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The Security Council and the Intervention Brigade: Some Legal Issues

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Introduction

On March 28, 2013, the United Nations Security Council (UNSC) authorized an Intervention Brigade (the Brigade) - its "first-ever 'offensive' combat force" - to undertake military operations against armed groups in the Democratic Republic of the Congo (DRC).[1] This *Insight* describes some of the legal issues that arise from the Brigade's mandate.

The Resolution

Resolution 2098 (2013),[2] unanimously adopted by the UNSC, extended the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and authorized the creation of the Brigade, which will operate under the direct command of the MONUSCO force commander. The Brigade will undertake offensive operations in the DRC.

The key provisions concerning the Brigade are found in the operative paragraphs 9, 10 and 12(b) of UNSC resolution 2098. The UNSC mandated the Brigade "to carry out targeted offensive operations . . . with the responsibility of neutralizing armed groups." [3] The role of the Brigade is also to "prevent the expansion of all armed groups . . . and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities." [4] Based on the references to the armed groups made elsewhere in the resolution, it is reasonable to assume that the Brigade is mandated to undertake offensive operations against, for example, the M23, the Democratic Liberation Forces for the Liberation of Rwanda, the Lord's Resistance Army, and various Mayi Mayi groups.[5]

Members of the UNSC unanimously accepted the recommendations of the Secretary-General to create the Brigade.[6] A key reason for supporting its creation was that it would "help the Congolese Government strengthen its control over territory." [7] However, some

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members of the UNSC expressed concerns about the implications of the Brigade's mandate. For example, Guatemala's representative in the UNSC argued that the Brigade would raise "conceptual, operational and legal considerations that had not been sufficiently explored."^[8]

The UNSC stipulated that the legal framework applicable to the Brigade in carrying out its functions and tasks is international law, including international humanitarian law.^[9]

Key Legal Issues

The UNSC's innovation in establishing an offensive military force to "neutralize" non-state armed actors in the DRC raises two broad and important legal questions. The first is whether the Brigade, as a matter of law, should legally be considered a party to the conflict in the Congo. The second question concerns the verb "neutralize" and the powers that the Brigade might imply from it.

Whether a UN peacekeeping force engaged in armed conflict with opposing forces should be considered a party to the conflict (for the purposes of applying international law) has been controversial for a number of decades.^[10] The UN has never publicly admitted that its peacekeepers are parties to the conflicts in which they engage, notwithstanding the fact that on a number of occasions it has acknowledged that its peacekeeping forces have engaged in offensive operations against armed groups.^[11] As a matter of law, it is difficult to conclude that the Brigade would not be a party to the conflict in situations where it conducts offensive operations. As a party to the conflict, the Brigade would be required to abide by international humanitarian law.

On the basis that the Brigade's operations are in support of the DRC, and conducted with the DRC's consent, the conflict would likely be categorized as a non-international armed conflict for the purposes of applying either Common Article 3,^[12] or Additional Protocol II to the Geneva Conventions.^[13] The choice between those two instruments will depend in large part on whether the armed groups that the Brigade fights meet the threshold prescribed by Additional Protocol II – that they are "under responsible command, [and] exercise such control over a part of its territory to enable them to carry out sustained and concerted military operations...".^[14] Regardless of whether the Brigade's adversaries meet this threshold, at a minimum, Common Article 3 will apply to the combat operations conducted by the Brigade. Furthermore, the Brigade will be expected to adhere to the Secretary-General's Bulletin concerning the application of international humanitarian law in situations of armed conflict, because its members are actively engaged in the conflict as combatants.^[15] If the members of the Brigade are combatants they "can be legitimate targets for the extent of their participation in accordance with international humanitarian law."^[16]

If it is accepted that the Brigade is a party to the conflict, the question that then arises is whether the MONUSCO as a whole is also a party to the conflict.^[17] One may argue that, because the Brigade is under the command and control of the MONUSCO Force Commander, the whole force is a party to the conflict and therefore could be lawfully targeted by opposition forces. A more nuanced approach might be to separate the Brigade from MONUSCO by arguing that only those MONUSCO forces engaged in actual fighting in support of the Brigade would be parties to the conflict. Thus, those MONUSCO units carrying out humanitarian aid or protecting vulnerable people would maintain their protected status and it would be unlawful to target them. The second option would be to distinguish members of MONUSCO on the basis that those taking an active part in hostilities could be targeted, and those who are not would retain their protected status. In either case, it would be important to consider how the opposing parties to the conflict are expected to distinguish between members of the Brigade and members of MONUSCO.

