
STUDENT CONTRIBUTIONS

Impartiality in United Nations Peace-Keeping

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Keywords: consent; impartiality; peace-keeping; self-defence; use of force.

Abstract: United Nations peace-keeping is presently being faced with dynamic new challenges. The concept of peace-keeping is rapidly expanding, operations are being entrusted with new and innovative tasks, and are increasingly being deployed in intrastate conflicts. As the functions of peace-keepers vary, so too does the role and conception of peace-keeping. The new tasks entrusted to peace-keepers have brought with them new problems and difficulties. Controversial recent operations, such as those in Somalia and the former Yugoslavia, have particularly raised the issue of impartiality in the context of UN peace-keeping. Impartiality is traditionally a distinguishing feature of peace-keeping operations, yet its meaning and status remain unclear.

1. INTRODUCTION

The concept of impartiality in UN peace-keeping has never been clearly defined. What it entails is ambiguous, yet it appears central to the notion of peace-keeping. Recent operations such as those in Bosnia and Somalia have raised claims that the peace-keepers' impartiality has been lost. Impartiality has been called into question as peace-keepers have faced new tasks and have been given a new role in internal situations. The aim of this article is to explore the concept of impartiality, to determine its status, its nature and its meaning, and to identify factors that can cause a loss of impartiality. Whether impartiality can be maintained in the new, expanded types of peace-keeping operations will be considered, as well as the effects of a loss of impartiality.

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2. PEACE-KEEPING - THE CONCEPT

2.1. History

The term peace-keeping is used to denote the use of military personnel under UN authority in order to maintain international peace and security by means other than enforcement measures under Chapter VII.¹ The concept evolved from Cold War necessity. The stand-off between East and West effectively meant that the Security Council could achieve little in its task of maintaining or restoring international peace and security. However, the UN could not remain passive when a threat to international peace and security loomed. The concept of an impartial force to keep the peace emerged, therefore, as “an improvisation in the effort of the UN to transcend or bypass the constraints of the Cold War in search of a role in a specific crisis”.²

The concept of UN armed peace-keeping, of an impartial force interposed between hostile parties, was established with the creation of the United Nations Emergency Force (UNEF I) in the Middle East in 1956.³ Its lightly armed troops were designed to act as a buffer between the opposing parties. Since that time, peace-keeping operations have increasingly become a useful and practical tool of the UN in its quest to maintain or restore international peace and security.

2.2. Requirements of peace-keeping operations

Peace-keeping evolved in practice, there is not any particular theory or doctrine behind it.⁴ Rather, even today, peace-keeping operations are created and deployed on an *ad hoc* basis. Another characteristic of peace-keeping operations is that troops are supplied by member states voluntarily. These characteristics are central to the concept of peace-keeping. However, there are also specific *requirements* that an operation must meet

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1. United Nations Department of Public Information, *The Blue Helmets, A Review of United Nations Peace-Keeping* 4 (1990).
 2. G. Abi-Saab, *United Nations Peacekeeping Old and New: An Overview of the Issues*, in D. Warner (Ed.), *New Dimensions of Peacekeeping* 2 (1995).
 3. UNEF I was created by UN Docs. GA/RES/998 and GA/RES/999 (1956).
 4. UN Department of Public Information, *supra* note 1, at 4.

in order to fit within the concept. Here, the term requirements is used in order to denote a degree of obligation. They are features which *must* be observed in a peace-keeping mission, as opposed to *characteristics*, which merely elucidate the nature of peace-keeping.⁵ In practice, there is a broad consensus about these requirements. Three basic criteria were determined and emphasized by Dag Hammarskjöld at the time of the establishment of UNEF,⁶ namely, peace-keeping operations must be consensual, impartial, and use force only in self-defence.

2.2.1. *Consent of the parties*

The first requirement under which a peace-keeping force must operate is that in order to station a force on the territory of a country, there must be the consent of that state to ensure that the mission is not coercive.⁷ Usually, consent is given in a bilateral act between the host state and the UN. Increasingly however, UN peace-keeping operations are being sent to situations of civil war and internal strife. Problems arise in internal conflicts where there are many factions or groups of belligerents, as well as in situations of failed states with no effective government.⁸ In these cases, the question is posed as to whose consent is necessary and whose can be dispensed with. Ideally, consent should be obtained from the different parties to the conflict. International law aside, this requirement can be justified by purely practical considerations, to ensure that co-operation from all sides is forthcoming.⁹

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5. The terminology to be used here is problematic. There seems to be no consensus as to whether 'characteristics' are just 'characteristics' or whether they are 'requirements', 'principles', or 'conditions' of peace-keeping. The confusion is reflected in the UN publications, reports, and resolutions on peace-keeping which seem to employ these terms on an *ad hoc*, arbitrary basis. This, in turn, surely reflects the doubt that exists as to the legal, political, or other status of these 'requirements'. For the purposes of this article, I shall refer to Hammarskjöld's three criteria (*i.e.* consent, impartiality, and the use of force only in self-defence) as the 'requirements' of peace-keeping. The terms 'condition' and 'principle' will only be used in inverted commas when they have been utilized by other authors.
 6. See UN Doc. A/3302 (1956).
 7. This legal restriction stems from the "essentially within the jurisdiction" clause of Art. 2(7) of the UN Charter, and more broadly from the concept of state sovereignty.
 8. As was the case in Somalia, for example.
 9. Note that if the Security Council decides to take enforcement action under Chapter VII of the Charter, consent is no longer necessary. However, strictly speaking, the operation then moves away from 'peace-keeping' and becomes 'peace enforcement'.

