

Legal implications of shifting paradigm: Intervention Brigade—MONUSCO’s enforcement action in the DRC

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Abstract

This article is devoted to shedding light on the legal implications of offensive action by Intervention Brigade (MONUSCO), established by the UN Security Council under resolution 2098(2013), to neutralize and disarm armed groups posing a threat to State authority[DRC] and civilian security. More specifically, the analysis is tackling whether the military operation by Intervention Brigade will comply with basic principles of UN peacekeeping and as well as adhering to international humanitarian law simultaneously. The article also discusses the interpretation of the Intervention Brigade’s mandate, whether it was created specifically to neutralize the M23 or all armed groups operating in the DRC.

Introduction

On March, 28, 2013, acting under Chapter VII of the UN Charter, the United Nations Security Council(UNSC) decided to extend the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and created an Intervention Brigade (the Brigade) and authorized it, the first ever offensive combat force, to take military action against armed groups, such as the M23, the Forces Démocratiques de Libération du Rwanda (FDLR), the Allied Democratic Forces (ADF), the Alliance des Patriotes pour un Congo Libre et Souverain (APCLS), the Lord’s Resistance Army(LRA),the Mayi Mayi, the National Force of Liberation (FNL), in the Democratic Republic of the Congo (DRC).¹

UNSC Resolution 2098(2013) has given the Intervention Brigade the mandate to neutralize and

disarm the armed groups mentioned above.² The Intervention Brigade consists *inter alia* of “three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander. Paragraph 12 of Resolution 2098(2013) authorizes the Intervention Brigade to “take all necessary measures” to perform the following tasks: “protecting civilians, neutralizing armed groups, monitoring the implementation of the arms embargo, and providing support to national and international judicial processes”.³ Since several decades ago the UN Security Council has adopted employing the language “to take all necessary measures or means”, which is the standard phrase the Security Council uses to authorize states to act militarily. Obviously, the objective of the mission is to contribute to the reduction of the threat posed by armed groups to state authority and civilian

¹ UN SC Resolution 2098 (2013) Adopted by the Security Council at its 6943rd meeting, on 28 March 2013, paras. 8 and 9.

² *Ibid.* paras.9 and 12 (b).

³ *Ibid.*

security in eastern DRC and to make space for stabilization activities.⁴

Furthermore, paragraph 10 of the foregoing resolution, similarly reaffirms that the Intervention Brigade “will have a clear exit strategy and that the Council will consider the continued presence of the Intervention Brigade in light of its performance and whether the DRC, which has the primary responsibility for safeguarding its sovereignty and territorial integrity, has made sufficient progress in implementing its commitments under the PSC Framework, as well as the establishment and implementation of a national security sector reform roadmap for the creation of a Congolese “Rapid Reaction Force” able to take over responsibility for achieving the objective of the Intervention Brigade”.⁵

It is important note that the UN Security Council has primary responsibility, under the United Nations Charter, for the maintenance of international peace and security. This responsibility is expressly stipulated in Article 24, 25 and Chapter VII of the UN Charter.⁶ It is, however, believed that peacekeeping is among the issues falling within the province of the Security Council, thereby it can establish a peacekeeping operation. The Security Council establishes a peacekeeping operation by adopting a Security Council resolution. The resolution sets out the mission’s mandate and size. The Security Council monitors the work of UN Peacekeeping operations on an ongoing situation, including through periodic reports from the Secretary-General and by holding dedicated Security Council sessions to

⁴ *Ibid.*

⁵ *Ibid.*, para.10

⁶ See the Charter of the United Nations: article 24, 25, and Chapter VII.

discuss the work of specific operations⁷. The Security Council can vote to extend, amend or end mission mandates as it deems appropriate. Chapter VII of the Charter of the United Nations provides the framework within which the Security Council may take enforcement action. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to make recommendations or to resort to non-military and military action to "maintain or restore international peace and security".⁸

The legal issues raised in Resolution 2098(2013)

The Resolution 2098(2013) raises two broad and important legal questions: first, given the mandate of the Intervention Brigade, as a matter of law, can it be regarded as a party to the conflict in the DRC? The second question concerns the exact armed group should be neutralized, as there are various armed groups operating in Eastern Congo? The resolution 2098(2013) lacks precise wording of armed group being targeted.

