



The United Nations at War in the DRC?

Legal Aspects of the Intervention Brigade

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FOI-R--3761--SE

DECEMBER 2013



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Titel	The United Nations at War in the DRC? Legal Aspects of the Intervention Brigade
Title	The United Nations at War in the DRC? Legal Aspects of the Intervention Brigade
Rapportnr/Report no	FOI-R--3761--SE
Månad/Month	December
Utgivningsår/Year	2013
Antal sidor/Pages	43 p
ISSN	1650-1942
Kund/Customer	Swedish Ministry of Defence
Forskningsområde	8. Säkerhetspolitik
Projektnr/Project no	A11306
Godkänd av/Approved by	Maria Lignell Jakobsson
Ansvarig avdelning	Defence Analysis

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Sammanfattning

Demokratiska republiken Kongo (DRK) har länge varit drabbad av konflikter. Ett antal försök att hitta en lösning på konflikten har misslyckats. Ytterligare ett försök att bidra till en lösning är det nya mandat som FN:s insats i DRK, MONUSCO, fick under 2013. Mandatet ger insatsen rätt att genom helt nya medel och metoder engagera sig i konflikten. Denna rapport analyserar det nya mandatet och diskuterar vilka konsekvenser detta kan få för fredsfrämjande insatser och konflikten i DRK.

Mandatet kan tolkas som att det bemyndigar MONUSCO att delta i den väpnade konflikten som kombattanter och använda våld i enlighet med krigets lagar. Detta reser ett antal viktiga juridiska och säkerhetspolitiska frågor. Även om ett så pass robust mandat är nödvändigt för att lösa konflikten, kan det få konsekvenser för nationell och regional säkerhet. Mandatet kan också påverka de sedan länge existerande principerna för fredsbevarande insatser.

Nyckelord: Afrika, afrikansk säkerhet, Demokratiska republiken Kongo, DRK, fredsfrämjande insatser, Förenta nationerna, FN, interventionsbrigad, internationell rätt, MONUSCO

Summary

The Democratic Republic of the Congo (DRC) has long suffered from violent conflict. Serial efforts to resolve the conflict have ended in failure. In an attempt to find a resolution, the United Nations peace operation in the DRC, MONUSCO, was given a new mandate in early 2013. The mandate allows the mission to use unprecedented means of engagement in the armed conflict. This report presents a thorough analysis of the mandate and discusses its implications for peace operations in general and the conflict in the DRC in particular.

The mandate can be held to authorise MONUSCO to engage as combatants in the armed conflict and to use force according to the laws of war. This raises several important questions of a legal and political nature. While such a robust mandate may be needed to resolve such a long-standing conflict, it may have consequences for national and regional security. It may also turn the long-standing principles of peacekeeping on their head.

Keywords: Africa, African Security, Democratic Republic of the Congo, DRC, MONUSCO, Peace Support Operations, International Law, Intervention Brigade, United Nations

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1 Introduction

The recent history of the Democratic Republic of the Congo (DRC) has been marked by conflict, which has often been ignited by events in the eastern part of the country and in neighbouring countries. One million people fled to eastern DRC during and after the Rwandan genocide in 1994. The conflict moved from Rwanda to the DRC and had a spillover effect on the local population. In 1996 an uprising among the Tutsis in the region eventually led to a Rwanda- and Uganda-backed rebellion that resulted in the overthrow of the Congolese government.

The violence escalated once again in 1998, leading Rwanda and Uganda to meddle in the conflict and to invade the DRC. The government in turn received support from, among others, Angola, Namibia and Zimbabwe. This conflict became known as the second Congo war, or the Great War of Africa. A peace deal was negotiated at the end of 2002, but fighting has continued between rebel groups and foreign armed groups as well as the national army, the *Forces Armées de la République Démocratique du Congo* (FARDC) in eastern DRC. This has had severe consequences for the civilian population, resulting in widespread insecurity. Several attempts have been made to integrate some of the armed groups into the FARDC.

In 1999, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) was deployed to, among other things, implement the ceasefire agreement, the Lusaka Accord, which had been signed by the warring parties. MONUC was also involved in a disarmament, demobilisation, repatriation, resettlement and reintegration (DDRRR) process, and facilitated the elections that were held in 2006. The protection of civilians was included in its mandate in 2000.¹ In July 2010, MONUC was transformed into the current mission, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). It was given a mandate in the areas of the protection of civilians, stabilisation and peace consolidation.²

Despite the UN presence, the conflict in eastern DRC has continued. In April 2012, there was a new rebellion, the *Mouvement du 23 mars* (M23). In order to put an end to the recurrent cycles of violence, in March 2013 the UN authorised an Intervention Brigade within the framework of MONUSCO.³ The Brigade has an explicit offensive mandate, including the right to neutralise armed groups. It is the first of its kind in the history of the United Nations.

¹ See United Nations Security Council S/Res/1234 (2000).

² United Nations Security Council S/Res/1925 (2010).

³ See United Nations Security Council S/Res/2098 (2013).

1.1 Aim and Scope

The offensive mandate given to MONUSCO has not been tested in practice before. It is therefore important to understand what the mandate really entails and what its implications could be. Even though the UN has clearly stated that this new mandate will not create a precedent for future UN missions, it will certainly affect the current mission of MONUSCO and the conflict on the ground.

The purpose of this report is to analyse the new mandate of MONUSCO and more specifically the tasks of the Intervention Brigade. A second aim is to discuss the consequences of such a mandate for both the UN and the conflict in eastern DRC.

1.2 Method and Limitations

Since it has not been possible to travel to the DRC or the region within the scope of this study, this study is primarily a literature review and a legal analysis. Official documents, the academic literature and news articles have been reviewed. The mandate of the Intervention Brigade has been analysed from mainly a legal perspective.

As is mentioned above, the main focus of the study is the Intervention Brigade and its possible implications. The report does not dwell in any depth on the background to the conflict in the DRC or of the actors involved. This means that the parts of MONUSCO's mandate that do not regulate the Intervention Brigade are excluded from the analysis. The work of MONUSCO only forms part of the study as far as it relates to the Intervention Brigade. Furthermore, since the Brigade has only been operational for a few months, it is too early to tell what the long-term effects of deploying an offensive military capacity will be.

1.3 Outline

Chapter 2 discusses how the Intervention Brigade came into being. Chapter 3 is a thorough and primarily legal analysis of United Nations Security Council resolution 2098 (2013). Chapter 4 discusses the possible implications of the Brigade for peacekeeping in general and the conflict in the DRC in particular. Chapter 5 concludes what implications the Brigade could have on future UN operations.

2 The Setting up of the Brigade

The security situation in the eastern part of the DRC deteriorated in April 2012. Former combatants of the *Congrès national pour la défense du peuple* (CNDP) deserted from the FARDC, into which they had been integrated in 2009, amid unsuccessful demands for better conditions and a regular salary. The major factor, however was the security concerns of Bosco Ntaganda, the leader of the CNDP, who feared being arrested by the International Criminal Court (ICC).⁴ Another contributory factor was the government's intention to redeploy former CNDP combatants to other parts of the country.⁵ The deserters formed M23 and waged a new conflict with the FARDC and the government.

The main concerns of the CNDP had been the security of the Tutsi community and defeat of the Democratic Forces for the Liberation of Rwanda (FDLR), which consisted primarily of those former members of the Rwandan army and government ousted after the genocide.⁶ M23 has also demanded that the Congolese government eliminate the FDLR.⁷ M23 has officially stated that it intends to implement the agreement of 23 March 2009,⁸ but has recently said that it will not reintegrate into the FARDC.⁹

On 15 November 2012, M23 advanced towards Goma, the provincial capital of North Kivu. For the first couple of days the FARDC managed to repel the offensive with support from MONUSCO. However, by 20 November 2012, M23 had taken control of Goma. Around 140 000 people were displaced during the offensive.¹⁰ The manner of M23's advance led the UN to suggest that the organisation was receiving external support.¹¹

Following the occupation, both regional and international actors engaged intensively in an attempt to resolve the conflict. The African Union (AU) Peace and Security Council demanded an end to the offensive and underlined the importance of cooperation within the framework of the International Conference

⁴ United Nations Security Council, Report of the Secretary-General, S/2012/355.

⁵ Stearns, Jason, *From CNDP to M23: The evolution of an armed movement in eastern Congo*, Rift Valley Institute, Usalama Project, 2012, p. 44.

⁶ Ibid., p. 26.

⁷ Mvano, Chrisspin, "Congo Rebels to return to talks but not to army", *Reuters*, 8 September 2013, <http://www.reuters.com/article/2013/09/08/us-congo-democratic-rebels-idUSBRE9870BJ20130908>, accessed 9 September 2013.

⁸ The 23 March 2009 Agreement between the DRC and the CNDP stated that the CNDP would integrate into the national army and the police and convert into a political party. CNDP military ranks would be recognised and members were to be given an amnesty. CNDP territorial administrators were to be given other tasks. See the Peace Agreement between the Government and le Congres National Pour la Defense de Peuple (CNDP), Goma, 23 March 2009.

⁹ Mvano, Chrisspin, "Congo Rebels to return to talks but not to army".

¹⁰ United Nations Security Council, Report of the Secretary-General, S/2013/96.

