

Advancing the Rule of Law Through Executive Measures: The Case of MINUSCA*

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Abstract

The United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) has been mandated to implement “urgent temporary measures” in the form of arrests and detentions of individuals. This rather innovative mandate brings about several legal and conceptual consequences that the article addresses, focusing on the compatibility of these measures with UN peacekeeping norms and principles and with past UN practice. In addition, the measures are said to contribute to law and order, public safety, the fight against impunity, and to the rule of law. This sheds light on the UN’s interesting conception of the rule of law in the Central African Republic and in conflict and post-conflict settings in general.

A. Introduction

The United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (hereafter MINUSCA, or “the mission”) is the most recent peacekeeping mission¹ created by the Security Council of the United Nations (UN),² on the basis of resolution 2149, which was adopted on 10 April 2014.³ It was established amid fears that ongoing “widespread and systematic targeting of civilians based on their religion or ethnicity” in the Central African Republic (CAR) could amount to pre-genocide acts⁴, hence calling for a strong response from the international community, following months (and, before that, years) of political crisis escalating into an armed conflict. In December 2012, the armed rebel group Séléka resumed its attacks against the government, rapidly taking control of several towns and of the capital Bangui in March 2013, when one of the heads of Séléka, Michel Djotodia, ousted the then President François

¹ *The United Nations Peacekeeping Operations – Principles and Guidelines* (“Capstone doctrine”) states that “Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace”, United Nations, Department of Peacekeeping Operations and Department of Field Support, *United Nations Peacekeeping Operations – Principles and Guidelines*, 2008, 18 [UN Peacekeeping Guidelines]. Following UN terminology, the term “peacekeeping” will be used in the present article in the same large sense, i.e. including “traditional” peacekeeping missions as well as “robust”, and/or multidimensional missions. It does not however cover peace enforcement which “involves the application, with the authorization of the Security Council, of a range of coercive measures, including the use of military force” without consent of the State, *ibid.* The terms “mission” and “operation” will be used as synonyms.

² The United Nations Mission for Justice Support in Haiti (MINUJUSTH) has been created in 2017 by resolution 2350, however, it can be regarded as an extension of the United Nations Stabilization Mission in Haiti (MINUSTAH) which it replaces. See SC Res. 2350, UN Doc S/RES/2350 (2017), 13 April 2017.

³ SC Res. 2149, UN Doc S/RES/2149 (2014), 10 April 2014.

⁴ *Statement of the Under Secretary-General on the Prevention of Genocide during the meeting of the Security Council in Arrria format on Inter-communities Dialogue and prevention of crimes in Central African Republic*, 14 March 2014, available at http://www.un.org/en/genocideprevention/documents/our-work/Doc.6_2014-03-12%20Statement%20of%20USG%20Adama%20Dieng%20to%20the%20Security%20%20Council.%20FINAL.pdf (last visited 10 January 2019); BBC News, ‘UN warning over Central African Republic genocide risk’, 4 November 2013, available at <http://www.bbc.co.uk/news/world-africa-24800682> (last visited 10 January 2019).

Bozizé and declared himself President.⁵ Groups of militias called “anti-balaka” opposed the Séléka, resulting in a civil war.⁶ Prior to deploying MINUSCA in April 2014, the Security Council had authorized the deployment of the African-led International Support Mission to the Central African Republic (MISCA), an African Union peacekeeping mission with French military support (Operation Sangaris), a few months earlier.⁷ The United Nations had also maintained a presence in the country through the United Nations Integrated Peacebuilding Office in the Central African Republic (BINUCA),⁸ a field office of the Department of Political Affairs of the Secretariat with a peacebuilding⁹ mandate.

⁵ *UN News Centre*, Le Secrétaire général préoccupé par la flambée de violences interconfessionnelles en RCA, available at <https://www.un.org/apps/newsFr/storyF.asp?NewsID=31634&Kw1=amos&Kw2=&Kw3> (last visited 10 January 2019).

⁶ For more in-depth accounts of the conflict in the Central African Republic, see A. Arieff, ‘Crisis in the Central African Republic’, 7 *Current Politics and Economics of Africa* (2014), 27; M. Welz, ‘Briefing: Crisis in the Central African Republic and the International Response’, 113 *African Affairs* (2014) 453, 601; T. Lesueur, ‘République centrafricaine : autopsie d’une crise méconnue’, *Politique étrangère* (2014), 163; R. Marchal, ‘Premières leçons d’une « drôle » de transition en République centrafricaine’, *Politique africaine* (2015), 123.

⁷ SC Res. 2127, UN Doc S/RES/2127 (2013), 5 December 2013. MISCA actually took over the Mission for the consolidation of peace in Central African Republic (MICOPAX) led by the Economic Community of Central African States (ECCAS) and supported by the European Union and France, created on 12 July 2008. MICOPAX was itself preceded by the Multinational Force in Central African Republic also set up by ECCAS in 2002 with support from the European Union and Germany. Before that, the UN had deployed another peacekeeping mission, the United Nations Mission in Central African Republic (MINURCA) from 1998 to 2000 (see SC Res. 1159, UN Doc S/RES/1159 (1998), 27 March 1998).

⁸ Declaration of the President of the Security Council, UN Doc S/PRST/2009/5 (2009), 7 April 2009, stating that the BINUCA should replace the United Nations Peace-Building Support Office in the Central African Republic (BONUCA) created in 2000 by the declaration of the President of the Security Council, UN Doc S/PRST/2000/5 (2000), 10 February 2000.

⁹ The UN Secretariat defines peacebuilding as “a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development. Peacebuilding is a complex, long-term process of creating the necessary conditions for sustainable peace. It works by addressing the deep-rooted, structural causes of violent conflict in a comprehensive manner. Peacebuilding measures address core issues that affect the functioning of society and the State, and seek to enhance the capacity of the State to effectively and legitimately carry out its core functions”, *UN Peacekeeping Guidelines*, *supra* note 1, 18. Key peacebuilding activities include: “a) Restoring the State’s ability to provide security and maintain public order; b) Strengthening the rule of law and respect

MINUSCA is a complex multidimensional¹⁰ and “robust” mission, characterized by ambitious peacekeeping and peacebuilding tasks and supported by the authorization to “use all necessary means” to implement them.¹¹ The first mandate of MINUSCA included the protection of civilians, support to the transition process and the extension of State authority, the facilitation of the delivery of humanitarian assistance, the promotion and protection of human rights, support to justice and the rule of law, and disarmament, demobilization, reintegration, and repatriation activities.¹² The difficulties faced by MINUSCA in carrying out all of its duties, particularly the protection of civilians¹³ in a highly volatile environment, led the Security Council to “prioritize” MINUSCA’s mandate in favour of security and protection tasks, so that, according to the mandate’s most recent version, MINUSCA shall in the first place ensure the protection of civilians and of the United Nations, provide good offices and support to the peace process, and facilitate the creation of a secure environment for the delivery of humanitarian assistance.¹⁴ If its capacities allow it to, MINUSCA is also “authoriz[ed] to pursue the following tasks: Support for the extension of State

for human rights; c) Supporting the emergence of legitimate political institutions and participatory processes; d) Promoting social and economic recovery and development”, *ibid.*, 25.

¹⁰ Multidimensional missions are peacekeeping missions which also “seek to undertake peacebuilding tasks and address root causes of conflict”, SC Res. 2086, UN Doc S/RES/2086 (2013), 21 January 2013, preamble. “These operations are typically deployed in the dangerous aftermath of a violent internal conflict and may employ a mix of military, police and civilian capabilities to support the implementation of a comprehensive peace agreement”. Their “core functions (...) are to a) Create a secure and stable environment while strengthening the State’s ability to provide security (...) b) Facilitate the political process by promoting dialogue and reconciliation and supporting the establishment of legitimate and effective institutions of governance” as well as coordination, *UN Peacekeeping Guidelines*, *supra* note 1, 22f..

¹¹ Peacekeeping missions authorized to “use all necessary means” to implement their mandate are said to be “robust”, *UN Peacekeeping Guidelines*, *supra* note 1, 19. SC Res. 2149 *supra*, note 3 is also based on the Chapter VII of the United Nations Charter, however, it is generally agreed that reference to the Chapter VII in the resolutions creating the missions does not carry as much legal consequences as giving peacekeeping missions the possibility to “use all necessary means”. See A. Novosseloff, ‘Chapitre VII et maintien de la paix : une ambiguïté à déconstruire’, *Bulletin du maintien de la paix* (2010) n°100.

¹² SC Res. 2149, *supra* note 3, para. 30.

¹³ *Human Rights Watch*, ‘Central African Republic – Civilians in Danger’, available at <https://www.hrw.org/news/2014/09/15/central-african-republic-civilians-danger> (last visited 10 December 2018).

¹⁴ SC Res. 2387, UN Doc S/RES/2387 (2017), 15 November 2017, para. 42.

authority, the deployment of security forces, and the preservation of territorial integrity”, “Security Sector Reform (SSR)”, “Disarmament, Demobilization, Reintegration (DDR) and Repatriation (DDRR)”, “Promotion and protection of human rights”, “Support for national and international justice, the fight against impunity, and the rule of law”, “Illicit exploitation and trafficking of natural resources”.¹⁵ However, through this prioritization process, MINUSCA’s mandate actually grew even broader. This broader mandate may be interpreted as a way to offer MINUSCA more flexibility in carrying out its activities, in the sense that MINUSCA can coordinate with other international actors in order to delegate or jointly implement the tasks that are of less priority, yet still having the possibility to intervene in these sectors that remain crucial in a peacekeeping enterprise¹⁶.