2.2.2. *Impartiality*

The second requirement of peace-keeping is that the operation must not favour one party over the other. In other words, the peace-keeping force must at all times remain impartial.¹⁰ The force must not take part in the conflict, prejudice the solution of the political questions at stake, or support any of the parties.¹¹ Impartiality will be considered in detail below.

2.2.3. *Use of force only in self-defence*

The third requirement of the concept of peace-keeping is that the troops are only allowed to use force in self-defence. In terms of peace-keeping, it is accepted that self-defence allows the use of force when necessary to ensure the completion of the tasks enumerated in the mandate.¹² Apart from this, peace-keeping troops are prohibited from taking the initiative in the use of weapons. This limitation on the use of force is an important corollary to the requirement of impartiality. Peace-keeping forces are, in theory, not to become involved in the conflict, thus their use of force is limited to a reactive response. The natural result of this limitation has been that the concept of self-defence has been expanded broadly in order to include certain uses of force which would otherwise be beyond its traditional meaning.¹³ Increasingly, greater levels of force are being authorized and the concept of self-defence is broadening. Although in many conflicts this is necessary in order to successfully fulfil the mandate, or to contain the conflict, the dangers of this tendency must be borne in mind. A UN peace-keeping force must not become another party to the conflict, thus becoming part of the problem rather than contributing to the solution.

10. When UNEF I was created, Hammarskjöld emphasized that the UN did not intend to “influence the military balance in the conflict and, thereby, the political balance affecting efforts to settle the conflict.” UN Doc. A/3302, *supra* note 6, para. 8.

11. M. Von Grunigen, *Neutrality and Peace-Keeping*, in A. Cassese (Ed.), *United Nations Peace-Keeping, Legal Essays* 137 (1978).

12. *See, e.g.*, UN Doc. S/11052/Rev.1, para. 4 (1973): “[s]elf-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council.”

13. This occurred, for example, in the UN peace-keeping operation in the Congo, where self-defence was held to include the right to use arms in defence of positions occupied by the UN (for example, guard points and blockades) and to guarantee the freedom of movement of UN troops. *See* O. Schachter, *International Law in Theory and Practice* 408 (1991).

2.3. Expansion of the concept of peace-keeping

Although there have been some early examples of peace-keeping operations fulfilling non-traditional tasks,¹⁴ it was not until the end of the Cold War that a new and innovative trend in peace-keeping really began. Since 1988, there has been a startling proliferation in the number of peace-keeping operations that have been created and deployed.¹⁵ To a large extent, these operations have been involved in internal conflicts. This in itself is a step away from the traditional concept of peace-keeping.¹⁶ It also means that the types of functions entrusted to the force have varied.¹⁷

There has also been a qualitative change in the nature of peace-keeping functions. Peace-keeping forces have even been deployed solely to fulfil a humanitarian mission, as was the case in Somalia. The character of peace-keeping operations has thus undergone fundamental changes. Yet the question arises whether the requirement of impartiality can still adequately be fulfilled in the 'non-traditional' peace-keeping operations. And if not, what are the consequences? In order to examine these questions, it is first necessary to explore the concept of impartiality.

14. In the cases of the United Nations Operation in the Congo (ONUC, 1960-1964) and the United Nations Security Force in West Irian (UNSF, 1962-1963), for example.

15. Between April 1988 and December 1994, there have been nine observer missions and 13 armed peace-keeping operations.

16. In Dag Hammarskjöld's vision of peace-keeping, UN participation in internal conflicts was precluded. He wrote that "[a] rule reflecting a basic Charter principle precludes the employment of United Nations elements in situations of an essentially internal nature. As a matter of course, the United Nations personnel cannot be permitted in any sense to be a party to internal conflicts. Their role must be limited to external aspects of the political situation as, for example, infiltration or other activities affecting international boundaries." Summary Study of the Experience Derived From the Establishment and Operation of UNEF, UN Doc. A/3943, para. 166 (1958).

17. The functions of the United Nations Transitional Assistance Group (UNTAG) in Namibia, for example, included drafting the new national constitution, monitoring the local police force, and supervising elections. In Cambodia, the UN established an interim government and was responsible for the relocation of returning refugees. A mission has been proposed to organize a referendum in the Western Sahara.

3. IMPARTIALITY - THE CONCEPT

3.1. What is impartiality?

Since the creation of UNEF I, a central requirement of UN peace-keeping has been that the force should remain detached from the conflict in the sense that it should never become partisan, helping one side or hindering the other. A UN peace-keeping force should, at all times, remain impartial. The requirement of impartiality is inextricably linked to the other requirements of peace-keeping discussed above. A guarantee of impartiality is more likely to help win the consent of the parties for a UN presence. Furthermore, the limited use of force means that the UN troops theoretically do not become part of the conflict, thus ensuring that impartiality is maintained.

Essentially, impartiality in a conflict means that the peace-keeping force must not be intended to further the interests of any contestant in the dispute.¹⁸ This does not mean inaction or even moral equivalence.¹⁹ Being impartial means that, theoretically at least, the peace-keeping force will not act with favour toward or prejudice against any one party, that it will show no bias and will act equally toward all parties. Of course, in practice, it would be rare if this could be completely achieved. To a certain extent, the very presence in the field of UN troops is bound to influence the balance. Dealings with the parties may well be more advantageous to one than the other. Essentially a 'holding action' designed to contain the conflict, a peace-keeping operation will favour the *status quo*, thus indirectly favouring those in power. What is central, therefore, is the perception of impartiality, by the parties, the local population, and the international community. If peace-keepers are seen as favouring one side, their reputation for impartiality will be put at risk, despite their motives or intentions.²⁰

18. L. Fabian, *Soldiers Without Enemies: Preparing the United Nations for Peace-Keeping* 21 (1971).

19. Lord David Owen, delivering the Fourth Cornelius van Vollenhoven Memorial Lecture, *The Limits of UN Enforcement*, 6 June 1995, Leiden University, The Netherlands.