¹¹ Ibid.

of the Great Lakes Region (ICGLR).¹² The ICGLR condemned the tactics of M23 but called on the government to address the grievances of M23.¹³ In addition, the Southern African Development Community (SADC) called for a withdrawal from Goma. On 2 December 2012, M23 withdrew from the city.

The ICGLR had discussed the matter of an Intervention Brigade long before the attack on Goma. In July 2012, the organisation decided to:

Direct the appropriate structures of the ICGLR to work with the AU and the UN for an immediate establishment of a neutral International Force to eradicate M23, FDLR and all other Negative Forces in the Eastern DRC and patrol and secure the Border Zones.¹⁴

Rwanda and Uganda were reportedly pushing for this solution while the DRC remained sceptical, with some government representatives preferring SADC to be responsible for such a force.¹⁵ As preparations for a force continued, Tanzania offered troops and a Force Commander and South Africa offered logistical support.¹⁶ The ICGLR also clarified that a Neutral International Force (NIF) should be mandated by the AU and the UN.¹⁷

After the attack on Goma, the wider international community became active in raising such a force. The government in Kinshasa was keen to get a new brigade approved by the United Nations Security Council, but France, the United States and the United Kingdom were reportedly sceptical.¹⁸

¹² African Union, Press Release, “The African Union strongly condemns the armed offensive launched by the M23 in the province of North Kivu, in the eastern part of the Democratic Republic of Congo”, 19 November 2012, <http://www.peaceau.org/uploads/auc-com-drc-19-11-2012.pdf> (accessed 3 October 2013). The ICGLR represents 12 countries in the region.

¹³ ICGLR, “Declaration of the Heads of State and Government of the Member States of the International Conference on the Great Lakes Region (ICGLR) on the Security Situation in Eastern Democratic Republic of Congo (DRC)”, 5th Ordinary Summit of the Heads of State and Government, Kampala, Uganda, 24 November 2012.

¹⁴ ICGLR, “Declaration of the Heads of State and Government of the Member States of the International Conference on the Great Lakes Region (ICGLR) on the Security Situation in Eastern Democratic Republic of Congo (DRC)”, Extraordinary Summit of the Heads of State and Government, Addis Ababa, Ethiopia, 15 July 2012.

¹⁵ Jones, Pete, “M23 of the Kivus: regional war and then a repeat of the 2009 accord?”, *Open Security*, 17 August 2012, <http://www.opendemocracy.net/opensecurity/pete-jones/m23-in-kivus-regional-war-and-then-repeat-of-2009-accord>, accessed 3 October 2013.

¹⁶ ICGLR, “Declaration of the Heads of State and Government”, 5th Ordinary Summit of the Heads of State and Government; S/2013/96.

¹⁷ ICGLR, “Declaration of the Heads of State and Government of the Member States of the International Conference on the Great Lakes Region (ICGLR) on the Security Situation in Eastern Democratic Republic of Congo (DRC)”, 3rd Ordinary Summit of the Heads of State and Government, Kampala, Uganda, 8 September 2012.

¹⁸ Hogg, Jonny and Charbonneau, Louis, “Insight, Getting tough in Congo: can risk pay off for U.N. forces?”, *Reuters*, 29 August 2013,

On 8 December 2012 SADC decided to deploy its standby force under the auspices of the NIF.¹⁹ It is alleged that this was done to diminish Rwandan and Ugandan influence over such a force.²⁰ The AU held consultations on the operationalisation of the NIF at the end of December, in particular whether it would be separate from or integrated into MONUSCO.²¹ At the beginning of January 2013, the Military Adviser to the UN travelled to the region to try to harmonise UN and regional efforts to create a security arrangement in the eastern parts of the DRC. At a ministerial-level meeting on 8 January 2013, which the Military Adviser attended, the matter of an Intervention Brigade made up of troops from SADC but within the framework of MONUSCO was discussed.²²

Talks between the leaders of the region resulted in agreement on the Peace, Security and Cooperation Framework for the Democratic Republic of Congo and the Region (the PSC Framework) on 24 January 2013. The United Nations Secretary-General, the Chairperson of the AU Commission, the Chairperson of SADC and the Chairperson of the ICGLR agreed to act as its guarantors. The PSC Framework stipulates a range of principles at the national, regional and international levels. These include: continued Security Sector Reform and consolidation of state authority at the national level; non-interference in the internal affairs of neighbouring countries and no provision of assistance or support to armed groups at the regional level; and a strategic review of MONUSCO at the international level. A regional oversight mechanism was established to promote these principles.²³ The signing of the PSC Framework was an essential step forward in acceptance of the deployment of the Intervention Brigade.

On 28 March 2013, the Security Council adopted resolution 2098 (2013), establishing an Intervention Brigade within MONUSCO. It consists of 3000 troops from Malawi, South Africa and Tanzania.

<http://mobile.reuters.com/article/idUSBRE97S0Q120130829?irpc=932>, accessed 5 September 2013.

¹⁹ SADC, “Communiqué on Extraordinary Summit of SADC Heads of State and Government in Tanzania”, 10 December 2012,
<http://www.info.gov.za/speech/DynamicAction?pageid=461&tid=94243>, accessed 5 September 2013.

²⁰ Stearns, Jason, “The politics of the intervention brigade: From Pretoria to Kigali”, 27 April 2013,
<http://congosasia.blogspot.se/2013/04/the-politics-of-intervention-brigade.html>, accessed 9 September 2013.

²¹ African Union, “The meeting on the security arrangements to be established in the Eastern part of the Democratic Republic of Congo ends in Addis Ababa”, 28 December 2012,
<http://www.peaceau.org/en/article/the-meeting-on-the-security-arrangements-to-be-established-in-the-eastern-part-of-the-democratic-republic-of-congo-ends-in-addis-ababa>, accessed 5 September 2013.

²² S/2013/96.

²³ Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the region.

3 United Nations Security Council Resolution 2098: Legal Analysis

United Nations Security Council Resolution 2098 can be held to be an unprecedentedly robust peacekeeping mandate. In the resolution, adopted on 28 March 2013, the Security Council decided that MONUSCO would include an Intervention Brigade consisting of three infantry battalions, an artillery company and a special forces and reconnaissance company.²⁴ Although UN peace operations have frequently operated under a Chapter VII mandate, which allows the use of force, the combination of a robust mandate and a military component capable of offensive military action is unparalleled.

The analysis below highlights the most important aspects of the resolution, and examines these in the light of both international law and the possible practical implications for the peace operation and the DRC. To provide a better understanding of the practical realities of the robust mandate authorised by resolution 2098, the analysis addresses the questions of *why* force was authorised, *what form* of force has been authorised, *who* can use force, and against *whom*, and *how* and *where* force may be used. First, however, the chapter provides a brief description of the basics of the legal frameworks relevant to an analysis of the mandate given to MONUSCO.

3.1 The Basics of the Relevant Law

International law makes a distinction between the right to use force and how force is used. The right to use force is regulated by a legal framework known as *jus ad bellum*, which authorises the use of force in self-defence and through a decision by the United Nations Security Council. How the force is used once initiated is regulated by a separate framework known as *jus in bello*. The distinction and separation between the two frameworks is important to ensure that how the force is used can be regulated irrespective of the legality of the initial decision to use of force.

3.1.1 The Law of Peace and the Law of War

The use of force is always regulated by law. Two legal frameworks regulate how force is used: *International Human Rights Law* (IHRL) and *International Humanitarian Law* (IHL). IHRL regulates the force used in times of peace and imposes restrictions on the use of force by the actors authorised to ensure the

²⁴ MONUSCO facts and figures, <http://www.un.org/en/peacekeeping/missions/monusco/facts.shtml>, accessed 5 September 2013.

internal security of a state, which primarily entails police and customs officers, and judicial organs. IHL, on the other hand, regulates the use of force in times of war, and enables more extreme forms of force, and the use of force under different circumstances and for different purposes than the IHRL framework.²⁵

Whether, how and against whom force can be used therefore differ in significant ways under the law of peace and the law of war. IHL, however, is only applicable to situations that legally amount to armed conflict, to parties to the conflict and to force related to the conflict. The existence of an armed conflict is determined by the situation on the ground.²⁶ Consequently, the situation on the ground is the determinant of which of the two legal frameworks regulates the use of force in a peace operation.

3.1.2 United Nations Security Council Resolutions

A United Nations Security Council resolution is the source of authority to use force in a peace operation. Such resolutions are not legal documents,²⁷ but the practical implementation of a resolution has legal consequences. It is important to note that the Security Council can only authorise a right *to* use of force (*jus ad bellum*). How force may be used is determined by the facts on the ground, and Security Council resolutions are therefore irrelevant for identifying the legal framework regulating how force is used (*jus in bello*).²⁸

In addition, a Security Council authorisation to use force is often conditional on a specific *purpose*, such as the protection of civilians. These purposes may impose *jus ad bellum* limitations on the right to use force, which means that the use of force for purposes other than those identified in the resolution would be illegal. The identified purpose is therefore key to understanding both whether and how force may be used in peace operations.

²⁵ For more on how the two frameworks differ see Lamont, Carina, *Empowering the Protection of Civilians: legal aspects of the use of force to protect civilians in peace operations*, FOI-R-3468-SE, 2012.

