

Note to Mr. Le Roy

MONUC — Operation Kimia 2

1. The purpose of this Note is to provide you with advice, further to an informal request from your Department, on the participation of MONUC in "Operation Kimia 2", as envisaged in the Joint Operation Directive attached to MONUC Code Cable N^o. CCX-106 dated 26 February 2009.
2. Detailed advice on this matter has already been provided in an electronic message dated 6 March 2009 from Mr. Hutchinson of this Office. That advice has been seen and approved by the Legal Counsel. In summary form, that advice is as follows.
3. It is fully consistent with MONUC's mandate for its armed units to participate in operations that are led by FARDC integrated brigades and jointly planned with the FARDC with a view to (i) forcibly disarming recalcitrant FDLR elements, in order to ensure their participation in the DDRRR process, and (ii) preventing the provision of support to the FDLR, including support derived from illicit economic activities.
4. Should the FARDC units concerned not be able to play and sustain a leading role in the operation envisaged in the Joint Operation Directive, MONUC's armed units may nonetheless properly carry out operations against the FDLR along the lines envisaged in that Directive pursuant to MONUC's mandate (i) to deter attempts at the use of force to threaten the Nairobi process and (ii) to ensure the protection of civilians under imminent threat of physical violence. MONUC's armed units may properly undertake such operations either (i) alongside the FARDC, as equal partners, or (ii) in a leading role, with FARDC units supporting them; or (iii) acting on their own.
5. It is within MONUC's mandate to provide logistical and other forms of support, including training, to FARDC units involved in operations pursuant to the Directive.
6. It is understood that the armed operations that MONUC's units will undertake pursuant to the Directive (i) are within the limits of MONUC's military capacity and (ii) will be conducted in areas where MONUC's armed units are already deployed.
7. Pursuant to Security Council resolution 1856 (2008), MONUC cannot participate in any form of joint operation with FARDC units, or support an operation by those units, if there are substantial grounds for believing there to be a real risk of them violating international humanitarian law, human rights law or refugee law in the course of the operation.
8. There would also be significant legal obstacles to MONUC participating in the operation envisaged in the Directive if Bosco Ntaganda were to play a prominent role in that operation, whether as a commander of, or senior officer in, one or more of the FARDC units involved, or as a staff officer involved in the planning or execution of

the operation or otherwise. You may therefore wish to consider seeking confirmation from MONUC that he is not, and will not be, involved in the present operation.

9. Assuming that (i) the parameters described in paragraph 6 above are respected and (ii) the difficulties described in paragraphs 7 and 8 are not present, MONUC may properly proceed to participate in and support the operation outlined in the Directive. In that event, the following requirements will need to be respected in order to ensure that the operation is conducted consistently with the requirements of resolution 1856 (2008) and the Organization's obligations under international law.
10. In the event that elements of the FARDC violate international humanitarian, human rights or refugee law in the course of the operation, MONUC must immediately intercede with the FARDC, both at the command and operational levels, with a view to dissuading the units concerned from continuing in such violations. Should the efforts fail and violations continue, MONUC must reassess its relations with the units concerned and, if the violations are widespread or serious, must cease its participation in the operation as a whole. In an extreme case, MONUC may need to take appropriate action, up to and including the use of armed force, against FARDC units or personnel in order to prevent or put a stop to violations of international humanitarian, human rights or refugee law, if those violations involve the use, or the imminent threat of the use, of physical violence against civilians.
11. A propos of what is said in paragraph 4 of MONUC's Code Cable, it must be recalled that MONUC has no mandate to hold on to detainees. Accordingly, and in accordance with Rule 5.1 of Annex A and paragraphs 16 and 17 of Annex C of MONUC's revised ROE of 10 February 2009: (i) all persons detained by MONUC must be transferred to appropriate Congolese authorities as soon as possible; (ii) all detentions must be immediately recorded and reported to the Force Commander, (iii) hand-over forms are to be completed and delivered to the Congolese authorities at the time of hand-over, providing them with the information detailed in paragraph 16 (a) of Annex C of the ROE, and (iv) receipts are to be obtained from those authorities for all transferred detainees. If this has not yet been done, the Force Commander should as soon as possible issue Standing Operating Procedures to define the modalities of transfers of detained persons, per paragraph 17 (d) of Annex C of the ROE.
12. Further, coordinated arrangements should be put in place between MONUC's military and human rights components to ensure that detainees transferred to local authorities are tracked and their treatment monitored. Arrangements should be made with the FARDC for this purpose, consistently with operative paragraph 12 of resolution 1856 (2008).
13. The United Nations cannot lawfully hand a person over to local authorities if there are substantial grounds for believing there to be a real risk that that person will be tortured or subjected to cruel, inhuman or degrading treatment, or otherwise have their human rights grossly violated. It is therefore crucial that the necessary

arrangements are made with the local authorities to ensure that detainees transferred to them by MONUC are treated in accordance with international norms.

14. Finally, we would point out that difficulties may arise, further to the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol, should there be substantial grounds for believing there to be a real risk that a detainee who is handed over to the Congolese authorities will be expelled from the country or forcibly sent back to his or her country of nationality. MONUC should accordingly consult closely with UNHCR, if it has not yet done so.



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in charge of the Office of Legal Affairs
1 April 2009

cc: Ms. O'Brien o/r