

# *Rules of Engagement and the Use of Force in United Nations Operations*

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## 1. INTRODUCTION

THE MANDATE ISSUED by the Security Council ('SC') establishes the legal basis for the use of force in a United Nations ('UN') mission, while the Operational Plan and Rules of Engagement ('ROE') are the instruments used to implement that mandate. Consequently, the ROE of any mission cannot exceed the purview of the mandate given to that mission by the SC.<sup>2</sup> ROE are accepted by contributing nations and the UN as the most common and effective way to control the use of force by military forces during UN operations.

The ROE set out when and how the use of force is authorised. They also reflect the unique capability of available weapons systems and the specific rules of international customary and treaty law that may be applicable. Whereas the mandate reflects the political, diplomatic, policy, and operational objectives of the mission, the ROE represent the practical application of those mandates where the use of force has been chosen as a means of implementation. However, when the mandate assigned by the SC does not match the ROE required by military units on the ground, then it becomes more difficult to carry out the intent and will of the UN and the SC.

The gap between mandate creation by the SC and the application of ROE by individual contributing nations in compliance therewith is a fatal flaw of the mandate system. When the ROE required to protect human rights and international humanitarian law in an area of conflict—a fundamental purpose of

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<sup>2</sup> Terry Gill, 'Legal Parameters for the Use of Force in the Context of the UN Collective Security System' in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, (Oxford: Oxford University Press 2010) fn 5 112.

the UN—do not match the mandate given by the SC, problems arise.<sup>3</sup> A mission may freeze due to its inability to act, or it may undergo ‘Mandate Creep’ where a Chapter VI mandate, meant to focus on observation and civil support, will begin to shift into Chapter VII, which allows military intervention, without the approval of the SC. In the former case, UN soldiers are forced to stand idly by and watch human rights abuses without lifting a finger, while in the latter, UN forces arguably violate international law despite furthering the true intent and purpose of their mission. The UN’s experiences in Rwanda and the former Yugoslavia attest to these unfortunate situations. The UN Organization Mission in the Democratic Republic of the Congo (MONUC) suffered from the same deficiencies, but made decisive changes after the intervention by French forces in 2003. This particular mission will be elaborated upon more extensively below.

Regardless, the disparity between mandates and ROE development reflects a need for change. This article will discuss the interrelationship between UN mandates and ROE in situations where the UN has deemed the use of force to be necessary. Section 2 will discuss basic principles of ROE and how they are formulated. Section 3 will then analyse how the use of force and ROE fit into UN mandates as well as international humanitarian law (‘IHL’). Section 4 focuses on the political and policy influences that negatively affect the creation of mandates and how those influences create gaps between the conceptualisation of the mandate and the formulation of ROE for UN missions. Section 5 explores the consequences of those gaps: the phenomena of Frozen Mandate and Mandate Creep. Section 6 will provide a case study, based on the MONUC mission, which concludes that clear mandate formulation and standardisation at the outset of UN missions, rather than progressive escalation of mandates, can have positive and tangible results for ROE drafting and implementation.

## 2. RULES OF ENGAGEMENT: BASIC PRINCIPLES

ROE constitute the most direct influence that the international law of armed conflict has on peacekeepers.<sup>4</sup> In the context of UN peacekeeping missions, the ROE are inherently connected to the level of force authorised in the mandate issued by the Security Council, which is, in turn, influenced by the concerns of the Security Council.<sup>5</sup>

<sup>3</sup> *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI article 1(1).

<sup>4</sup> Mary Ellen O’Connell, ‘Historical Development and Legal Basis: Binding Effect of International Law for the Soldier’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2013) 38.

<sup>5</sup> The term peacekeeping is used in this paper as a term encompassing peacekeeping in its classical sense as well as the principle of peace enforcement.

The application and translation of ROE is the responsibility of the commander and their planning staff and, especially in the UN context, must be translated from a theoretical mandate into a practical, understandable, and applicable set of rules on the permitted use of force.<sup>6</sup> Commanders are obliged to understand and apply all applicable rules of international law and formulate ROE that comply with them. They must also ensure that ROE given to soldiers in the field are understandable so that, if soldiers do have to use force in the course of their mission, it is done in a way that is both controlled and legal.<sup>7</sup> The United States Judge Advocate General's *Operational Law Handbook* comments on the multifaceted influences that must be taken into account during the establishment of ROE, including customary and treaty law principles, but also political objectives and mission limitations such as—in the context of a UN mission—the applicable Security Council mandate.<sup>8</sup> The ROE stipulate the means and methods of permitted use of force and are normally formulated by the Department of Peacekeeping Operations, with input from the Force Commander, and issued to troops in the field in the form of a pamphlet or laminated card known as Orders for Opening Fire.<sup>9</sup>

The applicable rules for using force under the ROE will differ according to international law and according to each new mission, as well as each individual situation that occurs, but in all cases ROE and the application of force must respect the IHL principles of necessity, distinction, proportionality, and humanity, topics that will be discussed in more detail in Section 4 of this article.<sup>10</sup> Therefore, the soldiers tasked with implementing the ROE must be familiar with, and trained in, the ROE of their particular mission. ROE for UN missions are often defined in negative terms, as rules of when not to use of force. This reflects the statement of Ben F. Klappe, in his section of *The Handbook of International Humanitarian Law* on ROE, expressing the general hesitancy of soldiers in UN missions to use force in any proactive way, even if doing so would serve the mission's purpose and the greater good more fully. He found that soldiers taking part in UN missions were trained to be reluctant to use force at all.<sup>11</sup>

This illustrates the conflict between mandates and ROE that has led soldiers to follow their ROE too restrictively or act on their principles of humanity and

<sup>6</sup> Patrick Cammaert and Ben Klappe, 'Application of Force and Rules of Engagement in Peace Operations' in Gill and Fleck (eds) (n 2) 151; see, also, Judge Advocate General of the United States, *United States Operational Law Handbook* (Virginia: The Judge Advocate General's Legal Center and School, U.S. Army 2013) 75.

<sup>7</sup> Ben F. Klappe, 'The Law of International Peace Operations: Rules of Engagement' in Fleck (ed) (n 4) 634.

<sup>8</sup> Judge Advocate General of the United States, (n 6) 75.

<sup>9</sup> Trevor Findlay, 'The Use of Force by Peacekeepers in Self-Defence: Some Politico-Legal Implications' in Alex Morrison et al (eds), *Peacekeeping with Muscle: The Use of Force in International Conflict Resolution* (Clementsport: The Canadian Peacekeeping Press 1997) 52.

<sup>10</sup> Alan Cole et al (eds), *Rules of Engagement Handbook* (Sanremo: International Institute of Humanitarian Law 2009) 5.

<sup>11</sup> Klappe, in Fleck (ed) (n 5) 633.

conscience, resulting in a distortion of their ROE as well as the mandate of the mission.<sup>12</sup> The use of force is ultimately the soldier's decision, and ROE must be permitted the flexibility to adapt to the specificity of each mission and the obstacles encountered. As will be seen in the following Sections, ROE for UN missions suffer from being limited by the mandate that gives them legal legitimacy.

