolution of the Role of the United Nations in Peace Operations' (2013) 95(891/892) IRRC 495-515, 498.

framework. That is, the practicalities or realities of peacekeeping in the field may often underpin or buttress the legal principles in some form of an indirect, bottom-up approach which, ultimately, seemingly emphasises the importance and relevance of peacekeeping's principles, particularly the principle of host state consent.

Despite these potential lessons which could have been taken from ONUC, similar tensions have persisted in the UN's later operations. Initially, when the UN re-entered the Congo with MONUC, there were few tensions between the host and the operation. This was perhaps due to the fact that it was a difficult transition period, with a weak government and there was, therefore, an element of reliance on MONUC for ensuring the implementation of the Lusaka Agreement and ending the conflict. This reliance by weak transitional governments is said to lead to the tolerance of a more significant level of intervention as the host government becomes reliant on the UN for security and development assistance.¹¹⁷ Arguably, this was reflected in MONUC's generally positive relationship with the Congolese government within the first few years of its deployment. However, as is typical with transition governments, as they become stronger, they are less interested in a significant military presence and interference in government practices.¹¹⁸ Indeed, the tipping point for the Congolese state appears to have been the 2006 elections – the first 'democratic' elections since the country gained independence in 1960. Following this, MONUC/MONUSCO

¹¹⁷ I Johnstone, 'Managing Consent in Contemporary Peacekeeping Operations' (2011) 18(2) *IntPeacekeep* 168-182, 174-175.

¹¹⁸ *ibid.*

has had a tumultuous relationship with the Congolese government, in particular, Kabila, who, when asked about the peacekeeping operation, said it was 'a love-hate relationship'.¹¹⁹ Whilst noting that both MONUSCO and the Congo were in the same boat – if one succeeded, so did the other – Kabila argued that was a difference in interpretations of 'success', with the operation focusing on 'elections and human rights' whilst the state viewed a reduction in armed groups and a population living in 'total harmony' to be the markers of success.¹²⁰ This view of the UN has driven repeated calls for the operation's exit. As previously noted, in 2009-2010, prior to MONUC's evolution into MONUSCO, Kabila repeatedly called for the UN's departure, which he continued to reiterate throughout this tenure.¹²¹ Most notably, in 2018, when the country prepared to hold further elections, Kabila once again demanded UN withdrawal, arguing that their presence had now been 'largely mitigated'.¹²² However, it has been suggested that Kabila knew that these attempts to 'get rid' of MONUSCO, would be 'very risky' as 'he could risk his own power by putting so much pressure' on the UN to withdraw.¹²³ Instead, Kabila is said to have 'lived with them [MONUSCO] and used them to get rid of this own opponents', such as Jean Pierre Bemba.¹²⁴ This, again, highlights, how the UN peacekeeping operation can, at times, be considered to be a form of coercive action

¹¹⁹ --, 'Big Man in Congo: A Conversation with Joseph Kabila' (*Foreign Affairs*, 14 December 2018) <<https://www.foreignaffairs.com/interviews/2018-12-14/big-man-congo>> Accessed 17 April 2020.

¹²⁰ *ibid.*

¹²¹ UN News (n52).

¹²² UNGA Plenary (73rd Session, 6th & 7th Meetings) (25 September 2018) UN Doc GA/12062.

¹²³ Interview with Congolese Independent Expert ('Interviewee 5') (Oxford, UK, 29 October 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 6.

¹²⁴ *ibid.*

designed to alter the host state (and therefore intervention) as the host state's clear rejections of the operation and withdrawal of effective consent is, in essence, ineffective. In other words, there is a loss of the element of voluntariness here as the host state cannot eject the operation or challenge its tasks during the mandate period. Furthermore, the remarks by Kabila, in particular the statement made about differing interpretations of success, arguably typify the TWAIL arguments which have been made throughout Chapters 2 and 3, concerning the Western-centric ideals and standards which are embedded within peacekeeping and international law. Indeed, there is a clear North-South divide here, with the Global South state (the Congolese government) seeking to challenge the dominant North (UN) agenda, yet is unable to because of the 'legalised hierarchy' which the UN is predicated upon.¹²⁵ This could again be viewed, then, as another example of international law acknowledging and reinforcing 'substantial power differentials between its participants'¹²⁶ as peacekeeping's frameworks and the composition of the UN uphold the mandatory decisions of the Security Council, thereby maintaining the dominance of the Council and, in particular, the permanent five members.

In addition to calling for the UN's withdrawal, the government has also attempted to hinder or manipulate the operation. For example, during the political crisis of 2015 to 2016,¹²⁷ Kabila signed an order forbidding his

¹²⁵ G Simpson, *Great Powers and Outlaw States: Unequal Sovereignty in the International Legal Order* (CUP 2004) 170-171.

¹²⁶ H Charlesworth, 'International Legal Encounters with Democracy' (2017) 8(6) *GlobalPolicy* 34-43, 34.

¹²⁷ HRW, 'DR Congo: Deadly Crackdown on Protests' (*Human Rights Watch*, 24 January 2015) <<https://www.hrw.org/news/2015/01/24/dr-congo-deadly-crackdown-protests>> Accessed 16 June 2020; BBC News, 'DR Congo Election: 17 Dead in Anti-Kabila Protests' (*BBC News*, 19 September 2016)

troops (the FARDC) from operating with MONUSCO.¹²⁸ However, as Senior Military personnel deployed in MONUSCO during the period noted, this order did not affect MONUSCO's military components from operating as normal, particularly within the North and South Kivus, Ituri and parts of Beni, noting that they had 'never requested the Congolese government to give me authorisation'.¹²⁹ They further argued that 'to say the government was the player against UN efficiency is just a lie', whilst they had not always been supportive, 'in terms of freedom of action, you cannot imagine the freedom of action we had'.¹³⁰ The experience of this senior military leader therefore highlights that whilst the host state government may use their consent as a tool to both manipulate the UN peacekeeping operation and to protect their national sovereignty, in practice, this arguably does not have as limiting an effect on the operation as may first appear. At least, this is certainly the case within the East of the country, where, as previously discussed, the government holds little power anyway. Thus, again, through a TWAIL lens, the patterns of domination and subordination are seemingly replicated and maintained.

It also further highlights the differing understandings of the principle of consent, and its impact on the operation, by personnel within the UN Secretariat and those within the UN operation in the field. Whilst some interviewees of this research, who work in the DPO, argued that there is

<<https://www.bbc.co.uk/news/world-africa-37406407>> Accessed 16 June 2020; Crisis Group, 'Boulevard of Broken Dreams: The "Street" and Politics in DR Congo' (Crisis Group Africa Briefing No 123) (ICG 2016).

¹²⁸ Interviewee 11 (n25) pg 44.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

'little you can do' without the host's consent, others, who have worked in the mission in the field argue very differently, noting, as discussed, that the Force component, for example, still have a great deal of operational freedom, even when lacking host state consent or support.¹³¹ This suggests that there may perhaps be a gap between the legal, political and conceptual understanding of the peacekeeping principle in UN headquarters and the operational realities in the mission headquarters, suggesting a need for an increase in dialogue between the different UN personnel to ensure a unified understanding of the principle and how it should best be interpreted and applied within peacekeeping. Without this, peacekeeping's legal framework and, therefore, its boundaries arguably become increasingly blurred; thereby, blurring the distinction between peacekeeping and intervention and consequently undermining the principle of non-intervention.

2.5 Making Sense of Consent in the DRC

The UN's endeavours in the Congo demonstrate the nuances within the principle of consent and, as was seen in Chapter 3, the role of consent in acting as the thin red boundary line between peacekeeping and intervention. In particular, the UN's experience in the Congo highlights how consent may only be legally required for the deployment of a Security Council mandated peacekeeping operation but seemingly still needs to be maintained throughout deployment, firstly, to a certain degree for the functioning of the operation and, secondly, to prevent the operation from

¹³¹ Contrast, Interviewee 16 (n20) and Interviewee 11 (n25).

treading or even crossing the interventionist line. As this section has outlined, maintaining host state consent has been crucial when trying to implement a mandate. Indeed, the Effectiveness of Peace Operations Network has argued that a main strategic constraint of MONUSCO has been the degree to which cooperation with the host state has diminished over the years.¹³² It noted that many interlocutors have observed that MONUSCO 'has been working with a government that does not want it to be there'.¹³³ For some in the DPO, this has been a source of frustration as they recognise the somewhat improved relationship with the new President, Tshisekedi, and note, with regret, 'all those years we spent knocking our head, trying to work with Kabila and his obstinacy'.¹³⁴ Therefore, as previously noted, maintaining consent can become a political issue, requiring changes to the mandate to appease the host or some form of political pressure on the host government. However, as was seen in Chapter 3,¹³⁵ exerting some form of pressure on the host state to maintain their consent to the operation, in itself, could be perceived as a form of coercive action to influence change in the state and, therefore, intervention. Again, this arguably leads us back to the persistent power differentials within both peacekeeping and international relations more broadly, which a TWAIL lens highlights, and which, in turn, influences the interpretation and application of the fundamental principles of peacekeeping.

¹³² Effectiveness of Peace Operations Network, 'Assessing the Effectiveness of the United Nations Mission in the DRC/MONUC-MONUSCO' (NUPI 2019) 18-19, 120-121.

¹³³ *ibid.*

¹³⁴ Interviewee 9 (n1) pg 6.

¹³⁵ Section 3.1.

Indeed, it could be argued that the disregard or seeming manipulation of host state consent expands peacekeeping's legal framework as a significant amount of emphasis is placed upon the host state's initial consent to deployment, which then permits an operation to undertake numerous actions or changes once within the host state. As such, this broader interpretation of the principle expands peacekeeping's frameworks, similarly expanding peacekeeping's red boundary line and thereby undermining or, at times contravening, the principle of non-intervention, as the Congo examples illustrate. Once again, as Chapter 3 noted, the principle of consent ultimately prevents the deployment or presence of the peacekeeping operation from crossing peacekeeping's boundary line and becoming intervention. However, it could be argued that when relations between the operation and the host government breakdown and the consent is effectively withdrawn, then the specific actions of the operation during this time (such as MONUC's shift to MONUSCO) could be viewed as a form of intervention. This therefore, again, demonstrates the fluidity of peacekeeping's boundaries and frameworks and the blurring of the boundary between peacekeeping and intervention.

3 Impartiality

As with the principle of consent, the interpretation and application of the principle of impartiality in the UN's operations in the Congo has also presented numerous issues. This section will explore two of these- joint operations with the Congolese armed forces (FARDC) and the UN's human rights due diligence policy (HRDDP)- which were outlined in Chapter 2.

Whilst there are numerous other examples throughout the UN's history in the Congo which could highlight the application of impartiality (such as ONUC's involvement in the Katanga secession and MONUC and MONUSCO's capacity building or justice reform)¹³⁶ joint military operations are perhaps the most illustrative example. Through an examination of these, the broader issues with the principle of impartiality will be highlighted. The first of these is the difficulty in fulfilling a complex mandate or host state requests and remaining impartial. The second is the risks of conducting joint operations to the perception of the operation by locals, armed groups and other actors and, thirdly, the UN's potential implication in violations of international law by host state actors. This section will explore, then, how these issues, which arise from a broader interpretation of impartiality have expanded peacekeeping's frameworks and, consequently, undermine the principle of non-intervention. This section will therefore question whether there must be limits to this evolution in order for impartiality to remain a legal principle, rather than simply a reflection of practice, and for it to regain peacekeeping's interventionist boundaries.

3.1 Joint Operations with the FARDC

As was seen in the previous Chapter, the authorisation of joint operations between the host state and peacekeeping operation was a significant evolution both within UN peacekeeping and, specifically, within

¹³⁶ CIVIC, 'Enabling Support by Mitigating Risk' (CIVIC, June 2020) <<https://civiliansinconflict.org/publications/policy/enabling-support-by-mitigating-risk/>> Accessed 1 July 2020.

peacekeeping in the DRC.¹³⁷ In the UN's first operation in the Congo, Hammarskjöld explicitly stated that the authority granted to ONUC could not be exercised 'either in competition with the representatives of the host government or in cooperation with them in any joint operation'.¹³⁸ Evidently, then, Hammarskjöld perceived joint ventures to be beyond the remit of peacekeeping, thereby narrowly interpreting the principle of impartiality and constricting peacekeeping's frameworks in this instance. This, in turn, supported the principle of non-intervention and reflected the general non-interventionist rhetoric at that time.¹³⁹ However, forty years later, as the UN returned to the Congo, the principle of impartiality was interpreted much more broadly when joint operations became a part of MONUC's mandate almost immediately.¹⁴⁰ In line with the UN's move to robust peacekeeping and the new concept of impartiality, which was discussed in the previous Chapter, MONUC was soon tasked with protecting civilians and working in cooperation with the host state.

3.1.1 Partnership

MONUC first began to work closely with the Congolese state during 'phase II' of its deployment when the operation's size and tasks were expanded.¹⁴¹ The Security Council tasked MONUC with establishing a joint structure with the Congolese Joint Military Commission, which was created under the

¹³⁷ Section 3.2.2.

¹³⁸ UNSC, 'Report of the Secretary General' (18 July 1960) UN Doc S/4389, 5.

¹³⁹ Section 3.2.2.

¹⁴⁰ S/RES/1291 (n10).

¹⁴¹ *ibid*, para 6, page 3.

Lusaka Ceasefire Agreement, to 'ensure close coordination' during MONUC's deployment.¹⁴² This then led to numerous joint operations and increased cooperation, with 'co-signed orders' between the Congolese and MONUSCO at the strategic, operational and higher levels of the military.¹⁴³ In particular, co-signed orders between MONUSCO and the FARDC began at the brigade and sector levels in South Kivu, Ituri and North Kivu, with the endorsement of senior military in Kinshasa.¹⁴⁴ A former Deputy-Force Commander within MONUC/MONUSCO noted that 'in terms of interaction and joint planning, lots of things had been done and where possible'.¹⁴⁵ Evidently, then, the newer concept of impartiality was interpreted and applied quite broadly within the Congo, almost instantaneously, and this continued, seemingly expanding even further as the operation became more robust and began to shift from MONUC to MONUSCO, with a larger, more complex mandate. For peacekeeping's frameworks, then, this broader interpretation of impartiality arguably expanded peacekeeping's boundary line, thereby taking the operation much closer to the intervention line and undermining the principle of non-intervention. Once again, the differing interpretations of impartiality from ONUC to MONUC could also be said to mirror the shift from non-intervention to interventionist rhetoric that was seen throughout the development of the principle of non-intervention in Chapter 2.

¹⁴² *ibid.*

¹⁴³ Interviewee 11 (n25) pg 45.

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

From late 2008 onwards, MONUC was also increasingly mandated to support FARDC operations against armed groups as part of the former's protection of civilian tasks. Between 2008 and 2010, 'the Mission's mandate evolved significantly' and 'an increasingly comprehensive approach to the provision of support to FARDC was developed.'¹⁴⁶ During this period, one of the most notable joint operations was *Kimia II*, launched by the FARDC in 2009 in the East of Congo, and supported by MONUC.¹⁴⁷ The aim of this operation was to forcibly disarm a Rwandan Hutu armed group, the Democratic Forces for the Liberation of Rwanda (FDLR) which had been present in the DRC since the Rwandan genocide.¹⁴⁸ The launching of *Kimia II* came after the DRC's joint operation (*Umoja Wetu*)¹⁴⁹ with Rwandan military forces, following a shift in political alliances between the DRC and Rwanda in January 2009. This marked a dramatic change in what had been an extremely turbulent relationship, as Chapter 2 noted,¹⁵⁰ and was aimed at bringing peace and security to the region. The operation was therefore highly politicised and involved complex, historical regional matters, rather than simply the internal affairs of the Congo. This arguably raises two key, interconnected problems for the UN, which have reoccurred, in varying degrees, throughout MONUC/MONUSCOs other joint operations with the Congolese government. Firstly, it seemingly draws the UN into, not only

¹⁴⁶ L Zerrougui, 'Strengthening the Rule of Law and Protection of Civilians in the Democratic Republic of the Congo' (*UN Chronicle*, August 2018) <<https://www.un.org/en/chronicle/article/strengthening-rule-law-and-protection-civilians-democratic-republic-congo>> Accessed 10 June 2020.

¹⁴⁷ UNSC, 'Fourth Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (21 November 2008) UN Doc S/2008/728, 3.

¹⁴⁸ See: UNSC, 'Final Report of the Group of Experts on the Democratic Republic of the Congo' (12 December 2008) UN Doc S/2008/773, paras 69-113.

¹⁴⁹ See: S Schulman and F Rusagara, 'Umoja Wetu: A Photo Essay' (2009) 154(2) *RUSIJ* 90-97;

¹⁵⁰ Section 3.4.2.

the internal affairs of the Congo, but also regional matters, thereby calling into question the UN's impartiality and, in turn, taking the operation closer to intervention. That is, whilst the rhetoric of impartiality remained within MONUC's mandate, supporting the host state in conducting operations against specific actors placed the UN against these actors (or other parties to the conflict), thereby potentially jeopardising the UN's impartiality. Indeed, the UN Special Rapporteur on Extrajudicial Executions argued that 'the Security Council's mandate [had] transformed MONUC into a party to the conflict in the Kivus';¹⁵¹ thus, breaching impartiality and potentially triggering international humanitarian law.¹⁵² Again, this demonstrates how peacekeeping's frameworks are fluid, with the principles overlapping and often invoking other elements of international law, such as IHL, thereby contributing to peacekeeping's legal framework.

This broad interpretation and application of the principle of impartiality also has further practical consequences in relation to the perception of the operation and, potentially, the safety of peacekeepers. Given the complex history of the Congo and the Great Lakes region, which was touched upon in Chapter 2,¹⁵³ support of these operations runs 'the risk of partiality' because of the organisation of rebel armed groups along ethnic lines.¹⁵⁴ In particular, MONUC supported FARDC operations, such as *Kimia II*, were heavily influenced by the Tutsi-based rebel group CNDP who were

¹⁵¹ S/2008/773 (n148).

¹⁵² UNSG, 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law' (6 August 1999) UN Doc ST/SGB/1999/13.

¹⁵³ Section 3.4.2.

¹⁵⁴ Vircoulon (n50).

'increasingly resented by other local communities'.¹⁵⁵ This resulted in other Congolese armed groups forging alliances with the FDLR (the group which the joint operation was targeting) in order to protect their community interests.¹⁵⁶ A former MONUC senior military leader noted that the Force therefore had to deal with 'competing priorities' – the mandate, the support of the Congolese army and then attacks because of this support.¹⁵⁷ Indeed, they state that the attack on the Force in Semiliki 'was precisely because we [were] supporting the Congolese army'.¹⁵⁸ An expansive interpretation of impartiality therefore also risks peacekeepers safety by embroiling them in conflict and presenting them as a target.¹⁵⁹

3.1.2 Implications

This then leads to the second notable problem which the UN has faced when conducting joint operations with the Congolese armed forces – the potential implications for the UN if any negative conduct occurs during the operation. As seen in Chapter 3, joint operations not only stretch the principle of impartiality but also potentially implicate the UN in any violations or crimes committed by the host state forces whether before, during or after the joint operation.¹⁶⁰ Indeed, *Kimia II* was severely criticised for failing 'miserably to root out the militias', committing violations of international law and for

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ Interviewee 9 (n1) pg 50.

¹⁵⁸ *ibid.*

¹⁵⁹ See: J Verweijen, 'Strange Battlefield Fellows: The Diagonal Interoperability Between Blue Helmets and the Congolese Army' (2017) 24(3) *IntPeacekeep* 363-387.

¹⁶⁰ Section 3.2.2.

aggravating 'an already devastating humanitarian crisis'.¹⁶¹ It was further found that 'the human cost of the operations ha[d] been high due to the abuses perpetrated against civilian populations' by FARDC troops, FDLR and RUD-Urunana reprisal attacks and by Mai-Mai groups.¹⁶² In particular, during the operation, former rebels of the political armed group CNDP,¹⁶³ who had been integrated into the FARDC, were found to have committed rapes and killings of civilians.¹⁶⁴ It is estimated that more than 1400 civilians had been killed– half by the FDLR and half by Congolese and Rwandan armed forces and allied militia– with 7500 women raped and 900,000 forced to flee their homes.¹⁶⁵ The Secretary-General later acknowledged these allegations, noting that 'some components of the United Nations system called for an immediate end to *Kimia II* and for the withdrawal of MONUC support for FARDC'.¹⁶⁶ Indeed, the UN Special Rapporteur on Extrajudicial Executions described the military operations as 'a disaster', with Operation *Kimia II* 'producing catastrophic results' and noted that in many areas the FARDC 'posed the greatest direct risk to security'.¹⁶⁷ Again, it is difficult to see how the UN could maintain its impartiality and, more broadly, the credibility of the Organisation when it

¹⁶¹ D Steingberg, 'UN Must Stop Backing Congo's Disastrous Operation Against Marauding Rebel Militias' (International Crisis Group, 30 November 2009) <<https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/un-must-stop-backing-congos-disastrous-operation-against-marauding-rebel-militias>> Accessed 26 June 2020.

¹⁶² UNSC, 'Final Report of the Group of Experts on the Democratic Republic of the Congo' (23 November 2009) UN Doc S/2009/603, 8.

¹⁶³ *Congrès National pour la Défense du Peuple*, led by Laurent Nkunda.

¹⁶⁴ Human Rights Watch, 'DRC: Events of 2008' (HRW 2008) <<https://www.hrw.org/world-report/2009/country-chapters/democratic-republic-congo>> Accessed 28 June 2020.

¹⁶⁵ Human Rights Watch, 'You Will be Punished: Attacks on Civilians in Eastern Congo' (HRW 2009) <<https://www.hrw.org/sites/default/files/reports/drc1209webwcover2.pdf>> Accessed 28 June 2020.

¹⁶⁶ UNSC, 'Thirtieth Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo' (4 December 2009) UN Doc S/2009/623, para 9.

¹⁶⁷ P Alston, 'Press Statement by Professor Philip Alston, UN Special Rapporteur on Extrajudicial Executions. Mission to the DR Congo' (15 October 2009) <<https://reliefweb.int/report/democratic-republic-congo/press-statement-professor-philip-alston-un-special-rapporteur>> Accessed 28 June 2020.

was supporting operations and forces that committed such acts. It also demonstrates how, in practice, there are differing understandings within the UN (both in the Secretariat and the operation) of what is an appropriate interpretation of the principle of impartiality, highlighting how, as Chapter 3 noted, the 'normative composition' of peacekeeping operations is 're-balanced each time'.¹⁶⁸ As such, it could be argued that this again exemplifies how peacekeeping's frameworks are continually contorted, re-interpreted and re-applied, thereby leaving the boundary between peacekeeping and intervention uncertain and, thus, undermining the principle of non-intervention.

Furthermore, the Congolese military leadership also presented numerous problems for the UN and their maintenance of impartiality. The Congolese army commander, Major General Dieudonné Amuli Bahigwa, appointed a newly-made General, former CNDP leader Bosco Ntaganda, as his effective deputy commander. At the time, Ntaganda was wanted on an arrest warrant issued by the International Criminal Court (ICC) for alleged war crimes and crimes against humanity¹⁶⁹ – a matter which the Congolese government was said to be aware of.¹⁷⁰ Nevertheless, rather than arrest Ntaganda, as they were legally obliged to do given they were a party to the ICC, the government removed Ntaganda's name from the official organisational structure of the *Kimia II* operation.¹⁷¹ Then, in a letter to

¹⁶⁸ J Karlsrud, 'Special Representatives of the Secretary-General as Norm Arbitrators? Understanding Bottom-up Authority in UN Peacekeeping' (2013) 19(4) GG 525-544, 527.

¹⁶⁹ *The Prosecutor v Bosco Ntaganda* (Judgment) ICC-01/04-02/06 (8 July 2019).

¹⁷⁰ HRW (n164).

¹⁷¹ *Ibid.*

MONUC's head of mission, the Congolese Minister of Defence explicitly stated that Ntaganda was not playing a role in *Kimia II*.¹⁷² However, it was later found that Ntaganda had played an important role in the operation, acting as the *de facto* deputy commander and overseeing the integration CNDP soldiers into the FARDC.¹⁷³ MONUC had therefore, unknowingly, conducted a joint operation with a former rebel leader who was accused of gross violations of international law and who would later lead a mutiny to form the rebel group, M23.¹⁷⁴ M23 then went on to terrorise Eastern Congo, performing summary executions, rapes and forced recruitment of children, culminating in the group capturing the city of Goma and the UN subsequently launching the Force Intervention Brigade, specifically to target the M23 armed group.¹⁷⁵ MONUC and, consequently, the UN were therefore at risk of being complicit in the crimes committed by the FARDC thereby potentially breaching the principle of impartiality. Moreover, this could also be viewed as an example of the host state still exercising their sovereignty in the presence of an external actor. That is, as was noted within the principle of consent, whilst the host state may not be able to force a withdrawal of an operation during the mandate period, they possess various tools at their disposal which, arguably, permits them to still exercise their sovereign rights (here to determine the composition of their national

¹⁷² UNSC, 'Twenty-Eighth Report of the Secretary-General on the United Nations Organization Mission to the Democratic Republic of Congo' (20 June 2009) UN Doc S/2009/335, para 3.

¹⁷³ HRW (n165) 43-44.

¹⁷⁴ See: Al Jazeera, 'Q&A: Who are DR Congo's M23 Rebels?' (*AL Jazeera*, 5 Nov 2013) <<https://www.aljazeera.com/news/africa/2013/08/201382411593336904.html>> Accessed 25 June 2020.

¹⁷⁵ See for example: HRW, 'DR Congo: M23 Rebels Kill, Rape Civilians' (*Human Rights Watch*, 22 July 2013). <<https://www.hrw.org/news/2013/07/22/dr-congo-m23-rebels-kill-rape-civilians>> Accessed 25 June 2020.

armed forces), even when they have forgone an element of sovereignty to the peacekeeping operation.

Despite this incident, MONUC and MONUSCO continued to work alongside the Congolese armed forces. On 1 January 2010, MONUC began a new phase of joint military operations with the FARDC, again against the FDLR, known as *Amani Leo*.¹⁷⁶ The purpose of this operation was similar to that of *Kimia II* – to protect civilians, prevent armed groups, such as the FDLR, from re-gaining territory, and to ‘create conditions for stabilisation and re-establishment of State authority’.¹⁷⁷ However, there was one noticeable difference with this operation in comparison to previous joint ventures – for *Amani Leo*, MONUC began to condition its support to specific FARDC units, based on human rights vetting.¹⁷⁸ Both the FARDC and MONUC military commands agreed to numerous measures such as the deployment of Military Police at the battalion level ‘to prevent and sanction violations of human rights, international humanitarian and refugee law by their own forces’.¹⁷⁹ These conditions embedded within the operational directive of *Amani Leo* arguably demonstrates the lessons which the UN had learned from *Kimia II*; that is, the need to include conditions and precautions to limit or prevent violations and UN complicity. Thus, a conditionality policy

¹⁷⁶ MONUC, ‘DR Congo: Peacekeepers Plan Operation Amani Leo with FARDC in North Kivu’ (*MONUC*, 19 Jan 2010) <<https://reliefweb.int/report/democratic-republic-congo/dr-congo-peacekeepers-plan-operation-amani-leo-fardc-north-kivu>> Accessed 22 June 2020.

¹⁷⁷ MONUC, ‘MONUC Outlines Cooperation with FARDC in Operation Amani Leo’ (*MONUC*, 5 March 2010) <<https://monuc.unmissions.org/en/monuc-outlines-cooperation-fardc-operation-amani-leo>> Accessed 22 June 2010.

¹⁷⁸ --, ‘National Committee for the Defense of the People (CNDP)’ <<https://www.globalsecurity.org/military/world/para/cndp.htm>> Accessed 22 June 2020.

¹⁷⁹ MONUC (n176).

was born, which, for peacekeeping's frameworks, could be viewed as an attempt to retract the boundaries of impartiality and counter the potential complicity of the UN in violations of international law. The conditionality policy could again be viewed, then, as another re-imagining of the principle of impartiality and, perhaps, an implicit recognition that the broadening of impartiality to include joint operations had been taken too far. In other words, the elastic band of peacekeeping's boundaries had been stretched to its limits and the conditionality policy was an attempt to retract this boundary, shrinking peacekeeping's frameworks, reducing peacekeeping's scope and bringing it away from the interventionist line.

3.2 From 'Conditionality' to 'Due Diligence'

The consequences stemming from MONUC's joint operations with the FARDC therefore led to the development of a conditionality policy. In particular, it arose as a direct response to the Kiwanja massacre in 2008 where an estimated 150 people were killed, half a mile away from MONUSCO peacekeepers.¹⁸⁰ As such, the UN was criticised for 'the lack of response and some of the joint support and joint operations that were supposed to go into the FARDC.'¹⁸¹ Whilst the Security Council had noted, within MONUC's mandate, that joint operations were to be undertaken 'in accordance with international humanitarian, human rights and refugee

¹⁸⁰ Human Rights Watch, 'Killings in Kiwanja: The UN's Inability to Protect Civilians' (HRW, 11 December 2018) <<https://www.hrw.org/report/2008/12/11/killings-kiwanja/uns-inability-protect-civilians>> Accessed 24 June 2020.

¹⁸¹ Interview with Senior Human Rights Officer in the Office of the UN High Commissioner of Human Rights ('Interviewee 13') (New York, 6 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>>.

law', this was evidently not enough.¹⁸² MONUC officials, including the protection advisor under the Deputy SRSG, 'who was detailing with OCHA and the protection cluster, therefore began to draft a 'non-paper on the conditionality' on how they should engage and the criteria for determining who they could and could not work with.¹⁸³ This again emphasises the key role of the office of the SRSG/SG in interpreting norms and shaping peacekeeping, in this instance, motivated by the concerns over the FARDC's behaviour and the possibility of the UN being complicit in that behaviour when they provided support or directly engaged in joint operations.¹⁸⁴ However, despite this clear need for steps to be taken, the conditionality policy was said to be a 'very sensitive topic' with some of the senior leadership concerned about the political partnership with the Congolese government and the difficulty in carrying this message to the government and national counterparts.¹⁸⁵ Indeed, to place conditions on MONUC support, would be to place pressure on an already precarious relationship and could have risked losing the operation's relationship with the host state and, consequently, host state consent.¹⁸⁶ Again, this could be viewed as another example of how the fundamental principles exist in a competitive overlapping arena. That is, to withdraw the boundaries of impartiality here by placing conditions on the host state had the potential of impacting the UN's relationship with the host government and consequently impacting the

¹⁸² UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856, para 3(g).

¹⁸³ Interviewee 13 (n181).

¹⁸⁴ --, 'Leaked Memo: MONUC-draft policy on conditionality of support to the FARDC' (12 October 2009) <<http://www.innercitypress.com/OLA1MONUC101209.pdf>> Accessed 27 June 2020.

¹⁸⁵ Interviewee 13 (n181).

¹⁸⁶ See: S Sebastián and A Gorur, 'UN Peacekeeping & Host-State Consent: How Missions Navigate Relationships with Governments' (Stimson Centre March 2018).

principle of consent. Similarly, as Chapter 3 discussed, conditioning support could also be viewed as coercive action designed to influence the state and therefore intervention, as the UN may be deemed to be exerting pressure on the government to make alterations to their armed forces, in order to meet both the UN's standards and basic international laws. Furthermore, from a TWAIL perspective, regardless of the good intentions of the policy, as was also seen in Chapter 3, it could be viewed as another example of Western standards and ideals being imposed by the Global North on the Global South.¹⁸⁷

MONUC was therefore placed in a difficult position, with political officers within the Secretariat concerned about this relationship and arguing that as they had a Security Council mandate, they had no choice but to support the Congolese armed forces.¹⁸⁸ On the other hand, legal officers within the operation recognised that the mandate did not absolve peacekeepers, or the UN, from its international obligations 'in terms of IHL and human rights'.¹⁸⁹ Indeed, the concept did not gain traction until an Office of Legal Affairs (OLA) opinion, which stated the UN's legal responsibilities, including individual legal responsibility for Force Commanders or SRSGs, 'if a peacekeeping operation is either aiding and abetting or being complicit to international crimes'.¹⁹⁰ In an internal memorandum the OLA stated that if MONUC had reason to believe that the FARDC were committing violations of international law, they 'may not lawfully continue to support that

¹⁸⁷ Section 3.2.2.

