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The MONUSCO Force Intervention Brigade at 10 and the Quest for Fair UN Peacekeeping Involvement in Non-International Armed Conflicts

Abstract

This article aims at assessing the fairness of peacekeeping involvement in non-international armed conflicts in light of ten years of practice of the MONUSCO Force Intervention Brigade (2013-2023). The article posits that respect for the three principles of peacekeeping, namely non-use of armed force except for self-defence, neutrality/impartiality, and consent of the belligerents, can be used to measure the fairness of a peacekeeping mission. Reference to procedural fairness as legitimacy, following the work of Thomas Franck, is employed here. The article describes the mandate of the MONUSCO Force Intervention Brigade in light of ten years of the UN Security Council's resolutions and practice in the field to conclude that the mission does not comply with the principles of peacekeeping and, thus, it cannot be seen as a fair UN involvement in a non-international armed conflict.

Key words: DRC, Fairness, Impartiality, Intervention Brigade, MONUSCO

1 Introduction

This article explores whether ten years of deployment of the MONUSCO Force Intervention Brigade (FIB) in the Democratic Republic of the Congo (DRC) has eroded or consolidated the fairness of peacekeeping interventions of the United Nations (UN) in non-international armed conflicts. To answer this question, the article considers whether the practice of the FIB over a decade is consistent with the three recognised principles of peacekeeping, namely non-use of armed force except for self-defence, neutrality (which became impartiality), and consent. Respect for these principles is considered here to be the measure of procedural fairness of UN peacekeeping intervention in non-international armed conflicts.

The article is structured as follows. In light of relevant studies on fairness in international law, Section 2 advances the suggestion that the three principles of peacekeeping can constitute the bedrock of the fairness of UN peacekeeping interventions in non-international armed conflict. Section 3 provides an overview of the evolution that the principles of peacekeeping have undergone since they were first formulated between 1956 and 1958. Section 4 presents an overview of the mandate of the FIB considering relevant resolutions by the UN Security Council and practice in DRC. In Section 5, the article argues that the activity of the FIB is irreconcilable with the principles of non-use of armed force except for self-defence and neutrality/impartiality. In the Conclusion, the article posits not only that ten years of practice by the FIB represent a radical change and a potential challenge to the integrity of the institution of peacekeeping, but also that they demonstrate that the FIB was an unfair peacekeeping intervention in a non-international armed conflict.

2 The Three Principles of Peacekeeping and Fairness of UN Peacekeeping Missions

This section discusses briefly how the fairness of UN peacekeeping missions can be understood from an international law perspective. Rather than providing a grand theory of fairness in international law, it is argued that fairness of peacekeeping missions should be assessed through the compliance of the mandate with the three well-established principles of peacekeeping: consent, neutrality/impartiality, and non-use of force except for self-defence.

There is ample debate around the notion of fairness in international law, how it should be measured in legal terms,[1] and how it affects specific branches such as the procedure of international courts.[2] However, limited attention has been devoted to fairness of peacekeeping missions.[3] Thomas Franck, the leading scholar on fairness in international law, has identified two aspects of fairness: legitimacy as procedural fairness and distributive justice as moral fairness.[4] This article focuses

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[1] See, above all, Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1998). See also Emmanuelle Tourme Jouannet, *What is a Fair International Society? International Law Between Development and Recognition* (Hart 2014); Andreas von Arnauld, 'Fairness and International Law: Within or Without?', AEL 2024/06 Academy of European Law European Society of International Law Paper, https://cadmus.eui.eu/bitstream/handle/1814/76749/AEL_2024_06.pdf?sequence=1&isAllowed=y; Roman Kwiecień, 'Reflections on the Role of Fairness for the Sources of International Law', AEL 2024/11 Academy of European Law European Society of International Law Paper, https://cadmus.eui.eu/bitstream/handle/1814/76754/AEL_2024_11.pdf?sequence=1&isAllowed=y.

[2] See, eg, Arman Sarvarian, Filippo Fontanelli, Rudy Baker, Vassilis Tsevelekos (eds), *Procedural Fairness in International Courts and Tribunals* (BIICL 2015); Yvonne McDermott, *Fairness in International Criminal Trials* (OUP 2016); Caleb H Wheeler, *Fairness and the Goals of International Criminal Trials: Finding a Balance* (Routledge 2023).

[3] Outside legal studies, see Jeni Whalan, *How Peace Operations Work: Power, Legitimacy, and Effectiveness* (OUP 2013) 49-85.

[4] Franck (n 1) 7-9.

mainly on the first aspect of fairness in relation to peacekeeping missions, though it is widely accepted that the two are interrelated.