MINUSCA thus has a large and robust mandate, but at first sight no different from other robust and multidimensional peacekeeping missions recently,¹⁷ or less recently,¹⁸ set up by the Council. However, MINUSCA’s mandates do contain a distinctive element that makes them worth the present argument; that is, they constitute a qualitative shift in peacekeeping practice.

Already in the first mandate, the Security Council allowed MINUSCA to implement unspecified “urgent temporary measures”,¹⁹ presenting them as a possibility rather than a request by using the word “may”.²⁰ These measures came to be specified in later mandates as the possibility to “arrest and detain” and were to be “urgently and actively adopt[ed]”.²¹ In all but the first mandate, two different paragraphs authorize MINUSCA to apprehend, arrest or detain individuals, under slightly different circumstances, so that a brief description of these provisions is necessary before moving on to their analysis.

¹⁵ *Ibid.*, para. 43.

¹⁶ Interview conducted by the author with UN DPKO staff, 11 November 2017.

¹⁷ E.g. the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) (SC Res. 2100, UN Doc S/RES/2100 (2013), 25 April 2013) or the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) (SC Res. 1925, UN Doc S/RES/1925 (2010), 28 May 2010 and SC Res. 2098, UN Doc S/RES/2098 (2013), 28 March 2013).

¹⁸ The United Nations Mission in South Sudan, the African Union-United Nations Mission in Darfur, the United Nations Operation in Burundi or the United Nations Operation in Côte d’Ivoire, all have a robust mandate with broad peacekeeping and peacebuilding tasks.

¹⁹ SC Res. 2149, *supra* note 3, para. 40.

²⁰ The French version uses the conditional tense: “*la MINUSCA pourrait*”, *ibid.*

²¹ For the latest version of the measures, see SC Res. 2387, *supra* note 14, para. 43.

In the paragraph dedicated to the “urgent temporary measures”, the Council mandated MINUSCA to

“urgently and actively adopt, within the limits of its capacities and areas of deployment, at the formal request of the CAR Authorities and in areas where national security forces are not present or operational, urgent temporary measures on an exceptional basis and without creating a precedent and without prejudice to the agreed principles of peacekeeping operations, which are limited in scope, time-bound and consistent with the objectives set out in paragraphs 42 and 43 (e), to arrest and detain in order to maintain basic law and order and fight impunity”.²²

From 2015 onwards, resolutions contained another provision under the “rule of law” component of the mandate, authorizing MINUSCA

“[w]ithout prejudice to the primary responsibility of the CAR Authorities, to support the restoration and maintenance of public safety and the rule of law, including through apprehending and handing over to the CAR Authorities, consistent with international law, those in the country responsible for crimes involving serious human rights violations and abuses and serious violations of international humanitarian law, including sexual violence in conflict, so that they can be brought to justice, and through cooperation with States of the region as well as the [International Criminal Court] in cases of crimes falling within its jurisdiction”.²³

This second provision, authorizing MINUSCA to apprehend alleged criminals, is related to the opening of investigations by the International Criminal Court (ICC) on alleged crimes committed in the Central African Republic since 1 August 2012,²⁴ and the creation of the Special Criminal Court, a hybrid jurisdiction set up by the Central African authorities with support from

²² *Ibid.* See also for similar wording SC Res. 2217, UN Doc S/RES/2217 (2015), 28 April 2015, para. 32; SC Res. 2301, UN Doc S/RES/2301 (2016), 26 July 2016, para. 34.

²³ SC Res. 2387, *supra* note 14, para. 43.

²⁴ Situation in the Central African Republic II, Decision Assigning the *Situation in the Central African Republic II* (Pre-Trial Chamber II), ICC-01/14-1, 18 June 2014.

the UN.²⁵ MINUSCA is thus tasked with arresting those who are likely to face charges before these two courts.

For the sake of the present analysis, the terms “urgent temporary measures” and “the measures” will designate both paragraphs, since they both allow MINUSCA to arrest and detain or apprehend²⁶ individuals. Differences of execution and rationale between the two paragraphs will be examined in part B of the article. It is worth noting that MINUSCA did implement such measures, with the Secretary-General regularly reporting on individuals who have been arrested and detained as part of the implementation of the measures.²⁷

The Security Council has been extremely cautious in drafting the paragraphs setting out these measures: not only are they “temporary”, “limited in scope [and] time-bound”, but they are also adopted “on an exceptional basis and without creating a precedent and without prejudice to the agreed principles of peacekeeping operations”, and “at the formal request of the CAR Authorities”²⁸. This cautiousness alone reveals the unusual character of the measures. A similar wording has been used with respect to the creation of the Intervention Brigade of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO),²⁹ which is regarded as a truly innovative element in peacekeeping practice, arguably amounting to actual war fighting.³⁰ Another questioning element is that these measures are part of the mission’s

²⁵ *Loi organique portant création, organisation et fonctionnement de la Cour pénale spéciale* (Law allowing for the creation, organization and functioning of the Special Criminal Court), Loi organique n°15-003, Central African Republic, 3 June 2015.

²⁶ Apprehend is regarded here as a synonym of arrest.

²⁷ For the most recent cases, see Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/865, 18 October 2017, para. 49; Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/473, 2 June 2017, para. 50; Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/94, para. 45. See also previous Reports of the Secretary-General on the Central African Republic from 2016 and 2015.

²⁸ See all resolutions, *supra* note 3, note 14 and note 22.

²⁹ The Security Council decided “that 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” (...) with the responsibility of neutralizing armed groups as set out in paragraph 12 (b) below 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”, SC Res 2098, UN Doc S/RES/2098 (2013), 28 March 2013, para. 9.

³⁰ M. Peter, ‘Between Doctrine and Practice: The UN Peacekeeping Dilemma’, 21 *Global Governance: A Review of Multilateralism and International Organizations* (2015) 351.

support to the rule of law and justice. Yet, except for cases of international territorial administration by the United Nations,³¹ other peacekeeping missions with rule of law and justice support components have never been authorized, at least in explicit terms,³² to take *executive* measures such as arrests and detentions. Rather, rule of law promotion by multidimensional missions has so far consisted of institutional support to key public institutions such as the judiciary.³³

This unusual element in MINUSCA's mandate raises a number of legal and conceptual issues that this article seeks to address, in order to reveal that the "urgent temporary measures" constitute a qualitative shift in UN peacekeeping practice. In that perspective, the first and second parts of the analysis will look at the authorization to implement the "urgent temporary measures" in light of the general legal framework of peacekeeping activities (A) and previous peacekeeping practice (B), in order to determine the extent to which these measures are compatible with said framework and practice. This reveals that the implementation of the measures amounts to the exercise of executive powers rather than usual peacekeeping activity. Resorting to a teleological perspective, the third part of the article will focus on the conceptual implications of the urgent temporary measures in light of their own objective of support to the rule of law (C). In that respect, the shift from promotion to the execution of the rule of law by a peacekeeping mission shows the very specific, and at times contradictory, conception of the rule of law that the United Nations upholds in the Central African Republic.

³¹ International territorial administration by the United Nations in Kosovo and in Timor Leste, and to some extent in Cambodia, is regarded here as distinct from peacekeeping operations.

³² See *under*, B. Practical Framework and Implications of the Urgent Temporary Measures.

³³ See, among others, mandates of the United Nations Mission in Liberia (SC Res. 1509, UN Doc S/RES/1509 (2003), 19 September 2003), the United Nations Operation in Côte d'Ivoire (SC Res. 1528, UN Doc S/RES/1528 (2004), 27 February 2004), the United Nations Mission for the Stabilization in Haiti (SC Res. 1542, UN Doc S/RES/1542 (2004), 30 April 2004), the United Nations Mission in the Central African Republic and Chad (SC Res 1778, UN Doc S/RES/1778 (2007), 25 September 2007) or the the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) (SC Res. 1925 *supra* note 17..

B. Normative Framework and Implications of the Urgent Temporary Measures

The authorization granted to MINUSCA to arrest and detain shall first be analyzed in light of the UN peacekeeping doctrine, i.e. norms and guiding principles that have been elaborated by the UN with respect to peacekeeping. The present section will explore the normative framework of UN peacekeeping in order to determine on which legal grounds the urgent temporary measures rest. Since the Security Council made sure to assert that the measures did not prejudice “agreed principles of peacekeeping operations”, implicitly inferring that they could indeed contradict these principles, special attention will be given to the compatibility between the measures and the principles governing peacekeeping.

I. Beyond the UN Charter

The normative framework which will be considered here in order to assess MINUSCA’s mandate lies first and foremost in the United Nations Charter,³⁴ and in internal UN principles and norms. Even though “[i]nternational human rights law is an integral part of the normative framework for United Nations peacekeeping operations” and international humanitarian law “is relevant to United Nations peacekeeping operations because these missions are often deployed into post-conflict environments where violence may be ongoing or conflict could reignite”,³⁵ the purpose of the present article is not to enter the abundant debate on the respective relevance of human rights, humanitarian law and, at times, occupation law³⁶ to regulate peacekeeping activities.³⁷

Peacekeeping was initially presented by former Secretary-General Dag Hammarskjöld as a “Chapter VI and a half” activity.³⁸ More recently, the Security Council started referring to Chapter VII when creating peacekeeping

³⁴ See, for a general analysis, A. Orakhelashvili, ‘The Legal Basis of the United Nations Peacekeeping Operations’, 43 *Virginia Journal of International Law* (2003) 2, 485.

³⁵ *UN Peacekeeping Guidelines*, *supra* note 1, 15.

³⁶ Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999).

³⁷ *Ibid.*, as well as F. Mégret & F. Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’, 25 *Human Rights Quarterly* (2003), 314; S. Sheeran, ‘The Use of Force in United Nations Peacekeeping Operations’, in M. Weller (ed.), *The Oxford Handbook of The Use of Force in International Law* (2015), 349, 357.