¹⁸⁸ Interviewee 13 (n181).

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*, pg 46.

operation, but must cease its participation in it completely'.¹⁹¹ MONUC could therefore 'not lawfully provide logistic or "service" support to any FARDC operation' if it had reason to 'believe that the FARDC units' were involved in such violations.¹⁹² The OLA argued that this was on the basis of the UN's obligations under 'customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law'.¹⁹³ The OLA therefore justified the conditionality policy on the basis of peacekeeper's obligations under international law, rather than as a necessity for maintaining the principle of impartiality. Thus, further contributing to peacekeeping's legal framework by re-affirming the potential application of these broader areas of international law.

Following this, the policy was then implemented into MONUC's practice, under the leadership of the then Deputy SRSG for the Rule of Law (and later SRSG for MONUSCO) Leila Zerrougui.¹⁹⁴ Again, highlighting the important role which senior leadership, particularly within the office of the SG/SRSG, have in acting as norm entrepreneurs and shaping the peacekeeping operation. In quite an irregular fashion, the first occasion in which MONUC suspended support for a Congolese operation 'defied all procedure because it was done in a very kind of executive fashion'.¹⁹⁵ That

¹⁹¹ New York Times, 'Confidential note from the UN Office of Legal Affairs to Mr. Le Roy, Head of the Department of Peacekeeping Operations: MONUC-Operation Kimia 2' (1 April 2009) <<https://www.nytimes.com/interactive/projects/documents/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1>> Accessed 1 April 2020.

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ Interviewee 13 (n188). See also: CIVIC (n136).

¹⁹⁵ *ibid.*

is, the current Under-Secretary General for Peace Operations, Jean-Pierre Lacroix, in a press conference in the Congo, 'on the spot' said that 'he would suspend support' for a Congolese battalion which had had been accused of crimes.¹⁹⁶ The policy was then officially endorsed by the Security Council in MONUC's mandate in 2009 where it stated that MONUC support to an FARDC-led military operation was 'strictly conditioned on FARDC's compliance' with IHL, human rights and refugee law.¹⁹⁷ The Council stressed that MONUC and FARDC cooperation should be conducted on the basis of joint planning, with MONUC interceding with the FARDC command 'if elements of a FARDC unit receiving MONUC's support are suspected of having committed grave violations of such laws'.¹⁹⁸ The inclusion of conditionality within MONUC's Security Council mandate was therefore important as it removed the previous caveat argument made by some political officers who argued that support had to be maintained, regardless of any violations, because it was within MONUC's mandate.¹⁹⁹

The conditionality policy, or the roots of the HRDDP, therefore began as a very Congo specific policy, focused on addressing UN complicity and, by extension, arguably restricting or regaining an element of the expanded principle of impartiality. However, it was soon recognised that this was an issue which was not Congo specific. According to senior UN personnel, 'there was a sense of urgency, that we could no longer support operations

¹⁹⁶ *ibid.*

¹⁹⁷ UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906 para 22.

¹⁹⁸ *ibid.*

¹⁹⁹ Interviewee 13 (n181).

that inflicted harm on civilians’ and ‘ultimately, we needed to apply that same policy across the board’.²⁰⁰ As explored in the previous Chapter, this then led to the development of the HRDDP which was adopted as an internal policy in July 2011²⁰¹ before being made public in March 2013.²⁰² This then takes us to the most infamous joint venture to be launched in the DRC – the Force intervention Brigade – which was deployed, perhaps not so coincidentally, at a similar time to the publication of the HRDDP.

3.3 The FIB – An African Solution?

The Force Intervention Brigade (FIB) was deployed as a separate offensive combat unit within the Force Component of MONUSCO in March 2013.²⁰³ The FIB was originally composed of 3069 soldiers and was mandated to carry out ‘targeted offensive operations’ either unilaterally or jointly with the Congolese Armed Forces, FARDC.²⁰⁴ Such operations were to be carried out ‘in a robust, highly mobile and versatile manner’, with the aim of preventing the expansion of armed groups, neutralising these groups and disarming them.²⁰⁵ Again, the objective of the FIB, to target armed groups in the East, was similar to the previous joint operations MONUC/MONUSCO had undertaken with the FARDC. In particular, the FIB was deployed to target the Mouvement du 23 mars (M23). As previously noted, the M23 emerged out of former CNDP rebels who had been recruited into the FARDC

²⁰⁰ Interviewee 10 (n23).

²⁰¹ UN Secretary General, Decision No 2011/18, 13 July 2011. See also: HP Aust, ‘The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?’ (2015) 20(1) JCSL 61-73.

²⁰² UNGA-SC, ‘Human Rights Due Diligence Policy’ (5 March 2013) UN Doc A/67/775-S/2013/110.

²⁰³ S/RES/2098 (n15).

²⁰⁴ *ibid.*

²⁰⁵ S/RES/2098 (n15) para 12.

but later mutinied, denouncing their conditions within the Congolese armed forces and accusing the government of insufficiently committing to the peace agreement.²⁰⁶ Whilst the Brigade is most often discussed in relation to the use of force, it also significantly expanded the principle of impartiality, arguably in three main ways: its invocation of regional interests and interventions; its specific targeting mandate; and the subsequent perception it created of the UN.

Firstly, the way in which the Brigade materialised greatly differed in comparison to the previous joint operations, in that it emerged as an idea amongst external states. The concept was initially conceived at the International Conference of the Great Lakes (ICGLR) and supported by the South African Development Community (SADC).²⁰⁷ As the M23 pursued its strategy in the summer of 2012, the African Union and the ICGLR proposed the establishment of a neutral International Force to 'eradicate existing armed groups'²⁰⁸ and sent a team of representatives to meet with MONUSCO personnel 'to see what could be done'.²⁰⁹ Whilst the concept of a Brigade had 'clearly garnered some support from Kinshasa and other parts of the region', 'it was quite clear that this neutral force was always going to lack the means to be deployed'.²¹⁰ In particular, it is said that the

²⁰⁶ UNSC, 'Report of the Secretary General on the UN Organisation Stabilisation Mission in the Democratic Republic of the Congo' (23 May 2012) UN Doc S/2012/355.

²⁰⁷ See: UN Doc S/2013/119 (n68); UNSC, 'Statement by the Presidential of the Security Council' (19 October 2012) UN Doc S/PRST/2012/22, 2.

²⁰⁸ 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 <<https://www.icglr-rtf.org/publication/view/kampala-declaration-2011/>> Accessed 1 May 2020; 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.

²⁰⁹ Interviewee 9 (n1).

²¹⁰ *ibid.*

Security Council, 'as is still the case, didn't want to finance [as occurred] in Somalia, a new African force'.²¹¹ Instead, the Council requested that the Secretary-General report on options for MONUSCO,²¹² leading to a UN Military Advisor meeting with the Chairs of SADC and ICGLR to discuss harmonising the regional and UN initiatives.²¹³ The FIB could therefore be viewed as a replication of some of the interventionist practices discussed in earlier Chapters. In particular, a form of collective security or multilateral intervention, whereby a group of states have identified a problem within another state and agreed to collectively act in an attempt to remedy this problem; all the while under the auspices of the UN.

Moreover, it could also be viewed as an attempted form of regional intervention and, for some, was 'a move for African solutions to African problems',²¹⁴ which, as seen in Chapter 2,²¹⁵ is more preferable, from a TWAIL perspective, than imported, foreign solutions.²¹⁶ Indeed, the force was composed of troops from South Africa, Tanzania and Malawi²¹⁷ and is said to have been 'a successful attempt of African solutions to claim, take and keep ownership of the African conflict – which Congo is'.²¹⁸ For the Congo, in particular, the FIB also put pressure on Rwanda, who had intervened extensively in the DRC for many years, 'not to intervene and

²¹¹ *ibid.*

²¹² UNSC Res 2076 (20 November 2012) UN Doc S/RES/2076, preamble, para 9.

²¹³ UNSC, 'Letter dated 27 November 2012 from the Secretary-General addressed to the President of the Security Council' (27 November 2012) UN Doc S/2013/876.

²¹⁴ Interviewee 11 (n25) pg 56.

²¹⁵ Section 3.4.2.

²¹⁶ A Mazuri, *Towards a Pax Africana: A Study of Ideology and Ambition*. (University of Chicago 1967) 203.

²¹⁷ 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.

²¹⁸ Interview with Independent Expert ('Interviewee 3') (Skype, 10 December 2018).

not to provide covert support to the M23'.²¹⁹ Therefore, 'what happened around the FIB' is said to have been a 'game changer', as 'the Congolese FARDC was suddenly able to overcome the boogeyman of Rwanda'.²²⁰ The FIB thus played a key role in Congo's attempts to rid itself of historical, regional or neighbouring intervention.

Again, this creates an interesting dynamic which has been previously discussed. That is, it highlights the shift in interventionist practices in the modern era, the move to regional intervention or, specifically in this case, 'African solutions to African problems' which, whilst still intervention, is seemingly more palatable.²²¹ However, whilst it breaks away from Anghie's dynamic of difference and the practice of the Global North intervening to offer solutions or close the gap with the Global South, it is not without its problems. As was noted in earlier Chapters, the concept has been used to justify extensive inter-African intervention, which is as 'problematic and riddled with hidden agendas as traditional interventions'.²²² This has particularly been the case in the Congo, more broadly with its complex relationships with Rwanda and Uganda and, more specifically, for the FIB, with the allegations of sexual exploitation and abuse by FIB troops, mainly from the South African contingent – a matter which will be explored in the subsequent Chapter.²²³ Overall, then, it could be argued that the UN offered the FIB a veneer of legitimacy in addition to legality, as it was deployed

²¹⁹ Interviewee 9 (n1) pg 65.

²²⁰ *ibid.*

²²¹ Chapter 2, Section 3.4.2.

²²² C Ero, 'The Problems with "African Solutions"' (*International Crisis Group*, 2 December 2013) <<https://www.crisisgroup.org/africa/problems-african-solutions>>.

²²³ Chapter 5, Section 4.3.

within a peacekeeping operation, and therefore deployed with the consent of the host state. As such, it arguably expanded peacekeeping's framework significantly, consequently undermining the principle of non-intervention, but, ultimately, not crossing the boundary line into the realm of peace enforcement or intervention because of the element of consent. Indeed, although the previous section noted that an argument could be made for the need to obtain explicit consent from the host state for the deployment of the Brigade, this was, perhaps, not necessary as the Congolese government were said to have manipulated the situation to ensure the Brigade was created.²²⁴ Arguably similar to how the Lumumba government manipulated Cold War tensions to ensure the deployment of ONUC, Kabila's government 'tried to accelerate' the FIB's arrival by 'strengthening all rumours about Ugandan and Rwandan troops on Congolese soil'.²²⁵ Conversely, Rwanda and M23 'tried to delay or even avert the arrival of the intervention brigade through a very aggressive discourse against the UN', including targeted measures to influence and intimidate Tanzania and South Africa²²⁶ and accusations of UN cooperation with the FDLR.²²⁷ Again, this reflects how the broadened concept of impartiality results in the UN becoming embroiled in internal and regional issues, thereby jeopardising its impartiality and taking it closer to the intervention line.

²²⁴ K Berwouts, 'DRC/North Kivu: Waiting for the Intervention Brigade' (*African Arguments*, 22 July 2003) <<https://africanarguments.org/2013/07/22/drc-north-kivu-waiting-for-the-intervention-brigade-by-kris-berwouts/>> Accessed 2 May 2020.

²²⁵ *ibid.*

²²⁶ *ibid.*

²²⁷ L Charbonneau, 'Rwanda Complains to UN about New Congo Brigade' (*Reuters*, 15 July 2013) <<https://www.reuters.com/article/us-congo-democratic-un-rwanda/rwanda-complains-to-u-n-about-new-congo-brigade-idUSBRE96E0PG20130715>> Accessed 5 May 2020.

3.3.1 FIB Targeting: Evolution or Breach?

The creation of the FIB within this complex mix of regional interventions is therefore a significant expansion of the principle of impartiality, which consequently expands peacekeeping's frameworks, potentially undermining the principle of non-intervention. Similarly, the second way in which the FIB expanded impartiality, potentially even breaching the principle, is through its use of targeting. That is, the Security Council mandated the FIB to go beyond the usual peacekeeping powers of using force in defence or reaction to threats, to using force to target specific named actors, thereby seemingly contravening the principle of impartiality and severely undermining, if not violating, the principle of non-intervention. This therefore raises the question– is the FIB's ability to target named actors another evolution of the principle of impartiality or is it a violation of the principle? For the framework brigade or regular troops in MONUSCO, the Security Council had authorised them to 'take all necessary measures' to protect the mission, mandate and civilians from threats of violence from 'any of the parties engaged in the conflict'.²²⁸ Therefore, as a former UN senior legal officer notes, if and when government troops 'were to attack or pose a threat to civilians, as they often have done, MONUSCO would have a duty under the PoC mandate to neutralise that threat'.²²⁹ As such, 'impartiality is arguably intact in the PoC mandate, as long as the mandate is implemented regardless of the source of the threat'.²³⁰ However, the

²²⁸ See for example: S/RES/2098 (n15) para 12(a)(i).

²²⁹ Interviewee 12 (n2).

²³⁰ *ibid.*

FIB's mandate differs from this and is said to be 'biased in every aspect'²³¹ as, on top of the PoC mandate, it permits the FIB to take the initiative and identify, track down and engage with specific armed groups.²³² Mona Ali Khalil argues that 'MONUSCO's impartiality became problematic when its peacekeepers were mandated to engage in hostilities with named actors' – as such, 'it [the FIB's military action] is no longer in response to an actual attack or imminent threat but rather because of the non-state party to the conflict being named or designated as a target', thus 'destroying impartiality'.²³³ As one senior UN human rights advisor noted, it 'puts us completely on one side because you've got a defined enemy'.²³⁴ The Brigade is therefore said to be 'actively engaged in favour of one party to an ongoing armed conflict, disregarding the peacekeeping principles'.²³⁵ It could therefore be argued that the FIB's ability to undertake targeting cannot be viewed as an evolution of the principle of impartiality and is, instead, a breach of the principle, consequently taking peacekeeping beyond its demarcated boundaries and into the realm of intervention. Indeed, senior personnel involved in the FIB's creation noted that 'very few of us thought that the Council would actually agree to everything we was asking for because we was asking for extraordinary powers, powers that had not been granted to any UN entity before', such as the ability to undertake targeted offensive operations.²³⁶ Thus, it could be argued that

²³¹ L Müller, 'The Force Intervention Brigade – United Nations Forces Beyond the Fine Line Between Peacekeeping and Peace Enforcement' (2015) 20(3) JCSL 359-380, 366.

²³² S/RES/2098 (n15).

²³³ *ibid.*

²³⁴ Interviewee 13 (n181) pg 59.

²³⁵ Müller (n231) 360.

²³⁶ Interviewee 9 (n1) pg 60.

there was an awareness that the FIB would greatly expand, or even breach, some of the fundamental principles of peacekeeping, but this was disregarded. This appears to stem from the rationale that 'if we stick only to the principles, if we have a very low reading of what peacekeeping can and cannot do, we are going to have a lot of failures'.²³⁷ This implies that peacekeeping's principles and, therefore, its legal frameworks are malleable and should be expanded and contorted to suit the needs on the ground. This, from a TWAIL perspective, could arguably be viewed as problematic as it renders peacekeeping open to being used by the hegemonic powers, particularly the dominant states in the Security Council, as a tool to further their interests and agenda – as was discussed in Chapters 2 and 3. Further, it is even more problematic for the relevance of the peacekeeping principles and the clarity of peacekeeping's frameworks or boundaries and for the principle of non-intervention as the fluctuating or potentially limitless expanding of peacekeeping's frameworks undermines the principle of non-intervention.

3.3.2 Distinguishing 'Blue' and 'Black' Helmets

This then leads to the third noticeable issue with the inclusion of the FIB, which is the numerous practical consequences which arise from a Brigade that is mandated to target and neutralise specific armed groups.²³⁸ In particular, it creates the perception, for both local communities and armed groups, that all peacekeepers are a combatant in the conflict and therefore

²³⁷ Interviewee 11 (n25) pg 43.

²³⁸ See, for example: DM Tull, 'The Limits and Unintended Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo' (2017) 25(2) *IntPeacekeep* 167-190.

a target, placing peacekeepers at risk. Indeed, it has been noted that the greatest 'challenge' which MONUSCO has faced is the difficulty of distinguishing between 'blue UN and black UN'.²³⁹ That is, within a peacekeeping operation 'you cannot have a physical separation between those who [are] going to go on the offensive and those who are going to go in the protection' or another component, 'it doesn't work like that, it's overlapping'.²⁴⁰ Therefore, it is difficult to distinguish between the civilian or general framework peacekeepers (the 'blue UN') and the military or FIB ('black UN'). The lack of a clear distinction could therefore result in all elements of the operation being associated with the FIB. For civilians or local communities this may create a disconnect between the UN and the local population – an issue which will be explored in the subsequent Chapter when examining the protection of civilians. For armed groups, there is a risk that they may perceive all UN personnel or any organisation associated with the UN as adversaries – as has occurred with international humanitarian organisations in the Congo, who have been targeted by armed groups or connected to peacekeeper's misconduct.²⁴¹ Furthermore, the UN Country Team and UN Office for the Coordination of Humanitarian Affairs (OCHA),²⁴² has often been confused or associated with the UN peacekeeping operation. As former senior OCHA personnel have noted, during MONUC's deployment, when 'the mission started to be part of the

²³⁹ Interview with Congolese Independent Expert ('Interviewee 5') (Oxford, UK, 29 October 2019) DOI: <<http://doi.org/10.17639/nott.7119>>.

²⁴⁰ Interviewee 11 (n25) pg 57.

²⁴¹ Interview with Senior DRC/Great Lakes Coordinator from International Organisation ('Interviewee 2') (Geneva, 12 November 2018) DOI: <<http://doi.org/10.17639/nott.7119>>.

²⁴² See: UN Country Team <<https://drcongo.un.org>> and OCHA <<https://www.unocha.org/drc>> Accessed 20 May 2020.

conflict', 'there was one contingent particularly, from a country I'm not going to cite, that was heavily engaged in the fight, together with the government'.²⁴³ As such, the UN was perceived as supporting the government. This proved to be 'extremely difficult' for OCHA personnel as 'we were in rebel territory', it became 'extremely dangerous for some of our staff' at times.²⁴⁴ Whilst the 'peacekeepers had the 'black logo' and OCHA had 'the blue logo [...] who knows that'.²⁴⁵ Again, this highlights the practical implications²⁴⁶ or consequences of a broad interpretation of impartiality and, arguably, the need for the UN to regain some element of impartiality, through a return to a narrower interpretation of impartiality.

3.4 Partially Impartial

Despite the numerous problems which MONUC and MONUSCO have encountered when undertaking joint operations, they have continued to be conducted. However, the practice has now evolved to include policy innovations, such as the HRDDP, which attempts to address some of the challenges.²⁴⁷ Indeed, it is said that MONUSCO is 'probably the mission that invests the most resources into the implementation of the HRDDP'.²⁴⁸ There are therefore various examples in which MONUSCO has supported FARDC operations but has later withdrew its support due to the host state's behaviour, perhaps the most infamous of which is Operation *Sukola I* and

²⁴³ Interview with Senior UNDP Personnel, formerly OCHA ('Interviewee 1') (Geneva, 20 November 2018) DOI: <<http://doi.org/10.17639/nott.7119>> pg 53.

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ See also: J Labbé and A Boutellis, 'Peace Operations by Proxy: Implications for Humanitarian Action of UN Peacekeeping Partnerships with Non-UN Security Forces' (2013) 95(891/892) *IRRC* 539-559.

²⁴⁷ HRDDP (n202).

²⁴⁸ Interviewee 10 (n23) pg 48.

the 'Red Generals'.²⁴⁹ The operation was, again, aimed at neutralising the armed group, FDLR, in Eastern Congo and initial operational planning included the full support of MONUSCO.²⁵⁰ However, during the planning, it transpired that the head of the operation (General Bruno Mandevu) and the commander of North Kivu, the region where the operation was to be conducted (General Fall Sikabwe) had poor human rights records.²⁵¹ Applying the HRDDP, MONUSCO refused to support the operation unless the two Generals were removed. However, the Congolese government refused to accede to the UN's ultimatum, with the government spokesman, Lambert Mende, stating that it was a 'sovereign decision' and the Congo was 'not under anyone's supervision'²⁵² – language which, from a TWAIL perspective, arguably highlights the ever-present North-South divide and desire of Global South states to challenge hegemonic power. Consequently, the government ignored the UN's deadline and instead unilaterally announced that it would be launching the operation without UN troops and with the two Generals still leading the offensive.²⁵³ It is argued that the UN therefore put themselves in an 'awkward position', by placing themselves 'at loggerheads' with the Congolese government because it was obvious that the condition– removing the two Generals– was never going to be

²⁴⁹ UNSC, 'Midterm Report of the Group of Experts on the Democratic Republic of the Congo' (16 October 2015) UN Doc S/2015/797.

²⁵⁰ *ibid.*, 8.

²⁵¹ M Nichols, 'UN to Congo: Remove Generals Accused of Abuses or Lose Support' (*Reuters*, 4 February 2015) <<https://www.reuters.com/article/us-congodemocratic-un/u-n-to-congo-remove-generals-accused-of-abuses-or-lose-support-idUSKBN0L823120150204>> Accessed 4 May 2020.

²⁵² --, 'DR Congo Rejects UN Ultimatum to Sack Tainted Generals' (*The East African*, 6 February 2015) <<https://www.theeastafrikan.co.ke/news/ea/DR-Congo-rejects-UN-ultimatum-to-sack-tainted-generals/4552908-2615116-j6p131/index.html>> Accessed 30 May 2020.

²⁵³ *ibid.*

met.²⁵⁴ The UN was 'essentially paralysed' and 'all of that contributed to what, overtime, came to be a reduction in the effectiveness' of the FIB.²⁵⁵ Indeed, it is frequently noted that after the FIB's initial success in neutralising the M23, it has been unable to replicate this level of effectiveness, for numerous reasons.²⁵⁶ Following the Red Generals predicament, then, it has been suggested that instead of a 'red flag strategy', a 'mitigation strategy' would have been better.²⁵⁷ That is, the UN could have noted their concerns and found mitigating circumstances or alternative conditions, without demanding the Generals be removed.²⁵⁸ In doing this, it would arguably have prevented the UN from becoming complicit in violations of international law and still maintained relations with the host state, thereby not jeopardising the host's cooperation or consent. This would also remove the potentially coercive ultimatum – to remove specific members of the national armed forces – thereby reducing the potential for the peacekeeping operation to be deemed to be an intervention.

The implementation of the HRDDP in the case of the Red Generals and its impact on the principles of impartiality and consent once again highlights how the fundamental principles cohabit in a competitive arena, with an expansion of one having an impact on another. More importantly, it also reinforces the argument made in Chapter 3 - that the HRDDP, regardless

²⁵⁴ Interviewee 9 (n1).

²⁵⁵ *ibid*, pg 49.

²⁵⁶ EPON (n132).

²⁵⁷ Interview with Independent Expert and Former UN Political Adviser ('Interviewee 8') (New York, 26 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 48.

²⁵⁸ Interviewee 9 (n1) pg 49.

of the seemingly well-intentioned motivations underpinning it, may be viewed as coercive action designed to influence change in the host state. This is based on the fact that it attempts to coerce the host state into making changes to their national armed forces, threatening to withdraw support if the conditions are not, thereby impacting on the state's self-determination and sovereignty. Indeed, the Congolese government explicitly recognised that the composition of their national armed forces was a 'sovereign decision' and refused to comply with the UN request, supporting the argument that the imposition of conditions is a form of coercive action and, therefore, intervention. Once again, from a TWAIL perspective it also demonstrates the patterns of domination and subordination which still linger within the UN and presents another example of a peacekeeping policy which is based on Western standards and ideals.²⁵⁹ This then leads back to the main concern of this broadening of impartiality-whether it amounts to a violation or simply an evolution of the principle and, by extension, whether it merely takes peacekeeping closer to intervention or if it amounts to a contravention of the principle of non-intervention. Whilst the previous Chapter noted that the broadening of impartiality to include joint operations is not a violation of the principle of impartiality but simply an evolution, it remains questionable how far it can evolve before it is no longer a legal principle and is simply practice. That is, the initial joint operations between MONUC and the FARDC could be viewed as an evolution, as they entailed joint planning with co-signed orders and,

²⁵⁹ Chapter 3, Section 3.2.2.

more crucially, were initially conceived in the Lusaka Ceasefire Agreement, which the Congolese host state signed.²⁶⁰ Therefore, joint operations in this instance could be viewed as a voluntary decision by the host state, as they had willingly agreed to them when signing the Lusaka Agreement. Although a TWAIL critique would perhaps argue that it is questionable what choice the Congo had in signing the agreement and would recognise the significant involvement of the Global North in crafting and implementing the Agreement,²⁶¹ the fact remains that the Congolese host state undertook joint planning and led the operations, with MONUC's support.

For the later joint operations, including the FIB, it could be argued that the interpretation and application of impartiality has gone beyond an evolution and has instead breached the principle of impartiality and, similarly, the principle of non-intervention. This is based upon the fact that these newer operations may result in an application the HRDDP which imposes on the state's sovereign rights, such as the creation and composition of their armed forces and the mode of activity or operations conducted by these armed forces. As has been noted throughout this Chapter and in Chapter 3, an application of the HRDDP could therefore be viewed as coercive action when a joint operation is paused or the peacekeeping operation threatens to withdraw support until the host state implements the former's proposed changes. Thus, in this instance, there is a coercive impact on the host

²⁶⁰ Lusaka Agreement (n9).

²⁶¹ See: Crisis Group, 'The Agreement on a Cease-Fire in the Democratic Republic of Congo' (ICG Democratic Republic of Congo Report No 5, 20 August 1999); E Rogier, 'The Inter-Congolese Dialogue: A Critical Overview' in M Malan and JP Gomes, *Challenges of Peace Implementation: The UN Mission in the Democratic Republic of the Congo* (ISS, 2004) 29.

state's sovereign rights, in particular, the structure of their armed forces, thereby arguably amounting to intervention. In a similar vein, the FIB's ability to target specific actors within the host state's territory could also be viewed as a breach, rather than an evolution of the principle of impartiality and, by extension, a breach of non-intervention. That is, as has been noted, targeting is difficult to reconcile with the notion of impartiality and, furthermore, impinges upon the Congolese state's sovereign rights, such as decisions on their national security or, to a certain degree, the state's right to declare war, particularly when the armed groups which the FIB is targeting are supported by neighbouring states, such as Rwanda and Uganda. Thus, the interpretation and application of impartiality here, again, amounts to a violation of the principles of impartiality and non-intervention. Even when the choice of target in these operations is selected by the host state, it is arguable that an element of coercion still exists, in part based upon the fact that the FIB is a creation of the Security Council and, therefore, as previously outlined,²⁶² is a mandatory decision or measure; thus, again removing an element of voluntariness and invoking coercive, compulsory language. In this instance, then, the FIB could be viewed as engaging in coercive action which amounts to political or military intervention, particularly as determining which actors to target could, effectively, influence a change in the Congo's relations with its neighbours. Thus, again, this broader interpretation and application of the principle of impartiality, as evidenced in the creation of the FIB, embroils the UN in

²⁶² Chapter 4, Section 2.

sovereign matters, resulting in the UN attempting to coerce change in the host state and, thus, amounting to intervention.

It could be argued, then, that the interpretation and application of the principle of impartiality within the UN's operations in the Congo has broadened peacekeeping's frameworks beyond an acceptable limit, consequently severely undermining and, at times, contravening the principle of non-intervention. However, it is arguable that despite this, the operation, as a whole, seemingly retains its non-interventionist status by a single thread – host state consent. That is, the consent of the state to the deployment of the operation, as explored in the previous section, is key to preventing the peacekeeping operation from becoming both peace enforcement and intervention. Therefore, whilst some of MONUSCO's practices may amount to intervention, it does not contravene the principle of non-intervention as the operation is acting under the umbrella of host state consent (*de jure* consent) – albeit, at times, this consent may be effectively withdrawn. Furthermore, it could also be argued that this expansion of the principle of impartiality to include joint operations is not a violation of the principle of non-intervention as it is, instead, an intervention by invitation.²⁶³ As was seen in Chapter 2, it has been argued that whilst peacekeepers are authorised to conduct joint operations with host state forces, the Council cannot mandate the host to conduct such operations.²⁶⁴ Therefore, were a host state plans and conducts joint operations, this

²⁶³ Labuda (n106).

²⁶⁴ Chapter 2, Section 4.2.2.

should instead be viewed as 'a function of the host state's consent' for UN intervention and therefore an invitation to intervention.²⁶⁵ From this angle, then, this broader interpretation of impartiality to include joint operations is, perhaps, best viewed as a significant expansion of the peacekeeping frameworks and, therefore, a challenge to but not a violation of the principle of non-intervention.

4 Limited Use of Force

A sense of déjà vu emerges when examining the UN's use of force in the DRC. Each time a peacekeeping operation has entered the country, it has done so tentatively or passively but has then rapidly evolved to a robust, highly forceful operation in an attempt to counter the complexities in the field. As with the previous two principles, the evolution of the principle of non-use of force from narrow to broad can be seen in the UN's peacekeeping endeavours in the Congo. Again, this brings with it a plethora of issues, some of which overlap or impact with the other two principles; demonstrating, once more, the inextricable links between the fundamental principles and their competitive existence. Furthermore, where an expansive use of force has been adopted, it too has seemingly broadened the boundaries of peacekeeping, thereby constricting the boundaries of the principle of non-intervention. Similar questions once again emerge as to how far the principle of non-use of force can be expanded before it becomes something else entirely; that is, how robust can peacekeeping be, before it

²⁶⁵ Labuda (n106) 3.

becomes peace enforcement or intervention? Is there a limit to its expansion or is it, like the principle of impartiality, saved by the single thread of (precarious) host state consent?

4.1 Rapid Evolution

For ONUC, following the traditional model of passive peacekeeping, the Security Council, initially adhered to a strict application of non-use of force.²⁶⁶ ONUC was limited to using force only in response to threats or attacks or to apprehend criminals, and to set up check points or post guard positions to prevent disorder, for example, at airports, rail stations and roads.²⁶⁷ These positions were also only established if required to implement the necessary functions within the agreement with the Congolese government.²⁶⁸ Thus suggesting that, perhaps in these early stages, host state consent may have been needed for operational changes to the mission. More importantly, for the principle of non-use of force, Hammarskjöld emphasised that 'the basic element involved is clearly the prohibition against any initiative in the use of armed force'.²⁶⁹ This was then reiterated in operational directives (rules of engagement) where it was stated that for the 'use of arms', 'on no account are weapons to be used unless in cases of great and sudden emergency and for the purpose of self-defence'.²⁷⁰ Even in self-defence, it was noted that firing 'should be

²⁶⁶ S/RES/143 (n4) 2.

²⁶⁷ S/4775 (n98); UNSC (15th year, 896th meeting) (9-10 September 1960) UN Doc S/PV/896, 14-30.

²⁶⁸ *ibid.*

²⁶⁹ S/4389 (n138) 5.