20. A. James, *Peacekeeping in the Post-Cold War Era*, 2 *International Journal* 253 (1995).

3.2. Is impartiality a legal concept?

In terms of UN peace-keeping, the question whether impartiality is a legal concept is of particular relevance. The answer will determine the extent of the obligation to observe the requirement of impartiality that peace-keepers are under, and the consequences of a breach. It is also pertinent to the peace-keepers' mandate. That is, must all peace-keeping operations endeavour to be impartial?

3.2.1. Sources of peace-keeping

In order to examine the legality of the concept of impartiality, it is necessary to have recourse to the sources of peace-keeping. Immediately, one is faced with the glaring absence of positive law or legal instruments which regulate peace-keeping. Peace-keeping arose from practice, and is governed by practice. In 1958, Dag Hammarskjöld's Summary Study provided an overview of the guiding principles to be respected by peace-keeping operations.²¹ In it, Hammarskjöld only indirectly refers to the impartiality of the peace-keeping force when he affirms that, "the Force should not be used to enforce any political solution of pending problems or to influence the political balance decisive to such a solution".²² In itself, the study is not a binding document, indeed it was never given formal approval by the General Assembly.²³ It is, however, useful and persuasive. The same can be said for the Draft Guidelines for Peace-Keeping Operations proposed by the Special Committee on Peace-keeping Operations in 1977,²⁴ which have never come into force. Impartiality as such is not expressly mentioned. Paragraph 9, however, states that "[s]uch forces must [...] act with complete objectivity".

Despite the lack of general legal regulation, it seems uniformly accepted that one of the guiding principles of peace-keeping is that the

21. UN Doc. A/3943, *supra* note 16.

22. *Id.*

23. See R.C.R. Siekmann, *National Contingents in United Nations Peace-Keeping Forces* 7 (1991).

24. Report of the Special Committee on Peace-Keeping Operations, 11th Report of the Working Group, Draft Formulae for Articles of Agreed Guidelines for United Nations Peace-Keeping Operations, UN Doc. A/32/394/Ann.II/App.I (1977).

force should act in an impartial way when in the field. UN publications concerning peace-keeping operations affirm this²⁵ and usually include the requirement of impartiality as a basic 'condition' of a peace-keeping operation. Furthermore, in the supplement to his Agenda for Peace, Boutros-Ghali emphasizes that impartiality is a particularly important 'principle' of peace-keeping.²⁶ The Security Council itself has recognized that there are certain "operational principles" that regulate peace-keeping activities which include "impartiality in implementing Security Council decisions".²⁷

None of the documents mentioned above have any binding force in international law. They provide guidance in the creation of peace-keeping forces, and arguably are evidence of existing practice and custom.²⁸ By themselves, however, they do not furnish any foundation to claim that the concept of impartiality is a legal concept. Indeed, viewed in isolation, these types of documents would support a conclusion that impartiality is a political concept, i.e. that impartiality is required for pragmatic reasons, in order to ensure the consent of the parties and possibly the efficacy of the operation. Apart from the influence of such documents, there are no instruments that regulate the creation of peace-keeping operations in general. Thus, it is the practice of individual operations, created on an *ad hoc* basis, which may further elucidate the nature of this requirement of peace-keeping.

3.2.2. *The constituent documents*

When an operation is considered, the consent sought from the host country can be given in a Status of Forces Agreement (SOFA), signed by representatives of the UN and the host country,²⁹ or in Security Council enabling resolutions and implementation reports by the Secretary-General.³⁰ The agreements between the UN and a member state can be

25. See, e.g., UN Department of Public Information, *United Nations Peace-Keeping* 7 (1993).

26. Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, Supplement to An Agenda for Peace, UN Doc. A/50/60-S/1995/35, para. 1 (1995).

27. UN Doc. S/25859, at 1 (1993).

28. This aspect will be explored further in Section 3.2.3., *infra*.

29. For example, SOFAs were concluded for the creation of UNEF I and ONUC.

30. E.g., UNEF II was established by UN Doc. S/RES/340 (1973) and implemented by UN

categorized as treaties, and thus fall under international law.³¹ Thus, provisions contained within such agreements would create legal rights and obligations. In the model SOFA, proposed by the Secretary-General,³² Article IV(6) states:

[t]he United Nations peace-keeping operation and its members shall refrain from any action or activity incompatible with the impartial and international nature of their duties or inconsistent with the spirit of the present arrangements.

If such an agreement is signed between the UN and a state in order to create a peace-keeping operation, there would be a legal requirement for the forces to remain impartial. This Article, however, is only a proposal for future operations. Not all of the SOFAs concluded to date have been so explicit as regards the requirement of impartiality. For example, the SOFA concluded for the creation of UNEF I states in Article 6 that:

[m]embers of the Force [...] shall refrain from any activity of a political character in Egypt and from any action incompatible with the international nature of their duties or inconsistent with the spirit of the present arrangements.³³

This formula was repeated in the SOFA concluded for the creation of the United Nations Operation in the Congo (ONUC)³⁴ and for the SOFA concluded with the Cypriot Government in 1964.³⁵ It is only in more recent SOFAs that the word “impartial” has been expressly included.

Doc. S/11052/Rev.1 (1973). The United Nations Interim Force in Lebanon (UNIFIL) was established by S/RES/425 (1978) and implemented by UN Doc. S/12611 (1978).