²⁶ Faite, Alexandre and Labb   Grenier, Jer  mie (eds). Legal Division of ICRC, *Report on Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN mandated forces*, Geneva, 11–12 December 2003, Executive Summary, p.1, <http://www.icrc.org/eng/resources/documents/publication/p0912.htm>, accessed 2 October 2013.

²⁷ Wood, Michael C., “Interpretation of Security Council Resolutions”, *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 80.

²⁸ Faite, Alexandre and Labb   Grenier, Jer  mie (eds). Legal Division of ICRC, *Report on Expert Meeting on Multinational Peace Operations*, Executive Summary, p. 2.

3.2 Why is Force Authorised?

United Nations Security Council resolution 2098 determines that the situation in the DRC constitutes a threat to international peace and security in the region.²⁹ A situation that amounts to a threat to international peace and security is a prerequisite for the UN Security Council to authorise the use of force.

The Security Council provides a graphic description of the situation in the DRC in the resolution. This offers insights into the background and motives for the Security Council to authorise such a robust mandate. For example, the Security Council reiterates that there is an existing and ongoing security and humanitarian crisis in North Kivu,³⁰ and that the crisis has been caused by M23 and other Congolese and foreign armed groups. The crisis in North Kivu is also said to have had a negative effect on the security and humanitarian situation in South Kivu and Katanga, and that there is a danger that the crisis will spread to these areas due to the threat posed by armed groups.³¹

The resolution expresses deep concern regarding the threat posed by M23 in the immediate vicinity of Goma, and *the serious violations of international humanitarian law* and abuses of human rights by M23 and other armed groups.³² Since IHL is only applicable to situations that legally amount to armed conflict, the reference to violations of IHL indicates an assumption that the situation “in the immediate vicinity” of Goma amounts to an armed conflict.³³ The exact proximities of the armed conflict are not made clear in the resolution. The wording of the resolution, however, indicates an understanding that the area of North Kivu at the time of the adoption of the resolution was suffering from an ongoing armed conflict, and that there was a risk that the armed conflict might spread to the areas of South Kivu and Katanga.³⁴

Resolution 2098 further expresses its great concern regarding the high levels of violence, and the abuses and violations of international law; and it condemns the targeted attacks on civilians, the widespread sexual and gender-based violence, the systematic recruitment and use of children, and the extrajudicial executions and arbitrary arrests.³⁵ The resolution thereby describes an extremely volatile

²⁹ S/Res/2098 (2013), p. 4.

³⁰ Ibid., p. 1.

³¹ Ibid., p. 2.

³² Ibid.

³³ The fact that the armed conflict is taking place between a state and organised armed groups means that the nature of the armed conflict is non-international (internal). This affects which parts of IHL apply to the conduct of the war. An analysis of which parts of IHL apply to non-international armed conflict falls outside the scope of this report.

³⁴ See more on the situation in South Kivu and Katanga below.

³⁵ S/Res/2098 (2013), p. 2.

environment in which violations of human rights and IHL seem to be systematised and widespread.

3.3 What Forms of Force have been Authorised?

Acting under Chapter VII of the UN Charter, the Security Council has authorised MONUSCO:

through its military component, in pursuit of the objectives described in paragraph 11 above, to take all necessary measures to perform the following tasks, through its regular forces and its Intervention Brigade as appropriate.³⁶

This passage contains two important details. First, MONUSCO's *military component* is authorised to use force (all necessary measures) in pursuit of all the objectives listed. The use of force is always regulated by law. The different legal frameworks, however, differ in *how* they allow force to be used, and what can be considered *necessary measures* therefore also differ. The wide range of the objectives listed in paragraph 11 of resolution 2098³⁷ indicates that the use of force will be regulated by IHL in one instance and by IHRL in another. For this reason, MONUSCO will need to ensure a capacity to operate within both IHL and IHRL. Attention to context will therefore be pivotal to the understanding of how each task can be addressed.

Second, the tasks listed are assigned to the MONUSCO military component as a whole. The wording *as appropriate* seemingly allows MONUSCO to delegate the different tasks to its regular forces or to the Intervention Brigade as it deems appropriate. In other words, MONUSCO can decide who does what within the military component to fulfil the overall mandate. This could result in some potential complications over possible legal distinctions regarding the legal status of peacekeepers and the use of force authorised. This is discussed further in section 3.4.

Paragraph 12 of resolution 2098 identifies that the *purpose* of the neutralisation operations is to “prevent the expansion of all armed groups, neutralise these groups, and to disarm them”.³⁸ The paragraph further outlines two expected results of the neutralisation mandate: “to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in

³⁶ S/Res/2098 (2013), para. 12.

³⁷ These objectives are: reduction of the threat posed by Congolese and foreign armed groups; and stabilisation through the establishment of functional state security institutions and strengthened democratic order.

³⁸ S/Res/2098(2013), para. 12(b).

eastern DRC and to make room for stabilizing activities".³⁹ It is notable that the threat to be combated is that from armed groups, and that it is the threat to state authority and civilian security that is to be neutralised. This affects whether and how force can be applied in the peace operation.

3.3.1 Neutralisation and Targeted Offensive Operations

Paragraph 12 (b) of resolution 2098 is crucial to an understanding of the scope and limitation of the mandate given to MONUSCO and the Intervention Brigade. It states that:

In support of the authorities of the DRC, on the basis of information collation and analysis, and taking full account of the need to protect civilians and mitigate risk before, during and after any military operation, carry out targeted offensive operations through the Intervention Brigade referred to in paragraph 9 and paragraph 10 above, either unilaterally or jointly with the FARDC, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy on UN-support to non-UN forces (HRDDP), 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;

The term *neutralise* is undeniably new to Security Council resolutions mandating peace operations. The term is not defined, and its meaning is therefore unclear. The term is commonly used in military contexts, but interpretations can vary between different military units and different nations. What is relatively clear, however, is that the term *neutralise* encompasses (without necessarily being limited to) the use of force.

What are considered *necessary measures* depends on the *purpose* of the force used, and the legal framework applicable to the situation at hand. If broadly interpreted, the term *neutralise* could entail force ranging from targeting by lethal force⁴⁰ to force used in order to capture and detain. If narrowly interpreted, on the other hand, the term could be limited to authorising force that render the armed groups ineffective.⁴¹

³⁹ Ibid.

⁴⁰ Oswald, Bruce, "The Security Council and the Intervention Brigade: Some Legal Issues", *American Society of International Law, Insights*, Vol. 17, Issue 15, 6 June 2013, <http://www.asil.org/insights130606.cfm>, accessed 13 September 2013.

⁴¹ NATO glossary of terms, AAP -06, 2013, defines *neutralisation fire* as "fire delivered to render a target temporarily ineffective or unusable".

In resolution 2098, the term *neutralise* is used in combination with other terms commonly used in military contexts, such as *offensive* and *targeted* operations. This strengthens the argument that the term *neutralise* should be interpreted broadly. The term *offensive operations*, when used in military contexts, generally means attacks that are not necessarily responding to prior use of force (self-defence or defensive operations), or launched without someone or something necessarily being threatened at the time of the attack (self-defence). The use of targeted and offensive operations, if and when this involves the use of potentially lethal force, could therefore be interpreted as constituting force that is not permitted under IHRL, resulting in the conclusion that the mandate might authorise force that is only permitted in contexts regulated by IHL.⁴²

Importantly, however, even when the peace operation is engaged in armed conflict, the purpose of the force identified in the resolution could further limit the use of force. The primary objective for using force authorised by resolution 2098 is to contribute to “reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities”⁴³. The force used by the peace operation must therefore ultimately serve the purpose of these objectives.

While the applicability of IHL to the conduct of peace operations (when engaged as combatants in armed conflicts) is widely accepted today,⁴⁴ the specific purposes identified in resolution 2098 could provide additional limitations on the use of force. If the force used undermines the objectives identified in the resolution, the force could possibly be held to fall outside the *jus ad bellum* limitations of resolution 2098. The objectives and purposes of resolution 2098 could therefore put additional limitations on the use of force than IHL would dictate.

3.3.2 Other Forms of Force Authorised

Resolution 2098 lists tasks that do not explicitly mention the Intervention Brigade but, depending on how the mandate is interpreted, could be performed by the Brigade. These are protection of civilians, monitoring the arms embargo and assisting in national and international judicial processes.

The resolution authorises MONUSCO’s military component to take *all necessary measures* to protect civilians under imminent threat of physical violence.⁴⁵ The

⁴² For more on the distinction between the use of force under IHRL and the use of force under IHL see Lamont, Carina, *Empowering the Protection of Civilians*.

⁴³ S/Res/2098 (2013), paras 9, 6.

⁴⁴ See United Nations Secretary-General’s Bulletin, ST/SGB/1999/13 (1999); and Alexandre Faite, and Jerémie Labbé Grenier (eds). Legal Division of ICRC, *Report on Expert Meeting on Multinational Peace Operations*.

