

**A tale of three nations ? : The role of United Nations peacekeepers and missions on the concept of nation-state, nationalism, and ownership of the state in Lebanon, the Democratic Republic of theCongo, and Kosovo.**

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**Part I**

The concept of nationalism of ideology and shared values has existed since Biblical times,<sup>1</sup> and has only become more prominent in societal structure in the centuries which have followed . Many attempts to define what is and is not nationalism have been made throughout history,<sup>2</sup> yet despite these attempts there is no perfect formula for what gives rise to nationalism or what makes a nation-state and how to create it. However, at its core a nation is made of people, and all nations, regardless of organization, ideology, or ethnicity, turn to law to control – if not shape – their societies. This duality of basic composition is perhaps best illustrated by the Black’s Law Dictionary definitions of “nation”<sup>3</sup> and “state.”<sup>4</sup> According to these definitions, a “nation” is “[a] large group of people having a common origin, language, and tradition and usually constituting a political entity,”<sup>5</sup> while a “state” is “[t]he political system of a body of people who are politically organized; the system of rules by which jurisdiction and authority are exercised over such a body of people.”<sup>6</sup> From this emerges the unity of people and law

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<sup>1</sup> Throughout the Old and New Testaments of the Bible, there are repeated references to tribal groups which functioned as sources of government, laws, kinship, religion, and culture, such as the Canaanites and the Hittites.

<sup>2</sup> There are myriad publications addressing the topic of nationalism and the nation-state. For a cross-section of this scholarship, *see generally* ANTHONY D. SMITH, NATIONAL IDENTITY (Reno, NV: University of Nevada Press 1991); BENEDICT ANDERSON, IMAGINED COMMUNITIES (London: Verso 1991); ERNEST GELLNER, NATIONS AND NATIONALISM (Ithaca, NY: Cornell University Press 1983).

<sup>3</sup> BLACK’S LAW DICTIONARY 1045 (7<sup>th</sup> ed.).

<sup>4</sup> *Id.* at 1415 (7<sup>th</sup> ed..).

<sup>5</sup> *Id.* at 1045

<sup>6</sup> *Id.* at 1415.

which forms the fundamental core of the global concept of a nation-state,, regardless of where one believes the concept itself originated.

With the advent of the United Nations (U. N.) in the aftermath of World War II, nations and nationalism became framed in the concept of “self-determination.”<sup>7</sup> This concept - originally meant to refer only to allowing areas under colonial control to determine whether they would remain under colonial control or forge their own states<sup>8</sup> - has taken on a life of its own and has been used in the international law realm to support the idea of breaking up states and providing support - especially from the United Nations - for splinter groups wishing to form their own states, regardless of whether these groups were part of the colonial apparatus that the United Nations’ charter was intended to eradicate.<sup>9</sup>

The U. N. Charter also charges the members of the Security Council with maintaining international “peace and security.”<sup>10</sup> From its initial conception as a means to stop interstate conflicts,<sup>11</sup> the “peace and security” preservation strand of the U. N. Charter has been used in conjunction with the military portions of the Charter to justify the creation and deployment of United Nations peacekeepers to areas of intrastate and

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<sup>7</sup> See Joe Sills, *The United Nations and the Formation of Global Norms* in *THE UNITED NATIONS: CONFRONTING THE CHALLENGES OF A GLOBAL SOCIETY* 35 – 36 (Jean E. Krasno ed.) (Boulder, CO: Lynne Rienner Publishers 2004).

<sup>8</sup> See Sills, *supra* note 7, at 35 – 36; U.N. CHARTER chap. XI.

<sup>9</sup> Chapter XI of the U.N. Charter specifies as follows: “Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.” U.N. CHARTER chap. XI.

<sup>10</sup> U.N. CHARTER chap. I, art. 1; *see also* Sills, *supra* note 7, at 51 – 53.

<sup>11</sup> See Sills, *supra* note 7, at 51 – 53; Jean E. Krasno, *The End of the Scourge of War: The Story of UN Peacekeeping* in *THE UNITED NATIONS: CONFRONTING THE CHALLENGES OF A GLOBAL SOCIETY* 225 - 232 (Jean E. Krasno, ed.) (Lynne Rienner Publishers: Boulder, CO. 2004).

intra-society conflict as well.<sup>12</sup> From keepers of peace and protectors of innocent populations, U. N. peacekeeping missions have come to encompass multi-faceted operations which attempt not only to protect human innocents, but also to create a legal and governmental structure for the affected areas.<sup>13</sup> Many of the legal systems which the U. N. attempts to impose in the areas where peacekeepers are deployed involve creating a constitution which, at least in name, guarantees that all peoples in an affected area are represented in various governmental and political bodies.<sup>14</sup>

This article will address the issue of whether U. N. peacekeeping missions and their attendant attempts to restructure the laws and governments of the affected areas actually promote the creation of a healthy and viable nation-state. By examining three United Nations missions – the United Nations Interim Force in Lebanon (UNIFIL),<sup>15</sup> the United Nations Mission in the Democratic Republic of the Congo (UNMONUC) in the Democratic Republic of Congo,<sup>16</sup> and the United Nations Mission in Kosovo (UNMIK)<sup>17</sup> – this article will examine several cases to see whether these peacekeeping missions do in fact lead to viable nation-states. The areas to be examined are the physical stability of the area and the ability of the peacekeepers and missions to prevent and respond to violence<sup>18</sup>; the stated goals and activities of the peacekeepers and the missions for the affected areas;<sup>19</sup> and the constitutional and/or governing documents which the missions

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<sup>12</sup> See OVERVIEW: QUESTIONS AND ANSWERS, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, available at <http://www.un.org/Depts/dpko/dpko/faq/> (last visited Nov. 10, 2005) (detailing the rise in peacekeeping deployments and operational scope).

<sup>13</sup> See *infra* Parts II, III, IV, V.

<sup>14</sup> See *infra* Parts II, III, IV.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *infra* Part IV.

<sup>18</sup> See *infra* Parts II, III, IV.

<sup>19</sup> See *infra* Parts II, III, IV.

have either promulgated or are in the process of attempting to promulgate for the affected areas.<sup>20</sup>

Part II of this article addresses Lebanon and UNIFIL.<sup>21</sup> Part II opens with a brief discussion of the previous role of the U. N. in Lebanon,<sup>22</sup> as well as a short background review of both the past and current state of Lebanese politics, law, and society.<sup>23</sup>

Discussion then moves to the UNIFIL mission itself, which was started in 1978 as an “interim” mission, yet continues to exist through the present day and indeed has been extended through 2006.<sup>24</sup> Finally, Part II concludes with analysis of the overall impact which UNIFIL has had on Lebanese law and society.<sup>25</sup>

Part III addresses the Democratic Republic of the Congo and UNMONUC.<sup>26</sup> As the Congo was also the site of an earlier U. N. peacekeeping mission (indeed, this was in many ways the first official site of a peacekeeping mission under the auspices of the U.N. peacekeeping force as it is currently envisioned<sup>27</sup>), Part III will open with a short history of the previous U. N. peacekeeping presence in the Congo.<sup>28</sup> Discussion will then turn to the history of the current conflict in the Congo.<sup>29</sup> This in turn leads to a discussion of UNMONUC.<sup>30</sup> Part III will conclude with analysis of the impact of UNMONUC on the stability of the Congo, as well as on the state of law and society in the Congo.<sup>31</sup>

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<sup>20</sup> See *infra* Parts II, III, IV.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See *infra* Part II. A.

<sup>23</sup> See *infra* Part II. B.

<sup>24</sup> See *infra* Part II. C.

<sup>25</sup> See *infra* Part II. D.

<sup>26</sup> See *infra* Part III. A.

<sup>27</sup> See *infra* Part III. A.

<sup>28</sup> See *infra* Part III. A.

<sup>29</sup> See *infra* Part III. B.

<sup>30</sup> See *infra* Part III. C.

<sup>31</sup> See *infra* Part III. D.

Part IV addresses Kosovo and UNMIK – and, by extension, Serbia and Montenegro.<sup>32</sup> A brief history of the Kosovo conflict opens Part IV, accompanied by a discussion of the current state of law, government and society in Serbia and Montenegro.<sup>33</sup> An examination of UNMIK follows, with close attention paid to both the escalation in violent incidents in Kosovo over recent months while UNMIK has been present in Kosovo,<sup>34</sup> and to the draft constitution which UNMIK is attempting to have Kosovars adopt (over the objections of such U. N. Security Council members as the United States<sup>35</sup>).<sup>36</sup> The conclusion of Part IV is a two-pronged analysis of the impact of UNMIK on Kosovar law and society,<sup>37</sup> as well as a comparison of the freedoms and rights offered to Kosovars under both the UNMIK draft constitution and the current constitution of Serbia and Montenegro.<sup>38</sup>

In conclusion, Part V ties together observations and analysis from the prior parts and draws conclusions as to the role which U. N. peacekeeper missions play in the creation of viable nation-states for the future.<sup>39</sup> The ultimate conclusion of this article is that, whatever the intentions behind peacekeeping missions might be, the structure and assigned functions of the U. N. peacekeeping missions discussed at best do not assist in the building of a cohesive legal or societal structure in the affected areas to which they are deployed,<sup>40</sup> and at worst actually serve to cripple the creation of a viable nation-state by insinuating themselves, their goals and norms into the new legal structures of the

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<sup>32</sup> See *infra* Part IV. A.

<sup>33</sup> See *infra* Part IV. A.

<sup>34</sup> See *infra* Part IV. B.

<sup>35</sup> See *infra* Part IV. B.

<sup>36</sup> See *infra* Part IV. B.

<sup>37</sup> See *infra* Part IV. C.

<sup>38</sup> See *infra* Part IV. C.

<sup>39</sup> See *infra* Part V.

<sup>40</sup> See *infra* Part V.

affected areas.<sup>41</sup> In so doing, these missions do not create legal systems which reflect shared societal values and norms, but rather insert an international bureaucratic understanding of what a nation-state “should” think and do.<sup>42</sup> This, it is argued, is the exact opposite of the U. N. Charter’s requirement of self-determination and subsumes the will of the local population to the will of the U. N. bureaucracy.<sup>43</sup> As a corollary, the undermining of the nation-state concept which forms the backbone of the U. N. also undermines the U. N. Charter’s charge to the Security Council that it promote international “peace and security.”<sup>44</sup>

## **Part II – Lebanon and UNIFIL**

### **A. Missions past – UNOGIL**

Although the UNIFIL mission has been in existence in Lebanon for 27 years,<sup>45</sup> it was not the first experience U.N. peacekeepers had with Lebanon. The first U.N. peacekeepers arrived in Lebanon in 1958<sup>46</sup> for an operation termed UNOGIL (U.N. Observation Group in Lebanon).<sup>47</sup> The presence of U.N. peacekeepers under the auspices of UNOGIL was at the request of the Lebanese government.<sup>48</sup> At the time, Lebanon domestically was involved in a power struggle between several internal political factions<sup>49</sup> (with primary divisions made across religious lines, which is the norm in

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<sup>41</sup> See *infra* Part V.