31. See Schachter, *supra* note 13, at 76, who, when discussing bilateral treaties writes: “[t]hrough more similar to contracts than to statutory law in form, such treaties are often standardised and therefore establish similar rights and obligations for a broad range of States. The many similar bilateral agreements create [...] networks of legal obligations that are an important part of international law.”
32. Report of the Secretary-General, Model Status of Forces Agreement for Peace-Keeping Operations, UN Doc. A/45/594 (1990).
33. See Exchange of Letters Constituting an Agreement Between the United Nations and the Government of Egypt Concerning the Status of the United Nations Emergency Force in Egypt, 260 UNTS 261 (1957).
34. See Agreement Between the United Nations and the Republic of the Congo (Leopoldville), Relating to the Legal Status, Facilities, Privileges and Immunities of the United Nations Organization in the Congo, 414 UNTS 29, Art. 1 (1961).
35. See Exchange of Letters Constituting an Agreement Between the United Nations and the Government of the Republic of Cyprus Concerning the Status of the United Nations Peace-Keeping Force in Cyprus, 492 UNTS 58 (1964).

Article 11 in the SOFA concluded for the peace-keeping force in Namibia, for example, copies the formula used in the UNEF I agreement cited above but adds the phrase “any action or activity incompatible with the impartial and international nature of their duties”.³⁶ It can be concluded, therefore, that when there is a legal instrument obliging impartiality of the forces, then impartiality will be a legal concept, creating legal obligations.

However, not all operations have employed the use of SOFAs. In some cases, the operation is deployed solely on the basis of an enabling resolution and an implementing report of the Secretary-General.³⁷ These documents often refer to the concept of impartiality. The Secretary-General’s implementing report considering the creation of UNEF II, for example, states that “[i]n performing its functions, the Force will act with complete impartiality and will avoid actions which could prejudice the rights, claims or positions of the parties concerned”.³⁸

The report by which the Secretary-General recommended the creation of the UN Protection Force (UNPROFOR) contained the basic principles of the peace-keeping operation in Yugoslavia. It stated, *inter alia*, that “all members of the peace-keeping operation [...] would be required to be completely impartial between the various parties to the conflict”.³⁹ As can be seen, there is similarity but little uniformity in the practice, mode, and language used when establishing peace-keeping operations. Yet, each time, there is some reference to the idea that the peace-keeping forces must remain impartial. The question now arises as to whether this common practice and uniform acceptance can be said to transpose the principle of impartiality into a norm of customary law.

3.2.3. *Impartiality as customary law*

For customary law to be formed, there must be practice by states, and *opinio iuris*, a belief by the state that it was under a legal obligation to

36. Agreement Between the United Nations and the Republic of South Africa Concerning the Status of the United Nations Transitional Assistance Group in Namibia (South West Africa), UN Doc. S/20412/Add.1 (1989) (emphasis added).

37. See the examples given in note 30, *supra*.

38. Report of the Secretary-General on the Implementation of UN Doc. S/RES/340 (1973), UN Doc. S/11052/Rev.1, at 11 (1973).

39. UN Doc. S/23280/Ann.III, para. 4 (1991).

behave in such a manner.⁴⁰ However, in terms of impartiality in peace-keeping, is it really accurate to talk of states' actions and states' beliefs? States, of course, are the members of the UN, but it is the UN as an organization which creates peace-keeping operations. It can be said that states act in their internal capacity as constituent parts of the organization rather than in their external capacity as counterparts to the UN.⁴¹

Peace-keeping is a structure of the UN, its principles and terms have been laid down by the UN. Thus, when we look at impartiality, it is not the practice of states *per se* which is relevant, but the practice of the UN in requiring that its troops remain impartial. When assessing *opinio iuris*, it is the belief held by the organization which creates the operations that must be considered. Thus the combination of UN practice plus *opinio iuris* creates customary law *internal* to the organization rather than general international customary law. Another way to express this would be to say that customary institutional law has been created.

It is generally recognized that international organizations have a legal order of their own, distinct from that of the member states.⁴² It is further recognized that custom can be a source of law for the internal order of international organizations.⁴³ Usually, custom in international organizations develops with regard to procedural matters.⁴⁴ Although the requirement that peace-keeping troops act impartially within a conflict is more than a procedural matter, if the two elements of practice and *opinio iuris* can be shown to be satisfied, it too will be a rule of customary law of the UN.

As evidenced in the instruments that have created and deployed peace-keeping operations, practice shows that since the creation of the first operation in 1956, there has generally been some requirement that the peace-keeping force remain impartial. This can be seen by an examination of the constituent documents, as was briefly attempted above. This first

40. M.N. Shaw, *International Law* 62, 3rd ed. (1991).

41. H.G. Schermers & N.M. Blokker, *International Institutional Law* 45, 3rd ed. (1995).

42. *Id.*, at 709.

43. See P. Cahier, *L'Ordre Juridique Interne des Organisations Internationales*, in R. Dupuy (Ed.), *A Handbook of International Organisations* 253 (1988). See also Schermers & Blokker, *supra* note 41, at 824.

44. For example, the rule in the Security Council that abstentions do not affect the concurring votes of the five permanent members is a rule that can now be considered customary law of the United Nations.

element of customary law, i.e. widespread practice,⁴⁵ therefore appears to be fulfilled. Whether in the field impartiality has always been observed is another matter, and may call for a subjective judgment. Here, widespread practice refers only to the requirement in the constituent documents that the force observe impartiality.

It may also be argued that the element of *opinio iuris* is satisfied. This can be evidenced in UN publications about peace-keeping, which all insist on the rule that peace-keeping operations must be impartial,⁴⁶ in Secretary-Generals' reports,⁴⁷ and in Security Council documents.⁴⁸ Such documentary evidence points to the belief that impartiality must be a requirement of peace-keeping operations.

Thus, impartiality in peace-keeping does have a legal character. This is found mainly from the legal instruments creating individual operations, and also from custom. Yet to be precise, the latter source is not the same as customary international law. It is customary law relevant within the institution of the UN.