Franck addressed the fairness of peacekeeping missions in the framework of the fairness of the action of the UN Security Council in maintaining peace and security, with specific reference to Chapter VII powers.[5] As some other legal commentators in the '90s and early '00s, Franck struggled to attribute autonomy to the phenomenon of peacekeeping: in the absence of any explicit reference to peacekeeping missions in the Charter, peacekeeping missions were seen as one of the possible manifestation of the power of intervention of the UN Security Council along with enforcement actions adopted under Articles 41 and 42 of the UN Charter.[6] In relation to these actions, Franck acknowledged that the UN Security Council, which is a political organ, enjoys broad discretion under the UN Charter.[7] However, to demonstrate legitimacy, and thus fairness, the action of the UN Security Council should have been exercised '*bona fide* and *intra vires*'.[8] In Franck's opinion, '[t]o assert the legitimacy of his actions and to pull members towards compliance with its decisions, the Council must be seen to be acting in accordance with established procedures and limitations'.[9] Franck identified these procedures and limitations mainly in Chapter VII and in Article 2(7) of the UN Charter, which states that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state' except for what is needed for 'the application of enforcement measures under Chapter VII'. In line with his view that the legitimacy of peacekeeping missions should be addressed in the framework of the overall powers of the UN Security Council in relation to the maintenance of peace and security,[10] Franck has scrutinised the fairness of certain peacekeeping missions in light of their compliance with the notion of intervention in the domestic jurisdiction of a state under Article 2(7) and their respect for the procedures dictated by Chapter VII for enforcement actions.[11]

Conversely, this article zooms in on the specificity of peacekeeping missions. Although these missions are not mentioned in the UN Charter, they have assumed distinct features and characteristics through the practice of the UN General Assembly, the UN Security Council, and member states.[12] This practice was studied, systematised, analysed, and digested in numerous documents authored or commissioned by the UN Secretary-General.[13] The practice of these three organs and of member

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[5] ibid 227-241, 305-310.
[6] ibid 299-300, 305. See also Paolo Picone (ed), *Interventi delle Nazioni Unite e diritto internazionale* (CEDAM 1995); Paolo Picone, 'Il peace-keeping nel mondo attuale: tra militarizzazione e amministrazione fiduciaria' (1996) 79 Rivista di diritto internazionale 5; Paolo Picone, 'Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale' (2005) 88 Rivista di diritto internazionale 5.
[7] Franck (n 1) 220.
[8] ibid.
[9] ibid 218.
[10] This is largely due to the difficulties in delimitating the boundaries of peacekeeping vis-à-vis peace enforcement. See ibid 309.
[11] ibid, 228. Recently, the legality of peacekeeping as a UN intervention has been discussed, with specific reference to DRC by Jennifer Giblin, *United Nations Peacekeeping and the Principle of Non-Intervention* (Routledge 2024).
[12] See eg DW Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (Stevens 1964); Nigel White, *Keeping the Peace* (Manchester University Press 1997); Terry Gill et als (eds), *Leuven Manual on the International Law Applicable to Peace Operations* (CUP 2017); Paul D Williams and Alex J Bellamy, *Understanding Peacekeeping* (3rd edn, CUP 2021); Rosa Freedman, Nicolas Lemay-Hébert, Siobhán Wills, *The Law and Practice of Peacekeeping: Foregrounding Human Rights* (CUP 2021); Alexander Gilder, *Stabilization and Human Security in UN Peace Operations* (Routledge 2022).
[13] See, among others, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping (17 June 1992); Supplement to an Agenda for Peace (25 January 1995); Report of the Panel on United Nations Peace Operations (21 August 2000) (hereinafter: 'Brahimi Report'); A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change (2 December 2004); UN Department of Peacekeeping Operations, *United Nations Peacekeeping Operations Principles and Guidelines* (UN 2008) (hereinafter: 'Capstone Doctrine'); UN

states has crystallised three main principles governing peacekeeping missions: non-use of armed force except for self-defence by peacekeepers, neutrality/impartiality of the mandate, and consent. Ample literature has analysed the quasi-constitutional nature of these principles, with specific focus on how they have evolved over time.[14] Although, as the product of practice from different organs and actors rather than rules embodied in normative tests, the principles of peacekeeping are quite flexible and subject to development, they have a minimum normative content that is constantly recognised by the UN Security Council, which keeps invoking them as the source of the legitimacy of peacekeeping mandates.[15]

This being the case, this article considers that the three principles of peacekeeping, as established in the practice of the UN General Assembly, the UN Security Council, the UN Secretary-General, and member states are the legal parameters for establishing the fairness of UN peacekeeping missions. This assumption is based on the fact that both UN organs and member states have recognised the value of these principles as the bedrock of peacekeeping missions. They are the – albeit flexible – boundaries within which peacekeeping missions can be adopted absent any explicit provision of the UN Charter. It is the constant consensus of UN organs and member states that elevate these principles to standards of fairness. Clearly, primarily this fairness is owed to the member states of the UN and to UN organs, since the UN Security Council mainly operates at inter-state level. However, peacekeeping has evolved with the protection of civilians as the main concern in situation where armed groups are actively involved in hostilities. Accordingly, it is suggested here that the three principles of peacekeeping are standards of fairness for member states and UN organs on the one hand – since they are the product of their consensus on what is peacekeeping – and for armed groups and civilians in the situations where the missions are deployed – since they create expectations in relation to what the mission can do under international law.

