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Note to Mr. Le Roy

MONUC — draft policy on conditionality of support to the FARDC

1. The purpose of this Note is to advise you, further to your Note of 7 October 2009, whether the Draft Policy (« *Appui de la MONUC à la mise en oeuvre de la politique de tolérance zero au sien des FARDC* ») attached to MONUC Code Cable N°. CCX-543 of 23 September 2009 is consistent with Security Council resolution 1856 (2008) of 22 December 2008.
2. In summary form, our comments on that Draft Policy are as follows:
 - (i) The Draft Policy needs to be adjusted to deal with violations of international humanitarian law and violations of refugee law, as well as violations of human rights law.
 - (ii) The Draft Policy needs to be adjusted to address military or operational support, as well as logistic or “service” support. Alternatively, a separate and parallel document needs to be elaborated (if one does not already exist) to address the “conditionality” of military or operational support.
 - (iii) The Draft Policy needs to be adjusted to provide for MONUC to cease its participation in, or support for, a FARDC-led operation in its entirety in the event that both intercession by MONUC and subsequent withdrawal by MONUC of logistic or “service” support for “problem” a battalion involved in that operation prove ineffective and it continues nevertheless to be the case that violations of international humanitarian law, human rights or refugee law are being committed by units of the FARDC involved in that operation.
 - (iv) The Draft Policy needs to be adjusted to address the initial decision by MONUC to agree to participate in or support FARDC-led operations.
3. Our reasoning is set out more fully in an attachment to this Note.


Patricia O'Brien
12 October 2009

cc: Ms. Malcorra

Attachment to Ms. O'Brien's Note of 12 October 2009 to Mr. Le Roy

Types of violations

1. Pursuant to paragraph 4 of the Draft Policy, it appears that MONUC would (i) notify the FARDC's "hierarchy" in the event that elements of a battalion that was receiving support from MONUC were to commit « *des grave violations des droits de l'homme* »; and (ii) suspend support to such a battalion in the event that, following such notification, the FARDC were not to take any action against those responsible for those violations or if elements of that same battalion were nevertheless to continue to commit human rights violations.
2. While the Draft Policy addresses violations of human rights, it therefore does not address violations by the FARDC of international humanitarian law or refugee law.
3. Pursuant to operative paragraph 3 (g) of resolution 1856 (2008), MONUC is authorized to "[c]oordinate operations with the FARDC integrated brigades deployed in the eastern part of the Democratic Republic of the Congo and support operations led by and jointly planned with these brigades in accordance with international humanitarian, human rights and refugee law", with a view to disarming recalcitrant local and foreign armed groups (emphasis added). This provision of resolution 1856 (2008) is in fact recalled and quoted in paragraph 3 of the Draft Policy.
4. Paragraph 4 of the Draft Policy should therefore be adjusted to address violations by the FARDC of international humanitarian law and international refugee law, as well as violations of human rights law.

Forms of support

5. While this is not clearly stated in the Draft Policy itself, it would appear from paragraph 3 of MONUC's Code Cable that it is intended to address logistic or "service" support only, and not any of the various forms of military or operational support that MONUC's armed units might conceivably provide to the FARDC.
6. In accordance with operative paragraphs 3 (g) and 5 of resolution 1856 (2008), MONUC, "working in close cooperation with the Government of the [DRC]", is authorized "to use all necessary means, within the limits of its capacity and in the areas where its units are deployed," "in order to . . . [c]oordinate operations with the FARDC integrated brigades deployed in the eastern part of the Democratic Republic of the Congo and support operations led by and jointly planned with these brigades in accordance with international humanitarian, human rights and refugee law" with a view to disarming recalcitrant local and foreign armed groups.
7. As observed in paragraph 7 (c) of the Annex to my Note of 13 January 2009, it is therefore a formal condition of MONUC's authority to use armed force in support of

any such FARDC-led operation that that operation be conducted in accordance with international humanitarian, human rights and refugee law.

8. The Draft Policy should accordingly be adjusted to extend also to military or operational support provided by MONUC to FARDC-led military operations. Alternatively, a separate document should be prepared (if one does not already exist) to articulate a similar policy of conditionality in respect of those forms of support.