Regarding the first question whether the Intervention Brigade (MONUSCO) is a party to the conflict, normally, the use of force by a United Nations peacekeeping operation always has political implications and can often give rise to unforeseen circumstances.⁹ A simple question can be asked: what is the mandate of the UN

⁷ *Ibid.*

⁸ See Chapter VII of the UN Charter, Article 39 provides, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

⁹ See the United Nations Peacekeeping operations Principles and Guidelines, Document, 2008.

peacekeepers? There are three basic principles of the UN Peacekeepers: “(a) the more or less voluntary consent of all parties to the presence and activities of the mission; (b) the peacekeepers’ impartiality in their relationships with the parties; and (c) the minimum use of force, only as a last resort and only in self-defence and defence of the mandate.”¹⁰

The principle of non-use of force except in self-defence dates back to the first deployment of armed United Nations peacekeepers in 1956.¹¹ According to the Rules of Engagement (ROE) of UN peacekeepers they are not allowed to take enforcement action. United Nations peacekeeping operations are not an enforcement tool. However, it is widely understood that UN peacekeepers may use force at the tactical level, with the authorization of the Security Council, if acting in self-defence and defense of the mandate.¹²

In particular, a United Nations peacekeeping operation should only use force as a measure of last resort, when other methods of persuasion have been exhausted, and an operation must always exercise restraint when doing so. In fact, use of force by UN peacekeepers will need to be made “at the appropriate level within a mission, based on a combination of factors including mission capability; public perceptions; humanitarian impact; force protection; safety and security of personnel; and, most importantly, the effect that such action will have on national and local consent for the mission.”¹³

In view of the above, use of non-violent means by UN peacekeeping is intended to avoid escalating violence. If this rationale is circumvented, obviously the UN peacekeepers would exacerbate the conflict situation they are meant to calm. Similarly, Trevor Findlay rightly put it that peacekeeping is a tool of conflict prevention, management and resolution.¹⁴ Peacekeepers are destined to be enablers rather than enforcers.¹⁵ They have no enemies and are not there to win. Their effectiveness depends on voluntary cooperation. This in turn enables them to act impartially, since they threaten no one.

Besides, the former Secretary-General of the United Nations, Dag Hammarskjöld, submitted to the General Assembly a proposal that “there was no intent in the establishment of the Force to influence the military balance in the current conflict, and thereby the political balance affecting efforts to settle the conflict.”¹⁶

Clearly, the Intervention Brigade has been authorized to take enforcement action supposedly to restore peace and security and to protect civilians in the DRC, but not in the sense of self-defence, which is the only circumstance that can trigger the use of force by UN peacekeepers. Indeed, any reason to undertake offensive action by UN peacekeepers outside self-defence remains artificial and acting *ultra vires* to their mandate. Alternatively, the UN Security Council would have taken enforcement measures, under Chapter VII of the UN Charter, to authorize collective military action by regional arrangement as it did in

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See the United Nations Peacekeeping operations Principles and Guidelines, *supra* note 9, Document, 2008.

¹⁴ Trevor Findlay’s Report on the Use of Force in UN Peace Operations, 2002.

¹⁵ *Ibid.*

¹⁶ See Report of the Secretary-General on Basic Points for the Presence and Functioning in Egypt of the United Nations Emergency Force, UN Doc A/3302 (6 November 1956).

Libya (2011),¹⁷ without creating Intervention Brigade that would operate within the ambit of the MONUSCO and be given two unrelated mandates *inter alia* peacekeeping and enforcement action. Obviously, if the Brigade were precisely authorized to undertake military action, through a regional arrangement, it would perfectly be consistent with the legal regime of the United Nations.

Given the mandate of MONUSCO, which is purely a peacekeeping, it seems quite controversial and unpersuasive position to argue that MONUSCO can exercise the command over offensive operation that itself does not have. It would be important to distinguish members of MONUSCO those who are taking an active part in hostilities and could be targeted, and those who are not would retain their protected status.

If the Intervention Brigade (MONUSCO) a supposedly UN peacekeeping force engaged in armed conflict with opposing forces should be considered as a party to the conflict and therefore should comply with existing international law. The UN has never publicly admitted that its peacekeepers are parties to the conflicts in which they engage, notwithstanding the fact that on a number of occasions it has acknowledged that its peacekeeping forces have engaged in offensive operations against armed groups.¹⁸ As a matter of

law, it is difficult to contend that the Brigade would not be a party to the conflict in situations where it conducts military operations. As a party to the conflict, the Brigade should observe international humanitarian law. However, the UN urges its peacekeepers to comply with humanitarian law if they are engaged in enforcement action.

If the Brigade's enforcement action are in support of the DRC, as stipulated in the paragraph 12 of Resolution 2098(2013)¹⁹, and conducted with the DRC's consent, the conflict would likely be categorized as a non-international armed conflict for the purposes of applying Common Article 3, which provides that: "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria..."²⁰ Similarly, the Intervention Brigade, in undertaking military action against the armed bands, has to observe Additional Protocol II to the Geneva

¹⁷ UN SC Resolution 1973 (2011), adopted by the Security Council at its 6498th meeting, on 17 March 2011.

¹⁸ U.N. Secretary-General, *Report on the United Nations Stabilization Mission in Haiti*, 25, U.N. Doc.S/2005/631 (Oct. 6, 2005); U.N. Secretary-General, Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, 16-17, U.N. Doc. S/2012/355 (May 23, 2012); U.N. Secretary-General, Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, 37, U.N. Doc. S/2013/96 (Feb. 15, 2013).

¹⁹ UN SC Resolution 2098 (2013), *supra* note 1, para.12.

