

The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo

SCOTT SHEERAN AND STEPHANIE CASE



Cover Photo: South African troops with the Force Intervention Brigade (FIB) of the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) pour out of an armoured vehicle at an operation site during a training session in Sake, Democratic Republic of the Congo. July 17, 2013. ©UN Photo/Sylvain Liechti.

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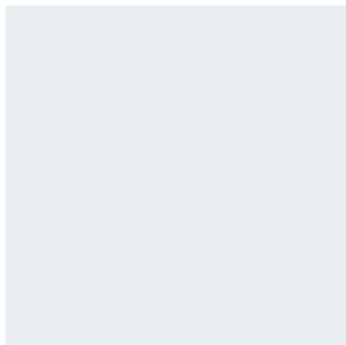
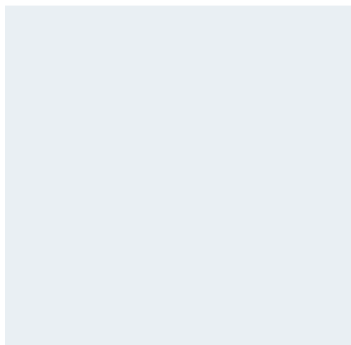
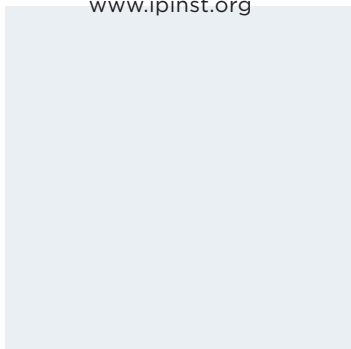
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Abbreviations

ACIRC	Allied Democratic Forces
AU	African Union
DFS	Department of Field Support
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
FARDC	<i>Forces Armées de la République Démocratique du Congo</i>
FDLR	<i>Forces Démocratiques de Libération du Rwanda</i>
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
LRA	Lord's Resistance Army
M23	<i>Mouvement du 23 mars</i>
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MINUSMA	Integrated Stabilization Mission in Mali
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NIAC	Non-international Armed Conflict
OHCHR	UN Office of the High Commissioner for Human Rights
ONUC	United Nations Operation in the Congo
RoE	Rules of Engagement
SOFA	Status of Forces Agreement
TCC	Troop-Contributing Country
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNOCI	United Nations Operation in Côte d'Ivoire
UNOSOM II	United Nations Operation in Somalia II

Executive Summary

In March 2013, the United Nations Security Council adopted Resolution 2098 establishing the Intervention Brigade within the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). This provided MONUSCO with an unprecedented UN peacekeeping mandate for offensive operations to neutralize armed groups in the Democratic Republic of the Congo (DRC). While the mandate was both innovative and controversial—for political, operational, and legal reasons—the Intervention Brigade has been seen by many as a success and a future model. The Security Council renewed the Intervention Brigade’s mandate in Resolution 2147 in March 2014 without any significant modifications.

It is clear that the legal issues for the Intervention Brigade’s mandate were not fully considered or understood in March 2013, and that they have political and practical consequences. This report analyzes the legal issues and reaches the following key conclusions:

- The Intervention Brigade’s mandate to use all necessary means to “neutralize” armed groups permits it to use force, including deadly force, and, in this instance, reflects UN forces moving toward a more traditional war-fighting, rather than peacekeeping, posture.
- MONUSCO as a whole, and not just the Intervention Brigade component, is considered a party to the armed conflict. As the UN is now a party, all military members of MONUSCO will have lost the protections afforded to them under international law (i.e., under international humanitarian law [IHL], the *Convention on the Safety of United Nations and Associated Personnel* through the status of forces agreement [SOFA], and the *Rome Statute of the International Criminal Court*), and therefore no longer enjoy legal protection from attacks. This may impact the willingness of troop-contributing countries (TCCs) to provide forces to MONUSCO.
- MONUSCO premises and bases can be catego-

rized as a military objective under IHL, and UN civilian staff may become collateral damage in an attack. This may give rise to additional responsibilities on the UN for its civilian staff in MONUSCO.

- The Intervention Brigade’s mandate is likely to lead to more instances of detention or internment by MONUSCO. This may generate IHL and international human rights law (IHRL) concerns, including the UN’s practical capacity to meet obligations of treatment, transfer of detainees to national forces, and legal authority for sustained detention or internment.
- While responsibility and accountability are especially important for the Intervention Brigade given its combat operations, MONUSCO’s mechanisms for complaints and claims are limited and not independent of the mission, and they focus on private law claims, not human rights or other violations of international law. The UN also may assert that it has little responsibility to remedy or pay compensation for deaths, injuries, or damage to property caused by peacekeeper actions in the course of carrying out their operations.
- The Intervention Brigade appears to go beyond all three of the agreed “basic principles” of UN peacekeeping—consent, impartiality, and non-use of force except in self-defense (including in defense of the mandate). The brigade’s mandate to use force, strictly speaking, is inconsistent with peace enforcement (e.g., using force to protect a peace agreement or ceasefire) that the UN asserts characterizes this component of MONUSCO. It is rather focused on eliminating or neutralizing particular parties—nonstate armed groups—to an armed conflict. Both these points raise questions for the scope, role, and design of UN operations in carrying out offensive mandates beyond traditional or even robust peacekeeping.
- MONUSCO’s pre-existing “protection of civilians” mandate provided the ability to use force against the main armed groups in the DRC. The addition of the Intervention Brigade’s mandate may reflect deficiencies of political will and capacity, more than it does the legal

* The UN Security Council this year extended the Intervention Brigade deployed in the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) to “neutralize and disarm” rebel groups in the country. This policy report builds on a prior IPI issue brief from July 2013 on policy and operational issues for the Intervention Brigade by examining the legal issues. The report is a review of the difficult legal issues, including for non-lawyers.

authority to use force. The Intervention Brigade may therefore risk undercutting the legal interpretation of MONUSCO's and other missions' long-standing mandates for the protection of civilians.

- While UN peace operations mandates continue to evolve and become more robust as required for particular situations, there is a general need to have greater transparency and open debate of the legal issues. This will help to achieve optimal outcomes and better promote the UN Charter's purposes and principles. The legal issues are both complex and at times unclear or contentious, which, in turn, creates practical problems for operational guidance and implementation on the ground.

Introduction

The Intervention Brigade in MONUSCO was both welcomed and controversial at its inception. In March 2013, the UN Security Council noted the lack of progress in the DRC and unanimously adopted Resolution 2098 establishing the first UN-led overtly offensive force. There was a recognized need to address the cycle of violence in the eastern DRC with a more robust response.¹ The Intervention Brigade was given an unprecedented mandate to neutralize rebel forces, something that neither the UN peacekeeping mission nor the Congolese government had been able to successfully address up to that point. The UN Secretariat asserted that it was a "peace enforcement" mission, not a peacekeeping mission, the "first-ever 'offensive' combat force," and that the Security Council authorized it "on an exceptional basis and without creating a precedent or any prejudice to

the agreed principles of peacekeeping."²

While many applauded the bold move, others were quick to point out that the UN was stepping into uncharted territory without fully considering the potential ramifications of its actions.³ In late April 2013, the UN secretary-general met with Security Council members during a retreat where the traditional boundaries of peacekeeping and alternatives were discussed, which had been triggered significantly by the Intervention Brigade's mandate.

Over the last year, the Intervention Brigade in MONUSCO has been hailed largely as a success. Equipped with attack helicopters, long-range artillery, armored personnel carriers, special forces, snipers, and even drones, the Intervention Brigade has been able to carry out and support Congolese government offensive operations forces in a way that MONUSCO was unable to and has produced military results. The UN reporting on Intervention Brigade activities has tended to emphasize a *supporting* role to Congolese national armed forces—the *Forces Armées de la République Démocratique du Congo* (FARDC)—more so than the media reporting on its activities,⁴ despite the leadership, superior capacity, and firepower deployed in UN operations in the DRC.

The Intervention Brigade of 3,069 troops deployed into the eastern DRC in July 2013, and rebel forces around Goma were given a 48-hour ultimatum to disarm by August 1, 2013.⁵ The Intervention Brigade's offensive operations began that August and have continued since, employing the full range of capabilities.⁶ In November 2013, the *Mouvement du 23 mars* (M23) rebel group ended its insurgency after more than a year and a

1 United Nations, *Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region*, UN Doc. S/2013/119, February 27, 2013, paras. 2–5.

2 UN Security Council Resolution 2098 (March 28, 2013), UN Doc. S/RES/2098, para. 9; and United Nations, "Intervention Brigade' Authorized as Security Council Grants Mandate Renewal for United Nations Mission in Democratic Republic of Congo," Press Release SC/10964, March 28, 2013. See also the mandate renewal, UN Security Council Resolution 2147 (March 28, 2014), UN Doc. S/RES/2147, para. 1.

3 For example, see Security Council member Guatemala's "Explanation of Vote after the Vote," March 28, 2013, available at www.guatemalaun.org/bin/documents/SCUN-RES-2089%282013%29-DRC.pdf.

4 For example, compare the language in media reports to the language used in the secretary-general's report preceding the renewal of the Intervention Brigade's mandate: "Though purely offensive operations have yet to be undertaken by MONUSCO, the Mission is currently providing support to the offensive operations of the Congolese armed forces against ADF around Kamango, launched on 16 January 2014." See United Nations, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, UN Doc. S/2014/157, March 5, 2014, para. 39.

5 UN News Centre, "UN Mission Sets Up Security Zone in Eastern DR Congo, Gives Rebels 48 Hour Ultimatum," July 30, 2013, available at www.un.org/apps/news/story.asp?NewsID=45535#.U1kRU8JOXVJ.

6 See, for example, "UN Helicopters Strike Congolese Rebels," *Al-Jazeera*, August 29, 2013, available at www.aljazeera.com/news/africa/2013/08/201382815950221122.html; Agence France-Presse, "UN Gunships Strike Ugandan Muslim Rebels in DR Congo," *ModernGhana.com*, March 1, 2014, available at www.modernghana.com/news/526485/1/un-gunships-strike-ugandan-muslim-rebels-in-dr-con.html; and Kenny Katombe, "U.N. and Congolese Troops Attack Rwandan Hutu Rebels," Reuters, March 12, 2014, available at www.reuters.com/article/2014/03/12/us-congo-democratic-offensive-idUSBREA2B15H20140312.

half of fighting, an event that has been seen by many as validating the Intervention Brigade's efforts. Now that the Intervention Brigade is turning its focus toward other armed groups in the eastern DRC, including the *Forces Démocratiques de Libération du Rwanda* (FDLR, Democratic Forces for the Liberation of Rwanda) and the Ugandan rebel group the Allied Democratic Forces (ADF), hope remains high that recent military successes will continue. In March 2014, Security Council Resolution 2147 renewed the mandate of the Intervention Brigade within MONUSCO, and little was changed of substance in the Intervention Brigade's mandate.⁷

From a legal standpoint, while various issues have been raised and debated, the implications of the Intervention Brigade have not been completely clear or resolved. In the Security Council retreat in April 2013, council members received an overview from the UN Office of Legal Affairs on MONUSCO's possible loss of protected status under IHL. Some council members expressed surprise that Resolution 2098 might have such legal implications.⁸

The Intervention Brigade's mandate to engage in combat operations against particular parties in this conflict represents a clear departure from the traditional "basic principles" of UN peacekeeping (i.e., consent, impartiality, and non-use of force except in self-defense, including in defense of the mandate).⁹ Furthermore, controversy remains surrounding the close military relationship between the Intervention Brigade and MONUSCO with the FARDC. The UN mission's credibility has been previously called into question as a result of its support to the FARDC, who have been credibly

accused of committing serious violations of human rights and IHL. Most recently, components of the FARDC have been accused of mistreating M23 detainees, carrying out mass rapes, killing civilians, committing sexual violence and other forms of torture, and looting and burning of villages.¹⁰

The UN Security Council was careful to express in Resolution 2098 that the Intervention Brigade would not set a precedent. However, its actual or perceived success in the DRC heightens the possibility that this type of peacekeeping model will be repeated. As stated by the permanent representative of France to the UN at the time of the mandate's renewal: "[N]ow we have tested our idea, the Intervention Brigade, and it works. So we hope it could be a model when necessary for the future."¹¹ It is therefore important to understand the legal implications of this type of UN force for now and the future.