³⁸ A.J. Bellamy *et al*, *Understanding Peacekeeping* (2004), 129.

missions, including MINUSCA.³⁹ What matters eventually is that, under the UN Charter, the Security Council has “primary responsibility for the maintenance of international peace and security”,⁴⁰ and that it has a large leeway in that respect.⁴¹ Peacekeeping being an *ad hoc* activity initially not envisaged in the Charter, its normative framework developed along with practice. Following the first UN peacekeeping mission, the United Nations Emergency Force (UNEF I),⁴² Secretary-General Hammarskjöld elaborated a set of principles governing peacekeeping, in order to ensure its compatibility with the Charter and with other principles of general international law and international humanitarian law. These principles are consent, impartiality, and the non-use of force.⁴³ They have been recalled and expanded in several UN documents since their inception and are mentioned in the resolutions concerning MINUSCA.⁴⁴ In addressing the question of the compatibility between MINUSCA’s mandate, and more specifically the urgent temporary measures, and these principles, a special focus will be placed on practical implementation of measures on the ground. Principles and guidelines are indeed often developed at the theoretical or, as the UN puts it, at the “strategic” level, but sometimes fail to properly address implementation problems arising on the ground.

II. Consent

The principle of consent is at the heart of the definition of peacekeeping.⁴⁵ The necessarily consensual nature of peacekeeping operations directly ensues from

³⁹ See *supra*, notes 3, 14 and 22.

⁴⁰ *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, art. 24.

⁴¹ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151, 177; L. Pineschi, ‘L’emploi de la force dans les opérations de maintien de la paix des Nations Unies ‘robustes’ : conditions et limites juridiques’, in *La sécurité collective entre légalité et défis à la légalité* (2008), 139, 148 ; P.M. Dupuy & Y. Kerbrat, *Droit International Public* (2014), 693.

⁴² Created by GA Res. 998, UN Doc A/RES/998 (1956), 4 November 1956.

⁴³ The principles were first conceptualized by the then Secretary-General Hammarskjöld, see UN Secretary-General, Summary Study of the Experience Derived from the Establishment and Operation of the Force”, UN Doc A/3943 (1958), 9 October 1958. They were then developed in several UN reports, particularly the Capstone doctrine, *supra*, note 1, 31, and by scholars, see among others N. Tsagourias, ‘Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension’, 11 *Journal of Conflict and Security Law* (2006) 3, 465; Bellamy, *supra* note 38, 95.

⁴⁴ SC Res. 2149, *supra* note 3, preamble, and following resolutions at notes 14 and 22.

⁴⁵ See for instance the definition provided by the Secretary-General Boutros Boutros-Ghali in its *Agenda for peace*: “Peace-keeping is the deployment of a United Nations presence in

their non-coerciveness, which is what distinguishes peacekeeping activity from peace enforcement, the latter consisting in the decision to impose peace on parties which have not given their consent to such an operation.⁴⁶ Consent has to be given by “the main parties to the conflict. This requires a commitment by the parties to a political process and their acceptance of a peacekeeping operation mandated to support that process”.⁴⁷

On this basis, the urgent temporary measures appear to respect the principle of consent. First, execution of the measures is subjected to “the formal request of the CAR Authorities”,⁴⁸ or in the first mandate, “the formal request of the Transitional Authorities”.⁴⁹ This alone implies that the measures will only be implemented if the Central African authorities consent to their execution. Given the practical reality of arrests of suspected criminals and other individuals, the “formal request” should be interpreted here as a general request to implement the measures beforehand and not as an *ad hoc* request each time MINUSCA forces are in the position to arrest individuals. Central African authorities did express their consent on several occasions. An insider’s perspective suggests that the UN actually elaborated the measures at the request of CAR authorities.⁵⁰ In its resolutions, the Security Council referred to several letters from the CAR authorities concerning the deployment of MINUSCA in general⁵¹ and execution of the measures in particular.⁵² Central African authorities also made several declarations expressing their consent before the Security Council, sometimes clearly calling for enforcement of the urgent temporary measures.⁵³

the field, hitherto with the consent of all the parties concerned”, *Report of the Secretary General*, UN Doc A/47/277 (1992), 17 June 1992, para. 20.

⁴⁶ See Mosler/Oellers-Frahm, ‘Art. 94’ in B. Simma et al (ed.), *The Charter of the United Nations: A Commentary* (2002), 1175.

⁴⁷ UN Peacekeeping Guidelines, *supra* note 1, 31.

⁴⁸ SC Res. 2387, *supra* note 14, para. 43. See also for similar wording SC Res. 2217, para. 32 and SC Res. 2301, para. 34, *supra* note 22.

⁴⁹ SC Res. 2149, *supra* note 3, para. 40.

⁵⁰ S. Mathias, ‘The Application of the Rule of Law to United Nations Peacekeeping Operations’, in C. Feinäugle (ed.), *The rule of law and its application to the United Nations* (2016), 107, 127.

⁵¹ SC Res. 2149, *supra* note 3, preamble.

⁵² “Taking note of the letter of the President of the Central African Republic to the Security Council dated 8 April 2014 of the letter to the Security Council dated 8 April 2014, by which the President of the CAR conveyed views regarding MINUSCA’s mandate in terms of protection of civilians and urgent temporary Measures”, SC Res. 2217, *supra* note 22, preamble.

⁵³ Ms Kpongo, the CAR representative before the Council, declared: “with regard to temporary emergency measures, this will be something new for MINUSCA. We welcome

However, even though consent is traditionally expected to come from the host State,⁵⁴ the Capstone doctrine affirms, as highlighted above, that consent should be given by the “main parties to the conflict”, in the context of a “political agreement”.⁵⁵ In the Central African context, the two main parties were, initially, the State and the Séléka, whose leader Michel Djotodia seized power in March 2013. Michel Djotodia agreed to the creation of a *Conseil national de transition* (National Transition Council) functioning as a transitional Parliament and benefitting from support of the Economic Community of Central African States (ECCAS). He promulgated the *Charte constitutionnelle de transition*,⁵⁶ a constitutional text previously adopted by the *Conseil national de transition* organizing the political transition in the country. The *Charte* can be regarded as a political agreement and was supported by the Security Council.⁵⁷ Under heavy international pressure, Michel Djotodia and his Prime Minister resigned in January 2014, allowing the *Conseil national de transition* to appoint new transitional authorities and Catherine Samba-Panza as transitional President.⁵⁸ It can thus be argued that the main parties to the conflict were involved in the conclusion of a political agreement in the sense prescribed by the UN, and that the principle of consent is respected.

To date though, several armed groups, some of which are offshoots of the Séléka, continue to wage attacks on civilians, UN forces, the government, and against each other.⁵⁹ The difficulty in assessing whether consent has been given or not thus lies in the identification of the “main parties” to the Central

that this is included in the mandate with stronger language, as it is essential that such measures be further implemented. President Touadera asked for this, and it has been done. We now hope that the temporary emergency measures will be implemented with determination”, UN Doc S/PV.7747, 26 July 2016.

⁵⁴ For an example illustrating this understanding, see S. Sebastian & A. Gorur, ‘U.N. Peacekeeping and Host State Consent’, Stimson Center (2018).

⁵⁵ *UN Peacekeeping Guidelines*, *supra* note 1, 31. Peter argues that the principle of consent can hardly be regarded as respected if peacekeeping missions intervene when no comprehensive peace agreement has been reached, Peter, *supra* note 30, 358.

⁵⁶ *Charte constitutionnelle de transition* (Transition Constitutional Charter), Central African Republic, 18 July 2013, available at <http://mjp.univ-perp.fr/constit/cf2013.htm> (last visited on 10 January 2019); Welz, *supra* note 6, 603.

⁵⁷ SC Res. 2149, *supra* note 3, para. 3.

⁵⁸ Marchal, *supra* note 6, 137.

⁵⁹ Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/865, *supra* note 27, para.12-24; Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/473, *supra* note 27, para. 3 and para. 12-14; and previous Secretary-General’s reports on the Central African Republic.

African conflict, in opposition to “spoilers” of the peace process, described as those “who may actively seek to undermine the peace process or pose a threat to the civilian population”.⁶⁰ The UN recognizes that there is no black or white answer to this question:

“[t]he fact that the main parties have given their consent to the deployment of a United Nations peacekeeping operation does not necessarily imply or guarantee that there will also be consent at the local level (...). Universality of consent becomes even less probable in volatile settings, characterized by the presence of armed groups not under the control of any of the parties, or by the presence of other spoilers”.⁶¹

From the UN’s perspective, lack of consent at the local level thus does not necessarily contravene the principle of consent to peacekeeping activity, insofar as local armed groups are regarded as “spoilers”. However, in civil conflicts such as the one in the Central African Republic, such a distinction between “main parties” to the conflict and “spoilers” can be contested. From a factual point of view, local armed groups do take part in the conflict. Indeed, the political agreements and transitional process initiated by the “main parties” to the Central African conflict have not resulted in a cessation of armed attacks, including against MINUSCA.⁶² In addition, the argument that consent is not to be sought from local armed groups regarded as “posing a threat to the civilian population” and as “spoilers” of a peace process to which they are not parties is difficult to uphold if the armed groups that are regarded as the “main parties” to the conflict, including the host State supported by the UN, have also threatened and endangered civilians and/or have carried out actions that threatened the peace process. In the Central African case, the Secretary-General carefully attributed attacks on civilians and other acts disrupting the peace process to “former” Séléka members or “militias”, and not to official parties to the peace process.⁶³ On that basis, the principle of consent is respected, though it can be argued that the way the “main parties” have been identified in the Central

⁶⁰ *UN Peacekeeping Guidelines*, *supra* note 1, 34 and 43.