Fairness and legitimacy, as in Franck's perspective, go hand in hand even if the principles of peacekeeping, rather than some rules of the UN Charter, are employed to measure them. As noted by the Capstone Doctrine, '[t]he firmness and *fairness* with which a United Nations peacekeeping operation exercises its mandate, the *circumspection with which it uses force*, the discipline it imposes upon its personnel, the respect it shows to local customs, institutions and laws, and the decency with which it treats the local people all have a direct effect upon perceptions of its legitimacy.'[16] A mandate that is outside the parameters of these three principles hardly can be fairly labelled as a peacekeeping mission, notwithstanding the nomenclature adopted by the UN Security Council. This perspective is not radically opposed to that of Franck, since the three principles of peacekeeping derive from the

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Department of Peacekeeping Operations, *New Partnership Agenda: Charting a New Horizon for UN Peacekeeping* (UN 2009); Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People (17 June 2015) (hereinafter: 'HIPPO Report'); 2020 Report on Implementation of the Recommendations of the Special Committee on Peacekeeping Operations (3 November 2020); 2021 Report on Implementation of the Recommendations of the Special Committee on Peacekeeping Operations (2 November 2021); 2023 Report on Implementation of the Recommendations of the Special Committee on Peacekeeping Operations (13 November 2023).

[14] See eg White (n 12) 232-247; Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2006) 11 Journal of Conflict & Security Law 465; Christian Henderson, *The Use of Force and International Law* (2nd edn, CUP 2024) 226-230.

[15] See eg Report of the Special Committee on Peacekeeping Operations 2023, substantive session (New York, 20 February–17 March 2023), para 26. See also Tsagourias (n 14) 482.

[16] Capstone Doctrine (n 13) 36. See also Lars Müller, 'The Force Intervention Brigade: United Nations Forces beyond the Fine Line between Peacekeeping and Peace Enforcement' (2015) 20 Journal of Conflict & Security Law 359, 360, 380.

rules of the UN Charter and they should not be interpreted as creating a new autonomous, self-contained legal regime.[17]

In light of this theoretical framework, the following subsection briefly explores the status of the principles of peacekeeping back to the time when the FIB was created in 2013. Then, the article discusses whether ten years of practice of the FIB are in line with the principles of peacekeeping so that the FIB can be considered to be a fair UN peacekeeping mission, or whether it constitutes a dangerous precedent that risks disrupting the tenuous boundaries of the notion of peacekeeping.

3 The Three Principles of Peacekeeping in a Nutshell

This section briefly describes the evolution faced by the three principles (or pillars) of peacekeeping since their inception in 1956 until 2013. These principles are non-use of armed force except for self-defence, neutrality/impartiality, and consent.

The principles of peacekeeping are modelled on the first armed peacekeeping mission, UNEF I, that was created in 1956 by the UN General Assembly to monitor ceasefire and withdrawal after the Suez Crises between Egypt, Israel, UK, and France.[18] This initiative by the UN General Assembly, which aimed at circumventing the politics and veto powers of the UN Security Council, raised quite a clamour: what was the legal basis for such an operation undertaken by the UN General Assembly rather than the UN Security Council, which is the organ with primary responsibility for the maintenance of international peace and security?[19] The UN Secretary-General at the time published a Report in 1958 trying to delineate the features and legal bases of UNEF I. In the auspices of the UN Secretary-General, the report 'endorse[d] certain basic principles and rules which would provide an adaptable framework for later operations that might be found necessary.'[20] According to the Report, members of UNEF I could only use armed force in personal self-defence,[21] the mission had to act pursuant to strict neutrality in relation to the underlying conflict,[22] and the presence of the mission was subject to the consent of the host state.[23]

However, when the UN Security Council started dispatching peacekeeping missions into situations of non-international armed conflict, where peacekeepers had to protect civilians in volatile situations where violent armed groups were operating, the principles provided by UNEF I needed to evolve. The need for this adjustment should not come as a surprise since the UN Secretary-General had warned that the parameters on UNEF I modelled were fit to deal with situations 'exclusively international in character in that they relate to armed conflict among States'.[24] Thus, the involvement in non-international armed conflicts led to a reconfiguration of the three principles,[25] particularly in

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[17] On the dangers produced by considering peacekeeping as an autonomous and self-contained legal regime, see Nigel D White, 'Peacekeeping Doctrine: An Autonomous Legal Order?' (2019) 88 Nordic Journal of International Law 86.
[18] UNGA Resolution 1001 (ES-I) (1956).
[19] Art 24(1), UN Charter.
[20] Summary Study of the Experience Derived from the Establishment and Operation of the Force (9 October 1958) para 154.
[21] ibid para 175.
[22] ibid para 149.
[23] ibid para 15.
[24] ibid para 14.
[25] See generally Henderson (n 14) 245-251

light of the prominence the UN Security Council provided to the protection of civilians in these situations.[26]