HOW INTERNATIONAL LAW APPLIES TO UN PEACEKEEPERS

Before addressing the practical legal issues and consequences of the Intervention Brigade, it is necessary to set out a few key points about international law in general as it applies to UN peacekeeping missions and personnel. UN peacekeeping is not explicitly provided for in the Charter, which is the constitutive legal instrument of the organization. It has developed ad hoc and by necessity to meet the changing circumstances associated with the UN's responsibility for maintaining international peace and security. The practice of UN peacekeeping has significantly influenced the development of the UN's relevant institutional law and policy, often resulting in ex

7 The one change of note for the general MONUSCO mandate was that "protection of civilians" language was changed to remove the qualifier "imminent."

8 Security Council Report, "Democratic Republic of the Congo," July 2013 Monthly Forecast, New York, June 28, 2013, available at www.securitycouncilreport.org/monthly-forecast/2013-07/democratic_republic_of_the_congo_2.php.

9 See, originally, United Nations General Assembly, *Report of the Secretary-General: Summary Study of the Experience Derived from the Establishment and Operation of the Force*, UN Doc. A/3943, October 9, 1958, para. 127. The interpretation of these principles, particularly the meaning of self-defense, has expanded and been endorsed by the UN General Assembly, Security Council, and Secretariat. See also United Nations General Assembly and Security Council, *Report of the Panel on United Nations Peace Operations* (also known as the Brahimi report), UN Doc. A/55/305 and S/2000/809, August 21, 2000, ix; and UN Department of Peacekeeping Operations (DPKO) and UN Department of Field Support (DFS), *United Nations Peacekeeping Operations: Principles and Guidelines* (also known as the Capstone Doctrine), January 18, 2008, 34.

10 For example, see UN Office of the High Commissioner for Human Rights (OHCHR) and MONUSCO, *Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Soldiers of the Congolese Armed Forces and Combatants of the M23 in Goma and Sake, North Kivu Province, and in and around Minova, South Kivu Province, from 15 November to 2 December 2012*, May 13, 2013, pp. 9–10, available at www.ohchr.org/Documents/Countries/CD/UNJHROMay2013_en.pdf; "Can the DRC Army Stop Abusing Human Rights?" IRIN News, August 12, 2013; UN News Centre, "UN Human Rights Office 'Disappointed' by Ruling in DR Congo Mass Rape Trial [of FARDC members]," May 6, 2014; and UN Security Council, *Ensuring Future Stability in Democratic Republic of Congo Will Depend on Evolving Situation, Simplified Mandates, Mission Chief Tells Security Council*, press release, UN Doc. SC/9820, December 16, 2009 ("... the FARDC have also committed human rights violations, including massacres ...").

11 Permanent Mission of France to the UN, "DRC/CAR/Ukraine: Remarks to the Press by Mr. Gérard Araud, Permanent Representative of France to the United Nations," March 28, 2014, available at www.franceonu.org/france-at-the-united-nations/press-room/speaking-to-the-media/remarks-to-the-press/article/28-march-2014-drc-remarks-to-the-

post facto legal justifications of peacekeepers' actions.¹²

The legal authority for UN peacekeeping is provided by a quasi-constitutional interpretation of the Charter. In the landmark *Certain Expenses* opinion (1962), the International Court of Justice (ICJ) held that the Security Council had the general implied power under the Charter to establish a UN peacekeeping operation, and that this was necessary to carry out the UN's functions effectively. The court stated that when the UN "takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* [beyond the powers of] the Organization."¹³

A UN peacekeeping mission operates under the international legal personality of the organization. A mission is considered a subsidiary organ of the Security Council, as is the case for MONUSCO, and the UN usually concludes a binding status of forces agreement (SOFA) with the host country. This means, generally speaking, that the UN is responsible under international law for the UN mission's and its peacekeepers' actions.¹⁴ The mission's command and control rests ultimately with the secretary-general, through, in turn, the under-secretary-general of the Department of Peacekeeping Operations (DPKO), the special representative of the secretary-general (head of mission), and the force commander.

Many of the legally binding standards of conduct for the organization, which are applicable to its peacekeepers, derive from customary international law and even the Charter rather than specific treaties.¹⁵ Unlike many states, the UN is not party to the Geneva Conventions (1949) or the Additional

Protocols (1977), or to the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights (1966). The legal obligations of the UN are not always exactly the same as for states, especially the state hosting a peacekeeping operation, and their precise content is often unclear or contested.¹⁶

Parameters of Action and Using Force: Interpreting the Mandate

The key element of the Security Council mandate provided to the Intervention Brigade is its authority to use force. International law makes a clear distinction between the authority to use force (*jus ad bellum*) and the legitimate means and methods of using force in armed conflict (*jus in bello*). The latter is also known interchangeably as the international law of armed conflict or international humanitarian law (IHL).

Resolution 2098 created the Intervention Brigade within MONUSCO and under the same force commander as the rest of the force. It explicitly authorized the Intervention Brigade to "take all necessary measures" to carry out "targeted offensive operations" to "prevent the expansion of all armed groups, *neutralize* these groups, and to disarm them."¹⁷ This was to reduce security threats in the eastern DRC and provide space for stabilization activities. It was an unprecedented offensive mandate to use force for a UN-led mission, which was reaffirmed in Resolution 2147 (2014) extending the Intervention Brigade's mandate. While other missions have had robust mandates, none have gone quite as far as the mandate for the Intervention Brigade in terms of explicit authoriza-

12 See, for example, International Court of Justice (ICJ), *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports 1962 (July 20, 1962), p. 15.

13 *Ibid.*, p. 168. The ICJ also reasoned that the organization's powers will "depend upon its purposes and functions as specified or implied in its constituent documents and *developed in practice*" (emphasis added), p. 180.

14 See International Law Commission, *Draft Articles on the Responsibility of International Organizations*, 2011, Article 10, available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf; and United Nations, *Revised Draft Memorandum of Understanding between the United Nations and Troop-Contributing Countries*, Article 9, available at www.un.org/en/peacekeeping/documents/un_in.pdf.

15 This position is reflected in United Nations, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, August 6, 1999; and United Nations, *Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces*, UN Doc. A/67/775-S/2013/110, March 5, 2013, which states that support by the UN to non-UN security forces "must be consistent with the Organization's purposes and principles in the Charter and its obligations under international law to respect, promote and encourage respect for international humanitarian, human rights, and refugee law."

16 For instance, years of debate surrounding the applicability of international humanitarian law to UN forces led to the secretary-general's bulletin on this issue (see *ibid.*), which seeks to clarify the fundamental principles and rules. However, these issues continue to be debated as various interpretations are possible.

17 UN Security Council Resolution 2098 (March 28, 2013), UN Doc. S/RES/2098, para. 12(b) (emphasis added).

tion of use of force against parties to the conflict.¹⁸

The word “neutralize”—or “neutraliser” in the original French resolution—can be interpreted in a broad or narrow way. A narrow interpretation might mean simply “to render ineffective,”¹⁹ which would likely preclude use of deadly force where other options are available. However, in the context of the resolution it is clear that “neutralize” does not constrain the Intervention Brigade’s ability to use deadly force.²⁰ The UN has stated that the Intervention Brigade was created to carry out peace enforcement, rather than peacekeeping, and that the troops would have authorization to use lethal force against armed groups. A broad interpretation of “neutralize” could translate into a range of authorized actions including capture, detention, or killing, and this reading is most consistent with other related terms in the resolution, such as “offensive” and “targeted.”

In principle, the rules of engagement (RoE) for the Intervention Brigade could adopt elements of more traditional RoE, reflecting military doctrine for war-fighting rather than regular peacekeeping. Such doctrine focuses on the use of force against “hostile forces” (i.e., armed groups), a relatively clearer concept for soldiers than using force in response to “hostile acts” or “hostile intent” of armed groups against the mission or its mandate (e.g., protection of civilians). The MONUSCO RoE are not publicly available, but there are unconfirmed suggestions that there is only one set of RoE

for the entire UN mission.

The mandate authorizes the Intervention Brigade to use force against “all” armed groups.²¹ This clearly extends beyond the M23, whose occupation of Goma in November 2012 was a significant catalyst for the Intervention Brigade.²² After the Intervention Brigade had “neutralized” the M23 in November 2013, it shifted focus toward the FDLR, ADF, and the Lord’s Resistance Army (LRA), which is reflected in the renewed mandate. However, many other dangerous rebel groups remain. It is estimated that there are at least three dozen other armed groups operating in the eastern part of DRC, all of different ethnicities and backgrounds.²³

The mandate to target *all* armed groups provides the UN Intervention Brigade forces with flexibility, but it also comes with responsibility, including strategic and operational choices of which groups to target. There is also a definitional issue of who may be considered a member of an “armed group” for mandate purposes and use of force. This will be reflected in the RoE for MONUSCO. While an “armed group” may be equated to the IHL concept of “organized armed groups” (OAGs), it is not clear that all armed groups mentioned in resolutions 2098 and 2147 reach the threshold of OAGs under IHL.²⁴ The RoE therefore might have to, as an alternative, also reflect the targeting of individuals or groups (e.g., the Mayi-Mayi) based on their taking an active part in hostilities.²⁵

18 In the early 1960s, the UN Operation in the Congo (ONUC) was mandated to “take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel.” See UN Security Council Resolution 169 (November 24, 1961), UN Doc. S/RES/169. The UN Operation in Somalia II (UNOSOM II) was mandated in 1993 to take “all necessary measures against all those responsible” for attacks against the UN including “their arrest and detention for prosecution, trial, and punishment.” See UN Security Council Resolution 837 (June 6, 1993), UN Doc. S/RES/837.

19 NATO glossary of terms defines *neutralization fire* as “fire delivered to render a target temporarily ineffective or unusable.” See NATO, *NATO Glossary of Terms and Definitions*, AAP-06, 2013 ed. (Brussels, Belgium, 2013). See also, US Department of Defense, “DOD Dictionary of Military Terms,” available at www.dtic.mil/doctrine/dod_dictionary/.

20 For example, see Bruce Oswald, “The Security Council and the Intervention Brigade: Some Legal Issues,” *American Society of International Law Insights* 17, No. 15 (June 6, 2013), available at www.asil.org/insights.

21 See UN Security Council Resolution 2098 (March 28, 2013), UN Doc. S/RES/2098, paras. 8, 12(b): “the M23, the FDLR, the ADF, the APCLS, the LRA, the National Force of Liberation (FNL), the various Mayi-Mayi groups and all other armed groups.”