⁴⁵ S/Res/2098 (2013), para. 12(a).

need to protect civilians can arise both during and outside of armed conflict, and it may therefore be necessary to apply measures aimed at protecting civilians within the IHL framework in some instances and within IHRL in others. The differences in how the two frameworks regulate military activities should not be underestimated, and the task of protecting civilians wherever the need for protection arises could result in significant challenges for MONUSCO.⁴⁶

The resolution further provides authority to monitor the implementation of the arms embargo on the DRC stipulated in United Nations Security Council resolution 2078 (2012).⁴⁷ The monitoring is described as requiring observation and reporting on flows of military personnel, arms or related material across the eastern border of the DRC.⁴⁸ Activities relating to the monitoring of the arms embargo are unrelated to the armed conflict, and are therefore to be undertaken within the IHRL framework. Observing (without interrupting or stopping) and reporting for the purpose of monitoring the implementation of an arms embargo undeniably requires an impartial and neutral actor. The mandate afforded MONUSCO is likely to require it to assume an objective and neutral position for monitoring, on the one hand, and a position as a party to the conflict, in neutralisation and offensive operations, on the other.

MONUSCO is also authorised to assist national and international judicial processes.⁴⁹ The task of enforcing international law to the extent of arresting and detaining suspects of international crimes would also fall under the legal regime of IHRL.

3.3.3 Conclusion: The Forms of Force that are Authorised

The mandate afforded MONUSCO entails a wide range of different tasks, such as protection of civilians, neutralising of armed groups, monitoring the arms embargo and assisting in national and international judicial processes.

MONUSCO is thereby tasked with using all necessary measures in contexts that may be regulated by both IHL (in the context of armed conflict and targeted offensive operations, and possibly the protection of civilians), and IHRL (in the context of monitoring an arms embargo, the protection of civilians outside of armed conflict and assisting judicial processes).

Needless to say, the means and methods used in carrying out these tasks must also necessarily differ. Similarly, the understanding of what constitutes *necessary measures* will differ depending on the legal framework regulating the use of

⁴⁶ See analysis on the use of force under IHRL and IHL in Lamont, Carina, *Empowering the Protection of Civilians*.

⁴⁷ S/Res/2098 (2013), para. 12(c).

⁴⁸ Ibid.

⁴⁹ S/Res/2098 (2013), para. 12(d).

force in each specific situation. If, how and to what extent such conflicting mandates are possible to fulfil in reality remains to be seen. It is likely, however, that the conflicting roles and tasks assigned to the military component of MONUSCO will result in significant challenges.

3.4 Who Can Use Force and Against Whom?

Having established that resolution 2098 possibly authorises force that in some cases would only be permissible under IHL, questions arise over *who* is authorised to use such force in the peace operation and which *legal status* such actors have. Legal status is closely connected to the most fundamental principle of IHL: the principle of distinction. Distinguishing those who can legally be attacked in an armed conflict from those who cannot is central to the very aim and purpose of IHL.

IHL generally provides only two options for legal status: *combatants* or *civilians*. Combatants are defined as members of armed forces or organised armed groups,⁵⁰ and their status provides a legal right to use force in armed conflicts and the right to prisoner-of-war status upon capture.⁵¹ A combatant is also a permanent legitimate target, who can be legally targeted based on his or her category rather than on whether he or she poses a threat at that specific time.⁵² The combatant status, however, is only applicable to international armed conflicts.

Civilians are defined in the negative as individuals who are not members of armed forces or organised armed groups.⁵³ They are not legally authorised to use force in an armed conflict, and can therefore be prosecuted under domestic law if they participate in hostilities. Civilians, on the other hand, have a legal right to protection from direct attack in armed conflicts, and can only be legally targeted if, and for the period during which, they directly participate in hostilities.⁵⁴ This means that civilians who take a direct part in hostilities can be targeted only if

⁵⁰ Geneva Conventions, Additional Protocol I, article 43.

⁵¹ Ibid., article 43, para. 2.

⁵² Kleffner, Jann K., “From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities: On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Conference”, *Netherlands International Law Review*, Vol. 54, Issue 2, 2007, p. 332.

⁵³ See the definition of civilians in the Geneva Conventions, Additional Protocol I, Article 50. No definition exists in Additional Protocol II, which is applicable to non-international armed conflicts.

⁵⁴ Geneva Conventions, Additional Protocol II, article 13(3). See also Kleffner, Jann K., “From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities”, p. 325.

and while they are participating. They regain their right to protection when they are not directly participating in hostilities.⁵⁵

Consequently, civilians enjoy temporally more extensive rights of protection from direct attack than combatants. However, while civilians can be prosecuted for any participation in the armed conflict, combatants are legally authorised to use force in the armed conflict and cannot be prosecuted for using force as long as the force does not violate the laws of war.

The legal status of “fighters” in non-international armed conflicts is not defined in IHL.⁵⁶ The notion of defining members of organised armed groups who are parties to a non-international armed conflict as something other than civilians taking direct part in hostilities has gained increased support.⁵⁷ This not least through the introduction of the concept of *continuous combat function* (CCF), according to which fighters do not regain their legal right to protection between their engagements in the armed conflict.⁵⁸ It has been argued that both members of organised armed groups and members of armed forces legally should be considered to be combatants.⁵⁹ This would make both legal targets irrespective of their direct participation at the time of the attack.

Whether this interpretation would be limited to the scope of targetability, or also affect the organised groups’ legal right to use force, is less clear. It seems likely that the illegality of members of organised armed groups using force in an armed conflict would remain, but Additional Protocol II of the Geneva Conventions, which is applicable to non-international armed conflicts, encourages the authorities in power to “grant the broadest possible amnesty to persons who have participated in the armed conflict”.⁶⁰

3.4.1 Legal Status of Peacekeepers

Military components of peace operations are generally considered *peacekeepers* and are as such authorised to use force under specific circumstances, such as the protection of civilians and self-defence. They are *not normally* authorised to use force in offensive military operations, and as a consequence are generally not engaged in an armed conflict as combatants. It is, however, generally accepted

⁵⁵ See more on *direct participation in hostilities* at International Committee of the Red Cross, <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/participation-hostilities/index.jsp>, accessed 12 September 2013.

⁵⁶ Lubell, Noam, *Extraterritorial Use of Force Against Non-State Actors*, OUP, 2010, p. 138.

⁵⁷ Ibid., p. 148.

⁵⁸ See more on the notion of the Continuous Combat Function in Melzer, Nils, *ICRC Interpretive Guidance on Direct Participation in Hostilities under International Humanitarian Law*, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, accessed 27 September 2013.

⁵⁹ Lubell, Noam, *Extraterritorial Use of Force Against Non-State Actors*, p. 147. See also Jann K. Kleffner, “From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities”.

⁶⁰ Geneva Conventions, Additional Protocol II, article 6(5).

that IHL applies to the conduct of peacekeepers to the extent that they take direct part in hostilities.⁶¹ The members of the military component of peace operations are therefore normally, and in legal terms, considered *civilians*.⁶² As such, they are only legitimate targets in the armed conflict to the extent and for the duration that they take direct part in hostilities.

Resolution 2098, however, provides a far-reaching mandate for the use of force, which to the extent that the force exceeds the limitations entailed in IHRL, can only be permitted under the IHL framework. To what extent peacekeepers are legally protected from attacks is a complex matter subject to debate. IHL makes no special provision for protection of peacekeepers. Any illegality in attacks on peacekeepers other than that stipulated in IHL would therefore stem from national rather than international law. According to the *Convention on the Safety of United Nations and Associated Personnel* (Safety Convention), state parties are obliged to criminalise attacks and other violent acts committed against peacekeepers.⁶³ This could possibly enhance the legal protection of peacekeepers in MONUSCO. However, as of October 2013, the DRC is not a signatory to the Safety Convention and therefore not bound by it,⁶⁴ which obviously puts in doubt the applicability of the protection regime contained in the Safety Convention to MONUSCO peacekeepers. If the Safety Convention is not applicable to MONUSCO peacekeepers, protection is limited to that entailed in IHL and in the national law of the DRC.

Even if the Safety Convention was to apply, however, interpretations of its scope of application vary.⁶⁵ If it is assumed, as many scholars do, that peacekeepers can be considered legal targets when engaged in the armed conflict,⁶⁶ one important question is whether a UN force engaged in armed conflict regains its right to protection between engagements (as per the notion of *direct participation in*

⁶¹ Faite, Alexandre and Labb   Grenier, Jér  mie (eds). Legal Division of ICRC, *Report on Expert Meeting on Multinational Peace Operations*. See also United Nations Secretary-General's Bulletin, ST/SGB/1999/13 (1999).

⁶² Scott, Leslie , "Emerging Voices: Distinction without a Difference - The UN's Attempt to Fight a War Without Fighting a War", *Opinio Juris blog archive*, <http://opiniojuris.org/2013/07/29/emerging-voices-distinction-without-a-difference-the-uns-attempt-to-fight-a-war-without-fighting-a-war/>, accessed 6 September 2013.

⁶³ Convention on the Safety of United Nations and Associated Personnel (1994), articles 9–10.

⁶⁴ United Nations Treaty Collection, online:

http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-8&chapter=18&lang=en, accessed 25 October 2013.

⁶⁵ See Zwanenburg, Marten, "United Nations and International Humanitarian Law", *Max Planck Encyclopaedia of Public International Law*, 2010; and Engdahl, Ola, "The Status of Peace Operation Personnel Under International Humanitarian Law", *Yearbook of International Humanitarian Law*, Vol. 11, 2008.