A further question regarding the establishment of the Brigade is why the UNSC thought it necessary to stipulate that the Brigade is mandated to 'neutralize' the armed groups. Did the UNSC use that word as a term of art to mean that the Brigade should "render [the armed groups] ineffective or unusable"?[18] If yes, did the UNSC intend to distinguish the Brigade's mandate from other operational terms such as "contain," "defeat," "destroy," "disrupt," or "exploit"? If the term is being used in a specific way, what ramifications does that have for the Brigade's functions and tasks? Might "neutralize" mean that targeting or capture of the rebel forces is limited to making the rebels ineffective? Furthermore, it is not clear why the UNSC felt it had to add "neutralize" to the Brigade's mandate when the Brigade, as a subordinate component of MONUSCO, would have the ability to "take all necessary measures" to complete its mandate.[19] Is the Brigade to interpret "take all necessary measures" more narrowly because of the word "neutralize"?

If the term "neutralize" is read broadly, it is reasonable to assume that the Brigade is mandated to target armed groups with lethal force. In line with the usual concept of offensive operations, the Brigade would be able to conduct ambushes, deliberate attacks and hold ground against any armed group. It therefore follows that the Brigade's rules of engagement would be amended to take into account the offensive nature of the operations, and that the international humanitarian law principles of necessity, proportionality, humanity and distinction would be considered accordingly - that is, from a different perspective to how those terms would be applied when self-defense is the justification for the use of force. The rules of engagement presumably would also have to deal with whether the basis for targeting is that a rebel is a member of an organized armed group, or whether he or she is taking an active part in hostilities.[20]

Again, reading the term "neutralize" broadly, the Brigade may imply that it has the power to detain and capture members of the armed groups it is conducting operations against. As a starting point, it is reasonable to assume that the Brigade will apply the UN "Interim Standard Operating Procedures: Detention in United Nations Peace Operations" when dealing with detainees. As these Procedures are over two years old, they may be updated to reflect more recent detention principles and guidelines such as found in the "Copenhagen Process: Principles and Guidelines concerning detention in non-international armed conflict and peace operations." Furthermore, it is also reasonable to assume that, consistent with the UN's past practice, the Brigade will transfer the armed group members that they have captured to the DRC authorities.

The UNSC rarely states that UN peacekeepers are to conduct operations in accordance with international human rights law. Resolution 2098 is no exception. The reference to HRDDP stipulates that the Brigade must apply human rights law when working with the Armed Forces of the DRC, and it does not equate to a broader requirement to apply international human rights law to actions taken against armed groups. However, a broad reading of the resolution's stipulation that the Brigade's operations are to be conducted in accordance with international law would require that international human rights law also be complied with.

Civil society, courts and tribunals are increasingly considering the extent to which UN forces are able to interpret UNSC resolutions in a manner that adversely impacts on the fundamental rights of individuals. For example, one interpretation of the *Al-Jedda v. United Kingdom* case is that the European Court of Human Rights will not look favorably on states that assert that they are exercising powers of indefinite detention based on a UNSC resolution. In addressing the power of British forces to use internment in Iraq, the Court argued that the mandate provided by the UNSC to take measures to contribute to the maintenance of security and stability could not be interpreted as creating a "binding obligation to use internment." [21]

Considering whether that approach might apply in relation to the Brigade's combat activities, it is worth reflecting whether the UNSC should be more nuanced when authorizing powers such as targeting and detention. Should the UNSC, for example, state explicitly that the Brigade has the power to target and detain, and if so, should it spell out the targeting and detention regimes it requires to be applied?