22 United Nations, *Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region*, UN Doc. S/2013/119, February 27, 2013, para. 5.

23 For an overview of the various rebel groups operating in the DRC, see “Briefing: Armed Groups in Eastern DRC,” IRIN News, October 13, 2013, available at www.irinnews.org/report/99037/briefing-armed-groups-in-eastern-drc.

24 The “organized armed groups” (OAGs) concept is not clearly defined in international humanitarian law (IHL). The treaty law sets out a narrow definition. See Additional Protocol II, Article 1(1) of the Geneva Conventions, which provides that OAGs must be “under responsible command, [and] exercise such control over a part of [a state’s] territory as to enable them to carry out sustained and concerted military operations and to implement *this Protocol* [emphasis added]” (i.e., and not for the purposes of Article 3 common to the Geneva Conventions). The case law and expert commentary have suggested a more pragmatic, broad, and purposeful definition. See International Committee of the Red Cross, “How Is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?” Opinion Paper, March 2008, p. 5 (which refers only to a “minimum of organization”). See also Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: ICRC, May 2009), p. 27, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf; International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic*, Judgment, Case No. IT-94-1-T (May 7, 1997), paras. 182–83; and UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, August 16, 2012, para. 134 (indicating that anti-government armed groups in Syria should be considered OAGs that are accountable under IHL).

25 Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*; Ashley Deeks, “How Does the UN Define ‘Direct Participation in Hostilities?’” *Lawfare* (blog), October 21, 2013, available at www.lawfareblog.com/2013/10/how-does-the-un-define-direct-participation-in-hostilities/.

The Standards that Apply: Laws of War and Peace

For the conduct of MONUSCO activities, there are two main legal frameworks that are applicable: IHL²⁶ and IHRL.²⁷ The former regulates the UN peacekeeping mission only when it is considered a party to a conflict, and the latter is relevant at all times, although the applicability of IHRL may be limited in scope during times of armed conflict. While the UN is not party to the relevant treaties for IHL and IHRL, it is accepted that the same legal rules may apply to the organization and its peacekeepers.²⁸ The Security Council takes the view that both bodies of law are applicable to the situation in the eastern DRC.²⁹ The two key questions that determine how IHL and IHRL apply to MONUSCO's activities are whether the mission is considered party to the conflict or conflicts, and if so, then whether it is MONUSCO as a whole or only the Intervention Brigade component.

INTERNATIONAL HUMANITARIAN LAW

The potential application to MONUSCO of IHL, which regulates conduct of hostilities, is triggered by an armed conflict. While there is no formal definition of an "armed conflict," it is considered to occur once hostilities between warring parties have

reached a minimum level of intensity. The threshold of intensity differs depending on whether the armed conflict is characterized as international or non-international.³⁰ Given the nature and extent of the violence in the eastern DRC, which has been described by the secretary-general as "overwhelming,"³¹ it is without serious question that the conflict meets the requisite level of intensity regardless of the category of conflict, including during the period for which the Intervention Brigade has been active.

The specific rules of IHL that apply to a given conflict depend on whether it is an "international armed conflict" (IAC), concerning conflicts between states, or a "non-international armed conflict" (NIAC), concerning a much broader category of conflicts but often within a single state. As the conflicts in DRC primarily concern government forces fighting with various nonstate armed groups, the NIAC classification is more relevant.³² Where multinational armed forces fight alongside or in support of state armed forces against organized armed groups, such as in DRC, the predominant view is that the conflict may be referred to as a "multinational" NIAC.³³ Some commentators take the view that particular armed groups in the eastern DRC are so intertwined with armed forces of neighboring states (e.g., claims that

26 IHL consists of a number of treaties, the core of which are the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, as well as customary international law. IHL primarily sets forth the legal framework for the conduct of armed conflicts of an international or non-international character involving states and armed groups.

27 International human rights law (IHRL) consists of a set of rules, set out in treaties or custom, which traditionally prescribe limits of state action and also impose certain responsibilities toward individuals and groups. It is also comprised of non-treaty-based principles, which help to shape and inform the body of human rights law.

28 While it is generally accepted that the UN and its peacekeepers are bound by international human rights law, the precise *scope* of obligations of UN peacekeeping operations is still unclear. See "We Are United Nations Peacekeeping Personnel" annexed to the memorandum of understanding between the UN and troop-contributing countries, requiring compliance with relevant directives on IHL and the "applicable portions of the Universal Declaration of Human Rights as the fundamental basis of ... standards [of conduct]," available at www.un.org/en/peacekeeping/documents/un_in.pdf; and United Nations, *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 Resumed Session*, UN Doc. A/61/19 (Part III), June 12, 2007, Annex, Annex H. See also discussion in Scott Sheeran, "A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo," *International Organizations Law Review* 8, No. 1 (2011): 76–84.

29 UN Security Council Resolution 2098 (March 28, 2013), UN Doc. S/RES/2098, para. 34 (b)(iii).

30 ICTY, *Prosecutor v. Dusko Tadic*, paras. 561–568. The ICTY has defined armed conflict as the "resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups in a State." See ICTY, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadic*, Case No. IT-94-1, A.C. (October 2, 1995), para. 141.

31 United Nations, "UN Secretary-General's Remarks to Second Meeting of the Regional Oversight Mechanism of the Peace, Security and Cooperation Framework for the DRC and the Region," September 23, 2013, available at www.un.org/sg/statements/index.asp?nid=7113.

32 The qualification of the situation in DRC as a NIAC, while practical, may be nevertheless controversial for a number of reasons. First, the classification of conflicts in which multinational forces are involved is not yet settled. However, it is the authors' point of view that, in this case, where MONUSCO is fighting alongside a government against nonstate armed groups, this is best described as a NIAC rather than an IAC. Second, the connection between some of the armed groups in DRC to neighboring countries, such as Uganda and Rwanda, may be relevant in considering the classification of the conflict. For an otherwise internal conflict to be considered "international" in character, the armed groups fighting against the state would have to be under the "effective control" of another state, which requires the extent of support to go beyond financing, training, supplying, and equipping. Although it is well known that armed groups in DRC are operating with the backing of other states, the extent and nature of such support is far from clear. See ICJ, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 1986 ICJ 14, 25 Int'l Legal Materials 1023 (June 27, 1986).

33 ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," Report for the 31st International Conference of the Red Cross and Red Crescent, Geneva, October 2011, p. 10, available at www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

Rwanda supported the M23) that it can also be characterized as an IAC.³⁴

It is widely accepted that two main conditions must be fulfilled for a NIAC to exist,³⁵ for example, as in the eastern DRC. First, there must be a minimum level of intensity that goes *beyond* mere internal disturbances, riots, and isolated or sporadic acts of violence.³⁶ The threshold of intensity required for a NIAC to exist is higher than that required for an IAC.³⁷ Second, the nonstate forces involved in the fighting must exhibit a minimum degree of organization, such as the existence of a chain of command, ability to plan and carry out military operations, and distinguishable uniforms.³⁸ International tribunals have generally concluded that IHL applies to the whole territory of the state affected by the NIAC and is not limited to the area of armed conflicts, in this case the eastern DRC.³⁹

The scope of application of IHL rules regulating MONUSCO's activities in this current situation is also connected to whether the Intervention Brigade may be considered a party to the armed conflict, and whether this classification extends to the rest of the UN forces. IHL imposes certain obligations on the parties to a conflict, including the requirements to distinguish between civilians and combatants at all times, to follow the principle of proportionality in launching an attack,⁴⁰ and to treat civilians in a humane manner. It also allows the parties to attack

their "military objectives" even when it results in so-called "collateral damage" to civilians, which is considered legal if it is proportionate to the military benefit.⁴¹ However, being classified as a party to the conflict also makes that party vulnerable to lawful attack under IHL. This means that if the MONUSCO mission as a whole were a party to the conflict, then not just the Intervention Brigade, but also military members of MONUSCO and the supporting UN mission infrastructure would become legitimate military targets for armed groups such as the M23.

Prior to the Intervention Brigade, the UN Secretariat had never publicly acknowledged that UN peacekeepers were *party* to a conflict in which they were involved.⁴² This was even when the UN's use of force reached a significantly intense level such as during the UN Operation in the Congo (ONUC, 1960–3) and the UN Operation in Somalia II (UNOSOM II, 1993). At a deeper level, that reflected an approach that when UN peacekeepers used force, they did so to maintain international peace and security on behalf of the international community—akin to a "world policeman"—rather than as a party to the conflict. In May 2013, however, the UN legal counsel foreshadowed that MONUSCO would become a party to the conflict,⁴³ and since then the UN's legal position has been referred to in various public contexts.⁴⁴ This was despite that the International

34 For example, see United Nations, *Letter Dated 22 January 2014 from the Coordinator of the Group of Experts on the Democratic Republic of the Congo Addressed to the President of the Security Council*, UN Doc. S/2014/42, January 23, 2014, paras. 20–24; and Louise Arimatsu, "The Democratic Republic of the Congo 1993–2010" in *International Law and the Classification of Conflicts*, edited by Elizabeth Wilmshurst (Oxford, UK: Oxford University Press, 2012).

35 See Common Article 3 of the Geneva Conventions, and Additional Protocol II, as the DRC is party to both. The ICRC's position is that most of Additional Protocol II has reached the level of customary status and is therefore binding on non-signatories as well. See Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," *International Review of the Red Cross*, 87, No. 857 (March 2005), available at www.icrc.org/eng/assets/files/other/irrc_857_henckaerts.pdf.

36 See Additional Protocol II, Article 1(2) of the Geneva Conventions. For relevant elements to take into account, see ICTY, *Prosecutor v. Boškoski*, Judgment (Trial Chamber), Case No. IT-04-82-T (July 10, 2008), paras. 177–193.

37 See Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations," *International Review of the Red Cross* 91, No. 873 (March 2009): 76, available at www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf.

38 For example, see ICTY, *Prosecutor v. Fatmir Limaj*, Judgment, Case No. IT-03-66-T (November 30, 2005), para. 94–134; and ICTY, *Prosecutor v. Haradinaj et al.*, Judgment, Case No. IT-04-84-T (April 3, 2008), para. 60.

39 The International Criminal Tribunal for Rwanda (ICTR) has decided, for example, that once the conditions for applicability of Common Article 3 and Additional Protocol II are fulfilled, their scope "extends throughout the territory of the State where the hostilities are taking place without limitation to the 'war front' or to the 'narrow geographical context of the actual theatre of combat operation.'" See ICTR, *Prosecutor v. Semanza*, Judgment (Trial Chamber), Case No. ICTR-97-20-T (May 15, 2003), para. 367.

40 This principle, which is recognized as a norm of customary international law in IACs and NIACs, prohibits the launching of an attack in which the expected incidental loss or damage to civilian life and/or objects would be excessive in relation to the concrete and direct military advantage anticipated.

41 See comments of the force commander of the Intervention Brigade, Brig-Gen James Aloizi Mwakibolwa, in, "NGOs Concerned about New DRC Intervention Brigade," IRIN News, May 31, 2013, available at www.irinnews.org/report/98140/ngos-concerned-about-new-drc-intervention-brigade.