<sup>42</sup> See *infra* Part V.

<sup>43</sup> See *infra* Part V.

<sup>44</sup> See *infra* Part V.

<sup>45</sup> See FREDERICK H. FLEITZ, JR., PEACEKEEPING FIASCOES OF THE 1990S: CAUSES, SOLUTIONS, AND U.S. INTERESTS 10 (Praeger: Westport, CT. 2002) (describing the many activities of UNIFIL as well as the timing of its opening in 1978).

<sup>46</sup> FLEITZ, *supra* note 45, at 12, 200 (stating that UNOGIL’s mandate was to be an “[o]bserver force deployed along the Lebanon-Syria border to monitor for illegal infiltration of arms or insurgents into Lebanon from Syria).

<sup>47</sup> Krasno, *supra* note 11, at 240.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.*; BACKGROUND NOTE: LEBANON, UNITED STATES DEPARTMENT OF STATE, available at <http://www.state.gov/r/pa/ei/bgn/35833.htm> (last visited Oct. 1, 2005) [hereinafter BACKGROUND NOTE]

Lebanon, as Lebanese law,<sup>50</sup> politics,<sup>51</sup> and society<sup>52</sup> are divided along confessional lines), and requested the U.N.'s intervention because of the increasing role which Syria was playing in giving support to some of the various factions involved in the conflict.<sup>53</sup> Although UNOGIL was created to monitor the Syrian role in the Lebanese conflict,<sup>54</sup> subsequent events in the greater Middle East led to a tenuous position for the Lebanese and UNOGIL,<sup>55</sup> which was not allowed to use force in its mandate.<sup>56</sup> Ultimately, the Lebanese government turned to the militaries of the United States and the United Kingdom to provide protection to Lebanese people and allow UNOGIL to continue with its observations.<sup>57</sup>

The UNOGIL mission did not extend past 1958, with the mission ending in December, 1958.<sup>58</sup> Despite UNOGIL's presence, and purported ability to monitor the inflow of ammunition and other resources to Lebanon, Syrian presence and control in Lebanon would not end with the UNOGIL mission.<sup>59</sup> Indeed, despite the intervention of UNOGIL, Lebanon enjoyed only a brief period of stability in the aftermath of the

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LEBANON]; LEBANON FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/geos/le.html> (last visited Oct. 22, 2005) [hereinafter LEBANON FACTBOOK].

<sup>50</sup> See LA CONSTITUTION LIBANAISE, REPUBLIQUE LIBANAISE ASSEMBLEE NATIONALE, available at <http://www.lp.gov.lb/Version%20Francaise/constitution.htm> (last visited Oct. 22, 2005);

<sup>51</sup> See generally LOI ELECTORAL PARLIMENTAIRE (2005) (containing confessional-based Parliamentary seat distribution and voting mechanisms).

<sup>52</sup> See generally Bachir Bilani, Ibrahim Najjar, Antoine El-Gemayel, *Personal Status* in THE LEBANESE LEGAL SYSTEM vol. I (Antoine El-Gemayel ed. 1985) (describing the various religious courts existing in Lebanon and their respective jurisdictions).

<sup>53</sup> See Krasno, *supra* note 11 at 240.

<sup>54</sup> See FLEITZ, *supra* note 45, at 200; Krasno, *supra* note 11, at 240.

<sup>55</sup> Krasno, *supra* note 11, at 240 (describing the impact of political instability in Iraq and Jordan on UNOGIL).

<sup>56</sup> See *id.*

<sup>57</sup> *Id.*; BACKGROUND NOTE LEBANON, *supra* note 49; BACKGROUND, LEBANON – UNOGIL, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, available at [http://www.un.org/Depts/dpko/dpko/co\\_mission/unogilbackgr.html](http://www.un.org/Depts/dpko/dpko/co_mission/unogilbackgr.html) (last visited Nov. 11, 2005) [hereinafter BACKGROUND UNOGIL].

<sup>58</sup> Krasno, *supra* note 11, at 240; BACKGROUND UNOGIL, *supra* note 57.

<sup>59</sup> See *infra* Parts II. B, C.

mission's termination before being plunged into a vicious and long-term civil war,<sup>60</sup> as discussed below. It should also be noted that this mission did not interfere in domestic Lebanese politics or life, but rather was aimed at controlling the Syrian dimension of Lebanese foreign relations; thus, UNOGIL was closer to the idea of stopping interstate conflict which was the original premise behind the promotion of "international peace and security" in the U.N. Charter used to justify the creation and existence of U.N. peacekeepers and peacekeeping missions.

## **B. Background**

As mentioned above, Lebanon is a country which is legally, politically, and societally fragmented across confessional lines; this has been the historical trend in modern Lebanon. The primary Christian groups in Lebanon are the Maronites,<sup>61</sup> and the Greek Orthodox,<sup>62</sup> with other groups such as other Uniate Churches,<sup>63</sup> Roman Catholics,<sup>64</sup> and Protestants<sup>65</sup> also comprising Christian communities in Lebanon. At the time of Lebanon's independence, the majority Muslim group were the Sunnis,<sup>66</sup> however with immigration to Lebanon from other surrounding countries, and in the aftermath of the Lebanese civil war, it is estimated that Shi'is are or will be the majority sect in the near future.<sup>67</sup>

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<sup>60</sup> BACKGROUND NOTE LEBANON, *supra* note 49; *see generally* TOUFIC K. GASPARD, A POLITICAL ECONOMY OF LEBANON 1948 – 2002: THE LIMITS OF LAISSEZ-FAIRE 97 (2004) (discussing the trends of violence and stability in Lebanon during this period).

<sup>61</sup> This sect, allied with the Roman Catholic Church, was founded on Mount Lebanon, and calls the Mountain its spiritual home. *See* OPUS LIBANI, *available at* <http://www.opuslibani.org/lb/Lebanon/dos003.html> (last visited Oct. 22, 2005).

<sup>62</sup> *See generally* EYAL ZISSER, LEBANON: THE CHALLENGE OF INDEPENDENCE 7 – 8, 61 (2000).

<sup>63</sup> *See* LEBANON FACTBOOK, *supra* note 49.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *See* Rania Maktabi, *The Lebanese Census of 1932 Revisited. Who Are the Lebanese*, 26 BRIT. J. MIDDLE EASTERN STUDS. 219 (1999).

<sup>67</sup> *See generally* BACKGROUND NOTE LEBANON, *supra* note 49; LEBANON FACTBOOK, *supra* note 49.

Although the Lebanese constitution decries confessionalism,<sup>68</sup> especially in the political realm,<sup>69</sup> and guarantees the same rights and freedoms to Lebanese of all beliefs,<sup>70</sup> the country is still governed by sectarian cleavages. Under the terms of the National Pact, an unwritten agreement entered into by the ruling confessional groups in 1958,<sup>71</sup> the position of President of the Lebanese Republic will be held by a Maronite,<sup>72</sup> the position of Lebanese Prime Minister will be held by a Sunni,<sup>73</sup> and the position of President of the Lebanese Parliament will be held by a Shi'ia.<sup>74</sup> Voters in Lebanese elections are registered by religious affiliation,<sup>75</sup> and seats in the Lebanese Parliament are apportioned among confessional parties.<sup>76</sup> In more personal terms, laws relating to personal status (typically laws having to do with marriage, divorce, family law, and inheritance<sup>77</sup>) are promulgated and administered by each sect according to its own councils and religious courts.<sup>78</sup>

As the result of many factors which are outside the scope of this article, civil war erupted in Lebanon along confessional lines in 1975 and continued until the 1990 Ta'if Accords.<sup>79</sup> This war, which saw intra-confessional fighting,<sup>80</sup> as well as inter-

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<sup>68</sup> See LEB. CONST. PREAMBLE (2005).

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See ZISSER, *supra* note 62, at 60 – 67.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> LOI ELECTORAL PARLIMENTAIRE, ch. 2 arts. 4, 13 (2005)

<sup>76</sup> See *id.*, *appx.*

<sup>77</sup> See generally Bilani et al., *supra* note 52.

<sup>78</sup> See *id.*; see also JUDICIARY: LEBANON, UNITED NATIONS DEVELOPMENT PROGRAMME, PROGRAMME ON GOVERNANCE IN THE ARAB REGION (POGAR), *available at* <http://www.pogar.org/countries/judiciary.asp?cid=9> (last visited Oct. 22, 2005).

<sup>79</sup> For a brief discussion of the Lebanese civil war, see Alexandra R. Harrington, *Resurrection from Babel: The cultural, political, and legal status of Christian communities in Lebanon and Syria and their prospects for the future*, TULSA J. COMP. & INT'L L. (forthcoming 2006).

<sup>80</sup> See *id.*

confessional strife,<sup>81</sup> not only engulfed Lebanon, but also attracted such actors as Syria, Israel, and the U.N., especially when the conflict started to create instability in the Lebanon-Israel border region where many Palestinian refugee camps were located.<sup>82</sup>

### C. UNIFIL - mandate and reality

UNIFIL was given life on March 19, 1978 through U.N. Security Council Resolutions 425 and 426.<sup>83</sup> These resolutions were passed as the result of Israeli incursions into Lebanon during the civil war,<sup>84</sup> and, in pertinent part, authorized U.N. action to stop the Israeli incursions<sup>85</sup>; this action was placed under the direction of the Secretary General.<sup>86</sup>

The first UNIFIL members arrived in the weeks immediately following the promulgation and adoption of Resolutions 425 and 426,<sup>87</sup> while diplomats were still trying to figure out the acceptability of UNIFIL in the area.<sup>88</sup> At this time, concerns were raised as to what UNIFIL would actually do for and to Lebanon and its territorial integrity.<sup>89</sup> Into the mix of the Israeli-Palestinian conflict,<sup>90</sup> the Lebanon-Israeli conflict,<sup>91</sup>

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<sup>81</sup> *See id.*

<sup>82</sup> *See id.*; see also WALID KHALIDI, CONFLICT AND VIOLENCE IN LEBANON: CONFRONTATION IN THE MIDDLE EAST 130 – 31 (Cambridge: Harvard University Press, 1979).

<sup>83</sup> U.N. SECURITY COUNCIL RESOLUTION 425 (1978); U.N. SECURITY COUNCIL RESOLUTION 426 (1978).

<sup>84</sup> *See id.*

<sup>85</sup> *See* U.N. SECURITY COUNCIL RESOLUTION 425 (“The Security Council . . . Decides, in the light of the request of the Government of Lebanon, to establish immediately under its authority a United Nations interim force of Southern Lebanon for the purpose of confirming the withdrawal of Israeli forces, restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority in the area, the force to be composed of personnel drawn from Member States.”).