²⁰ Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, common art. 3, Aug. 12, 1949, 75 U.N.T.S 31; Geneva Convention Relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed

Forces at Sea, opened for signature Aug. 12, 1949, 75 U.N.T.S 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S 287.

Conventions of 12 August 1949, pursuant to Article 4(1): "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors"²¹, which is also an effective part of legal regime governing any non-international armed conflict. The choice between those two instruments (Common Article 3 or Additional Protocol II) will depend in large part on whether the armed groups that the Brigade fights meet the threshold prescribed by Additional Protocol II – that they are "under responsible command, and exercise such control over a part of its territory to enable them to carry out sustained and concerted military operations..."²²

International law applicable to non-international armed conflict binds both warring parties, including the UN peacekeeping contingent unusually authorized to use force. Consequently, the Intervention Brigade is no exception whatsoever. This is a legal challenge the members of the Security Council needed to address. Any military action undertaken with or without the green light of the Security Council has to adhere to the relevant international humanitarian law.

Furthermore, the Brigade should be expected to adhere to the Copenhagen Process Principles and Guidelines concerning the application of international humanitarian law in situations of armed conflict, because its members are actively

engaged in the conflict as combatants.²³ In particular, the Principles and Guidelines provide a general savings clause intended to ensure the continued applicability of international law to military operations conducted by states, international organizations, or non-state actors. However, the participants failed to reach agreement on the application of international humanitarian law and international human rights law to detention in international military operations. To that effect, the Principles and Guidelines are "intended to apply to non-international armed conflicts and peace operations,"²⁴ and do not apply to international armed conflicts.

The second fundamental question is whether the Intervention Brigade was targeting to neutralize the M23 or all the armed groups that operate in the DRC. Accordingly, paragraph 8 of Resolution 2098(2013) generally ascribes the condemnation to "the M23, the Forces Démocratiques de Libération du Rwanda (FDLR), the Allied Democratic Forces (ADF), the the Alliance des Patriotes pour un Congo Libre et Souverain (APCLS), the Lord's Resistance Army(LRA), the National Force of Liberation (FNL), the various Mayi Mayi groups and all other armed groups and their continuing violence and abuses of human rights, including summary executions, sexual and gender based violence and large scale recruitment and use of children,..."²⁵, which have significantly violated human rights and international humanitarian law. It further embodies that the perpetrators should be brought to accountability.

²¹ Article 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), of 8 June 1977.

²² *Ibid.*

²³ The Copenhagen process on the handling of detainees in international military operations the Copenhagen process: Principles and Guidelines.

²⁴ *Ibid.*

²⁵ UN SC Resolution 2098 (2013), *supra* note 1, para.8.

Whereas paragraph 12 (b) articulates that, “to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities...”²⁶.

Evidently, paragraph 8 simply condemns the violation of human rights and humanitarian law by the armed groups in the DRC, but it does not envisage the mandate of the Brigade. Paragraph 12 clearly sets out the missions, as noted elsewhere, of the Intervention Brigade, however, it doesn't specify which armed group should be neutralized. If one applies the general rules of interpretation the resolution 2098(2013) appears ambiguous or equivocal. It would have been important to distinguish, among the rebel groups operating in the DRC, which one should be neutralized and disarmed. Can it be construed generally that enforcement action by the Brigade implied neutralizing all armed groups? If yes, why did the Security Council wait longer to take measures until the attack by the M23? In any event, the Security Council adopted the resolution due to the deepening crisis in North-Kivu by the 23 March Movement (“M23”) fighting the government forces.²⁷ If the foregoing resolution was adopted precisely to flush out all armed groups, if not presumably targeting the M23, the Security Council would have extended the mandate of MONUSCO sooner than later. Truly speaking, the subversive activities, including mutiny, of non-state actors have long been plagued the Eastern Congo for the several decades

ago, thereby the Security Council should have addressed this perennial problem long ago.

In this regards, it is imperative to recommend the Security Council to adopt another resolution unequivocally redefining the mandate of the Intervention Brigade, and which armed group(s) should be neutralized or disarmed, otherwise the status quo of the mandate remains rather ambiguously worded.

Conclusion

Admittedly, the members of the Security Council extended the mandate of MONUSCO and created the Intervention Brigade with the authorization to neutralize and disarm the armed groups purposely to restore peace and security and to protect civilian in the DRC, but the two fundamental questions remained unanswered. As already noted, the Security Council hastened to adopt resolution 2098(2013) without considering the legal challenges associated with it. As such, there is a high skepticism whether the Intervention Brigade can achieve its objectives through military action, yet the Kampala political negotiations would perhaps more appropriately resolve the conflict.

Acknowledgement

I am thankful to Dr Zeray Yihdego, Senior Lecturer in Public International Law, University of Aberdeen, for his useful comments in the draft of this work.

²⁶ *Ibid.* para.12.

²⁷ *Ibid.*, Preamble of UN SC Resolution 2098 (2013).