⁶¹ *UN Peacekeeping Guidelines*, *supra* note 1, 32.

⁶² Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2017/473, *supra* note 27, para. 12-14.

⁶³ See Secretary-General, *Report of the Secretary-General on the Central African Republic*, UN Doc S/2013/677, 15 November 2013, para. 2-7, and *Report of the Secretary-General on the Central African Republic*, UN Doc S/2014/142, 3 March 2014, para. 3-9.

African case remains problematic and, if these same groups were to be regarded as parties to the conflict, then MINUSCA's mandate would violate the principle of consent.

III. Impartiality

Impartiality in the context of peacekeeping is defined by the UN as the implementation of the mandate “without favor or prejudice to any party (...) but [it] should not be confused with neutrality or inactivity”.⁶⁴ The UN further adds that “[t]he need for even-handedness towards the parties should not become an excuse for inaction in the face of behavior that clearly works against the peace process”.⁶⁵ Impartiality is frequently regarded as a political and strategic condition for effective peacekeeping.⁶⁶ The legal rationale and legal implications of a lack of impartiality are the same as the rationale and implications of the absence of consent as articulated by the Capstone doctrine⁶⁷ in that under both circumstances, i.e. whether the UN intervenes without consent of the parties or acts in a partial way, the UN mission would become party to the conflict and peacekeeping would transform into peace enforcement. Recently, this issue has been raised in relation to MONUSCO's Intervention Brigade,⁶⁸ and several authors argued that the Brigade turned MONUSCO into a partial party to the conflict, targeting only the armed group March 23 Movement (M23) while backing the *Forces Armées de la République Démocratique du Congo* (FARDC), the government armed forces.⁶⁹

Since the urgent temporary measures pursue general goals, such as the maintenance of law and order, justice and the rule of law, and fighting impunity, they do not target one party as such and can thus be regarded as impartial,

⁶⁴ *UN Peacekeeping Guidelines*, *supra* note 1, 33.

⁶⁵ *Ibid.*

⁶⁶ Several authors base their argument on this perspective, e.g. C.T. Hunt, ‘All necessary means to what ends? the unintended consequences of the ‘robust’ turn in UN peace operations’, 24 *International Peacekeeping* (2017) 1, 108, H. Willmot & S. Sheeran, ‘The protection of civilians mandate in UN peacekeeping operations: reconciling protection concepts and practices’, 95 *International Review of the Red Cross* (2013) 517, or Peter, *supra* note 30, 359.

⁶⁷ *UN Peacekeeping Guidelines*, *supra* note 1, 32.

⁶⁸ Peter, *supra* note 30.

⁶⁹ J. Karlsrud, ‘The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN Peacekeeping Operations in the CAR, the DRC and Mali’, 36 *Third World Quarterly* (2015) 1, 7 and C.T. Hunt, *supra* note 66, 113; see also Peter, *supra* note 30, 360.

in theory at least.⁷⁰ Rather, because they aim at combating the commission of acts that work against peace, like serious violations of human rights and international humanitarian law, they actively contribute to the principle of impartiality. However, since MINUSCA, like other peacekeeping missions, is mandated to provide support to the government in place, its actual impartiality is questionable.⁷¹ Again, respect of the impartiality principle depends upon who the individuals actually targeted by the urgent temporary measures are. In practice, there is a risk that execution of the measures will only result in the arrest of leaders of local rebel groups (the same ones whose consent is not sought by the United Nations) while avoiding those close to, or part of, the government in place. In order to respect the principle of impartiality, it is therefore necessary that MINUSCA equally enforces the measures, regardless of the political affiliation of the alleged criminals. In fact, it is important that MINUSCA efficiently implements the measures *tout court* so as not to leave itself open to criticisms of biased enforcement. Indeed, failure to arrest well-known criminals of one or the other armed group will likely be interpreted by the population as MINUSCA taking sides when implementing the measures,⁷² and could consequently constitute a violation of the principle of impartiality.

IV. Non-use of force

The principle of the non-use of force by peacekeeping operations is at the heart of the definition of peacekeeping itself and has become the key criterion to categorize peace operations in academic works.⁷³ It is also the principle that has evolved most since its first inception as the prohibition for UN peacekeepers to use force except in cases of strict self-defence.⁷⁴ A rapid chronology of the use of

⁷⁰ Similarly, one can argue that insofar as the urgent temporary measures fall under “law enforcement” rather than “peace enforcement”, they respect the impartiality principle, H. Yamashita, ‘Impartial’ Use of Force in United Nations Peacekeeping’, 15 *International Peacekeeping* (2008) 5, 627.

⁷¹ Peter, *supra* note 30, 359.

⁷² One such case has been reported concerning Abdoulaye Hissene and Haroun Gaye from the *Front Populaire pour la Renaissance de la Centrafrique*, see *Civilians in Conflict*, ‘The Primacy of Protection’, available at <https://civiliansinconflict.org/publications/research/primacy-of-protection/> (last visited on 18 February 2019)

⁷³ See amongst others, Mathias, *supra* note 50, Bellamy, *supra* note 38, 108, and K. Kenkel, ‘Five generations of peace operations: from the “thin blue line” to “painting a country blue”’, 56 *Revista Brasileira de Política Internacional* (2013) 125.

⁷⁴ “This right [to self-defence] should be exercised only under strictly defined conditions”, Secretary-General, *Summary Study of the Experience Derived from the Establishment and*

force by UN peacekeeping missions illustrates this evolution. The authorization to use force quickly exceeded strict self-defence, with the first mission allowed to use force in order to implement its mandate being the United Nations Operation in Congo (ONUC).⁷⁵ The notion of “defence of the mandate” thus appeared in order to accommodate the non-coercive nature of peacekeeping with the perceived need to ensure efficiency in implementation of the mandate. The notion of “defence of the mandate” was clearly recognized by the report of the Panel on United Nations Peace Operations (Brahimi report)⁷⁶ and later official documents.⁷⁷ The use of force by peacekeeping missions further evolved when the Security Council allowed peacekeeping missions, designated as “robust” missions, to “use all necessary means”, including force.⁷⁸ Practice of the Security Council to allow peacekeeping missions to use “all necessary means” grew in the 2000s (e.g. the United Nations Mission in Sierra Leone,⁷⁹ the United Nations Mission in the Democratic Republic of Congo,⁸⁰ the United Nations Operation in Côte d’Ivoire,⁸¹ the United Nations Mission in Sudan,⁸² the African Union-United Nations Hybrid Operation in Darfur⁸³ or the United Nations Mission in the Central African Republic and Chad).⁸⁴ To date, the principle of non-use of force by peacekeepers should thus be understood in a rather extensive sense as allowing the use of “all necessary means”, including force, in self-defence and in defence of the mandate. This understanding of the (non-)use of force reveals that, again, the UN bases its conception of the use of

Operation of the Force”, UN Doc A/3943, 9 October 1958, para. 179.

⁷⁵ SC Res. 143, UN Doc S/RES/143 (1960), 14 July 1960. In a further resolution, the Security Council “[authorized] the Secretary-General to take vigorous action, including the use of the requisite measure of force, if necessary”, Sc Res. 169, UN Doc S/RES/169 (1961), 24 November 1961, para. 4.

⁷⁶ “Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission’s mandate”, *Report of the Panel on United Nations Peace Operations*, UN Doc S/2000/809, 21 August 2000, para. 49.

⁷⁷ *UN Peacekeeping Guidelines*, *supra* note 1, 31.

⁷⁸ See also above, notes 11, 16 and 17.

⁷⁹ SC Res. 1289, UN Doc S/RES/1289 (2000), 7 February 2000.

⁸⁰ SC Res. 1291, UN Doc S/RES/1291 (2000), 24 February 2000.

⁸¹ SC Res. 1528, UN Doc S/RES/1528 (2004), *supra* note 33.

⁸² SC Res. 1590, UN Doc S/RES/1590 (2005), 24 March 2005, para. 16.

⁸³ SC Res. 1769, UN Doc S/RES/1769 (2007), 31 July 2007.

⁸⁴ SC Res. 1778, UN Doc S/RES/1778 (2007), 25 September 2007.

force on a distinction between the international and the local or “tactical” level.⁸⁵ The use of force at the international level qualitatively differs from peacekeeping: it amounts to peace enforcement in the form of an armed intervention under international law. The use of force at the local level, on the contrary, still fits within the principle of non-use of force by peacekeeping missions.

Thereby, the urgent temporary measures are compatible with the principle of the non-use of force as understood in UN doctrine. When authorizing for the first time a peacekeeping mission, the ONUC, to use force, the Security Council had actually done so precisely to proceed to arrests and detentions.⁸⁶ The measures do constitute a way to use force, but only at the national level and not in the international understanding of the use of force. They can be regarded as one of “the necessary means” that MINUSCA is allowed to use to implement its mandate, being a robust mission.⁸⁷ In that sense, rather than considering that the Security Council took yet another step in the ever broadening authorization granted to peacekeeping missions to use force,⁸⁸ it can be argued that, by explicitly authorizing MINUSCA to arrest and detain individuals, the Security Council clarified what these “necessary means” may entail, offering a clarification as to what the principle of non-use of force by peacekeepers does cover.

The normative basis for peacekeeping activity, including the UN Charter, thus allows the Security Council to authorize MINUSCA to arrest and detain individuals, and execution of the urgent temporary measures appears compatible with the “agreed principles of peacekeeping operations”, at least theoretically and on the basis of a broad and extensive understanding of these principles. At the “field” level, compatibility of the measures with traditional principles of peacekeeping is more dubious. The urgent temporary measures thus offer an example of the tendency of recent UN peacekeeping practice to drift away from usual UN peacekeeping doctrine,⁸⁹ and illustrate the lack of adequacy between, on the one hand, the doctrine and discourses on peacekeeping

⁸⁵ According to the Capstone doctrine, “robust peacekeeping should not be confused with peace enforcement, as envisaged under Chapter VII of the Charter. Robust peacekeeping involves the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict. By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military force at the strategic or international level”, *UN Peacekeeping Guidelines*, *supra* note 1, 34.