<sup>86</sup> *See* U.N. SECURITY COUNCIL RESOLUTION 426 (1978) (adopting the Secretary General’s prepared report on Lebanon as the governing document for the mission established). *See also* KHALIDI, *supra* note 82, at 131 – 32 (describing the contents of the Secretary General’s report and what it would mean for the area).

<sup>87</sup> KHALIDI, *supra* note 82, at 134.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.* at 134 – 35 (describing particularly Maronite concerns that the presence of UNIFIL would only serve to undermine the idea of sovereignty in the already civil war-torn Lebanon).

<sup>90</sup> *See id.* at 134.

<sup>91</sup> *See id.*; CHARLES WINSLOW, LEBANON: WAR AND POLITICS IN A FRAGMENTED SOCIETY 221 (Routledge: New York 1996); Kranso, *supra* note 11, at 240 – 241 (describing the PLO and Israeli factions operating in the UNIFIL area and the ways in which UNIFIL access to certain areas was denied by both groups).

the Lebanese civil war,<sup>92</sup> and the complex triangular relationship between Syria, Lebanon, and Israel,<sup>93</sup> the U.N. was placing peacekeepers at the mercy of the PLO, Israeli forces, and other groups operating in the area, with very little recourse for themselves or the population living in the UNIFIL area.<sup>94</sup>

From 1978 to the present, UNIFIL has been a constant presence on the Lebanon-Israel border,<sup>95</sup> yet has been unable to impact the Lebanese-Israeli land dispute beyond monitoring and reporting incidents to higher-ups in each government and the U.N. structure,<sup>96</sup> and providing some forms of humanitarian aide to those living near the UNIFIL camp (which, while certainly admirable from a humanitarian point of view, is legally in violation of Resolutions 425 and 426, as these only authorize the interim force to be present for Israeli withdrawal from the area<sup>97</sup>).<sup>98</sup> Lebanon and Israel have gone back and forth over control of the border in the UNIFIL area, and the progress made in removing the Israelis from the contested area was attributable more to other events in the region than to the presence and action of UNIFIL.<sup>99</sup>

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<sup>92</sup> See KHALIDI, *supra* note 82, at 134 – 135; WINSLOW, *supra* note 91, at 221 – 224.

<sup>93</sup> WINSLOW, *supra* note 91, at 221 – 224.

<sup>94</sup> Indeed, the constant efforts of then-Secretary General Waldheim to ensure the safety of UNIFIL and at least some promises to honor a ceasefire – in the event that it could be brokered – are well documented. See, e.g., KHALIDI, *supra* note 82, at 133 – 137. More troubling for the prestige of the U.N. and UNIFIL in the area was the fact that ultimately the PLO and Maronite groups were brought together by the Lebanese Prime Minister in order to agree to use UNIFIL as a means of paving the way towards Lebanese territorial integrity. *Id.* at 140.

<sup>95</sup> See UNIFIL BACKGROUND, LEBANON – UNIFIL – BACKGROUND, UNIFIL: UNITED NATIONS INTERIM FORCE IN LEBANON, available at <http://www.un.org/Depts/dpko/missions/unifil/background.html> (last visited Nov. 10, 2005) [hereinafter UNIFIL BACKGROUND].

<sup>96</sup> See *id.* (“UNIFIL monitored the area through ground and air patrols and a network of observation posts. It acted to correct violations by raising them with the side concerned, and used its best efforts, through continuous, close liaison with both sides, to prevent friction and limit incidents.”).

<sup>97</sup> See U.N. SECURITY COUNCIL RESOLUTION 425 (1978); U.N. SECURITY COUNCIL RESOLUTION 426 (1978).

<sup>98</sup> See FLEITZ, *supra* note 45, at 10 (describing UNIFIL as having “long been engaged in civilian administration, humanitarian activities, and rebuilding infrastructure”).

<sup>99</sup> See UNIFIL BACKGROUND, *supra* note 95.

In terms of exercising its peacekeeping function, it can be argued that UNIFIL is hardly a success. Not only has it been unable to effectively mediate the land dispute situation it was sent in to control, it cannot legitimately function in the area without the guaranteed protection (or at least guarantee of freedom from harassment) by such local groups as Hizbollah.<sup>100</sup> From the start of the UNIFIL mission through the most recently released reports by the UNIFIL officers to the Secretary General and the Security Council there are recurrent trends which indicate the weakness of the UNIFIL mission.<sup>101</sup> This weakness stems not only from the political and day-to-day situation in which UNIFIL operates, but also the failure of the U.N. itself to properly equip UNIFIL members and create a cohesive operating unit.<sup>102</sup>

If the purpose of a peacekeeping force and mission is, at its heart, to protect international peace and security through protecting the local populations involved in conflict and stopping the escalation of violence in the affected area, then UNIFIL represents a failure of peacekeeping. Rather than forcing an Israeli withdrawal from the area of southern Lebanon under UNIFIL's control, UNIFIL sat by and was unable to do anything to stop the Israelis from further incursions into Lebanese sovereign territory in 1982.<sup>103</sup> Even after the Israeli pull-back from a portion of the southern Lebanese border

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<sup>100</sup> See Krasno, *supra* note 11, at 241 (describing the transition from PLO control of the area around the Southern Lebanese border to Hizbollah control of the same area, under the noses of UNIFIL).

<sup>101</sup> See, e.g., DENNIS C. JETT, *WHY PEACEKEEPING FAILS* 26 (St. Martin's Press: New York 2000) (stating that "[w]hen Israel's incursion into Lebanon took place, UNIFIL was already on the scene but able to do little to prevent the fighting."); FLEITZ, *supra* note 45, at 60 – 61 (describing the forced withdrawal of the French contingent to UNIFIL in 1986 when it became the target of attacks, as well as the brutal murder of a U.S. Marine (Lieutenant William R. Higgins) by terrorists while he was attached to a U.N. force operating in Southern Lebanon).

<sup>102</sup> See FLEITZ, *supra* note 45, at 74 ("Rapidly slapped together, UNIFIL suffered severe strategic, logistic, and procurement difficulties and lacked coherent organization.").

<sup>103</sup> See UNIFIL BACKGROUND, *supra* note 95.

area in 2000,<sup>104</sup> UNIFIL was still unable to stop the basic fighting between Israelis, Palestinians, and Lebanese, and, according to UNIFIL's own documents, could do little more than act as a tattle-tale for observed bad acts on either side,<sup>105</sup> while becoming a targets itself<sup>106</sup> and finding itself unable to guarantee the safety of its personnel,

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<sup>104</sup> See *id.*

<sup>105</sup> See, e.g., *id.*; REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 17 JANUARY TO 17 JULY 2000), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N00/537/14/PDF/N0053714.pdf?OpenElement> (last visited Nov. 10, 2005) (“Any violations of the withdrawal line are immediately brought to the attention of the side concerned.”) [hereinafter SG REPORT 2000].

<sup>106</sup> See REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD FROM 17 JULY 1997 TO 15 JANUARY 1998), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N98/009/91/IMG/N9800991.pdf?OpenElement> (last visited Nov. 10, 2005) (setting out the number of peacekeepers killed by hostilities in the course of UNIFIL at 76) [hereinafter SG REPORT 1997/1998]; REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 16 JANUARY 1999 TO 15 JULY 1999), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N99/212/53/PDF/N9921253.pdf?OpenElement> (last visited Nov. 10, 2005) (detailing increased threats and attacks on UNIFIL personnel and stations, and UNIFIL's asking for protection and cease-fire from armed forces operating in the area) [hereinafter SG REPORT 1999]; INTERIM REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (Oct. 31, 2000), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N00/712/72/IMG/N0071272.pdf?OpenElement> (last visited Nov. 10, 2005) (“On several occasions, Hizbollah personnel have restricted the Force's freedom of movement. . . . Hizbollah forced UNIFIL personnel at gunpoint to hand over vehicles and military hardware they found on the terrain.”); REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 23 JANUARY TO 20 JULY 2001), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N01/462/75/IMG/N0146275.pdf?OpenElement> (last visited Nov. 10, 2005) (describing repeated incursions by Israeli fighter jets into the affected area and Hizbollah actions to limit or stop UNIFIL mobility in its own area); REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 24 JULY 2003 TO 19 JANUARY 2004), *available at* <http://daccess.un.org/doc/UNDOC/GEN/N04/210/35/IMG/N0421035.pdf?OpenElement> (last visited Nov. 10, 2005) (describing increased incidents of civilian violence, including one in which the UNIFIL staff was caught in the crossfire, and stating that the most UNIFIL could do was “call for restraint” by the parties involved); REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 21 JANUARY TO 21 JULY 2004), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N04/427/61/IMG/N0442761.pdf?OpenElement> (last visited Nov. 10, 2005) (describing multiple incidents taking place on or near UNIFIL headquarters, and the death of another peacekeeper as the result of hostile fire – bringing the toll to 79); REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 21 JANUARY 2004 TO 20 JULY 2005), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N05/210/76/PDF/N0521076.pdf?OpenElement> (last visited Nov. 10, 2005) (describing blatant targeting of UNIFIL and its personnel by all sides involved and UNIFIL's impotence to stop these attacks and threats); REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 21 JANUARY 2005 TO 20 JULY 2005), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N05/420/36/PDF/N0542036.pdf?OpenElement> (last visited Nov. 10, 2005) (stating that threats to UNIFIL positions and personnel have only increased, as illustrated by a time when the Lebanese Armed Forces had to be called in by UNIFIL to stop demonstrations taking place near its operating centers).

buildings, and equipment or the safety of the local populations.<sup>107</sup> Indeed, perhaps the most involvement UNIFIL is alleged to have had in intervening in the Israeli-Lebanese conflict situation came in a 2000 incident in which UNIFIL forces were accused by the Israelis of secreting away videotape containing information on a group of Hizbollah members who kidnapped several Israeli soldiers.<sup>108</sup>

Despite these failures, the Lebanese government repeatedly asks for, and the U.N. Security Council repeatedly grants, extensions of the UNIFIL mission; the most recent extension provides for UNIFIL operations to continue through at least 2006.<sup>109</sup>

Interestingly, at a time when the Lebanese government and people are in the middle of a

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<sup>107</sup> See SG REPORT 1997/1998, *supra* note 106 (describing the increase in violence between various forces in the affected area, which resulted in civilian casualties, using a statement which is standard in these reports, “the Force did its best to prevent its area of operations from being used for hostile activities”); REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 16 JANUARY TO 15 JULY 1998), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/197/12/IMG/N9819712.pdf?OpenElement> (last visited Nov. 10, 2005) (stating that the incidents of violence among forces in the affected area “increased significantly” during the period, resulting in civilian casualties and injuries); REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 16 JULY TO 15 JANUARY 1999), *available at* <http://daccessdds.un.org/docs/UNDOC/GEN/N99/011/34/IMG/N9901134.pdf?OpenElement> (last visited Nov. 10, 2005) (describing the instances of hostilities occurring in the affected areas as “the highest number in a long time”); SG REPORT 1999, *supra* note 106 (“In the area of UNIFIL . . . the situation became more volatile. The armed elements became more assertive and showed an increasing tendency to operate in the vicinity of village and UNIFIL positions.”); REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 16 JULY 1999 TO 15 JANUARY 2000), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N00/244/09/IMG/N0024409.pdf?OpenElement> (last visited Nov. 10, 2005) (describing attacks on civilians which occurred in the UNIFIL-controlled areas) [hereinafter SG REPORT 1999/2000]; SG REPORT 2000, *supra* note 105 (describing an assassination and other serious acts of violence committed in the UNIFIL area of control during the report period). REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 17 JANUARY 2002 TO 12 JULY 2002), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N02/474/30/IMG/N0247430.pdf?OpenElement> (last visited Nov. 10, 2005) (“Tensions in the UNIFIL area of operation increased during the reporting period, with an outbreak of violent incidents across the Blue Line in the first two weeks of April, surpassing any activity seen since Israel’s withdrawal from Lebanon in May 2000.”).