3.3. Consequences of the legality of the requirement of impartiality

Assuming that, as argued above, impartiality is indeed a legal concept, certain consequences ensue. Firstly, as impartiality falls under customary law, future peace-keeping operations will be bound to respect the requirement even in the absence of an explicit provision in the constituent documents regarding impartiality. Secondly, consequences flow from the legal nature of the requirement if it is breached by the peace-keeping force. Here, difficulties of proof are immediately apparent. Nowhere is it defined what precisely remaining impartial in practice requires. Is it enough if there is a *perceived* loss of impartiality, or must there be an *actual* loss of impartiality? And who is competent to judge whether or not impartiality

45. In the *Asylum case (Columbia v. Peru)*, 1950 ICJ Rep. 266, the International Court of Justice (ICJ) held that a customary rule must be "in accordance with a constant and uniform practice". However, this was modified slightly in the *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, 1969 ICJ Rep. 3, where the ICJ remarked that state practice had to be "both extensive and virtually uniform in the sense of the provision invoked".

46. See, e.g., United Nations Department of Public Information, *supra* note 1.

47. See, e.g., UN Doc. 3943, *supra* note 16; and UN Doc. A/50/60-S/1995/35, *supra* note 26.

48. See, e.g., UN Doc. S/25859 (1993).

has been lost? Furthermore, what is the relevance of the intention of the peace-keeping force? Or must only deeds be examined? Such questions illustrate the difficulties faced when alleging a loss of impartiality. In most cases, the opinions of the parties and of the UN will surely differ as to how, whether, or when the operation lost its impartiality. For example, debates continue as to whether UNPROFOR had become a party to the conflict in Bosnia.⁴⁹ Nevertheless, where the impartiality of the peace-keeping force can validly be questioned, the legality of the requirement will produce certain legal remedies. Primarily, if it is breached, the host state would have a valid ground to revoke the agreement with the UN, thus terminating the peace-keeping operation.⁵⁰

If the UN as an organization admits that the requirement of impartiality has been breached, it may decide to settle the claim with the member state involved.⁵¹ However, if no agreement on this question can be reached, the UN may decide to request an advisory opinion from the International Court of Justice. This would be a welcome move as it would give the Court the opportunity to pronounce upon, and clarify, the concept of impartiality and what it entails in practice. The initiative for requesting an advisory opinion rests only with the organization however, not with the host state. Another possible remedy may be found in arbitration, which may be an effective means of dispute settlement between an international organization and a state.

None of these possibilities, however, have been tried, and indeed, they seem rather remote. The main drawback of such options is the amount of time that they would take, probably being concluded, if not commenced, long after the operation has been terminated. Arguably therefore, the most important consequences of crossing the line between peace-keeper and combatant will be practical rather than legal. A loss of impartiality,

49. In his lecture, *supra* note 19, Lord Owen stated that: “[t]he International Committee of the Red Cross now says that it does not consider the UN peace-keepers detained by the Bosnian Serbs as hostages. From the moment there was an armed engagement between these two parties, they apply humanitarian law as in the Third Geneva Convention of 1949 which governs the treatment of prisoners of war. I absolutely reject the ICRC view that the UN is a ‘party to the conflict’ and I do believe that UN troops are hostages.”

50. However, this is assuming that the operation has not entered the realm of Chapter VII. Once this threshold has been crossed, host state consent is no longer a fundamental requirement. As regards impartiality in this respect, see further Section 4.4., *infra*.

51. This was, for example, the case with the claims arising from the ONUC operation, when the UN admitted responsibility for the injury caused to individual citizens.

perceived or actual, will result in a lack of co-operation and confidence of the parties. Furthermore, other states may in future be hesitant about accepting a peace-keeping force on their territory. Member states will be reluctant to contribute troops. The UN's reputation for impartiality and its quest for peace will be seriously eroded. To a large extent, the credibility of the UN rests on its objective politics. If this is lost, so too will be the respect for, and authority of, this international guardian of the peace.

4. IMPARTIALITY IN PRACTICE

4.1. Introduction

Recent operations, which have been examples of the 'expanded' notion of peace-keeping, have called into question whether the UN peace-keeping forces have adequately fulfilled the requirement of impartiality. The operations in Somalia and the former Yugoslavia are striking examples of situations where the mandate of the force has gone beyond traditional or 'classic' peace-keeping tasks. Both have been innovative, with a strong humanitarian dimension. Both, particularly the second United Nations Operation in Somalia (UNOSOM II), have raised the problem of impartiality being juxtaposed with an authorization to use force. Both peace-keeping operations have been criticized as being partisan. Neither has been a success.

The conflicts in Somalia and the former Yugoslavia, and the respective peace-keeping missions, show the difficulties that can be faced when attempting to transpose the requirement of impartiality into practice. Those difficulties are exacerbated when the mandate of the force authorizes tasks that fall into the realm of the 'expanded' notion of peace-keeping. That is, remaining impartial will be easier when the force is to carry out a traditional peace-keeping task such as providing a buffer zone. By contrast, when the operation is deployed in an internal situation, entrusted with humanitarian tasks and faced with diverse warring factions, the observance of impartiality faces new challenges.

4.2. The former Yugoslavia

The UN operation in the former Yugoslavia, particularly in Bosnia-Herzegovina, may well have its positive aspects, but in no way can it be held to have been a success. Indeed, its perceived helplessness in the face of aggression has incited widespread criticism of, and disillusionment with, the UN, and has called into question the role of impartiality in peace-keeping operations. Impartiality has been questioned in terms of its appropriateness, and UNPROFOR has been criticized both of being partisan and of remaining impartial.⁵² UN involvement in the conflict in the former Yugoslavia is extensive and multi-dimensional. One aspect of UNPROFOR's mandate in particular, however, has raised the issue of impartiality. UNPROFOR's mandate to protect the six towns declared 'safe areas' highlights many of the problems faced by UNPROFOR in attempting to fulfil its duties while remaining impartial. The safe areas are small-scale manifestations of the difficulties encountered by UNPROFOR in the wider context of the entire conflict, and thus reflect the problems of impartiality of the peace-keepers in this conflict. As such, they merit further attention.