42 Patricia O'Brien, "Respecting IHL: Challenges and Responses," statement made at 36th Roundtable on Current Issues of International Humanitarian Law, San Remo, Italy, September 5, 2013, available at http://legal.un.org/ola/media/info_from_lc/POB-San-Remo-36th-Roundtable-5-September-2013.pdf.

43 Patricia O'Brien, statement by the under-secretary-general for Legal Affairs and UN legal counsel delivered to the International Law Commission, Geneva, May 23, 2013, available at <http://legal.un.org/ilc/sessions/65/Statement%20byTheLegal%20Counsel.pdf>.

44 *Ibid.*; See also UN Office of Legal Affairs (OLA) representative Mona Ali Khalil, panel discussion, "Humanitarian Law, Peacekeeping/Intervention Forces and Troop-Contributing Countries: Issues and Challenges," Asian-African Legal Consultative Organization (AALCO), United Nations, New York, August 21, 2013; and Mona Ali Khalil, "Peace Forces at War" panel discussion at the annual general meeting of the American Society of International Law, April 7–12, 2014.

Committee of the Red Cross (ICRC) considered MONUSCO party to the conflict *before* the Intervention Brigade was established.⁴⁵ MONUSCO had already been engaged in offensive combat actions against armed groups, for example, as early as 2006 and twice in 2012.⁴⁶

According to the UN Secretariat, the issue of whether UN peacekeepers are party to the conflict in the DRC is determined by a legal test unique to the UN context. The 1999 *Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law* provides the relevant guidance. The bulletin states that IHL is applicable to UN forces “when in situations of armed conflict they are *actively* engaged therein as combatants, to the *extent and for the duration of their engagement*.”⁴⁷ This test is challenging to apply in practice and a departure from usual approaches in IHL, and it is still not universally accepted.

The secretary-general's bulletin does not apply the common approach from IHL that once a NIAC is determined to exist, the state and organized armed forces are considered party to the conflict for its entire duration. Under the bulletin's test, UN peacekeepers can become party to the conflict for a limited period of time—they can lose protection from attack only for the duration of active engagement, and then regain protected status afterward. This approach has some similarities with the IHL concept of “the direct participation in hostilities” by civilians.⁴⁸ The bulletin reflects the UN Secretariat's position on IHL applicability and is

not generally accepted by the ICRC, which has suggested this approach may confuse the international law on use of force and IHL (i.e., *jus ad bellum* and *jus in bello*).⁴⁹ The ICRC's perspective is that regardless of the UN's mandate or intention for deploying a UN peacekeeping operation, the question of whether the UN is a party to a conflict (and therefore whether IHL applies) is similar as for other parties: it is a factual determination based solely on realities on the ground.⁵⁰

The ambiguity concerning the UN peacekeeping force's possible status as a *party* to the conflict largely disappears when it comes to the Intervention Brigade. The brigade's mandate makes clear that its purpose is to use offensive force, which has been reflected in its operations. As Lieutenant-General Carlos Alberto dos Santos Cruz, MONUSCO's force commander, has stated: “We are going to protect the civilians, eliminate and neutralize the threats.... We are not going to wait for the threat to come here against the civilians.”⁵¹ In light of the Intervention Brigade's obvious combat role, it would be extremely difficult to argue that it was not a party to the conflict, and that IHL did not apply. It is likely for these reasons that the UN has *not* sought to deny it is party to the conflict in DRC when it comes to this classification. This all supports a more traditional approach to IHL application to UN forces, rather than the test prescribed in the secretary-general's bulletin, which may not have fully anticipated such robust operations as the Intervention Brigade.

A more difficult question, which has been the

45 For example, see the legal arguments by ICRC Legal Adviser Tristan Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces,” in special edition on multinational operations, *International Review of the Red Cross* 95, No. 891–892 (December 2013), available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9297707&fulltextType=RA&fileId=S181638311400023X>.

46 United Nations, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, UN Doc. S/2012/355, May 23, 2012, para. 16; and United Nations, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, UN Doc. S/2013/96, February 15, 2013, para. 37. (“MONUSCO forces were alongside FARDC and in some cases by themselves at the front.”)

47 United Nations, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, August 6, 1999, s. 1.1. (emphasis added).

48 Civilian loss and restoration of protection against direct attack is contingent upon their direct participation in hostilities. The duration of the loss of protection depends on the beginning and end of the direct participation in hostilities. See Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*.

49 Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces.” See also ICRC, *Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, Geneva, December 11–12, 2003, available at www.icrc.org/eng/assets/files/other/icrc_002_0912.pdf.

50 This includes the fulfillment of the conditions for armed conflict derived from the relevant provisions of IHL (in particular Common Articles 2 and 3 to the Geneva Conventions of 1949). See ICRC, statement made in the Fourth Committee, UN General Assembly, New York, October 31, 2013: “The applicability of IHL to UN forces, just as to any other forces, is determined *solely* by the circumstances prevailing on the ground and by specific legal conditions stemming from the relevant provisions of IHL, irrespective of the international mandate assigned to the forces by the Security Council. The mandate and legitimacy of a UN mission are issues which fall within the scope of the Charter of the United Nations, and *have no bearing* on the applicability of IHL to peacekeeping operations” (emphasis added).

51 “Congo and the General,” *Al-Jazeera*, February 6, 2014, available at <http://m.aljazeera.com/story/2014131116336818>.

focus of significant debate, is whether MONUSCO as a whole or just the Intervention Brigade is party to the conflicts in the DRC. Some major TCCs, for example Pakistan, have been clear they consider that the Security Council's separation of the Intervention Brigade and MONUSCO mandates within Resolution 2098 suggests a distinction between the two forces for IHL purposes. This position is likely underpinned by concern for safety of regular MONUSCO peacekeepers, as those peacekeepers do not have the same offensive mandate to attack armed groups. The Security Council's decision to bestow a different mandate on a specific brigade within a broader UN force was unprecedented, both in terms of language and concept, and opened the door to different interpretations for IHL purposes.

The position of the UN Office of Legal Affairs as well as the ICRC is that the military members of both the Intervention Brigade and regular MONUSCO forces are party to the conflict. This is supported by a legal rationale.⁵² When the Security Council established the Intervention Brigade, it did not create a separate legal entity; from a practical and legal perspective, the brigade was clearly a part of MONUSCO. The peacekeepers all operate as part of a single military force, with the same UN emblems and blue helmets, under a single force commander.⁵³ The shared use of military bases, communications, logistics, and other support structures is also common. While it might be possible for the Intervention Brigade to be configured in a way to justify differential treatment, in terms of the regular MONUSCO classification of being party to the conflict, this was not achieved by Resolution 2098 and its implementation, and no significant changes were made in Resolution 2147.

A second potential legal basis for MONUSCO's status as a party to the conflict in DRC concerns its

support to the FARDC.⁵⁴ The UN may become party to the conflict as a result of its direct logistical and tactical support to the FARDC, the latter being a party to the conflict with the various armed groups. Admittedly, this "support-based approach" is a relatively new concept for IHL and the development of which must be further discussed. It is not expressed or set out in the treaty law and associated customary international law of IHL.⁵⁵ However, the approach complements the normal determination of IHL applicability, is logical in principle, and particularly relevant to whether the UN forces would be a legitimate target under IHL, for example, for the M23.⁵⁶

INTERNATIONAL HUMAN RIGHTS LAW

The focus of the debate on the application of IHL to the Intervention Brigade and MONUSCO as a whole has not been matched by discussion of the logical corollary, the extent to which international human rights law (IHRL) may apply. The scope of potential IHRL application is significantly reduced if MONUSCO's activities are subject to IHL. While application of IHRL to UN peacekeeping operations is a complicated issue, the organization clearly accepts that it has human rights obligations in the peacekeeping context.⁵⁷ One key area where this is relevant is detention, as the UN's Interim Standard Operating Procedures on Detention in UN Peace Operations (the UN Detention SOP) are generally predicated on the application of IHRL.⁵⁸

Legal Protections for UN Peacekeepers

The impact of the Intervention Brigade's mandate on safety and security of MONUSCO's peacekeepers is a significant issue. UN peacekeepers, both military and civilian, benefit from legal protections from attack under various legal

52 Ferraro, "The Applicability and Application of International Humanitarian Law to Multinational Forces."

53 For example, see comments of the Intervention Brigade force commander in "NGOs Concerned about New DRC Intervention Brigade," IRIN News.

54 For example, see Maj. Gen. Patrick Cammaert and Fiona Blyth, "The UN Intervention Brigade in the Democratic Republic of the Congo," New York: International Peace Institute, July 2013, p.10.

55 See arguments in Ferraro, "The Applicability and Application of International Humanitarian Law to Multinational Forces."

56 It appears that both the ICRC and UN Office of Legal Affairs may be in agreement that regardless of the Intervention Brigade, MONUSCO is party to the conflict in DRC due to its support of the FARDC. This at least appeared to be the view offered by Tristan Ferraro, ICRC, and Mona Khalil, OLA, in "Peace Forces at War" panel discussion at the annual general meeting of the American Society of International Law, April 7–12, 2014.

57 See United Nations, *Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces*, UN Doc. A/67/775-S/2013/110, March 5, 2013. See also letter dated April 1, 2009 from UN Office of Legal Affairs to the UN Department of Peacekeeping Operations cited in Jeffrey Gettleman, "U.N. Told Not To Join Congo Army in Operation," *New York Times*, December 9, 2009, available at www.nytimes.com/2009/12/10/world/africa/10congo.html.

58 DPKO/DFS, "Interim Standard Operating Procedures on Detention in United Nations Peace Operations," Ref. 2010.6, January 25, 2010, para. 2. There is a difference of view whether the SOP may exclude IHL situations from the scope of its procedures. On the face of it, para. 2 suggests it does, while para. 9 states that nothing in the SOP affects the application of IHL. This is another potential point of difference between the UN and ICRC.

regimes—general rules of IHL, the *Convention on the Safety of United Nations and Associated Personnel* (1994) and its Optional Protocol (2005), and the *Rome Statute of the International Criminal Court* (1998). However, these legal protections are not absolute and the Intervention Brigade’s mandate and actions may negate their applicability to MONUSCO’s military forces.

The general approach of the secretary-general’s bulletin is that UN peacekeepers may be considered legitimate targets when, and for the duration of the time, they are actively engaged in armed conflict. This is because, under IHL, attacks against peacekeeping personnel including military members are prohibited, so long as those personnel are entitled to protections given to civilians.⁵⁹ The civilian members of the UN mission continue to have civilian status under IHL, even if the UN military peacekeepers are party to a conflict. However, for MONUSCO, both the UN Secretariat and ICRC agree that the whole military mission has attained the status of a party to the conflict and would therefore not be subject to any ongoing assessment of active engagement (as would be the case for civilians directly participating in hostilities).⁶⁰ This has been reflected in UN public statements about killings of MONUSCO military members, which have condemned the killings but not suggested a violation of IHL.⁶¹

This legal perspective, while easy to understand and apply, does lead to a certain tension. For “regular” MONUSCO troops, there is some logic that they should regain protection from attack in between periods of active fighting, to implement their impartial “protection of civilians” and other non-offensive mandates. However, a key problem

is the ability to distinguish and separate the regular MONUSCO forces from the Intervention Brigade. As the M23 spokesman stated in May 2013: “Blue helmets come with an offensive mandate while others are deployed in the same areas with a peacekeepers’ mandate. They have really to separate areas so that we can make the distinction.”⁶² Under IHL, parties to the conflict need to distinguish who they may legitimately target from whom they may not.⁶³ This can be very difficult and may impact the parties’ legal obligations.