The principle of non-use of armed force except for self-defence was construed in the UNEF I model as a ban on 'offensive actions'[27] so that individuals 'engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms'.[28] However, this strict mandate started germinating case-by-case exceptions that were due to the specific problems faced by peacekeepers. For instance, peacekeepers became entitled to use force to guarantee their freedom of movement: if in 1960, in the framework of the first mission in Congo, ONUC, peacekeepers employed armed force to guarantee their freedom of movement even in the absence of an explicit authorisation,[29] making Frank wonder whether this was in line with procedural fairness.[30] In 1993, in relation to UNPROFOR in former Yugoslavia, the UN Security Council implicilty authorised the use of armed force to guarantee freedom of movement of the peacekeepers.[31] Today, it is a given that peacekeepers can use armed force to defend themselves and to guarantee their freedom of movement. However, since the consent of the host state is needed for the deployment of the mission, force is usually employed only if freedom of movement is impaired by armed groups not affiliated to the host state.

To try to enlarge this principle further, in 1973 the UN Secretary-General considered that peacekeepers could use armed force in personal self-defence and in defence of the mandate. In his words, '[s]elf-defence would include resistance to attempts by forceful means to prevent [the mission] from discharging its duties under the mandate of the Security Council.'[32] Even in this formulation, the principle maintained a defensive character, linked to the reaction to forceful means by other actors. The possibility to use armed force to guarantee freedom of movement, mentioned above, can be seen as a component of the wider notion of defence of the mandate.

When the protection of civilians became the main objective of peacekeepers' mandated, the extension that the principle of non-use of force faced was more poignant. In 1994, the failure of UNAMIR in Ruanda to stop the Tutsi genocide demonstrated the inadequacy of the traditional understanding of use of force only in self-defence, even though its mandate was expanded to include taking 'action in self-defence against persons or groups who threaten' civilians and UN personnel.[33] In response, the principle of non-use of armed force evolved further, with the UN Security Council explicitly authorising peacekeepers to use armed force to protect civilians. For instance, in 1999, in relation to Sierra Leone, the UN Security Council, pursuant to Chapter VII of the UN Charter, decided that the mission UNAMSIL could 'take the necessary action to ensure the security and freedom of movement of its personnel and […] to afford protection to civilians under imminent threat of physical violence'.[34] More generally, in 2001, the Brahimi Report reconceptualised the principle of non-use of armed force, affirming that peacekeepers 'must be capable of defending themselves, other mission

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[26] On this topic, see, recently, Hanna Bourgeois and Patryk I Labuda, 'When May UN Peacekeepers Use Lethal Force to Protect Civilians? Reconciling Threats to Civilians, Imminence, and the Right to Life' (2023) 28 Journal of Conflict & Security Law 1; Alexander Gilder, 'The UN and the Protection of Civilians: Sustaining the Momentum' (2023) 28 Journal of Conflict & Security Law 317.
[27] Summary Study (n 20) para 175.
[28] ibid para 179.
[29] See S/5078 (16 February 1962); Georges Abi-Saab, *The United Nations Operation in the Congo 1960-1964* (OUP 1978) 174-176.
[30] Franck (n 1) 288.
[31] UNSC Resolution 807 (1993), para 4.
[32] S/11052/Rev.1, 27 October 1973, para 4(d).
[33] UNSC Resolution 918 (1994), para 4.
[34] UNSC Resolution 1270 (1999), para 14.

components, and the mission's mandate',[35] and they must be provided with rules of engagement that would 'not force [UN] contingents to cede the initiative to their attackers'.[36]

The combination of authorisation under Chapter VII and the broadening interpretation of the principle of non-use of armed force (including the defence of the mandate) led to the coinage of a new expression, 'robust peacekeeping mandates', which refers to 'operations where, strictly speaking, use of force [is] authorized beyond self-defence'.[37] Indeed, in robust mandates, the UN Security Council has authorised peacekeepers to any means or measures that are necessary to protect civilians and/or to fulfil the mandate,[38] with expressions that are identical to those employed when the Council authorises enforcement missions under Chapter VII. Although this shift sparked a vigorous academic debate, the imperative of protecting civilians and the past failures of peacekeepers in Ruanda, former Yugoslavia, and Somalia led to a solid consensus on this broadening of the principle of non-use of armed force.[39]

The principle of consent has evolved as well. In the UNEF I model, consent from Egypt was considered necessary for the deployment of peacekeepers on Egyptian soil.[40] The UN Secretary-General also noted the consent of all the belligerents involved: the consent of Egypt, Israel, UK, and France – the main belligerents in the Suez Crisis – is a the prerequisite for the deployment of the mission.[41] Accordingly, the principle of consent meant the consent of all belligerents, which were, in the UNEF I model, all belligerent states. When the UN Security Council started dispatching peacekeeping missions in non-international armed conflicts involving armed groups, a shift occurred in the way the principle of consent was understood, moving from consent of all belligerents to consent of all states involved. Besides the consent of the territorial state(s) in which the mission is deployed, which is still considered a *condicio sine qua non* for the deployment of a peacekeeping mission, the UN Security Council does not consider that the consent of armed groups is necessary for the deployment of the mission. Sometimes, the Council has sought the consent of some armed group as a part of their involvement in a peace process politically desirable and appropriate,[42] not because of legal obligation, but as a political move to ensure the chance of success of the mission.[43] Simultaneously, the UN Security Council perceives itself to be free not to seek the consent of other armed groups that are considered to be obstacles to the peace process, as recognised by the Capstone doctrine.[44]