4.2.1. *The safe areas*

The towns of Sarajevo, Tuzla, Žepa, Gorazde, Bihać, and Srebrenica and their surroundings were declared "safe areas" following the visit of the Security Council Mission to Bosnia and Herzegovina in April 1993.⁵³ This was the result of a growing concern over the fate of these towns and their populations which were under incessant attack by Bosnian Serb forces.

52. See *NATO Troops Could Do the Job, if the Politicians so Ordered*, International Herald Tribune, 15 August 1995. He highlights the dilemma faced by UNPROFOR when he writes: "[t]he simplest example from Bosnia exposes the fallacy of Neutral Intervention. You, the Neutral Intervenor wish to escort some truckloads of food and medicine, to, say, a besieged and hungry Muslim village. The Serbs halt the trucks, because to let them through will prolong the village's resistance. If you insist on forcing the trucks through (which in fact the United Nations 'protection' force has almost never done), you are taking sides against the Serbs, because you have helped to prevent them from capturing the village. If you back away, you have in effect helped the Serbs because they will soon be able to capture the starving village, and so advance their lines."

53. See UN Docs. S/RES/824 (1993) and S/RES/836 (1993).

Initially, safe areas were envisaged as being areas that would be free from attack and any other hostile acts which may endanger the safety of the inhabitants, and where the unimpeded delivery of humanitarian assistance would be ensured.⁵⁴ The resolutions establishing the safe areas did not include an enforcement component, although in both instances the Council acted under Chapter VII of the Charter. However, Resolution 836 which expanded the initial mandate, authorized UNPROFOR, acting in self-defence, to take necessary measures, including the use of force, in reply to attacks against the safe areas, armed incursion into them or in the event of any deliberate obstruction to the freedom of movement of UNPROFOR or of protected humanitarian convoys.⁵⁵ In this resolution, the Council also authorized member states to take all necessary measures, through the use of air power in and around the safe areas, to support UNPROFOR.⁵⁶

The concept of the safe areas, when attempted in practice, turned out to be a failure. This was recognized by the Secretary-General himself in his report of 9 May 1994.⁵⁷ He attributed this to two main reasons. Firstly, it was due to the misconceptions held by the warring parties as to what the concept involved. Most significantly, the army of the Bosnian Government was not excluded from the safe areas. Resolution 836 explicitly enabled UNPROFOR to “promote the withdrawal of military or paramilitary units other than those of the Government of Bosnia-Herzegovina”.⁵⁸ In fact, the army of the Bosnian Government used the areas as locations to rest and regroup, train and re-equip. Furthermore, the safe areas were used as a firing base at Serb positions.⁵⁹ Naturally, this was perceived by the Serbs as the UN aiding the side of the Bosnian Government. In addition, the Bosnian Serbs viewed UNPROFOR’s use of NATO’s close air support as an intervention in favour of the Muslims.⁶⁰ On the other hand, a perception held by the Bosnian Government forces was that the very establishment of the safe areas seemed to be

54. UN Doc. S/1994/555, para. 2 (1994).

55. UN Doc. S/RES/836, *supra* note 53, para 9.

56. *Id.*, para 10.

57. UN Doc. S/1994/555, *supra* note 54, para 13.

58. UN Doc. S/RES/836, *supra* note 53, para. 5.

59. UN Doc. S/1994/555, *supra* note 54, para. 13.

60. *Id.*, para. 14.

allowing the Serbs to retain the land that they had already captured.⁶¹ In other words, the UN was seen as tacitly approving the *status quo*, which, in terms of territory, favoured the Bosnian Serbs. Furthermore, the Bosnian Government fully expected UNPROFOR to intervene to protect the territory that was still under its control. Thus, the conflicting expectations and attitudes held by the parties challenged the credibility of UNPROFOR, and led to a situation where its impartiality was questioned by both sides. The parties' perception that impartiality had been lost meant that their co-operation was not forthcoming. This in turn rendered execution of the mandate virtually impossible, and severely affected the efficacy of the operation.

The second factor cited by the Secretary-General as thwarting the concept of the safe areas was the lack of resources which prevented UNPROFOR from fulfilling its mandate. Clearly, a large number of troops would be needed in order to successfully carry out such an extensive mandate. However, the Security Council decided upon a "light option" of troop reinforcement,⁶² and thus, a small number of lightly armed troops were entrusted to fulfil an extensive mandate, comprising a variety of tasks, over a large area. UNPROFOR's mere presence proved unable to deter attacks and the troops were neither structured nor equipped for combat. Effective protection of the populations of the safe areas simply could not be achieved. Thus, the lack of troops and the unrealistic stretching of resources meant that the mandate could not be fulfilled by the peace-keeping force. In this respect, the implementation of the mandate contributed to the loss of impartiality of UNPROFOR.

The validity of these reasons as offered by the Secretary-General, cannot be denied. However, the mandate itself can also be criticized as leading to a perceived loss of impartiality. The very idea of establishing areas where one side's army is allowed but the other is excluded, necessarily leads to a serious challenge to the impartiality of those who must implement such a mandate. Furthermore, the result of such a mandate in practice meant that effectively, UNPROFOR was protecting territory of the Bosnian Government and providing areas where attacks could be

61. C. Goebel, *Population Transfer, Humanitarian Law, and the Use of Ground Force in UN Peacemaking: Bosnia and Herzegovina in the Wake of Iraq*, 25 *International Law and Politics* 647 (1993).