Of course, regardless of the position taken by the UN concerning the applicability of international humanitarian law or international human rights law, each troop contributing state is bound by its own national and international obligations and might therefore reach different conclusions from the UN, and between themselves, concerning what law applies to their forces serving with the Brigade.

Conclusion

Clearly members of the UNSC believe that setting up a UN commanded and controlled force to fight armed groups in the Congo is necessary for maintaining international peace and security, and to protect the civilian population. There are, however, two broad legal uncertainties that remain. First, it is uncertain whether the Brigade's forays into offensive operations will mean that MONUSCO will be considered a party to the conflict for the purposes of applying international law. Second, it is unclear what if any legal limits the term "neutralize" places on the Brigade when it is conducting operations. It will be interesting to see how the Brigade operationalizes its mandate, and the effects that its operations will have on the development of the law and practice of UN peace operations.

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Endnotes:

[1] Press Release, Security Council, 'Intervention Brigade' Authorized as Security Council Grants Mandate Renewal, U.N. Press Release SC/10964, (Mar. 28, 2013), *available at* <https://www.un.org/News/Press/docs/2013/sc10964.doc.htm>.

[2] S.C. Res. 2098, U.N. Doc. S/RES/2013 (28 Mar. 2013).

[3] *Id.* ¶ 9.

[4] *Id.* ¶ 12(b).

[5] *See, e.g., Id.* ¶ 8.

[6] *See* U.N. Secretary-General, *Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region*, ¶ 60, U.N. Doc. S/2013/119 (Feb. 27, 2013).

[7] Press Release, *supra* note 1, statement by Eugene-Richard Gasana, Rwanda.

[8] *Id.*

[9] *Id.* ¶ 12(b).

[10] *See, e.g.,* Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *International Law and the Classification of Conflicts 32-79* (Elizabeth Wilmshurst ed., 2012); Daniel Cahen, *IHL Challenges series - Typology of Conflicts, Part V – Wrap Up*, Intercross (Apr. 4, 2013), <http://intercrossblog.icrc.org/blog/ihl-challenges-series-typology-conflicts-part-v-wrap>.

[11] UN peacekeepers have engaged in offensive operations in a number of situations including the Republic of the Congo in 1961. *See, e.g.,* Trevor Findlay, *The Use of Force in UN Peace Operations 75-80* (2002). For more recent examples of the UN Secretary-General reporting UN forces engaging in offensive operations, see U.N. Secretary-General, *Report on the United Nations Stabilization Mission in Haiti*, ¶25, U.N. Doc.S/2005/631 (Oct. 6, 2005); U.N. Secretary-General, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic*

Republic of the Congo, ¶¶16-17, U.N. Doc. S/2012/355 (May 23, 2012); U.N. Secretary-General, Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, ¶37, U.N. Doc. S/2013/96 (Feb. 15, 2013).

[12] Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, common art. 3, Aug. 12, 1949, 75 U.N.T.S 31; Geneva Convention Relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 75 U.N.T.S 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S 287.

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S 609 [hereinafter Additional Protocol 1]. For a more detailed discussion as to why the conflict would not be classified as an international armed conflict, see, e.g., Dapko Akande, *supra* note 10, at 62-3.

[14] Additional Protocol I, *supra* note 13, at art. 1(1).

[15] U.N. Secretary General, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, §2, U.N. Doc. ST/SGZB/1999/13 (Aug. 6, 1999).

[16] *Id.*

[17] For a more detailed discussion concerning the classification of the conflict in the DRC, see Louise Armatsu, *The Democratic Republic of the Congo 1993-2010 in International Law and the Classification of Conflicts* 146-202 (Elizabeth Wilmshurst ed., 2012).

[18] US Department of Defence, Dictionary of Military Terms, *available at* http://www.dtic.mil/doctrine/dod_dictionary/.

[19] S.C. Res. 2098, *supra* note 2, ¶12.

[20] Nils Melzer, International Committee of the Red Cross, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009), *available at* <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

[21] *Al-Jedda v United Kingdom*, App. No. 27021/08, Eur. Ct. H.R. 109 (2011).