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[35] Brahimi Report (n 13) x.
[36] ibid.
[37] Michael Bothe, 'Peacekeeping Forces', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law online* (OUP 2016) para 19.
[38] See, eg, UNSC Resolution 1270 (1999), para 14; UNSC Resolution 1975 (2011), para 6; UNSC Resolution 2100 (2013), para 17; UNSC Resolution 2155 (2014), para 4; UNSC Resolution 2295 (2016), para 17; UNSC Resolution 2304 (2016), paras 5 and 10.
[39] See, eg, the discussion in James Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Hart 2001); Trevor Findlay, *The Use of Force in UN Peace Operations* (OUP 2002); Laura Pineschi, 'L'emploi de la force dans les opérations de maintien de la paix des Nations Unies "robustes": conditions et limites juridiques', in Maurizio Arcari and Louis Balmond (eds), *La sécurité collective entre légalité et défis à la légalité* (Giuffrè 2008) 139; Nigel White, 'Peacekeeping or War-fighting?' in Nigel White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 572.
[40] Summary Study (n 20) para 15.
[41] ibid para 21.
[42] ibid 318.
[43] SCSL, Trial Chamber, *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, case no SCSL-04-15, Judgement (2 March 2009) para 226.
[44] Capstone Doctrine (n 13) 32. See, also, HIPPO Report (n 13) para 127.

The principle of neutrality has faced a similar evolution in parallel with that of the principles of non-use of force and consent, with a change in terminology from neutrality to impartiality. In the UNEF I model, the principle was interpreted very strictly: the mission 'was not used in any way to enforce withdrawals' and was provided with 'a clear-cut mandate which has entirely detached it from involvement in any internal or local problems, and also has enabled it to maintain its neutrality, in relation to international political issues.'[45] Indeed, UNEF I was not deployed in Lebanon because there 'it is unlikely that a United Nations Force could have operated without soon becoming a party to the internal conflicts among nationals of the country'.[46] However, when peacekeeping missions have been dispatched by the UN Security Council in non-international armed conflicts, they ended up siding with the governments against armed groups. Faced with the reality of peacekeeping missions siding with states whose consent they need against other belligerents, the Brahimi Report has replaced neutrality with impartiality, noting that impartiality means 'adherence … to the principles of the UN Charter and to the objectives of a mission mandate that is rooted in Charter principles'.[47] This formulation is so overly vague and empty of actual meaning that one could believe it was coined by ChatGPT, if only it existed in 2001. Accordingly, some commentators have suggested that neutrality/impartiality should be reconfigured from a principle on the legality of the mandate to a political goal of the mission,[48] but this conclusion conflicts with the fact that neutrality/impartiality is still invoked as one of the three principles. Correctly, the Capstone Doctrine acknowledges a shift from the old principle of neutrality, according to which peacekeepers should not be involved in a conflict in any way, to impartiality as equal attitude towards all parties that threaten civilians and undermine the peace process.[49] As noted by international case law, impartiality means that peacekeepers 'should not condone actions by the parties that violate the undertakings of the peace process or international norms and principles'.[50] As concluded in the HIPPO Report, impartiality means that '[m]issions should protect civilians irrespective of the origin of the threat'.[51]

In 2013, when the FIB was established, the three principles of peacekeeping could have been summarised as follows: 1) non-use of force except in personal self-defence, to guarantee the mission's freedom of movement, and to defend civilians; 2) consent of all the belligerent states involved; 3) impartial attitude towards the protection of civilians irrespective of which belligerent threatens them. The following section will discuss whether ten years of practice of the FIB comply with these principles.

4 The Mandate and the Practice of the FIB

When the UN Security Council created the FIB with Resolution 2098 (2013), its mandate sparked significant attention among commentators.[52] The UN Security Council decided that