⁶⁶ Kolb, Robert, "Applicability of international humanitarian law to forces under the command of an international organization", Background Document 1 in Faite Alexandre and Labb   Grenier, Jér  mie (eds). Legal Division of ICRC, *Report on Expert Meeting on Multinational Peace Operations*, p. 66 and 68.

hostilities) or whether it could legally be targeted irrespective of its participation in hostilities at the time of the attack (as per the status of *combatants*).

There is controversy over this too. Some argue that the fact that peacekeepers are made up of state armed forces suggests that peacekeepers should be considered combatants rather than civilians.⁶⁷ Under such an interpretation, peacekeepers would not regain their right of protection between engagements in an armed conflict and would consequently be permanently targetable for as long as IHL continues to apply.

Resolution 2098 seemingly enables force to be used against targets irrespective of their direct participation in hostilities at the time. Because IHL grants equal rights and imposes equal obligations on all parties to a conflict,⁶⁸ it is possible to argue that the rules applied to the armed groups must also apply to the military members of MONUSCO engaged in the armed conflict. Consequently, if it is held that resolution 2098 authorises the use of force against armed groups outside the temporally limited scope of targetability entailed in the notion of direct participation in hostilities, both the members of the organised armed groups in the DRC and the members of the military component of MONUSCO who are engaged in the armed conflict must be considered combatants in terms of *when* they can be legally targeted. This raises the question of *who within MONUSCO* is a legitimate target of attack.

3.4.2 A Legal Distinction between MONUSCO and the Intervention Brigade?

The International Committee of the Red Cross (ICRC) has found that for the purpose of distinction, members of state armed forces may be considered combatants in both international and non-international armed conflicts, and that “All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel”.⁶⁹ This highlights the question of whether, and to what extent, MONUSCO’s military component constitutes *a single* armed force, or if the Intervention Brigade, although “included in” MONUSCO, can be held to constitute a separate entity in legal terms.

A further complication is that the legal status may differ between the Intervention Brigade and the “regular force” (as termed in resolution 2098, para. 12) of MONUSCO. Although the authorisation for the use of force is somewhat

⁶⁷ Zwanenburg, Marten, “United Nations and International Humanitarian Law”, para. 19.

⁶⁸ Kleffner, Jann K., From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities, p. 323. See also Roberts, Adam, “The equal application of the laws of war: a principle under pressure”, *International Review of the Red Cross*, Vol. 90 No 872 (December 2008).

⁶⁹ International Committee of the Red Cross, Study on Customary International Humanitarian Law, Rule 3, originally published by CUP, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule3, accessed 13 September 2013.

ambiguous, resolution 2098 specifies that the authorisation to conduct offensive targeted operations applies to the Intervention Brigade. Assuming that the authorisation is limited to the Intervention Brigade, members of the Intervention Brigade can be considered to be engaged as combatants in the armed conflict.

Due to the fact that the Intervention Brigade is under the same command and control as the regular force, that of the Force Commander, and that resolution 2098 states that MONUSCO “shall include” an Intervention Brigade, it could be argued that the entire military component of MONUSCO must be considered a single entity, and thus that the entire military component of MONUSCO must hold the same legal status.

If, on the other hand, the Intervention Brigade is considered legally distinct from the rest of the force, the “regular force” of MONUSCO would enjoy more extensive rights to legal protection than the members of the Intervention Brigade. In practice, this would mean that while members of the Intervention Brigade could be legally attacked outside of any ongoing hostilities, members of the regular force could only be legally attacked while directly participating in hostilities.

3.4.3 Conclusion: Who Can Use Force and Against Whom

MONUSCO has been afforded a mandate to neutralise armed groups and engage in targeted offensive operations. This pre-established authority to use force results in the conclusion that the mandate may entail an authorisation to engage in the armed conflict in the DRC as combatants. This would mean that the peace operation would be considered a party to the conflict, and that both the peacekeepers and the members of organised armed groups in the DRC could be legally targeted.⁷⁰

There is still some doubt, however, as to *which personnel* within MONUSCO have been afforded the authorisation to use force in the DRC. It has not been possible to reach a definite conclusion on the status of the MONUSCO military component within the limitations of this analysis. The wording of resolution 2098 is ambiguous, and the legal status of the military members of MONUSCO could differ depending on whether they are members of the Intervention Brigade or the regular force.

From a legal perspective, finding sufficient support for a legal distinction between the Intervention Brigade and the “regular forces” is a challenge. On the other hand, from a practical perspective, a legal distinction between the two

⁷⁰ The legal protection provided to peacekeepers in articles 8.2(b)(iii) and 8.2(e)(iii) of the Rome Statute is conditioned on them having the legal status of civilians. Once they become combatants, they become legitimate targets. See Faite Alexandre and Labb   Grenier, Jér  mie (eds). Legal Division of ICRC, *Report on Expert Meeting on Multinational Peace Operations*, p. 68.

seems to be a fundamental necessity to enable MONUSCO to fulfil all of its wide ranging tasks.

3.5 How Can Force Be Used?

The broad mandate afforded to MONUSCO, a mandate which seemingly authorises the peace operation to engage as combatants in the armed conflict in eastern DRC, puts the question of *how* force can be used at centre stage in this analysis.

Resolution 2098 highlights the obligation of the UN force to comply with international law.⁷¹ The obligation to adhere to international law notably includes both the laws of war (IHL) and the laws of peace (IHRL). It is nonetheless important to note in which context the activities that entail the use of force are being undertaken. When not engaged as combatants in an armed conflict, international human rights law regulates the force used by the peace operation.⁷² It is therefore important to distinguish between activities undertaken as a part of that conflict (such as neutralisation and targeted offensive operations) and the use of force unrelated to the armed conflict (such as in monitoring the arms embargo).

Resolution 2098 also imposes a requirement to take “full account of the need to protect civilians and mitigate risk before, during and after any military operation”.⁷³ In other words, in conducting “neutralising” operations, the Intervention Brigade must balance the risks posed to civilians. This resembles the requirements of distinction, proportionality and precaution entailed in IHL. IHL requires all warring parties to distinguish between civilians and legitimate targets, and to use proportionate force and take necessary precautions in attacks. The inclusion of the requirement to mitigate risks to civilians before, during and after the military operation is therefore also a requirement entailed in IHL. It is not, however, to be confused with the task to protect civilians, which requires activities specifically directed at ensuring the protection of civilians from threats of physical force. The obligation to take full account of the need to protect civilians is limited to ensuring that civilians are not adversely affected by activities undertaken for other purposes and objectives, such as disarming armed groups.

⁷¹ S/Res/2098 (2013), para. 12(b) holds that operations shall be carried out “in strict compliance with international law”.

⁷² Lamont, Carina, *Empowering the Protection of Civilians*, Chapter 3.

⁷³ S/Res/2098(2013), para. 12(b).

3.6 Where Can Force Be Used?

Once the existence of an armed conflict has been established, the question of *where* that conflict exists also arises. If an armed conflict exists in the eastern part of the DRC, is MONUSCO authorised to conduct targeted offensive neutralisation activities in all of the DRC? Or is the legal authority to engage in such combat activities limited to the eastern part of the DRC? To answer this question, it is necessary to address the question of the geographical scope of IHL.

Interpretations on the geographical scope of IHL differ. First, the scope of application differs depending on whether the armed conflict is of an international or a non-international nature. An armed conflict is international if it involves two or more states. IHL applies to the whole territory of a warring state in an international armed conflict.⁷⁴ The situation for non-international armed conflict, however, is more complicated.

There are two main interpretations of the geographical scope of IHL in non-international armed conflicts. The first interpretation applies strict geographical limitations to the application of IHL. This interpretation holds that the existence and intensity of the violence determine the existence of an armed conflict.⁷⁵ A second interpretation argues for a more flexible application, in which IHL applies to all the areas in which combatants are present.⁷⁶ This is the traditional interpretation related primarily to international armed conflicts. The strict interpretation with tight geographical limitations, on the other hand, has been argued to be most suitable for non-international armed conflicts.⁷⁷

Determining the geographical scope of the mandate is important for defining where in the DRC MONUSCO can engage in targeted and offensive operations, and the use of force regulated by IHL.

3.7 The Changing Nature of the Armed Conflict

Having established that the peace operation in the DRC can be considered to be involved in the armed conflict as combatants, and that IHL consequently applies to the peace operation, the question of *what parts of IHL* are applicable to the conduct of the peace operation arises. IHL distinguishes between international and non-international armed conflicts, and the legal regime regulating international armed conflicts differs from that which regulates non-international armed conflicts. Although the differences entailed in the two legal regimes are

⁷⁴ Lubell, Noam, *Extraterritorial Use of Force Against Non-State Actors*, pp. 94.

⁷⁵ This interpretation draws from the *Tadic* case, Prosecutor v Tadic, Case no IT-94-1-T.

⁷⁶ Lewis, Michael W., “Drones and the Boundaries of the Battlefield”, *Texas International Law Journal*, Vol. 47 Issue 2, 2012, pp. 301.

⁷⁷ Ibid.

diminishing, there are still some important distinctions that make the classification of the armed conflict important to this analysis. One such difference is the legal status of the individuals engaged in the armed conflict, and consequently the scope of targetability of such individuals. The geographical scope of applicability of IHL may also differ, as well as the initiation and termination of the armed conflict. The differences could therefore affect when, where and how force may be used in the DRC by the Intervention Brigade.