### 3. THE USE OF FORCE IN UN MISSIONS AND INTERNATIONAL LAW

ROE represent the practical application of the use of force theoretically envisioned by the United Nations and are therefore influenced by political, legal and social factors.<sup>13</sup> While UN troops are, in all situations, permitted to use force up to and including lethal force for their own personal self-defence as well as the defence of their unit, beyond those parameters it is the mandate that dictates how far individual soldiers are permitted to use force to defend civilians, take proactive roles, or—in a more recent and controversial development—defend the mandate and the mission itself.<sup>14</sup> In the UN's *Handbook on United Nations Multidimensional Peacekeeping Operations* the 'appropriate use of force' is explained in the following way:

The use of force by the military component will depend on the mandate of the peacekeeping operation and the rules of engagement; sometimes the Security Council will authorise a peacekeeping operation to use armed force in situations other than in self-defence. The circumstances under which the operation may use armed force will then be spelt out in the relevant resolution of the Council. The rules of engagement for the peacekeeping operation will clarify the different levels of force that can be used in various circumstances, how each level of force should be used and any authorisations that may need to be obtained from commanders.<sup>15</sup>

In all situations where UN troops are permitted to use force, whether in self-defence or in a peace-enforcement capacity, the fundamental principles of IHL will apply.<sup>16</sup> Peacekeeping falls under a Chapter VI mandate, generally a role of observation and civilian support, or a Chapter VII mandate, which normally calls for more aggressive action in conflict zones where human rights abuses are occurring.

<sup>12</sup> Mary Ellen O'Connell, in Fleck (ed) (n 5) 39.

<sup>13</sup> Chief of the Defence Staff, *Use of Force for CF Operations, B-GJ-005-501/FP-001* (Ottawa: Government of Canada 2008) 2–4; see, also, Judge Advocate General of the United States (n 6) 75; see, also, Cammaert and Klappe, in Gill and Fleck (eds) (n 2) 151.

<sup>14</sup> Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press 2002) 361.

<sup>15</sup> United Nations, *Handbook on United Nations Multidimensional Peacekeeping Operations* (New York: Department of Peacekeeping Operations 2003) 57.

<sup>16</sup> UN Doc ST/SGB/1999/13 (1999), *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law* ('Secretary General's Bulletin').

*A. Chapter VI*

The use of force for self-defence is considered the minimum that the UN can afford to the troops it sends into conflict zones.<sup>17</sup> This basic principle was established during the deployment of the UN Emergency Force (UNEF I) that was sent to Egypt in November 1956, and has been included in the guidelines of every peacekeeping mission deployed by the UN since. This mission established the classical conception of peacekeeping, based on Chapter VI of the UN Charter, the idea for which is largely credited to then Canadian Minister of Foreign Affairs Lester B. Pearson. Chapter VI of the UN Charter allows the SC to use any means, short of calling for the use of force, to peacefully resolve a conflict.<sup>18</sup> The self-defence principle has, however, been blurred and expanded since that first deployment to include defence of the mandate.

The principle of self-defence in the context of UN Chapter VI mandates has expanded to include, depending on the capacity of the UN force, defence of the mandate and the mission.<sup>19</sup> The expansion of the definition led former UN Secretary-General (SG) Dag Hammarskjöld to refer to peacekeeping as ‘Chapter VI-and-a-half’.<sup>20</sup> The extension of the self-defence principle to defence of the mission and the mandate gives UN forces an additional guiding principle to help them ascertain hostile intent. Allowing these principles to apply to the defence of the mandate is a positive development, as it gives UN forces the interpretive flexibility to act where the substance and purpose of a mission is threatened.<sup>21</sup> The principle of defence of the mission was used during the UN Operation in the Congo (ONUC) in the 1960s and was criticised as being an unjustified expansion of a Chapter VI mandate into Chapter VII.<sup>22</sup> It has developed since then as the basis for the new, proactive role that UN peacekeeping forces increasingly have to play; this will be analysed in detail through a case study in Section 7. Unfortunately, it comes nowhere close to bridging the gap between the mandate creation process and ROE formulation. UN peacekeepers are trained to be reluctant to use force, and this, combined with the predominantly defensive nature of UN ROE, creates hesitancy in using force even when it is justified. For example, during ONUC twelve Irish soldiers were ambushed and ten were killed. In the field report, the Irish officer’s confusion over their ROE was cited as the reason for the incident;

<sup>17</sup> Findlay, in Alex Morrison et al (eds) (n 9) 53.

<sup>18</sup> Ben F. Klappe, ‘The Law of International Peace Operations: General’ in Fleck (ed) (n 4) 612.

<sup>19</sup> Terry Gill, ‘Legal Parameters for the Use of Force within the Context of Peace Operations’ in Gill and Fleck (eds) (n 2) 150.

<sup>20</sup> Larry Johnson, ‘Peacekeeping with Muscle: Possibilities Under the Charter of the United Nations’ in Morrison et al (eds) (n 9) 27.

<sup>21</sup> Findlay (n 17) 87.

<sup>22</sup> *ibid* 88.

the troops felt that they only had legal authority to use force if fired upon first.<sup>23</sup> During the UN Assistance Mission for Rwanda (UNAMIR), in addition to the almost 800,000 civilians massacred, ten Belgian soldiers, who were part of the UN force, were disarmed and executed by Hutu militiamen during the Tutsi genocide without firing a shot in self-defence.<sup>24</sup> Since the Hutu militiamen did not use force in apprehending the Belgians, the latter did not feel that they could use force legally according to their mandate and, as a result, handed over their weapons.<sup>25</sup> ROE cannot be so stringent that soldiers second-guess themselves when interpreting whether a potential assailant can be considered a military target. This must be the soldier's decision based on the reasonable belief in the hostile intent of the potential assailant and the particular situation and context.<sup>26</sup> This will likely result in UN forces gaining credibility and effectiveness rather than losing it.

It has always been assumed that the credibility of a UN mission under Chapter VI has derived from the consent of the parties involved.<sup>27</sup> However, this is becoming less and less applicable, as parties to conflicts manipulate the UN's efforts for strategic purposes and undermine the efforts of peacekeepers.<sup>28</sup> In the *Brahimi Report*, chaired by Lakhdar Brahimi, the panel tasked with drafting the report reiterated the importance of consent and impartiality towards the parties in conflict as the primary foundations of peacekeeping operations. This was, however, a precursor to the more important point that consent, or the lack of it, should not be permitted to hinder a UN force's ROE or their application in self-defence, defence of the mandate, or defence of civilians.<sup>29</sup> Brahimi states in his report that 'rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect and...should not force United Nations contingents to cede the initiative to their attackers.'<sup>30</sup> The *Brahimi Report* argues that UN ROE should allow for proactive engagement with forces that show hostile intent.

<sup>23</sup> For a detailed account of the incident see E. W. Lefever and W. Joshua, *United Nations Peacekeeping in the Congo, 1960-1964: An Analysis of Political, Executive and Military Control*, vol 3 (Brookings Institution for the US Arms Control and Disarmament Agency: Washington, DC 1966) appendix P-7.

<sup>24</sup> Findlay (n 17) 280.

<sup>25</sup> Astri Suhrke, 'Dilemmas of Protection: The Log of the Kigali Battalion' (1998) 5 *International Peacekeeping* 1, 9.

<sup>26</sup> Klappe, in Fleck (ed) (n 4) 635.

<sup>27</sup> Terry Gill, 'Characterisation and Legal Basis for Peace Operations' in Gill and Fleck (eds) (n 2) 136.

<sup>28</sup> UN Doc A/55/305-S/2000/89 (2000), *Identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council: report of the Panel on United Nations Peace Operations ('Brahimi Report')* para 48; see, for example, how during the UNAMIR mission in Rwanda, the Hutu militia used the pretext of the Arusha Peace Agreement and the limited mandate and ROE of the UN forces to stockpile weapons and prepare for the impending genocide perpetrated against the Tutsi population: Findlay, (n 17) 278.

<sup>29</sup> *Brahimi Report* (n 28) paras 49–50.