⁸⁶ SC Res. 169, UN Doc S/RES/169 (1961), 24 November 1961, para. 4.

⁸⁷ SC Res. 2149, *supra* note 3, para. 29.

⁸⁸ Mégret & Hoffmann, *supra* note 37, 314, 327; Peter, *supra* note 30, 351, 352.

⁸⁹ On this topic, see generally Peter, *supra* note 30.

principles, and, on the other hand, its actual implementation in the field. The fact that MINUSCA's mandate seems to stretch peacekeeping doctrine leads one to wonder about the relevance of analyzing the urgent temporary measures in light of peacekeeping norms and principles. Rather, it may be useful to look for another, more relevant paradigm to understand the qualitative shift that MINUSCA's mandate induces. Indeed, comparison between these measures and previous peacekeeping practice reveals that, even if they appear theoretically compatible with peacekeeping norms and principles, the urgent temporary measures do constitute a unique case that is best addressed from the perspective of international territorial administration practice.

C. Practical Framework and Implications of the Urgent Temporary Measures

Just as the Council affirmed that the urgent temporary measures did not prejudice agreed principles of peacekeeping, it also warned that they did not set a precedent in peacekeeping practice. An *a contrario* reading of this assertion suggests that these measures could indeed constitute a precedent. Explicitly authorizing a peacekeeping mission to apprehend, arrest, and detain individuals is not as such a complete novelty in UN peacekeeping practice. The Security Council had already allowed three previous peacekeeping missions to implement similar measures, though with slight differences which the present section will undertake to reveal. Comparing the measures with previous practice, this part of the argument will demonstrate that the measures do constitute a qualitative shift in peacekeeping practice, to the point that they draw closer to cases of international administration of territories by the UN, rather than other peacekeeping missions.

I. Previous practice of arrests and detentions by peacekeeping missions

As previously mentioned, the first mission to be formally allowed to arrest and detain individuals was the United Nations Operation in Congo (ONUC). In resolution 169, the Security Council “authorized the Secretary-General to take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation”.⁹⁰ Several decades later, the Security Council authorized the second

⁹⁰ SC Res. 169, UN Doc S/RES/169 (1961), 24 November 1961, para. 4.

United Nations Operation in Somalia (UNOSOM II), which was already allowed to use “all necessary means”, to proceed to arrests and detentions of individuals suspected of having carried out the attack against UN forces on 5 June 1993.⁹¹ Finally, the Security Council asked the United Nations Mission in Liberia (UNMIL) “to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone”.⁹² In parallel to these three cases where the Security Council explicitly authorized peacekeeping missions to arrest and detain individuals, some reports of the Secretary-General reveal that other peacekeeping missions had, on an *ad hoc* basis, also arrested and/or detained individuals. This is the case of “robust” missions allowed to use all necessary means, such as the United Nations Mission in the Democratic Republic of Congo (MONUC), but also of peacekeeping missions that were not allowed to use force, like the United Nations Assistance Mission for Rwanda (UNAMIR) and the United Nations Mission for the Stabilization in Haiti (MINUSTAH).⁹³ In addition, it is likely that some arrests and detentions are not reported by the United Nations, so that they remain unnoticed.⁹⁴ These cases show that the execution by MINUSCA of the urgent temporary measures does not constitute a precedent in the sense that it already occurred in previous peacekeeping practice, both in a legal and factual sense. However, some notable differences remain between the three missions authorized by the Security Council to arrest and/or detain individuals, and MINUSCA’s mandate. One difference relates to the fact that the measures are presented as a means to support the rule of law in the Central African Republic, and this will be addressed in part C. Other differences relate to the execution of the measures and reveal that they constitute a qualitative shift from peacekeeping to the exercise of executive powers, so that the peacekeeping paradigm becomes irrelevant to properly understand and address the nature of the urgent temporary measures.

⁹¹ SC Res. 837, UN Doc S/RES/837 (1993), 6 June 1993, para. 5.

⁹² SC Res. 1638, UN Doc S/RES/1638 (2005), 11 November 2005, para. 1.

⁹³ B. ‘Ossie’ Oswald, ‘Detention by United Nations Peacekeepers: Searching for Definition and Categorisation’, 15 *Journal of International Peacekeeping* (2011) 1-2, 118, 127-128.

⁹⁴ *Ibid.*, 129.

II. Differences between previous practice and the urgent temporary measures

A key difference between the above-mentioned cases of peacekeeping missions allowed to arrest and detain individuals and MINUSCA's urgent temporary measures lies in the absence of limits surrounding the implementation of the latter. Indeed, there is no restriction *ratione personae* to the execution of the urgent temporary measures and the "time-bound" character of the measures is doubtful, particularly since there is no link connecting implementation of the measures with a specific event.

The above-mentioned authorizations granted to peacekeeping missions to arrest and detain were each limited *ratione personae*, sometimes in relation to a specific event, and consequently, *ratione temporis*. ONUC had the wider mandate in that respect, yet still targeting a specific group of individuals explicitly designated by the Security Council as "all foreign military and paramilitary personnel and political advisers not under United Nations Command, and mercenaries, as laid down in paragraph 2 of Security Council resolution 161 A".⁹⁵ With respect to UNOSOM II, the authorization to proceed to arrests and detentions targeted "all those responsible for the armed attacks referred to in paragraph 1 above, including against those responsible for publicly inciting such attacks", paragraph 1 condemning "the unprovoked armed attacks against the personnel of UNOSOM II on 5 June 1993"⁹⁶. In addition, the fact that the authorization was directly linked to a specific event suggests that UNOSOM II would not have been allowed to arrest and detain individuals otherwise. UNMIL's mandate is the most specific since it targeted only one person, former Sierra Leonean president Charles Taylor,⁹⁷ against whom the Special Tribunal for Sierra Leone had issued an international arrest warrant.⁹⁸ In all three cases, the possibility to carry out arrests and detentions was thus limited to certain individuals and/or certain circumstances, so that also resulted in a limitation in time. In the case of ONUC, due to the limitation *ratione personae*, the authorization to arrest and detain would logically end when no "foreign military

⁹⁵ SC Res. 169, UN Doc S/RES/169 (1961), 24 November 1961, para. 4. Resolution 161 again designates "all Belgian and other foreign military and paramilitary personnel and political advisers not under United Nations Command, and mercenaries", SC Res. 161, UN Doc S/RES/161 (1961), 21 February 1961, para. 2.

⁹⁶ SC Res. 837, UN Doc S/RES/837 (1993), 6 June 1993, para. 5 and para. 1.

⁹⁷ SC Res. 1638, UN Doc S/RES/1638 (2005), 11 November 2005, para. 1.

⁹⁸ *The Prosecutor against Charles Gankay Taylor*, Warrant of Arrest and Order for Transfer and Detention, SCSL-2003-01-1, 7 March 2003.

and paramilitary personnel” were present in the Congo anymore – though this indeed could turn out to be a never-ending period of time, while for UNMIL, the authorization would automatically end if Charles Taylor was arrested – which happened a few months after the Security Council adopted resolution 1638.⁹⁹

On the contrary, MINUSCA can apprehend anyone suspected of having committed serious violations of human rights and humanitarian law, and it can also simply “arrest and detain” individuals with the view to “maintain basic law and order”. In the former scenario, MINUSCA should specifically target individuals responsible for such serious violations, particularly those likely to face proceedings before the International Criminal Court and before the Special Criminal Court, though, in the context of ongoing violence, there is no restriction *ratione personae* to such an authorization. In the second case, the authorization is even broader since MINUSCA can arrest anyone suspected of breaching the law. As to restrictions *ratione temporis*, even if the measures are said to be “time-bound”,¹⁰⁰ the Security Council did not specify what the limit may be, though it could have done so by either deciding on a specific duration, or by circumscribing the execution of the measures to certain circumstances such as the improvement of security conditions. Furthermore, the Security Council has systematically renewed the measures with each mandate. Under such circumstances, MINUSCA is thus acting as any police force fulfilling its law and order functions.

The Security Council did however limit the execution of the measures to a (still quite broad)¹⁰¹ geographical circumstance: “areas where national security forces are not present or operational”.¹⁰² Paradoxically, this restriction precisely reveals the qualitative shift induced by the measures from support to direct executive functions. Indeed, peacekeeping missions, however robust they may be, still implement their mandate in *support* of the host State. This is obvious in the

⁹⁹ C. Timberg, ‘Liberia’s Taylor Found and Arrested’ (2006) available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879.html> (last visited on 20 November 2018).

¹⁰⁰ See all MINUSCA resolutions previously cited, *supra* notes 3, 14 and 22. It is worth noting that the “temporary” measures have so far been renewed systematically in each new mandate.

¹⁰¹ See, for the latest account, Secretary-General, *Report on the Central African Republic October 2017*, *supra* note 59, para. 12-24.

¹⁰² See all MINUSCA resolutions previously cited, *supra*, notes 3, 14 and 22.

general philosophy of peacekeeping detailed above,¹⁰³ in the terminology used in UN documents, whether doctrinal¹⁰⁴ or operational,¹⁰⁵ and in concrete activities. UN peacekeeping missions usually contribute to law and order, rule of law, justice, and fighting impunity by supporting, training, assisting, or helping with reforms of national institutions.¹⁰⁶ For instance, they accompany local police forces when patrolling, or visit tribunals or prisons to provide advice to local personnel.¹⁰⁷ But, in the case of MINUSCA, when implementing the measures, the mission intervenes on its own, hence neither supporting national institutions, nor contributing to the strengthening of their capacities. It does provide such support otherwise as will be explained in part C, but not through the execution of the measures.