²⁷⁰ Quoted in: UNSC, 'Observations by the Special Representative of the Secretary-General in the Republic of the Congo on the Memorandum by Major-General HT Alexander (S/4445, Annex II)' (21 August 1960) UN Doc S/4451, 2.

resorted to only in extreme instances'.²⁷¹ Similarly, for the 'protection of internal security', it was further stated that ONUC 'should exhaust all possible peaceful means of keeping order before any resort to force'.²⁷² When interpreting these mandates and directives in the field, the then SRSG, Ralph Bunche, stressed the use of force only in self-defence, referring to ONUC as a 'peace force, not a fighting force', and noting that ONUC was there 'to do harm to no one, if it can be avoided'.²⁷³ Evidently, as was seen with the principle of impartiality, Hammarskjöld and senior leadership within ONUC initially took a very narrow reading of the principles, limiting its use of force and arguably espousing strong non-interventionist rhetoric. This therefore, again, supports the argument set out in Chapter 3 that the office of the SG acts as a norm entrepreneur and, also reflects how peacekeeping evolved in-line with the patterns of intervention which Chapter 2 explored.²⁷⁴ In this instance, the narrow interpretation of force arguably mirrored the non-interventionist rhetoric that was espoused during that time as newly independent states were emerging through decolonisation.²⁷⁵

However, despite this strong non-interventionist, limited use of force discourse, the UN's approach quickly changed as tensions in the Congo grew. Indeed, whilst reiterating minimal force, in private correspondence to Hammarskjöld, Bunche discussed the potential need for ONUC to employ

²⁷¹ *ibid.*

²⁷² *ibid.*

²⁷³ *ibid.*

²⁷⁴ Chapter 3, Section 2.

²⁷⁵ Chapter 2, Section 3.

force 'with [a] liberal interpretation of [the] self-defence principle' in certain areas of the Congo.²⁷⁶ Following the assassination of Lumumba, the death of Hammarskjöld and growing conflict, the Security Council took a much more proactive approach to the use of force. The primary objective of ONUC shifted from taking the 'necessary steps' to support the withdrawal of foreign troops and maintain law and order, to taking 'vigorous action', including 'the use of the requisite measure of force, if necessary'.²⁷⁷ Under these mandates, ONUC launched numerous forceful and, at times, highly controversial operations, such as Operation Morthor which resulted in hundreds of casualties and led to internal disputes over whether the SG had authorised the SRSG to take military action.²⁷⁸ In essence, it was a debate over the extent of the role or boundaries of the Office of the Secretary-General. Furthermore, within this expansion of the use of force, in its final military endeavour, Operation Grandslam, ONUC used airpower for the first time in UN history.²⁷⁹ In an attempt to end the Katangan secession, Swedish jets neutralised Katanga's air force in a coordinated attack with ONUC's ground force, eventually ending the secession.²⁸⁰ ONUC's unique use of airpower, further expanded the interpretation of the principle of non-use of force and set a precedent which has now resulted in attack helicopters and drones becoming an important strategic, military

²⁷⁶ Quoted in: B Urquhart (n35) 329.

²⁷⁷ S/RES/169 (n67) 4.

²⁷⁸ See: Findlay (n7) 75-76; S Collins, 'Letters Show O'Brien Had UN Authority for Actions in Katanga' (*The Irish Times*, 31 November 2018) <<https://www.irishtimes.com/news/politics/letters-show-o-brien-had-un-authority-for-actions-in-katanga-1.3695184>> Accessed 5 May 2020; M Kennedy and A Magennis, *Ireland, the United Nations and the Congo* (Four Courts Press 2014).

²⁷⁹ W Dorn, 'The UN's First "Air Force": Peacekeepers in Combat, Congo 1960-64' (2013) 77(4) *JMilHist* 1399-1425, 1399.

²⁸⁰ *ibid.*

component of peacekeeping operations²⁸¹ - demonstrating how Congo has, at times, shaped UN peacekeeping, rather than peacekeeping shaping the Congo.

This rapid expansion of the principle arguably demonstrates the fluidity of peacekeeping's frameworks and epitomises a recurring dichotomy within peacekeeping and the interpretation and application of the fundamental principles, which is the clash between theory and practice or a battle between idealism and pragmatism. That is, whilst UN peacekeeping was conceived in order to be a passive, monitoring tool, in reality, in order to achieve its aim of maintaining international peace and security, it has had to mould, adapt and evolve beyond these initial conceptions - as has already been seen with the other two fundamental principles. Therefore, it could be said that whilst a certain position or desire is postulated, in practice this may not occur. This is a difficulty which persists today, with current MONUSCO military personnel noting that there is an 'absolute tension' between the idealism and universalism of rights and responsibilities, which is translated into the mandate, and the difficulties peacekeepers face when trying to apply that criteria.²⁸² Thus, the 'idealist position' of, for example, limited use of force 'is right but the pragmatic position is what happens'.²⁸³ It could be further argued that this spotlights a broader issue of the approach peacekeeping takes to post-conflict states which is, applying a TWAIL lens, seemingly based upon Global North

²⁸¹ See for example: T Piiparinen, 'Beyond the Technological Turn: Reconsidering the Significance of the Intervention Brigade and Peacekeeping Drones for UN Conflict Management' (2015) 21(1) GG 141-160.

²⁸² Interview with Senior MONUSCO Military Personnel ('Interviewee 17') (Skype, 9 February 2020)

²⁸³ *ibid.*

standards and ideals, with a lack of consideration for the complexities of the Global South state. Put simply, it could be seen as demonstrating how peacekeeping operations and their mandates are an example of an oversimplified Western answer to a very complex, misunderstood problem.²⁸⁴

No more so is this dichotomy evident than with ONUC and its rapid evolution of the non-use of force which was repeated when the UN returned to the Congo in August 1999 with MONUC. Similar to ONUC's deployment, as previously noted, MONUC was deployed as a traditional, passive operation of 90 military personnel, designed to monitor and observe the Lusaka Ceasefire Agreement²⁸⁵ and was not authorised to use force beyond self-defence. Thus, the principle of non-use of force was narrowly interpreted.²⁸⁶ However, as with ONUC, within one year of deployment the operation rapidly and forcefully expanded, with a 'second phase' of deployment in February 2000, raising the troop ceiling to 500 observers and 5,537 military personnel²⁸⁷ – a significant increase from the initial deployment. This expansion coincided with the UN's shift to robust peacekeeping and the publication of the Brahimi Report, which expanded the use of force from individual self-defence to defence of the mission.²⁸⁸ As was seen in Chapters 2 and 3, through robust peacekeeping, peacekeepers were now permitted to use force to defend themselves, the

²⁸⁴ W Easterly, *The White Man's Burden* (OUP 2006) 9.

²⁸⁵ S/RES/1258 (n10).

²⁸⁶ UNSC Res 1234 (9 April 1999) UN Doc S/RES/1234.

²⁸⁷ S/RES/1291 (n10).

²⁸⁸ UNGA, 'Report of the Panel on United Nations Peace Operations' ("Brahimi Report") (21 August 2000) UN Doc A/55/305-S/2000/809, paras 48-51. UNGA, 'Report of the Special Committee on Peacekeeping Operations' (28 March 2003) UN Doc A/57/767, para 46.

mission's components and the mandate. Thus, as was seen in the previous Chapter, the principle of non-use of force was notably expanded, resulting in a simultaneous expansion of peacekeeping's frameworks and boundaries, which, in turn, began to undermine the principle of non-intervention.²⁸⁹ For MONUC, this robustness was reflected in its Security Council mandate which, for the first time, expressly stated that it was 'acting under Chapter VII', permitting MONUC to 'take the necessary action', as it deemed 'within its capabilities' to protect UN personnel, facilities and equipment and to protect civilians 'under imminent threat of physical violence'.²⁹⁰ Therefore, again, the UN, upon returning to the Congo, rapidly expanded its interpretation and application of the principle of non-use force. Although, on this occasion, whereas ONUC arguably stepped out on its own in its expansion, MONUC's broader application of the use of force was in-keeping with the general consensus within peacekeeping at that time.²⁹¹ However, in an act of Secretary-General norm entrepreneurship and reflecting the use of the DRC as a laboratory for UN peacekeeping, the principle was evolved further in 2002 following another increase in troops to 8,700 personnel.²⁹² On this occasion, the Council endorsed a SG proposal for a revised concept of operations²⁹³ which called for the significant strengthening of MONUC through the creation of a 'forward force' composed of 'two robust task forces' in order to support the

²⁸⁹ Chapter 3, Section 3.3.

²⁹⁰ S/RES/1291 (n10) 8.

²⁹¹ Chapter 3, Section 3.3.

²⁹² UNSC Res 1445 (4 December 2002) UN Doc S/RES/1445 10.

²⁹³ *ibid*, 10.

disarmament, demobilisation and repatriation (DDR) of foreign armed groups.²⁹⁴ Within this mandate, however, the Council simply 'endorsed' the proposal and did not explicitly invoke Chapter VII or permit the operation to 'take all necessary measures' when conducting these duties. It is therefore suggested that this 'leads to the conclusion that this was not an authorisation to use force beyond self-defence'.²⁹⁵ Whilst this may be true, it could be argued that the increased military presence and the introduction of 'robust' task forces all create the persona of a much more robust, forceful operation. That is, it may not have broadened the use of force beyond self-defence but it arguably could still be viewed as a subtle, vertical expansion of the principle or, at the very least, a clarification of the newer concept of self-defence, as it permitted force during the fulfilment of a mandate task – DDR.

Indeed, further nuances within the norm of non-use of force emerged through MONUC when, in 2003, again following a Secretary-General recommendation,²⁹⁶ its use of force was notably expanded with the introduction of a 'Interim Emergency Multinational Force' (IEMF).²⁹⁷ This temporary French-led force was deployed in Bunia for four months and authorised to undertake 'all necessary measures' to fulfil its mandate.²⁹⁸ Most notably, the aim of this force, which later became the EU-led

²⁹⁴ UNSC, 'Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (10 September 2002) UN Doc S/2002/1005, paras 48-54.

²⁹⁵ Sloan (n47).

²⁹⁶ UNSC, 'Letter dated 15 May 2003 from the Secretary-General addressed to the President of the Security Council' (28 May 2003) UN Doc S/2003/574.

²⁹⁷ UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484.

²⁹⁸ *ibid.*

Operation Artemis,²⁹⁹ was 'to contribute to the stabilization of the security conditions'.³⁰⁰ The language within the mandates was therefore, again, robust but now also included the term 'stabilisation',³⁰¹ which could likewise be perceived as a creeping expansion or experiment of this broadened principle of non-use force and, thus, an expansion of peacekeeping's legal framework. As a result, these subtle developments – force to fulfil DDR tasks, the IEMF and the introduction of stabilisation – could all be seen as undermining the principle of non-intervention as they broaden the principle of non-use of force and permit the peacekeeping operation to engage in further activities which creep closer to the intervention boundary line. That is, these activities are proactive (in comparison to the traditional concept of reactive force in self-defence) and relate to matters which fall within the scope of the host state's sovereignty, such as domestic and foreign policies, territorial integrity and state authority, with the ill-defined notion of 'stabilisation', in particular, engaged in institution building. As such, the peacekeeping operations use of force here could arguably be viewed as coercive action designed to influence change in these areas of the host state, thereby amounting to intervention. Even if, at this point, the activities fall short of this threshold and do not amount to intervention or a violation of the principle of non-intervention, they are, at the very least, a notable expansion of peacekeeping's frameworks and, therefore, expand

²⁹⁹ S. Ulriksen, C. Gourlay and C. Mace, 'Operation Artemis: The Shape of Things to Come?' (2004) 11(3) *IntPeacekeep* 508-525.

³⁰⁰ *ibid.*, 1.

³⁰¹ See: A. Gilder A, 'The Effect of 'Stabilization' in the Mandates and Practice of UN Peace Operations' (2019) 66 *NILR* 47-73.

the red boundary line surrounding peacekeeping, consequently contracting the boundaries of non-intervention.

This broadening of the principle of non-use of force also blurs the boundaries between peacekeeping and peace enforcement. Indeed, for some, ONUC's robust military activities, in particular, Operation Morthor 'marked a temporary lapse of ONUC from peacekeeping into peace enforcement'.³⁰² As the former Under-Secretary for Peacekeeping, Marrack Goulding, noted, ONUC was the first 'case of a transition from peacekeeping to peace enforcement'.³⁰³ However, the ICJ in *Expenses* found differently, highlighting that the force was directed at non-state actors, rather than the state, noting that ONUC was not 'coercive or enforcement action' and was commenced 'at the request, or with the consent' of the host state.³⁰⁴ This statement from the ICJ suggests, then, that ONUC was not intervention as it was supported by host state consent and was not coercive action directed at the state. Therefore, as with the principle of impartiality, even if the principle of non-use of force is interpreted broadly, the existence of host state consent, again, means that the operation is consensual peacekeeping and thus not peace enforcement or in violation of the principle of non-intervention. Despite this, perhaps the argument can still be made as to how far these principles are able to expand before they stretch peacekeeping's boundaries to its limits and take it across the line into intervention. Indeed, for MONUC's deployment, the then Secretary-

³⁰² Findlay (n7) 75.

³⁰³ M Goulding, 'The Evolution of United Nations Peacekeeping' (1993) 69(3) *IntAff* 451-464, 453.

³⁰⁴ *Certain Expenses* (n88) 164.

General, Kofi Annan, later noted that 'a firm military intervention, of the kind that went beyond the impartial peacekeeping' that had previously been implemented was necessary to create stability in the East of Congo.³⁰⁵ Arguably, this could be interpreted as both a disregard for the fundamental principles or, again, a battle of idealism versus pragmatism, with the latter prevailing. By extension, it may then be argued that this suggests that MONUC, in practice, went beyond (and was intended to go beyond) peacekeeping, potentially crossing the line into intervention. However, again, it is seemingly the element of consent which hangs as a single thread, holding the peacekeeping operation back from violating the principle of non-intervention.

4.2 An Extension of the State?

This precarious expansion of non-use of force in the Congo began to peak from 2003 to 2006 when the country underwent a transition period, holding its first democratic elections since its independence. During this time, MONUC's troop capacity significantly increased again³⁰⁶ and it was authorised to use 'all necessary means' to complete its mandated tasks, which began to include both the protection of civilians (PoC) and election support.³⁰⁷ For example, it was able to use force to 'deter any foreign or Congolese armed group from attempting to use force to threaten the political process'³⁰⁸ and to assist in the 'establishment of a secure and

³⁰⁵ K Annan, *Interventions: A Life in War and Peace* (Penguin 2013) 117.

³⁰⁶ UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493.

³⁰⁷ UNSC Res 1565 (1 October 2004) UN Doc S/RES/1565, 4(b).

³⁰⁸ UNSC Res 1649 (21 December 2005) UN Doc S/RES/1649.

peaceful environment for the holding of free and transparent elections’.³⁰⁹

In a similar vein, the Security Council again authorised the deployment of a temporary, EU-led force -EUFOR- to ‘support MONUC to stabilise the situation’ and contribute to the protection of civilians.³¹⁰ Once again, then, the Council had authorised a smaller, temporary force and invoked the language of ‘stabilisation’ which resulted in some of the most robust and forceful peacekeeping action in the UN’s history.³¹¹ In particular, the term ‘stabilisation’ was included in the operation’s name in 2010 with the shift from MONUC to MONUSCO,³¹² which further militarised the operation, permitting an increased level of force in order to fulfil a broad range of task in order to create stability.³¹³

Furthermore, the inclusion of protection of civilians within MONUC’s mandate again reflected the broader peacekeeping and intervention agenda, as seen in Chapters 2 and 3. It also marked the beginning of MONUC/MONUSCOs engagement with PoC, which eventually became (and remains) a priority task for the operation.³¹⁴ Whilst this will be discussed in greater detail in the subsequent Chapter, for the principle of non-use of force, the inclusion of PoC expanded the principle as peacekeepers were permitted to use force in defence of themselves, the mission components

³⁰⁹ UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756, para 3(e).

³¹⁰ UNSC Res 1671 (25 April 2006) UN Doc S/RES/1671, 2, 8.

³¹¹ See: T Tardy, ‘The European Union and UN Peace Operations: What Global-Regional Peace and Security Partnership?’ in C de Coning and M Peter (eds) *United Nations Peace Operations in a Changing Global Order* (Palgrave Macmillan 2019) and A Mattelaer, ‘EUFOR RDC and the Development of the ESDP’ (2007) 60(3) *StudDip* 73-89;

³¹² S/RES/1925 (n54).

³¹³ See: C de Coning, ‘Implications of Stabilisation Mandates for the Use of Force in Peace Operations’ in P Nadin, *The Use of Force in UN Peacekeeping* (Routledge 2018); D Curran and CT Hunt, ‘Stabilization at the Expense of Peacebuilding in UN Peacekeeping Operations’ (2020) 26(1) *GG* 46-68.

³¹⁴ See, for example: UNSC Res 1592 (30 March 2005) UN Doc S/RES/1592; S/RES/1856 (n182); UNSC Res 2502 (19 December 2019) UN Doc S/RES/2502.

and the mandate – which now included the extremely ambiguous task of acting to protect civilians from threats of violence.³¹⁵ Thus, it could be argued that the potential for force to be used, under the justification of PoC, became, essentially, limitless. Moreover, this, again, highlights how peacekeeping's principles and norms cohabit in a competitive arena, constantly being re-imagined and altered in reaction to a re-interpretation or application of its counterparts. Indeed, whilst the task of PoC is 'supposed to be implemented neutrally and impartially'; that is, against both state and non-state actors, within the Congo, it is usually only implemented against the latter.³¹⁶ As such, when exercising force against non-state actors, to protect civilians from attacks, MONUC/MONUSCO, like ONUC, has 'ended up fighting on the government's side'.³¹⁷ As was seen within the impartiality section, this then raises issues relating to the risks for peacekeepers, the perception by armed groups of the peacekeepers as legitimate targets and the potential triggering of international humanitarian law. Moreover, it arguably also places the peacekeeping operation in the unusual position of essentially becoming (or being perceived to be) an extensive of the host state armed forces, as its selective use of force almost exclusively against armed groups, in essence, results in the eradication of the state's enemies or opponents – an issue which arguably also occurs with the FIB and its targeting mandate.

³¹⁵ *ibid.*

³¹⁶ C Henderson, *The Use of Force and International Law* (CUP 2018) 186.

³¹⁷ ND White, 'Peacekeeping or War-Fighting?' in ND White and C Henderson, *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 582.

4.2.1 Neutralising state opponents

The introduction of the FIB in 2013 therefore marked another significant expansion or evolution of the principle of non-use of force within the Congo, specifically through its ability to launch 'targeted offensive operations' to 'neutralise' armed groups'.³¹⁸ Indeed, by its own admission, the UN labelled the FIB 'the first ever offensive combat force' in UN peacekeeping,³¹⁹ signalling that this was perhaps a new era of robust peacekeeping. Or, at the very least, given that it was created 'on an exceptional basis and without setting a precedent', it was to be viewed as a temporary expansion of the principle of non-use of force.³²⁰

Whilst the level of force which the FIB is permitted to use is seemingly no different from the level of force which the rest of the framework brigade are authorised to use under MONUSCO's PoC mandate,³²¹ the difference (and therefore the expansion to the non-use of force principle) lies in the way in which this use of force may be triggered or used. Under any PoC mandate, force is authorised against 'any individual or group that commits physical violence against civilians or threatens to do so'.³²² Thus, regardless of whether the perpetrator is a state or non-state actor, the source of the threat is 'a legitimate target'.³²³ Within the FIB's mandate, however, 'the M23 is, named in the resolution as the target, regardless of whether they're physically attacking civilians or jeopardising the safety of civilians in any

³¹⁸ S/RES/2098 (n15) para 9.

³¹⁹ UN Press Release, 'Intervention Brigade Authorized as Security Council Grants Mandate Renewal for United Nations Mission in Democratic Republic of Congo' (SC/10964, 28 March 2013).

³²⁰ S/RES/2098 (n15) para 9.

³²¹ S/RES/2502 (n314).

³²² Interviewee 12 (n2).

³²³ *ibid.*

particular moment'.³²⁴ It is this -the specific, explicit targeting of one of the parties to the conflict- which is 'the new, dynamic, tectonic shift in the mandate'-³²⁵ not the fact that the FIB is using robust force, which was already authorised in MONUSCO's PoC mandate. The targeting of specific actors then, as with the principle of impartiality, is also extremely problematic for the principle of non-use of force and, arguably, expands peacekeeping's frameworks to its limits, taking peacekeeping much closer to the intervention line, potentially violating the principle of non-intervention, if such force is used.

However, whilst this remains true, it has been noted that the FIB 'did not actually need to invoke the offensive nature of the force' because 'the M23 did something incredibly stupid' and attacked the UN.³²⁶ Therefore, the FIB's actions against the M23 were not 'an offensive operation, it was always a self-defence'.³²⁷ As a former MONUSCO military commander noted, by attacking the UN, the M23 'gave us the obvious reasons to intervene, we had to stop the threat, we had to stop the source of what was killing civilians' and 'we was able to fire without causing civilian casualty'.³²⁸ Thus, whilst the FIB had a more expanded version of the use of force, it instead relied upon the broader, self-defence interpretation of force, acting in defence of itself and civilians.³²⁹ As such, it can be argued

³²⁴ *ibid.*

³²⁵ *ibid.*

³²⁶ Interviewee 9 (n1) See also: UNSC, 'Report of the Secretary-General on MONUSCO' (17 December 2013) UN Doc S/2013/757; UNSC, 'Report of the Secretary-General on MONUSCO' (30 June 2014) UN Doc S/2014/450, paras 28, 53.

³²⁷ Interviewee 9 (n1).

³²⁸ Interviewee 11 (n25).

³²⁹ On the FIB and IHL, see: B Sonczyk, 'The Protection of the Intervention Brigade Under Article 8(2)(e)(iii) of the Rome Statute of the International Criminal Court' (2015) 13 QILZoom-in 13, 25-40.

that this expansion of the principle of non-use of force is only an expansion in theory and not, yet, in practice. Therefore, it could perhaps be seen as undermining but not yet violating the principle of non-intervention.

Similarly, the inclusion of the ill-defined term 'neutralising' also seemingly expands the principle of non-use of force, taking peacekeeping much closer to coercive, enforcement action. Indeed, the neutralising of armed groups 'is seen by most people [within the 'broader peacekeeping community'] as the crossing of a line that is very problematic for a peacekeeping operation', which was demonstrated by the 'FIB experience, post-M23'.³³⁰ Again, this neutralisation of specific targets is also where there is an overlap with the principle of impartiality, as previously discussed, as the choice of actor to target has implications for the UN's partiality and the perception of the UN. Again, the selection of targets also potentially renders the operation vulnerable to being used by the state to eradicate its enemies. Thus, in these instances where MONUSCO is mandated to support the state in neutralising armed groups, the peacekeeping operation could arguably be viewed as an extension of the state. Indeed, these 'neutralisation' efforts, which are designed to establish security and stability in certain areas of the Congo, form part of MONUSCO's broader stabilisation-related activities which, some have argued, result in MONUSCO 'entering into a form of mutual symbiosis with the state'.³³¹ That is, in these contexts, such as when MONUSCO has supported the state in neutralising the ADF armed group,

³³⁰ Interviewee 10 (n23) pg 62.

³³¹ AC Day and CT Hunt, 'UN Stabilisation Operations and the Problem of Non-Linear Change: A Relational Approach to Intervening in Governance Ecosystems' (2020) 9(1) Stability 1-23, 14.

'the UN is an extension and amplification of the state, increasing its monopolising potential in the security realm, helping it to eradicate enemies' and boosting the state's capacity to deliver basic services to the population.³³² This, again, appears difficult to reconcile with peacekeeping's fundamental principles and, by extension, the principle of non-intervention, and creates the perception of the UN as undertaking a 'parastatal role',³³³ with over 60 per cent of the population viewing the operation's partnership with the Congolese army negatively.³³⁴ Thus, if the operation is seemingly undertaking functions of the state or acting alongside the host in the execution of these sovereign functions, this could, again, be viewed as a form of intervention but, arguably, one which undermines but does not violate the principle of non-intervention. It could be argued that where the operation undertakes these tasks in joint operations or in co-operation with the host state, it could be viewed as another form of intervention by invitation. If the state is willing to accept the UN undertaking this more forceful role, it could perhaps be viewed as intervention by invitation as the same arguments which have been made earlier and in Chapter 3 in regards to joint operations could, again, be applied, with this being viewed as 'a function of the host state's consent'.³³⁵

Moreover, the targeting and neutralising mandate also has an effect on the legal character of the operation and the risk to peacekeepers. Indeed, as

³³² *ibid.*

³³³ *ibid.*

³³⁴ Congo Research Group, *'Impasse in the Congo: What Do the People Think? Results from a National Public Opinion Poll' (Investigative Report No2, NYU, October 2016)* <<http://congoresearchgroup.org/wp-content/uploads/2016/10/Final-Poll-CRG-BERCI.pdf>> Accessed 12 February 2020].

³³⁵ Labuda (n106).

Mona Ali Khalil notes, 'to the extent that the FIB was an integral part of MONUSCO, the FIB mandate resulted in MONUSCO being deemed a party to the conflict – not just the FIB'.³³⁶ As a result, if and when the FIB is engaged in forceful action and therefore a party to the conflict, international humanitarian law would be triggered;³³⁷ thus, again, contributing to the legal frameworks surrounding peacekeeping. Further, whilst Müller argues that this 'intensified role of the UN as an enforcement actor' was 'not prepared by an assessment and adjustment of the rules and principles applicable to UN missions',³³⁸ interviews conducted throughout this research suggest this might not be entirely accurate. Indeed, this was a matter which was considered by the creators of the Brigade, who contemplated the potential scenarios or implications of the FIB using force against the M23.³³⁹ This included debating whether 'if you stop being a peacekeeper and you become subject to the laws of war, does that make the Secretary-General, as a sort of Commander in Chief of the Intervention Brigade, a legitimate target?'.³⁴⁰ It could therefore be argued that there was a recognition of the legal and practical implications of the Brigade but this seemingly did not outweigh the apparent need for the FIB.³⁴¹ As such, even though the legal implications were considered and the mandate was 'couched in all sorts of caveated language about 'without prejudice to the principles of peacekeeping'', it is 'a sort of conscious departure' from the

³³⁶ Interviewee 12 (n2).

³³⁷ UNSG Bulletin (n152).

³³⁸ Müller (n231) 360.

³³⁹ Interviewee 9 (n1).

³⁴⁰ *ibid*, pg 42.

³⁴¹ See: SC/10964 (n104).

fundamental principles, particularly the non-use of force.³⁴² The inclusion of the FIB within MONUSCO therefore expanded the principle of non-use of force by permitting the use of targeting, and had the consequential effect of changing 'the nature of the mission' as 'it really transforms peace operations into targets and legitimate targets'.³⁴³ FIB troops thus have a 'double status of combatants and of protected persons',³⁴⁴ creating a further nuance within the principle of non-use of force and placing the operation closer to the intervention line. Indeed, it has been argued that the UN understood the FIB to be a peace enforcement mission rather than a peacekeeping mission because it not only uses robust force, it also takes it further into offensive action.³⁴⁵ Therefore, as the peacekeeping operation crosses the line into combatancy, it must also cross the line into intervention, making the action one of enforcement not peacekeeping. Once more then, the introduction of the FIB significantly expanded peacekeeping's frameworks, blurring the boundaries between peacekeeping and intervention and thereby noticeably undermining the principle of non-intervention.

4.3 Force-less Force

It is clear to see that the UN's peacekeeping operations within the Congo have taken a very broad interpretation and application of the principle of non-use of force, thus significantly expanding peacekeeping's frameworks

³⁴² Interviewee 16 (n20) pg 51.

³⁴³ Interviewee 13 (n181) pg 59.

³⁴⁴ Müller (n231) 360.

³⁴⁵ P Cammaert and F Blyth, 'Issue Brief: The UN Intervention Brigade in the Democratic Republic of the Congo' (IPI 2013).

blurring its boundaries. At times, this has been in-keeping with the general consensus on the use of force and interventionist rhetoric, as was outlined in Chapters 2 and 3, such as the shift to robust peacekeeping.³⁴⁶ Whilst, at other times, the operation has arguably taken the initiative and expanded the principle specifically within the Congo (e.g. ONUC during decolonisation and the FIB). This, once again, demonstrates how peacekeeping's principles and norms are re-imagined or re-interpreted for each peacekeeping operation, emphasising the fluidity of the norms and the peacekeeping frameworks. It also highlights the use of the Congo as a peacekeeping laboratory, led by the SRSG and senior leadership, and the reputation which MONUC/MONUSCO has gained for being an innovative mission.³⁴⁷ This, in turn, reinforces the argument made in Chapter 3, that the office of the SG, in particular the SRSG, plays a pivotal norm entrepreneur role, significantly shaping a peacekeeping operation through their interpretation and application of the principles and norms of peacekeeping.

However, throughout this expansion, despite the authorisation to use increased levels of force or target/neutralise named actors, this has not always resulted in these powers being used. Throughout MONUC's deployment, despite the high levels of force which the operation was permitted to use under the broadened concept of self-defence, it was severely criticised for failing to take military action. In particular, it was criticised for failing to prevent armed rebels for taken the city of Bukavu in

³⁴⁶ Chapter 2, Section 4.

³⁴⁷ See, for example: Interviewee 10 (n23); Interviewee 9 (n1) (pp 36-38).

2004, despite the presence of 700 MONUC troops authorised to 'use all necessary means'.³⁴⁸ Similarly, the FIB has also been criticised for failing to act and for having little success after its initial offensive against the M23.³⁴⁹ Indeed, it is argued that 'the dynamic which was created in the liberation' of the territory which M23 had occupied 'was not used to create a positive move and we [the FIB] started to hesitate'.³⁵⁰ Therefore, as senior UN personnel have noted 'we almost never get into trouble for using too much force, but we always get into trouble when we use insufficient force'.³⁵¹ They maintained that they have never had 'a single conversation with any commander or civilian leader in MONUSCO saying 'you use too much force'';³⁵² further arguing that MONUSCO has never received any complaints that they had used disproportionate or unauthorised force from the ICC or Congolese judicial process.³⁵³ In a similar vein, the Cruz report also criticised the operation for failing to use force, claiming that troop contributing nations (TCNs) have 'Chapter VI syndrome';³⁵⁴ thus, suggesting that there is, again, a gap between theory and practice. That is, whilst the principle of non-use of force may be expanded in theory, in practice it is not implemented to its fullest extent and, therefore, in reality,

³⁴⁸ S/RES/1493 (n306); UN News, 'Rebels Take Bukavu in Eastern DR of Congo, Protesters Target UN' (*UN News*, 2 June 2004) <<https://news.un.org/en/story/2004/06/105462-rebels-take-bukavu-eastern-dr-congo-protesters-target-un>> Accessed 6 May 2020.

³⁴⁹ A Novosseloff, 'The Effectiveness of the UN Mission in the Democratic Republic of the Congo' (IPI, 19 December 2019) <<https://theglobalobservatory.org/2019/12/effectiveness-un-mission-democratic-republic-of-the-congo/>> Accessed 8 April 2020.

³⁵⁰ Interviewee 11 (n25) pg 63.

³⁵¹ Interviewee 9 (n1).