[45] Summary Study (n 20) para 149.
[46] ibid para 151.
[47] Brahimi Report (n 13) para 50.
[48] Micaela Frulli, *Le operazioni di peacekeeping delle Nazioni Unite: continuità di un modello normativo* (Editoriale Scientifica 2012) 62.
[49] Capstone Doctrine (n 13) 33.
[50] SCSL (n 43) para 227.
[51] HIPPO Report (n 13) para 126.
[52] Among early reactions, see eg Priscila Fett, 'Tudo de novo no front: MONUSCO, uma nova era nas peacekeeping operations?' (2013) 10 Revista de Dereito International 169; Marco Longobardo and Federica Violi, '*Quo vadis* peace-keeping? La compatibilità dell'*Intervention Brigade* in Congo con i principi regolanti le operazioni di pace alla prova dei fatti' (2015) 70 La Comunità Internazionale 245; Otto Spijkers, 'The Evolution of United Nations Peacekeeping in the Congo From ONUC, to MONUC, to MONUSCO and its Force Intervention Brigade' (2015) 19 Journal of International Peacekeeping 88; Müller (n 16) Ray Murphy, 'UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians' (2016) 21 Journal of Conflict & Security Law 209; Dennis M Tull, 'The Limits and Unintended

> MONUSCO shall, for an initial period of one year and within the authorized troop ceiling of 19,815, *on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping*, include an "Intervention Brigade" consisting inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander, with the responsibility *of neutralizing armed groups* […] and the objective of contributing to reducing the *threat posed by armed groups to state authority* and civilian security in eastern DRC and to make space for *stabilization* activities.[53]

Inter alia, the UN Security Council authorised MONUSCO

> *In support of the authorities of the DRC*, on the basis of information collation and analysis, and taking full account of the need to protect civilians and mitigate risk before, during and after any military operation, [to] carry out *targeted offensive operations* through the Intervention Brigade […], either unilaterally or jointly with the [governmental forces], in a robust, highly mobile and versatile manner and in strict compliance with international law […] to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities.[54]

Notwithstanding the promise that the FIB was created on an exceptional basis, the UN Security Council has confirmed the deployment of the FIB every year from 2014 to 2023, in order to respond to the threats against civilians and against stability posed by an array of different armed groups.[55] Although the UN Security Council has claimed since 2013 that the FIB needed an exit strategy,[56] the FIB is still operating in DRC.

In the space of this article, it is impossible to explore in detail the practice of the FIB in implementing its mandate over ten years of activity.[57] Suffice it to say that the UN Security Council has constantly reiterated the idea that the FIB should be employed to neutralise armed groups, to carry out offensive operations, and to support governmental forces.[58] The UN Secretary-General has not been shy in reporting on the involvement of the FIB in military operations. For instance, in 2013, the UN Secretary-General noted that the FIB 'supported operations by the Congolese armed forces against [the armed group] M23 from 21 to 30 August with ground troops, attack helicopters and artillery fire'[59] and that 'MONUSCO support included combat operations by ground troops from the FIB and attack helicopters, artillery and mortar fire, as well as logistics support.'[60] In 2014, it was reported that 'the Mission continued to provide support to [governmental] operations […] marked by

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Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo' (2018) 25 International Peacekeeping 167.

[53] UNSC Resolution 2090 (2013), para 9 (emphases added).

[54] ibid para 12(a) (emphases added).

[55] UNSC Resolution 2147 (2014), para 1; UNSC Resolution 2211 (2015), para 1; UNSC Resolution 2277 (2016), para 24; UNSC Resolution 2348 (2017), para 26; UNSC Resolution 2409 (2018), para 29; UNSC Resolution 2502 (2019), para 22; UNSC Resolution 2556 (2020), para 22; UNSC Resolution 2612 (2021), para 22; UNSC Resolution 2666 (2022), para 19; UNSC Resolution 2717 (2023), para 29.

[56] This is a constant from UNSC Resolution 2098 (2013), para 10 to UNSC Resolution 2666 (2022), paras 38-42.

[57] For an overview of interesting facts, see, eg, A Walter Dorn, 'Peacekeepers in Combat: Protecting Civilians in the D.R. Congo' (2023) 26 Journal of International Peacekeeping 31; Giblin (n 11) 147-215.

[58] For the most recent restatement of this mandate, see UNSC Resolution 2717 (2023), para 34(b).

[59] S/2013/581 (30 September 2013), para 37.

[60] S/2013/757 (17 December 2013), para 40.

heavy fighting', including the provision of 'attack helicopter and ground troop support'.[61] In 2015, the UN Secretary-General acknowledged that '[i]n support of the national authorities, MONUSCO carried out targeted joint *offensive* operations to *prevent* the expansion of armed groups and to neutralize and disarm them'[62] and that it employed 'ground troops and attack helicopters'.[63] In 2016, attack helicopters and artillery were employed on several occasions[64], with 'MONUSCO troops, including special forces and the Force Intervention Brigade, […] directly engaged in this coordinated operation' though the provision of tactical support and artillery fire support.[65] In 2021, governmental forces 'and MONUSCO launched joint *offensive* operations against the [armed group] ADF in Beni territory'.[66] In 2022, offensive operations by the FIB were reported.[67] In 2023, while the government of DRC acknowledged publicly 'that the mandate of the regional force was "unequivocally offensive"',[68] the FIB carried out several joint offensive operations with governmental forces.[69]

The following section explores whether ten years of practice of the FIB as succinctly described so far complies with the principles of peacekeeping. In the event of a negative answer, the fairness of the UN intervention in DRC should be questioned.