62. UN Doc. S/RES/844, paras. 2 and 4 (1993).

launched *from* but not *at*. Coupled with the critical lack of troops, the operation had little chance for success. The lack of troops meant that UNPROFOR was to a very large extent reliant on the co-operation of the parties. The unrealistic, unwise, and partisan mandate meant that co-operation by the parties was not forthcoming.

UNPROFOR's perceived loss of impartiality resulted in a loss of credibility. UN personnel were attacked and taken hostage, weapons that had been confiscated were seized, bombardments continued on the safe areas and on convoys carrying humanitarian relief, and, finally, the whole notion of a safe area suffered a severe set-back as the Bosnian Serbs took over Srebrenica and Žepa in July 1995.

4.3. Somalia

The UN operation in Somalia has been one of the most radical, ambitious, - and disastrous - operations throughout the history of peace-keeping.⁶³ It has shown that the UN cannot discard the three traditional requirements of peace-keeping, - consent of the parties, force only in self-defence, and impartiality - without facing severe costs and widespread criticism. In Somalia, the failure of the UN peace effort can largely be attributed to the lack of co-operation from the warring factions involved. Arguably, this was due to the widely-held perception by the Somali people that the UN peace-keeping force was blatantly partisan.⁶⁴ Impartiality was called into question mainly due to the extent of the force used by the UN troops. Whether an authorization to use force can be consonant with a peace-keeper's duty to remain impartial is questionable and will be explored further. Another reason for the failure of UNOSOM can be attributed to the extreme nature of the conflict. The civil war, anarchy and desperate famine in the country meant that the 'blue berets' were faced with entirely new challenges. Issues of impartiality were particularly raised in relation

63. Although generally referred to as a peace-keeping operation, whether in fact the operation in Somalia was one of peace-keeping or peace-enforcement is debatable, and will be discussed *infra*.

64. See R. Thakur, *From Peace-Keeping to Peace-Enforcement: The UN Operation in Somalia*, 32 *Journal of Modern African Peace Studies* 399 (1994). Thakur writes that Mohamed Sahnoun, the former UN representative to Somalia, reportedly remarked that UNOSOM was perceived by the Somalis as an occupation force.

to UNOSOM II. It is this stage of the Somali operation that will now be focused upon.

4.3.1. UNOSOM II

On 26 March 1993, the Security Council adopted Resolution 814 establishing UNOSOM II. With a strength of 28,000 military and 2,800 civilian staff, it was the largest peace-keeping force in UN history. UNOSOM II was clearly not a 'traditional' peace-keeping operation. Its mandate was extensive and included a variety of tasks such as repatriation of displaced persons, mine-clearance, and the protection of personnel.⁶⁵ A critical component of UNOSOM II's mandate was the enforced disarmament of the factions in order to create a "secure environment" for the provision of humanitarian assistance.⁶⁶

The authorization to use force was not explicitly stated in this resolution. However, various arguments have been made to support the proposition that it was implied by the Security Council.⁶⁷ Firstly, the Security Council explicitly approved the report of the Secretary-General of 3 March 1993⁶⁸ which recommended that UNOSOM II be endowed with enforcement powers under Chapter VII.⁶⁹ Secondly, the resolution requested the provision of humanitarian assistance and the maintenance of a secure environment "in accordance with the recommendations contained in [that] report".⁷⁰ And thirdly, the mandate of the force was expanded by the Security Council "acting under Chapter VII of the Charter of the United Nations".⁷¹ In Resolution 837 of 6 June 1993, the Security Council affirmed that Resolution 814 authorized the Secretary-General to take "all necessary measures".

In June 1993, UNOSOM II used extensive retaliatory force in response to attacks carried out by the faction headed by General Aidid. Attacks on

65. UN Doc. S/RES/814 (1993).

66. *Id.*

67. See I.C. Meijer, *UN Peace-Keeping Forces: The Conditions of Change*, 7 *LJIL* 63, at 76 *et seq.* (1994).

68. UN Doc. S/RES/814, para. 1 (1993).

69. UN Doc. S/25354, para. 58 (1993).

70. UN Doc. S/RES/814, paras. 4 and 14 (1993).

71. *Id.*, at B.

the peace-keepers led to the adoption by the Security Council of Resolution 837, whereby the authority to take all necessary measures against those responsible for the attacks was confirmed. A series of retaliatory attacks against Aidid's strongholds was carried out by UNOSOM, raising questions as to whether the relief effort had been transformed into a military campaign.⁷² Thus, the question of the impartiality of the UN peace-keeping operation was raised. Most significant is the issue whether UNOSOM's authorization to use, and its actual use of, force was the cause of its perceived loss of impartiality, and more generally, whether any peace-keeping operation authorized to use force can remain impartial. These issues will now be explored further.

4.4. Impartiality and the authorization to use force

The concept of impartiality is linked to the requirement that force is used only in self-defence. The rationale behind the limitation of force is to ensure that the UN troops remain outside the conflict, not becoming part of the problem. However, in many circumstances, this type of operation is simply not appropriate. Where UN peace-keepers and civilians are being attacked, where various armed gangs loot, kill and ambush, where violence proliferates daily and there is no peace to keep, a peace-keeping operation will become a dangerous exercise in futility. In such situations, the Security Council may, acting under Chapter VII of the UN Charter, authorize the troops to use force if necessary, thus moving away from 'peace-keeping' and into the realm of 'peace enforcement'.