<sup>30</sup> *Brahimi Report* (n 28) para 49.

The foundation of UN peacekeeping operations' credibility was previously based on impartiality in the sense of treating both sides equally.<sup>31</sup> The *Brahimi Report* suggests an interpretation of impartiality based on adherence to the principles of the UN Charter and the mandate assigned to the mission by the SC.<sup>32</sup> Where there is an aggressor showing hostile intent, peacekeepers should, under a Chapter VI mandate and their ROE, be able to use force to defend the targets of that aggression with moral and legal justification.<sup>33</sup> This new interpretation of impartiality has the power to lend more credibility to UN missions, as long as mandates remain flexible enough to allow ROE to adapt to changing situations on the ground. It means a UN force with credibility based on positive action instead of a symbolic and non-threatening military presence. In the past, the old view of impartiality pushed some UN commanders to manipulate situations to allow them to intervene where their consciences necessitated action, but the limits of their mandate—and consequently their ROE—prevented the legal use of force.

During the ONUC mission, which took place from 1960-1964, Dag Hammarskjöld used the strategy of interposing UN soldiers between civilians and hostile forces to enable the use of force in self-defence.<sup>34</sup> This way, peacekeepers could use force legally under a Chapter VI mandate if attacked, which helped deter belligerent forces. Hammarskjöld was criticised for allowing this mandate creep in the Congo, which France, Britain, and Belgium claimed was beyond the legal authority of the mission.<sup>35</sup> The UN Protection Force (UNPROFOR) also used this strategy in the former Yugoslavia while it was still mandated under Chapter VI, as did UNAMIR.<sup>36</sup> In Rwanda, Lieutenant-General Roméo Dallaire, the UN Force Commander, posted his small force as guards outside of the safe zone, placing them between fleeing Tutsis and Hutu militiamen.<sup>37</sup> While this strategy shows that UN leaders can, to a certain extent, defend civilians without having to use force, it is clear, based on the frequency of its use as a strategy, that it has become a standard practice, which is cause for alarm.<sup>38</sup> The self-defence principle is not meant to allow commanders to deliberately place UN troops in harm's way

<sup>31</sup> *Brahimi Report* (n 28) para 50.

<sup>32</sup> Ray Crabbe, 'Future Peace Operations: A Conceptual Approach' in Richard Wiggers and Ann L. Griffiths (eds), *Canada and International Humanitarian Law: Peacekeeping and War Crimes in the Modern Era* (Halifax: Centre for Foreign Policy Studies 2002) 111.

<sup>33</sup> *Brahimi Report* (n 28) para 50.

<sup>34</sup> Operations Directive No 8 [untitled], February 1961, UN Archives DAG/13/1.6.5.0.0; see, also, Findlay (n 17) 61.

<sup>35</sup> Findlay, in Morrison et al (eds) (n 9) 65.

<sup>36</sup> Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House Publishers 2004) 268–269; see, also, Victoria Holt and Tobias C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect, and Modern Peace Operations* (Washington: The Henry L. Stimson Center 2006) 83; see, also, D. Last, *Theory, Doctrine and Practice of Conflict De-Escalation in Peacekeeping Operations* (Canadian Peacekeeping Press: Clementsport 1997) 105–107.

<sup>37</sup> Holt and Berkman (n 40) 83.

<sup>38</sup> *ibid.*

so as to allow reprisal. Using the self-defence principle in such a way glosses over a clearly interventionist act that resembles peacekeeping under a Chapter VII mandate. This phenomenon of ‘mandate creep’, where a Chapter VI mission is expanded beyond the legal scope of the mandate, will be discussed in Section 5. Whether these commanders openly defied the mandates and ROE that they were given or simply interpreted them as allowing their actions does not matter; what is important is that the commanders were forced into situations where the only way to protect civilians was to bend and distort the mandate of their mission.

### *B. Chapter VII*

Unlike Chapter VI, missions mandated under Chapter VII of the UN Charter do not require the consent of the parties involved and are normally reserved for the most serious situations in which ‘international peace and security’ are threatened.<sup>39</sup> Originally, for the SC to make such a finding, it required the use of armed force by a state, which the SC deemed to be an act of aggression or a breach of the peace.<sup>40</sup> However, SC policy has progressed since then to recognise that nowhere in Chapter VII does it refer to states as the only entities that can breach international peace and security.<sup>41</sup> Importantly, in the *Report of the International Commission on Intervention and State Sovereignty* (‘Responsibility to Protect’), serious threats to civilians and human rights were cited as legitimate reasons for finding a threat to international peace and security, a principle strongly supported by the General Assembly and cited as the grounds for the intervention in Libya in 2011.<sup>42</sup> However, when the SC does mandate a mission under Chapter VII, it rarely expresses how it envisions the enforcement of the mandate, or what levels of force are authorised. The key phrase that denotes a Chapter VII authorisation has become ‘all necessary means.’<sup>43</sup>

Even under Chapter VII, the ROE limit the use of force beyond what is necessary to achieve the specific goals mandated in the SC resolution. This means that if protection of civilian populations under immediate threat of violence is not mandated, and thus does not become part of the ROE of the mission, then UN forces will not be legally permitted to defend civilians.<sup>44</sup> For example, in 1993 the SC authorised a Chapter VII mandate for UNPROFOR in the former Yugoslavia, but notably refrained from using the ‘all necessary means’ language in the resolution authorizing the change in mandate.<sup>45</sup> The resulting application of the mandate

<sup>39</sup> *Charter of the United Nations* (n 3) article 39.

<sup>40</sup> *Certain expenses of the United Nations*, Advisory Opinion, [1962] ICJ Rep 177.

<sup>41</sup> Findlay (n 17) 55.

<sup>42</sup> Gareth Evans et al (eds), *Report of the International Commission on Intervention and State Sovereignty: The Responsibility to Protect* (Ottawa: International Development Research Centre 2001); see, also, UNSC RES 1973 (2011).

<sup>43</sup> UNSC RES 836 (1993); see, also, UNSC RES 1565 (2004).

<sup>44</sup> Findlay (n 17) 425; see, also, Gill, in Gill and Fleck (eds) (n 2) 111.

<sup>45</sup> UNSC RES 807 (1993).



through UNPROFOR's ROE was haphazard and lacked standardisation. Some commanders interpreted their ROE narrowly as being to deter attacks against the safe-areas, but not to defend them where such deterrence failed.<sup>46</sup>

Such a case occurred in the context of the massacres at Srebrenica in 1995. The SC had declared Srebrenica a safe-area and had mandated a contingent of Dutch troops to protect the enclave, and the civilians within it, from attack by Bosnian Serbs.<sup>47</sup> The Netherlands was later pursued in its domestic courts for failing to fulfil their international obligations as peacekeepers. Evidence showed that elements of the Dutch Battalion (Dutchbat) had witnessed more than one instance of Bosnian Serbs beating, and in some instances, killing male refugees outside the compound without taking any action.<sup>48</sup> Therefore, the Dutchbat knew that the refugees were at serious risk of mistreatment should the Bosnian Serbs take control of the camp. Despite this, when the Bosnian Serb Army surrounded the compound, the Dutchbat forces abandoned their positions and withdrew to a nearby compound; in the ensuing massacre, 8,000-10,000 Bosnian Muslim refugees were killed by the Bosnian Serbs forces<sup>49</sup> Interestingly, in a related decision, the Hague Court of Appeal left open the possibility for the UN to be held responsible for failing to fulfil its mandate where the peacekeepers in question are under its effective control. This ruling makes the clarity and enforcement of ROE all the more important in UN missions where the use of force is authorised.<sup>50</sup> It is clear that the formulation of mandates by the SC and their subsequent translation into ROE are in dire need of reinterpretation, both in the case of Chapter VI and Chapter VII mandates.