5 Ten Years of FIB and the Principles of Peacekeeping

Apart from initial reactions mentioned above, several commentators have discussed the compatibility of the FIB with the three principles of peacekeeping in light of one decade of practice.[70] Accordingly, this section provides a succinct analysis of the compatibility between the FIB and the principles of peacekeeping.

The UN Security Council has repeated for ten years that the FIB is created without 'any prejudice to the agreed principles of peacekeeping'.[71] In international law, the clause 'without any prejudice' usually refers to the need to preserve in parallel the existence of two norms that apparently may contradict each other.[72] The most recent versions of the mandate suggest that the UN Security Council believes that the FIB can fulfil its mandate acting *within* the boundaries of the three principles of peacekeeping: the UN Security Council '[a]uthorised MONUSCO, in pursuit of its mandated tasks and in line with the basic principles of peacekeeping, to take all necessary measures to carry out its mandate'.[73]

Although the UN Security Council has repeated for ten years that the FIB was created without 'any prejudice to the agreed principles of peacekeeping,' it is difficult to reconcile ten years of the FIB's practice with the principles of peacekeeping. In relation to the principle of non-use of force,

[61] S/2014/450 (30 June 2014), para 54
[62] S/2015/172 (10 March 2015), para 35 (emphases added).
[63] S/2015/486 (26 June 2015), para 18.
[64] S/2016/233 (9 March 2016), para 24.
[65] S/2016/579 (28 June 2016), para 32.
[66] S/2021/807 (17 September 2021), para 32 (emphasis added). See also S/2021/987 (1 December 2021), para 62; 2021 Report on Implementation of the Recommendations (n 13) para 142.
[67] S/2022/503, 22 June 22, paras 35 and 39; S/2022/709 (22 September 2022), para 70
[68] Statement of 5 February 2023, cited in S/2023/208 (20 March 2023), para 8.
[69] S/2023/451 (19 June 2023), para 40; S/2023/574 (2 August 2023), para 20; S/2023/932 (30 November 2023), para 44.
[70] See the sources cited above (n 52). See, also, in this special issue, Jennifer Giblin, 'The Force Intervention Brigade: A Conscious Departure' XXX.
[71] See the constant reassurances repeated yearly between UNSC Resolution 2098 (2013), para 9, and UNSC Resolution 2717 (2023), para 29.
[72] Emmanuel Roucounas, 'Engagements parallèles et contradictoires' (1987) 206 *Recueil des Cours* 9, 92.
[73] UNSC Resolution 2717 (2023), para 32.

the FIB was adopted in the framework of a mission, MONUSCO, that already had all the features of a robust mandate in 2013.[74] Already at that time peacekeepers could employ armed force in personal self-defence, to guarantee their freedom of moment, and to protect civilians under threat. However, the qualitative novelty of the FIB rests on the fact that it is tasked with offensive operations, rather than with defensive or deterring ones only. Moreover, the reference to 'neutralisation' in the mandate adopted by the UN Security Council clearly dictates that the physical destruction of some armed groups, or at the very least, their permanent dismantling and incapacitation, is the goal in itself of these offensive operations. Accordingly, the FIB, in light of its mandate and of the robust stance adopted in practice, is not in line with the principle of non-use of armed force in peacekeeping operations. This conclusion is without prejudice to the possibility that such a mandate could be justifiable under different rules of international law or could be effective to limit human suffering in DRC.[75]

The FIB is also incompatible with the principle of neutrality/impartiality, which has always been seen as the one more strictly linked to the notion of fairness.[76] For instance, in relation to ONUC in Congo, Frank questioned whether this support to the government diminished the fairness of the mission in light of his reading of the principle of non-intervention under Article 2(7).[77] This question can be posed if one recognises that the principle of neutrality is a binding rule to assess the fairness (and the legality) of peacekeeping missions. The very fact that the FIB is tasked with neutralising some of the belligerents involved in the armed conflict in DRC renders it is impossible to consider that the FIB is neutral in relation to the parties of the conflict.[78]

Moreover, the FIB cannot even be considered impartial, in the sense that it responds equally to all threats against civilians. Being part of a stabilisation mandate that operates along with the government, it is clear that the FIB is perceived as siding with one belligerent and is reluctant to take actions against its forces.[79] As noted by a commentator, the FIB 'allows offensive operations explicitly and exclusively against one party (or group of parties) to the conflict, ie armed groups; it allows conducting these operations jointly with the opposing party to the conflict, ie the state armed forces; and it declares the objective of these operations to be a reduction of armed groups' threat towards state authority.'[80] In fact, although in Eastern DRC the very Congolese government is responsible for widespread abuses against civilians, the FIB has never employed force against the government.[81] The UN Security Council is not oblivious to the fact that the Congolese government is responsible for atrocities against civilians: in 2016, the UN Secretary-General reported that '[a]rmed groups accounted for 38 per cent and State actors for 62 per cent of the alleged violations. MONUSCO documented an increasing trend of allegations of violations of fundamental rights and