³⁵² *ibid.*

³⁵³ *ibid.*

³⁵⁴ Dos Santos Cruz CA, Phillips WR, Cusimano S, 'Improving Security of United Nations Peacekeepers: We need to change the way we are doing business' ("Santos Cruz Report") (19 December 2017) <https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf>.

peacekeeping's framework or boundaries are not as expansive as first appears. Regardless, it still indicates a trend towards intervention, with a more aggressive, militarised form of peacekeeping.³⁵⁵

Whilst there may be many reasons for this lack of use of force, such as the logistics or 'unpreparedness' of operating in terrain as diverse and complex as the Congo (e.g. engaging in jungle warfare),³⁵⁶ arguably a key factor is the TCNs. That is, the political will and interest of the TCN and, by extension, the risk-appetite of their troops within the field.³⁵⁷ It is frequently noted that some peacekeepers have a low risk appetite as 'TCNs are not prepared for them to die on peacekeeping operations'.³⁵⁸ Indeed, 'no normal country would send soldiers to do this type of task and under these conditions' as the jungle terrain of the Congo, combined with the unconventional composition of the armed groups requires 'special forces', as opposed to conspicuous peacekeepers in blue helmets and white vehicles.³⁵⁹ Therefore, it is very difficult to conduct these types of operations, even for 'a national, very well organised and strictly commanded and controlled, well-trained military'.³⁶⁰ The difficulties of the operation, combined with the motivations of the TCNs thus result in a reluctance from peacekeepers. Whilst some troops may be 'much more kind of focused, willing to engage and at least try to fulfil the mandate' others

³⁵⁵ R Gowan, 'Fighting Words: The Cruz Report Restores a Military Voice to Peacekeeping Debates' (*IPI*, 19 February 2018) <<https://theglobalobservatory.org/2018/02/fighting-words-cruz-report-restores-military-voice/>> Accessed 18 May 2020.

³⁵⁶ Novosseloff (n349).

³⁵⁷ Verweijen (n159).

³⁵⁸ Interviewee 4 (n3) pg 23.

³⁵⁹ Interviewee 13 (n181).

³⁶⁰ *ibid.*

are not willing and able and 'have no interest or an appetite to engage into an environment that is often alien to them'.³⁶¹ This therefore may be one contributing factor or explanation for the lack of force used within the Congo, despite the heightened levels of use of force. It also, arguably, highlights the inadequacy of peacekeeping as a tool for these types of activities, which, again, leads back to an overarching debate within peacekeeping, which is whether it should be undertaking enforcement-style tasks at all.³⁶² As such, if the expanded use of force is not being used in practice, then it follows that there is little need for the broader interpretation of non-use of force and, as such, peacekeeping frameworks should be retracted, with a move back towards less robust peacekeeping. This, in turn, would bring peacekeeping away from the enforcement or intervention boundary line, consequently reducing peacekeeping's interventionist nature and supporting the principle of non-intervention. Furthermore, the Cruz report's highlighting of a seeming reluctance to execute Chapter VII action could perhaps be viewed as a recognition by some TCNs that such forceful,³⁶³ coercive action goes beyond peacekeeping's remit and is, therefore, illegal intervention. There are of course, exceptions to these generalisations, as the President of Uruguay vehemently disagreed with robust peacekeeping and the deployment of the FIB, yet still provided troops who, perhaps somewhat ironically, 'did a good

³⁶¹ Interview with Senior DRC/Great Lakes Coordinator from International Organisation ('Interviewee 2') (Geneva, 12 November 2018) DOI: <<http://doi.org/10.17639/nott.7119>> pg 23.

³⁶² See, for example: T Tardy, 'A Critique of Robust Peacekeeping in Contemporary Peace Operations' (2011) 18(2) *IntPeacekeep* 152-167; M Peter, 'Between Doctrine and Practice: The UN Peacekeeping Dilemma' (2015) 21(3) *GG* 351-370.

³⁶³ Cruz Report (n354).

job' as they were more familiar with the terrain and style of warfare than other TCNs.³⁶⁴ It could also, from a TWAIL perspective, be viewed as an unwillingness by the Global South TCNs to carry out the bidding of the Global North led Security Council. The levels of force used within peacekeeping operations may therefore be dependent, to a certain extent, on the motivations, interests and non-interventionist views of the TCN. In particular, many of the Global South TCNs (such as countries in the G77 and NAM) are strong supporters of the principle of non-intervention, perhaps offering an explanation for the reluctance to engage in robust force in the host state. This then leads, again, to the importance of the fundamental principles in providing a red boundary line around peacekeeping, consequently preventing it from crossing the line and becoming intervention. Within the Congo, the rapid evolution of force, introduction of temporary forces and terms such as 'neutralisation' and 'stabilisation', combined with the broad PoC mandates and the FIB's targeting powers all arguably expand the principle of non-use force, at times to its limits and perhaps even beyond. As was noted with the principle of impartiality, this expansion then has 'a degree of drift, which has knock on effects on the other two' principles;³⁶⁵ demonstrating the inextricable links between the holy trinity and their un-harmonious co-existence. More specifically, it arguably highlights how the peacekeeping operation, again, is reliant on the principle of consent to maintain its peacekeeping status

³⁶⁴ Interviewee 11 (n25) pg 59.

³⁶⁵ Interviewee 16 (n20) pg 67.

and how the basis of robust joint of jointly planned operations may lie in consent, with these peacekeeping operations therefore better understood as a form of intervention by invitation.³⁶⁶

As with the principle of impartiality, questions remain as to how far the principle can be expanded before it is no longer a legal principle of peacekeeping. It appears that the increased levels of force, through the expanded interpretation of self-defence, may remain as they are now common practice throughout most peacekeeping operations.³⁶⁷ However, what is still questionable is the effect that the FIB and its targeting/neutralising mandate may have on the principle - whether it is simply a temporary or exceptional expansion, or whether it has now set a precedent and has permanently expanded the boundaries of peacekeeping's use of force. For some, it is obvious that 'of course, in legal terms, we now have a precedence, there's no denying it' but it is noted that the 'alignment of stars' which was needed to create the Brigade is hard to replicate.³⁶⁸ That is, there existed a rare agreement or mutuality of understanding between the Security Council, those in the field and MONUSCO in order to allow for the creation of the Brigade.³⁶⁹ For others, it is perhaps a welcome relief that a replication of the FIB would be difficult. Whilst it is recognised that the 'FIB had its moment where it was potentially useful', in that it had an important 'political role', namely through having SADC, as a regional entity invested in Congo, ultimately, the FIB is said to

³⁶⁶ Labuda (n106) Chapter 2, Section 4.2.2.

³⁶⁷ Such as in Darfur, CAR, Mali, and South Sudan.

³⁶⁸ Interviewee 9 (n1) pg 65.

³⁶⁹ *ibid.*

be 'flawed and shouldn't be repeated'.³⁷⁰ Indeed, senior personnel within the UN's Policy, Evaluation and Training Division have noted that 'in terms of doctrine and policy development, we have always treated the FIB as a Secretary-General's exception, as does the Council's approach' through, for example, the explicit statement within MONUSCO's resolutions, that it does not create a precedent.³⁷¹ There was therefore a sense of relief 'from the perspective of people in New York and peacekeeping policy people' who were 'very glad that it hasn't been replicated anywhere else because it is such an exceptional mandate' that runs counter to tried and tested peacekeeping doctrine and principles.³⁷²

5 'Holy Trinity' or 'Holy Principle'?

An exploration of an interpretation and application of peacekeeping's legal framework in the DRC therefore raises numerous issues. Firstly, this Chapter has demonstrated how the fundamental principles which constitute peacekeeping's core legal framework – consent, impartiality and non-use of force- do not exist harmoniously but, instead, overlap and are continually re-interpreted, re-applied and re-balanced, arguably, through each mandate renewal or significant evolution of the peacekeeping operation. That is, when one of the principles is expanded, or interpreted more broadly, such as when MONUSCO has embarked upon joint operations with the Congolese armed forces, then this has significantly expanded the

³⁷⁰ Interview with Independent Expert and Former UN Political Adviser ('Interviewee 8') (New York, 26 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 34.

³⁷¹ Interviewee 10 (n23) pg 62.

³⁷² *ibid.*

principles of impartiality and limited use of force and, as such, has required a re-balancing of all of the principles.

This, in turn, leads to the second notable issue which has arisen from this Chapter's exploration – that an expanded interpretation of these principles results in an expanded peacekeeping framework, which then undermines or potentially contravenes the principle of non-intervention. Throughout this Chapter, there have been various points throughout ONUC, MONUC and MONUSCO's deployment where it is arguable that peacekeeping has amounted to coercive action to influence change in the host state and, therefore, intervention. Examples of this include: ONUC's involvement in the Katanga secession, MONUC's shift to a stabilisation operation, joint operations conducted by both MONUC and MONUSCO and the implementation of the HRDDP. It has been argued that in all of these instances, the peacekeeping operation has engaged in sovereign matters such as the composition of the host state armed forces and diplomatic or political policy issues and has attempted to coerce change within these areas, thereby attempting to influence change in the host state; thus, amounting to intervention. Similarly, the Chapter has also highlighted how, applying a TWAIL lens, these elements of coercion often expose the recurring North-South divide, patterns of dominance and the furtherance of Western-centric ideals and standards – such as the pressure exerted on states to provide consent to a mandate renewal and the imposition of conditions or standards (through the HRDDP) which must be met before joint operations can be undertaken.

The third issue which has then arisen from this Chapter's examination of peacekeeping in the DRC, is whether ONUC, MONUC and MONUSCO's re-interpretation of the fundamental principles, and therefore the peacekeeping frameworks, are best viewed as an evolution or a breach of peacekeeping's boundaries and, by extension, whether they undermine or contravene the principle of non-intervention. Again, the question which must be asked is – should there be a limit on how far these principles may evolve? This is a particularly poignant issue when it comes to the current formation of MONUSCO, which includes the FIB. As this Chapter has demonstrated, the FIB has arguably been one of the greatest challenges to the fundamental principles of peacekeeping, significantly blurring the boundaries between peacekeeping and peace enforcement or intervention. It has invoked numerous debates over the legality of the operation, its compatibility with the fundamental principles and its practical effectiveness, including the risk it imposes upon peacekeepers and the potential invocation of international humanitarian law. It has also highlighted the different approaches to intervention, particularly within the Security Council. That is, whilst the UK and France supported the creation of the Brigade, both Russia and China expressed reservations, with Russia emphasising the inclusion of the fundamental principles in the resolution and China stressing the importance of the operation not setting a precedent.³⁷³ Despite this, the Chapter has highlighted how the FIB's mandate to use targeted force to neutralise armed groups is particularly

³⁷³ UNSC (68th year, 6943rd meeting) (28 March 2013) UN Doc S/PV.6943.

problematic and difficult to reconcile with the principles of impartiality and limited use of force, thus taking the peacekeeping operation beyond the boundaries of peacekeeping and into the realm of intervention, thereby seemingly violating the principle of non-intervention. However, as has been noted, it appears that for this expansion of MONUSCO to include the FIB and for most other noticeable evolutions throughout MONUC and MONUSCO's history, the operations have been saved from crossing the boundary line and becoming intervention because of the initial host state consent that was given to the deployment of the operations. Therefore, whilst the principles of impartiality and non-use of force may be expanded to their very limits, host state consent acts as a single, thin barrier, preventing the operation from violating these principles and amounting to a violation of the principle of non-intervention. Put differently, the UN's peacekeeping operations in the Congo demonstrate how consent is the distinction between peacekeeping and peace enforcement or intervention. It follows, then, that, in theory, as a peacekeeping operation is only ever deployed with host state consent, it can continually expand and evolve once in the field, without ever violating the principle of non-intervention, because of this initial consent. This is arguably problematic as it turns the peacekeeping operation into a hybrid peacekeeping-intervention, which is a far cry from the traditional concept of peacekeeping. Indeed, in these instances, it is perhaps best to view the peacekeeping operation not as peacekeeping but as a form of intervention by invitation, 'a function of the

host state's consent',³⁷⁴ as has been argued throughout this Chapter, in particular in relation to joint operations.

This deeper level of analysis into peacekeeping's legal frameworks in practice has therefore demonstrated the complex relationship between the fundamental legal principles and the ability of a peacekeeping operation to significantly evolve without, overall, breaching peacekeeping's boundary line and becoming intervention. These evolutions within the operations in the Congo could therefore be seen as, at times, undermining the principle of non-intervention but, ultimately, not violating it because of the principle of consent. Building upon this analysis, the subsequent Chapter will examine peacekeeping's normative framework, again providing specific examples of how peacekeeping's norms have been interpreted and applied within the Congo and, whether, they too support or undermine the principle of non-intervention.

³⁷⁴ Labuda (n106).

Chapter 5

The Congo and Peacekeeping's Normative Framework

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1 Introduction

Whilst the fundamental principles form the core of peacekeeping, constituting a large portion of peacekeeping's legal framework, surrounding this is a broader normative framework. Following on from Chapter 4's analysis of the legal principles, this Chapter will consider how the norms of democracy promotion, protection of civilians (PoC) and the prohibition of sexual exploitation and abuse (SEA) have been interpreted and applied in the Congo. These norms, although possessing commonalities with principles of law are, ultimately, not underpinned by law and therefore do not amount to legal principles. However, this distinction between laws and norms is not always a clear one, as will be seen within this Chapter, as some norms (such as PoC) possess some legal underpinnings and therefore make a secondary contribution to peacekeeping's legal framework. The purpose of this Chapter, then, is to explore the evolution of peacekeeping's norms within the UN's operations in the Congo, examining, as was done in Chapter 4, whether an application of these norms has, at times, resulted in peacekeeping reinforcing or undermining the principle of non-intervention.

1.1 Multi-dimensional Christmas Trees

As seen in Chapter 3, as peacekeeping operations significantly expanded after the Cold War, with the shift to multi-dimensional peacekeeping, normative aspects began to play an increasingly important role.¹ These norms therefore form a part of peacekeeping's broader normative

¹ See: M Bothe, 'UN Peace Operations' in D Fleck (ed) *The Handbook of the Law of Visiting Forces* (2nd edn, OUP, 2018) 50-74.

framework which, unlike the 'holy trinity', are not required by fundamental rules of international law and are therefore not legal principles. Despite this, the norms do assist in dealing with some of peacekeeping's complex legal questions, such as the responsibilities and liabilities of peacekeepers accused of sexual exploitation and abuse, and the applicability of international humanitarian and human rights law.² As such, the norms, at times, may have legal underpinnings or may invoke elements of international law thereby providing a subsidiary contribution to peacekeeping's legal framework, again demonstrating how, as discussed in Chapter 3, the frameworks overlap. This Chapter will therefore assess how this normative framework has been interpreted and applied in the Congo and how this has impacted the boundaries of peacekeeping and, consequently, the principle of non-intervention. It will be argued that, as with the legal principles in the previous Chapter, where these new norms have been interpreted broadly, it has expanded the boundaries of peacekeeping, consequently taking peacekeeping closer to intervention and thus contracting or potentially contravening the principle of non-intervention.

An expansion of these three newer concepts has also seemingly had a knock-on effect on the fundamental legal principles. For example, both the protection of civilians and democracy promotion have resulted in increased levels of force being used. Thus, an expansion of these norms may result

² See: ND White, 'Peacekeeping and International Law' in J Koops, N MacQueen, T Tardy and PD Williams (eds) *The Oxford Handbook of United Nations Peacekeeping Operations* (OUP, 2016) 43-59.

in a simultaneous expansion or re-imagining of the principle of non-use of force. Again, as was discussed in the previous Chapter, this highlights how peacekeeping's norms exist in an unharmoniously competitive arena, in which they are re-balanced for each peacekeeping operation and, even, each mandate.³ This re-balancing or waxing and waning of norms is particularly evident in the UN's peacekeeping operations in the DRC, which is often credited for being innovative⁴ and 'a test case for a lot of ideas'.⁵ In particular, MONUSCO is said to be 'quite proactive in initiating changes from within the mission, rather than waiting for the Council or waiting for headquarters to tell them'.⁶ These innovations are often led by or credited to senior, and to a certain extent, junior personnel within MONUSCO, in particular the Office of the Special Representative of the Secretary-General (SRSG).⁷ It could be argued, then, that MONUSCO's interpretation and implementation of the peacekeeping norms and Council mandate once again highlights the key norm entrepreneurship role of the SG, SRSG and other senior leadership stemming from the SG's office, which was explored in Chapter 3.⁸

This then leads to a further issue with these new, somewhat controversial norms, which has arisen in the Congo, and that is the expansion of the

³ J Karlsrud, 'Special Representatives of the Secretary-General as Norm Arbitrators? Understanding Bottom-up Authority in UN Peacekeeping' (2013) 19(4) GG 525-544.

⁴ Interview with Senior UN DPPA-DPO Personnel ('Interviewee 9') (New York, 27 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>>

⁵ Interview with Independent Expert and Former UN Political Adviser ('Interviewee 8') (New York, 26 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>>.

⁶ Interview with Senior UN DPO Personnel, Policy, Evaluation and Training Division ('Interviewee 10') (New York, 3 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 37.

⁷ *ibid.*

⁸ Section 2.

peacekeeping mandate and the tasks of multi-dimensional peacekeeping operations. Contemporary peacekeeping mandates are often referred to as 'Christmas tree' mandates, given the extensive list of tasks which the Security Council places upon an operation.⁹ For some, these mandates are problematic, particularly in countries such as the DRC, as, once MONUC/MONUSCO was 'no longer helping parties emerging from a conflict [to] implement a peace agreement', it became 'an open ended, ill-defined statebuilding enterprise'.¹⁰ This is then said to have become further problematic as the operation's PoC mandate developed, with the concept of PoC expanding to include 'protecting all civilians, everywhere at all times' and 'obviously, that's created a huge gap in terms of expectations versus what the mission is actually able to do'.¹¹ Similarly, the one-year mandate system and renewal 'frustrates a lot of actors on the ground' and 'seems a little bit futile', with 'so much energy and time' going into 'discussing and negotiating', when 'everyone really knows that in order to bring peace and stability to a context like Congo, you need much more medium and longer term solutions'.¹²

As a result of these significantly expanded mandates, in 2019/2020, as the operation is preparing to leave, senior UN personnel note that 'we're looking for an exit strategy' and 'we realise 'well, there is no exit''.¹³ Whilst

⁹ Security Council Report, 'Is Christmas Really Over? The Mandating of Peace Operations' (UNSC, 22 February 2019) <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_council_mandating_february_2019.pdf> Accessed 20 May 2020.

¹⁰ Interview with Senior Political Affairs Officer, UN DPO ('Interviewee 16') (New York, 10 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 18.

¹¹ *ibid.*

¹² Interview with Senior Adviser in the Office of the Special Representative on Conflict Related Sexual Violence ('Interviewee 14') (New York, 9 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 21.

¹³ Interviewee 16 (n10).

there may be numerous answers to this conundrum, one possible solution which could perhaps be learnt from MONUSCO's experience is that, 'the Council should be less ambitious in designing mandates'.¹⁴ Arguably, one way in which this could be done, is through a retraction of peacekeeping's normative frameworks, as this Chapter will explore. The Chapter therefore seeks to question – should these additional norms be a part of peacekeeping frameworks? That is, although these norms and the activities which stem from them have now become common-place in the evolved model of peacekeeping, with the numerous multi-dimensional operations, should they remain a model for peacekeeping? In other words, has peacekeeping now reached the limits of its current evolutionary cycle and, therefore, should it begin to retract back to the more traditional model of peacekeeping and away from these large, multi-dimensional operations?

All of these questions arise when considering the UN's operations in the Congo and, in particular, MONUSCO's interpretation and application of the norms of democracy promotion, PoC and prohibition of SEA. With MONUSCO now almost two years into a three-year exit strategy, and with plans to gradually withdraw from the six provinces it is currently present in (starting with the Kasais in June 2021),¹⁵ the difficulties in withdrawing such a large operation from a complex situation are evident.¹⁶ It therefore calls into question the need, feasibility and (as has been explored

¹⁴ Interviewee 8 (n5) pg 57.

¹⁵ UNSC, 'Report of the Secretary General' (30 November 2020) UN Doc S/2020/1150.

¹⁶ See: UNSC, 'Joint Strategy on the Progressive Drawdown of MONUSCO' (27 October 2020) UN Doc S/2020/1041.

throughout this thesis) the legality of multi-dimensional operations. Indeed, the steady decline in these large peacekeeping operations over the last five years due to budget pressures, a divided Security Council and contested track records, combined with the impact of the COVID-19 pandemic,¹⁷ have led some to question their future.¹⁸ It could be argued, then, that a shrinking of the Security Council mandates, in particular through a reduction of peacekeeping's normative framework, would help to resolve some of these practical issues and some of the legal implications, such as debates over peacekeeping's Charter basis.¹⁹ This retraction of peacekeeping's normative framework would then retract the overall boundaries of peacekeeping and firm the thin red line between peacekeeping and intervention, thereby reinforcing the principle of non-intervention.

This Chapter will therefore explore all of these issues, taking each of the norms in turn – democracy promotion, protection of civilians and prohibition of sexual exploitation and abuse- focusing on how an expansion of these norms, through multi-dimensional operations such as MONUC/MONUSCO, has expanded peacekeeping's frameworks and thus, undermined or potentially contravened the principle of non-intervention. Similar to the previous Chapter, it will seek to question how far these norms

¹⁷ IPI, 'COVID-19 Crisis an Opportunity to "Rethink and Develop UN Peacekeeping Further"' (IPI 7 October 2020) <<https://www.ipinst.org/2020/10/un-peace-ops-during-covid-19-high-level-dialogue#3>> Accessed 7 October 2020.

¹⁸ A Day, 'The Future of Multidimensional Peacekeeping' (IPI, 15 September 2020) <<https://theglobalobservatory.org/2020/09/future-multidimensional-peacekeeping/>> Accessed 10 October 2020.

¹⁹ See: Chapter 3, Section 1.

can evolve before they no longer remain relevant to peacekeeping or expand peacekeeping's frameworks to its limits, taking it into the realm of intervention. Put differently, it will question whether the Christmas tree mandates in the Congo have expanded peacekeeping too far and, as such, whether a narrower interpretation of these norms is needed to limit the ever-broadening concept of peacekeeping and to reinforce, rather than undermine, the principle of non-intervention.

2 Democracy Promotion

As seen in Chapter 3, the norm of democracy promotion within peacekeeping operations, rather than possessing any legal underpinnings, arguably stems from the 'spirit' of the UN Charter ("We the peoples") and international institutions' preference for democratic governance.²⁰ Within the DRC, numerous difficulties have arisen in relation to the development of democracy within the country and, for some, it is best viewed as a 'pseudo-democracy' – a country whose democratic political institutions, such as multiparty electoral competition, 'masks the reality of authoritarian domination'.²¹ Thus, calling into question the presumption that liberal democracy is the most ideal form of governance, which can be transported to any state, as seen in Chapter 3. As such, it could then be debated whether democracy promotion could or should be included within peacekeeping's normative framework.

²⁰ Charter of the United Nations "UN Charter" (24 October 1945), preamble; as discussed in Chapter 3, Section 4.1 of this thesis.

²¹ L Diamond, 'Thinking About Hybrid Regimes' (2004) 13(2) JDemoc 21-35, 24.

2.1 Democratising the DRC

Throughout its history, the country has held four elections – 1960, 2006, 2011 and 2018- with varying degrees of success. The first of these free and fair elections was held in May 1960, one month before the country was formally granted its independence from Belgium. Under the provisional constitution, a bicameral parliamentary government was established, with a prime minister (Lumumba) and a president (Kasavubu) elected to lead the country through its transition into independence.²² However, as has been noted throughout this thesis, the Belgian's had left the Congo ill-prepared for independence, with little infrastructure or public administration and only a dozen university qualified Congolese.²³ Somewhat unsurprisingly, democracy struggled to take hold within this new political culture and Lumumba and Kasavubu, unable to maintain law and order, expel foreign troops and counter a secession in Katanga, requested UN assistance a mere twelve days after gaining independence.²⁴ ONUC was therefore 'deployed in a country where the institutions of state were collapsing' in what some refer to as the first case of 'painting a country blue' – the act of the UN taking over administrative functions of a failed state to restore peace and order.²⁵ In what could perhaps be viewed as the first application of an informal norm of democracy promotion within peacekeeping, ONUC was called upon to 'help establish an indigenous

²² See: DN Gibbs, 'The United Nations, International Peacekeeping and the Question of 'Impartiality': Revising the Congo Operation of 1960' (2000) 38(3) JModAfrStud 359-382, 362; D Van Reybrouck, *Congo: The Epic History of a People* (Fourth Estate 2015) 227-281.

²³ *ibid.*

²⁴ UNSC Res 143 (14 July 1960) UN Doc S/RES/143.

²⁵ M Goulding, 'The Evolution of United Nations Peacekeeping' (1993) 69(3) IntAff 451-464, 452.

government in a nascent country with a mutinous army, a breakaway province, and little experience in self-government'.²⁶ Therefore, as seen in Chapter 3,²⁷ whilst the norm of democracy promotion was only formally introduced into peacekeeping's normative framework in the 1990s, it could be argued that ONUC temporarily expanded the normative framework here by engaging in statebuilding activities. As a result, it took ONUC much closer to the intervention line, thereby expanding peacekeeping's frameworks and undermining the principle of non-intervention. Indeed, throughout this period, when ONUC was undertaking significant sovereign functions, such as maintaining law and order and establishing a governance system, this could be viewed as coercive action designed to alter or influence change in the state and therefore intervention. In other words, ONUC was attempting to establish democratic governance, with the Congolese state having little voluntary choice over this form of governance, given their vulnerability as a newly independent state (with little infrastructure and outbreaks of violence), rendering them reliant on the peacekeeping operation and, thus, unable to voluntarily reject ONUC's decisions on law and order and governance systems. Put simply, at certain points, the Congo had little choice but to accept the actions ONUC was undertaking to establish a state and administrative structure; thus, ONUC's actions can be said to have amounted to intervention. This also then ties in with the previous discussions on consent and the extent to which a host

²⁶ J Dobbins, SG Jones, K Crane, A Rathmell, B Steele, R Teltschik and A Timilsina, *The UN's Role in Nation-Building: From the Congo to Iraq* (RAND Corporation 2005) 5-29, 7.

²⁷ Section 4.1.

state may consent to or reject peacekeeping tasks once an operation is deployed.²⁸ In this instance, it appears that host state consent was irrelevant during ONUC's mandate period for these democracy promotion tasks.

Moreover, this initial attempt at democracy promotion within the Congo raised questions as to what establishing democracy within the Congo actually meant. For the Belgians it meant organising parliamentary elections, to the Afro-Asian and Soviet-bloc states 'it meant liberating the Congo from Belgian colonial control' and for the United States it meant 'ensuring the country not "fall" to a communist dictatorship'.²⁹ What is noticeable here, is that the decision on what democratic governance in the Congo meant was decided, ultimately, by external actors and not the Congolese themselves. Similar to the colonial Scramble for Africa and the demarcating of arbitrary borders within the continent, then, the voice of the Global South state was the most irrelevant factor in determining the fate of the Congo.³⁰

Two further observations can then be drawn from this. Firstly, the involvement of external actors in the internal affairs of the newly independent Congo established a precedent which has led to continual external intervention in relation to Congolese governance, particularly as Congo has been viewed as pivotal in regional and global politics. For example, Congo's neighbours, Rwanda and Uganda, and the Southern

²⁸ Chapter 3, Section 3.1; Chapter 4, Section 2.4.

²⁹ *ibid*, 9.

³⁰ See: Chapter 2, Section 2.3.

African Development Community (SADC) have all shown a particular interest in Congo's leadership, at times supporting or attempting to influence Congolese politics in order to further their own agendas or protect their interests within the Great Lakes region.³¹

Secondly, from a TWAIL perspective, this supports arguments made in Chapter 3 that democracy (and democracy promotion) is a Western-centric notion which perpetuates the colonial dichotomies of 'civilised' and 'uncivilised', reinforcing patterns of domination and subordination and the North-South divide.³² Indeed, the differing views on how ONUC should interpret and apply the norm of democracy promotion in the Congo arguably reflects how this is a 'classic instance' of the 'imperial project at work', with the dominant external actors determining how the subordinate host state should be governed.³³ This is reinforced by the fact that there was an apparent lack of host state consent to these peacekeeping tasks, in part due to the instability and lack of infrastructure in Congo's initial few months of independence. Furthermore, it could also be viewed as another example of Anghie's dynamic of difference, with the dominant actor (ONUC and member states) identifying a gap between themselves and the Congolese host state (a lack of democratic governance) and then seeking to bridge that gap by altering or normalising (democratising) the host state.

³¹ See: SADC Press Release, 'SADC Reiterates Its Position For a Stable and Peaceful DRC' (*SADC*, 29 May 2020) <<https://reliefweb.int/report/democratic-republic-congo/sadc-reiterates-its-position-stable-and-peaceful-drc>> Accessed 18 June 2020; Tamm H, 'Status Competition in Africa: Explaining the Rwandan-Ugandan Clashes in the Democratic Republic of Congo' (2019) 118(472) *AfrAff* 509-530; M Schneider, 'Examining the Role of Rwanda in the DRC Insurgency' (Crisis Group 19 September 2012) <<https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/examining-role-rwanda-drc-insurgency>> Accessed 18 June 2020.

³² Chapter 3, Section 4.1.

³³ V Sripathi, 'The United Nation's Role in Post-Conflict Constitution-Making Processes: TWAIL Insights' (2008) 10(4) *ICLR* 411-420, 420.

Thus, using this as an excuse or justification for intervention. For the peacekeeping frameworks and the principle of non-intervention, then, this first example of democracy promotion in the Congo, by ONUC, arguably expanded peacekeeping's normative frameworks exponentially, particularly for peacekeeping at that time. That is, as seen in earlier Chapters, ONUC was deployed during the decolonisation period when interventionist rhetoric was low and peacekeeping was, typically, following the traditional, consensual, non-interventionist form of peacekeeping.³⁴ However, as was noted, ONUC quickly evolved in response to the Congo crisis, resulting in a rapid expansion of its peacekeeping frameworks, including, here, its normative framework.³⁵ As a result, this expanded normative framework, stretched peacekeeping's red boundary line, taking it much closer to the realm of intervention and, at times, potentially breaching the line, becoming a form of intervention and thereby violating the principle of non-intervention.

2.2 Intervention to Counter Intervention

Following the Congo's first elections, and the assassination of the first elected Prime Minister, Lumumba, the Congo was ruled by Mobutu Sese Seko, whose thirty-two-year dictatorship did little to build Congo's infrastructure, with national resources used to fund Mobutu's lavish lifestyle³⁶- revealing the weakness of the early UN approach to democracy promotion. Thus, the socio-economic realities of the Congo, combined with

³⁴ Chapter 2, Section 3; Chapter 4, Section 1.2.

³⁵ *ibid.*

³⁶ See: M Wrong, *In the Footsteps of Mr Kurtz* (Harper Collins Publishers 2000).

under-development and authoritarianism, acted as severe constraints on the potential institutionalisation and consolidation of democracy.³⁷ As the Cold War drew to a close, Mobutu was ousted by a rebel insurgency in 1997, led by Laurent Kabila and supported by Rwanda.³⁸ When conflict ensued, this created a justification for external intervention, particularly by Congo's neighbours, with the South African Development Community (SADC) states of Angola, Zimbabwe and Namibia launching a military intervention in 1998 to support Kabila's regime against the Rwandan and Ugandan backed Congolese Rally for Democracy (RCD) rebel group.³⁹ Whilst many view this First Congo War as a Congolese revolution, it has been argued that it was, 'in reality, a regionally built rebellion'.⁴⁰ Indeed, the conflict had local, national and regional dimensions, which resulted in SADC, the Organisation for African Unity (OAU), South Africa and other regional power brokers attempting to establish a ceasefire agreement in the Congo.⁴¹ Once again, the strong interests of these external actors in the governance of the DRC was evident, in particular, with the neighbouring states of Rwanda and Uganda who were said to have wished for a Congolese regime that was under their control.⁴²

³⁷ See: S Decalo, 'The Process, Prospects and Constraints of Democratisation in Africa' (1992) 91(362) *AfrAff* 7-35; JF Clark, 'The Constraints on Democracy in Sub-Saharan Africa: The Case for Limited Democracy' (1994) 14(2) *SAISReview* 91-108.

³⁸ M Deibert, *The Democratic Republic of Congo: Between Hope and Despair* (Zed Books Ltd 2013) 63.