¹⁰³ See A. Normative Framework and Implications of the Urgent Temporary Measures.

¹⁰⁴ *United Nations Peacekeeping Operations – Principles and Guidelines*, *supra* note 1, 18.

¹⁰⁵ Except for the protection of civilians and itself, MINUSCA is mandated to provide support to the Central African authorities in general, including with respect to “support for national and international justice, the fight against impunity, and the rule of law” which includes “To help reinforce the independence of the judiciary, build the capacities, and enhance the effectiveness of the national judicial system as well as the effectiveness and the accountability of the penitentiary system; (ii) To help build the capacities of the national human rights institution”, “To provide technical assistance to the CAR Authorities to identify, investigate and prosecute those responsible for crimes involving violations of international humanitarian law and of violations and abuses of human rights”, “To provide support and to coordinate international assistance to the justice and correctional institutions to reinstate the criminal justice system”, “To provide technical assistance to the CAR Authorities in partnership with other international partners, to support the operationalization of the [Special Criminal Court]”, “To provide technical assistance, in partnership with other international partners, and capacity building for the CAR Authorities, in order to facilitate the functioning of the SCC”, “To assist in the coordination and mobilization of bilateral and multilateral support to the operationalization and functioning of the SCC”, and “To provide support and to coordinate international assistance to build the capacities, and enhance the effectiveness of the criminal justice system as well as the effectiveness and the accountability of police and penitentiary system”, SC Res. 2387, *supra* note 14, para. 43. See also for similar wording SC Res. 2217, *supra* note 22, para. 32 and SC Res. 2301, *supra* note 22, para. 34

¹⁰⁶ Secretary-General, *Strengthening and coordinating United Nations rule of law activities*, UN Doc A/71/169, 20 July 2016, para. 29-37 [Secretary-General, United Nations rule of law activities July 2016]; Secretary-General, *Strengthening and coordinating United Nations rule of law activities*, UN Doc A/70/206, 27 July 2015, para. 37-44 [Secretary-General, United Nations rule of law activities July 2015]; Secretary-General, *Strengthening and coordinating United Nations rule of law activities*, UN Doc A/69/181, 24 July 2014, para. 23-27 [Secretary-General, United Nations rule of law activities July 2014]; and previous reports on the same subject.

¹⁰⁷ *Ibid.*

MINUSCA then becomes, on some parts of the Central African territory, the sole “legitimate” bearer of public force.¹⁰⁸ As a consequence, its mandate is best addressed as an example of international territorial administration,¹⁰⁹ even if more limited than model cases of the United Nations administrations in Kosovo and Timor Leste where the United Nations held executive powers, including enforcement of law and order.¹¹⁰ Mégret and Hoffmann consider cases of international territorial administration as “qualitative” changes in peacekeeping practice and define them according to the fact that these missions implement “policing and order-maintenance work that is usually taken care of by the state”.¹¹¹ Cases of international territorial administration by the United Nations in contexts such as Kosovo and Timor Leste have been criticized for their lack of accountability and failure to uphold human rights, all the more important since these missions held executive powers.¹¹² Similar problems may arise in relation to the execution of the urgent temporary measures by MINUSCA, particularly because of the absence of a proper remedy to challenge the legality of the measures.¹¹³ However, the executive nature of MINUSCA’s mandate is not officially acknowledged by the United Nations (though it is acknowledged

¹⁰⁸ In political theory, this function is the main attribute of public power and defines sovereignty (see, for instance, M. Weber, *The Theory of Social and Economic Organization* (1922), translated by A.M. Henderson and Talcott Parsons (1947), 156. MINUSCA’s legitimacy derives from the Security Council resolutions and the fact that they are compatible with peacekeeping norms, see above, part A.

¹⁰⁹ On unnoticed instances of international territorial administrations, see R. Wilde, ‘From Danzig to East Timor and Beyond: The Role of International Territorial Administration’, 95 *The American Journal of International Law* (2001) 583.

¹¹⁰ In Timor Leste, the Security Council decided that the United Nations Transitional Administration in East Timor (UNTAET) would “exercise all legislative and executive authority, including the administration of justice”, SC Res. 1272, UN Doc S/RES/1272 (1999), 25 October 1999, para. 1. UNMIK was similarly mandated to “[m]aintaining civil law and order”, SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999, para. 11.

¹¹¹ Mégret & Hoffmann, *supra* note 37, 328.

¹¹² “Where the UN itself acts as the government, the normal rationale for immunity, shielding the organization from state interference, makes little sense” F. Rawski, ‘To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations’, 18 *Connecticut Journal of International Law* (2002) 103, 105. For criticisms regarding the lack of accountability of these missions, see Mégret & Hoffman, *supra* note 37, as well as P. Klein, ‘L’administration internationale de territoire : quelle place pour l’Etat de droit ?’, in Société française pour le droit international (S.F.D.I.) (ed.), *L’État de droit en droit international: colloque de Bruxelles* (2009), 385; E. De Brabandere, ‘Immunity of International Organizations in Post-Conflict International Administrations’, 7 *International Organizations Law Review* (2010), 79.

¹¹³ See C. I.

internally),¹¹⁴ and thus legal implications stemming from it are more likely to go unnoticed and unaddressed.

Through comparison with previous practice of arrests and detentions by peacekeeping missions, this section showed that MINUSCA's urgent temporary measures constitute a qualitative shift that is however not addressed as such, since it is hidden in an otherwise robust but standard multidimensional peacekeeping mandate. However, the executive dimension within MINUSCA's mandate bears the risk of bringing about problems of accountability and respect for human rights that experiences of international territorial administrations by the United Nations have already revealed. These problems will be further addressed in the final part of the article, which will take a closer look at the compatibility between the execution of the measures and support to the rule of law, including respect for human rights and accountability.

D. Conceptual Framework and Implications of the Urgent Temporary Measures

Previous developments analyzed the urgent temporary measures within the framework of general peacekeeping doctrine and practice by the United Nations, which revealed that the execution of the urgent temporary measures reached the limits of peacekeeping practice, even in a broad, robust understanding of it, so that it is best addressed as a case of international territorial administration, even if limited. The present section will now look at the urgent temporary measures from the perspective of their own rationale, that is, the rule of law. Authorizing MINUSCA to arrest and detain individuals in order to promote the rule of law, justice, and fight against impunity, reveals the very specific conception of the rule of law that the United Nations upholds in the Central African Republic. Besides, since MINUSCA is acting like a State when implementing the measures, resorting to the rule of law paradigm to analyze the measures becomes all the more relevant.¹¹⁵

¹¹⁴ Interview conducted by the author with UN DPKO staff, 8 November 2017. This is also evident from general UN discourse on the mission.

¹¹⁵ "This kind of UN peacekeeping thus seems to be the UN activity closest to actions of organs of a nation state. Therefore, the view can be taken that in this specific context the contents of the rule of law which apply to UN staff should more or less be congruent with those the rule of law in the UN Declaration provides for States on the national level", C. Feinäugle, 'The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction From an International Public Authority Perspective', 7 *Goettingen Journal of International Law* (2016), 157, 178.

In the resolution creating MINUSCA, the urgent temporary measures were not part of paragraph 30 of the resolution which covered the tasks included in the mission's mandate *per se*.¹¹⁶ In later resolutions, both the paragraph on the urgent temporary measures and the paragraph authorizing MINUSCA to apprehend suspects of serious human rights and humanitarian law violations were related to the rule of law, though the exact formulation varied from "Support for national and international justice and the rule of law",¹¹⁷ "Assistance to advance the rule of law and combat impunity",¹¹⁸ to "Support for national and international justice, the fight against impunity, and the rule of law", and, specifically, "Rule of law" in the later version of the mandate.¹¹⁹ The link between implementation of the measures and the rule of law is further confirmed by the objectives expressly associated with the urgent temporary measures: the authorization to arrest human rights violators serves the purposes of "the restoration and maintenance of public safety and the rule of law",¹²⁰ while the urgent temporary measures as such will "maintain basic law and order and fight against impunity".¹²¹

The link between MINUSCA arresting and detaining individuals, and the promotion of the rule of law, justice, and the fight against impunity, thus seems evident for the United Nations. Such a causal relationship is, however, questionable if one looks at most definitions of the rule of law, justice, and impunity, including those of the United Nations itself. For the sake of the present demonstration, justice and the fight against impunity will be regarded as sub-elements of the rule of law, so that the argument will mostly revolve around definitions of the rule of law. This is justified by the UN's own conception of these notions. The Secretary-General associated the concepts of the rule of law and justice in its report proposing definitions of these two notions, which regards the rule of law as

¹¹⁶ SC Res. 2149, *supra* note 3.

¹¹⁷ SC Res. 2217, *supra* note 22, para. 33 and SC Res. 2301, *supra* note 22, para. 35. Note that in the 2015 mandate, the urgent temporary measures appear as an autonomous task of the mandate, while the authorization to arrest those suspected of serious breaches of human rights and humanitarian law appears under the "Support for national and international justice and the rule of law" component of the mandate.

¹¹⁸ SC Res. 2301, *supra* note 22, para. 34.

¹¹⁹ SC Res. 2387, *supra* note 14, para. 43.

¹²⁰ All but the 2014 resolution, *supra* notes 14 and 22.

¹²¹ All resolutions previously cited, *supra* notes 3, 14 and 22.