[74] Murphy (n 52) 220-222.
[75] This author has provided some views on these issues in Marco Longobardo, 'Robust Peacekeeping Mandates: An Assessment in Light of *Jus Post Bellum*' in Carsten Stahn and Jens Iverson (eds), *Just Peace After Conflict:* Jus Post Bellum *and the Justice of Peace* (OUP 2020) 165; Marco Longobardo, '"Super-Robust" Peacekeeping Mandates in Non-International Armed Conflicts under International Law' [2020] 24 Spanish Yearbook of International Law 42. See also Gina Heathcote and Lucia Kula, 'The Force Intervention Brigade in the DRC, Civilian Security and Women Peace and Security' in this special issue XXX.
[76] Marion Laurence, 'An "Impartial" Force? Normative Ambiguity and Practice Change in UN Peace Operations' (2019) 26 International Peacekeeping 256, 261; Kalala Ilunga Matthiesen, 'Le Respect Du Droit International Humanitaire Par Les Forces Multinationales Ou Forces De Maintien De La Paix' (2018) 5 KAS African Law Study Library 351, 356.
[77] Frank (n 1) 228.
[78] See Peter Fabricius, 'Is the Force Intervention Brigade Neutral?', 27 November 2014, https://issafrica.org/iss-today/is-the-force-intervention-brigade-neutral.
[79] Henderson (n 14) 251.
[80] Müller (n 16) 366. See also Giblin (n 11) 185-189.
[81] Gilder (n 26) 323.

freedoms.'[82] In 2015, MONUSCO declined to join a governmental military operation because of the human rights abuse record of the newly-appointed Congolese generals.[83] In the words of a leading commentator on peacekeeping issues, 'where peacekeepers use "robust" force against non state actors but are less willing to do so against government forces we see a key flaw of P[rotection] o[f] C[ivilians] emerging'.[84] Not only, accordingly, is this lack of neutrality/impartiality patent,[85] but it is also the distinctive feature of the deployment of the FIB.

The only principle of peacekeeping that is respected in the establishment, maintenance, and practice of the FIB is that of consent of the Congolese government. This consent is the reason why the FIB struggles to take a proactive stance to protect civilians from governmental abused. But, as this author has argued elsewhere, if the only principle of peacekeeping that is respected is the consent of the local government, maybe the FIB should be assessed from the perspective of the institute of UN intervention by invitation rather than from that of peacekeeping.[86] It is almost ironic that this is the perspective from which Franck raised doubts of the fairness of some previous peacekeeping missions.[87]

6 Conclusions: No Fairness without Respect for the Principles of Peacekeeping

Because the FIB does not comply with the three principles of peacekeeping, the involvement of the UN peacekeepers in this non-international armed conflict fails to meet the threshold of fairness. At the beginning of this article, it was argued that the three principles of peacekeeping, non-use of armed force, neutrality/impartiality, and consent, could be used to measure the fairness of the involvement of UN peacekeepers in non-international armed conflict. At least, the three principles can be employed in relation to the notion of procedural fairness as a source of legitimacy, even though they have an important substantive role to play as well. Since the three principles of peacekeeping are the product of the convergent practice of the UN General Assembly, the UN Security Council, and member states, they can be seen as the anchor to which the international community tie peacekeeping operations in the absence of explicit provision in the UN Charter.

The respect for these principles is fundamental to upholding the fairness of peacekeeping operations, particularly when they are deployed in the violent context of non-international armed conflicts, where armed groups fight against the government and the lives of civilians are at serious risk. From the analysis of ten years of activity of the FIB, and considering the relevant resolutions adopted by the UN Security Council and the practice on the ground, it appears that the FIB does not respect the three principles of peacekeeping. In particular, the direction to neutralise some armed groups in support of the government not only runs contrary to the principle of non-use of armed force, but it is radically incompatible with the principle of neutrality/impartiality. As a result, it is possible to question whether the FIB has transformed MONUSCO from a peacekeeping mission to a case of UN intervention by invitation. Since the mission should be considered unfair for lack of compliance

[82] S/ 2016/ 579 (28 June 2016), para 41. See also S/2016/833 (3 October 2016), para 73.
[83] S/2015/172 (10 March 2015), para 37.
[84] Gilder (n 26) 327.
[85] Mauro Barelli, 'China and Peacekeeping: Unfolding the Political and Legal Complexities of an Ambivalent Relationship' (2022) 12 Asian Journal of International Law 157, 173.
[86] Longobardo, '"Super-Robust"' (n 75). See also Patryk I Labuda, 'UN Peacekeeping as Intervention by Invitation: Host State Consent and the Use of Force in Security Council-Mandated Stabilisation Operations' (2020) 7 Journal on the Use of Force and International Law 317.
[87] Franck (n 1) 227-241, 305-310.

with the principles of peacekeeping, its legitimacy cannot be sustained and the UN Security Council should make it clear that the force operates outside the boundaries of peacekeeping.