³⁹ See: GA Dzinesa and J Laker, 'Post-Conflict Reconstruction in the Democratic Republic of the Congo (DRC)' (CRC Policy Advisory Group Seminar Report, 19-20 April 2010), 20-23 <https://media.africaportal.org/documents/CCRPB04_Post-ConflictDRC_UpdatedApr2011.pdf> Accessed 15 March 2020 and *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment of 19 December [2005] ICJ Rep 168.

⁴⁰ T Carayannis, K Vlassenroot, K, Hoffman and A Pangburn, 'Competing Networks and Political Order in the Democratic Republic of Congo' (LSE, 2018) 6.

⁴¹ UNSC, 'Ceasefire Agreement' ("Lusaka Ceasefire") (23 July 1999) UN Doc S/1999/815.

⁴² Crisis Group, 'The Agreement on a Cease-Fire in the Democratic Republic of Congo' (ICG Democratic Republic of Congo Report No 5, 20 August 1999).

This eventually led to the Lusaka Ceasefire Agreement which, amongst other things, brought the Congolese domestic agenda back to the centre stage. This was key for the deployment of a peacekeeping operation, the withdrawal of foreign armed troops and the formation of a new Congolese armed force and re-establishment of state administration, through the initiation of an Inter-Congolese National Dialogue.⁴³ Thus, the Lusaka Agreement was the foundations upon which the UN could then enter and undertake democracy promotion tasks. As has been noted in previous Chapters, MONUC was deployed in 1999 to oversee the Agreement and rapidly evolved as conflict ensued, including the assassination of President Laurent-Désiré Kabila in 2001, who was replaced by his son, Joseph Kabila, during the beginning of the Second Congo War.⁴⁴ In-line with the increase in interventionist rhetoric and a push for democratisation in the post-Cold War era, as seen in Chapter 3,⁴⁵ the Inter-Congolese Dialogue was officially opened, two years after the signing of the agreement,⁴⁶ following what became typical stonewalling from Kabila.⁴⁷ In another example of the key norm entrepreneurship role of the Secretary-General, the Dialogue was re-launched at the initiative of SG Kofi Annan who invited the three main Congolese parties (the DRC government, RCD-Goma and MLC) to attend an informal meeting in New York in November 2001.⁴⁸ Financial resources

⁴³ *ibid.*

⁴⁴ See: K Berwouts, *Congo's Violent Peace: Conflict and Struggle Since the Great African War* (Zed Books 2017).

⁴⁵ Section 4.1.

⁴⁶ See: UN Press Release, 'Opening of Inter-Congolese Dialogue' (19 October 2001) UN Doc SG/SM/8000-APR/345.

⁴⁷ Crisis Group, 'The Inter-Congolese Dialogue: Political Negotiation or Game of Bluff?' (ICG Africa Report No 37, 16 November 2001).

⁴⁸ UN News, 'Fighting in Eastern DR of Congo 'must stop', Annan tells Security Council' (*UN News*, 9 November 2001) <<https://news.un.org/en/story/2001/11/20102-fighting-eastern-dr-congo-must-stop-annan-tells-security-council>> Accessed 5 June 2020.

to ensure a broad range of participants were involved in the process was then provided by numerous contributors, including South Africa, the European Union, the USA, Canada and Belgium.⁴⁹ This, again, demonstrates the keen interest of external actors in Congo's political affairs⁵⁰ and is reminiscent of Congo's first attempts at democracy in 1960, whereby decisions over Congo's governance system were dominated by external actors, rather than the Congolese themselves.

Moreover, the significant efforts of regional actors to resolve the conflict and establish governance could also be viewed as an example of 'African solutions to African problems', as was discussed in Chapter 2.⁵¹ In this instance, however, it is somewhat of a double-edged sword. On the one hand, the Global South states attempts to take ownership and to provide solutions to a problem within the Global South is, through a TWAIL lens, arguably preferable to externally imposed solutions.⁵² On the other hand, the significant involvement of Congo's neighbours exposes a noticeable flaw within the concept of 'African solutions to African problems' - that it may be used to justify or legitimate interventions which are just as 'problematic and riddled with hidden agendas as traditional interventions'.⁵³ The notion then becomes further troublesome when the dominant role that Western actors played in supporting the regional actors bids to establish an

⁴⁹ See: E Rogier, 'The Inter-Congolese Dialogue: A Critical Overview' in M Malan and JP Gomes, *Challenges of Peace Implementation: The UN Mission in the Democratic Republic of the Congo* (ISS, 2004) 29.

⁵⁰ See, for example, the UK's discussion of the situation: HL Deb 28 May 2002, vol 635, Part 145, Cols 1142-1145.

⁵¹ See: Section 3.4.2; TM Mays, 'African Solutions for African Problems: The Changing Face of African-Mandated Peace Operations' (2003) 23(1) JConfStud 106-125;

⁵² *ibid.*

⁵³ C Ero, 'The Problems with "African Solutions"' (*International Crisis Group*, 2 December 2013) <<https://www.crisisgroup.org/africa/problems-african-solutions>>. See also: *DRC v Uganda* (n39).

agreement is also considered. That is, the involvement of neighbouring and regional actors could essentially be viewed as a straw man – a front or disguise – which masked the influential role of the dominant Global North states and institutions that were bankrolling and supporting the Dialogue behind the scenes.

Therefore, from a TWAIL perspective, the Dialogue could be viewed, firstly, as another example of Anghie's dynamic of difference and, secondly, as the furtherance of Western ideals and standards with an over-simplified Western solution to a complex problem. That is, given the extensive involvement of the Global North, it could be viewed as a presentation of the dynamic of difference with the dominant North identifying a gap between them and the 'other' (the DRC), creating a division which the former then seeks to reduce by transforming the 'other', in this instance, through democratisation. Furthermore, as with ONUC, the interpretation and application of a structure designed to establish democratic governance is based upon Western-centric ideals and standards.⁵⁴ This then invokes notions of 'civilisation' and reinforces the disparity between the North and South states, exemplified with the dynamic of difference.⁵⁵ In addition, it is argued that 'in their Western ideas', MONUC/the UN thought it was 'about tribal killing each other so therefore if you take one from each group then therefore you are solving the issues which really [it did] not'.⁵⁶ The

⁵⁴ See: Chapter 3, Section 4.1.1; GH Fox and BR Roth (eds) *Democracy and International Law* (Edward Elgar 2020).

⁵⁵ N Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP 2020) 5.

⁵⁶ Interview with Congolese Independent Expert ('Interviewee 5') (Oxford, UK, 29 October 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 10.

imposition of Western standards and ideals, in the form of a Dialogue to establish democratic governance, could therefore be considered, on this occasion, to be another example of the West's application of an oversimplified solution to a complex, misunderstood problem⁵⁷ - an issue which has been noted throughout this thesis' exploration of the history of intervention. Indeed, it is also a recurring critique of the approach of the UN and international actors to peacekeeping and peacebuilding in the DRC. For many, international actors fail to understand the root causes of violence in the Congo, particularly the way in which local agendas ('micro-level rivalries over lands, resources and traditional or administrative power') play a decisive role in sustaining local, national and regional violence.⁵⁸ In particular, it has been argued that these actors' emphasis on holding elections, as opposed to local conflict resolution, ultimately doomed any peacebuilding efforts in the Congo.⁵⁹ An argument could therefore be made that the interpretation and application of the norm of democracy promotion by MONUC, in this instance, is an unnecessary expansion of peacekeeping's normative framework because it is simply a furtherance of Western or hegemonic standards, ideals and agendas, rather than being a suitable or appropriate solution for the Congo. Thus, from a TWAIL perspective, the peacekeeping operation's democracy promotion tasks could again be compared to the colonial civilising missions as both contain a dominant power attempting to enlighten or transform the subordinate 'other' in order

⁵⁷ See, for example: W Easterly, *The White Man's Burden* (OUP 2006) 9.

⁵⁸ S Autesserre, 'Hobbes and the Congo: Frames, Local Violence and International Intervention' (2009) *Intrg* 63(2) 349-280, 256.

⁵⁹ *ibid.*

for them to meet hegemonic standards, with little regard for the 'others' interests and needs.

For peacekeeping's normative frameworks, MONUC's involvement in the Dialogue could also be seen as one of the first examples of a peacekeeping operation engaging in the interpretation and application of the norm of democracy promotion. Indeed, MONUC was said to have 'had a pretty intrusive role'⁶⁰ under their mandate to monitor the implementation of the agreement and issue communiques.⁶¹ It could be argued, then, that MONUC's contribution to establishing the foundations for a democratic governance system was a broad application of the norm of democracy promotion, thereby expanding peacekeeping's normative framework and simultaneously undermining the principle of non-intervention. More specifically, it could, at times be viewed as a violation of the principle of non-intervention as MONUC's engagement in sovereign matters, through their support of establishing a system of governance and leadership, could be viewed as coercive action designed to influence change in the host state, given the vulnerability of weakness of the Congolese state at that time and their subsequent reliance on MONUC. As such, any actions which MONUC took in an attempt to foster democratic governance in the Congo could be viewed as coercive as the Congolese state had little voluntary choice in accepting the changes to their state, given their vulnerable position. Again, this then links back to the principle of consent and the debate over whether

⁶⁰ Interviewee 16 (n10) pg 3.

⁶¹ UNSC Res 1417 (14 June 2002) UN Doc S/RES/1417, 13-14; UNSC Res 1468 (20 March 2003) UN Doc S/RES/1468, 1.

a host state can and should consent to specific peacekeeping tasks during the deployment of an operation. Therefore, similar to ONUC's role in 1960, MONUC's role throughout the Dialogue could be viewed as amounting to intervention, thereby taking peacekeeping beyond its normative and legal frameworks. More specifically, it could be deemed to be an example of intervention to counter intervention, similar to the USA's Monroe Doctrine and ONUC's deployment to counter colonial intervention in 1960. Indeed, the purpose of the Dialogue was to create a new political order for the Congo, that liberated the 'Congolese from external occupation and interference',⁶² a notion which was contradictory in nature, given that it was driven by external actors.

2.3 Elections: Declining Intervention and Increasing Corruption

The Inter-Congolese Dialogue therefore demonstrates how peacekeeping's normative framework was expanded during this period and how the inclusion of the norm of democracy promotion can have a direct impact on peacekeeping's legal principles, particularly consent. Furthermore, reflecting how the principles and norms cohabit in a competitive arena, MONUC's involvement in the Dialogue could also be said to have impacted the principle of impartiality. The significant UN presence in the Dialogue arguably placed the UN in a difficult position when the Dialogue raised numerous issues,⁶³ not least the fact that Bosco Ntaganda, wanted for war crimes by the ICC, was a signatory to the agreement.⁶⁴ In essence, the UN

⁶² Crisis Group (n47).

⁶³ See: T Carayannis and H Weiss, 'The Democratic Republic of Congo, 1996-2002' in J Boulder (ed) *Dealing with Conflict in Africa: The United Nations and Regional Organisations* (Palgrave Macmillan 2003) 253-303.

⁶⁴ *The Prosecutor v Bosco Ntaganda* (Judgment) ICC-01/04-02/06 (8 July 2019).

was therefore working cooperatively or supporting such actors thereby impinging upon their impartiality.

Despite this, the Dialogue eventually resulted in Kabila being officially named as President, with some arguing that he largely owed his position 'to the support he had from key players in the international community'.⁶⁵ Indeed, initially, the main focus of the inter-Congolese negotiations had been 'whether or not Kabila should be recognised as President', much to the rebel movements' frustrations,⁶⁶ and for international actors, Kabila was viewed as a 'much more stable' option for the country.⁶⁷ Kabila could therefore be said to have been purposefully hand-picked or chosen by the dominant external actors involved in the Dialogue, rather than him being democratically elected by the parties to the agreement. Thus, again supporting the argument that these actors, including MONUC, played a coercive role in establishing democratic governance in the Congo, thereby amounting to intervention. As such, the Dialogue failed to reconcile Congolese leaders and political factions and had similarly failed to transform Congo's electoral process or to institute 'good governance'.⁶⁸ However, Kabila was later able to 'gain a degree of legitimacy' with the 2006 elections⁶⁹ – the country's second free and fair elections and the first elections since 1960.

⁶⁵ Interviewee 16 (n10) pg 3.

⁶⁶ *ibid.*

⁶⁷ Interviewee 5 (n56).

⁶⁸ Crisis Group (n47).

⁶⁹ Interviewee 16 (n10).

To ensure the success of the 2006 elections, the Security Council authorised an EU-led quasi-enforcement mission (EUFOR) to be temporarily deployed to support MONUC.⁷⁰ 'Acting under Chapter VII', MONUC were authorised 'to take all necessary measures, within its means and capabilities' to complete its tasks.⁷¹ This included some of the key themes which had begun to emerge within peacekeeping at that time;⁷² namely, to 'stabilise a situation', protect civilians and ensure the security and free movement of EUFOR personnel and installations.⁷³ Therefore, if MONUC's role in the Congolese National Dialogue could be viewed as phase one of the norm of democracy promotion in the DRC, MONUC's role in the 2006 elections could be viewed as phase two of the norm. That is, the norm was expanded as these new tasks (such as creating a stable environment for elections, supporting EUFOR and providing logistical and strategical support for the organising of elections) were introduced into MONUC's mandate, consequently expanding peacekeeping's normative framework and creeping peacekeeping closer to the intervention line. Furthermore, this normative expansion also had an impact on peacekeeping's legal framework, particularly the principles of non-use of force and impartiality. The invocation of Chapter VII in MONUC's mandate permitted both MONUC and EUFOR to use an increased level of force in order to complete the democratisation tasks, such as EUFOR thwarting a heavy attack against the

⁷⁰ UNSC Res 1671 (25 April 2006) UN Doc S/RES/1671.

⁷¹ *ibid*, 8.

⁷² As seen in Chapter 2 and 3.

⁷³ S/RES/1671 (n70) 8.

then Vice-President, Bemba.⁷⁴ This therefore pushed the operation closer to peace enforcement and, consequently, intervention, again highlighting the overlap between the legal and normative frameworks and demonstrating how an expansion or re-imagining of one norm or principle may have an impact on the others. This, in turn, may expand peacekeeping's legal and normative frameworks, stretching the red boundary line surrounding peacekeeping and consequently undermining the principle of non-intervention.

Moreover, whilst the 2006 elections were generally found to be a success, 'technically sound, transparent and credible',⁷⁵ with MONUC providing a stable environment,⁷⁶ for some, the UN support of the elections were viewed as being motivated by 'neo-colonialist temptations'.⁷⁷ Thus, again, underscoring the TWAIL arguments that democracy promotion invokes notions of 'civilisation' and is based on Western ideals and agendas.⁷⁸ Indeed, this role or application of the norm of democracy promotion continued after the 2006 elections, with MONUC, and then MONUSCO routinely mandated to work 'in close cooperation with the Congolese authorities' to support 'the strengthening of democratic institutions and the rule of law'.⁷⁹ These mandates could therefore, again be viewed as an

⁷⁴ See: A Ajello, 'The EU Security Role in the Great Lakes Region' in A Adebajo and K Whiteman (eds) *The EU and Africa: From Eurafrique to Afro-Europa* (Hurst and Company 2012) 291.

⁷⁵ UNSC Report, 'Twenty-Third Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo' (20 March 2007) UN Doc S/2007/156.

⁷⁶ BO Knutsen, 'The EU's Security and Defense Policy (ESDP) and the Challenges of Civil-Military Coordination (CMCO): The Case of the Democratic Republic of Congo (DRC)' (2009) 18(4) EurSec 441-459, 449.

⁷⁷ See: Ajello (n74) 291.

⁷⁸ As outlined in Chapter 3, Section 4.1.

⁷⁹ UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756, 3; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856.

expanded or broad interpretation and application of the norm of democracy promotion which, in turn, expands peacekeeping normative framework, thereby undermining the principle of non-intervention.

However, whilst the UN was heavily involved in the 2006 elections and the development of democracy in the following years, this involvement or support decreased for each of the two subsequent elections. Thus, it could be argued that there was a retraction of this broadened interpretation of the norm of democracy promotion and, therefore, a shrinking of peacekeeping's normative framework, with the red, elastic boundary line now being tightened, taking MONUSCO back to a less interventionist operation and thereby supporting the principle of non-intervention. Indeed, for the Congo's 2011 elections, the Security Council was faced with the dilemma of limiting MONUSCO's role to the protection of civilians in Eastern Congo, as agreed with Kabila, or to expand its mandate 'in an attempt to enforce democratic principles before the elections at the risk of confronting the incumbent regime'.⁸⁰ MONUSCO therefore could have expanded the norm of democracy promotion, choosing to go against the will of the state to undertake democratisation tasks, but, instead, chose to play a more limited role, as agreed with the host state.⁸¹ It could be argued that this may reflect a recognition, by MONUSCO, that on this occasion, the pursuance of democracy promotion would have amounted to coercive

⁸⁰ A Boutellis and G Lacaille, 'Renewing MONUSCO's Mandate: What Role Beyond the Elections?' (IPI Issue Brief, May 2011).

⁸¹ UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991, 5.

action and, therefore, intervention, taking the operation beyond its peacekeeping boundaries.

Whilst this retraction of the boundaries of peacekeeping is both welcome and necessary, for some senior UN personnel, it was recognised that this decline in international involvement almost had a 'directly proportional relationship' with 'increasing levels of rigging'.⁸² That is, where MONUC played a significant role in the 2006 elections, there were fewer allegations of rigging and corruption than in the 2011 elections when MONUSCO played less of a role in the organising of elections. Indeed, in 2011, whilst Kabila was 're-elected', both Kabila and his primary opponent, Etienne Tshisekedi (the father of the current President) declared themselves president, leading to an eruption of violent protests in response to the controversial results.⁸³ Similar events then occurred with Congo's fourth elections, which should have been held in 2016 but were delayed until 2018 following Kabila's numerous attempts to amend the constitution and remain in power for a third term.⁸⁴ As occurred in 2011, the 2018 elections, including the build-up to the elections, were surrounded by political protests, particularly by youth groups such as LUCHA, with numerous deaths and dozens of arrests by the government.⁸⁵ There was therefore a repeat of the same pattern of

⁸² Interviewee 16 (n10).

⁸³ HRW, 'DR Congo: 24 Killed Since Election Results Announced' (*Human Rights Watch*, 21 December 2011) <<https://www.hrw.org/news/2011/12/21/dr-congo-24-killed-election-results-announced>> Accessed 10 May 2020.

⁸⁴ H Hoebeke, 'Kabila Shows His Hand in DR Congo's Electoral Poker' (*Crisis Group*, 16 August 2018) <<https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/kabila-shows-his-hand-dr-congos-electoral-poker>> Accessed 14 May 2020.

⁸⁵ See: T Wilson, 'Congolese Activists on Hunger Strike After Court Refuses Release' (*The Guardian*, 19 March 2016) <<http://www.theguardian.com/world/2016/mar/19/congolese-activists-on-hunger-strike-after-court-refuses-release>> Accessed 20 March 2020.

declined external involvement and increased corruption and violence. Indeed, UN personnel have noted that for these elections, 'there was a complete rejection of international involvement', with the Congolese government refusing to accept MONUSCO's logistical support, even though it was mandated to provide it.⁸⁶ For the government, 'even hints at interference in the DRC's sovereignty is, you know, obviously a no no'; it was therefore 'made very clear that they were going to organise their own elections'.⁸⁷ Again, this demonstrates how MONUC/MONUSCO's involvement in the elections could, at times, amount to coercive action designed to influence change within the host state, as they are evidently undertaking or engaging in tasks which fall within the state's sovereign rights, which is recognised by the host state. Thus, it appears that the greater the role the UN plays in democracy promotion, the more the norm and peacekeeping's normative frameworks are expanded, thereby expanding the boundaries of peacekeeping and undermining or potentially contravening the principle of non-intervention.

Furthermore, the elections within the Congo, in particular, the 2018 elections demonstrate that the electoral process has struggled to produce a semblance of democracy in the DRC. Thus, supporting TWAIL arguments that 'international law does not take global democracy seriously' as it imposes certain obligations on states (such as the need to hold democratic elections) but does not hold it responsible for any further deepening or

⁸⁶ Interviewee 16 (n10).

⁸⁷ *ibid.*

development of the concept.⁸⁸ This, again, reverts back to the issue of what is considered to be a 'successful democracy' and what it means for a peacekeeping operation if these elections are not 'successful'.⁸⁹ Indeed, although the most recent elections marked the first peaceful transition of power in the Congo's history, the results were extremely controversial, with Felix Tshisekedi declared the winner by the Congolese authorities, despite voting databases revealing that Martin Fayulu had won the vote.⁹⁰ For many, this was viewed as another bid by Kabila to cling to power, through a deal with Tshisekedi,⁹¹ again demonstrating how the regime was 'vulnerable to authoritarian drift'⁹² and highlighting how the concept of Western liberal democracy has failed to take root in the Congo. Indeed, despite elections, the Congolese state 'remains a predatory structure, as it has been during most of the Congo's history'.⁹³ The Congolese state or political landscape is therefore 'best understood as competing networks of access, with power located in individual networks rather than institutions'.⁹⁴ In particular, there remains a battle for power within Congo's political elite, with an attempt to dismantle the Kabila regime, as Tshisekedi and his new allies, opposition leaders Moïse Katumbi (Ensemble pour la République) and Jean-Pierre Bemba (Mouvement de Libération du Congo) met on several

⁸⁸ See Chapter 3, Section 4.1; BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 ICLR 3-27, 8.

⁸⁹ B Heldt, 'Peacekeeping Operations and Transitions to Democracy' in H Fjelde and K Höglund (eds) *Building Peace, Creating Conflict* (Nordic Academic Press 2011) 47-71.

⁹⁰ T Wilson, D Blood and D Pilling, 'Congo Voting Data Reveal Huge Fraud in Poll to Replace Kabila' (*Financial Times*, 15 January 2019) <<https://www.ft.com/content/2b97f6e6-189d-11e9-b93e-f4351a53f1c3>> Accessed 16 May 2020.

⁹¹ *ibid.*

⁹² SA Matti, 'The Democratic Republic of the Congo? Corruption, Patronage, and Competitive Authoritarianism in the DRC' (2010) 56(4) *AfricaToday* 42-61, 42.

⁹³ S Autesserre, 'Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences' (2012) 111(443) *AfrAff* 202-222, 219.

⁹⁴ Carayannis et al (n40) 6.

occasions in early 2021 to negotiate appointments for key government positions, including the role of prime minister.⁹⁵

From the 2018 elections, then, it could be argued that it is questionable whether the norm of democracy promotion should remain a part of peacekeeping's normative framework or whether peacekeeping should focus more on a people-centred, bottom-up rather than state-centric, top-down approach. Indeed, the political protests prior, during and after the 2018 elections are said to be 'a clear demonstration of the Congolese population's aspirations for political change',⁹⁶ yet these voices are constrained by the patronage power structures and the political elite's desperate bids to cling to power. Therefore, it could be argued that supporting grassroots initiatives may be a more preferable means of developing democracy within the Congo and, ultimately, securing peace, particularly as the Congolese people view electoral concerns, peace and security concerns and economic problems as inextricably linked.⁹⁷

2.4 Forcing Democracy?

The interpretation and application of the principle of democracy promotion by the UN's peacekeeping operations in the DRC highlights some of the shortcomings of the norm, which were also seen in Chapter 3.⁹⁸ Namely, the comparisons which can be made with the notion of 'civilisation' and the

⁹⁵ J Afrique, 'DRC: Sacred Union Members Tshisekedi, Bemba, Katumbi Fail to Reach an Agreement' (*The African Report*, 15 January 2021) <<https://www.theafricareport.com/59406/drc-sacred-union-members-tshisekedi-bemba-katumbi-fail-to-reach-an-agreement/>> Accessed 20 January 2021.

⁹⁶ Crisis Group, 'Congo: Is Democratic Change Possible?' (Crisis Group Africa Briefing No 225, 5 May 2015) <<https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/congo-democratic-change-possible>> Accessed 15 March 2020.

⁹⁷ S Autesserre, *The Frontlines of Peace: An Insider's Guide to Changing the World* (OUP 2021).

⁹⁸ Section 4.1.

colonial civilising mission and the suitability of establishing democratic governance in complex, post-conflict settings. In particular, the UN's efforts at democracy promotion in the Congo exemplifies how simply holding elections does not equate to nor result in a deeply penetrating, flourishing democracy. That is, despite holding elections, the reform of Congolese politics and government has been limited,⁹⁹ with deeply embedded patronage systems. As has been noted throughout, the Congo therefore remains a 'predatory regime in which the enormous wealth of the country is being monopolised by the rulers and their external allies, instead of serving the basic needs of the Congolese people'.¹⁰⁰ This is, again, typified with the recent allegations made by LUCHA that Joseph Kabila has been paid almost \$16 million in Congolese taxpayer's money since leaving office.¹⁰¹ Whilst there may have been an official handover of power following the elections, then, in reality the same Kabila-regime remains, indicating that the holding of ostensibly democratic elections where, in essence, window dressing to placate external international actors.

Therefore, despite the involvement of the UN and the exercise of the norm of democracy promotion, predominantly through the supporting of elections, democracy has failed to take root. For some, the political culture is the main culprit for Congo's perpetual 'failure to launch', which has, at times, included political elites thwarting the (mostly) good intentions of the

⁹⁹ Crisis Group (n96).

¹⁰⁰ G Nzongola-Ntalaja, *The Congo from Leopold to Kabila: A People's History* (Zed Books 2006) 2.

¹⁰¹ LUCHA, 'Tweet' (24 November 2020) <<https://twitter.com/luchaRDC/status/1331167225139634176>> Accessed 25 November 2020.

international community.¹⁰² As such, some UN personnel argue that the UN should 'stop doing statebuilding' as peacekeeping 'is a very poor tool' for undertaking such a task, with MONUSCO spending 'a huge amount of money' to support a state 'that has shown no desire or willingness or capacity to play the kind of games that it's being asked to play'.¹⁰³ Indeed, the UN's emphasis on statebuilding and preoccupation with elections distracts from the issues whose resolutions are most likely to lead to peace; namely, poverty, unemployment, corruption, poor access to land, criminal justice system and education.¹⁰⁴ It could be argued, then, that MONUC/MONUSCO's democracy promotion endeavours in the Congo presenting numerous issues or lessons which could be learned for peacekeeping's normative framework.

The first of these issues is whether a focus on institution or statebuilding is a suitable task for peacekeeping and whether the norm of democracy promotion should therefore be a part of peacekeeping's normative framework. Arguably, MONUC and MONUSCO's involvement in democracy promotion within the DRC indicates that the norm of democracy promotion should perhaps be restricted or even removed from peacekeeping's normative framework. This is not to say that democratisation is not a worthwhile task but, rather, that it is one which should not be undertaken by peacekeeping operations. Indeed, it has been argued that the Council

¹⁰² T Trefon, *Congo Masquerade: The Political Culture of Aid Inefficiency and Reform Failure* (Zed Books 2011).

¹⁰³ Interviewee 8 (n5) pg 16.

¹⁰⁴ S Autesserre, 'What the Uproar Over Congo's Elections Misses' (*Foreign Affairs*, 1 March 2017) <<https://www.foreignaffairs.com/articles/democratic-republic-congo/2017-03-01/what-uproar-over-congos-elections-misses>> Accessed 15 March 2020.

gave MONUC/MONUSCO 'a task they couldn't do', with the statebuilding and central reform mandate 'pie in the sky' after twenty years, with 'almost no meaningful improvement in the SSR side of things'.¹⁰⁵ Therefore, the inclusion of democracy promotion could be viewed as somewhat of an unnecessary expansion of the normative framework of peacekeeping, in part because the operation is ill-equipped to undertake it. This is further compounded by the fact that it has the potential to impact the fundamental principles of peacekeeping and thereby expand or alter peacekeeping's legal framework which, in turn, may undermine the principle of non-intervention. For example, MONUC used significant force to create a 'stabilised' environment to hold elections, therefore, the interpretation and application of the norm of democracy promotion had a knock-on effect on the principle of non-use of force. Similarly, the decision to support (or not support) certain actors during electoral processes could be viewed as an infringement on the principle of impartiality. This, in turn, could impact the principle of consent if relationships between the host government and the peacekeeping operation breakdown – as was seen throughout the Inter-Congolese Dialogue and the 2006 elections. Again, this demonstrates that as the norms and legal principles exist in a competitive arena, there is an inevitability that changes to one norm or principle, may impact others. By extension, when these norms are expanded, thus broadening

¹⁰⁵ Interviewee 8 (n5) pg 19.

peacekeeping's normative framework, this, consequently, expands the peacekeeping boundaries and constricts the principle of non-intervention.

This then leads to the second notable issue – whether democracy promotion in the DRC has, at times, amounted to intervention. As the previous section argued, at certain points throughout ONUC, MONUC and MONUSCO's history in the Congo, it is arguable that their promotion of democracy has amounted to coercive action designed to influence change in the host state. ONUC's execution of state functions to establish a governance system and MONUC's robust involvement in the Inter-Congolese Dialogue and 2006 elections, for example, could be viewed as having a coercive impact on the Congolese state's sovereign rights, in an attempt to push the Congo towards changing to democratic governance; thus, amounting to intervention. Indeed, this is reinforced by the Congolese government's rejection of MONUSCO's involvement in the more recent elections, with the state explicitly stating that it was a matter of their 'sovereign rights'.¹⁰⁶ This then presents the third key issue which has arisen in the Congo, which is whether there is a more suitable alternative to democracy promotion tasks or statebuilding, such as returning to the more traditional peacekeeping role of supporting agreements. As occurred, for example, with the launch of the 'Peace, Security and Cooperation (PSC) Framework' in 2013 (alongside the FIB) which outlined 'key action at the national, regional and international levels required to end the recurring cycles of

¹⁰⁶ Interviewee 16 (n10); Crisis Group (n96).

violence' in Eastern DRC.¹⁰⁷ The framework has since proved to be most useful in weakening some of Congo's long-standing rebel groups, the FDLR and ADF,¹⁰⁸ and contributing to the defeat of M23. It also encouraged Rwanda to 'not interfere in their neighbours',¹⁰⁹ thereby addressing some of the historic regional intervention issues which have hindered the Congo's development of democracy and contributed to instability. The benefits of the framework have therefore 'outlasted the benefits of the intervention brigade but, of course, one is more spectacular than the other'.¹¹⁰ Again, this can be viewed as supporting the notion that the norm of democracy promotion in the form of elections is neither the best nor only way in which UN peacekeeping operations can support the political landscape of its host country, in order to achieve the ultimate goal of maintaining international peace and security. As such, it suggests, again, that there is a need for a retraction of peacekeeping's normative framework, through a retraction of the norm of democracy promotion.

By extension, this raises a fourth issue which can be drawn from the UN's experiences in the Congo – whether peacekeeping should focus more on a people-centred, bottom-up approach, rather than a state-centric, top-down approach. That is, the UN's emphasis on democratic elections in the DRC, from a TWAIL perspective, could be viewed as a default approach to post-

¹⁰⁷ UNSC, 'Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region' (27 February 2003) UN Doc S/2013/119, 7.

¹⁰⁸ UN News, 'Five Years On' (*UN News*, 28 Feb 2018) <<https://ungreatlakes.unmissions.org/five-years-progress-has-been-made-implementation-peace-security-and-cooperation-framework-drc-and->>; UN Office of the Special Envoy for the Great Lakes Region, 'Joint Press Release on the Peace, Security and Cooperation Framework, JPR21' (27 February 2018) <<https://ungreatlakes.unmissions.org/five-years-peace-security-and-cooperation-framework-drc-and-region-remains-central-achieving-lasting>> Both accessed 15 May 2020.

¹⁰⁹ Interviewee 9 (n4) pg 55.