#### 4. THE RELATIONSHIP BETWEEN UN MANDATES AND RULES OF ENGAGEMENT

The ROE represent the essence of applicable IHL and the SC mandate and, therefore, reveal—more than any other UN document—the true nature of the mission.<sup>51</sup> Unfortunately, one has only to examine the divide between the formulation of the mandate and the creation of the ROE for UN peacekeeping missions to understand why, so often, ROE have proven to be incommensurate with the SC's vision. The actions of a State's peacekeepers have the power to cast the governments that authorised their involvement in a negative light. In Part A of this Section, the result of these policy considerations on the mandate development

<sup>46</sup> Findlay (n 17) 229.

<sup>47</sup> UNSC RES 819 (1993); see, also, UNSC RES 824 (1993); see, also, UNSC RES 836 (1993).

<sup>48</sup> *Nuhanovic v State of the Netherlands*; *Mustafic v State of the Netherlands*, [2011] Court of Appeal of The Hague, Judgment of 5 July 2011.

<sup>49</sup> Klappe, in Fleck (ed) (n 5) 622–624.

<sup>50</sup> *The Association of Citizens Mothers of Srebrenica et al. v The State of the Netherlands*, [2010] Court of Appeal of The Hague, Judgment of 30 March 2010; see, also, Fleck, 'Status of Forces in Enforcement and Peace Enforcement Operations' in Gill and Fleck (eds) (n 2) 108.

<sup>51</sup> Findlay (n 17) 369.

process will be analysed, and Part B will focus on how the mandate and IHL, in turn, affect the development of ROE.

#### *A. The Influences that Shape the Creation of the Mandate*

Political, policy and diplomatic forces shape the mandate creation process at the UN and have crippling effects for both UN missions and the individuals they are deployed to protect. As will be seen in Part B of this Section, the SC mandate is the main influence on the formulation of the mission's ROE, and, therefore, the influences that shape the SC mandate have a direct impact on the UN force's ability to act on the ground. These hesitations and preoccupations with national image and popular policy will be analysed in the context of the mandates for the UNPROFOR, UNAMIR and UNOSOM II missions in the following pages.

Based on reports published by both the UN as well as independent parties, the international preference for a 'light', largely symbolic peacekeeping presence that dominated the 1990's had a strong effect on the creation and maintenance of both UNPROFOR and UNAMIR.<sup>52</sup> During the collapse of the Dutchbat in Srebrenica and the international community's inaction during the Rwandan genocide, the fresh memory of US engagement in the Battle of Mogadishu during the UN Operation in Somalia II (UNOSOM II) in October 1993, only intensified the pressure to support policies of symbolic as opposed to effective peacekeeping.<sup>53</sup> The result, as was seen in Rwanda, has been the authorisation of small under-armed peacekeeping forces with insufficient legal grounds to use force when needed. In its comprehensive report following the UNAMIR mission, the UN Department of Peacekeeping Operations explained that 'the mandates of UNAMIR were a product of the international political environment in which they were formulated, and tended to reflect concerns and imperatives of certain Member States that had little to do with the situation in Rwanda.'<sup>54</sup> The political tension in the creation of UNAMIR was so palpable that as soon as the Arusha Peace Accord broke down with the assassination of President Habyarimana, France and Belgium sent forces into the country to unilaterally—and without warning—evacuate its peacekeepers and foreign nationals, thus endangering the mission even further.<sup>55</sup>

Political concerns and national interests must always play a role in the decision making process of a sovereign nation, but these political and policy influences must not be permitted to govern to such levels that they hinder the UN's legal ability to

<sup>52</sup> *Brahimi Report* (n 31) paras 19–22.

<sup>53</sup> On October 3, 1993, soldiers of the United States Rangers, operating as part of the UNOSOM II force, attempted to capture Somali leader Mohamed Farrah Aidid in a raid. The ensuing battle resulted in 18 US troops, one Malaysian soldier, and between 300 and 1000 Somalis being killed; see Findlay (n 17) 200 for a detailed account of the incident.

<sup>54</sup> UN, *Comprehensive Report on Lessons Learned from United Nations Assistance Mission for Rwanda (UNAMIR) October 1993–April 1996* (New York: Department of Peacekeeping Operations 1996) 3.

<sup>55</sup> *ibid* 6.

safeguard international peace and security. Rather than allow their decisions to be affected by outside influences, the SC must ensure that future mandates, and the ROE that result from them, are based on events and situations on the ground where the operations are going to occur. Especially for the creation of ROE, the mandate operates only as an initial ceiling on how, and in what manner, force may be utilised as a tool by UN forces. IHL constitutes another layer of restrictions that must also be taken into account when formulating ROE.

### *B. The Influences that Shape the Creation of Rules of Engagement*

ROE are developed according to the SC mandate and IHL to ensure that, when it becomes necessary, force is used in a manner that is controlled and legally justified. To understand the significance of the additional hurdle that SC mandates create for ROE development, it is also necessary to understand the minimum constraints on the legal use of force under IHL.

The former SG of the UN, Kofi Annan, published a bulletin dealing with specific principles of IHL that apply to UN forces. In it, he emphasises that the bulletin applies to UN forces ‘when in situations of armed conflict they are actively engaged therein as combatants’ and that they therefore apply ‘in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence’.<sup>56</sup> Although there was some confusion as to what ‘situation of armed conflict’ meant, the conclusion most in line with UN policy is that the principles specified in the bulletin apply at all times when recourse to force is utilised as an option by UN forces, regardless of whether or not the conflict in question rises to the level of an international armed conflict.<sup>57</sup> This represents a stricter application of IHL principles to UN forces, since the Geneva Conventions, with the exception of Common Article 3, apply only to situations of international armed conflict.<sup>58</sup>

With regard to the use of force, the bulletin sets out four general principles of IHL: (1) necessity, (2) distinction, (3) proportionality, and (4) humanity.<sup>59</sup> The first principle permits only that level of force necessary for achieving the specific mission goals.<sup>60</sup> According to the second principle, when UN personnel use force, they must always distinguish between civilians and combatants, and between

<sup>56</sup> *Secretary General’s Bulletin* (n 19) s.1.1.

<sup>57</sup> Klappe, in Fleck (ed) (n 4) 625–626.

<sup>58</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (‘Geneva Convention’)* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 article 2.

<sup>59</sup> *Secretary General’s Bulletin* (n 19) ss. 5–9; see, also, Cole et al (eds) (n 12) 5–6.