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”¹²²

In the same report, the Secretary-General adds that “justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large”.¹²³ The conceptual closeness between these two definitions is rather self-explicit since they both refer to notions of accountability, procedural guarantees, and cover substantive human rights content. The fight against impunity appears as a practical consequence of these two notions. In practice, the promotion of justice, support to justice systems and mechanisms, and fighting against impunity are widely regarded by the United Nations as elements contributing to the promotion of the rule of law in general, for instance in the Secretary-General reports on the rule of law.¹²⁴

In its Declaration on the rule of law of 2012, the General Assembly, though not adopting any official definition of the rule of law, still referred to some elements of the Secretary-General’s definition, stating that “all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law”.¹²⁵ The Declaration also associated

¹²² Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc S/2004/616 (2004), 23 August 2004, para. 6 [Secretary General, Rule of law and Transitional Justice in Conflict and Post-conflict Societies].

¹²³ *Ibid.*, para. 7.

¹²⁴ See, among others, Secretary-General, *United Nations rule of law activities July 2016*, *supra* note 106, para. 30 and para. 40; Secretary-General, *United Nations rule of law activities July 2015*, *supra* note 106, para. 46; Secretary-General, *United Nations rule of law activities July 2014*, *supra* note 106, para. 24 and 28-32; and previous reports on the same subject.

¹²⁵ GA Res. 67/1, UN Doc A/RES/67/1, 30 November 2012, para. 2.

the rule of law and justice, and recalled that the rule of law applied to the UN itself.¹²⁶

The present section will rely on the description of the rule of law contained in the Declaration of the General Assembly and on the above-mentioned definition of the rule of law by the Secretary-General, in order to evidence the extent to which the rule of law promoted and enforced by MINUSCA greatly differs from these conceptions. The demonstration will proceed in two parts, first focusing on the contradictions between the urgent temporary measures and the rule of law as described in the Declaration and defined by the Secretary-General, including related conceptions of justice and the fight against impunity, and second showing that *enforcement* of the rule of law through the execution of the measures is incompatible with the concept of the rule of law itself.

I. Contradictions Between the United Nations' Conception of the Rule of Law and the Urgent Temporary Measures

The central element in both the General Assembly's Declaration and the Secretary-General's definition of the rule of law, as well as in conceptions of justice and the fight against impunity, appears to be accountability.¹²⁷ Accountability of the Secretariat is defined by the General Assembly as "the obligation of the Secretariat and its staff members to be answerable for all decisions made and actions taken by them, and to be responsible for honouring their commitments, without qualification or exception."¹²⁸ If military and police components of peacekeeping missions are not "staff members" of the Secretariat per se, the Secretary-General still affirmed on numerous occasions that peacekeepers had to abide by the

¹²⁶ "We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities", *ibid.*

¹²⁷ See again, "all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law", *ibid.*, "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws", Secretary General, *Rule of law and Transitional Justice in Conflict and Post-conflict Societies*, *supra* note 122, para. 6.

¹²⁸ GA Res. 64/259, UN Doc A/RES/64/259, 5 May 2010, para. 8.

rule of law,¹²⁹ and were to be held accountable.¹³⁰ Yet, implementation of the executive measures, though theoretically contributing to the rule of law, results in a violation of the principle of accountability. Indeed, notwithstanding the much debated issue of accountability of peacekeepers in general, the measures themselves lack a mechanism that would hold MINUSCA forces accountable for the arrests and detentions that they carry out. In the absence of such a mechanism, MINUSCA is at risk not only of failing to respect the accountability requirement in the definition of the rule of law, but also of actively violating a set of human rights explicitly or implicitly mentioned in the definition of the rule of law, particularly the right to judicial remedy and a fair trial,¹³¹ as well as general “protection of the law”.¹³² Indeed, if the Secretary-General did (indirectly) address the question of protection of individuals detained by UN peacekeeping operations through, for instance, the UN Bluebook on Criminal Justice Standards for UN Police updated in 2009,¹³³ the Bulletin on Observance by UN Forces of International Humanitarian Law,¹³⁴ or the Interim Standard Operating Procedures on Detention in UN Peace Operations,¹³⁵ there is no general mechanism allowing individuals to contest their arrest and detention before the United Nations,¹³⁶ nor is there such a mechanism for MINUSCA specifically.

For that matter, the UN did set up mechanisms to address possible human rights violations where it exercised executive powers. In Kosovo, an

¹²⁹ He did so notably in his report proposing a definition of the rule of law, where he stated that “if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law”, Secretary General, *Rule of law and Transitional Justice in Conflict and Post-conflict Societies*, *supra* note 122, para. 33.

¹³⁰ Secretary-General, *In larger Freedom: towards Development, Security and Human Rights for all*, UN Doc A/59/2005, 21 March 2005, para. 113; *UN Peacekeeping Guidelines*, *supra* note 1, 15 and 79.

¹³¹ GA Res 217 (III), UN Doc A/RES/217, 10 December 1948, Art. 8-10.

¹³² GA Res. 67/1, *supra* note 125, para 2.

¹³³ Department of Peacekeeping Operations & United Nations Office on Drugs and Crime, *United Nations Criminal Justice Standards for United Nations Police*, 2009.

¹³⁴ Secretary-General, *Observance by United Nations Forces of International Humanitarian law*, UN Doc ST/SGB/1999/13, 6 August 1999.

¹³⁵ Not publicly available, mentioned in Mathias, *supra* note 50, 109.

¹³⁶ M. Heupel & M. Zürn, *Protecting the Individual from International Authority: Human Rights in International Organizations* (2017), 189-191.

Ombudsperson¹³⁷ and later a Human Rights Advisory Panel¹³⁸ were created (with much delays and limited competency and funding), as well as a commission which was mandated specifically to review detentions but lasted only three months.¹³⁹ Similarly, the International Force for East Timor, which supported the United Nations Transitional Administration in East Timor (UNTAET), created a Detainee Management Unit which operated for a few months,¹⁴⁰ while UNTAET eventually set up an Ombudsperson,¹⁴¹ though all of these institutions have been criticized for their relative lack of efficiency.¹⁴² More generally, and since such a mechanism does not exist for MINUSCA, it is worth recalling that the United Nations as an organization enjoys absolute immunity, including for violations of fundamental human rights.¹⁴³ The general framework of functional immunity enjoyed by UN peacekeeping personnel¹⁴⁴ (civilian police staff¹⁴⁵ as well as military contingents¹⁴⁶) with respect to acts committed in the exercise

¹³⁷ *On the Establishment of the Ombudsperson Institution in Kosovo*, U.N. Doc. UNMIK/REG/2000/38, 30 June 2000.

¹³⁸ *On the Establishment of the Human Rights Advisory Panel*, U.N. Doc. UNMIK/REG/2006/12, 23 March 2006.

¹³⁹ *On the Establishment of a Detention Review Commission for Extra-judicial Detentions based on Executive Orders*, UN Doc. UNMIK/REG/2001/18, 25 August 2001. See also De Brabandere, *supra* note 112, 115.

¹⁴⁰ M. Kelly *et al.* (eds), 'Legal Aspects of Australia's Involvement in the International Force for East Timor', 83 *International Review of the Red Cross* (2001) 101.

¹⁴¹ UNTAET Daily Briefing, *Twenty Cases Examined by Ombudsperson*, 1 June 2001. See also De Brabandere, *supra* note 112, 117.

¹⁴² Klein, *supra* note 112, 393-396; De Brabandere, *supra* note 112, 112-116.

¹⁴³ *Mothers of Srebrenica v. The State of the Netherlands and the United Nations*, Supreme Court of the Netherlands, case n°200.022.151/01, 30 March 2010, para. 5.1.

¹⁴⁴ *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, 1 UNTS 15. For an extensive overview of applicable customary and conventional law, see D. Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations', 95 *International Review of the Red Cross* (2013) 613.

¹⁴⁵ Personnel of UN Civilian police is to be considered as "experts" according to the Model Status of Forces Agreement, thus enjoying functional immunity as provided for in the *Convention on the Privileges and Immunities of the United Nations*, *supra* note 144, para. 26.

¹⁴⁶ Generally provided by Status of Forces Agreements, though in the case of MINUSCA, this document is not publicly available. According to the Model Status of Forces Agreement, only the contributing State has jurisdiction to prosecute military personnel for criminal offences, Secretary-General, *Report of the Secretary-General: Model Status-of-Forces Agreement for Peace-Keeping Operations*, UN Doc A/45/594, 9 October 1990, para. 47. Since arrests and detentions are unlikely to qualify as criminal offences, it appears that military contingents would also be protected by immunity provisions in this scenario.

of their duties will most likely protect them from facing charges with respect to unlawful arrests or detentions.¹⁴⁷

Moreover, supposing that individuals arrested and detained by MINUSCA forces could seek remedy before national courts after they have been transferred to the Central African authorities, they will face a highly dysfunctional justice system,¹⁴⁸ the incapacity of which to dispense justice is precisely the justification for MINUSCA's support to the rule of law in general, and for the urgent temporary measures in particular. As the Secretary-General reports on the decision to enforce the measures:

“A United Nations multidisciplinary team visited the Central African Republic to develop recommendations with regard to the adoption of urgent temporary measures to maintain basic law and order and fight impunity pursuant to paragraph 40 of resolution 2149 (2014). The team confirmed an almost total lack of capacity of national counterparts in the areas of police, justice and corrections. (...) The team recommended that, where national actors and institutions are unable to adequately assume their roles and perform their functions, international personnel should have the authority, exceptionally, to take over those roles and functions and perform them directly”.¹⁴⁹

Furthermore, the execution of the measures contradicts the principles of “legal certainty” and “procedural and legal transparency” since UN peacekeepers continue to operate in a legal vacuum that has been highlighted by previous

¹⁴⁷ See, on this issue, R. Burke, ‘Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity’, 16 *Journal of Conflict and Security Law* (2011) 63; Fleck, *supra* note 144; Rawski, *supra* note 112, De Brabandere, *supra* note 112.