The Intervention Brigade troops are not only wearing the same UN emblem and blue helmets but also using the same bases and transport as the other MONUSCO forces, which are not authorized to use force in the same offensive manner. The complexities of this relationship were illustrated when an unarmed MONUSCO helicopter carrying out a reconnaissance mission came under direct fire from positions held by the M23 rebels in the DRC. While the attack was strongly condemned,⁶⁴ the UN helicopter would have been able to gather information useful for Intervention Brigade attacks on the M23.

In addition to attacks on UN military personnel in MONUSCO, there may be attacks against the UN mission’s premises and property. In usual circumstances, UN buildings, vehicles, and equipment would not constitute military objectives under IHL and attacks on them would be unlawful so long as they remained civilian in character.⁶⁵ However, in practice, UN bases are used by both regular MONUSCO forces and the Intervention Brigade, as well as for supporting the activities of the Intervention Brigade, and therefore are legitimate targets under IHL.⁶⁶ This leads to safety risks

59 This has been cited as a rule of customary international law by the ICRC. See “Rule 33,” in *Customary International Humanitarian Law*, eds. Jean-Marie Henckaerts and Louise Doswald-Beck, vol. 1 (Cambridge, UK: Cambridge University Press; ICRC, 2005), available at www.icrc.org/customary-ihl/eng/print/v1_rul_rule33.

60 An argument can be made that the actions of the Intervention Brigade, and possibly MONUSCO as a whole, would still fall under the “direct participation in hostilities” framework if its members can be considered to have a “continuous combat function.” The issue with that argument is once the civilians satisfy the “continuous combat function” test, they are effectively regarded as members of an organized armed group, and not really in effect as civilians.

61 The killings may, however, be violations of national law of the DRC. See “Martin Kobler, Head of MONUSCO, Strongly Condemns the Killing of UN Peacekeeper by M23,” MONUSCO Press Release, August 28, 2013.

62 “NGOs Concerned about New DRC Intervention Brigade,” IRIN News.

63 “Rule 33,” in *Customary International Humanitarian Law*, eds. Henckaerts and Doswald-Beck.

64 For example, the UN Special Envoy for Africa’s Great Lakes region, Mary Robinson, immediately condemned the attack, and “remind[ed] the M23 leadership that any act aimed at obstructing MONUSCO in the exercise of its mandate, as stipulated by the United Nations Security Council 2098, is unacceptable.” See UN News Centre, “DR Congo: Attack on Peacekeeping Helicopter ‘Unacceptable,’ Says UN Envoy,” October 12, 2013, available at www.un.org/apps/news/story.asp?NewsID=46256#.UvqUMXddWKx.

65 See “Rule 10” and “Rule 33,” in *Customary International Humanitarian Law*, eds. Henckaerts and Doswald-Beck. Article 7 of the *Convention on the Safety of United Nations and Associated Personnel* prohibits any attack upon UN and associated personnel, their equipment, and premises. See also *Rome Statute of the International Criminal Court*, 1998, Article 8(2)(b)(ii).

66 The Intervention Brigade has been operating out of bases in Goma, Munigi, and Sake, where internally displaced persons have occasionally taken shelter.

for UN civilian staff members co-located on these bases who may become caught up in an attack, and potentially to a responsibility on the part of the UN to relocate civilian staff to safer premises.⁶⁷

The status of UN peacekeepers under IHL is also directly related to legal protections available under international criminal law and the 1994 Safety Convention.⁶⁸ The Rome Statute criminalizes attacks against the personnel and property of a UN peacekeeping mission “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”⁶⁹ Decisions of the International Criminal Court (ICC) and the Special Court for Sierra Leone have affirmed the test in the secretary-general’s bulletin, that UN forces “enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities.”⁷⁰

The 1994 Safety Convention provides protection from attack for all UN personnel, including military forces, but it has an IHL-related exception.⁷¹ The convention’s protections do not apply to a UN operation that the Security Council has authorized as an enforcement action under Chapter VII and in which “any personnel are engaged as *combatants* against organized armed forces and to which the law of *international armed conflict* applies.”⁷² The convention’s text and drafting history suggests that UN peacekeepers would only lose their protections if they were both in an IAC and acting under a peace enforcement mandate.⁷³ However, it was not foreseen at the time that the UN would engage in peace enforcement in

NIACs, as MONUSCO presently does in the DRC. Furthermore, the secretary-general’s bulletin on IHL was intended to operate in the alternative to the Safety Convention and has been more recently understood as extending to NIACs.⁷⁴ Therefore, a more logical and purposive interpretation for the convention in today’s context is to understand its legal protection as capable of being excluded in NIACs, as well as IACs. The issue may also depend on the precise wording in the SOFA between the DRC and UN that makes the principles of the Safety Convention applicable.

While the DRC is not currently party to the Safety Convention, it is understood that the SOFA signed between the UN and DRC for MONUSCO incorporates a reference to the principles encapsulated in the Safety Convention. However, even if the Safety Convention applies, it is reasonable to conclude that members of the Intervention Brigade would have lost their protection from attack as a result of their direct engagement in hostilities. Furthermore, by virtue of Article 2(2) of the Safety Convention, it appears that *all* military personnel of MONUSCO would lose potential protection of the convention. This article provides on the face of it that the moment *any* member of the UN military force acts as a combatant, the entire operation is excluded from protection under the convention.⁷⁵

It appears from the Security Council retreat in April 2013 that the notion the Intervention Brigade and the broader MONUSCO operation would become lawful targets under IHL was not well understood at the time of adopting Resolution 2098. For this reason, it is unsurprising that the

67 Under UN Security Council Resolution 2098, the secretary-general is required to report to the Security Council the “[r]isks and their implications for the safety and security for the UN personnel and the facilities as a result of the possible operations of the intervention Brigade as well as measures taken to strengthen their security and mitigate risks” (para. 34(vi)).

68 *Convention on the Safety of United Nations and Associated Personnel*, December 9, 1994.

69 Rome Statute, Article 8(2)(b)(iii) and (e)(iii).

70 International Criminal Court (ICC), *Prosecutor v. Abu Garda*, Case No. ICC 02/05-02/09, Decision on the Confirmation of Charges (Pre-Trial Chamber I), (February 8, 2010), paras. 78 and ff. in particular para. 83; ICC, *Prosecutor v. Abdallah Banda et al.*, Case No. ICC 02/05-03/09, Decision on the Confirmation of Charges (Pre-Trial Chamber), (March 7, 2011), paras. 61 and ff. Special Court for Sierra Leone, *Prosecutor v. Hassan Sesay*, Judgment (Trial Chamber), Case No. SCSL-04-15-T, (March 2, 2009), para. 233.

71 Safety Convention, Article 2(2).

72 *Ibid.*, Article 2(2) (emphasis added).

73 See Christopher Greenwood, “Protection of Peacekeepers: The Legal Regime,” *Duke Journal of Comparative & International Law* 7, No. 185 (1996): 197–200. In 2000, the secretary-general stated: “The exclusion from the scope of application of the convention of Chapter VII United Nations operations carried out in situations of international armed conflict gives rise to the suggestion that enforcement actions carried out in situations of *internal armed conflict* (UNOSOM II type operations) are included within the scope of the convention and subject to its protective regime” (emphasis added). See United Nations, *Report of the Secretary-General: Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel*, UN Doc. A/55/637, November 21, 2000. The ICRC has been critical of the Safety Convention on the point that its legal protections are broader than IHL, which may, in turn, have a negative impact on respect for IHL.

74 There is greater scope for this in the secretary-general’s bulletin, sections 1.1 and 1.2 (e.g., refers to protections in “international law of armed conflict” rather than law of international armed conflict).

75 See Safety Convention, Article 2(2).

council stated in its Resolution 2098 “its condemnation of any and all attacks against [MONUSCO] peacekeepers, *emphasizing* that those responsible for such attacks must be held accountable.”⁷⁶ The lack of IHL protection was subsequently debated and recognized in a Security Council press release in August 2013,⁷⁷ including at Rwanda’s instigation. However, the issue appears largely to have been ignored in the mandate renewal in Resolution 2147 in 2014, and the same call was made for accountability for attacks against UN peacekeepers. In this sense, the Security Council has largely ignored the legal changes brought about by the Intervention Brigade and may be evidencing a lack of understanding of applicable IHL.

Detainees: Treatment and Transfer

It is natural that the offensive operations conducted by the Intervention Brigade are more likely to generate detainees, including those who have been captured, wounded, or surrendered. This raises issues concerning the legal authority, treatment, and transfer of detainees. While the UN emphasizes publicly its offensive operations are in support of the FARDC, there are media reports of armed rebels trying to surrender to the UN forces, rather than the government authorities, including due to fears of being tortured or harmed by the FARDC.⁷⁸

There is no truly comprehensive legal framework that governs the taking, handling, and transfer of detainees during UN operations.⁷⁹ A collection of rules from IHL and IHRL constitute the main legal framework. This is reflected in the secretary-general’s bulletin and the UN Detention SOP,

which sets out minimum rules on the humane treatment of captured persons and humane conditions of detention facilities, both in armed conflict and during times of peace. However, as the former UN legal counsel has pointed out, neither document was designed for a situation in which the UN is actively engaged in armed conflict.⁸⁰ The Copenhagen Principles, which were recently developed to help articulate principles applicable to detainees held by international military forces, may also provide some guidance, but it is unclear whether those principles extend to UN forces.⁸¹ For these reasons, it appears the UN has developed an internment SOP to apply specifically to the Intervention Brigade’s mandate to neutralize armed groups, and for MONUSCO operations in support of that mandate, and this is also reflected in a supplemental arrangement to the UN-DRC SOFA.⁸² In the context of MONUSCO’s status as party to the armed conflict, the secretary-general’s bulletin also provides a useful basis of standards for detention.

The MONUSCO internment SOP and supplemental arrangement to the SOFA both do well to capture and operationalize the legal standards and UN responsibilities. There are three key legal issues with respect to detainees and internees. The first concerns whether, in practice, MONUSCO can meet the various obligations of treatment set out in the secretary-general’s bulletin. These include requirements to hold detainees in secure and safe premises, including separate quarters for men, women, and children, as well as obligations to ensure all possible safeguards of hygiene and health, access to medical attention, and entitlement to food and clothing.⁸³ In addition, the UN must notify the ICRC’s Central Tracing Agency, and

76 UN Security Council Resolution 2098 (March 28, 2013), Un Doc. S/RES/2098, preamble.

77 See UN Security Council, *Press Statement on Democratic Republic of Congo*, UN Doc. SC/11108, August 29, 2013. “They recalled that intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict, constitutes a crime under international law.”

78 James Verini, “Should the United Nations Wage War To Keep Peace?” special report, *National Geographic*, March 27, 2014, available at <http://news.nationalgeographic.com/news/2014/03/140327-congo-genocide-united-nations-peacekeepers-m23-kobler-intervention-brigade/>.

79 Bruce Oswald, “The Law on Military Occupation: Answering the Challenges of Detention during Contemporary Peace Operations,” *Melbourne Journal of International Law* 8 (2007), available at www.law.unimelb.edu.au/files/dmfile/download01a11.pdf.

80 See O’Brien, “Respecting IHL.” The Interim SOP on Detention does not apply where IHL applies, however, this is complicated in many cases by how IHL applies to the UN, see para. 9.