<sup>60</sup> *Secretary General’s Bulletin* (n 19) 6.1; see, also, Jann Kleffner, ‘Scope of Application of International Humanitarian Law’ in Fleck (ed) (n 4) 59.

civilian objectives and military objectives, when targeting.<sup>61</sup> The third principle, proportionality, prohibits the use of force on a military target only when the incidental harm to civilians or civilian objects would be disproportionate.<sup>62</sup> Finally, the principle of humanity prohibits the infliction of any unnecessary suffering in the use of force; the use of force by the UN must be calculated and reasonable.<sup>63</sup>

While the majority of the principles enunciated in the Bulletin come directly from the Geneva Conventions and the Additional Protocols, the UN is not itself a party to any international treaties, even if the general principles of IHL are applied as a matter of policy.<sup>64</sup> In addition, the Bulletin states that the international treaties that participating nations are signatories to continue to bind the forces that they contribute, despite the UN having effective control over them.<sup>65</sup> Therefore, while technically the Bulletin will only bind UN forces in conflicts not amounting to an international armed conflict, if the situation does become qualified as such, the forces involved will be bound by any applicable international treaties and conventions to which their home-states are signatories.<sup>66</sup> In addition, any principles contained in those treaties and any conventions that have become settled state practice with the support of *opinio juris* would apply by way of customary international law, regardless of whether the nations in question are signatories thereto.<sup>67</sup>

The SC mandate is superimposed over these IHL principles. The influence of political and policy pressures on the mandate creation process, discussed in the previous Section, translates into ROE that do not conform to mission requirements. Clearly, the path from mandate creation to the official laminated Orders for Opening Fire card issued to each peacekeeper is not clear or direct and is influenced by much more than practical concerns for the efficient achievement of mission goals.<sup>68</sup> Force Commander Roméo Dallaire, for example, originally drafted interim ROE for UNAMIR that included permission to use force to defend ‘persons under UN protection’, but these were never approved, and the mission

<sup>61</sup> *Secretary General’s Bulletin* (n 19) s 5.1; see, also, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (‘Additional Protocol I’) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 article 48; see, also, Kleffner, in Fleck (ed) (n 4) 60.

<sup>62</sup> *Secretary General’s Bulletin* (n 19) s 5.4; see, also, *Additional Protocol I* ibid article 51(5)(b); see, also, Knut Ipsen, ‘Combatants and Non-combatants’ in Fleck (ed) (n 4) 94.

<sup>63</sup> *Secretary General’s Bulletin* (n 19) s 6.3; see, also, *Additional Protocol I*, ibid article 35(2); see, also, Kleffner, in Fleck (ed) (n 4) 59–60.

<sup>64</sup> Michael Schmitt, ‘Targeting in Operational Law’ in Gill and Fleck (eds) (n 1) 246–247.

<sup>65</sup> *Secretary General’s Bulletin* (n 19) s. 2.

<sup>66</sup> *Geneva Convention* (n 74) article 2; see, also, *Prosecutor v Dusko Tadic* (Appeal Judgment) ICTY-94-I-A (15 July 1999).

<sup>67</sup> *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3; see, also, *Statute of the International Court of Justice* (adopted 26 June 1945 as part of the *Charter of the United Nations*, entered into force 18 April 1946) article 38(1)(b).

<sup>68</sup> Holt and Berkman (n 40) 85.

was eventually mandated to only use force for self-defence.<sup>69</sup> Dallaire's draft ROE complied with IHL, but the mandate further restricted his ability to act.

## 5. THE GREAT DIVIDE: THE SEPARATION BETWEEN UN MANDATES AND RULES OF ENGAGEMENT

Over-politicisation of mandates results in convoluted ROE that leave UN forces in morally and legally untenable situations. In some scenarios, the mandate freezes because UN forces become indecisive and hesitant to use force at all, regardless of whether or not they actually have the authority to do so. In other situations, there is an operational void between the role envisioned for the mission by the SC and the actual role that the mission is pushed into on the ground. The result is that UN forces are sent into conflict zones unequipped and untrained for the tasks they have to perform, and the parameters of their mission gradually 'creep' from a Chapter VI role towards a Chapter VII role, potentially violating IHL. After all, the legal foundations for the use of force are centred on the mandate, which makes any use of force outside of the parameters of that mandate illegal.<sup>70</sup>

These situations reflect a significant gap between theory and practice, as well as between decision-makers in the SC and those actually putting the mandate into practice on the ground.<sup>71</sup> UN mandates are unlikely to give direct guidance on what is actually expected for the implementation of that mandate, which makes the transition of authority for the use of force from the SC to the Force Commander unpredictable, especially considering how little input the Force Commander actually has in the creation of the ROE.<sup>72</sup> Parts A and B of this Section will discuss the two prevalent consequences that result from this dysfunction between mandate creation and ROE formulation: Frozen Mandate and Mandate Creep.

### *A. The 'Frozen Mandate'*

Frozen mandates arise because of a number of factors but, in general terms, the causes can be grouped under two areas: (1) insufficient mandates and overly restrictive ROE and (2) inconsistent and uninformed interpretation of ROE. As was discussed in Section 3, in the cases of both the Irish contingent during the ONUC mission and the Belgian contingent during the UNAMIR mission, confusion over ROE caused peacekeepers to hesitate at the crucial moment in which they were killed. Even where the UN forces were militarily capable of defending themselves, overly restrictive ROE made the circumstances under which

<sup>69</sup> Astri Suhrke, 'Facing Genocide: the record of the Belgian battalion in Rwanda' (1998) 29 *Security Dialogue* 37, 44.

<sup>70</sup> Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1, 6.

<sup>71</sup> Klappe, in Fleck (ed) (n 4) 629.

<sup>72</sup> Holt and Berkman (n 40) 84–85.

they believed they could use force ambiguous. Soldiers' unwillingness to breach the ROE, as they interpreted them, was arguably taken advantage of not only to kill the peacekeepers in question, but in the case of the UNAMIR mission, also between 500,000 and 800,000 innocent civilians.<sup>73</sup>

In SC Resolution 918 of 1994, the SC instructed UN forces in Rwanda to 'contribute to the security and protection' of civilians and recognised that its forces 'may be required to take action in self-defence'.<sup>74</sup> Based on this language, it is unclear whether the UN contingent would be legally permitted to use force if they were not fired upon personally; it implies that the mandate requires the UN force to decline to act.<sup>75</sup> Restricting peacekeepers' right to interpret hostile intent is an unreasonable limitation on ROE above and beyond the requirements at IHL. Instead, peacekeepers should be allowed to interpret both hostile acts and hostile intent. The failure to react robustly and consistently when it is justified degrades the credibility of the UN force, thus putting the entire mission at risk.<sup>76</sup>

When ROE are not permissive enough to allow UN forces to intervene in humanitarian crises when they are needed, the organisation created to stop atrocity simply becomes an observer. When Force Commander General Roméo Dallaire requested authorisation to seize weapons caches in Rwanda, after warning the UN Secretariat of the impending genocide, his request was denied because the mandate for UNAMIR did not permit such action; UN forces were only allowed to conduct weapons recovery operations to establish the weapon-free zone originally agreed upon in the Arusha Peace Accord. UNAMIR was forced to return the weapons they had seized to their owners. Conceivably, those same weapons were eventually used in the ensuing genocide, and Dallaire's force did not have the ROE or the manpower to conduct operations to stop it. This was what led General Dallaire to place his forces directly in the line of fire between civilians and Hutu militiamen. This would activate the self-defence principle if they were attacked, which allowed him to save thousands of civilians.<sup>77</sup> In the UN's report on UNAMIR, common themes are 'fundamental misunderstandings' of what UNAMIR needed for success, and 'false [...] military assessments'.<sup>78</sup> In many cases, however, frozen mandates arise not out of incapacity but from misinterpretation of applicable ROE.

The failure of UN soldiers to use force even in self-defence shows that misinterpretation of ROE can be just as fatal as not having the required ROE at all. While the UN establishes its own ROE for each mission, soldiers taking part often have national ROE that may or may not comply.<sup>79</sup> The *Brahimi Report* attacked this phenomenon in particular, saying that the lack of common operating

<sup>73</sup> UN (n 70) 1; see, also, Findlay (n 17) 19.

<sup>74</sup> UNSC RES 918 (1994).

<sup>75</sup> Holt and Berkman (n 40) 85.

<sup>76</sup> UN (n 70) 3; Findlay (n 17) 371.