Withdrawal of support

9. Pursuant to paragraph 4 of the Draft Policy, MONUC would (i) notify the FARDC's "hierarchy" in the event that elements of a battalion that was receiving support from MONUC were to commit grave violations of human rights and (ii) suspend support to that battalion in the event that, following such notification, the FARDC were not to take any action against those responsible for those violations or if elements of that same battalion were nevertheless still to commit human rights violations. At the same time, it is emphasized in that same paragraph of the Draft Policy that, in the event MONUC were to cease for these reasons to provide support to a particular battalion, it would nevertheless continue to provide support to other battalions of the FARDC. Indeed, it appears that other battalions might even receive an increased level of support from MONUC.
10. As noted above, paragraphs 3 (g) and 5 of resolution 1856 (2008) together authorize MONUC "to use all necessary means, within the limits of its capacity and in the areas where its units are deployed," "in order to . . . [c]oordinate operations with the FARDC integrated brigades deployed in the eastern part of the Democratic Republic of the Congo and support operations led by and jointly planned with these brigades in accordance with international humanitarian, human rights and refugee law" with a view to disarming recalcitrant local and foreign armed groups (emphasis added).
11. As also noted above, it is therefore a formal condition of MONUC's authority to use armed force in support of any such FARDC-led operation that that operation is planned and conducted in accordance with international humanitarian, human rights and refugee law. As emphasized in paragraph 7 (c) (iii) of the Annex to my Note to you of 13 January 2009, it follows that, if MONUC has reason to believe that FARDC units involved in an operation are violating one or other of those bodies of law and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely.
12. Similarly, MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. As noted in paragraph 9 (b) of the Annex to my Note to you of 2 October 2008, this follows directly from the Organization's obligations under customary international law and from the Charter to uphold

promote and encourage respect for human rights, international humanitarian law and refugee law. If MONUC is required to cease its participation in a FARDC-led operation for the reasons under contemplation, then, MONUC must therefore also cease to provide any of the FARDC units involved in that operation (if it continues without MONUC's military or operational support) with any form of logistic or "service" support.

13. The Draft Policy therefore needs to be adjusted to provide for this "final" eventuality.
14. In this connection, we would note that, in paragraph 7 (c) of the Annex to my Note to you of 13 January 2009, we did not contemplate any intermediate step between, on the one hand, MONUC's interceding with the FARDC and the DRC Government in the event that it has reason to believe that any of the FARDC units involved in an operation are violating one or other of the bodies of law in question and, on the other hand, MONUC's ceasing to participate in that operation if, despite its representations, MONUC has reason to believe that such violations are still being committed.
15. We have no objection as such to the intermediate step which is provided in the Draft Policy — of MONUC's withdrawing logistic or "service" support to a battalion if, notwithstanding oral or written representations, it continues to be the case that violations are still being committed by any of that battalion's units. We are not in a position to assess the likely efficacy of this intermediate measure. We would assume, though, that MONUC considers that it has reason to believe that it may indeed prove to be effective, at least in some cases, in securing speedy and effectual intervention by FARDC battalion commanders to put an end to violations by elements under their command.
16. That said, we would emphasize that, if MONUC decides to place any reliance on this intermediate measure, it must be prepared to ensure close and rapid follow-up in order to monitor its effectiveness and, in the event that there is no clear and convincing evidence that it is indeed serving to bring violations speedily to an end, to move on speedily and decisively to the "final" step of withdrawing participation in, and support to, the operation as whole.

The initial decision to support an operation

17. The Draft Policy appears only to address the situation where MONUC is currently providing support to an ongoing FARDC-led operation. It does not address the initial decision by MONUC whether to participate in or support a FARDC-led operation, whether that operation is still in the planning stage or is already under way.
18. In this connection, we would recall what is said in paragraph 7 (c) (i) of the Annex of my Note to you of 13 January 2009: that MONUC must refrain from agreeing to participate in or support any FARDC-led operation to disarm recalcitrant armed groups if there are substantial grounds for believing that there is a real risk that any of

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the FARDC units involved would violate international humanitarian law, human rights law or refugee law. That advice is reflected in paragraph (iii) of Secretary-General's Decision No. 2009/12 of 2 June 2009 on the Democratic Republic of the Congo.

19. The Draft Policy needs to be adjusted to address this stage of the decision-making process and so ensure full and proper implementation of that paragraph of the Secretary-General's Decision.
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