¹¹⁰ *Ibid.*

conflict states, invoking notions of 'civilisation' in, seemingly, another example of a simple Western answer being applied to a very complex problem.¹¹¹ The UN's interpretation and application of the norm of democracy promotion within the Congo could be viewed, then, as a failure to recognise the complexities of the Congo and, specifically, Congolese politics. Indeed, this has, to a certain extent, been recognised by a former head of MONUSCO, Alan Doss, who, in a recent piece on 'the limits of outside intervention', noted that 'with hindsight' MONUSCO 'did not devote enough of our energy' towards building political trust, social cohesion and community resilience.¹¹² Instead, Doss claims the mission was 'overly focused on the military dimensions of our mandate', acknowledging that the broader efforts should have been 'explicit goals for peace operations from the start'.¹¹³ Similarly, others have argued that democracy itself 'may not be the golden ticket', at least not in the short term, with real lasting peace in the Congo requiring power being given to ordinary citizens.¹¹⁴ In particular, the small island of Idjwi, situated in Congo's Lake Kivu in the South East of the country, is cited as somewhat of a success story and desirable model, as the only place within Congo to have sustained peace, with none of the outbreaks of violence that have plagued the East of the country.¹¹⁵ Most noticeably, Idjwi is not governed by Western liberal democracy, but by traditional Congolese governance systems of blood

¹¹¹ Chapter 3, Section 4.1.

¹¹² A Doss, 'The Congo, Afghanistan and the Limits of Outside Intervention' (*Pass Blue*, 18 January 2021) <<https://www.passblue.com/2021/01/18/the-congo-afghanistan-and-the-limits-of-outside-intervention/>> Accessed 20 January 2021.

¹¹³ *ibid.*

¹¹⁴ Autesserre (n97).

¹¹⁵ *ibid.*

pacts, elders, superstitions and magical beliefs.¹¹⁶ Therefore, instead of resolving issues by calling the police, armed forces or resorting to violence, the people of Idjwi try to contact local groups such as religious networks, traditional institutions, women's groups and youth groups.¹¹⁷ It has been argued, then, that many lessons can be learned from Idwji, particularly the important role of local actors or micro-politics in ensuring security, as opposed to macro-political, government endeavours.¹¹⁸ This arguably challenges, then, the international community's preference for liberal democracy as the most suitable form of governance and, perhaps, suggests that peacekeeping should begin to focus more on people-centred, bottom-up approaches in order to identify and support the most appropriate initiatives for supporting the establishment of sustainable peace and security.

For peacekeeping's overall frameworks, then, the Congo demonstrates how an expansive interpretation and application of the norm of democracy promotion once again expands peacekeeping's normative framework, with an overlap with the legal principles also impacting the legal framework. This, in turn, expands peacekeeping's red boundary line, taking peacekeeping closer to intervention and thereby undermining or, at times, contravening the principle of non-intervention. This section has therefore

¹¹⁶ *ibid.*

¹¹⁷ S Autesserre, 'Here's What Congo Can Teach the World About Peace' (*The Washington Post*, 19 October 2016) <<https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/19/heres-what-this-island-in-congo-can-teach-the-world-about-peace/>> Accessed 20 May 2020.

¹¹⁸ A Blin, 'Idjwi Island in Congo (DRC): Peace Through Local Action and Security "From Below"' (*Commons Polis*, 18 February 2020) <<https://commonspolis.org/en/proposals/idjwi-island-in-congo-drc-peace-through-local-action-and-security-from-below/>> Accessed 20 February 2020.

suggested that, as was argued in Chapter 4 for the legal principles, a redrawing of these boundaries may be needed, through a retraction of the interpretation and application of the norm of democracy promotion. Ultimately, this would require a review of Security Council mandating,¹¹⁹ with the need for more realistic, streamlined mandates or, even, 'designer mandates' specifically focused on the particularities of the situation in which the peacekeeping operation is to be deployed.¹²⁰

3 Protection of Civilians

The interpretation and application of the norm of protection of civilians (PoC) within the UN's operations in the DRC is a classic example of the struggle of protection mandates with capabilities and impact or implementation.¹²¹ Indeed, MONUC and MONUSCO have, on occasions, catastrophically failed to protect civilians, resulting in mounting criticisms against the operation and debates over the inclusion of PoC as a priority task for peacekeepers.¹²² As was noted in Chapter 3, the Congo has been somewhat of an incubator for the development of the norm of PoC, with numerous policies developed throughout MONUC/MONUSCOs deployment, typically in-line with the general developments in the PoC norm but often stepping out on its own, significantly expanding the norm within the DRC. Therefore, as with the previous norm of democracy promotion and the legal

¹¹⁹ See: P Nadin, 'An Argument For More Focused UN Peacekeeping Mandates' (*Our World, UNU*, 18 February 2014) <<https://ourworld.unu.edu/en/an-argument-for-more-focused-un-peacekeeping-mandates>> Accessed 15 May 2020.

¹²⁰ I Martin, 'All Peace Operations Are Political: A Case for Designer Missions and the Next UN Reform' (CIC Thematic Essay, 2015) <https://cic.nyu.edu/sites/default/files/political_missions_2010_martin_allpeace2.pdf> Accessed 16 May 2020.

¹²¹ See: ND White, 'Empowering Peace Operations to Protect Civilians: Form over Substance?' (2009) 13 JIP 327-355.

¹²² Chapter 3, Section 4.2.

principles discussed in Chapter 4, the broad interpretation and application of the norm of PoC in the Congo has led to an expansion of peacekeeping's normative framework which has, in essence, undermined and, at times, potentially violated the principle of non-intervention.

3.1 Becoming a Priority

As seen in Chapter 3, the UN's first exercise of the norm of protection of civilians can arguably be traced back to ONUC, which was given an Operational Directive to 'where feasible' afford every protection to 'unarmed groups' who may be subjected to violence, 'using armed force if necessary'.¹²³ Thus, as with the norm of democracy promotion, ONUC temporarily expanded peacekeeping's normative framework, by including a PoC element, before the concept was formally introduced into peacekeeping's frameworks.¹²⁴

It is then during MONUC's deployment, when three major incidences (Kisangani 2002, Ituri 2003 and Bukavu 2004) highlighted the operations limitations, with MONUC gaining a reputation for fleeing conflict, hiding behind its compound walls and failing to protect civilians.¹²⁵ This therefore led to the introduction of a PoC mandate, which was in-keeping with the broader interventionist rhetoric and formal introduction of PoC into peacekeeping mandates.¹²⁶ The first of these incidences which motivated

¹²³ Operations Directive No 8 (untitled), February 1961, UN Archives DAG/13/1.6.5.0.0; Operations Directives August 1960-January 1964, Box 3, pp2-3.

¹²⁴ Chapter 3, Section 4.2.

¹²⁵ J Hatcher and A Perry, 'Defining Peacekeeping Downward: The UN Debacle in Eastern Congo' (*Time*, 26 Nov 2012) <<http://world.time.com/2012/11/26/defining-peacekeeping-downward-the-u-n-debacle-in-eastern-congo/>> Accessed 28 May 2020.

¹²⁶ As seen in: Chapter 3, Section 4.2.

the change in MONUC's mandate came with the massacre of civilians in Kisangani in May 2002 by RCD-Goma, despite the nearby presence of MONUC troops.¹²⁷ Following this, in early 2003 MONUC was, again, unable to contain escalating violence in Ituri, following the repatriation of Ugandan forces that had been occupying the area, resulting in the deployment of a temporary EU-led force – Operation Artemis- which was mandated to work alongside MONUC to stabilise the security conditions and, if necessary, 'contribute to the safety of the civilian population'.¹²⁸ Again, as with democracy promotion, the Security Council invoked Chapter VII through the inclusion of the ambiguous 'Acting under Chapter VII' within the chapeau of the resolution.¹²⁹ As such, the Interim Emergency Multinational Force and MONUC were permitted to use an expanded level of enforcement-style force.

However, although MONUC was authorised to use robust force, both MONUC and Operation Artemis were considered to be 'totally insufficient' for dealing with the crisis in Ituri, only managing to guarantee civilians safety in 'several very limited spaces carved out with great effort'.¹³⁰ Furthermore, both MONUC and Operation Artemis were criticised for simply using force to drive the rebels out of Bunia, rather than attempting to disarm or disband the armed groups and reintegrate fights.¹³¹ As a result,

¹²⁷ Human Rights Watch, 'War Crimes in Kisangani' (August 2002) 14(6)(A) HRW.

¹²⁸ UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484.

¹²⁹ *ibid.*

¹³⁰ Médecins Sans Frontières, 'Ituri: Unkept Promises? A Pretense of Protection and Inadequate Assistance' (MSF, 25 July 2003) <<https://reliefweb.int/sites/reliefweb.int/files/resources/E4AD40CF77CAAEFBC1256D6E00339499-msf-drc-25jul.pdf>> Accessed 28 May 2020.

¹³¹ S Ulriksen, C Gourlay and C Mace, 'Operation Artemis: The Shape of Things to Come?' (2004) 11(3) *IntPeacekeep* 508-525, 520.

whilst the town of Bunia was eventually secured (after the slaughter of hundreds of civilians, with thousands forced to flee)¹³² the operation did little for the rest of Ituri, with numerous atrocities against civilians committed in the months following.¹³³ This therefore highlights MONUC's limitations in protecting civilians and is another example of intervention to counter intervention, with the UN operation attempting to expel neighbouring or regional intervention.

Following this, the third notable incident or failure by MONUC was the capture of Bukavu in 2004 by the Nkunda-led CNDP, again, despite the nearby deployment of MONUC troops.¹³⁴ Indeed, prior to the crisis MONUC leadership had been warned on multiple occasions by both UN agencies and from independent sources that the situation was highly explosive.¹³⁵ As one UN humanitarian employee, working for the UN Office for the Coordination of Humanitarian Affairs (OCHA) at the time, noted 'when General Nkunda started the uprising in the east and started with Bukavu, we saw it coming'.¹³⁶ They therefore tried to work with their UN colleagues, including warning the UN country team, in anticipation of Nkunda's rebellion.¹³⁷ However, the then head of the Department of Peacekeeping Operations, who happened to be visiting Congo at that time, had a 'very very different reading on the situation', arguing it was stable, with matters improving, as

¹³² Human Rights Watch, 'Ituri: "Covered in Blood"' (July 2003) 15(11)(A) HRW.

¹³³ *ibid.*

¹³⁴ UN News, 'Rebels Take Bukavu in Eastern DR of Congo, Protesters Target UN' (*UN News*, 2 June 2004) <<https://news.un.org/en/story/2004/06/105462-rebels-take-bukavu-eastern-dr-congo-protesters-target-un>> Accessed 6 May 2020.

¹³⁵ See generally: J Reynaert J, 'MONUC/MONUSCO and Civilian Protection in the Kivus' (IPIS 2010).

¹³⁶ Interview with Senior UNDP Personnel, formerly OCHA ('Interviewee 1') (Geneva, 20 November 2018) DOI: <<http://doi.org/10.17639/nott.7119>>.

¹³⁷ *ibid.*

talks were happening between groups.¹³⁸ This was also compounded by reports from the Human Rights Special Rapporteur for Congo¹³⁹ and a UN Panel of Experts¹⁴⁰ who detailed the extent of the ethnic violence in the region, in relation to the exploitation of natural resources. Despite this, those within UN peacekeeping refused to accept or listen to the warnings. Indeed, it was dismissed by many as merely a 'tribal war' with the then SRSG, Amos Ngongi, cited as stating that the 'Congolese are fighting among themselves'.¹⁴¹ Whilst UN peacekeeping therefore remained steadfast in their interpretation of the situation, organisations such as OCHA were discreetly (so as to not create the impression of a divided UN) removing staff from potential danger zones and ensuring OCHA personnel were present in areas where people may flee to, in order to support them when they sought to escape the violence.¹⁴² Subsequently, when violence did break out, OCHA was relatively prepared, whilst the peacekeeping operation was not. Furthermore, when MONUC became involved in the fighting, despite OCHA's efforts, they were also targeted by armed groups who did not distinguish between OCHA and MONUC, viewing them as one in the same.¹⁴³ As a result, OCHA contingents had to avoid all UN insignia (badges, uniforms, vehicles) and relied on working closely with other non-UN NGOs in the areas.¹⁴⁴ The Bukavu crisis therefore arguably highlights

¹³⁸ *ibid.*

¹³⁹ UNHCR, 'Report from the Special Rapporteur on the Question of the Situation of Human Rights in the DRC' (27 March 2001) UN Doc E/CN.4/2001/40/Add.1.

¹⁴⁰ UNSC, 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC' (16 October 2002) UN Doc S/2002/1146.

¹⁴¹ HRW (n132).

¹⁴² Interviewee 1 (n136).

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

not only MONUC's inability to protect civilians but a disconnect between MONUC and other UN agencies or international organisations in the field¹⁴⁵ and, once again, demonstrates a failure to understand or appreciate the complexities of the Congo.

This latter incident was, therefore, the final tipping point for the operation, with international organisations calling for a 'robust use of force by MONUC troops in protection of the civilian population'.¹⁴⁶ As a result, this led to the increased use of force, as seen in Chapter 4, and a more explicit PoC mandate from the Security Council, again highlighting the interconnectedness of peacekeeping's principles and norms. Within this new PoC mandate, MONUC's PoC responsibilities were extended to include protecting refugees, internally displaced persons, children in armed conflict, humanitarian and human rights workers and victims of sexual violence.¹⁴⁷ Crucially, it also noted that 'the protection of civilians must be given priority in decisions about the use of available capacity and resources'.¹⁴⁸ Thus, arguably expanding the norm by recognising its need to be positioned as a priority task, simultaneously expanding the potential for force to be used to fulfil this task. This was later confirmed by the Council in MONUC's 2008 mandate, when MONUC became the first UN peacekeeping operation to make PoC its priority task – a priority which has remained in place ever

¹⁴⁵ J Labbé J and A Boutellis, 'Peace Operations by Proxy: Implications for Humanitarian action of UN Peacekeeping Partnerships with Non-UN Security Forces' (2013) 95(891/892) IRRC 539-559.

¹⁴⁶ HRW (n132).

¹⁴⁷ UNSC Res 1794 (21 December 2007) UN Doc S/RES/1794.

¹⁴⁸ *ibid.*

since.¹⁴⁹ Furthermore, the differing approaches to the Bukavu crisis by the two UN agencies (peacekeeping and humanitarian) weakened the overall UN approach at a time when a joint, coherent approach was clearly needed to protect civilians. As such, following the crisis, the UN Department of Peacekeeping Operations and OCHA began to work more closely, sharing security and analysis and trying to find joint solutions, with an unofficial joint framework for collective engagement developing.¹⁵⁰ It could therefore be argued that the norm of PoC was expanded within the Congo by both the inclusion of protection tasks within MONUC's mandate and, to a certain extent, by this collaboration with humanitarian actors. It therefore had a broader, institutional impact which could, again, be viewed as an expansion of peacekeeping normative framework, on this occasion through the engagement with additional international actors.

The development of PoC within the Congo therefore highlights how peacekeeping norms are created and institutionalised, building upon a general consensus, trends and external pressures. It also demonstrates how the norm gradually expanded within the Congo, thereby resulting in a gradual expansion of the normative framework which, in turn, takes peacekeeping closer to the intervention line, undermining the principle of non-intervention. However, whilst the norm has been expanded within the Congo, there is, similar to the norm of democracy promotion, somewhat of a gap between the expectations of the norm and the reality. That is, just

¹⁴⁹ UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856; UNSC Res 2556 (18 December 2020) UN Doc S/RES/2556.

¹⁵⁰ Interviewee 1 (n136).

as democracy promotion has failed to establish a deep and lasting democracy in the Congo, so too has the norm of PoC struggled to result in the protection of civilians, with the increased levels of force rarely used. This is, arguably, in part because, as noted in Chapter 3, the protection of all civilians is an impossible task, particularly within a country the size of Congo.¹⁵¹

This then raises numerous issues, such as whether or to what extent the norm should be included within peacekeeping's normative framework and, in particular, if it is to be included, whether it should be a priority task given that a failure to fulfil the task may impact the 'success' of the operation. That is, a problem with mandating PoC as a priority task is that it is difficult to fully implement and requires the cooperation of the host state. If the tasks must be fulfilled in order for the operation to fulfil its mandate and withdraw, then, consequently, exit strategies are 'hostage' to the host state who 'may be unwell, or unable, to carry them [the PoC tasks] out'.¹⁵² A commitment to PoC consequently 'worsens this dilemma of when and how to leave', which the UN and AU have faced in their joint Darfur mission in Sudan, and, are arguably at risk of facing in the DRC.¹⁵³ This then leads to the question of who PoC should be a priority for – the state or the peacekeeping operation- and whether PoC should therefore remain a priority task for a peacekeeping operation or, rather, as with democracy

¹⁵¹ Section 4.2.

¹⁵² Doss (n112).

¹⁵³ *ibid.*

promotion, there should therefore be a retraction of this norm, such as limiting PoC to protecting civilians in specified situations.

3.2 PoC Tools

After the protection of civilians was established as a priority task for MONUC, the operation began to significantly develop PoC tools resulting in a much more nuanced or evolved understanding of the norm of PoC. That is, MONUC/MONUSCO's interpretation and implementation of the norm of PoC has created a comprehensive collection of PoC tools which has significantly expanded peacekeeping's normative framework, simultaneously expanding its interventionist potential and thereby undermining the principle of non-intervention.

Often, these tools were developed following a noticeable failure or incident of violence, resulting in the death of civilians. For example, after the massacre of more than 100 people near a MONUC camp in Kiwanja (North Kivu) in 2008, joint protection teams (JPTs) were established.¹⁵⁴ These multi-disciplinary teams, composed of military, police and civilian personnel from the peacekeeping mission are deployed to 'hotspots' or areas needing protection in order to analyse protection needs and outline preventive and responsive measures which may need to be taken.¹⁵⁵ In addition to these teams, the UN also developed a 'Must-Should-Could' (PoC) Matrix (MSC), a joint planning exercise between MONUSCO and the humanitarian

¹⁵⁴ Human Rights Watch, 'Killings in Kiwanja: The UN's Inability to Protect Civilians' (HRW, 11 December 2018) <<https://www.hrw.org/report/2008/12/11/killings-kiwanja/uns-inability-protect-civilians>> Accessed 26 June 2020.

¹⁵⁵ See: UN Peacekeeping, 'Protecting Civilians' <<https://peacekeeping.un.org/en/protecting-civilians>> Accessed 15 May 2021.

community.¹⁵⁶ The aim of this matrix is to identify priority areas and to assess the threat level and degree of vulnerability of the local community. It then ranks areas as being 'must protect', 'should protect' and 'could protect'. This information is then passed along to a 'Protection Cluster' and SMG-PP¹⁵⁷ who decides on the appropriate action to be taken. Therefore, in a similar way to which the Bukavu crisis resulted in closer cooperation between peacekeepers and humanitarian actors, the PoC matrix also enhanced cooperation between the UN peacekeeping operation and the wider humanitarian community. Again, this creates a subtle expansion in the norm of PoC by extending peacekeeping's reach into the humanitarian sphere. Whilst this may be well-intentioned, it runs the risk of undermining the work of impartial and unarmed humanitarian actors where their tasks may overlap with those of the UN peacekeepers.¹⁵⁸

In a similar vein, MONUSCO has developed further tools in order to implement the norm of PoC, focusing on building partnerships at the local level, with Community Liaison Assistants (CLAs) – national staff working alongside troops in military bases to enhance interaction between the Force and local communities.¹⁵⁹ These assistants analyse protection needs and, again, inform protection strategies and plans. Alongside this, Community Alert Networks (CANs) have been established as an early-warning

¹⁵⁶ See: JA Boutellis, 'From Crisis to Reform: Peacekeeping Strategies for the Protection of Civilians in the Democratic Republic of Congo' (2013) 2(3):48 Stability 1-11.

¹⁵⁷ *ibid*; See generally: Global Protection Cluster, 'Democratic Republic of Congo' <<https://www.globalprotectioncluster.org/field-support/field-protection-clusters/democratic-republic-of-congo/>> Accessed 10 May 2020.

¹⁵⁸ Labbé and Boutellis (n145).

¹⁵⁹ J Kullenberg, 'Community Liaison Assistants: A Bridge Between Peacekeepers and Local Populations' (FMR, October 2016) <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/community-protection/kullenberg.pdf>> Accessed 15 May 2020.

mechanism within communities surrounding MONUSCO bases, communicating via radio or mobile phone to alert one another of an imminent threat.¹⁶⁰ More recently, this network has developed a specific phone number (similar to a 999 call in the UK) for threat warnings. Along with Community Protection Committees¹⁶¹ and Local Security Committees, these PoC tools demonstrate a broadened interpretation and application of the norm of PoC and, as has been noted throughout this thesis, mark more of a people-centred, bottom-up approach to peacekeeping. Indeed, the 2015 HIPPO Report emphasised the significance of local actors to the effectiveness of peace operations, noting that 'they are the main agents of peace'¹⁶² and 'engagement must increasingly be regarded as core to mission success'.¹⁶³ Furthermore, when visiting the DRC in August 2019, Secretary-General Guterres' first visit was not to the newly elected Prime Minister, Tshisekedi, but to Ebola survivors and health workers in North Kivu, to assess MONUSCO's implementation of its mandate to protect civilians.¹⁶⁴ This could, again, be viewed as an example of the SG's norm entrepreneurship as it reinforces the norm of PoC and reflects an aim of Guterres' tenure to build greater partnerships.¹⁶⁵

¹⁶⁰ See: CIVIC, 'Community Engagement by MONUSCO with Reduced Field Presence' (CIVIC, May 2018) <https://civiliansinconflict.org/wp-content/uploads/2018/06/MONUSCO_Community-Engagement-Brief.pdf> Accessed 20 May 2020.

¹⁶¹ See: UNSC, 'Report of the Secretary-General on the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo' (25 September 2014) UN Doc S/2014/698.

¹⁶² UNGA-SC, 'Report of the High-level Independent Panel on Peace Operations' ("HIPPO Report") (17 June 2015) UN Doc A/70/95-S/2015/446, 48.

¹⁶³ *ibid*, 14.

¹⁶⁴ UN News, 'UN Chief Pays Tribute to the Courage of DR Congo Citizens' (*UN News*, 1 September 2019) <<https://news.un.org/en/story/2019/09/1045372>> Accessed 14 May 2020.

¹⁶⁵ A Guterres, 'Secretary-General-designate António Guterres' Remarks to the General Assembly on Taking the Oath of Office' (UNSG, 12 December 2016) <<https://www.un.org/sg/en/content/sg/speeches/2016-12-12/secretary-general-designate-ant%C3%B3nio-guterres-oath-office-speech>> Accessed 16 May 2020.

Despite this expansion of the norm of PoC and the development of these tools, designed in order to allow MONUSCO to implement the norm, there have still been numerous occasions in which the peacekeeping operation has failed to execute this norm and protect civilians. In particular, there has often been a pattern of failures despite a significant UN presence, with systemic rapes and attacks against civilians occurring in close proximity to MONUSCO bases.¹⁶⁶ On occasions, these have also occurred despite repeated warnings from the local protection committees,¹⁶⁷ suggesting a failure on the part of both MONUSCO and its PoC tools which had been purposefully established to prevent such incidences. This is further compounded by a failure of the operation to adequately respond to the massacres, as occurred in the village of Mutarule, North Kivu, when MONUSCO failed to visit the village until two days after the massacre,¹⁶⁸ simply condemning the attacks and labelling it as a flare of 'inter-ethnic violence'.¹⁶⁹ Once again, this could be viewed as a disregard for the complexities of the Congo and an example of how the norm of PoC may be expanded in theory but not necessarily in practice. Indeed, here, MONUSCO had essentially failed to implement or support the very PoC tools which they had helped to establish. That is, they had failed to respond to alerts

¹⁶⁶ Such as the systemic rapes in 13 villages in North Kivu in 2010, 30 kilometres from a MONUSCO base. See: P Worsnip, 'UN's Ban Sends Top Aide to Congo After Mass Rape' (*Reuters*, 24 August 2010) <<https://www.reuters.com/article/oukwd-uk-congo-democratic-rape-idAFTRE67N5VQ20100824>> Accessed 15 May 2020; UN Press Release, 'Conference by Special Representative for the Democratic Republic of Congo' (25 August 2010) <<https://reliefweb.int/report/democratic-republic-congo/press-conference-special-representative-democratic-republic-congo>> Accessed 15 May 2020.

¹⁶⁷ HRW, 'DR Congo: Army, UN Failed to Stop Massacre' (*Human Rights Watch*, 2 July 2014) <<https://www.hrw.org/news/2014/07/02/dr-congo-army-un-failed-stop-massacre>> Accessed 1 Jan 2018.

¹⁶⁸ *ibid.*

¹⁶⁹ UN News, 'UN Peacekeepers in Eastern DR Congo Help Restore Calm After Inter-Ethnic Violence Flares' (*UN News*, 7 June 2014) <<https://news.un.org/en/story/2014/06/470232-un-peacekeepers-eastern-dr-congo-help-restore-calm-after-inter-ethnic-violence>> Accessed 9 August 2019.

from the protection committees that they had helped to create which, for some, consequently results in MONUSCO providing a false sense of security.¹⁷⁰

This then leads to three main issues which stem from the PoC efforts in the Congo which have been outlined in Chapter 3.¹⁷¹ Firstly, whether the PoC mandates could be perceived as imposing a duty or obligation on peacekeepers to protect civilians; secondly, if this is a duty which should be placed upon peacekeepers or should, instead, be a priority for the host state; and thirdly, the perception local populations have of UN peacekeeping as protectors of civilians. All these issues, in turn, then pose questions as to how broadly the norm can or should be interpreted and, consequently, to what extent this then impacts peacekeeping normative frameworks and the principle of non-intervention.

3.3 Expectations and Capabilities

The prioritisation of PoC within peacekeeping mandates, in-line with the shift to robust peacekeeping, resulted in force being permitted in order to protect civilians.¹⁷² As noted earlier, the often-invoked phrase of 'Acting under Chapter VII' included within PoC mandates introduces enforcement elements into a peacekeeping operation, creating confusion over what this means for both the norm of PoC and the principle of limited use of force. A broader interpretation of PoC may therefore have a knock-on effect on the principle of non-use of force, again demonstrating the co-habitation of

¹⁷⁰ HRW (n154).

¹⁷¹ Section 4.2.

¹⁷² *ibid.*

peacekeeping's norms and principles and the overlap between the legal and normative frameworks. This shift to a more forceful implementation of PoC is seen in the language of MONUC/MONUSCO's mandates and is posited in such a way that it seemingly places a legal duty or obligation on peacekeepers to protect civilians. In 2003 the Security Council 'authorise[d] MONUC to take the necessary measures' as it deemed 'within its capabilities' to 'protect civilians' under imminent threat of physical violence.¹⁷³ Ten years later, the language surrounding PoC changed slightly, with the Security Council authorising MONUSCO to 'take all necessary measures' to 'ensure' the 'effective protection of civilians under imminent threat of physical violence'.¹⁷⁴ This broadening of the language surrounding 'necessary measures' (from 'the' to 'all') arguably invokes more coercive language, implying that a broader range of measures ('all') needed to be taken – including the use of force- rather than simply those measures which the operation could determine, for itself, where within its capabilities. This therefore broadens the already ambiguous notion of 'necessary measures', thereby expanding the norm of PoC and consequently expanding the normative frameworks of peacekeeping, increasing its interventionist potential and consequently undermining the principle of non-intervention. That is, were these measures may include the use of increased levels of force or may impact the state's sovereign rights, then this could amount to coercive action designed to influence change in

¹⁷³ UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493 para 25.

¹⁷⁴ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, para 12.

the host state and, therefore, intervention.¹⁷⁵ This is then compounded by the fact that more recent mandates note that when prioritising tasks, 'the protection of civilians must be given priority in decisions about the use of available capacity and resources'.¹⁷⁶ Again, reinforcing the positioning of PoC as a priority task and emphasising that this places an obligation on MONUSCO to focus its resources on this task.

Indeed, the inclusion of the term 'ensure' also implies that the protection of civilians has become an obligation for MONUSCO peacekeepers. It could therefore be argued that the language within the PoC mandate imposes a legal duty or obligation on MONUSCO peacekeepers to protect civilians, however they deem necessary, if they are under imminent threat of violence. Further, as these PoC mandates are authorised under Chapter VII, pursuant to Article 25 of the UN Charter, although member states are not obliged to contribute to a peacekeeping operation, if they do, then they become bound by Articles 2 and 25 and must accept and carry out measures within the mandate 'so as to achieve its lawful objectives'.¹⁷⁷ Indeed, both the Department of Peace Operations (DPO, then DPKO) and the Department of Field Support (DFS) have noted that peacekeepers 'are authorized and are duty bound to undertake actions to protect civilians' when the host state is unwilling or unable to do so.¹⁷⁸ Furthermore, in their

¹⁷⁵ Chapter 3, Section 4.2.; Chapter 4, Section 4.

¹⁷⁶ UNSC Res 2502 (19 December 2019) UN Doc S/RES/2502, para 25.

¹⁷⁷ *Al-Jedda v UK* App No 27021/08 (ECtHR, 7 July 2011) para 34. See also *Namibia*, where the ICJ held that in order to assess the legally binding nature of UNSC Resolutions, one had to consider 'the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences': *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, para 114.

¹⁷⁸ See: DPKO/DFS Policy, 'The Protection of Civilians in United Nations Peacekeeping' (2015) Ref 2015.07. p6.

2017 Guidelines on the use of force by UN peace operations, the departments argued that if 'the mission is mandated for PoC' then they are under an 'obligation to use force to protect civilians from armed attack', if 'all other unarmed tactics, techniques and procedures fail'.¹⁷⁹ Therefore, as noted in Chapter 3, this creates a two-pronged expansion of peacekeeping's legal and normative frameworks, pushing peacekeeping closer to the intervention boundary line. Firstly, it expands the concept of PoC, confirming it is a priority task and an obligation for peacekeepers to fulfil and, secondly, the stipulation that force can and should be used to fulfil this task simultaneously expands the principle of non-use of force. This ambiguous language in the mandates, combined with the expanded use of force in defence of the mandate (and therefore in defence of tasks such as PoC) expands the norm of PoC exponentially.¹⁸⁰ Thus, by extension, it expands peacekeeping's frameworks and undermines the principle of non-intervention when PoC tasks invoke elements of coercive action that impinge upon state's sovereign rights. As was suggested for the norm of democracy promotion, it could be argued that there needs to be a review and reimagining of the Security Council mandate in order to clarify these legal and practical issues. In particular, to clarify how much force could or should be used in order to implement a PoC mandate and whether this, in turn, is a legal duty or obligation.

¹⁷⁹ *ibid*, 23.

¹⁸⁰ Chapter 3, Section 4.2.; Chapter 4, Section 4.

3.4 MONUSCO the Protector

This language of 'duty' and 'obligation' also points to a further issue which is whether or to what extent peacekeepers should be tasked with protecting civilians. Arguably, this language within the mandates places an undue burden on UN peace operations and could be perceived as both an erosion of host state sovereignty and interventionist behaviour by the peace operation, depending on the 'measure' which is used (e.g. use of force). As previously noted, the very concept of PoC – to protect all civilians- is an impossible task, evidenced in the numerous so-called failures of MONUC and MONUSCO in the Congo. This leads to the question of whether PoC should be the primary responsibility of the peacekeeping operation.

Within the Congo, this has become a particularly poignant issue as MONUSCO is now the primary actor undertaking the protection of civilians, as opposed to the state, thereby creating a reliance on the peacekeeping operation to fulfil protectorate tasks. In a 2019 strategic review of MONUSCO, it was noted that the operation had 'pursued an out-focused mission-drive protection strategy', focusing on perfecting its own system and thereby diminishing the primary role of State authorities in assuming their protection of civilians.¹⁸¹ As such, whilst MONUSCO's internal PoC systems had been strengthened, there had been 'little success in terms of national ownership and buy-in.'¹⁸² The independent review therefore deemed that MONUSCO's general approach to the protection of civilians is

¹⁸¹ UNSC, 'Transitioning from Stabilization to Peace: An Independent Strategic Review of MONUSCO' ("Strategic Review") (25 October 2019) UN Doc S/2019/842, para 77.