<sup>77</sup> Dallaire (n 36) 268–269.

<sup>78</sup> UN (n 70) 3.

<sup>79</sup> Cole et al (eds) (n 12) 5.

procedures, including interpretation of ROE, ‘must stop’ and that nations whose policies are contrary to those of the UN ‘must not deploy’.<sup>80</sup> This statement by the SG represents a crucial call for standardisation of operation procedure for UN forces. Without it, UN missions lose legitimacy while civilians and peacekeepers alike are endangered. Such a situation arose in Rwanda, where certain UN contingents intervened to the best of their abilities to protect civilians, while others ignored what was happening around them. For example, General Dallaire believed that the Belgian contingent ‘had serious misconceptions about the ROE, making them unnecessarily passive’.<sup>81</sup> This insight was, unfortunately, proven true when ten of the Belgian contingent lost their lives.

Similarly, frozen mandates can arise when national governments go around UN command structures and direct their forces while they are involved in UN missions without consulting force commanders.<sup>82</sup> In Srebrenica, the Dutchbat had the ROE to protect the Muslim refugees within their compound, but under orders from their national government, they turned them over to Bosnian soldiers, who in turn killed them. Recently, the Netherlands was held to be responsible by the District Court of The Hague for the deaths of 300 refugees that it turned over to Bosnian soldiers and whom they had the capacity to protect within their compound.<sup>83</sup> This follows the Court of Appeal of The Hague’s decision in *Nuhanovic*, where it held the Netherlands accountable for three deaths arising out of the same incident and circumstances.<sup>84</sup> The Dutch state intervened, took effective control of the Dutchbat, and gave orders not to act that directly contradicted the orders issued by UNPROFOR headquarters. The need for unified and standardised ROE and command structure is readily apparent: implementation and interpretation, not inadequacy, caused the biggest problems for UNPROFOR’s ROE.<sup>85</sup> Misinterpretation becomes an issue most often when ROE that are put forward as strict become fluid, such as when a mission’s mandate gradually expands and changes from a Chapter VI to a Chapter VII operation.<sup>86</sup> While the change is made quickly on paper, formulating new ROE and having them applied uniformly by troops in the field while the operation is ongoing is much slower, and constant readjustment should therefore be avoided.<sup>87</sup>

<sup>80</sup> *Brahimi Report* (n 30) para 109.

<sup>81</sup> Findlay (n 17) 279.

<sup>82</sup> *Brahimi Report* (n 30) 45.

<sup>83</sup> Anna Holligan, ‘Dutch State Liable Over 300 Srebrenica Deaths’ *BBC News* (16 July 2014) <<http://www.bbc.com/news/world-europe-28313285>> accessed 17 August 2014.

<sup>84</sup> *Nuhanovic* (n 57); see, also, Klappe, in Fleck (ed) (n 4) 623.

<sup>85</sup> Findlay (n 17) 271.

<sup>86</sup> See, for example, the SC altering UNPROFOR’s mandate through UNSC RES 807 (1993) to explicitly move the operation under Chapter VII for the first time while the mission was ongoing.

<sup>87</sup> Findlay (n 117) 373.

### B. 'Mandate Creep'

Mandate Creep occurs when UN Force Commanders stretch the boundaries of the mandate for their mission in order to react to events occurring in conflict zones. While UN forces with insufficient ROE and badly formulated mandates make the UN look ineffective, UN forces that don't follow their mandate—or follow it haphazardly—run the more dangerous risk of making the UN seem incompetent.<sup>88</sup> When a UN mission begins to blur the lines between Chapter VI and Chapter VII by using force in ways that it is not mandated to do or is not authorised to do under its ROE, then it constitutes a breach of international law.<sup>89</sup> However, if a force is sent into a conflict zone with insufficient ROE to protect the civilians or safe-areas that they are supposed to protect, then the previously discussed scenario of mandate freeze arises. Unfortunately, the UN's solution to this problem has been to progressively expand a UN force's mandate piecemeal, reacting to instead of dictating events on the ground.

Mandate creep shows the same theoretical and political dependence on the principles of escalation of force and minimum use of force that UN peacekeepers are ordered to act under through their ROE. Reliance on these principles puts the mission at risk just as it puts UN forces at risk. In the former Yugoslavia, for example, UNPROFOR was sent into the conflict in 1992 in the absence of a firm cease-fire agreement: the force was lightly armed, could only use force in self-defence and was seen as an 'interim arrangement to create [...] conditions of peace and security'.<sup>90</sup> This mandate was established in February 1992, and by September of that year, the SC passed Resolution 776, which allowed UNPROFOR to use force in order to protect humanitarian aid, but other than that the provision held UNPROFOR to the normal ROE of a Chapter VI mission.<sup>91</sup> This dysfunctional hybrid is representative of the hesitancy of the SC to recognise the conflict for what it was: an internal sectarian war with no peace to keep. It took until February 1993 for the SC to begin using Chapter VII language in its mandates and, as has been discussed in other incidents such as the Srebrenica Massacre in 1995, UNPROFOR was never able to consolidate and apply the ROE it was given so belatedly.<sup>92</sup>

The UN mission to Somalia shifted into a Chapter VII enforcement scenario as awkwardly as UNPROFOR had.<sup>93</sup> Similarly, UNOSOM I began operations in Somalia with no ceasefire to keep. The mission's primary purpose was to facilitate the delivery of humanitarian aid for victims of the civil war occurring

<sup>88</sup> *ibid* 370.

<sup>89</sup> Fleck, in Gill and Fleck (eds) (n 2) 111.

<sup>90</sup> Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press 2004) 217–218; see, also, UNSC RES 743 (1992).

<sup>91</sup> Gray (n 175) 218; see, also, UNSC RES 776 (1992).

<sup>92</sup> Gray (n 175) 218–221.

<sup>93</sup> Findlay (n 18) 378.



in Somalia and began with a deployment of only fifty unarmed observers, which was later augmented.<sup>94</sup> UNOSOM I was not able to carry out its mandate and was supplemented by a completely new mission: UNITAF.<sup>95</sup> UNITAF was a multinational non-UN force that was mandated explicitly to act under Chapter VII to ‘use all means to establish [...] a secure environment for humanitarian relief’.<sup>96</sup> Thus, while acting under Chapter VII, the force was not to take offensive action against wrongdoers, but only to protect humanitarian relief. This, too, failed, and the mission was again redefined by the SC. Both UNOSOM I and UNITAF were replaced by UNOSOM II in 1993.<sup>97</sup> For soldiers taking part in the operations, the constant shift of mandate and ROE caused massive operational difficulties.

UNOSOM II had a broad mandate that called for it to prevent resumption of violence, secure disarmament of armed factions, maintain security at key locations—such as airports—and to assist in the protection of humanitarian aid.<sup>98</sup> While UNITAF was restricted to the use of force in self-defence, the UNOSOM II ROE went as far as allowing the use of deadly force without hostile action or intent in some situations. For example, ‘crew-served weapons’ were automatically considered a threat to UNOSOM II forces whether or not they showed hostile intent.<sup>99</sup> The same principle applied to ‘armed individuals’ within the areas under the control of UNOSOM II forces.<sup>100</sup> In addition, national ROE caveats further confused the situation, as each contingent used force in different degrees in different situations, with no standardisation to speak of.<sup>101</sup> UNOSOM II shows the devastating consequences of mandate creep from the peacekeepers’ perspective, but also from the perspective of the host-nation population. The shift of missions from UNOSOM I, to UNITAF, to UNISOM II was confusing for its force members, but it is easy to imagine that Somalis likely saw no change at all; one day there were white foreigners and the next day they were still there. The only difference between the forces, or the ROE for that matter, for Somalis was likely their experience: one day they could carry weapons, while on the next armed soldiers pointed rifles at them and took their weapons away. The Battle of Mogadishu, in which eighteen Americans and an estimated 300 Somalis perished, marked the unfortunate climax of the confusion.