Whether the involvement of a peace operation in a non-international armed conflict against non-state actors internationalises a conflict is open to debate. While some argue that an international presence, such as a peace operation, automatically internationalises the conflict, others hold that it is the status of the other parties to the conflict that determines the nature of the conflict.⁷⁸ Analyses to date, however, have largely focused on situations in which the military component of a peace operation finds itself in a situation that obliges them to engage, and in which the threshold for armed conflict is reached through that engagement. Seemingly, therefore, these analyses have presumed that the peace operation only engages in the armed conflict on a case-by-case basis and as civilians taking a direct part in hostilities.

The extensive mandate afforded to MONUSCO, with pre-established authority to use offensive and targeted military force that may only be permitted under IHL, could constitute a vastly different situation than that often assumed in these analyses. This extensive mandate could lead to the conclusion that its involvement in the peace operation in the DRC internationalises the conflict, making the law of international armed conflict applicable. It is not possible to reach a definite conclusion on this matter, however, within the limitations of this analysis.

⁷⁸ Faite, Alexandre and Labb   Grenier, J  r  mie (eds). Legal Division of ICRC, *Report on Expert Meeting on Multinational Peace Operations*.

4 Implications of Using the Brigade

According to the UN, the Intervention Brigade is fully operational and ready to face any threats from any rebel group.⁷⁹ The last Malawian troops arrived in October 2013. In July and August 2013, fighting erupted between the FARDC and M23. M23 shelled both the city of Goma and MONUSCO. As a consequence, the FARDC joined forces with the Intervention Brigade in an offensive against M23. According to the mission, this was to protect civilians. Helicopter gunships, armoured personnel carriers and a large number of ground troops were reportedly used.⁸⁰ During the fighting, a Tanzanian peacekeeper was killed and 14 other troops were injured.⁸¹ Tens of thousands of people were displaced as a result of the fighting.⁸² M23 continued to violate IHL by killing, sexually violating and forcefully recruiting the civilian population.⁸³

After a brief period of negotiations during September 2013, suspension of the peace talks were once again suspended, due to questions on who should get amnesty and who should be integrated into the FARDC. M23 and the FARDC supported by the Intervention Brigade resumed fighting on 25 October 2013. M23 was forced out of its strongholds. By 5 November M23 declared an end to its military operations and that troops were to prepare for a Disarmament, Demobilisation and Reintegration (DDR) process.⁸⁴

The engagement of the Intervention Brigade raises several questions, which are discussed below.

4.1 Peacekeepers as Combatants and the Question of Impartiality

The use of force is frequently perceived as being at odds with the principle of impartiality in peace operations. Questions over the impartiality of MONUSCO are not new and date back to its predecessor, MONUC. The missions have supported the FARDC for several years in its operations against rebels,

⁷⁹ MONUSCO,
<http://monusco.unmissions.org/Default.aspx?tabid=10662&ctl=Details&mid=14594&Itemid=20063&language=en-US>, accessed 5 September 2013.

⁸⁰ *Al Jazeera*, “UN helicopters strike Congolese rebels”, 29 August 2013,
http://www.aljazeera.com/news/africa/2013/08/201382815950221122.html?utm_medium=referral&utm_source=pulsenews, accessed 7 October 2013.

⁸¹ United Nations Security Council, Report of the Secretary-General, S/2013/569, para. 3.

⁸² Ibid., para. 4.

⁸³ Ibid., paras 7, 8.

⁸⁴ Katombe, Kenny, “Congo’s defeated M23 rebels announces disarmament, seeks diplomacy”, *Reuters*, 5 November 2013, http://worldnews.nbcnews.com/_news/2013/11/05/21318777-congos-defeated-m23-rebels-announce-disarmament-seek-diplomacy, accessed 21 November 2013.

especially the FDLR.⁸⁵ The Intervention Brigade has brought the matter to a head.

Impartiality has frequently been called into question as peace operations have been faced with new tasks.⁸⁶ It has, for example, been held to mean that a peace operation “cannot further the interest of any contestant in the dispute”.⁸⁷ Such a definition of impartiality lies dangerously close to that of *neutrality*, a concept with which *impartiality* must not be confused. *Neutrality* implies avoidance of actions that would affect the local balance of power. *Impartiality*, on the other hand, refers to taking “even-handed”⁸⁸ or *fair* actions. The use of force is thus not necessarily linked to impartiality.

In order to be impartial, the legal principles of predictability and equality before law need to be upheld. *Predictability of law* requires that the law is established, available and sufficiently detailed to predict legal consequences. *Equality before the law* entails obligations that everyone, regardless of position, power or influence, is equal before the law, and must be treated in the same manner in the same circumstances. The use of force is therefore not problematic for the principle of impartiality, as long as the force used remains within the scope and limitations of the applicable legal framework.⁸⁹

However, with such an offensive mandate the issue of MONUSCO’s impartiality could be questioned. As this analysis shows, the offensive mandate afforded the peacekeeping mission can be interpreted as authorising the peacekeeping force to engage as combatants in the armed conflict. A UN peacekeeping force operating as combatants in an armed conflict is undoubtedly controversial. While this could be argued to be a necessity to halt the escalating violence and the violations of human rights and humanitarian law in the DRC, it would result in the peace operation becoming a party to the conflict and it will therefore be difficult to claim impartiality in regard to the conflict. Ultimately, this could undermine the legitimacy of the actions taken by a mission. Taken together, this could mean

⁸⁵ See for example *Reliefweb*, “MONUC continues to support joint operations against rebels in eastern DRC”, 6 May 2009, <http://reliefweb.int/report/democratic-republic-congo/monuc-continues-support-joint-operations-against-rebels-eastern-drc>, accessed 5 September 2013; Vircoulon, Thierry. “After MONUC, Should MONUSCO Continue to Support Congolese Military Campaigns?”, International Crisis Group, 19 July 2010, <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/vircoulon-after-MONUC-should-MONUSCO-continue-to-support-congolese-military-campaigns.aspx>, accessed 5 September 2013.

⁸⁶ Vohra, Shyla, “Impartiality in United Nations Peace-keeping”, *Leiden Journal of International Law*, Vol. 9, 1996, p. 63.

⁸⁷ *Ibid.*, p. 68.

⁸⁸ Kelly, Max and Giffen, Alison, *Military Planning to Protect Civilians: Proposed Guidance for United Nations Peacekeeping Operations*, The Henry L. Stimson Center, 2011, p. 21.

⁸⁹ Lamont, Carina, *Empowering the Protection of Civilians*, pp. 42.

that the way in which UN peacekeeping is perceived could be negatively affected.

4.2 Affecting the Conflict

As is shown above, its offensive mandate could make the Intervention Brigade a party to the conflict and is therefore bound to affect the conflict in one way or another. The main purpose of the Brigade is to reduce the level of conflict by neutralising the armed groups in eastern DRC. It is, however, not certain that this will be the case, even though the defeat of M23 points in that direction.

4.2.1 In the DRC

The support from the UN and more specifically the Intervention Brigade was important to defeat M23. For example, operations were planned jointly between the UN and the FARDC and MONUSCO provided logistical and tactical support.⁹⁰ Furthermore, the Intervention Brigade was divided into three task forces used as blocking forces and back up for the FARDC and contributing to a three-front war against M23.⁹¹

By participating in operations against M23 the Intervention Brigade has gained increased credibility amongst the population in eastern DRC. Furthermore, the defeat of M23 may make other armed groups more cautious to use violence, rather opting for negotiations.⁹² The Intervention Brigade playing the role it did in fighting M23 might thus contribute to stabilisation in eastern DRC. The Intervention Brigade's role in bringing M23 down, could also contribute to rebuilding the credibility of the UN as a whole in the DRC.

The FARDC performed better than ever before during the latest operation against M23 in October and November 2013. Interestingly, this can not only be attributed to the cooperation with the Intervention Brigade but also to improved

⁹⁰ Stearns, Jason, "As the M23 nears defeat, more questions than answers", 30 October 2013, <http://congosiasa.blogspot.se/>, accessed 19 November 2013.; Long, Nick, "Congo-Kinshasa: Expanded Role for UN Troops in DRC", *allAfrica*, 14 November 2013, <http://allafrica.com/stories/201311150381.html>, accessed 19 November 2013.

⁹¹ Olivier, Darren, "How M23 was rolled back", *African Defence Review*, 30 October 2013, <http://www.africandefence.net/analysis-how-m23-was-rolled-back/>, accessed 19 November 2013.

⁹² Wolters Stephanie, "It may be too soon to celebrate the defeat of the M23", *ISS Today*, 5 November 2013, <http://www.issafrica.org/iss-today/it-may-be-too-soon-to-celebrate-the-defeat-of-the-m23>, accessed 19 November 2013.

command structures within the FARDC.⁹³ This in turn has led to better logistics, regular salaries and a better spirit among the soldiers.⁹⁴ It will be interesting to see if the FARDC could continue to perform in this way, especially without harassing the civilian population as has been the case previously.