By sanctioning the use of force, other than in self-defence, the very nature of the operation changes. No longer is the UN reliant upon the consent of the parties. It is no longer working 'between the parties', and the efficacy of the operation is no longer conditional upon the co-operation and trust of both sides. Impartiality, therefore, no longer has a role to play. Indeed, it can be questioned whether the use of force and impartiality could ever be consonant, or whether they are in fact mutually exclusive concepts. The latter proposition seems the more persuasive. Once the UN troops become combatants in the fray, the very idea of impartiality is negated. Being authorized to use force, necessarily means that the

72. Thakur, *supra* note 64, at 398.

UN has the possibility to attack or fight one or more of the parties. The power to attack, to strike, to use all necessary means, even to retaliate⁷³ is plainly at odds with the idea of remaining impartial and not taking part in the combat. The use of force will mean that the UN troops become combatants. In Somalia, the UN troops clearly lost their impartiality once the authorization to use force was given. General Aidid and his faction perceived the UN force as partisan, and with reason. By attacking one of the parties, the UN operation cannot be said to be impartial. Arguments could be made that the use of force was objective, and that impartiality can be maintained when force is authorized and used. However, it is extremely doubtful whether those who are on the receiving end of the force would agree.⁷⁴ And it is the parties' perception of impartiality which is crucial. Furthermore, the use of force in a conflict will almost certainly affect the relative strength of the parties, thereby contributing to a loss of impartiality in the eyes of the disadvantaged party.⁷⁵

This is the consequence of a peace enforcement action. Force is to be used, and due to the very nature of the operation, impartiality cannot and need not be maintained. This type of operation is clearly more appropriate in certain situations, for example in Somalia, where a peace-keeping mission simply cannot be effective. Thus, although generally, the UN operation in Somalia has been referred to as a peace-keeping operation, it clearly does not have all three traditional requirements of a peace-keeping operation. By authorizing the use of force under Chapter VII, the Security Council shifted the operation into the realm of peace enforcement. The criticism and controversy generated by UNOSOM II, and its ultimate failure, show that blurring the line between peace-keeping and peace enforcement can have dangerous consequences. Ambiguity over the role of the force can lead to conflicting expectations, and the reputation of peace-keeping will be damaged, affecting future operations. The reputation of the UN, its authority and credibility will be at stake.⁷⁶

73. The Secretary-General, in UN Doc. S/26738, para. 91 (1993), proposed that: "UNOSOM II must retain capability for coercive disarmament and retaliation against attacks on personnel."

74. A. James, *Peacekeeping in International Politics* 368 (1990).

75. *Id.*

76. See, e.g., E. Clemons, *No Peace to Keep: Six and Three-Quarters Peacekeeping*, 26 *International Law and Politics* 107 (1993-1994); and N. White, *UN Peacekeeping - Development or Destruction?*, 12 *International Relations* 129 (1994).

The Security Council should learn from the conflicts in Bosnia and Somalia that a peace-keeping operation is not effective in cases of ongoing civil strife. Nor can peace-keepers protect humanitarian convoys, or demilitarize areas while keeping to the requirements of peace-keeping, when understaffed and under attack. The Secretary-General and the Security Council would be wise to carefully assess the situation before deploying a force, and to outline the tasks of the force. Then, in the light of Bosnia and Somalia, if such tasks and the nature of the conflict seem to require more than a lightly armed, impartial force, it should be clearly and authoritatively decided to deploy an enforcement action. Only by so acting can the problems encountered in Bosnia and Somalia be avoided in the future.

5. CONCLUSION

The concept of peace-keeping rests upon three central requirements. These are that the operation receives the consent of the parties, that it remain impartial, and that force is used only in self-defence. There is an interrelationship between the requirements which makes them interdependent. For example, if extensive force, beyond that of self-defence, is authorized, the peace-keepers will enter the conflict and impartiality will be lost. This may lead to the withdrawal of host state consent. As peace-keeping operations are often dependent upon the co-operation and trust of the parties - peace-keepers are usually only lightly armed and not equipped for combat - it is essential that the three requirements are observed. Impartiality is a crucial requirement of peace-keeping, upon which the efficacy of the operation may rest. Once there is a perception that the UN peace-keepers are acting in a partisan manner, consent and co-operation will be withdrawn, the peace-keepers may be put at risk, and the operation's chances for success will rapidly diminish.

Impartiality is being increasingly questioned due to the nature of recent operations which have been humanitarian in nature and often confined to internal situations. Such situations may be inappropriate for a peace-keeping operation. This can be due, firstly, to the nature of the conflict. For example, there may be a multitude of factions of armed gangs in an internal conflict, not all of which consent to the presence of the

troops. The peace-keepers may then be in danger of being attacked, as occurred in Somalia. Secondly, a peace-keeping force may be unable to fulfil the mandate. This happened, for example, in relation to the safe areas in Bosnia. In both cases, the impartiality of the UN force will be lost in the eyes of the parties, and in deploying a peace-keeping force in such situations, the Security Council risks the efficacy of the operation, the lives of the peace-keepers, and, ultimately, the credibility of peace-keeping operations and the authority of the UN.

The Security Council must have more respect for the significance of the requirement of impartiality. By blurring the line between peace-keeping and peace enforcement, through the authorization to use force, and by adopting unrealistic mandates for the operation, impartiality is put at risk. Such challenges to impartiality have been particularly apparent in recent operations, examples of the 'expanded' role of peace-keeping. The Security Council must consider the effects of a loss of impartiality. Firstly, it is a legal requirement which, over time, has been transposed into customary law of the internal legal order of the UN. As such, peace-keepers are obliged to observe it, and its loss would be a breach of a legal norm. Most important, however, is its practical, pragmatic value. A loss of impartiality will lead to a loss of co-operation by the parties, which may have dire consequences for the operation. Bosnia and Somalia testify to the significance that this requirement has within a peace-keeping operation.