<sup>94</sup> UNSC RES 751 (1992).

<sup>95</sup> Gray (n 175) 222; UNSC RES 794 (1992).

<sup>96</sup> UNSC *ibid.*

<sup>97</sup> UNSC RES 814 (1993).

<sup>98</sup> *ibid.*; see, also, Gray (n 175) 223.

<sup>99</sup> Findlay (n 17) 422–424.

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.* 214–215.

## 6. THE UN MISSION IN THE DEMOCRATIC REPUBLIC OF THE CONGO: MONUC

The UN mission to the Democratic Republic of the Congo (DRC), MONUC, provides an interesting case study, as it represents a culmination of the topics discussed in this paper. While MONUC started off much as UNPROFOR and UNOSOM I did, with forces and mandates insufficient for its task, MONUC grew and developed in order to become one of the most vigorous and effective examples of the use of force by a UN mission in recent memory. It is unfortunate, however, that the mission had to start from behind and catch up as events developed. In 1999, the DRC was in turmoil, as civil war raged along tribal lines, as well as between foreign nations, such as Rwanda, that intervened in order to take advantage of the nation's rich natural resources. It is estimated that the conflict has claimed the lives of almost four million people.<sup>102</sup>

MONUC first took form as a small force of ninety military liaisons in 1999. Based on the findings of this advance mission, the African nations of the UN requested 15,000-20,000 troops with a robust Chapter VII mandate to help quell the civil war and unrest in the DRC and ensure implementation of the Lusaka Ceasefire Agreement.<sup>103</sup> Their request was denied. Still reluctant to send a force with such a proactive mandate, the SC fell back on its graduated approach of escalation of force and approved a force of 5,537.<sup>104</sup> Instead of the robust Chapter VII mandate that the African nations knew was necessary, the SC issued MONUC a mandate that resembled Chapter VI for the most part, with an element of Chapter VII grafted on at section 8 to 'take the necessary action [...] as it deems it within its capabilities, to protect [...] civilians from imminent threat of physical violence'.<sup>105</sup> MONUC began with a confusing and poorly drafted resolution, mandating the protection of civilians 'within its capabilities' but equipped it barely enough to defend itself, let alone apply its ROE proactively.

### *A. Same Mistakes, but Lessons Learned?*

The size and uncertain purpose of the MONUC mission in 2000 meant that it was not able to operate effectively. In many cases, troops arriving for the mission were unaware of the dire conflict that they were entering and were untrained for the robust peace enforcement role that was expected of them. Different contingents interpreted the mandate and ROE in a variety of ways, and others were not even

<sup>102</sup> Coghlan et al, 'Mortality in the Democratic Republic of the Congo: a nationwide survey' (2006) 367 *The Lancet* 9504, 44–51.

<sup>103</sup> UNSC RES 1258 (1999); see, also, UN Doc S/1999/815 (1999), *Letter Dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council*; see, also, Holt and Berkman (n 40) 159.

<sup>104</sup> UNSC RES 1291 (2000) 3.

<sup>105</sup> *ibid* 4.

aware of the protection of civilians caveat in their ROE.<sup>106</sup> MONUC had the authority to use force to protect civilians as of 2000, but still took years to adjust because each contingent understood the mission in contradictory ways. As a result, the SC expanded MONUC in response to ongoing atrocity instead of preempting it.<sup>107</sup>

In 2002, the SC increased the MONUC mission to 8,700 troops and created two task forces to help with disarmament, demobilisation, and repatriation.<sup>108</sup> Even with these changes and the capacity to use force to protect civilians in their ROE, MONUC acted more as an observer mission. For example, in May 2002 MONUC had approximately 1,000 troops in the city of Kisangani, and yet failed to attempt to stop the massacres taking place there at the hands of RCD-Goma, a Congolese rebel group.<sup>109</sup> When fighting escalated in the Ituri province in 2003, the 700-strong MONUC force present there was incapable of protecting civilians in the area, due to the breadth of territory that the force was expected to patrol, leading the SG to comment on the ‘immense gap between its capabilities and the high expectations of the population’.<sup>110</sup> As a result of the SC’s early hesitation, the SG was forced to call upon France to lead an Interim Emergency Multinational Force (IEMF) in June 2003 to establish security where MONUC could not.

Operation Artemis, the operation led by IEMF, bought time for the SC to correct its mistakes, and set a firm example for when the mission was handed back to MONUC in September 2003. The French forces established a weapons-free zone and civilian protection area around the city of Bunia and enforced its control over that area aggressively.<sup>111</sup> The Ituri Crisis forced the UN to reconsider what the protection of civilians meant in the context of the deployment of a Chapter VII mission, and when IEMF handed control back to MONUC, the UN had organised the Ituri Brigade, which was comprised of approximately 4,800 troops, heavily armed and accompanied by combat helicopters. MONUC’s troop ceiling was raised to 10,800, and its mandate expanded to ‘take the necessary measures in the areas of deployment of its armed units [...] within its capabilities’ to ensure the security and freedom of movement of UN personnel, protect civilians from physical violence, and improve the security situation in the DRC.<sup>112</sup> To fulfil these goals, MONUC was authorised to ‘use all necessary means to fulfil its mandate.’<sup>113</sup> This put the mission clearly within Chapter VII in terms of capacity, mandate and ROE. The difference in conceptualisation of the mission between pre- and

<sup>106</sup> Holt and Berkman (n 40) 191.

<sup>107</sup> *ibid.* 159.

<sup>108</sup> UNSC RES 1445 (2002).

<sup>109</sup> Holt and Berkman (n 40) 159–160.

<sup>110</sup> Gray (n 175) 249; see, also, UN Press Release SC/7820 (2003), *Security Council Considers Way Forward in Democratic Republic of Congo, Hearing 28 Speakers*.

<sup>111</sup> Holt and Berkman (n 40) 162.

<sup>112</sup> UNSC RES 1493 (2003).

<sup>113</sup> *ibid.*

post-Operation Artemis MONUC is so great that it must be discussed in terms of MONUC Part 1 (MONUC1) and MONUC Part 2 (MONUC2). This separation is important, because MONUC2 represents the first concrete example of the UN successfully putting the *Brahimi Report* into practice.

*B. The Use of Force and Application of ROE in the Congo*

The use of force is, understandably, a last-resort scenario in any situation, but when it becomes necessary it must be reacted to quickly and assertively; MONUC2 is important because it shows that a UN force can walk the thin line between robust peacekeeping and war-fighting while maintaining the confidence of contributing nations, the host nation, and civilians. Clear mandates had noticeably positive effects on the outcome of MONUC2. Whereas once the SC spoke vaguely in terms of ‘promoting a secure and stable environment’, during the MONUC2 mission it clearly mandated the mission to ‘protect civilians’.<sup>114</sup> The role does not come without costs, but when MONUC2 accepted its purpose and applied its ROE, it received resounding support from the SC, the UN in general, and, most importantly, civilians on the ground.