<sup>108</sup> See UNIFIL BACKGROUND, *supra* note 95.

<sup>109</sup> U.N. SECURITY COUNCIL RESOLUTION 1614 (2005). It is interesting to note that after 27 years in existence, this Resolution still refers to the “interim nature of UNIFIL” and “[l]ooks forward to the early fulfillment of the mandate of UNIFIL.” *Id.* Resolution 1614 is also of interest because it reaffirms the initial mandate for UNIFIL, while at the same time enlarging the scope of UNIFIL to include mine removal and other activities not designated in the UNIFIL mandate. *Id.*

debate over the future of the country's ties with Hizbollah<sup>110</sup> and Syria (a frequent source of Hizbollah funding<sup>111</sup>), UNIFIL's extension means that the Lebanese government itself can put off a confrontation with Hizbollah in the southern Lebanon region where UNIFIL now operates. UNIFIL presence in this area can also be seen as retarding the concept of ownership over southern Lebanon by the Lebanese as a whole, as the area is not fully under the control of Lebanese military or police,<sup>112</sup> and it can be argued that the continued presence of UNIFIL indicates to residents of the area, and by extension to the Lebanese in general that there is no settled incorporation of the area into sovereign Lebanese territory.

#### **D. Analysis and conclusions**

The above account of the UNIFIL mission paints a dismal picture for those peacekeepers and mission officials deployed to UNIFIL, as they face personal and professional threats, and are essentially operating at the mercy of the armed factions and other groups operating in the border area.<sup>113</sup> It also casts aspersions on whether UNIFIL

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<sup>110</sup> Not only is the validity of terrorism per se an issue all over the Middle East, Hizbollah in Lebanon is a particular issue because of the electoral role Hizbollah is seeking in the country. *See "Lebanon Reborn? Defining National Priorities and Prospects for Democratic Renewal in the Wake of March 14, 2005," Panel I of a Hearing of the House International Relations Committee, Federal News Service (Jul. 28, 2005) (statement of Rep. Tom Lantos).* It is important to note that a member of Hizbollah current holds a ministry portfolio, much to the displeasure of the international community. *See id.* (statement of C. David Welch, Assistant Secretary of State for Near Eastern Affairs).

<sup>111</sup> *See generally Statement of C. David Welch, supra note 110.*

<sup>112</sup> UNIFIL BACKGROUND, *supra note 95*; *see also* REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS INTERIM FORCE IN LEBANON (FOR THE PERIOD 15 JANUARY 2003 TO 23 JULY 2003), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N03/431/55/IMG/N0343155.pdf?OpenElement> (last visited Nov. 10, 2005) (stating the Lebanese government's oft-repeated opinion that until there is a complete ceasefire with Israel, Lebanese troops should not control the border area; this then allows Hizbollah a freer reign in the area without governmental prosecution).

<sup>113</sup> *See supra* Part II. C.

is operating on firm legal ground in light of the narrow language of its original mandate and the wide-ranging activities it currently engages in.<sup>114</sup>

Whatever the dismal nature of the UNIFIL mission for its staff members, it is even more dismal for the concept of nationalism and the nation-state in Lebanon, as well as the concept of ownership of the area by the Lebanese government and people UNIFIL operated in the contested border area for all but the first three years of the Lebanese civil war, but was unable to do anything to stop the war or stop Israeli incursions into the civil war itself. UNIFIL was unable to stop the PLO from operating in the area, and when the PLO relocated, UNIFIL could not stop Hizbollah and other equally terroristic and disruptive groups from filling the void left by the PLO.<sup>115</sup> Similarly, even after the end of the Lebanese civil war, UNIFIL has been unable to stop Israeli forces from intruding on the area. All of this leads to a status-quo situation, where no real progress towards integrating the border area into Lebanon, on a map or in the psyche, can be made.

At the same time, the rest of Lebanon is at a precipice point for sovereignty and self-ownership of nation, as illustrated by the after-effects of the assassination of former Lebanese Prime Minister - and increasingly vocal anti-Syrian advocate - Rafik Hariri on February 14, 2005, allegedly at the hands of Syrian-allied forces.<sup>116</sup> In the days following Hariri's death, the country came together and average Lebanese from a variety of

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<sup>114</sup> See U.N. SECURITY COUNCIL RESOLUTION 425 (1978); U.N. SECURITY COUNCIL RESOLUTION 426 (1978); *cf.* UNIFIL BACKGROUND, *supra* note 95 (describing the overall scope of activities engaged in by UNIFIL and its duration since the 1978 resolutions).

<sup>115</sup> See *supra* Part II. C. (detailing the rise of Hizbollah-based threats to civilians and UNIFIL personnel operating in the UNIFIL area in the years since the end of the Lebanese civil war).

<sup>116</sup> In response to the public outcry over Hariri's assassination, the U.N. established a commission to investigate the murder. For information relating to the first report issued by the commission, and the commission's ongoing activities, see LEBANON: WHO MURDERED HARIRI? INDEPENDENT PANEL PROBES EX-PREMIER'S ASSASSINATION, UN NEWS CENTRE, *available at* <http://www.un.org/apps/news/infocusRel.asp?infocusID=110&Body=Leban&Body1=> (last visited Nov. 21, 2005).

religious sects began demanding a pullout of Syrian troops and intelligence agents in Lebanon.<sup>117</sup> While this unity has not resulted in an overthrow of the standard confessional divides in Lebanese society, or changed any laws relating to societal status, it has demonstrated that the Lebanese Republic, as a constitutional government with viable rights and freedoms, is something with which many people associate themselves and feel a sense of responsibility and ownership for.

UNIFIL becomes problematic in light of the Hariri episode because it perpetuates the idea of a fragmented Lebanon needing the protection of outside parties (however inadequate this protection might be) to survive. Legally, the framework for a viable Lebanon exists in the form of a constitution and series of statutory laws which were created by the Lebanese themselves and which, at least in the constitutional case, were able to withstand even civil war.<sup>118</sup> The Hariri demonstrations and the Syrian retreat which followed are signals that the “nation” part of the “nation” and “state” duality discussed in Part I is becoming a more concrete reality in Lebanon, since the Lebanese were rallying for Syrian removal as Lebanese, not as Maronites, Sunnis, or any other confessional or self-identifying group.<sup>119</sup> With the “state” apparatus entrenched in Lebanese law, politics, and society, and the “nation” idea constantly emerging, the UNIFIL presence can only serve to harm the creation of a viable Lebanese nation-state by undermining the sense of communality of all Lebanese territory under the same laws and

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<sup>117</sup> See BACKGROUND NOTE LEBANON, *supra* note 49.

<sup>118</sup> Certainly, one may question whether there was a disconnect between the constitutional provisions and society at the time of the civil war, however it deserves emphasizing that the constitution emerged virtually unscathed from the civil war and the Ta’if Accord that ended it. In this sense, adherence to the Lebanese constitution is a reaffirmation of Lebanese national identity and ownership of the state because the constitution was not created by the U.N. or other entities in the wake of the civil war – contrast this with the constitutions of the Democratic Republic of Congo and Kosovo discussed below. The national ownership of the Lebanese constitution is most closely analogous to the current draft Iraqi constitution than either the Congo or Kosovo constitutions.

<sup>119</sup> See BACKGROUND NOTE LEBANON, *supra* note 49.

by the same people. UNIFIL also provides a staging ground for Hizbollah and other terror groups to infiltrate Lebanon further, thereby continuing to threaten the cohesion of the Lebanese state and identity. There may indeed be some problems with the state, and the cohesion of national identity might need to be strengthened, but the ultimate purpose of self-determination has been met in Lebanon, and international peace and security can only be undermined by maintaining a divisive U.N. peacekeeping force and mission there.

### **Part III – the Democratic Republic of Congo**

#### **A. Missions Past - UNONUC**

The Democratic Republic of the Congo (the Congo), formerly known as the Belgian Congo,<sup>120</sup> has the distinction of being the site of the U.N. peacekeeping operation which launched the peacekeeping mechanism that has evolved into the current U.N. Department of Peacekeeping Operations.<sup>121</sup> From the outset, the conflict in the Congo was both international – in that other nations, particularly Belgium, were directly involved in the conflict<sup>122</sup> – and an intranational civil war, in which various factions started a civil war within days of the country's 1960 grant of independence.<sup>123</sup> In this sense, the first U.N. peacekeeping deployment in the Congo (named United Nations

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<sup>120</sup> See RAM CHANDRA PRADHAN, *THE UNITED NATIONS AND THE CONGO CRISIS* 3 – 5 (MANAS Publications: New Delhi, India 1975).

<sup>121</sup> See also Charles Norchi, *Human Rights: A Global Common Interest* in *THE UNITED NATIONS: CONFRONTING THE CHALLENGES OF A GLOBAL SOCIETY* 100 (Jean E. Krasno ed.) (Boulder, CO: Lynne Rienner Publishers 2004).

<sup>122</sup> See U.N. SECURITY COUNCIL RESOLUTION 145 (1960); U.N. SECURITY COUNCIL RESOLUTION 146 (1960) (urging withdrawal of Belgian troops in the Congo for the stability of the country); BACKGROUND, REPUBLIC OF THE CONGO – ONUC, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, available at <http://www.un.org/Depts/DPKO/Missions/onucB.htm> (last visited Nov. 11, 2005) [hereinafter BACKGROUND ONUC].

<sup>123</sup> See generally GEORGES ABI-SAAB, *THE UNITED NATIONS OPERATION IN THE CONGO 1960 – 1964* (Oxford: Oxford University Press 1978) (providing details of the parties involved in the Congo conflict before and after UNONUC's deployment); BACKGROUND ONUC, *supra* note 122.