¹⁸² *ibid.*

'disconnected from the overarching political strategy needed to sustain local gains.'¹⁸³ The review therefore proposed that the operation should reinforce capacity building for Congolese authorities, in order to progressively transfer 'tools and capacities relating to the protection of civilians' to Congolese security forces.¹⁸⁴

Put simply, then, whilst MONUSCO had created numerous PoC tools and strategies, such as the community liaison assistants and threat matrix, this has strengthened MONUSCO's ability to protect civilians but not the Congolese states, which, in turn, raises numerous issues. Firstly, as seen in Chapter 3, it expands the norm of PoC and peacekeeping's normative boundary, arguably, to its limits, pushing the peacekeeping operation beyond the red boundary line and into the realm of intervention as it is, in essence, undertaking the role of the state as the protection of its citizens is a sovereign right. Therefore, the UN is 'basically substituting to regalian powers that the state cannot implement'.¹⁸⁵ As noted in Chapter 3,¹⁸⁶ where the state is willing to accept the UN peacekeeping operation undertaking this role, as in the Congo, then an argument could be made that this a 'function of the host state's consent' and, therefore, a form of intervention by invitation.¹⁸⁷

¹⁸³ *ibid*, para 78.

¹⁸⁴ *ibid*.

¹⁸⁵ Interview with Senior Human Rights Officer in the Office of the UN High Commissioner of Human Rights ('Interviewee 13') (New York, 6 December 2019) DOI: <<http://doi.org/10.17639/nott.7119>> pg 46.

¹⁸⁶ Section 4.2.2.

¹⁸⁷ PI Labuda PI, 'United Nations Peacekeeping as Intervention by Invitation: Host State Consent and the Use of Force in Security Council-Mandated Stabilisation Operations' (2020) JUFIL 1-37.

Secondly, MONUSCO's heightened PoC role creates a reliance on the peacekeeping operation (both by the state and local populations) and an unrealistic perception of MONUSCO as the protector of all civilians. Indeed, senior UN personnel have noted that because MONUSCO has been allowed 'to substitute itself for the national authorities', this has created 'all sorts of perverse incentives', as the large, expensive peacekeeping operation 'creates a perfect opportunity for elites that are benefiting from a particular way of doing things to blame everything on the UN'.¹⁸⁸ As such, when there is an outbreak of violence which leads to loss of civilian life, both the state and the local population are 'pointing the finger at the mission' and 'hardly anyone's asking, well why isn't it the government that is dealing with the problem', 'why isn't the FARDC not able to protect civilians'.¹⁸⁹ This dichotomy was epitomised in December 2019 when anti-MONUSCO demonstrations broke out in Beni and neighbouring towns, such as Butembo, with protestors claiming that the peacekeeping operation had failed to protect civilians from rebel attacks.¹⁹⁰ Three days prior to the protests, rebel fighters belonging to the Allied Democratic Forces (ADF) attacked and killed at least nineteen people in a village near Oicha, approximately 14 miles from Beni,¹⁹¹ where there is a significant MONUSCO presence.¹⁹² The local population had therefore perceived the protection of

¹⁸⁸ Interviewee 16 (n10) pg 24.

¹⁸⁹ *ibid.*

¹⁹⁰ Al Jazeera, 'Protests Spread in East DRC as Fury Against UN Peacekeepers Rises' (*Al Jazeera*, 27 November 2019) <<https://www.aljazeera.com/news/2019/11/protests-spread-east-drc-fury-peacekeepers-rises-191127074511102.html>> Accessed 1 Dec 2019.

¹⁹¹ Al Jazeera, 'DR Congo: At Least 19 Killed in New Rebel Attack Near Beni' (*Al Jazeera*, 29 November 2019) <<https://www.aljazeera.com/news/2019/11/dr-congo-15-killed-rebel-attack-beni-191127155019797.html>> Accessed 1 Dec 2019.

¹⁹² As of November 2019, in Beni there are 557 UN peacekeepers from Malawi, a Formed Police Unit of approximately 150 Indian officers and 150 Tanzanian peacekeepers stationed at the airport. See: UN News, 'UN

civilians to be the role of MONUSCO, rather than the state, thereby holding peacekeepers accountable for their perceived inability or failure to protect civilians.

Again, this creates a problematic reliance on a temporary peacekeeping operation, which, from a TWAIL perspective, could also be seen as reinforcing patterns of domination and subordination, recreating the colonial archetypal image of the external actor as the enlightened saviour.¹⁹³ That is, it is the dominant, Global North led actor who is deemed to be the protectorate of the Congolese peoples, as opposed to the Global South host state. In essence, this reinforces or replicates the colonial dichotomies of the a 'civilised' Global North and an 'uncivilised' Global South, the latter of which requires the support and protection of the former. As a result of this reliance, interviewees within the Office of the SRSG in Congo have argued that there is a need to ensure civil society are aware that MONUSCO is not and should not be the main protector of civilians,¹⁹⁴ with others working within MONUSCO also arguing that PoC should be removed as a priority task for MONUSCO and should instead be undertaken by the UN country team.¹⁹⁵ Indeed, as MONUSCO is progressively phasing down, pursuant to its exist strategy, the operation has been working on 'detailed plans for scaling up' the UN country teams 'presence and

Mission in DR Congo Appeals for Calm as Violent Protests Continue' (*UN News*, 25 November 2019) < <https://news.un.org/en/story/2019/11/1052151>> Accessed 1 Dec 2019.

¹⁹³ As seen in Chapter 3, Section 4.2.2.

¹⁹⁴ Interview with Political Adviser in the Office of the SRSG MONUSCO ('Interviewee 18') (Skype, 17 February 2020).

¹⁹⁵ Interview with Personnel in MONUSCO's Stabilisation Support Unit ('Interviewee 19') (Skype, 21 February 2020).

programmatic activities' in the area where MONUSCO is set to withdraw.¹⁹⁶ This has included provincial-level transition task forces and has been guided by the humanitarian-development-peace nexus approach, demonstrating the significantly developed relationships between these actors since MONUC and OCHA's clash over the Nkunda-led CNDP attack in 2004. Furthermore, for PoC, MONUSCO has been working with provincial leaders and civil society organisations 'to map existing provincial mechanisms for the protection of civilians, in view of the progressive handover of responsibilities to local actors'.¹⁹⁷ Thus, perhaps demonstrating a recognition of the state's inability to undertake protectorate tasks and, arguably, marking a necessary shift in approach from state-centric, top-down to people-centred, bottom-up, as has been discussed throughout this thesis.

MONUSCO's interpretation and application of the norm of PoC therefore demonstrates how a broad understanding expands peacekeeping's normative boundary, thereby undermining the principle of non-intervention and, at times, potentially taking peacekeeping into the realm of intervention. Furthermore, it also highlights a wider issue of how to reconcile people-oriented PoC mandates with the state-centric logic of UN-mandated interventions.¹⁹⁸ This is now demonstrated in the operation's withdrawal as it is engaging with local-level authorities and civil society

¹⁹⁶ UNSC, 'Report of the Secretary-General' (18 March 2021) UN Doc S/2021/274, para 59.

¹⁹⁷ *ibid*, para 60.

¹⁹⁸ PI Labuda, 'With or Against the State? Reconciling the Protection of Civilians and Host-State Support in UN Peacekeeping' (IPI 2020).

organisations, thereby seemingly adopting grassroots, bottom-up approach. As such, it could be argued that this, again, supports the notion of a need for the re-drawing of peacekeeping's boundaries and a move to a more bottom-up, insider led approach which, again, may require a review of the Security Council mandate as it is this which, ultimately, sets the parameters which a peacekeeping operation may act within.

4 Prohibition of Sexual Abuse and Exploitation

The DRC has an unfortunate history of sexual exploitation and abuse (SEA) both during conflict and in peace time. Since the start of the 1996 First Congo War, rape has been used as a weapon of armed conflict, with the fragmented command structures of both armed groups and the Congolese armed forces (FARDC) leading to the use of sexual violence as a military tactic.¹⁹⁹ This resulted in the Congo being labelled the 'rape capital of the world' in 2010.²⁰⁰ However, it is not only the warring parties in the Congo who have subjected civilians to such horrors - UN peacekeepers have also been significant perpetrators of sexual exploitation and abuse. As such, similar to the development of the norm of PoC, the interpretation and application of the prohibition of SEA in the Congo has resulted in numerous tools and policies, thereby broadening the norm in an attempt to address the issue. However, as was noted in Chapter 3, the development of this norm, unlike its counterparts, has been somewhat slow, with a disconnect

¹⁹⁹ See: MONUSCO, 'Sexual Violence Unit' <<https://monusco.unmissions.org/en/sexual-violence-unit>> Accessed 10 May 2021.

²⁰⁰ S Meger, 'Rape of the Congo: Understanding Sexual Violence in the Conflict in the Democratic Republic of Congo' (2010) 28(2) JContempAfrStud 119-135; UN News, 'Tackling Sexual Violence Must Include Prevention, Ending Impunity - UN Official' (UN News, 27 April 2010) <<https://news.un.org/en/story/2010/04/336662>> Accessed 1 Jan 2018.

between the Secretary-General and office of the SG who have promoted the norm, and the Security Council and Member States, including the troop contribution nations (TCNs) who have typically done little to support the norm. Indeed, whilst the Security Council mandate repeatedly 'strongly condemns' sexual violence in conflict, encouraging the Government of the DRC to combat such violence and end impunity, particularly when acts are committed by host state forces (the FARDC), this same level of condemnation and drive to implement strategies and roadmaps is not seen for sexual violence committed by UN peacekeepers.²⁰¹ This again demonstrates the hypocrisy or power differentials that are entrenched within peacekeeping, as a TWAIL lens has highlighted throughout Chapters 2 and 3. The norm of prohibition of SEA therefore differs from the other principles and norms in that its slow development has resulted in only a limited expansion of peacekeeping's normative framework. For the principle of non-intervention, then, the norm has supported, rather than undermined the principle but, as Chapter 3 noted, a broader interpretation of the norm would reinforce the principle further given that its aim is to restrict peacekeeper's behaviour and limit their coercive intervention through SEA.

4.1 Protectors or Predators?

As early as the UN's first operation in Congo, ONUC, there were allegations of rape by Ethiopian troops and an Indian officer.²⁰² Reporting of such incidences then became most prominent in 2003-2004, shortly after the

²⁰¹ S/RES/2556 (n149) paras 9-10.

²⁰² HL Deb 15 March 1962, vol 238, Cols 364-88, 367.

UN had returned to the DRC with MONUC. In 2003 an uncovered memo from the MONUC child protection officer in Kindu to MONUC headquarters in Kinshasa reported fears about allegations of SEA by MONUC forces, yet no action was taken.²⁰³ Similarly, when a gender advisor to MONUC contacted UN headquarters in New York requesting that Moroccan troops in Kisangani were not sent to Bunia, following allegations of extreme sexual abuse, including child pornography, a short-lived investigation was dropped due to a lack of evidence and support for the inquiry.²⁰⁴ As noted in Chapter 3, these allegations arose around the same time as the General Assembly's report on SEA of refugees by aid workers in West Africa²⁰⁵ and the subsequent SG's Bulletin on protection from SEA.²⁰⁶ However, this did not necessarily translate into any noticeable action with the Congo – the norm was therefore not transported into the field. Again, as has been noted with the other two norms within this Chapter, there is then a gap between theory and practice.

A year later, in June 2004, a cable sent from MONUC's office in Kinshasa to the UN's New York headquarters detailed fifty claims of SEA against minors by MONUC forces in Bunia.²⁰⁷ It is at this point that an independent UN

²⁰³ K Holt and S Hughes, 'Will Congo's Women Ever Have Justice?' (*The Independent*, 12 July 2004) <<https://www.independent.co.uk/news/world/africa/will-congos-women-ever-have-justice-46938.html>> Accessed 1 June 2019.

²⁰⁴ *ibid*; C Lynch, 'UN Sexual Abuse Alleged in Congo' (*The Washington Post*, 16 December 2004) <<https://www.washingtonpost.com/archive/politics/2004/12/16/un-sexual-abuse-alleged-in-congo/ae8ed493-29e0-482b-aafc-5be20838cc47/>> Accessed 17 May 2020.

²⁰⁵ UNGA, 'Investigations into Sexual Exploitation of Refugees by Aid Workers in West Africa' (11 October 2002) UN Doc A/57/465; UNGA Res 57/306 (22 May 2003) UN Doc A/RES/57/306.

²⁰⁶ UNSG, 'Secretary-General Bulletin: Special Measures for Protection for Sexual Exploitation and Abuse' (9 October 2003) UN Doc ST/SGB/2003/13.

²⁰⁷ K Holt and S Hughes, 'Sex and the UN: When Peacemakers Become Predators' (*The Independent*, 11 January 2005) <<https://www.independent.co.uk/news/world/africa/sex-and-the-un-when-peacemakers-become-predators-486170.html>> Accessed 17 May 2020.

investigation team from the Office of Internal and Oversight Services (OIOS) was deployed to Bunia to conduct investigations,²⁰⁸ which was followed by a special investigative team from the Department of Peacekeeping Operations (DPKO).²⁰⁹ Despite the investigations, details of allegations continued to emerge.²¹⁰ However, in line with Annan's newly launched zero tolerance policy,²¹¹ MONUC's resolutions began to recognise the 'grave concern' of allegations of SEA by MONUC personnel.²¹² In doing so, it encouraged MONUC to conduct training for personnel and to ensure 'full compliance' with its code of conduct, simultaneously, urging TCNs to 'take appropriate disciplinary and other action to ensure full accountability for misconduct'.²¹³ Similar statements 'expressing grave concern' and calling for training and accountability were also repeated in MONUC's subsequent mandates,²¹⁴ with SG Kofi Annan introducing 'non-fraternisation' regulations in the DRC which banned peacekeepers from having sexual relations with the local population.²¹⁵

Whilst the Secretary-General was therefore promoting the norm of prohibition of SEA (once again highlighting the norm entrepreneurship role of the SG)²¹⁶ arguably, the same cannot be said for the Security Council,

²⁰⁸ UNGA, 'Investigation of the OIOS into Allegations of SEA in MONUC' (5 January 2005) UN Doc A/59/661.

²⁰⁹ UN Press Release, 'Press Briefing on Sexual Exploitation Allegations Related to MONUC' (22 November 2004) <<https://www.un.org/press/en/2004/lute041122.doc.htm>>; UN Press Release, 'Statement by the Secretary-General' (19 November 2004) <<https://www.un.org/sg/en/content/sg/statement/2004-11-19/statement-secretary-general-allegations-sexual-exploitation-and>> Both accessed 15 May 2020.

²¹⁰ E Wax, 'Congo's Desperate 'One-Dollar UN Girls' (*The Washington Post*, 21 March 2005) <<https://www.washingtonpost.com/archive/politics/2005/03/21/congos-desperate-one-dollar-un-girls/26b5e610-d9ed-42e1-909a-03b2e061377d/>> Accessed 15 May 2020.

²¹¹ See: Chapter 3, Section 4.3.

²¹² UNSC Res 1565 (1 October 2004) UN Doc S/RES/1565, 25.

²¹³ *ibid.*

²¹⁴ For example: UNSC Res 1635 (28 October 2005) UN Doc S/RES/1635, 8.

²¹⁵ E Leopold, 'UN Bans Peacekeepers From Sex With Congolese' (*Global Policy*, 10 February 2005) <<https://archive.globalpolicy.org/security/issues/congo/2005/0210nonfrat.htm>> Accessed 22 July 2020.

²¹⁶ Chapter 3, Section 2.

on the basis of MONUC's subsequent mandates and their approach to SEA. That is, it is debatable how much of a priority the norm of prohibition of SEA was in the DRC given that in 2007, in an eight page mandate, the first and only mention of SEA came on the final page of the mandate in the second to last paragraph.²¹⁷ The same phrases were again reiterated and placed low-down on MONUC's list of tasks in the 2008 mandate.²¹⁸ This shifted in 2009 in MONUC's final mandate when the issue of SEA became incorporated into MONUC's PoC tasks, with the tackling of SEA by UN peacekeepers therefore essentially moving from the bottom of the task list to the top, surpassing DDR and SSR provisions.²¹⁹ Under the umbrella of protection of civilians, including humanitarian and UN personnel, the Council again requested that the SG continued to fully investigate the allegations of SEA and take appropriate measures per the 2003 SG Bulletin.²²⁰ Whilst this was still a reiteration of statements that had been made for the previous four years, it could be argued that the absorption of SEA into PoC placed the issue higher on MONUC's task list, placing it within one of its priorities, thereby expanding the norm slightly.

However, what remained problematic was that neither the 2008 nor 2009 mandates made any reference to the role of TCNs in addressing SEA committed by their troops, instead the mandates call upon the Secretary-General to investigate allegations and to take appropriate measures under

²¹⁷ S/RES/1756 (n79) 22.

²¹⁸ S/RES/1856 (n79) 15.

²¹⁹ UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906, 12-13.

²²⁰ *ibid.*

the 2003 SG Bulletin.²²¹ Therefore, it could be argued that the absorption of SEA into PoC, rather than being viewed as placing the norm higher on MONUC's priority list could instead be seen as detracting from the seriousness of SEA, essentially downgrading it as a problem in and of itself. Indeed, in the next Security Council mandate, as MONUC transitioned into MONUSCO, the norm of SEA was again moved, this time placed under MONUSCO's second priority task of 'stabilisation and peace consolidation'.²²² With this 2010 mandate, the Council simply stated that the SG was to take the 'necessary measures to ensure full compliance' of MONUSCO with the UN's zero-tolerance policy on SEA and 'to keep the Council informed if cases of such conduct occur'.²²³ Within this mandate, then, the reference to SEA by peacekeepers was relatively short, with no reference to the SG Bulletin. This could be viewed as somewhat of a disregard or waning of support for the norm of prohibition of SEA which was reflected in the fact that MONUSCO's 2011 and 2012 mandates did not contain a single reference to SEA committed by UN peacekeepers.²²⁴ This seemingly diminished support for tackling SEA was again evidenced in the 2013, 2014 and 2015 mandates which referred to SEA by peacekeepers but simply repeated the same sentence that had been contained within the 2010 mandate – that the SG was to take the necessary measures to ensure compliance with the UN's zero-tolerance policy and to keep the Council

²²¹ SG Bulletin (n206).

²²² UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925, 15.

²²³ *ibid.*

²²⁴ S/RES/1991 (n81); UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053; UNSC Res 2017 (20 November 2012) UN Doc S/RES/2017.

informed of any allegations.²²⁵ The implementation of the norm of prohibition of SEA within the Congo during this period therefore demonstrates how peacekeeping's norms and principles, as was seen in Chapter 3, 'wax and wane'²²⁶ and are dependent on external pressures, events and practices. More specifically, it highlights how a lack of support for a norm results in its stagnation. From a TWAIL perspective, the seeming disinterest of the dominant actors (in particular the Global North P5 within the Security Council) to engage with and develop the norm, reflecting how peacekeeping is beholden to the agenda of the hegemonic powers. That is, as the prohibition of SEA is evidently not a priority for member states, given that it requires them to potentially address issues within their own state troops or within another TCN, then it is, consequently, not a focus within the peacekeeping agenda. Indeed, it is a task which is primarily offloaded to the Secretary-General, despite the fact that is an issue directly stemming from member states. In essence, then, the norm is highly politicised, with member states seemingly more concerned with losing the support of a TCN or souring relations between states than they are of addressing SEA amongst its peacekeepers. This is exemplified by the fact that within MONUSCO, the TCN with the most significant number of SEA allegations against it is South Africa²²⁷ – a key TCN who contribute a sizeable battalion

²²⁵ S/RES/2098 (n174) para 26; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147, para 32; UNSC Res 2211 (26 March 2015) UN Doc S/RES/2211, para 22.

²²⁶ Karlsrud (n3) 527.

²²⁷ See: UN Conduct in Field Missions, 'Sexual Exploitation and Abuse: Table of Allegations' <<https://conduct.unmissions.org/table-of-allegations>> Accessed 20 May 2021.

to the Force Intervention Brigade, which is also often commanded by South African military personnel.²²⁸

This, in turn, again exemplifies the inherent power differentials embedded within the UN system in addition to the unequal balance of power between the external, dominant actor and the subordinate host state. This is evidenced, particularly during this period, with the Security Council mandates which routinely condemned sexual violence by the Congolese national armed forces and other armed groups, yet, again, remained silent on the issue of SEA by UN peacekeepers. Furthermore, SEA can be said to have become a tool to reinforce the North-South divide, with dominant Western states, such as the United States, using allegations of SEA against troop contribution countries to, amongst other things, 'delegitimise their claims on relevant debates'.²²⁹

4.2 SG's Norm Entrepreneurship

This low-point for the norm within the Congo significantly changed following the 2015 HIPPO report which, as noted in Chapter 3, expanded the norm of prohibition of SEA, renewing support for the UN's zero-tolerance policy and reaffirming the primary responsibility of troop and police contributing countries to investigate allegations.²³⁰ The impact of the HIPPO report was then reflected in MONUSCO's mandates as the Council explicitly referred to

²²⁸ SADC Press Release, 'SADC Reiterates Its Position For a Stable and Peaceful DRC' (SADC, 29 May 2020) <<https://reliefweb.int/report/democratic-republic-congo/sadc-reiterates-its-position-stable-and-peaceful-drc>> Accessed 1 May 2021; P Fabricius, 'Asking the Right Questions About the Force Intervention Brigade' (ISS, 21 August 2020) <<https://issafrica.org/iss-today/asking-the-right-questions-about-the-force-intervention-brigade>> Accessed 15 May 2021.

²²⁹ TG Weiss and G Kuele, 'The Global South and UN Peace Operations' (*E-International Relations* 3 Feb 2019) <https://www.e-ir.info/2019/02/03/the-global-south-and-un-peace-operations/#_ftn2> Accessed 18 May 2020.

²³⁰ HIPPO Report (n162).

the report and their own resolution.²³¹ Supporting this revival of the norm, they again called upon the Secretary-General to ensure compliance of the zero-tolerance policy within MONUSCO but also requested troop and police contributing countries to 'take preventative action' including pre-deployment awareness training.²³² This was then reiterated in MONUSCO's mandate in the following year, reflecting a broadening of the norm within the Congo, with this noticeable shift from simply reporting allegations to now undertaking pro-active, preventative steps in the form of pre-deployment training. This could therefore be viewed as an expansion of the norm of prohibition of SEA and peacekeeping's frameworks, simultaneously supporting the principle of non-intervention as it attempted to prevent violence by peacekeepers against civilians.

The norm was then expanded further within the Congo following a strategic review of MONUSCO, which noted the need to enhance the authority of the SRSR to ensure accountability of MONUSCO staff.²³³ Alongside the pre-established tasks of the SG and the TCC's provision of pre-deployment training and investigating allegations, a performance management framework was also introduced.²³⁴ The Secretary-General was now mandated to conduct a comprehensive performance review of all MONUSCO units in accordance with the Operational Readiness Assurance and

²³¹ UNSC Res 2277 (30 March 2016) UN Doc S/RES/2277.

²³² *ibid.*

²³³ UNSC, 'Special Report of the Secretary-General on the Strategic Review of the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo' (29 September 2017) UN Doc S/2017/826, para 98.

²³⁴ UNSC Res 2409 (27 March 2018) UN Doc S/RES/2409, paras 4, 40, 57, 60.

Performance Improvement Policy and the zero-tolerance policy on SEA.²³⁵ Again, this demonstrated how a renewed support for the norm within the broader UN Secretariat had filtered into the UN's peacekeeping operation in the Congo. Thus, it reflects how the peacekeeping agenda is very much influenced and shaped by the dominant states, again highlighting the entrenched power differentials within the UN system and peacekeeping. Furthermore, this expansion of the SG and SRSGs tasks within this area, including the requirement of the SG to report to the Council every three months on the percentage of MONUSCO contingents who meet the performance standards, also highlights the important norm entrepreneurship role of the SG.²³⁶ Indeed, as previously noted, the norm of prohibition of SEA can therefore be said to be largely driven by the Office of the Secretary-General, which is reflected here in the implementation of the norm within the Congo.

Through this broadened norm, in 2019 and 2020 similar reiterations of the SG and TCCs role in the implementation of the norm have been included within MONUSCO's mandate, this time shifting the task from under the heading of 'Gender, Sexual Violence and SEA' to 'Mission Effectiveness'.²³⁷ However, despite these advancements, there still remain allegations of SEA. More recently, there has been a gradual increase in the number of SEA allegations reported in the SG's three-month reports. Initially, between 1 December 2019 and 29 February 2020, three allegations of SEA by two

²³⁵ *ibid.*

²³⁶ *ibid.*, para 60. See also: Chapter 3, Section 2.

²³⁷ S/RES/2502 (n176) para 45; S/RES/2556 (n149) para 47.

military contingent members and one international staff member were received.²³⁸ This increased to five allegations of SEA by military, police and civilian staff were recorded between 1 May and 31 August 2020,²³⁹ with a further six allegations of SEA by peacekeepers within the military component of MONUSCO recorded from 1 November 2020 to 28 February 2021.²⁴⁰ These were then referred to the relevant troop or police contributing countries (TCC) or the Office of Internal Oversight Services for investigation, with the victims referred to the UN Population Fund, UN Children's Fund and other relevant partners for support.²⁴¹ Whilst there may be numerous reasons for this gradual increase in allegations reported by the SG, including an improvement in the reporting mechanisms and performance reviews of peacekeepers, more broadly it, again, demonstrates the renewed support for the norm and a more concerted effort to tackle SEA, beginning with this continual monitoring and reviewing.

These efforts to maintain the norm are also evidenced in the adaptations undertaken throughout the COVID-19 pandemic to ensure the tools and policies are still implemented. This therefore marks a further development or deepening of the norm, albeit one which seemingly does not alter the peacekeeping boundaries but simply reaffirms support for the norm. In particular, in order to ensure community outreach of the UN's zero-

²³⁸ UNSC, 'Report of the Secretary-General' (18 March 2020) UN Doc S/2020/214, para 64.

²³⁹ UNSC, 'Report of the Secretary-General' (21 September 2020) UN Doc S/2020/919, para 66.

²⁴⁰ S/2021/274 (n177?) para 73.

²⁴¹ *ibid.*

tolerance policy on SEA, this was predominantly undertaken through radio broadcasts and text measures owing to the pandemic.²⁴² Beyond this, projects under the trust fund which provide support to victims of SEA began in January 2021 in Bunia, Beni, Uvira, Kalemie, Bujovu and Sake which, again, are worthwhile projects but reactive rather than proactive and do not address the root cause or prevent SEA.²⁴³ As such, the development of the norm appears to be moving forward but at a stuttering pace.

4.3 Perverse Consequences of Interventions

Despite these noticeable developments in the interpretation and application of the norm within the Congo, as noted, SEA by peacekeepers within MONUSCO remains problematic. Therefore, whilst MONUSCO has achieved many positive results, such as re-establishing a (precarious) peace throughout much of Congo,²⁴⁴ these interventions 'have also produced a series of detrimental outcomes', such as an increase in human rights violations.²⁴⁵ These incidences of sexual exploitation and abuse could be viewed, then, as another of 'the perverse consequences of well-meaning international efforts.'²⁴⁶ That is, although committed by a very small portion of peacekeepers, these actors exploit their positions of privileged power and subsequently tarnish the whole of the mission, undermining any positive contributions which the operation may have made. This then underscores concerns raised in Chapter 3 about the suitability of sending

²⁴² *ibid*, para 74.

²⁴³ *ibid*.

²⁴⁴ Effectiveness of Peace Operations Network, 'Assessing the Effectiveness of the United Nations Mission in the DRC/MONUC-MONUSCO' (NUPI 2019).

²⁴⁵ Autesserre (n97) 203-204.

²⁴⁶ *ibid*, 222.

soldiers, who are trained to fight, to keep peace, particularly when this is combined with differing cultural attitudes and rules on sexual conduct.²⁴⁷

As former Secretary-General Ban Ki Moon noted, even 'a single substantiated case' of SEA involving UN peacekeepers is 'one case too many'.²⁴⁸ Indeed, senior personnel within the UN Secretariat have noted, the UN 'can definitely do more', particularly the Secretary-General, but, again, as previously noted, a fear of the severe backlash from member states, limits the SG from speaking out more.²⁴⁹ This is evident in the Congo with the significant number of allegations of SEA against troops from South Africa.²⁵⁰ Thus, despite South Africa having the highest record of SEA-related cases of all TCCs, with 45% of all SEA cases in MONUSCO from 2008-2013 having been committed by South African troops, it has remained a key contributor of troops.²⁵¹ Similarly, in 2018, eleven of the twenty-two allegations of SEA were committed by South African troops (with some allegations involving more than one incident and upto three troops), yet there was only one repatriation, with South Africa, again, continuing to contribute troops and playing a pivotal role within the FIB.²⁵² This therefore highlights how despite the tools and policies which have been developed, including the deployment of more female peacekeepers,²⁵³

²⁴⁷ Chapter 3, Section 4.3.2.

²⁴⁸ UNGA, 'Report of the Secretary-General: Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (16 February 2016) UN Doc A/70/729, 1.

²⁴⁹ Interviewee 10 (n6).

²⁵⁰ UN Conduct in Field Missions, 'Sexual Exploitation and Abuse: Table of Allegations' <<https://conduct.unmissions.org/table-of-allegations>> Accessed 30 May 2021.

²⁵¹ SM Cold-Ravnkilde and T Mandrup, 'When Peacekeepers Do Damage: Sexual Exploitation and Abuse in the Democratic Republic of Congo' (Danish Institute for International Studies 2017).

²⁵² UN Conduct (n227).

²⁵³ UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325.

there is a permanent obstacle in the way of the norm of prohibition of SEA - the reliance of the UN on TCCs to prosecute their personnel and provide adequate gender awareness training pre-deployment.²⁵⁴ The UN is therefore beholden to member states and, as such, as has been demonstrated within the Congo, this has limited the development of the norm of prohibition of SEA, consequently restricting peacekeeping's normative framework which, in turn, has the effect of undermining the principle of non-intervention because it does little to prevent these acts against civilians being committed.

5 Regaining Peacekeeping's Normative Boundaries

Whilst Chapter 4 demonstrated how the fundamental principles of peacekeeping have been interpreted and applied within the UN's peacekeeping operations in the DRC, this Chapter has explored peacekeeping's norms of democracy promotion, protection of civilians and the prohibition of sexual exploitation and abuse. Adopting the same approach as the previous Chapter, this section has sought to examine how an interpretation and application of these norms has either expanded or contracted peacekeeping's normative framework. Thus, once again demonstrating the fluidity of these frameworks and the red boundary line that surrounds peacekeeping, which, consequently may reinforce or undermine the principle of non-intervention, depending on how broadly the norms are interpreted. Throughout this exploration, a TWAIL lens has also

²⁵⁴ As discussed in Chapter 3.

continued to be applied, with the Chapter noting, in particular, how the norms of peacekeeping may contribute to the maintenance of the power differentials (which had been explored in Chapters 2 and 3) and how these norms appear to be frequently driven or based upon the dominant states interests and agendas.

This Chapter has found that, firstly, like peacekeeping's legal principles, the norms cohabit in a competitive arena in which they are re-balanced for each operation and, even, each mandate.²⁵⁵ In particular, it has highlighted how these norms have waxed and waned, typically in-keeping with international trends, but, often, in response to changes within the Congo, thereby reinforcing the notion that the DRC has frequently been used as a test bed for UN peacekeeping. That is, MONUSCO is considered to be an innovative operation which has been 'quite proactive in initiating changes from within the mission, rather than waiting for the Council or waiting for headquarters to tell them'.²⁵⁶ Put simply, at times, it is the Congo which has shaped UN peacekeeping, rather than peacekeeping shaping the Congo.