While M23 has been perceived as the most pressing issue at the moment, it is important to bear in mind that the mission is mandated to act against all armed groups. If this is not done, the legitimacy and even-handedness of the mission could be called into question. Furthermore, other armed groups will be given the opportunity to operate freely while all the attention is given to M23. In addition, if the aims of M23, such as the eradication of the FDLR, are not achieved, the group is likely to resume fighting in one constellation or another. UN officials have stated that MONUSCO will now focus on the FDLR and the Allied Democratic Forces – a Ugandan Islamist rebel group.⁹⁵ Whether and how this will be achieved remains to be seen.

Despite the successes the FARDC and MONUSCO have had in fighting M23, one also has to be cautious in defining this as the final defeat of the organisation. A peace deal has certainly been signed by the government and M23 in December 2013 but one should be careful of putting too much hope in a signed peace agreement. History has shown that the failure of implementation has given rise to new rebellions, M23 being such an example.

4.2.2 In the Region

The FDLR is one of the reasons for Rwanda's interference in the DRC and why it has supported both the CNDP and M23.⁹⁶ Made up of former members of the Rwandan army and government ousted after the genocide in 1994, the FDLR is perceived as a threat to Rwandan security. To what extent the FDLR, which is estimated to be a force of less than 3000 troops, is actually a threat is open to question, but it nonetheless plays the role of a symbolic threat.⁹⁷ Other important reasons for Rwandan interference are the question of control and the fear of

⁹³ Stearns, Jason, "As the M23 nears defeat, more questions than answers"; Long, Nick, "Congo-Kinshasa: Expanded Role for UN Troops in DRC"; Sheperd, Ben, "Congo-Kinshasa: The Fall of the M23 - African Geopolitics and the DRC", *allAfrica*, 14 November 2013, http://allafrica.com/stories/201311151145.html?aa_source=slideout, accessed 19 November 2013; Olivier, Darren, "How M23 was rolled back".

⁹⁴ Stearns, Jason, "As the M23 nears defeat, more questions than answers".

⁹⁵ Nichols, Michelle, "UN peacekeepers in Congo focus on new armed groups", *Reuters*, 6 October 2013, <http://www.reuters.com/article/2013/10/06/us-congo-democratic-un-idUSBRE9950IZ20131006>, accessed 7 October 2013.

⁹⁶ According the UN group of experts on the DRC, Rwanda has provided direct military support to M23 and the de facto chain of command of M23 ends with the Rwandan Minister of Defence, see the United Nations Security Council, Report of the Secretary-General S/2012/843.

⁹⁷ Stearns, Jason, "From CNDP to M23", p. 56.

dissidents from Rwanda joining forces with armed groups in the DRC; mistrust of the government in Kinshasa; and economic interests in the DRC, such as mining and cattle farming.⁹⁸ Rwanda, along with Uganda, has reportedly pushed for an intervention force within the framework of the ICGLR.⁹⁹ Speculating on the motives behind such an effort, it is probably not too far-fetched to say that from a Rwandan perspective, an intervention force should be set up to eradicate the FDLR rather than M23. Others believe that Rwanda's activities within the ICGLR have been window dressing, officially supporting the setting up of an Intervention Force but in reality hampering any significant outcome.¹⁰⁰

Rwanda opposed the UN offensive in August 2013 and it reportedly deployed tanks and troops on the border at the end of August.¹⁰¹ However, during the fighting in October and November 2013, Rwanda did not act in support of M23. This was probably one of the main factors for why M23 could be defeated. One reason Rwanda's inaction might have been the international pressure put on Rwanda.¹⁰² Another reason could have been that the support from the Congolese communities that have previously supported groups linked to Rwanda has diminished.¹⁰³ Furthermore, Rwanda not acting might also be explained by regional politics. It was SADC that made the Intervention Brigade a political reality. The cost for Rwanda to risk facing South Africa and Tanzania might have been too high.¹⁰⁴ If further military action will be needed against M23 in the future, there is however no certainty that Rwanda would continue to stand on the side lines. Hence, in a worst case scenario, the UN might end up opposing the Rwandan army. How the Intervention Brigade is used against other armed groups, and more specifically the FDLR, in the near future is crucial for Rwanda not to act. Rwanda has indeed posed the question in the Security Council on how the Intervention Brigade is intended to be used for such a purpose.¹⁰⁵

⁹⁸ Ibid.

⁹⁹ Jones, Pete, "M23 of the Kivus: regional war and then a repeat of the 2009 accord?".

¹⁰⁰ See Stearns, Jason. "From CNDP to M23", p. 53.

¹⁰¹ Stearns, Jason, "Fact-checking the recent M23 escalation", 31 August 2012, <http://congosasia.blogspot.se/>, accessed 9 September 2013.

¹⁰² Stearns, Jason, "As the M23 nears defeat, more questions than answers"; Kulish, Nicholas and Sengupta, Somini, "New U.N. Brigade's Aggressive Stance in Africa Brings Success, and Risks", *The New York Times*, 12 November 2013, http://www.nytimes.com/2013/11/13/world/africa/new-un-brigades-aggressive-stance-in-africa-brings-success-and-risks.html?_r=0, accessed 19 November 2013; Sheperd, Ben, "Congo-Kinshasa: The Fall of the M23 - African Geopolitics and the DRC".

¹⁰³ Sheperd, Ben, "Congo-Kinshasa: The Fall of the M23 - African Geopolitics and the DRC".

¹⁰⁴ Ibid.

¹⁰⁵ Security Council Report, "Adoption of Presidential Statement on Developments in the DRC", What's in Blue, 13 November 2013, <http://www.whatsinblue.org/2013/11/adoption-of-presidential-statement-on-developments-in-the-democratic-republic-of-the-congo.php>, accessed 19 November 2013.

The presence of states from the SADC community could also lead to further tensions in the region. South Africa and SADC played a role in ending the second Congo war through mediation. Peace deals were signed with Rwanda and Uganda, respectively, leading to their withdrawal from the DRC. South Africa has also contributed peacekeepers to the UN missions in the DRC. South Africa's involvement, however, is thought to be influenced by self-interest. The DRC government has given oil exploration rights to South African companies, some of them allegedly owned by President Zuma's nephew.¹⁰⁶ South Africa also has an interest in the Inga Dam hydroelectric projects. An agreement is being finalised, which would give South Africa access to energy produced by the dams.¹⁰⁷ This, along with tense relations with Rwanda after an assassination attempt on the exiled Rwandan general, Kayumba Nyamwasa, in Johannesburg in 2010, is probably behind South Africa's participation in the Intervention Brigade.¹⁰⁸ It is possible to envisage a situation in which if something happened to the South African peacekeepers during an offensive operation, this might be blamed on Rwanda, further damaging the relationship between the two countries.¹⁰⁹ The Intervention Brigade might therefore cause frictions beyond the borders of the DRC.

4.2.3 Realistic Expectations

As is noted above, there is an existing and ongoing security and humanitarian crisis in North Kivu and there have been serious violations of IHL. These include targeted attacks on civilians, widespread sexual and gender-based violence, the systematic recruitment and use of child soldiers, extrajudicial executions and arbitrary arrests.¹¹⁰ Needless to say, neither the Congolese government's nor the international community's efforts have been enough and there was a pressing need to do more. Despite the negative implications it could have for the UN, the Intervention Brigade is one such an attempt. At the time, this was the only solution the DRC and the international community could agree on, and regardless of the debate on whether the UN should take on these types of offensive tasks, not acting in the DRC conflict was not an option. Nonetheless, the international community has to be realistic about what the Brigade can achieve. It can at best be a short term solution to the conflict.

¹⁰⁶ Khadija, Pate, "Under scrutiny: South Africa's role in DRC elections", *Daily Maverick*, 14 December 2011, <http://www.dailymaverick.co.za/article/2011-12-14-under-scrutiny-south-africas-role-in-drc-elections/>, accessed 6 September 2013.

¹⁰⁷ Stearns, Jason, "The politics of the intervention brigade: From Pretoria to Kigali", 27 April 2013, <http://congosiasa.blogspot.se/2013/04/the-politics-of-intervention-brigade.htm>, accessed 9 September 2013.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ S/Res/2098 (2013).

Even though the operations might be successful in fighting the armed groups in eastern DRC, this will not be enough to address the root causes of conflict, among others the lack of state structures, conflict over land and the security and economic interests of neighbouring countries. This means that the conflict would be likely to continue. Hence, the offensive strategy adopted by MONUSCO must go hand in hand with a long-term strategy that addresses the root causes of conflict in eastern DRC.

4.3 Confusion of Actors

If regarded as combatants, the way in which peacekeepers are seen could fundamentally change and they will become legitimate targets. This means that the level of threat against the peacekeepers and the mission will increase. This might apply not only to the military elements but also to the civilian parts of the mission and the UN agencies as well.

As is mentioned above, a legal distinction could be made between the regular forces of MONUSCO and the Intervention Brigade, meaning that the troops in the Brigade could be seen as combatants and the regular forces as civilians. If such distinction between the different entities within MONUSCO is to be made, it will be necessary to enable any warring party to discriminate between MONUSCO's military members, who will be legitimate targets, and its military members, who cannot be attacked. A lack of sufficiently distinctive emblems would result in an inability of the warring parties to make a distinction between legitimate and illegitimate targets, putting the regular forces at risk of being mistaken for combatants. Moreover, a lack of sufficient distinction could also endanger the activities that the regular forces are engaged in, such as the protection of civilians, monitoring the arms embargo or assisting in humanitarian aid or judicial processes.