Operation in the Congo, or UNONUC<sup>124</sup>) was a test not only for the Congo as a nation and the peacekeepers sent to protect it, but also to the idea of self-determination which forms the backbone of the U.N. itself and the U. N. Charter.<sup>125</sup> Due to the international aspects of the conflict, intervention in the Congo was also viewed as an extension of the preservation of “international peace and security” called for in the U.N. Charter.<sup>126</sup> UNONUC forces were assisted in their efforts by the diplomatic efforts of the then-Secretary General Dag Hammarskjöld himself<sup>127</sup>; indeed Hammarskjöld’s death was caused by an aircraft accident which occurred while he was in the area to assist with the peace process.<sup>128</sup>

The 1960 conflict in the Congo was in essence a conflict for the fledgling nation-state and its ownership. The initial throes of the Congolese independence movement featured economic hardship and societal differences which emerged in the face of independence.<sup>129</sup> In the years leading up to full-fledged Congolese independence, the idea of independence and the type of state which the Congo would be in the future emerged in a variety of political parties, each represented by its own leaders and with its own

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<sup>124</sup> REPUBLIC OF THE CONGO, UNITED NATIONS OPERATION IN THE CONGO, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS – COMPLETED PEACEKEEPING OPERATIONS, *available at* <http://www.un.org/Depts/DPKO/Missions/onuc.htm> (last visited Nov. 11, 2005).

<sup>125</sup> The Congo had been colonized by the Belgians in the 1880s, becoming an official colony in 1908. *See* PRADHAN, *supra* note 120, at 3 – 5; Rosalyn Higgins, *Introduction, Operation in the Congo (ONUC), 1960 – 1964*, in UNITED NATIONS PEACEKEEPING 1946 – 1967 DOCUMENTS AND COMMENTARY III AFRICA 7 (Rosalyn Higgins ed.) (Oxford: Oxford University Press 1980) [hereinafter Higgins, *ONUC*].

<sup>126</sup> PRADHAN, *supra* note 120, at 44 – 46 (setting forth the parameters of the UNONUC mission as opposed to other peacekeeping missions at the time, and noting that the only time force was authorized for UNONUC was when a peacekeeper was acting in self-defense).

<sup>127</sup> It was Hammarskjöld who first defined the role peacekeepers were to play by refusing requests by the Congolese government to place the U.N. peacekeepers in the hands of the government itself. PRADHAN, *supra* note 120, at 61. For an excellent source of insights into the private actions and motivations of Dag Hammarskjöld during the emergence of the Congo conflict, *see* ABI-SAAB, *supra* note 123, at 1 – 20.

<sup>128</sup> PRADHAN, *supra* note 120, at 145; ABI-SAAB, *supra* note 123, at 154.

<sup>129</sup> *See* PRADHAN, *supra* note 120, at 16 – 18; ABI-SAAB, *supra* note 123, at 6 – 9; JAMES DOBBINS, SETH G. JONES, KEITH CRANE, ANDREW RATHMELL, BRETT STEELE & RICHARD TELTSCHIK, *THE UN’S ROLE IN NATION-BUILDING: FROM THE CONGO TO IRAQ* 5 – 6 (Santa Monica, CA: Rand 2004).

concepts of what the new nation should be.<sup>130</sup> Despite the well-intentioned rhetoric of self-determination, in the early Congolese case independence and free elections bred violence and provincial fighting which ignited into the civil war and occasioned the arrival of U.N. peacekeeping forces<sup>131</sup> on the heels of an attempt by Belgium to re-deploy its troops to the area.<sup>132</sup>

As the Congolese civil war progressed it began to involve the U.N. in general, and the UNONUC forces in particular, in its power contest,<sup>133</sup> until finally the Security Council refined UNONUC's mandate in the Congo to reflect the reality of the political and legal situation on the ground rather than in a conference room.<sup>134</sup> Even then, the diplomatic and day-to-day ground conditions in the Congo were extremely volatile and unpredictable for diplomats, officials, and peacekeepers alike.<sup>135</sup> Indeed, after four years

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<sup>130</sup> See PRADHAN, *supra* note 120, at 18 – 23 (describing the rise of political parties, their differences, and their nascent leaders); ABI-SAAB, *supra* note 123, at 6 – 9 (describing the early attempts of various Congolese leaders to draw the U.N. and Security Council members into the conflict); Higgins, *ONUC*, *supra* note 125, at 10 – 13; Krasno, *supra* note 11, at 233.

<sup>131</sup> See PRADHAN, *supra* note 120, at 24 – 34 (describing the political unrest attendant on the 1960 national elections, and in particular the discontent within the army which ultimately led to the Congolese civil war); ABI-SAAB, *supra* note 123, 21 – 53 (setting out the actors involved and the reasons for UNONUC's first presence in the Congo); see generally ABI-SAAB, *supra* note 123 (describing the motivations of the Congolese actors and the stages of their internal fight for control and external fight for international recognition and support throughout the Congo conflict).

<sup>132</sup> See PRADHAN, *supra* note 120, at 35; ABI-SAAB, *supra* note 123, at 21 – 28; Higgins, *ONUC*, *supra* note 125, at 11 – 13.

<sup>133</sup> For a complete account of the history and background of the civil war's escalation, see PRADHAN, *supra* note 120, at 70 – 117 (providing detailed descriptions of the factions in the Congo, their lobbying techniques within the U.N. structure, and the response of various members of the U.N. to each side); Chandra Lekha Sriram & Karin Wermester, *From Risk to Response: Phases of Conflict, Phases of Conflict Prevention* 42 in FROM PROMISE TO PRACTICE: STRENGTHENING UN CAPACITIES FOR THE PREVENTION OF VIOLENT CONFLICT (Chandra Lekha & Karin Wermester eds.) (Boulder, CO: Lynne Rienner Publishers 2003).

<sup>134</sup> See PRADHAN, *supra* note 120, at 127 (“the . . . resolution laid down three primary objectives for the UN to pursue in the Congo: (a) the prevention of civil war (b) the withdrawal of the Belgian and other foreign military and para-military personnel and political advisers from the Congo (c) the creation of a right atmosphere of the Congolese Parliament.”); ABI-SAAB, *supra* note 123, at 97 – 106.

<sup>135</sup> See generally PRADHAN, *supra* note 120, at 118 – 198 (setting out the details and strategies involved on all sides of the conflict in the various provinces affected, and the U.N. reaction to them).

in the Congo UNONUC officials and peacekeepers were still faced with fresh outbreaks of fighting and violence in new areas of the country.<sup>136</sup>

One of the reasons for the continued conflict in the Congo was the abrogation of the Congolese constitution,<sup>137</sup> which initially occurred in 1960, and continued to be an issue throughout the course of the conflict.<sup>138</sup> Although the conflict in the Congo was ultimately calmed under the Mobutu regime,<sup>139</sup> and UNONUC forces left the Congo by the end of 1964,<sup>140</sup> the first Congolese civil war conflict rent a hole in the fabric of constitutionalism in the new nation.<sup>141</sup> Tellingly, the UNONUC mission had also created tension at the U.N. as to the constitutionality of peacekeeping activities such as UNONUC under the terms of the U.N. Charter<sup>142</sup>; these tensions would later be resolved in favor of increased U. N. peacekeeping activity.<sup>143</sup>

## **B. Post – UNONUC Background**

While the Mobutu regime in the Congo arguably did not bring societal openness or an environment conducive to the enjoyment of constitutional rights and freedoms,<sup>144</sup> it did bring a semblance of stability to the country until the mid-1990s.<sup>145</sup> However, the

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<sup>136</sup> See PRADHAN, *supra* note 120, at 206 – 208; ABI-SAAB, *supra* note 123, at 192. For a description of the political and military situation in UNONUC, see Higgins, *ONUC*, *supra* note 125, at 61 – 83.

<sup>137</sup> ABI-SAAB, *supra* note 123, at 54; Higgins, *ONUC*, *supra* note 125, at 9 – 10 (providing a description of the first Congolese constitution).

<sup>138</sup> See ABI-SAAB, *supra* note 123, at 54 – 123.

<sup>139</sup> DOBBINS ET AL., *supra* note 129, at 14; BACKGROUND NOTE: DEMOCRATIC REPUBLIC OF THE CONGO (KINSHASA), U.S. DEPARTMENT OF STATE, available at <http://www.state.gov/r/pa/ei/bgn/2823.htm> (last visited Nov. 9. 2005) (detailing Mobutu’s regime) [hereinafter BACKGROUND NOTE CONGO].

<sup>140</sup> See ABI-SAAB, *supra* note 123, at 192.

<sup>141</sup> See DOBBINS ET AL., *supra* note 129, at 14 (“ONUC failed to eliminate, and in some respects contributed to, the constitutional weaknesses of the Congolese government.”).

<sup>142</sup> Higgins, *ONUC*, *supra* note 125, at 54 – 60.

<sup>143</sup> See Krasno, *supra* note 11, at 238 – 260 (describing the changing role of U.N. peacekeeping operations from the completion of UNONUC to 2004).

<sup>144</sup> See BACKGROUND NOTE CONGO, *supra* note 139 (providing information on the constitution promulgated after the Mobutu regime came into power and throughout its tenure).

<sup>145</sup> See *id.* (describing the political and social climate under the Mobutu regime); THE DEMOCRATIC REPUBLIC OF THE CONGO, CIA WORLD FACTBOOK, available at

political climate in neighboring states was not as tightly controlled as Mobutu's Congo, and by the mid-1990s ethnic fighting in Rwanda had started to spill over into the Congo, at least in terms of sending combatants across the border.<sup>146</sup> The internal state of law and order in the Congo began to deteriorate at the same time,<sup>147</sup> and in 1999 Mobutu was removed from power in a coup; he was then succeeded by Laurent Kabila.<sup>148</sup>

### C. UNMONUC – mandate and mission

In the wake of the Kabila coup and the rising instability in the Congo, the U.N. Security Council created the UNMONUC force for the Congo,<sup>149</sup> initially as an observer mission only.<sup>150</sup> However, the situation in the Congo did not stabilize, and by 2001 the U.N. Security Council authorized an increase in UNMONUC military personnel.<sup>151</sup>

Unlike the UNONUC forces, which were deployed to try to keep the peace in a nascent country, the UNMONUC forces were sent in to stabilize the region, yet to date have failed to do so. UNMONUC forces have not stopped the Congolese fighting after six years of deployment, and indeed stories of atrocities against the Congolese peoples and other refugee populations which UNMONUC are charged with protecting emerge from the area on a regular basis.<sup>152</sup> UNMONUC forces themselves are also targets of

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<http://www.cia.gov/cia/publications/factbook/print/cg.html> (last visited Nov. 9, 2005) [hereinafter CONGO FACTBOOK].

<sup>146</sup> See CONGO FACTBOOK, *supra* note 145.