Secondly, the Chapter has highlighted that whilst the norms form a part of peacekeeping's broader normative framework, which surrounds peacekeeping's core legal framework, there are, at times, a degree of overlap.²⁵⁷ For example, whilst the concept of democracy promotion could perhaps only be considered as a norm, failing to amount to a legal principle,

²⁵⁵ J Karlsrud (n3).

²⁵⁶ Interviewee 10 (n6) pg 37.

²⁵⁷ As noted in Chapter 3.

PoC and the prohibition of SEA have clearer legal underpinnings in areas such as international humanitarian and human rights law, thus providing a subsidiary contribution to peacekeeping's legal framework. Similarly, where a broader interpretation and application of these norms has been taken in the Congo, this has had a knock-on effect on the legal principles with, for example, democracy promotion and PoC invoking questions over impartiality and an increased level of force, thereby expanding the principles of impartiality and non-use of force.

This then leads to the third matter which this Chapter has noted- the impact of these frameworks on the principle of non-intervention. It has been argued that the broader understanding of democracy promotion and PoC, which has been implemented in the DRC, has led to an expansion of peacekeeping's normative frameworks that has consequently undermined or, at times contravened, the principle of non-intervention. Indeed, it is argued that, at times, this broadened application of these norms has resulted in the peacekeeping operation undertaking coercive action designed to influence change in the host state and, therefore, intervention – such as MONUC's involvement in the Congo's National Dialogue or MONUSCO's substitution for the state in the protection of civilians. Conversely, it has been found that of the three norms, the prohibition of SEA is the only norm to have not been rapidly developed and broadly interpreted, thereby only providing a limited contribution to the normative framework. However, as seen in Chapter 3, it has been argued that, unlike its democracy and PoC counterparts, a narrow application of the norm,

seemingly based predominantly on member states reluctance to support the norm, effectively permits SEA and thereby undermines, rather than supports, the principle of non-intervention. Therefore, in essence, the only norm to support the principle of non-intervention is the one that is least developed.

Finally, the Chapter has argued that the significant expansion of peacekeeping's normative framework in the Congo, through the norms of democracy promotion and PoC, in particular, has pushed peacekeeping to its very limits. As such, the Chapter has advocated for the need to re-draw the normative (and indeed legal) boundaries of peacekeeping (by narrowing the interpretation and application of these principles) in the hope of retracting peacekeeping's interventionist potential and reinforcing the principle of non-intervention. A shrinking of these legal and normative frameworks, would, perhaps, then mean a retreat from the large, multi-dimensional operations, with their ambiguous Christmas tree mandates, to a more traditional model of peacekeeping. This, in turn, would go some way in helping to clarify the legal issues which this thesis has explored (including peacekeeping's charter basis) and more appropriately match the mandates to peacekeeping capabilities. As this Chapter has suggested, this may therefore require a review of Security Council mandating and a consideration of adapting a more people-centred, as opposed to state-centric, approach to peacekeeping.

Chapter 6

Conclusion

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1. Introduction

This thesis has highlighted, through an exploration of peacekeeping’s frameworks in the Democratic Republic of the Congo, the interventionist nature of peacekeeping and the potential for peacekeeping to cross the thin red boundary line between peacekeeping and intervention, thereby becoming a form of intervention. That is, both peacekeeping and intervention are ill-defined with no pre-determined or explicit frameworks creating set boundaries around the concepts. As such, both concepts are fluid, open to being reinterpreted and contorted, particularly by dominant powers, in order to justify interventions or meet the needs and agendas of these dominant actors. Throughout an exploration of these issues, the thesis has also uniquely adopted a TWAIL perspective, seeking to offer, not a totalising destructive critique of intervention and UN peacekeeping, but, rather, a constructive critique, highlighting instances where colonial patterns and dichotomies of domination and subordination and the North-South divide are replicated within intervention and peacekeeping practices. It has

therefore provided an alternative to the prevailing Western narratives in order to contribute to the reimagining and reinvigoration of UN peacekeeping.

The thesis has explored all of these issues in somewhat of a pyramid structure. Beginning with the top of this pyramid, Chapter 2 explored the development of the principle of non-intervention before Chapter 3 moved on to explore the second layer - the most prevalent form of intervention today, UN peacekeeping. The third Chapter also exposed the legal and normative frameworks surrounding peacekeeping and how those laws and norms potentially interacted with the principle of non-intervention. The final layer of the pyramid then examined peacekeeping in practice, with Chapters 4 and 5 exploring how the legal and normative frameworks are interpreted and applied within the UN's peacekeeping operations in the DRC. The thesis therefore provides a deep analysis of intervention and peacekeeping in order to determine the relationship between the two and to question whether peacekeeping is, at times, intervention.

2. Intervention as Peacekeeping

To begin with, Chapter 2 traced the development of the principle of non-intervention, with intervention defined as any action taken by a state, state actor or international organisation such as the UN, which may be deemed coercive, in order to force change within the host state.¹ The Chapter then highlighted how the concept and practice of intervention has been

¹ Chapter 2, Section 1.

somewhat cyclical. That is, there has been a constant fluctuation in intervention and non-intervention rhetoric with, often, a disparity between rhetoric and practice. In other words, whilst the principle of non-intervention may have been emphatically supported, in practice, interventions have continually occurred, as was seen, for example, with the Cold War proxy wars. These cycles of interventionist practice have therefore had the impact of either supporting or undermining the principle of non-intervention. Unpicking all of this, the Chapter began by examining the historical development or roots of non-intervention, including the Peace of Westphalia and colonialism, it then went on to examine key tipping points such as the formulation of the United Nations and then, most crucially, the decolonisation period.² It is this latter period that this thesis has argued was a crucial moment for the formulation of the principle of non-intervention as it transformed from a principle which exclusively benefited the European hegemonic powers, to one that now applied to the newly independent Global South states. The principle therefore transformed from a European or Western principle to a universal one and was 'professed equally emphatically in the East, West and Third World'.³ Having clarified the composition of the principle of non-intervention, which had been significantly developed within the UN system, particularly with General Assembly Resolutions and Declarations, the Chapter then went on to explore the nuances within the principle.⁴ It examined how, through the

² Chapter 2, Section 2.

³ W Grewe, *The Epochs of International Law* (Walter de Gruyter & Co; Rev Ed edition 2000) 654.

⁴ Chapter 2, Section 3.

International Court of Justice (ICJ) and regional organisations, a greater understanding of the principle in practice began to develop, with the ICJ, in particular, condemning intervention in the Global South and, for the first time, addressing intervention by the Global South within the Global South.⁵

From this, the Chapter continued to explore how the firmly established principle of non-intervention developed throughout the post-Cold War era and into the twenty-first century. It noted how intervention began to diversify, with the end of the Cold War sparking a shift in attitude towards intervention, which arguably undermined the principle of non-intervention, as there was greater support for intervention. The increased optimism about the potential for the UN during this period, combined with the perceived failures of the international community, such as the Rwandan genocide and Srebrenica massacre, resulted in a move from unilateral to multilateral intervention.⁶ There was therefore a revival of UN peacekeeping, through the justification of collective security intervention, and a return to humanitarian-based interventions, with the introduction of the concept of the responsibility to protect (R2P).⁷ During this period, Chapter 2 argued that the principle of non-intervention was both challenged by these increasing justifications for intervention and simultaneously further developed as the principle began to grapple with regional interventions, with ICJ decisions, again, providing some clarity on how

⁵ See: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14; *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment of 19 December [2005] ICJ Rep 168.

⁶ Chapter 2, Section 4.

⁷ Chapter 2, Section 4.1.

these related to the principle.⁸ This diversification in the forms of intervention therefore contributed to a more nuanced understanding of the principle of non-intervention and its application in the ever-changing modern era. This was then further developed in the post-9/11 era which, Chapter 2 argued could, again, be viewed as a tipping point for the principle, as intervention shifted from a military to security approach. Threats to international peace and security now included, not just armed conflict but civil violence, organised crime, terrorism, weapons of mass destruction, poverty, infectious disease and 'environmental degradation', permitting states to 'take advantage of any relevant security system' in order to counter these issues.⁹ This shift was, in turn, reflected in UN peacekeeping with a move to robust, multi-dimensional, 'stabilisation' operations pushed peacekeeping into the realm of intervention. The Chapter then began to question whether UN peacekeeping, as the most prevalent form of intervention today, could be considered to be, at times, a form of coercive action designed to influence change in the host state and, therefore, intervention.

Whilst exploring this development of the principle of non-intervention, Chapter 2 also applied a TWAIL lens which highlighted numerous issues, such as: the unequal global order, lack of a Third World or Global South voice within both international law and the international system, and the use of international law to maintain hierarchies, including colonial legacies

⁸ See: *DRC v Uganda* (n5).

⁹ B Simma, DE Khan, G Nolte, A Paulus, N Wessendorf (eds) *The Charter of the United Nations: A Commentary, Vol 1* (3rd edn, OUP 2012) 111.

and patterns of domination and subordination. Indeed, the Chapter argued that the formulation of the principle of non-intervention during the decolonisation period was largely driven by the newly independent Global South states and could therefore be viewed, from a TWAIL perspective, as a prime example of the Global South challenging both the dominance of the Global North and the international law and institutions which maintained this hierarchical system.¹⁰ Furthermore, Chapter 2 also argued that the structure of the UN, particularly the veto-wielding Security Council, legitimised Western global hegemony through the 'cloak of universality'¹¹ and exploited the unclear Charter basis of peacekeeping, meaning the Council can move from non-interventionist Chapter VI peacekeeping operations to interventionist Chapter VII operations. That is, regardless of the influx of Global South states into the UN General Assembly, the inherently biased Security Council enshrines the power of the hegemonic permanent five (p5) states, perpetually maintaining the North-South divide and dichotomies of domination and subordination, whilst espousing principles of universality and equality. Chapter 2 then highlighted how this filters down into the UN system and into its activities, such as peacekeeping, with this argument explored further in Chapter 3.

Alongside this, following Anghie's discussion on the influence of colonialism in shaping international law,¹² Chapter 2 argued that the principle of non-intervention had also been animated by colonialism, providing examples of

¹⁰ Chapter 2, Section 3.1.

¹¹ M Mutua, 'What is TWAIL?' (2000) 94 ASILPROC 31-38, 37.

¹² A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007)

this colonial influence, such as when the principle had ostensibly applied to the Global South but had been used by the Global North to legitimise extensive intervention – as occurred in the Congo in 1960 with the deployment of ONUC and throughout the 1990s with the humanitarian-based interventions. The Chapter further argued that remnants of colonialism or colonial practices could be found within intervention today, particularly, within UN peacekeeping. It was argued that comparisons may be drawn between the two forms of intervention, not least given that both were (or are) the most illustrious forms of intervention in their era – colonialism in the nineteenth and twentieth centuries and peacekeeping in the twenty-first century. Chapter 2 also argued that both peacekeeping and colonialism invoked, for example, elements of domination and subordination and were largely motivated or shaped by the interests and will of the hegemonic powers.¹³

3. Peacekeeping as Intervention

Flowing on from this comparison, Chapter 3 explored the second layer of the pyramid – UN peacekeeping – finding that, despite the lack of an explicit framework, there do exist principles and norms which, together, form a complex peacekeeping framework. The Chapter argued that peacekeeping possesses both legal and normative frameworks which establish an invisible red boundary line around peacekeeping that divides peacekeeping from intervention. The Chapter found that, along with the broad framework of

¹³ Chapter 2, Section 5.

the UN Charter, the fundamental principles of consent, impartiality and non-use of force constituted peacekeeping's legal framework, whilst the newer, more controversial norms of democracy promotion, protection of civilians (PoC) and the prohibition of sexual exploitation and abuse (SEA) constituted peacekeeping's normative framework. It was argued that the legal framework sits at peacekeeping's core and is surrounded by the much broader normative framework. However, Chapter 3 highlighted how these frameworks do not exist in total isolation but, rather, overlap at certain points. In particular, it noted how the norms of PoC and prohibition of SEA contain legal underpinnings, thereby potentially invoking elements of international humanitarian, criminal and human rights law and consequently making a secondary contribution to peacekeeping's legal framework.¹⁴ It was further argued that these principles and norms do not exist harmoniously and instead 'exist in a competitive arena' with the normative composition of a peacekeeping operation being 're-balanced each time'.¹⁵ Therefore, if, for example, one principle is interpreted broadly, this may have an impact on another principle or norm, thereby altering peacekeeping's overall framework. These frameworks could therefore be viewed as a fluid, red elastic band, constantly expanding and contracting, as the principles and norms within them are routinely reinterpreted and contorted within each peacekeeping operation and, even, each peacekeeping mandate.

¹⁴ Chapter 3, Sections 4.1 and 4.2.

¹⁵ J Karlsrud, 'Special Representatives of the Secretary-General as Norm Arbitrators? Understanding Bottom-up Authority in UN Peacekeeping' (2013) 19(4) GG 525-544, 527.

When exploring each of these principles and norms in turn, assessing their evolution and their contribution to peacekeeping's frameworks, the Chapter adopted the lens of the Secretary-General. That is, the Chapter found that the Secretary-General (SG), as head of the Secretariat and, therefore, head of peacekeeping, was a 'norm entrepreneur' who had the ability to create, institutionalise and interpret norms, thereby possessing the ability to significantly shape peacekeeping.¹⁶ Focusing on the role of the SG thus offered a deeper analysis of peacekeeping and its relationship with non-intervention and highlighted how the SG's embeddedness allowed them to influence the trajectory of peacekeeping and promote norms, as was seen with Kofi Annan's promotion of the norm of PoC. It also highlighted how the SG is embodied within the field by the Special Representative to the Secretary-General (SRSG) who leads the peacekeeping operation and has significant control over how the operation's mandate is interpreted and applied. Thus, determining the interpretation and application of peacekeeping's principles and norms within their operation. For example, it was found that within the UN's operations in the DRC, there has been a marked difference in the operation when the SRSG has had a more robust or forceful agenda, compared to when the SRSG has focused on creating a political dialogue. Therefore, in essence, the SRSG can be said to determine the interventionist nature of the operation, simultaneously dictating the composition of the peacekeeping frameworks for that mandate. Again, this

¹⁶ I Johnstone, 'The Secretary-General as Norm Entrepreneur' in S Chesterman, *Secretary or General? The UN Secretary-General in World Politics* (CUP 2007). See also: Chapter 3, Section 2.

highlights the fluidity of peacekeeping's frameworks and how the norms and principles of peacekeeping are continually re-imagined for each operation.

Chapter 3 therefore highlighted how the six principles and norms are continually contorted, re-interpreted and re-shaped which results in peacekeeping's frameworks being continually contracted and expanded. That is, the Chapter explored each principle or norm in turn and found that whether in isolation or taken together, if the principles are interpreted narrowly, then this constricts peacekeeping's frameworks, thereby firming the boundary between peacekeeping and intervention and consequently reinforcing the principle of non-intervention. However, with the exception of the prohibition of SEA, when the principles and norms are interpreted broadly (as is frequently the case with contemporary, multi-dimensional stabilisation operations) then this expands peacekeeping's frameworks, blurring the line between peacekeeping and intervention and therefore undermining the principle of non-intervention or, at times, potentially contravening it. It also found that these evolutions within peacekeeping were often in-line with the interventionist trends which Chapter 2 explored. That is, where the principle of non-intervention was emphatically supported, such as during decolonisation, peacekeeping operations followed the traditional model of peacekeeping, with the principle's narrowly interpreted and peacekeeping deemed to be non-interventionist in nature. Conversely, when there has been support for intervention, such as in the post-Cold War era with the calls for humanitarian-based interventions and democratisation, peacekeeping's boundaries have been expanded, leading

to the introduction of, for example, robust peacekeeping and multi-dimensional operations. Therefore, any changes to peacekeeping's boundary line, by extension, results in changes to the boundaries of the principle of non-intervention. In particular, the Chapter found that the evolution of peacekeeping was often in-line with the interventionist trends which had been outlined in Chapter 2. As such, when there has been strong non-interventionist rhetoric, peacekeeping's boundaries have been narrowly interpreted; conversely, when there has been support for intervention, peacekeeping's boundaries have been expanded, leading to the introduction of, for example, robust peacekeeping and multi-dimensional operations.

The only exception to this pattern is the norm of prohibition of SEA, as the Chapter found that a broader interpretation and greater application of this norm would reinforce the principle of non-intervention as it places a restriction on peacekeeper's behaviour with the aim of preventing them from committing a violent form of intervention. Thus, unlike the other two norms of peacekeeping – democracy promotion and PoC - Chapter 3 found that the prohibition of SEA was not, in itself, interventionist but was instead designed to prevent intervention. However, it found that this norm, unlike its counterparts, had not evolved as rapidly nor had it received the same level of support from member states, arguably due to the fact that it places restrictions upon the dominant, intervening actors and condemns their

misconduct.¹⁷ Thus, from a TWAIL perspective, highlighting how the moulding or reimagining of peacekeeping's frameworks are shaped by the dominant powers to meet their interests.

Indeed, a TWAIL lens was, again, applied throughout this Chapter and highlighted how the same dynamics and patterns of domination and subordination which were found within the principle of non-intervention could also be found within UN peacekeeping. In particular, an application of the TWAIL lens demonstrated how the principles and norms are predominantly based upon Western values and standards and their interpretation and application is often based upon the hegemonic powers interests and agendas – as was seen with the norm of democracy promotion and PoC.¹⁸ It also highlighted examples of where Anghie's dynamic of difference is recreated within peacekeeping and noted how this dynamic may, at times, be shaped by the Secretary-General, given their pivotal norm entrepreneur role. Furthermore, throughout the Chapter it was noted how peacekeeping's frameworks and their application, can reinforce or recreate the North-South divide, thereby maintaining the colonial dichotomies of domination and subordination, particularly where peacekeeping is taken closer to the intervention line and could be viewed as coercive action designed to influence change in the host state – such as through the use of force or PoC.

¹⁷ Chapter 3, Section 4.3.

¹⁸ Chapter 3, Section 4.1 and 4.2.

4. The DRC – Peacekeeping’s Laboratory

Chapter 3 therefore set out peacekeeping’s legal and normative frameworks, demonstrating their fluidity and ability to constantly expand or contract, depending on how the principles and norms are interpreted and applied. Chapter 4 then took the legal framework – the principles of consent, impartiality and non-use of force- and examined how each principle had been interpreted and applied within the UN’s peacekeeping operations in the Congo. The Chapter found that, firstly, as was argued in Chapter 3, the principles and norms do not exist harmoniously but, instead, overlap and are continually re-interpreted, re-applied and re-balanced through each mandate renewal and, even, in reaction to changes in the field, such as an increased in armed group violence. The Chapter found that when one of the principles is expanded, such as when MONUSCO has embarked upon joint operations with the Congolese armed forces, then this broader interpretation of impartiality has simultaneously expanded the principle of limited use of force, which has also impacted the principle of consent where relations during these operations breakdown.¹⁹ This, in turn, leads to the second notable finding – that is, when these principles have been broadly interpreted, they have expanded peacekeeping’s legal frameworks, stretching the invisible red boundary line around peacekeeping, taking it much closer to the realm of intervention, and thereby undermining the principle of non-intervention. Indeed, the Chapter argued that, at times, ONUC, MONUC and MONUSCO have all crossed this

¹⁹ Chapter 4, Section 3.1.

boundary line, potentially violating the principle of non-intervention, as they have undertaken coercive action designed to influence change in the host state and, thus, intervention. The Chapter argued that ONUC's involvement in the Katangan secession, MONUC's shift to a stabilisation operation, joint operations conducted by both MONUC and MONUSCO and the implementation of the Human Rights Due Diligence Policy (HRDDP) could all be cited as examples of this coercive action, rendering the peacekeeping operations a form of intervention. In particular, the Chapter explored the conducting of joint operations between MONUSCO and the Congolese armed forces (FARDC), arguing that these operations are difficult to reconcile with peacekeeping's 'holy trinity' of legal principles and could, perhaps, be best viewed as a form of intervention by invitation.²⁰

Throughout this exploration of the three legal principles in the Congo, Chapter 4 also highlighted the key role which the Secretary-General and Special Representative of the Secretary-General (SRSG) play in shaping the peacekeeping operation, thereby reinforcing the argument put forward in Chapter 3 - that the SG is a norm entrepreneur within peacekeeping. In particular, it noted how the trajectory of MONUSCO within the DRC is noticeably shaped by the SRSG, depending on their expertise or interpretation of the Security Council mandates. For example, when the SRSG adopted a more forceful and robust interpretation of the mandates, the Force Intervention Brigade was deployed, marking a significantly robust

²⁰ *ibid.*

period in MONUSCO's history. Furthermore, the continued application of a TWAIL lens throughout the Chapter, again highlighted the continual patterns of domination and subordination, along with the dominance and furtherance of Western-centric ideals and standards. It argued that this was particularly the case were the peacekeeping operation could be deemed to be undertaking coercive action – such as the pressure exerted on states to provide consent to a mandate renewal or the imposition of conditions or standards (through the HRDDP) which must be met before joint operations are conducted.²¹

Continuing this analysis of peacekeeping's frameworks in the DRC, Chapter 5 explored peacekeeping's normative framework, unpicking the three norms of democracy promotion, protection of civilians (PoC) and the prohibition of sexual exploitation and abuse (SEA). Again, as with the legal frameworks, it found that these norms do not exist harmoniously, with a degree of overlap between these norms and the legal principles, particularly when, for example, an application of democracy promotion or PoC invokes the use of force.²² The Chapter also found that, as highlighted in Chapter 3, these norms, although not amounting to legal principles, may at times contribute to peacekeeping's legal frameworks where they may trigger broader elements of international law. As with the legal principles, it also found that were the norms of democracy promotion and PoC are expanded and interpreted more broadly, this results in an expansion of

²¹ Chapter 4, Section 3.2.

²² Chapter 5, Section 3.

peacekeeping's frameworks, thereby stretching the red elastic boundary line surrounding peacekeeping. Chapter 5 therefore once again demonstrated the fluidity of peacekeeping's frameworks and its boundaries which has, consequently, resulted in a constantly fluctuating support or undermining of the principle of non-intervention.

In particular, the Chapter found that a broader application of the norms of democracy promotion and PoC within the Congo had, again, resulted in ONUC, MONUC and MONUSCO, at times, undertaking coercive action to influence change in the host state and, therefore, intervention. For example, the Chapter argued that MONUC's involvement in the Congo's National Dialogue, established by the Lusaka Ceasefire Agreement, and MONUSCO's substitution for the state in protection of civilian tasks amounted to coercive action and thereby intervention.²³ Chapter 5 also found that the outlier to this pattern of continually broadening norms, was the norm of prohibition of SEA. It found that although there has been a troubling level of SEA committed by peacekeepers within MONUSCO, there has not been the same level of commitment to the expansion of the norm of prohibition of SEA as there has been with the norms of democracy promotion and PoC.²⁴ It has been argued that this has, in part, been due to a reluctance of member states to engage in the matter, highlighting how the UN is, again, beholden to its member states, particularly the hegemonic powers. Indeed, as with the previous Chapters, a TWAIL lens was again

²³ Chapter 5, Section 2.2 and Section 3.

²⁴ Chapter 5, Section 4.3.

applied throughout Chapter 5, highlighting how the patterns of domination and subordination and the furtherance of Western interests had been recreated in, for example, the pursuance of democratisation in the Congo, despite it clearly failing to take hold and, instead, is used to disguise authoritarian regimes and patronage systems of governance.²⁵ Similarly, the Chapter noted how the expansion of MONUSCO's PoC tools and policies created a reliance on the peacekeeping operation, often resulting in MONUSCO undertaking the role of the state.²⁶ As such, Chapter 5 argued that the broadening of the norms of democracy promotion and PoC within the Congo had been taken too far. It suggested that these norms had expanded peacekeeping's normative framework to its very limits, requiring a re-drawing of the normative boundaries of peacekeeping, through a retraction or constriction of the broad interpretations of these two norms. In order to achieve this, it was noted that this may require a change in the approach taken by the Security Council to mandating peacekeeping operations, including a move back towards the more traditional concept of peacekeeping and, perhaps, a shift to a people-centred, rather than state-centric, approach to peacekeeping.

5. Conclusion

The thesis has therefore unpicked the relationship between peacekeeping and intervention, demonstrating how, at times, an expansion of peacekeeping's legal and normative frameworks results in the undermining

²⁵ Chapter 5, Section 2.4.

²⁶ Chapter 5, Section 3.4.

or potential violation of the principle of non-intervention. The thesis has therefore imagined these frameworks as forming an invisible red, elastic boundary line around peacekeeping which constantly expands and contracts with each re-interpretation or re-imagining of peacekeeping's principles and norms. Through an exploration of peacekeeping in the DRC, it has been argued that in recent times the continual expansion of these principles and norms has resulted in the red boundary line being stretched to its very limits and, even, beyond. Therefore, in answer to the question posed at the very beginning of this thesis – peacekeeping is, at times, intervention.

Whilst it could be argued that those operations which are mandated by the Security Council under Chapter VII cannot amount to intervention, due to the exception embedded within Article 2(7),²⁷ this thesis has argued that these operations should be considered to be peace enforcement or intervention, not peacekeeping. That is, these operations stretch the traditional understanding of peacekeeping, blurring the lines with peace enforcement, and expanding peacekeeping far beyond its intended purpose. Indeed, the move to robust peacekeeping, Cruz report²⁸ and Action for Peacekeeping initiative²⁹ all appear to promote a more aggressive form of peacekeeping which this thesis has shown has resulted in an increase in intervention. The contemporary multi-dimensional operations and their

²⁷ See: Chapter 3, Section 1 and Section 3.1.

²⁸ CA Dos Santos Cruz, WR Phillips and S Cusimano, 'Improving Security of United Nations Peacekeepers: We need to change the way we are doing business' ("Santos Cruz Report") (19 December 2017) <https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf> Accessed 10 May 2021.

²⁹ UN Peacekeeping, 'A4P+ Priorities for 2021-2023' <https://peacekeeping.un.org/sites/default/files/a4p_background_paper.pdf> Accessed 10 May 2021.

extensive Christmas tree mandates permit broader interpretations of peacekeeping's principles and norms in an attempt to fulfil the mandated tasks. This results in an expansion of peacekeeping's frameworks and an increase in peacekeeping's interventionist potential, along with unrealistic expectations of an operation that has neither the resources nor capabilities to fulfil such mandates. Moreover, this thesis' unique application of a TWAIL lens has demonstrated how this move towards increased intervention is not just legally and practically problematic but is also a return to neo-colonial times. That is, it reinforces patterns of domination and subordination, creating a concept of peacekeeping which is made in the image of the hegemonic Security Council, thus contradicting the intent and purpose of the United Nations to be a universal, global organisation.³⁰

It could therefore be argued that peacekeeping has evolved too far. The grandiose forms of intervention, through multi-dimensional stabilisation operations, appear to be reaching a natural end. Whilst these operations were an innovative response to the conflict of its day, it is questionable whether they remain an appropriate model of peacekeeping in the current climate. As such, there is arguably a need for a narrowing of these peacekeeping frameworks and a move away from multi-dimensional operations back to a more traditional model of peacekeeping, which would be consistent with peacekeeping's cyclical nature. Now, in 2020/2021, as there has been a gradual decline of multi-dimensional operations over the

³⁰ See Chapter 1, Charter of the United Nations (24 October 1945).

last five years as a result of budget pressures, a divided Security Council, contested track records and the impact of the COVID-19 pandemic,³¹ the time is arguably ripe for this re-imagining of peacekeeping.

In order to achieve this, there needs to be a fundamental reconceptualisation of peacekeeping operations, with a review of what and who contributes to peace. More specifically, two key factors could help to effect this change – one stemming from the Security Council and another coming from the overall approach to peacekeeping. Firstly, there needs to be a revision of Security Council mandates, including a re-structuring of the mandate which would assist in debates over peacekeeping's Charter basis and the blurring of peacekeeping and peace enforcement. That is, the Council should reconsider the catch-all phrase of 'Acting under Chapter VII' which is placed into the introductory section or chapeau of some resolutions, including that of MONUSCO.³² Instead, the invocation of Chapter VII should only occur within specific paragraphs, clarifying which tasks, such as PoC, are mandated under this provision. This could then provide some clarity over peacekeeping's legal basis and assist peacekeeper's in the implementation of the mandate, whilst simultaneously firming the boundaries between peacekeeping and peace enforcement. As such, it would go some way towards remedying the interventionist shift within peacekeeping, which this thesis has highlighted.

³¹ A Day, 'The Future of Multidimensional Peacekeeping' (*IPI*, 15 September 2020) <<https://theglobalobservatory.org/2020/09/future-multidimensional-peacekeeping/>> Accessed 20 May 2021; IPI, 'COVID-19 Crisis an Opportunity to "Rethink and Develop UN Peacekeeping Further"' (7 October 2020) <<https://www.ipinst.org/2020/10/un-peace-ops-during-covid-19-high-level-dialogue#3>> Accessed 20 May 2021.

³² UNSC Res 2556 (18 December 2020) UN Doc S/RES/2556.

In a similar vein, the Council should also consider a revision of its Christmas tree mandates, reducing the list of mandated tasks which it sets for a peacekeeping operation and creating more realistic, stream-lined mandates. This could also include 'designer mandates' which are specifically focused on the particularities of the situation in which the operation is to be deployed.³³ Again, this would assist in clarifying some of the legal and practical issues which this thesis has explored. Indeed, if interviewees of this research have noted that 'constraints of the Security Council mandate' was 'the major framework for us to make decisions', as opposed to general international law, then it follows that the key to rethinking peacekeeping's frameworks is through a shrinking or re-imagining of the mandate.³⁴

Secondly, as this thesis has suggested at various points, the UN could also re-consider its state-centric, outsider-led, top-down approach to peacekeeping, moving, instead, to one which is people-centred, bottom-up and insider-led, focused on including the input of actors on the ground. Put simply, peacekeeping should be a concept for 'we the people' rather than a concept for member states, which reflects the broader, fundamental purposes of the UN that is also invoked for other UN initiatives, including the Sustainable Development Goals.³⁵ This shift in approach may then create more sustainable solutions to conflict and violence, particularly in

³³ I Martin, 'All Peace Operations Are Political: A Case for Designer Missions and the Next UN Reform' (CIC Thematic Essay, 2015) <https://cic.nyu.edu/sites/default/files/political_missions_2010_martin_allpeace2.pdf> Accessed 16 May 2020.

³⁴ Interview with Independent Expert and Former UN Political Adviser ('Interviewee 8') (New York, 26 November 2019) DOI: <<http://doi.org/10.17639/nott.7119>>.

³⁵ UN, "'We The People' for The Global Goals" <<https://www.un.org/sustainabledevelopment/blog/2015/09/we-the-people-for-the-global-goals/>> Accessed 15 May 2021.

complex settings such as the DRC. It would also challenge the lingering colonial dichotomies and patterns of domination and subordination, within intervention and peacekeeping, which a TWAIL lens has demonstrated still exist within the two concepts. Therefore, a re-imagining of peacekeeping, through a move to a more people-centred approach, could challenge these power dynamics and give a greater voice to peoples of the Global North in the hope of finally establishing sustainable peace and security within countries such as the Congo.

These are not easy problems to answer but just because they are difficult does not mean that they cannot be, at the very least, attempted. Indeed, as Secretary-General Dag Hammarskjöld famously stated, the United Nations 'was not created in order to bring us to heaven, but in order to save us from hell'.³⁶ Peacekeeping should therefore not be expected to fulfil unrealistic lists of tasks set by a body of hegemonic powers but, rather, to support host states and its peoples in developing sustainable peace and security. Thus, peacekeeping should retreat back towards a more traditional model, re-considering its *raison d'être* and how it could more appropriately fit with the modern era. However, such an endeavour would perhaps require the norm entrepreneurship of a unique Secretary-General, like Dag Hammarskjöld, which is a mantle that few may be able to undertake.

³⁶ UN Press Release, 'Address by Secretary-General Dag Hammarskjöld' (13 May 1954) UN Doc SG/382, 7.

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