81 *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines*, 2012, available at <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>.

82 See O’Brien, “Respecting IHL.”; “Draft of Standing Operating Procedures on Internment by the United Nations Stabilization Mission in the Democratic Republic of the Congo,” 2013, copy on file with authors, paras. 2–3; and “Draft of Arrangement on the Treatment of Persons Handed Over by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) to the Government of the Democratic Republic of the Congo supplementary to the Agreement between the United Nations and the Government of the Democratic Republic of the Congo on the Status of the United Nations Organization Mission in the Democratic Republic of the Congo,” 2013, copy on file with authors, para. 2.

83 *Ibid.*, para. 8(b)–(f).

permit ICRC access to detainees.⁸⁴ To comply with these requirements, significant resources are needed to create the necessary infrastructure, facilities, and supporting services to detain members of armed groups on any kind of a short- or long-term basis. While unconfirmed, it appears that the UN has responded to the Intervention Brigade's mandate by building a central facility designed for internment, although it may not yet be in use. Even if it were to be put into use, it is unclear whether MONUSCO would have the necessary supervisory staff and medical or administrative services to run adequate detention or internment facilities according to requirements under IHL and other law.⁸⁵

The UN may be relieved of many of these obligations, especially where it is not in a position to fulfill them, by transferring detainees to national authorities, particularly the FARDC. This gives rise to the second legal issue concerning when the UN hands over detainees to government forces or authorities. The former UN legal counsel indicated that this is the preferred approach where detained persons cannot be diverted into disarmament, demobilization, and reintegration programs.⁸⁶ However, government forces will usually want to detain and screen captured members of armed groups. These captives will likely have committed serious violations of national law by taking up arms against the national government. Under IHL and IHRL, and according to the principle of non-refoulement, transfer of any detainees to government authorities is prohibited where there are substantial grounds to believe they would be at risk of torture. The secretary-general's bulletin does not

make this express but provides indirectly for this accepted obligation.⁸⁷

This may be problematic for MONUSCO forces that engage in detention of armed group members. There is credible reporting that the FARDC has engaged in serious human rights violations, and there are also human rights concerns about conditions in government detention facilities.⁸⁸ To comply with obligations under international law, the UN forces would need to properly assess the risk and ensure that any transfers complied with the non-refoulement obligation, which in some cases may be difficult. While it is likely the Intervention Brigade tries to avoid taking detainees, leaving it to the FARDC, this will not be always possible.

The MONUSCO draft internment SOP and supplemental arrangement to the UN-DRC SOFA prohibit handover of detainees to DRC authorities where there are "substantial grounds for believing that there is a real risk" a detainee will be subject to: (1) torture or cruel, inhumane or degrading treatment or punishment; (2) threats to life or freedom on account of race, religion, nationality, membership of a particular social group, or political opinion; (3) arbitrary deprivation of life; (4) the death penalty (which is not illegal per se); (5) enforced disappearance; or (6) a grossly unfair trial.⁸⁹ In practice, these prohibitions may present some challenges when MONUSCO finds it necessary to detain and transfer in the eastern DRC, due to the evidence of the FARDC's mistreatment of detainees.

Another significant issue for detention concerns

84 Ibid., para. 8(a) and (g).

85 While the position of the authors in this report is that the conflict in DRC is a NIAC, should the circumstances suggest that MONUSCO is involved in an IAC, this would have major consequences on the UN's obligations concerning detention under the Third and Fourth Geneva Conventions. The exact circumstances under which individuals may be detained in a NIAC and corresponding obligations on the detaining party are still contested. However, the position of the ICRC is that internment is "clearly a measure that can be taken in non-international armed conflict" based on the provisions of Additional Protocol II, and that the principles and rules of the Fourth Geneva Convention may serve as guidance in practice. See Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence," *International Review of the Red Cross* 87, No. 858 (June 2005), available at www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf. See also Royal Courts of Justice, *Serdar Mohammed v. Ministry of Defence and Others*, [2014] EWHC 1369 (QB), (May 2, 2014), available at www.judiciary.gov.uk/judgments/serdar-mohammed-v-ministry-of-defence-and-others/.

86 See O'Brien, "Respecting IHL."

87 *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines*, 2012, para 8(d).

88 In March 2013, the UN *Report of the United Nations Joint Human Rights Office (MONUSCO-OHCHR) on Deaths in Detention Centres in the Democratic Republic of Congo* outlined the government's failure to provide adequate conditions in detention facilities, which resulted in high rates of disease and even death. See also OHCHR/MONUSCO, *Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Soldiers of the Congolese Armed Forces and Combatants of the M23 in Goma and Sake, North Kivu Province, and in and around Minova, South Kivu Province, from 15 November to 2 December 2012*, May 13, 2013.

89 DPKO/DFS, "Draft Standing Operating Procedures on Internment by the United Nations Stabilization Mission in the Democratic Republic of the Congo," 2013, copy on file with authors; "Draft of Arrangement on the Treatment of Persons Handed over by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) to the Government of the Democratic Republic of the Congo Supplementary to the Agreement between the United Nations and the Government of the Democratic Republic of the Congo on the Status of the United Nations Organization Mission in the Democratic Republic of the Congo," 2013, copy on file with authors.

obstacles the UN may face if it does not hand over detainees to government forces or authorities, either as a result of logistical challenges or due to concerns about potential human rights violations. Even if practically possible, it is unclear whether the UN has the legal authority under its mandate to detain individuals for more than a short period of time. The UN Detention SOP does not contemplate detention by the UN beyond seventy-two hours, except in rare circumstances.⁹⁰ The MONUSCO internment SOP does not seem to contemplate any particular time limits to the UN retaining detainees.⁹¹ The MONUSCO mandate's authority to detain could be interpreted more broadly in situations where it is unable to hand over detainees to the FARDC or other national authorities, and may find a basis in IHL, which provides a party to the conflict with a legal basis to detain.

Responsibility and Accountability

With the Intervention Brigade forces operating under more demanding conditions than most UN peacekeeping forces, and carrying out high pressure and timely combat operations, there is a greater likelihood of mistakes being made in the "fog of war." Collateral damage, which may include civilian deaths caused by MONUSCO operations, if proportionate, is permissible when attacking military objectives in the course of offensive operations. This may inevitably lead to a greater relevance of responsibility and accountability for loss or damage caused by MONUSCO, and possible violations of IHL or IHRL even if unintentional. There also have been serious issues raised concerning the UN mission in the DRC, including by UN special rapporteurs, of the UN's complicity

in IHL or IHRL violations due to its support provided to FARDC forces that commit such violations.⁹²

It is important to determine who is responsible under international law for actions of MONUSCO troops. This is especially so since MONUSCO's military activities are carried out by military forces from TCCs acting under UN auspices. The UN's general position is that, in principle, it has exclusive command and control of UN peacekeeping forces, and therefore, the responsibility and related immunities accrue to the organization.⁹³ Military personnel are generally considered to be under the authority of the UN and therefore under the control of the force commander. However, in some cases, troops have carried out instructions of their own governments, above those issued by the UN, which creates ambiguity as to who has effective control.

The UN is legally responsible in theory for the UN peacekeeping forces' activities only where it has "effective control *over the act in question*."⁹⁴ This may be challenging to establish for many violations, as the conduct in question is unlikely to be part of formal orders. However, the UN in practice tends to take a broad view of what conduct is legally associated with the UN mission, particularly in the context of asserting its broad immunities.⁹⁵

As a general matter in IHL and IHRL, the UN has obligations (depending on which body of law is applicable) to provide a remedy or pay compensation for the deaths, injuries, or damage to property caused by its actions.⁹⁶ The UN is also required under the 1946 *Convention on the Privileges and Immunities of the United Nations* and the UN *Model Status-of-Forces Agreement for Peacekeeping Operations* to make provisions for settlement of disputes of a private law nature (e.g., compensation

90 DPKO/DFS, "Interim Standard Operating Procedures on Detention in United Nations Peace Operations," para. 74.

91 DPKO/DFS, "Draft Standing Operating Procedures on Internment by the United Nations Stabilization Mission in the Democratic Republic of the Congo," 2013, copy on file with authors, paras. 311, 314.

92 See Cammaert and Blyth, "The UN Intervention Brigade in the Democratic Republic of the Congo," p.10; and Sheeran, "A Constitutional Moment?"

93 This was evident in the UN's various contributions to the International Law Commission's work on the *Draft Articles on the Responsibility of International Organizations*, 2011.

94 See International Law Commission, *Report of the International Law Commission*, UN Doc. A/59/10, 2004, 99 (emphasis added).

95 For example, see World News Radio, "Should the UN's Legal Immunity Continue?" November 14, 2013, available at www.sbs.com.au/news/article/2013/11/14/should-uns-legal-immunity-continue.

96 See *Hague Convention IV on the Laws and Customs of War on Land*, October 18, 1907, Article 3; and Additional Protocol I of the Geneva Conventions, Article 91. The ICRC considers both to be customary international law and applicable to NIACs. See "Rule 150" in *Customary International Humanitarian Law*, eds. Henckaerts and Doswald-Beck, pp.547-48; *International Covenant on Civil and Political Rights* (adopted December 19, 1966, entered into force March 23, 1976) 999 UNTS 171 (ICCPR), Article 2(3); and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted December 10, 1984, entered into force June 26, 1987) 1465 UNTS 85 (CAT), Article 14.

for damage).⁹⁷ The UN General Assembly has arguably cut across or modified these obligations by imposing certain restrictions on claims and remedies against UN peacekeeping operations, some of which are quite stringent.⁹⁸ The most relevant to the Intervention Brigade and MONUSCO is that compensation is not available for damage from “operational necessity.”⁹⁹ The UN General Assembly has endorsed the secretary-general’s broad definition of this term, which in effect excludes any compensation arising from peacekeepers’ actions in the course of carrying out operations.¹⁰⁰ However, there is a practice of making ex gratia payments for deaths, injuries, or damage to property by the UN and states contributing personnel to these operations.

The UN’s direct responsibility for MONUSCO military activities is probably more theoretical than practical, due to a lack of developed mechanisms for monitoring and facilitating claims, and the difficulties in investigating the conduct of UN military forces. There is no human rights complaint mechanism, forum, or body such as the Human Rights Council’s Universal Periodic Review or UN Human Rights Committee, with competence or jurisdiction over the UN or MONUSCO. There is only a private law claims process provided pursuant to the SOFA.¹⁰¹ This process is not independent as it is part of the mission. One of the only examples of a human rights complaint mechanism in UN peacekeeping, which is still limited in scope and powers, is the UN

Interim Administration Mission in Kosovo (UNMIK) Human Rights Advisory Panel.¹⁰² The DRC, however, is party to the 1966 *Optional Protocol to the International Covenant on Civil and Political Rights*, which provides the UN Human Rights Committee with jurisdiction over individuals’ complaints. A victim may therefore bring a human rights claim against the DRC for not ensuring a remedy in respect of UN forces’ actions, in which the committee might be willing to indirectly consider the UN’s responsibility. Further, in the unlikely situation the ICC considers a case from the DRC against a UN peacekeeper, the victims could also make an associated claim for compensation in that forum.¹⁰³

Legally speaking, the UN’s immunities are restricted to acts in an “official capacity.”¹⁰⁴ However, procedurally, allegations often cannot be investigated without the UN waiving the immunity of mission members from legal process. The UN’s assertion of immunity will generally stand as valid unless it is overturned by the International Court of Justice (ICJ).¹⁰⁵ Moreover, MONUSCO has no general ability to waive the immunities for investigation and prosecution of military members of its mission, even for IHL or IHRL violations, as the soldiers are under the exclusive criminal jurisdiction of the TCC.¹⁰⁶ There are complicated arrangements agreed between the UN and TCCs for investigations, but they largely leave the power to investigate and prosecute with the TCC, and not with the UN’s administrative processes.¹⁰⁷

97 *Convention on the Privileges and Immunities of the United Nations*, February 13, 1946, section 29; and United Nations, *Report of the Secretary-General: Model Status-of-Forces Agreement for Peace-keeping Operations*, UN Doc. A/45/594, October 9, 1990, part VII.