<sup>147</sup> FLEITZ, *supra* note 45, at 169.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (describing the UNMONUC mandate as “buffer, observer, and humanitarian to restore order in the Congo, which is divided by a war between Congolese factions and troops from Rwanda, Burundi, Uganda, and Angola. Given ‘Chapter VII mandate’ to defend civilians, UN personnel, and UN facilities.”).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See UNITED NATIONS PEACE OPERATIONS YEAR IN REVIEW 2004, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, available at [http://www.un.org/Depts/dpko/dpko/pub/year\\_review04/](http://www.un.org/Depts/dpko/dpko/pub/year_review04/) (last visited Nov. 11, 2005) (describing several instances where prominent areas and targets in the Congo were seized, and civilians harmed, and UNMONUC's inability to stop such events from happening); OPERATION ARTEMIS: THE LESSONS OF THE INTERIM EMERGENCY MULTINATIONAL FORCE, PEACEKEEPING BEST PRACTICES UNIT, MILITARY DIVISION, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS,

various warring factions, in a similar fashion to UNIFIL forces in Lebanon, and UNMONUC peacekeepers have been targeted, killed, and injured by these factions since their arrival in the Congo.<sup>153</sup>

In light of the humanitarian charge given to UNMONUC under its mandate, an account of UNMONUC activities is not complete without a mention of the hideous and frequent allegations, largely substantiated, of sexual abuse by UNMONUC forces against the very women and children they are in the Congo to protect.<sup>154</sup> The U.N. response to this – greater peacekeeper education about safe sex with host populations and a further study of the allegations – seems not only grossly out-of-proportion to the gravity of the situation,<sup>155</sup> but also belies the essential question at the heart of these abuses – whether peace and security are being advanced by allowing UNMONUC forces to rape, spread HIV and other diseases, and father children without impunity.<sup>156</sup>

Turning to law and politics in the Congo, UNMONUC has similarly been unable to keep the peace or foster a settlement to the hostilities. There is a functioning government of the Congo,<sup>157</sup> which is an extension of the Kabila regime under the leadership of Laurent Kabila's son,<sup>158</sup> Joseph, who assumed control after his father's

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available at <http://pbpu.unlb.org/pbpu/library/Artemis.pdf> (last visited Nov. 11, 2005) (reporting on Operation Artemis, which was deployed in 2003 to assist U.N. peacekeepers in the Congo who had become overwhelmed by the situation on the ground).

<sup>153</sup> See FATALITIES, DEMOCRATIC REPUBLIC OF THE CONGO – MONUC – FACTS AND FIGURES, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, available at <http://www.un.org/Depts/dpko/missions/monuc/facts.html> (last visited Nov. 11, 2005).

<sup>154</sup> See Alexandra R. Harrington, *Victims of Peace: Current Abuse Allegations against U.N. Peacekeepers and the Role of Law in Preventing them in the Future*, 12 ILSA J. INT'L & COMP. L. (forthcoming 2005).

<sup>155</sup> For an account of the many forms of abuses perpetrated by U.N. forces in the Congo in particular, and the impact which these acts have on their victims, the victims' families, and the region as a whole, see *id.*

<sup>156</sup> See *id.*

<sup>157</sup> CONGO FACTBOOK, *supra* note 145; BACKGROUND NOTE CONGO, *supra* note 139.

<sup>158</sup> CONGO FACTBOOK, *supra* note 145; BACKGROUND NOTE CONGO, *supra* note 139.

death.<sup>159</sup> Early attempts at cease-fires and draft settlements which were brokered by the Organization of African Unity (OAU) and the U.N. failed miserably.<sup>160</sup> At present, there is a draft Congolese constitution which is scheduled to be sent to the voters for referendum approval at some point in 2006<sup>161</sup>; this, and the election of several vice-presidents and ministers to a temporary government of an unspecified duration,<sup>162</sup> are the only concrete and seemingly long-lasting steps towards legal and political stability which have been achieved during the time of UNMONUC's mission in the Congo.

#### D. Analysis

Unlike the UNIFIL mission, which has jurisdiction limited to a particular area within an already established state, UNMONUC operates in what is best described as the remnants of a state. The Mobutu regime held the shattered state which emerged from the first Congolese civil war together through standard dictatorial practices of highly concentrated control and by ignoring constitutional imperatives<sup>163</sup>; it did not foster legal or political avenues for citizens to take ownership of the state. The regime repressed political movements which ran counter to its own stances, positions and views,<sup>164</sup> but it could not control the inner workings of neighboring countries, and was similarly unable

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<sup>159</sup> CONGO FACTBOOK, *supra* note 145; BACKGROUND NOTE CONGO, *supra* note 139.

<sup>160</sup> See *Letter Dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council*, UNITED NATIONS SECURITY COUNCIL, available at [http://www.un.org/Docs/s815\\_25.pdf](http://www.un.org/Docs/s815_25.pdf) (last visited Nov. 11, 2005) (transmitting the text of an attempted Ceasefire in the Congo, which was endorsed by the OAU and contained provisions for a significant role for the OAU were the ceasefire to have held).

<sup>161</sup> CONGO FACTBOOK, *supra* note 145; BACKGROUND NOTE CONGO, *supra* note 139. For the text of the draft Congolese constitution, see *PROJET DE CONSTITUTION DE LA REPUBLIQUE DU CONGO*, LIBRARY OF CONGRESS, GLOBAL LEGAL INFORMATION NETWORK, available at <http://www.glin.gov/view.do?documentID=160383&showAll=time> (last visited Nov. 10, 2005) [hereinafter DRAFT CONGOLESE CONSTITUTION].

<sup>162</sup> CONGO FACTBOOK, *supra* note 145; BACKGROUND NOTE CONGO, *supra* note 139.

<sup>163</sup> See CONGO FACTBOOK, *supra* note 145; BACKGROUND NOTE CONGO, *supra* note 139.

<sup>164</sup> See CONGO FACTBOOK, *supra* note 145; BACKGROUND NOTE CONGO, *supra* note 139.

to stop the flow of unrest from these neighbors across the borders of the Congo.<sup>165</sup> By the time UNMONUC was authorized and deployed a very legitimate question existed (and still exists) – whether there was actually any peace to keep.

Once deployed to the Congo, UNMONUC was similarly unable to bring an end to the conflicts raging inside the country. UNMONUC's mission mandate calls for peacekeepers to do several things while in the Congo,<sup>166</sup> but the use of force is not one of them except in a few rare instances<sup>167</sup>; hence, UNMONUC forces have become targets in the conflict.<sup>168</sup> Due to their weak status vis a vis the use of force, UNMONUC forces have also been unable to protect the population of the Congo from warring factions. Indeed, UNMONUC has been unable to protect these populations even from themselves.

Legally, the UNMONUC mission has proved no more successful. With UNMONUC forces unable to control the fighting, early attempts at peace and cease-fire were scuttled.<sup>169</sup> Currently, a draft constitution exists and, if enacted, this draft constitution purports to guarantee Congolese citizens many rights and privileges.<sup>170</sup> However, this draft constitution contains several provisions which are problematic and

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<sup>165</sup> See CONGO FACTBOOK, *supra* note 145; BACKGROUND NOTE CONGO, *supra* note 139.

<sup>166</sup> U.N. SECURITY COUNCIL RESOLUTION 1291 (2000); *see also* DEMOCRATIC REPUBLIC OF THE CONGO – MONUC – MANDATE, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, *available at* <http://www.un.org/Depts/dpko/missions/monuc/mandate.html> (last visited Nov. 11, 2005) [hereinafter MONUC MANDATE].

<sup>167</sup> See U.N. SECURITY COUNCIL RESOLUTION 1565 (2004); MONUC MANDATE, *supra* note 166.

<sup>168</sup> See FATALITIES, DEMOCRATIC REPUBLIC OF THE CONGO – MONUC – FACTS AND FIGURES, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, *available at* <http://www.un.org/Depts/dpko/missions/monuc/facts.html> (last visited Nov. 11, 2005) (providing current casualty figures for the UNMONUC mission).

<sup>169</sup> See *Letter Dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council*, UNITED NATIONS SECURITY COUNCIL, *available at* [http://www.un.org/Docs/s815\\_25.pdf](http://www.un.org/Docs/s815_25.pdf) (last visited Nov. 11, 2005).

<sup>170</sup> See DRAFT CONGOLESE CONSTITUTION, *supra* note 161

call into question whether the state to be governed by this constitution actually exists or is a constructed fiction.<sup>171</sup>

The explanatory note to the draft constitution explains that “[s]ince its independence. . . the Democratic Republic of Congo has been confronted by recurrent political crises, one of the fundamental causes of which has been the contestation of its institutions and actors.”<sup>172</sup> The preamble to the draft constitution states “We, the Congolese people, united by destiny and a history of noble ideas of liberty, fraternity, solidarity, justice, peace, and work. . . . Reaffirm our inalienable and unprescribable right for us to organize freely and develop our political, economic, social and cultural lives.”<sup>173</sup> The first title of the explanatory note of the draft constitution, “The State and Its Sovereignty,”<sup>174</sup> provides that “the present constitution reaffirms democratic principles which emanate from the people as the source of primary sovereignty.”<sup>175</sup> However, Article 51 of the constitution provides “[t]he State has the task of assuring and promoting the peaceful and harmonious coexistence of all ethnic groups in the country. The State assures equal protection and promotion of vulnerable groups and all minorities in the State.”<sup>176</sup> Further, Article 66 charges the Congolese people themselves with the task of stopping discrimination.<sup>177</sup>

On their face, these constitutional provisions are lofty goals and pleasant sound bites. However, a look at what these provisions mean when taken together paints a far less pleasing picture. Admitting that there have been difficulties with sovereignty and

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<sup>171</sup> *See id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *See* DRAFT CONGOLESE CONSTITUTION, *supra* note 161, at art. 51.

<sup>177</sup> *Id.* at art. 66.

peace in the Congo is certainly a historical truism, however this admission also undermines the idea that the draft constitution has been created for a viable state which can go forward and govern itself peaceably. Admitting difficulties with sovereignty and peace since Congolese independence while at the same time constructing a questionable basis of beliefs which all Congolese as a people are assumed to hold and are entitled to is both incongruous and leads to an unbalanced legal construct and societal sense of the guiding history of the Congo. By charging the state with monitoring and overseeing the equal protection of minorities and other groups which have been victims of discrimination or worse in the past, the draft constitution legalizes the concept that the Congolese people as a whole are still divided and cannot function as a society without the intervention of the government to stop fighting. Conversely, by charging the people with the legal duty of stopping discrimination, the draft constitution also enshrines the idea that the federal government created in the draft constitution must have help in protecting its citizens and is not legally powerful or societally respected enough to control its population.

Certainly the UNMONUC forces did not write the draft constitution provisions and are not responsible for these glaring problems which will likely prevent the full realization of a viable Congolese nation-state owned by all Congolese if the draft constitution is ultimately adopted. However, UNMONUC is responsible for the draft constitution because by its very presence and premise, UNMONUC insinuates that there is a single Congolese state to preserve and keep peaceful. Self-determination as a concept was meant to free people from colonization, however there is no legal or practical basis to support the idea that self-determination as an espoused right stopped when European

nations left. If the U.N.'s true goal is to provide the people of the world with the right to self-determination, and the ability to access this right, then it must also realize that self-determination can come in the form of neighbors electing to fight and secede from their neighbors even if the state being deconstructed by such secession was a U.N.-based construct in the past. Years of peacekeeping operations have amply illustrated that, when there is no peace to keep, peacekeeping becomes futile and impedes progress towards an ultimate solution to the conflict.