The formation and mobilisation of the Ituri Brigade was a strong and symbolic shift from the observation-reaction role of MONUC1 to the coercive-proactive stance of MONUC2. The deployment, however, was not flawless, and the Ituri Brigade still needed a sharp reminder of the more vigorous role that they were meant to take on. In early 2004, mutinous DRC troops occupied the city of Bukavu, and hundreds of civilians lost their lives. A typical scenario of mandate freeze occurred due to misinterpretation of shifting ROE. The UN deputy Force Commander, despite having access to attack-helicopters and troops on the ground, failed to utilise the assets at his command, or perhaps simply wasn’t willing to put them in harm’s way.<sup>115</sup> The result was a significant decrease in confidence and respect for MONUC2. The Uruguayan contingent that was in charge of defending the city became universally loathed by civilians in the area, leading some to comment that the ‘Uruguayans [had not] come for peacekeeping, they [had come] for tourism’.<sup>116</sup> Thousands of civilians who had returned to their homes in the region after the Ituri Brigade had arrived once again fled.<sup>117</sup>

The events in Bukavu registered with the SC, however, as it approved an enlargement of MONUC2 to 16,700 troops.<sup>118</sup> Beginning in 2005, MONUC2 conducted some of the most aggressive peacekeeping ever seen. The force maintained uncompromising cordon-and-search operations to pre-empt attacks on

<sup>114</sup> Holt and Berkman (n 39) 187.

<sup>115</sup> Cammaert and Klappe, in Gill and Fleck (eds) (n 2) 155.

<sup>116</sup> James Traub, ‘The Congo Case’ *The New York Times* (3 July 2005) <<http://www.nytimes.com/2005/07/03/magazine/the-congo-case.html>> accessed 9 August 2014.

<sup>117</sup> Holt and Berkman (n 40) 164; see, also, Cammaert and Klappe, in Gill and Fleck (eds) (n 2) 155.

<sup>118</sup> UNSC RES 1565 (2004).

local villages, which by June 2005 had disarmed almost 15,000 militia members.<sup>119</sup> This, of course, attracted reprisals, as an ambush by a local militia, the Nationalist and Integrationist Front (FNI), killed nine Bangladeshi peacekeepers in February 2005. The reaction of Brigadier General Jan Isberg, the Commander of the Ituri Brigade, to these unfortunate events was important both for the success of the mission and restoring confidence in the assertive role that the UN was taking. Instead of backing off, General Isberg and the Ituri Brigade engaged the FNI during its cordon-and-search operations and killed fifty to sixty militia members during the ensuing firefights.<sup>120</sup> The 3,700-strong Pakistani contingent in particular was noted for its consistent application of the mission ROE to protect civilians. When it encountered Hutu rebel forces with links to the Rwandan genocide, the Pakistani contingent delivered the militia an ultimatum, and then moved in with aerial support to burn the camp to the ground; this was repeated with other armed groups on at least thirteen other occasions by October 2005.<sup>121</sup> It is likely that the Ituri Brigade's success was due to the fact that the Pakistani contingent that made up the bulk of its forces all followed the same ROE, both national and UN, and therefore did not have as many national caveats interfering with the mission. The international response to the proactive applications of MONUC2's mandate and ROE was positive, as MONUC2's mandate was further strengthened in March 2005. If coercive action was not expressly allowed before, it was spelled out in plain language in Security Council Resolution 1592, calling for increased cordon-and-search operations and coercive tactics.<sup>122</sup> This clearly shows the SC and the international community accepting and supporting the more robust application of ROE that MONUC2 had adopted. However, it did not occur without repercussions.

The expansion of the legal use of force in UN operations in situations that justify it is a step in the right direction for UN peacekeeping doctrine, but it must nonetheless be balanced against the repercussions that it causes. MONUC2 is, again, a perfect example. The assertive stance that the mission took had obvious positive effects in its areas of operation, as civilians gained confidence in the peacekeepers and a measure of security was restored. However, outside of the safe areas established by MONUC2, reprisal attacks against civilian populations took place. In addition, not all Non-Governmental Organisations ('NGOs') were willing to be affiliated with a UN mission that used force to achieve its objectives, and some pulled their support.<sup>123</sup> One of the primary purposes for the use of force by a UN mission is to provide for safe and efficient delivery of humanitarian aid to civilian populations. If the loss of support from humanitarian groups and backlash

<sup>119</sup> Holt and Berkman (n 40) 165.

<sup>120</sup> IRIN, 'DRC: UN Troops Killed 50 Militiamen in Self-Defence, Annan Says' (4 March 2005) <<http://www.irinnews.org/report/53269/drc-un-troops-killed-50-%20militiamen-in-self-%20defence-annan-says>> accessed 9 August 2014.

<sup>121</sup> Holt and Berkman (n 40) 166.

<sup>122</sup> UNSC RES 1592 (2005); see, also, Holt and Berkman (n 140) 165–166.

<sup>123</sup> Holt and Berkman (n 40) 157.

by militias outweighs the ground gained by applying mission ROE robustly, the decision to use force must be carefully analysed. These phenomena are foreseeable consequences of the proactive application of more permissive ROE, however, and if MONUC2 is an example for the future, then it has certainly vindicated the SC's policy decisions. In 2006, the DRC had its first democratic elections in 46 years, and in 2010, MONUC transitioned from a military role to a state-building role as it was renamed the United Nations Organization Mission in the Democratic Republic of the Congo (MONUSCO).<sup>124</sup>

## 7. CONCLUSION

In order for UN missions to be effective and compliant with IHL, the gap between the creation of mandates and the formulation of ROE for UN missions must be closed. The problems with the existing system have, unfortunately, come to the forefront through trial and error on an international scale. No single fix exists; however, MONUC has shown improvements that also serve as indicators of what solutions do in fact make a difference to mission efficacy when ROE are applied by soldiers on the ground.

UNPROFOR's experiences in the former Yugoslavia show that a Chapter VI mandated peacekeeping force cannot simply be incrementally adapted to become a Chapter VII mission. Not only does it risk infringing upon IHL by inviting mandate creep and inconsistent application of mission ROE, but it endangers the perceived impartiality of the force in general.<sup>125</sup> The relative failure and success of MONUC1 and MONUC2 reaffirm this lesson. MONUC1 was given a patchwork mandate that hinted at Chapter VII but remained Chapter VI, with a force that was hesitantly increased over time. MONUC2, on the other hand, was given a clear Chapter VII mandate with equipment and ROE to apply it. Another cause of misinterpretation comes from a lack of standardisation in ROE application, often due to national caveats that restrict soldiers' actions. The frozen mandate that results is equally dangerous for peacekeepers as for civilians and the mission. The SC must make efforts to standardise ROE before sending a mission to a conflict zone, and must refrain from scaling up the mission's ROE too frequently over the course of the mission.

The development of clear ROE for international missions comprised of multi-national contingents is a daunting task; however, it is essential in order for peacekeeping forces to remain effective in the twenty-first century. UN ROE will always be more restrictive than war-fighting, but must remain permissive enough to allow intervention where it is necessary; they must be flexible enough to allow local commanders to adapt to situations on the ground, but rigid enough to prevent mandate creep and the potential violation of international law. They must

<sup>124</sup> UNSC RES 1925 (2010).

<sup>125</sup> Gray (n 175) 227.

be sufficiently detailed so as not to leave room for error, but must also be clear and succinct enough to be memorised and carried by a soldier on a pocket-sized laminated card.<sup>126</sup> The bluff of international repercussions that worked so well for Lester B. Pearson during the Suez Crisis is no longer effective, and the UN has started to adapt to a new more proactive role maintaining international peace and security. While Rwanda, Somalia and the former Yugoslavia were devastating experiences, MONUC has shown that the SC and the international community as a whole have begun to accept the realities of modern peacekeeping.

<sup>126</sup> Findlay (n 17) 372–373.