98 UN General Assembly Resolution 52/247, *Third-Party Liability: Temporal and Financial Limitations* (July 17, 1998), UN Doc. A/RES/52/247.

99 *Ibid.*, para. 6.

100 United Nations, *Report of the Secretary-General: Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations*, UN Doc. A/51/389, September 20, 1996, para. 14; and United Nations, *Report of the Secretary-General: Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations*, UN Doc. A/51/903, May 21, 1997, para. 13.

101 United Nations, *Report of the Secretary-General: Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations*, UN Doc. A/46/185, May 23, 1991, para. 53; and *Convention on the Privileges and Immunities of the United Nations*, February 13, 1946, section 29.

102 See UNMIK Human Rights Advisory Panel page, available at www.unmikonline.org/hrap/Eng/Pages/default.aspx.

103 Rome Statute, Article 75.

104 *Convention on the Privileges and Immunities of the United Nations*, February 13, 1946, section 18(a). See also United Nations, *Report of the Secretary-General: Model Status-of-Forces Agreement for Peace-keeping Operations*, UN Doc. A/45/594, October 9, 1990.

105 See ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999 (April 29, 1999); and ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Reports 1989 (December 15, 1989). See also discussion of Haiti and the cholera outbreak in World News Radio, “Should the UN’s Legal Immunity Continue?”

106 United Nations, *Report of the Secretary-General: Model Status-of-Forces Agreement for Peace-keeping Operations*, UN Doc. A/45/594, October 9, 1990, para 51.

107 See, for example, United Nations General Assembly, *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, UN Doc. A/59/661, January 5, 2005, in which the United Nations Office of Internal Oversight Services (ID/OIOS) investigated sixty-eight allegations of sexual exploitation against MONUC peacekeepers. According to a 2007 General Assembly report, governments of national military contingents have the primary responsibility for investigating allegations against members of military contingents and the ID/OIOS can only investigate if and when national government prove unwilling or unable to conduct such investigations. See United Nations, *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 Resumed Session*, UN Doc. A/61/19 (Part III), June 11, 2007, Article 7.

The Intervention Brigade's combat operations will lead to greater possibilities of damage caused and mistakes made by UN forces, both during periods of combat as well as during any detention or internment by MONUSCO of armed group members.¹⁰⁸ There is an unresolved tension and even contradiction between IHRL and IHL standards for remedies and compensation on the one hand with those the UN applies in its operations based on the Convention on Privileges and Immunities, the SOFA, and the General Assembly resolution on claims in peacekeeping. The accountability and claims processes that are available are quite limited in scope and effectiveness, and are not independent. This leads to concerns of human rights violations or that other victims of UN actions or mistakes may not receive justice or an adequate remedy.

UN Peace Enforcement and International Law: Broader and Systemic Issues

The UN's assertion that the Intervention Brigade is peace enforcement rather than peacekeeping has naturally attracted concerns that it contradicts the agreed "basic principles" of UN peacekeeping—consent, impartiality, and non-use of force except in self-defense (including in defense of the mandate).¹⁰⁹ The Security Council's Resolutions 2098 and 2147 recognized this issue by taking the unprecedented step of noting that the Intervention Brigade's mandate was without "any prejudice" to the agreed basic principles of peacekeeping.¹¹⁰

While there has always been debate about the nature and scope of UN peacekeeping, the basic

principles are today agreed and mostly clear. The 2008 *United Nations Peacekeeping Operations: Principles and Guidelines* (also known as the Capstone Doctrine) provides a central and useful articulation of the basic principles, although not one without problems. It asserts that peacekeeping operations "are deployed with the consent of the *main parties* to the conflict."¹¹¹ Without the consent of the main parties, a UN operation may be considered as peace enforcement (which the UN has already conceded the Intervention Brigade to be).¹¹² It is clear, for example, that the M23 constituted a main or local party to the conflict in DRC and did not consent even tacitly to the Intervention Brigade's deployment and mandate. For the M23 to do so would be equivalent to it agreeing to force being used for the M23's elimination.

The Capstone Doctrine explains that UN peacekeeping operations "should be *impartial* in their dealings with the parties to the conflict" and also "implement their mandate without favour or prejudice to any party."¹¹³ In a NIAC situation, and one in which government forces are responsible and largely unaccountable for serious violations of human rights and IHL, the Intervention Brigade's offensive mandate to "neutralize" the nonstate armed groups and its relative silence on the FARDC stretches the concept of impartiality. As the Capstone Doctrine notes, the "need for evenhandedness towards the parties should not become an excuse for inaction in the face of behavior that clearly works against the peace process."¹¹⁴

MONUSCO may now be "taking sides" in the eyes of some in DRC and further afield. Components of the FARDC have committed violations of IHL and IHRL against civilians, and the UN continues to be criticized about the lack of

108 Although unconfirmed, the draft SOPs on internment reportedly encompass the right of interned persons to make a claim for compensation for any bodily injury or damage to property attributable to wrong action on the part of MONUSCO and related to the internment.

109 The basic principles have been endorsed by the UN General Assembly, Security Council, and Secretariat.

110 UN Security Council Resolution 2098 (March 28, 2013), UN Doc. S/RES/2098, para. 9; and UN Security Council Resolution 2147 (March 28, 2014), UN Doc. S/RES/2147, para. 1.

111 Capstone Doctrine, 31 (emphasis added). See also the United Nations General Assembly and Security Council, *Report of the Panel on United Nations Peace Operations* (also known as the Brahimi report), UN Doc. A/55/305 and S/2000/809, August 21, 2000, xi. ("The Panel concurs that *consent of the local parties, impartiality and the use of force only in self-defense* should remain the bedrock principles of peacekeeping." (emphasis added)); and Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford, UK: Oxford University Press, 2002), p. 4 (referring to "the more or less voluntary consent of all parties to the presence and activities of the mission").

112 Capstone Doctrine, *ibid.*, 40. ("The Security Council may take enforcement action without the consent of the main parties to the conflict, if it believes that the conflict presents a threat to international peace and security. This, however, would be a peace enforcement operation.")

113 Capstone Doctrine, *ibid.*, 33 (emphasis added); Brahimi Report, ix ("Impartiality for United Nations operations must therefore mean adherence to the principles of the Charter: where one party to a peace agreement clearly and incontrovertibly is violating its terms, continued equal treatment of all parties by the United Nations can in the best case result in ineffectiveness and in the worst may amount to complicity with evil."); and Findlay, *The Use of Force in UN Peace Operations*, p. 4 (referring to "the peacekeepers' impartiality in their relationships with the parties").

114 Capstone Doctrine, *ibid.*, p. 33.

implementation of its Human Rights Due Diligence Policy concerning its own support to the FARDC.¹¹⁵ There are positive steps to address FARDC accountability and discipline, but they are more modest and less effective, for example, than the Intervention Brigade's operations against the M23. These issues may impact the unique legitimacy and effectiveness of UN peacekeeping operations and MONUSCO. Unlike for MONUSCO's mandate for protection of civilians, the Intervention Brigade's mandate can be seen to privilege security issues over impartiality and human rights protection. It focuses on armed groups rather than the FARDC, which is a key part of the "cycle of impunity" and ongoing conflict, a fact that the Security Council has recognized.¹¹⁶

Finally, the use of force only in self-defense by UN peacekeepers is the most complex of the three principles—legally, conceptually, and practically.¹¹⁷ This is largely because its extension to self-defense "including in defense of the mandate" is both unclear in scope and conceptually problematic when used to justify pre-emptive or offensive use of force.¹¹⁸ The Capstone Doctrine explains that:

The notion of self-defense has subsequently come to include resistance to attempts by forceful means to prevent the peacekeeping operation from discharging its duties under the mandate of the Security Council. ... The ultimate aim of the use of force [in UN peacekeeping] is to influence and deter spoilers working against the peace process or seeking to harm civilians; and *not to seek their military defeat*.¹¹⁹

If the Intervention Brigade's mandate to neutralize armed groups in DRC—which is acknowledged to be peace enforcement—is considered to fit the expanded rubric of self-defense, then virtually any Security Council mandate for a UN operation to use force would qualify as self-defense.

While the basic principles provide a framework that tries to set boundaries for UN peacekeeping

under the Charter, they have not been particularly influential in the UN Security Council's mandating of missions. The Intervention Brigade's mandate may indeed be replicated for future UN missions, notwithstanding the fact that the UN Security Council stated in Resolutions 2098 and 2147 that it was not creating a precedent. The apparent conflict of the Intervention Brigade's mandate with the basic principles of UN peacekeeping raises questions about how to define the proper role of the UN (and by implication member states) in carrying out mandates beyond traditional or even robust peacekeeping.

The Intervention Brigade's mandate may go even beyond peace enforcement and toward war fighting. "Peace enforcement" has an impartial connotation not well reflected in an unambiguous mandate to "neutralize" all nonstate armed groups in the conflict.¹²⁰ The Intervention Brigade's military operations are designed to eliminate particular parties to the conflict. They are not, for example, built on impartially enforcing a peace agreement or ceasefire, or protecting civilians as a primary aim. The mandate identifies that all "armed groups" are to be neutralized and does not condition the use of force on current threats to civilians or the peace (e.g., by some FARDC components). This robust mandate has not yet created serious safety and security risks for the UN mission's members. The armed groups' capacities in DRC have not been significant enough for conflict with MONUSCO to escalate seriously, as perhaps was the case for the UN in Somalia in the 1990s.

PROTECTION OF CIVILIANS: THE INADEQUATE MANDATE?

A further issue is whether the Intervention Brigade is evidence that the MONUSCO protection-of-civilians mandate was inadequate, or, rather, that the UN peacekeeping forces have been unwilling or

115 For example, see Matthew Russell Lee, "On DRC, ICP Asks Kobler of FDLR Delay, Inaction on Minova Rapes, Drone," October 27, 2014, available at www.innerecitypress.com/drc1koblersaid102714.html. This article suggests that: "After [MONUSCO SRSG] Kobler referred to the UN's stated Human Rights Due Diligence Policy, Inner City Press asked him if any UN support was withdrawn over the DRC Army's 130 rapes in Minova and only two convictions. Kobler's answer did not mention any aid suspended."

116 For example, UN Security Council Resolution 1856 (December 22, 2008), UN Doc. S/RES/1856, stated that "the accelerated building of credible, cohesive and disciplined Congolese armed forces is *essential* for the implementation of MONUC's mandate."