¹⁴⁸ The incapacity of the Central African justice system to dispense justice – or its total absence – has been reported throughout most Secretary-General's reports on the Central African Republic. The Secretary-General notes that “[r]ampant impunity remains a major challenge throughout the country. Rule of law institutions are totally absent outside Bangui. (...) Since my last report, no major crime cases have been investigated, prosecuted or adjudicated by the authorities”, *Report of the Secretary General on the Central African Republic*, UN Doc S/2014/562, 1 August 2014, para. 16 [Secretary-General, Report on the Central African Republic August 2014]. See also Human Rights Watch, *Meurtres Impunis: Crimes de Guerre, Crimes contre l'humanité et la Cour Pénale Spéciale en République Centrafricaine* (2017), 82-83.

¹⁴⁹ Secretary-General, *Report on the Central African Republic August 2014*, *supra* note 148, para. 52.

research.¹⁵⁰ The paragraphs on arrests of alleged criminals in MINUSCA's mandate specify that arrests should be "consistent with international law",¹⁵¹ which is too vague a provision to offset the problem of legal uncertainty. A staff member of the Department of Peacekeeping Operations (DPKO) interviewed on the topic¹⁵² answered that MINUSCA forces were to apply national law, particularly since the Central African Criminal code and Code of Criminal Procedure had both been redrafted in the 2000s with the support of the United Nations and were thus regarded as compliant with international human rights standards.¹⁵³ However, the extent to which UN police and military forces are knowledgeable of the Central African Codes remains doubtful. It also poses the question of which law is applicable to the execution of the measures, in the hypothesis that some dispositions of the Central African Codes contradict international law provisions on that matter and since the UN has elaborated (non-binding) guidelines for peacekeeping forces carrying out police and similar functions.¹⁵⁴ Finally, such legal uncertainty further complicates the issue of accountability, since it becomes all the more difficult to hold MINUSCA forces accountable in the absence of a clear legal framework.¹⁵⁵

Execution of the measures thus contradicts several elements of the UN's conception of the rule of law as set out in the Declaration of the General Assembly and in the definition of the Secretary-General, including the principle of accountability, recognized international human rights such as the right to judicial remedy, "equal protection of the law", and legal certainty.

¹⁵⁰ "Falling back on the national laws and police practices of the respective police officer or contingent equally does not meet the requirements of the rule of law. More precise guidance is needed on what should replace any insufficient law, at least in the areas where UN police work directly affects the rights of citizens of the host state" T. Fitschen, 'Taking the Rule of Law Seriously : More Legal Certainty for UN Police in Peacekeeping Missions', 9 *Geneva Papers* (2012), 6.

¹⁵¹ See SC Res. 2387, *supra* note 14; SC Res. 2301, *supra* note 22.

¹⁵² Interview conducted by the author with UN DPKO staff, 17 November 2017.

¹⁵³ "The reforms reflected in the new code of criminal procedure focused, inter alia, on the harmonization of domestic penal laws with universally recognized principles governing the rights of the accused", Secretary-General, *Report of the Secretary-General on the situation in the Central African Republic and on the activities of the United Nations Peacebuilding Support Office in that country*, UN Doc S/2009/627, 8 December 2009, para. 49.

¹⁵⁴ *Supra* notes 133-135.

¹⁵⁵ Fitschen, *supra* note 150, 6 and 25.

II. The Paradox of Enforcing the Rule of Law

One of the elements of the Secretary-General's definition of the rule of law, "participation in decision-making", recalls what, according to a majority of scholars, the rule of law truly is: a constitutional principle organizing the relationship between a State and its citizens.¹⁵⁶ In that perspective, the very fact that the rule of law is "enforceable" by a peacekeeping mission through the execution of measures, like the urgent temporary measures, negates the constitutional essence of the principle. Indeed, this "rule of law" undercuts the possibility of the State-citizens relationship to even exist by directly intervening in lieu of the State and assuming its functions. Such a paradox raises the question of the conception of the rule of law as developed by the United Nations in post-conflict settings: what is its content and what are its functions?

The urgent temporary measures are the most obvious example of the conception of the rule of law that the UN has developed in conflict and post-conflict settings, i.e. a concept amounting to criminal justice, with a primary law and order and securitization objective.¹⁵⁷ This understanding of the rule of law is evident in other provisions of MINUSCA's mandate on the rule of law as well. In addition to apprehending alleged human rights and humanitarian law violators, the other task in MINUSCA's latest mandate to support the rule of law is to "provide support and to coordinate international assistance to build the capacities, and enhance the effectiveness of the criminal justice system as well as the effectiveness and the accountability of police and penitentiary system",¹⁵⁸ while previous mandates comprised similar tasks related to the "criminal justice system".¹⁵⁹ United Nations peacekeeping missions¹⁶⁰ and agencies¹⁶¹ acting in

¹⁵⁶ Amongst others, Kanetake affirms that the rule of law "regulates the relations between the national government and individuals under its jurisdiction", M. Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework Paper', in M. Kanetake & A. Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (2016), 15. See also A. Lewis, *Judicial Reconstruction and the Rule of Law: Reassessing Military Intervention in Iraq and Beyond* (2012), 13; J. Chevallier, *L'État de droit*, 5th ed. (2010), 13.

¹⁵⁷ See again R.Z. Sannerholm & F. Wall, *supra* note 33.

¹⁵⁸ SC Res. 2387, *supra* note 14, para. 43.

¹⁵⁹ See all resolutions previously cited, *supra* notes 3, 14 and 22.

¹⁶⁰ See the missions enumerated, *supra* note 33.

¹⁶¹ Under its section "Just and Accessible Rule of Law", the United Nations Development Assistance Framework in Afghanistan 2015-2019 reports that "Most rule of law funding supported the MoI and Afghan National Police (...). In addition, courthouses have been re-built, judges have been trained (...). Prosecutors have been trained and joint police-prosecutor work has been initiated. Additional prisons and detention centres have been

other post-conflict settings demonstrate a similar approach to the rule of law embodied in the police, justice, and corrections systems. In a resolution on multidimensional peacekeeping operations, the Security Council noted that these missions could be mandated to “[s]upport the strengthening of rule of law institutions of the host country (...) in helping national authorities develop critical rule of law priorities and strategies to address the needs of police, judicial institutions and corrections system and critical interlinkages thereof”.¹⁶² This conception of the rule of law as amounting to the functioning of the “criminal justice chain” at the same time explains, and is further reinforced by, the adoption of the urgent temporary measures to support the rule of law in MINUSCA’s mandate. This specific conception of the rule of law allows it to not only be supported, but also enforced, by measures such as arrests and detentions carried out by an external armed force in a relative legal vacuum. The fact that the UN sees the rule of law as a functioning criminal justice system thus explains the paradox highlighted above, according to which direct law enforcement measures can be implemented externally but still be regarded as a way to uphold the rule of law.

E. Conclusion

MINUSCA has been mandated to implement “urgent temporary measures” allowing for arrests and detentions of individuals by UN forces, together with the authorization to apprehend those suspected of having committed serious violations of human rights and humanitarian law in the Central African Republic. If such authorizations are not entirely new in a UN peacekeeping context, they nonetheless carry important legal and conceptual implications that this contribution sought to address. First, the present article demonstrated that, if execution of the measures appears to be compatible with the normative framework for peacekeeping, including the principles of consent, impartiality, and the non-use of force, this was made possible only at the theoretical level and on the basis of a very broad and flexible understanding of these principles.

built or refurbished” *United Nations Development Assistance Framework in Afghanistan 2015-2019*, 13; see also the programmes implemented under the Rule of Law section of the United Nations Development Programme (UNDP) in Afghanistan, available at <http://www.af.undp.org/content/afghanistan/en/home/ourwork/crisispreventionandrecovery/overview.html> (last visited 26 November 2018); the *Integrated Strategic Framework of the United Nations in Haiti 2010-2011*, 11; the *United Nations Development Assistance Framework in Sierra Leone 2008-2010*, 5.

¹⁶² SC Res. 2086, *supra* note 10, para. 8.

At the “field” level, the compatibility of the urgent temporary measures with peacekeeping doctrine is more dubious. Comparison between the conditions under which the measures are implemented, and previous practice of arrests and detentions by UN peacekeeping forces, further showed that the measures could hardly be considered as any other peacekeeping tool. Rather, the measures confer MINUSCA executive powers, and are best addressed as examples of international territorial administration. Indeed, they bring about the same problems of accountability and respect for human rights. It is thus all the more paradoxical that the urgent temporary measures and the authorization granted to MINUSCA to apprehend alleged criminals be presented as serving the rule of law, justice, and the fight against impunity, in addition to “basic law and order”.¹⁶³ Indeed, the urgent temporary measures turned out to be incompatible with the UN’s own general conception of the rule of law at the international level, particularly because of the lack of accountability and legal certainty that prevail in the implementation of the measures. More fundamentally, the very fact that MINUSCA directly enforces such measures is irreconcilable with the essence of the rule of law as a principle governing the relationship between a State and its citizens. Such a paradox reveals the extremely specific conception of the rule of law that the UN supports in post-conflict settings, which revolves around enforcing criminal justice. The extent to which the urgent temporary measures promote the rule of law in the Central African Republic thus depends on the understanding of the rule of law that one chooses to adopt: a functioning criminal justice system or a legal principle organizing the State-citizens relationship.

¹⁶³ See all resolutions previously cited, *supra* notes 3, 14 and 22.