The case of UNMONUC and the current attempts at governing the Congo also indicate that peacekeeping missions can undermine international peace and security. Peacekeepers becoming victims of the conflict cannot protect domestic or international peace and security, and peacekeepers who become predators do nothing but harm to the concept of international peace and security. Turning to law, peacekeepers, and their missions, deployed to areas fraught with ethnic and affiliational conflicts - which are so deep-seated that they have existed at least since independence and are subject to constitutional attempts to keep in check - undermine the laws of the U.N. Charter which they are charged with upholding and leave open the possibility that international peace and security will be continually undermined in the aftermath of the installation of a new governmental apparatus which seeks to put a legal gloss over decades of conflict without solving the underlying reasons behind it.

## **Part IV – Kosovo**

### **A. History and Background**

Currently, Kosovo is part of the internationally recognized territory of Serbia and Montenegro.<sup>178</sup> Formerly part of Yugoslavia, Kosovo began to experience internal conflicts at the end of the 1990s,<sup>179</sup> when the states comprising Yugoslavia were in the process of dividing up the doomed Yugoslav state into smaller nations.<sup>180</sup> During this process, the Serbs engaged in a campaign of ethnic cleansing and atrocities against the largely-Albanian population in the Kosovo province of Serbia.<sup>181</sup> In the face of these acts, and on the heels of the very public atrocities committed upon various ethnic groups in neighboring Bosnia,<sup>182</sup> the international community began to react to the Kosovo violence, first through NATO and then through the U.N.<sup>183</sup>

The political situation in Serbia and Montenegro stabilized after the 2000 regime change which saw the ouster of Slobodan Milosevic,<sup>184</sup> and currently is under the legal safeguards of a valid and binding constitution.<sup>185</sup> This constitution proclaims itself as the constitution of all Serbia and Montenegro and contemplates that the Kosovo province is

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<sup>178</sup> See SERBIA AND MONTENEGRO, CIA WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/print/yi.html> (last visited Nov. 9, 2005) [hereinafter SERBIA & MONTENEGRO FACTBOOK]; BACKGROUND NOTE: SERBIA AND MONTENEGRO, UNITED STATES DEPARTMENT OF STATE, available at <http://www.state.gov/r/pa/ei/bgn/5388.htm> (last visited Nov. 9, 2005) [hereinafter BACKGROUND NOTE SERBIA & MONTENEGRO].

<sup>179</sup> See SERBIA & MONTENEGRO FACTBOOK, *supra* note 178; BACKGROUND NOTE SERBIA & MONTENEGRO, *supra* note 178.

<sup>180</sup> See SERBIA & MONTENEGRO FACTBOOK, *supra* note 178; BACKGROUND NOTE SERBIA & MONTENEGRO, *supra* note 178.

<sup>181</sup> See SERBIA & MONTENEGRO FACTBOOK, *supra* note 178; BACKGROUND NOTE SERBIA & MONTENEGRO, *supra* note 178.

<sup>182</sup> See Satish Namibar, *UN peacekeeping operations in the former Yugoslavia – from UNPROFOR to Kosovo* in UNITED NATIONS PEACEKEEPING OPERATIONS: AD HOC MISSIONS, PERMANENT ENGAGEMENT 177 – 179 (Ramesh Thakur and Albrecht Schnabel eds.) (New York: United Nations University Press 2001); see generally SERBIA & MONTENEGRO FACTBOOK, *supra* note 178; BACKGROUND NOTE SERBIA & MONTENEGRO, *supra* note 178.

<sup>183</sup> See SERBIA & MONTENEGRO FACTBOOK, *supra* note 178; BACKGROUND NOTE SERBIA & MONTENEGRO, *supra* note 178; see also Dick A. Leurdijk, *The UN and NATO: The Logic of Primacy* in THE UNITED NATIONS AND REGIONAL SECURITY: EUROPE AND BEYOND 64 – 68 (Michael Pugh and Waheguru Pal Singh Sidhu eds.) (Boulder, CO: Lynne Rienner Publishers 2003) (outlining the initial relationship between U.N. and N.A.T.O. forces in Kosovo).

<sup>184</sup> See SERBIA & MONTENEGRO FACTBOOK, *supra* note 178.

<sup>185</sup> See CONSTITUTIONAL CHARTER OF THE STATE OF UNION OF SERBIA AND MONTENEGRO, available at <http://www.gov.yu/document/povelja.pdf> (last visited Nov. 12, 2005).

still part of the sovereign territory of Serbia and Montenegro , albeit under the protection of outside actors.<sup>186</sup>

The constitution of Serbia and Montenegro creates a uniform seal and flag for the country, uniting all groups under this banner.<sup>187</sup> This constitution guarantees citizens of each constituent state/province the same rights and privileges as those in other constituent states/provinces enjoy.<sup>188</sup> The constitution also attempts to create equality and parity between member states at the ministerial level by requiring that certain key ministries be split between members from different states.<sup>189</sup> Under the judiciary provisions of the constitution, all judicial hearings on constitutional questions having to do with the interpretation of the federal constitution must also be attended by state justices who are to have input on the constitutional question at hand.<sup>190</sup> A state in Serbia and Montenegro retains the right to secede from the federal constitution through certain referenda mechanisms.<sup>191</sup> Additionally, the constitution of Serbia and Montenegro has an amendment, the Charter on Human and Minority Rights and Civil Liberties which guarantees rights and freedoms to all ethnicities, religions, and member state populations.<sup>192</sup> Among the many provisions of this Charter is an article specifically

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<sup>186</sup> *See id.*, PREAMBLE (“Proceeding from the equality of the two member state, the state of Montenegro ad the state of Serbia which includes the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija, the latter currently under international administration in accordance with UN SC resolution 1244.”).

<sup>187</sup> *Id.* at art 4.

<sup>188</sup> *Id.* at art. 7 (“A citizen of a member state shall also be a citizen of Serbia and Montenegro. A citizen of a member state shall have equal rights and duties in the other member state as its own citizen, except for the right to vote and be elected.”).

<sup>189</sup> *Id.* at art. 35.

<sup>190</sup> *Id.* at art. 49.

<sup>191</sup> CONSTITUTIONAL CHARTER OF THE STATE OF UNION OF SERBIA AND MONTENEGRO, ART. 60, *available at* <http://www.gov.yu/document/povelja.pdf> (last visited Nov. 12, 2005).

<sup>192</sup> *See* CHARTER ON HUMAN AND MINORITY RIGHTS AND CIVIL LIBERTIES, *available at* <http://www.gov.yu/document/povelja.pdf> (last visited Nov. 12, 2005).

enumerating special rights of minority groups,<sup>193</sup> and an article which exhorts member states to enact legislation and social programs geared towards raising the standard of living of minority groups in the state.<sup>194</sup>

## B. UNMIK

The United Nations authorized a peacekeeping mission (United Nations Mission in Kosovo or UNMIK) for Kosovo in 1999.<sup>195</sup> UNMIK was on the ground in Kosovo soon after its mandate, sharing some of its responsibilities with NATO forces which were already in the area.<sup>196</sup>

Under the terms of its mandate, UNMIK was not only supposed to stop the ethnic and other violence occurring in Kosovo, it was also to “perform basic civilian administration functions; promote the establishment of substantial autonomy and self-government in Kosovo; facilitate a political process to determine Kosovo’s future status; coordinate humanitarian and disaster relief of all international agencies; support the reconstruction of key infrastructure; maintain civil law and order; promote human rights;

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<sup>193</sup> *Id.* at art. 52 (“Members of national minorities shall have the following rights: to express, keep, cherish, develop and publicly manifest their national and ethnic, cultural and religious identity; to use their symbols in public places; to freely use their language and script; to proceedings being conducted by the authorities in the communities having a considerable minority population also in the language of the minority population concerned; to receive education in their language in state institutions; to establish private educational institutions at all levels; to use their own name and surname in their own language; to the traditional local names, names of streets and settlements, as well as topographic signs to be written also in the minority language; to a certain number of seats in the Assembly of the Member State concerned and in the Assembly of the State Union, based on the principle of direct representation, in accordance with the laws of the Member States; to be adequately represented in public services, state authorities and local self-governance authorities; to be fully and impartially informed in their own language, including the right to express, receive, send, and exchange information and ideas; to establish their own public media.”).

<sup>194</sup> *Id.* at art. 55. It should also be noted that recent editions of the U.S. State Department’s annual report on religious freedom emphasizes that those acts of religious-based criminality or discrimination in Serbia and Montenegro were not done at the behest of state actors. *See SERBIA AND MONTENEGRO (INCLUDES KOSOVO), UNITED STATES DEPARTMENT OF STATE INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005, available at* <http://www.state.gov/g/drl/rls/irf/2005/51578.htm> (last visited Nov. 12, 2005).

<sup>195</sup> *See UNMIK AT A GLANCE, UNMIK, UNITED NATIONS INTERIM ADMINISTRATION MISSION IN KOSOVO, available at* <http://www.unmikonline.org/intro.htm> (last visited Nov. 11, 2005) (providing a description on U.N. Security Council Resolution 1244, the mandate resolution for UNMIK) [hereinafter UNMIK AT A GLANCE].

<sup>196</sup> *See id.*

and assure the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.”<sup>197</sup> Regardless of whether one views this mandate as within or without the scope of the U.N. Charter,<sup>198</sup> these goals were easier promulgated than achieved.

In the six years since the creation and deployment of UNMIK, the mission has not met its goals. Administration of justice is in and of itself a struggle over which ethnic group’s law to apply and how to apply it.<sup>199</sup> There are increasing reports of civilian-on-civilian violence based on ethnic differences despite the presence of UNMIK forces.<sup>200</sup> And, most importantly, governmental creation is at a standstill.<sup>201</sup>

The closest UNMIK has come to sponsoring an independent government for Kosovo is the 2001 Constitutional Framework for Provisional Self-Government,<sup>202</sup> which has not been officially adopted,<sup>203</sup> and does not enjoy U.S. support.<sup>204</sup> Under the terms of the Constitutional Framework, much of the governing of Kosovo would be done by

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<sup>197</sup> See *id.* (stating the scope of UNMIK’s jurisdiction under Resolution 1244).

<sup>198</sup> The author emphasizes her belief that strictly reading the U.N Charter, which is the only “law” of the U.N. that has any staying power and does not expire – except for treaties which themselves stem from the Charter – is the only legal way to read the Charter. Accordingly, it is her belief that missions such as UNMIK, which conflate peacekeeping with glorified nation-building, are not legal when justified by the U.N. Charter alone.