Adding to the confusion is the question of the different tasks of the civilian part of the mission, including other UN agencies, and the military part. The organisation is supposed to both provide humanitarian aid and fight the rebels. It is possible to argue that the mandate of the Intervention Brigade is to contribute to the protection of civilians and in the long run to create a more conducive environment for humanitarian aid. This, however, is dependent on how the brigade acts in the field. It is of outmost importance that the brigade has the well-being of the population as its top priority when planning for and engaging in offensive operations. If not, this will negatively affect the reputation of the UN and endanger the work of other actors in the area of humanitarian aid. The need for distinction is therefore ultimately not just a matter of security concern for the MONUSCO military component, but also a matter of concern for the MONUSCO peace operation and the tasks assigned to it as a whole.

4.4 Accountability

Enabling and ensuring accountability is important for any use of force in any context. Ensuring accountability with security actors, such as the military, is also a primary requirement for enabling security and, in turn, political, economic and social development.¹¹¹ Accountability is arguably particularly important where peace operations are authorised to use force under the laws of war and thereby authorised to engage as a party to a conflict.

Enabling accountability requires an ability to establish facts. Conflict areas, however, are often flooded with misinformation and conflicting information. Establishing facts in a conflict area requires the proficient collection and analysis of information by an impartial and independent actor. Peace operations frequently assume the position of an impartial and independent actor in an area suffering from conflict or insecurity. If MONUSCO is engaged as an active party in the armed conflict in the DRC, however, it cannot without significant difficulty assume the position of an independent and impartial actor. Establishing the facts of events on the ground could therefore be severely obstructed. The inability to conduct independent analyses of or investigations into allegations of unlawful use of force undermines the possibility of holding parties to account. Moreover, a lack of a capacity to establish the facts could seriously hamper the prospects of identifying adequate and effective policies in and for the peace operation in its overall quest for a sustainable peace.

Under paragraph 15 of resolution 2098, MONUSCO's "civilian component", although it is unclear which part, is authorised to support the UN system in the country *to ensure* that any support provided by the United Nations in eastern DRC is consistent with international humanitarian law, international human rights law and refugee law, as applicable.¹¹² In other words, the civilian component must ensure that the military component abides by IHL and IHRL. This will mean monitoring military activities, as well as having insight into military operations and access to military actors and processes.

Given that the Office of Internal Oversight Services (OIOS), which is specifically mandated to investigate breaches of UN rules and regulations within the UN, has been largely relieved of its mandate to investigate allegations against members of military components of peace operations,¹¹³ it seems unlikely that

¹¹¹ OECD DAC, *Handbook on Security System Reform: Supporting Security and Justice*, 2007, Section 1, paras 1–3.

¹¹² S/Res/2098(2013), para. 15.

¹¹³ See for example United Nations General Assembly, Report of the Secretary-General on the activities of the Office of Internal Oversight Services, A/59/661 (2005), in which the United Nations Office of Internal Oversight Services (ID/OIOS) investigated 68 allegations of sexual exploitation against MONUC peacekeepers. According to a General Assembly report dated 11 June 2007, governments of national military contingents have the primary responsibility for

any civilian component of a peace operation would be enabled to investigate the conduct of military components. This raises the question of how accountability for UN activities can be ensured in MONUSCO activities.

4.5 Intelligence

Resolution 2098 specifies that *neutralisation* should be based on “information collation and analysis”.¹¹⁴ Collation and analysis of information are intelligence activities. It has been argued that intelligence activities are necessary for peace operations to be able to fulfil their mandates in today’s complex peacekeeping environments, but intelligence operations have long been controversial in the context of peace operations. The UN has been reluctant to accept the need for intelligence operations, which is linked to its multinational status and need to be transparent.¹¹⁵ This new wording is therefore an indication of a possible shift towards accepting intelligence operations as a necessary ingredient of peace operations in certain contexts.

MONUSCO has been authorised to use Unmanned Aerial Vehicles (UAVs) for surveillance purposes. According to the MONUSCO Force Commander, General Carlos Alberto dos Santos Cruz, the UAVs could bolster operations, helping to identify armed groups, track the movements [of armed groups] and monitor the safety of internally displaced persons.¹¹⁶ The UAVs are therefore seen as serving offensive military purposes and needs, but UAVs are also recognised as having the potential to ensure the protection of vulnerable groups.

Some caution is needed, however, when discussing the use of UAVs by the UN. First, increased access to information comes with an increased number of questions about how information is used. Better knowledge of the situation on the ground may lead to more requests for the mission to act on this knowledge.¹¹⁷ Furthermore, what will be done with the data collected that is of no direct use to

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 General Assembly, A/ 61/19 (Part III), article 7.

¹¹⁴ S/Res/2098(2013).

¹¹⁵ Norheim-Martinsen, Per Martin and Aasland Ravndal, Jacob, “Towards Intelligence-Driven Peace Operations? The Evolution of UN and EU Intelligence Structures”, *International Peacekeeping*, Vol. 18, No. 4, pp. 454–467, 2011, p. 457.

¹¹⁶ United Nations Security Council, 6987th meeting, “Force Commanders Dwell on New Technology, Pre-deployment training, Inter-mission cooperation in Briefing Security Council on peacekeeping operations”, Department of Public Information, News and Media Division, 26 June 2013, <http://www.un.org/News/Press/docs/2013/sc11047.doc.htm>, accessed 9 September 2013.

¹¹⁷ Karlsrud, John, and Rosén, Frederik, “In the Eye of the Beholder? The UN and the Use of Drones to Protect Civilians”. *Stability: International Journal of Security & Development*, 2(2): 27, 1-10, 2013, p. 5.

the mission?¹¹⁸ Should the intelligence information collected and analysed for the specific purposes of the peace operation be shared with the government authorities of the contributing nations? Intelligence operations must necessarily balance the sharing of information with the sovereign rights of the host nation, and must not violate international law. Many questions remain about how intelligence operations should be undertaken in peace operations, such as what methods and means are legal according to the applicable legal framework, and to what extent the mandate afforded the peace operation allows intelligence activities. Finally, the use of UAVs might affect the level of trust and confidence in the mission as it becomes more visibly connected to the process of gathering intelligence.

¹¹⁸ Ibid., p. 6.

5 The Future of UN Operations

In the past, MONUSCO has been perceived as not doing enough, especially in the area of protecting civilians.¹¹⁹ There has therefore been some uncertainty over whether the Intervention Brigade would be put to use. Reporting confirms that the Brigade has engaged in fighting alongside the FARDC and might have been successful in pushing back M23, at least for now. This initial success might improve the reputation of the UN in the region and beyond. However, this is unlikely to be the end of the armed conflict in eastern DRC, and whether the Brigade can continue to participate and succeed in fighting the armed groups in the long run remains to be seen. If a UN operation with an offensive mandate cannot diminish the threat posed by armed groups to a civilian population in the long run, the credibility of the UN will be called into question.

Although the UN has previously had several mandates under Chapter VII, it has never been as explicitly offensive as in the case of the Intervention Brigade. This is a game changer within the UN, even though it has been clear that the Intervention Brigade should not create a precedent for future peacekeeping,¹²⁰ probably because of the expectations the UN would face when establishing new missions. It is notable that the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) was not given an offensive mandate like that of the Intervention Brigade. One reason for the more cautious formulation might be troop contributing countries' scepticism about engaging in offensive operations.

Precedent or not, the Intervention Brigade raises the question of how we want to see peacekeeping and peace enforcement operations develop in the future. Is a more robust response necessary in today's conflict environments or does this undermine the future work of the UN? Above all, how can the UN ensure that the mission remains both impartial and accountable for its actions?

¹¹⁹ See for example Stearns, Jason, "UN report on rapes released: why is MONUSCO so bad at protecting civilians?", 8 September 2010, <http://congosasia.blogspot.se/2010/09/un-report-on-rapes-released-why-is.html>, accessed 16 October 2013.

¹²⁰ S/Res/2098(2013).

Acronyms

AU	African Union
CCF	Continuous Combat Function
CNDP	Congrès national pour la défense du peuple
DDRR	Disarmament, Demobilisation, Repatriation, Resettlement and Reintegration
DRC	Democratic Republic of the Congo
DRK	Demokratiska republiken Kongo
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Democratic Forces for the Liberation of Rwanda
ICC	International Criminal Court
ICGLR	International Conference of the Great Lakes Region
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
M23	Mouvement du 23 mars
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission on the Democratic Republic of the Congo
NIF	Neutral International Force
OIOS	Office of Internal Oversight Services
SADC	Southern African Development Community
UAVs	Unmanned Aerial Vehicles
UN	United Nations

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The Democratic Republic of the Congo (DRC) has long suffered from violent conflict. Serial efforts to resolve the conflict have ended in failure. In an attempt to find a resolution, the United Nations peacekeeping operation in the DRC, MONUSCO, was given a new mandate in early 2013.

The mandate allows the mission to use unprecedented means of engagement in the armed conflict. This report presents a thorough analysis of the mandate and discusses its implications for peace operations in general and the conflict in the DRC in particular