117 For example, see Scott Sheeran, "The Use of Force in United Nations Peacekeeping Operations," in *The Oxford Handbook of the Use of Force in International Law*, edited by Marc Weller (Oxford, UK: Oxford University Press, 2015 forthcoming); and Findlay, *The Use of Force in UN Peace Operations*, pp. 21–32.

118 *Ibid.*; and Findlay, *The Use of Force in UN Peace Operations*, pp. 14–15, 74, 356.

119 Capstone Doctrine, pp. 34–35; and United Nations, *Report of the Secretary-General on the Implementation of Security Council Resolution 340 (1973)*, UN Doc. S/11052/Rev.1, October 27, 1973, para. 5 (emphasis added).

120 See Capstone Doctrine, *ibid.*, p. 19. ("Such actions are authorized to restore international peace and security in situations where the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression.")

unable to implement it.¹²¹ Since 2008, the UN mission in the DRC has been tasked with protecting civilians in the eastern regions of the country. The Security Council Resolution 1856 (2008) authorized the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC, the predecessor to MONUSCO) under Chapter VII of the Charter to “attach the highest priority to addressing the crisis in the Kivus, in particular the protection of civilians” and to ensure their protection under “imminent threat” of physical violence.¹²² A UN report has recently concluded that MONUSCO peacekeepers in DRC were reluctant to implement the protection mandate during the fall of Goma at the end of 2012.¹²³

The UN Secretariat has elaborated that to use force for the “protection to civilians under imminent threat of physical violence” includes a proactive approach to those actors that threaten civilians, and is not just reactive.¹²⁴ Further, as the UN Office of Legal Affairs has indicated, the mandate and use of force applies equally to both rebel groups and to government forces. In light of the UN’s position on protection of civilians, it is unclear how much more the Intervention Brigade mandate added to MONUSCO’s original mandate, given the clear record of the M23 harming civilians. This is particularly since the Security Council Resolution 2147 (2014) dropped the qualifier of

“imminent” threat for the protection-of-civilians mandate for MONUSCO generally, thereby lowering the threshold of using force for protection of civilians. It also may be that the rules of engagement for the regular MONUSCO forces and Intervention Brigade are the same.¹²⁵ The UN’s initial forty-eight-hour ultimatum to the M23 for surrender of weapons and joining demobilization and reintegration processes, which signaled the commencement of the Intervention Brigade’s operations, was clearly publicly cast in terms of protection of civilians and not “neutralizing” the armed groups.¹²⁶

In some other UN peacekeeping missions, protection-of-civilians mandates have been interpreted broadly to allow for protective use of force against those who present a threat.¹²⁷ The broader scope of interpretation for the protection-of-civilians mandate is contested by some TCCs. This was reflected, for example, by UN peacekeepers’ inaction as the M23 took over Goma in November 2012 and threatened civilians.¹²⁸ In one recent example, MONUSCO peacekeepers reportedly failed to respond to a massacre in Mutarule on June 6, 2014, despite being alerted to the fact that killings were underway. The commander of the nearby MONUSCO peacekeepers’ contingent and base was reportedly told by his national superiors to merely clarify the situation and gather more information.¹²⁹

121 See United Nations General Assembly, *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, UN Doc. A/59/661, January 5, 2005; United Nations, *Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations*, UN Doc. A/68/787, March 7, 2014, para. 44; International Crisis Group, “Congo Crisis: Military Intervention in Ituri,” Report No. 64, June 13, 2003, p. 12 (the report states the mission has “proved totally incapable of fulfilling its protection mandate”); and Verini, “Should the United Nations Wage War To Keep Peace?” (“noting that since the mission began, in 1999, the killing and rape and displacement have continued and the number of militias has increased, while peacekeepers have earned a reputation for inaction.”)

122 UN Security Council Resolution 1856 (December 22, 2008), UN Doc. S/RES/1856. See also UN Security Council Resolution 1925 (May 28, 2010), UN Doc. S/RES/1925; and UN Security Council Resolution 2053 (June 27, 2012), UN Doc. S/RES/2053.

123 United Nations General Assembly, *Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations: Report of the Office of Internal Oversight Services*, UN Doc. A/68/787, March 7, 2014. The UN Under-Secretary-General for Internal Oversight Services, Carman Lapointe, reported to the Fifth Committee that the UN cannot adequately protect civilians while “troop-contributing countries do not instruct their contingents to do all they can, including using force as a last resort.” See Michelle Nichols, “U.N. Study Finds Peacekeepers Avoid Using Force To Protect Civilians,” Reuters, May 16, 2014, available at www.reuters.com/article/2014/05/16/us-un-peacekeepers-civilians-idUSBREA4F0M220140516.

124 For example, see DPKO, “Specialized Training Materials on Child Protection for UN Peacekeepers: Trainers Guide,” 2014, p. 128, available at www.peacekeepingbestpractices.unlb.org/PBPS/Library/Trainers%20Manual%20Child%20Protection%20STM.pdf, which provides: “The protection of civilians mandate specifies an ‘imminent’ threat of physical violence. However, ‘imminent’ does not imply that violence is guaranteed to happen in the immediate future. A credible threat to civilians may exist if there is a reasonable belief that a potential aggressor has the intent and capacity to inflict physical violence. A threat of violence against civilians is imminent from the time it is identified until such time that the mission can determine that the threat no longer exists.”

125 Discussion of authors with an expert who had reviewed the ROE.

126 MONUSCO stated that if M23 forces did not surrender they “will be considered an imminent threat of physical violence to civilians and MONUSCO will take all necessary measures to disarm them, including by the use of force in accordance with its mandate and rules of engagement,” UN News Centre, “UN Mission Sets Up Security Zone in Eastern DR Congo, Gives Rebels 48 Hour Ultimatum.”

127 For example, in April 2011 in Côte d’Ivoire, the United Nations Operation in Côte d’Ivoire (UNOCI) successfully undertook military operations to protect civilians in Abidjan, preventing the use of heavy weaponry against them. UN Security Council Resolution 1975 (March 30, 2011), UN Doc. S/RES/1975. See UNOCI, “Post-Election Crisis,” accessed November 1, 2014, available at www.un.org/en/peacekeeping/missions/unoci/elections.shtml.

128 Barbara Plett, “UN Under Fire over Fall of Goma in DR Congo,” BBC News, November 21, 2012, available at www.bbc.co.uk/news/world-africa-20422340.

129 Human Rights Watch, “DR Congo: Army, UN Failed To Stop Massacre,” July 3, 2014, available at www.hrw.org/news/2014/07/02/dr-congo-army-un-failed-stop-massacre.

The formation of the Intervention Brigade may highlight the documented reluctance of some TCCs to implement the mandate and to risk the safety and security of their own forces,¹³⁰ rather than an inherent deficiency in the protection-of-civilians mandate. The new mandate given to the Intervention Brigade may have been a political exigency. While it satisfied the need for more robust use of force, it may also undercut the legal interpretation of MONUSCO's and other missions' long-standing mandates for the protection of civilians.

IMPLICATIONS FOR OTHER UN PEACEKEEPING OPERATIONS

The legal issues and associated practical problems faced by the Intervention Brigade and MONUSCO will resonate for other UN operations, such as the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), and the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). The high-threat environments and robust mandates of these two UN operations, and their cooperation with national armed forces, the African Union (AU), and French military forces, make it likely they are or will become party to an armed conflict. The UN forces in Mali have already been engaged in significant fighting, and in the Central African Republic they could get drawn into such fighting due to attacks or the threat posed by insurgents and other armed groups.

When the Security Council passed Resolution 2100 (2013) establishing MINUSMA, Russia, the only country to provide an explanation of its vote, noted the connection between MINUSMA and the Intervention Brigade. Russia expressed concern regarding what it perceived as a trend in the use of force in UN peacekeeping. The Russian ambassador suggested that “what was once the exception now threatens to become unacknowledged standard practice, with unpredictable and unclear consequences.”¹³¹ While this was somewhat an overstatement, the Security Council had

provided MINUSMA a robust mandate with parallels to the Intervention Brigade, in particular, to use force in support of the Malian authorities “to deter threats and take active steps to prevent the return of armed elements to those areas [in the North of Mali].”¹³²

Conclusion

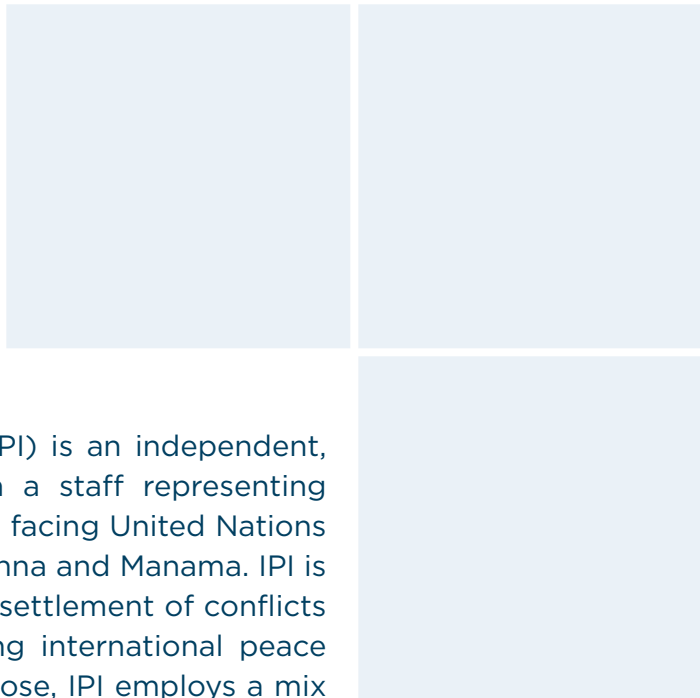
The mandating of the Intervention Brigade by the Security Council was a bold, innovative, and controversial step. It was also a UN operation that the consequences of which, particularly the legal issues, had not been fully thought out. It is now largely considered a success, and some consider it a model for future UN peacekeeping operations. While the focus has been primarily on its political and operational aspects, the legal issues are real and of practical consequence. This includes the lawful targeting of UN forces and difficulties, for example, in the UN operation meeting its international obligations concerning detainees. It also brings into focus broader issues such as the responsibility and accountability of UN peacekeepers, and the obligations of the organization, including under the Charter. The Intervention Brigade goes beyond peacekeeping and even peace enforcement, and may be seen as “taking sides” in the conflict. The UN operation in DRC may also lead to misunderstandings about the robust legal authority to use force under the protection-of-civilians mandate.

This report intended to provide a considered overview of the legal issues concerning the Intervention Brigade. The legal frameworks and applicable rules for UN peacekeeping operations are often not understood, and the associated interpretations and consequences not well known or transparent. It is important for the effectiveness and future of UN peacekeeping, including the growth and need for more robust mandates, that the debate is not confined to policy and operational matters but also has a strong foundation in and respects and promotes international law and the UN Charter.

¹³⁰ See United Nations General Assembly, *Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations: Report of the Office of Internal Oversight Services*, UN Doc. A/68/787, March 7, 2014, para. 44.

¹³¹ Permanent Mission of the Russian Federation to the United Nations, “Statement by H.E. Ambassador Vitaly I. Churkin, Permanent Representative of the Russian Federation to the United Nations, during the Security Council Meeting on the Situation in Mali,” April 25, 2013, available at www.russiaun.ru/en/news/sc_mali.

¹³² UN Security Council Resolution 2100 (April 25, 2013), UN Doc. S/RES/2100, para. 16(a)(i).



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