<sup>199</sup> See Anthony J. Miller, *Keynote Address: UNMIK: Lessons from the Early Institution-Building Phase*, 39 NEW ENGLAND L. R. 1, 16 (2004) (discussing the disjointed effort by UNMIK associated foreign lawyers to use international law in Kosovo when local populations were seeking to have their cultural and traditional laws applied instead); Peter Viggo Jackson, *Military Forces and Public Security Challenges in THE UNITED NATIONS AND REGIONAL SECURITY: EUROPE AND BEYOND* 142 – 143 (Michael Pugh and Waheguru Pal Singh Sidhu eds.) (Boulder, Co: Lynne Rienner Publishers 2003) (describing the incongruities of applicable laws in Kosovo when foreign jurists and lawyers were brought into the region to act as neutral sources of law and justice); David Marshall, *Reviving the Judicial and Penal System in Kosovo in THE UNITED NATIONS AND REGIONAL SECURITY: EUROPE AND BEYOND* 155 – 174 (Michael Pugh and Waheguru Pal Singh Sidhu eds.) (Boulder, Co: Lynne Rienner Publishers 2003).

<sup>200</sup> For recent accounts of violence, see KIM INFO NEWSLETTER 10 11-05, available at [http://www.kosovo.com/news/archive/2005/November\\_11/1.html](http://www.kosovo.com/news/archive/2005/November_11/1.html) (last visited Nov. 12, 2005) (providing an assortment of news stories on the peacemaking efforts in Kosovo and resurgent violence in the area).

<sup>201</sup> The Constitutional Framework was promulgated in May, 2001, but has yet to be acted upon. See CONSTITUTIONAL CHARTER OF THE STATE OF UNION OF SERBIA AND MONTENEGRO, ART. 60, available at <http://www.gov.yu/document/povelja.pdf> (last visited Nov. 12, 2005).

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

<sup>204</sup> See *Briefing on U.S. Strategy for Kosovo*, R. Nicholas Burns, Under Secretary for Political Affairs, UNITED STATES DEPARTMENT OF STATE, Nov. 9, 2005, available at <http://www.state.gov/p/us/rm/2005/56651.htm> (last visited Nov. 10, 2005).

UNMIK and its leadership directly and for an indefinite period of time.<sup>205</sup> The Constitutional Framework subdivides the residents of Kosovo into ethnic and/or religious groups and subgroups, and purporting to give each of these groups their own set of guaranteed rights and freedoms.<sup>206</sup> This division is carried through to elections, which, under the Constitutional Framework, would be administered by apportioning the allotted Parliamentary seats by groups in order to make sure that ethnic and religious segments of the population are present in the parliamentary government.<sup>207</sup>

### C. Analysis

UNMIK's mandate is arguably not a peacekeeping mandate at all, but rather a state-building mandate<sup>208</sup>; in this sense, it undermines the legal and ethical premise of self-determination, and, in so doing, undermines the basic U.N. tenet of international peace and security.

Legally, there is no basis for the independence of Kosovo outside of the U.N. expressing its view that, in the face of ethnic cleansing carried out against Kosovars by some Serbians, Kosovo should be its own state.<sup>209</sup> Before the creation of Yugoslavia after World War I, the Kosovo area was part of other empires and not its own sovereign entity.<sup>210</sup> Indeed, Milosevic's reign of terror against Kosovars was not motivated by an

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<sup>205</sup> CONSTITUTIONAL FRAMEWORK FOR PROVISIONAL SELF-GOVERNMENT, CHAP. 8, UNMIK/REG/2001/9 – 15 MAY 2001, *available at* <http://www.unmikonline.org/constframework.htm> (last visited Nov. 11, 2005).

<sup>206</sup> *Id.* at chap. 4.4 (providing additional rights to those in the constitution of Serbia and Montenegro, and creating an environment in which the rights of each community come to define the community and its relations with society at large).

<sup>207</sup> *Id.* at chap. 9. Contrast this endorsed plan with the situation in Lebanon, where confessionalism is enshrined in law and politics and yet often decried by the general international public.

<sup>208</sup> *See* UNMIK AT A GLANCE, *supra* note 195.

<sup>209</sup> *See* SERBIA & MONTENEGRO FACTBOOK, *supra* note 178.

<sup>210</sup> BACKGROUND NOTE SERBIA & MONTENEGRO, *supra* note 178.

attempt to stop Kosovar independence<sup>211</sup>; rather, it was an attempt to cleanse Serbia of groups other than Serbs.<sup>212</sup> It was only in reaction to this cleansing attempt that Kosovar independence groups began to emerge.<sup>213</sup>

Of the three case studies presented in this article, Kosovo offers the most puzzling example of U.N. peacekeeping presence as a catalyst to create a nation where there otherwise might not be one. Examining the Constitutional Framework, the lack of a unified people to make up a “nation” and the lack of any semblance of a legal or governmental apparatus to make up a “state” is glaringly obvious. The Constitutional Framework acknowledges that there is no homogenous Kosovar population,<sup>214</sup> and fosters the already existing divides among those living in Kosovo by allowing any and every group present in the Kosovo province to avail itself of rights which are designed to create differences rather than celebrate the diverse beliefs found in a unified society, or create a unified society at all. If neighbors are guaranteed the right to celebrate their differences in the constitution but are not also bound under the same description as “Kosovars” (or any other nationality), there is no shared sense of Kosovar identity which can support the imposition of laws and governmental apparatuses on individuals. Rather, neighbors will view each other by their subgroups, and depend on their ethnic or religious leaders for legitimatization of law and government, thus depriving citizens of owning their nation.

The role of UNMIK under the Constitutional Framework is a complete abrogation of any form of self-government by the Kosovars. The concept of self-determination is

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<sup>211</sup> *See id.*

<sup>212</sup> *See id.*; *see also* SERBIA & MONTENEGRO FACTBOOK, *supra* note 178.

<sup>213</sup> BACKGROUND NOTE SERBIA & MONTENEGRO, *supra* note 178.

<sup>214</sup> UNMIK AT A GLANCE, *supra* note 195.

just that – the determination of a people to live together as a nation with shared laws, values, and government.<sup>215</sup> Self-determination does not include any role, no matter how short-lived, for a non-military occupying force to act as the source of legal and governmental primacy in the affected area. By creating a legally binding government apparatus which usurps local control, UNMIK and its officers have drafted a document which takes the “state” concept away from Kosovars for an indeterminate period of time and inserts itself and other U.N. bodies as quasi-governmental organizations.<sup>216</sup> There are no checks on the powers used by these quasi-governmental bodies, the Kosovars are not given the right to request that these bodies leave or cease their activities, and the most that the people of Kosovo are guaranteed is that there will be some nascent form of Parliament created, although even this body is accountable to UNMIK’s leadership.<sup>217</sup>

Certainly, nothing can erase the horrors of Serbian acts of violence against Kosovars; however, examining the UNMIK construct of a state for Kosovo, one wonders whether more injustice will be done to Kosovars if they stay part of Serbia and Montenegro or if they succumb to the Constitutional Framework proposed by UNMIK. With constitutional guarantees of civil rights and freedoms forming the backbone of the new constitution of Serbia and Montenegro, Kosovars, should they opt to remain part of Serbia and Montenegro, would at least have the opportunity to have their voices heard in a national setting and be citizens of a larger state which protects their rights and is accountable to the people who comprise it. Even if Kosovo as a province were ultimately

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<sup>215</sup> See U.N. CHARTER chap. XI.

<sup>216</sup> See generally, UNMIK AT TWO, UNMIK UNITED NATIONS INTERIM ADMINISTRATION MISSION IN KOSOVO, available at <http://www.unmikonline.org/2ndyear/unmik2.htm> (last visited Nov. 11, 2005) (describing the involvement of other U.N. organizations in UNMIK).

<sup>217</sup> See generally CONSTITUTIONAL FRAMEWORK FOR PROVISIONAL SELF-GOVERNMENT, UNMIK/REG/2001/9 – 15 MAY 2001, available at <http://www.unmikonline.org/constframework.htm> (last visited Nov. 11, 2005).

to secede from Serbia and Montenegro, as it could do under the constitutional provisions existing in Serbia and Montenegro, it would be seceding as a state to presumably form its own state. This would be vastly preferable to surrendering its freedoms to a Constitutional Framework created and administered by UNMIK actors who are unaccountable to the Kosovars and who cannot create either the “nation” or the “state” in Kosovo.

### **Part V – Conclusion**

Lebanon, the Democratic Republic of the Congo, and Kosovo are states separated by distance on maps, time, language, religion, ethnicity, and modernity, to mention only a few areas. These countries do not share common ancestry, or heritage, or culture. And yet, they all have a common bond, one that goes beyond the U.N. peacekeepers who have set foot on their soil – they are all entitled to self-determination under the laws and ethical mores of the U.N. This entitlement did not cease to exist when colonial governments were broken up, and it is no way limited to self-determination from European or Western powers only.

The states selected as case studies for this article were chosen because they represent different points on the road toward the creation of a nation-state that gives its citizens legal and cultural ownership of the state such that they become part of the state’s nationalism construct. These states are also illustrations of the unique ability of U.N. peacekeeping missions to hinder the creation of a viable nation-state.

The Lebanese experience with UNIFIL demonstrates that, good intentions and requests of some parties involved aside, there comes a time when the presence of U.N. peacekeepers who cannot even stop violence in the area to which they are deployed

serves only to preserve domestic strife and cleavages, thus creating a disconnect between existing laws and norms which would allow full integration if left alone.

The Congolese experience with UNONUC and UNMONUC questions whether U.N. peacekeeping missions do legitimately preserve nation-states, and concludes that, contrary to mandates and mission statements, U.N. peacekeepers and their missions can easily become agents of cohesion for a nation-state so lacking in cohesion that it is neither a “nation” nor a “state.”

The Kosovo experience with UNMIK is designed to illustrate the dangers that U.N. peacekeeping exhibits when it crosses the bounds of any form of peacekeeping that could have been envisioned at the time the U.N. Charter was enacted, or the first peacekeeping missions created, to become itself an agent of colonization under the guise of humanitarian benevolence and acquired knowledge.

Taken individually, these case studies offer lessons and insights into the nature of nation-states, nationalism, and the role of an outside peacekeeping force in both. As a whole, this article demonstrates that, regardless of the justification for intervention, U.N. peacekeeping operations devolve into exercises which threaten the ability of people in an affected area to exercise their U.N.-given legal and moral rights to self determination. This article also demonstrates that when peacekeepers tarry too long in an area or attempt to keep a state lacking the “nation” and the “state” duality required for a viable nation-state together they can work to upset international peace and security – in the present, as in Lebanon, or in the future, as with UNONUC in the Congo, which voids the legal basis for the creation of peacekeeping forces under the auspices of the U.N. Conflict and violence are not palatable concepts in a society driven largely by humanitarian ideals and

constructs; however, forcing groups of people to live together unwillingly because diplomats and peacekeepers can salvage a constructed state, or because an international body deems itself a proper source of law and government for these peoples, is as violative of the humanitarian right of self-determination to create a nation-state and a sense of nationalism as is arming the combatant groups or allowing them to go their separate ways.