CURRENT DEVELOPMENTS

STABILIZATION AND THE EXPANDING SCOPE OF THE SECURITY COUNCIL'S WORK

*By Jacob Katz Cogan**

Lost amid the criticisms of the UN Security Council for its paralysis in responding to the crises in Syria and Ukraine has been the contemporaneous expansion in the scope of the Council's work.[1] Increasingly engaged in the protection of states from nonstate actors, such as the Mouvement du 23 mars and Islamic State, and other contemporary threats, such as pandemics and illicit trade, the Council, and with it the United Nations as a whole, has exercised episodically, but recurrently, more and more powers. The extension of the Council's purview and its assumption of greater authorities has typically been envisioned, designed, and justified as a means of stabilizing, securing, and strengthening fragile states, on the assumption that strong states are the necessary prerequisites for maintaining international peace and security, economic development, and the protection of individuals. Tasked with implementing the Council's innovative initiatives, the secretary-general has increasingly subjected the organization's work to human rights constraints, such as the Human Rights Due Diligence Policy. This article addresses these two sets of developments in turn, and posits that the Council is operating more and more within a stabilization paradigm—an approach that deems state fragility and failure as critical threats to world order, with the consequence that it is appropriate for, and indeed incumbent upon, the Council to act beyond its traditional limits in order to restore and bolster at-risk states.[2] Though the further elaboration and lastingness of this paradigm remains uncertain, its novelty and potential implications are significant.

I. THE EXTENDED SCOPE OF THE SECURITY COUNCIL'S RESOLUTIONS

Security Council resolutions are constitutive documents. They not only authorize or demand or encourage or condemn specified acts or behavior, but establish and reestablish, preserve, and expand (or pull back) the Council's authority to take those very decisions. Thus, through its actions to maintain international peace and security, the Council interprets the authority bestowed upon it by the UN Charter, and in applying the Charter's broad framework to contemporary problems, the Council, through its practice, revises the bounds of its own

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[1] *See, e.g.*, Somini Sengupta, *In Dealings on Syria, Security Council Exposes Its Failings*, N.Y. TIMES, May 9, 2014, at A12.

[2] On the term *stabilization*, see Robert Muggah, *Introduction* to STABILIZATION OPERATIONS, SECURITY AND DEVELOPMENT: STATES OF FRAGILITY 1 (Robert Muggah ed., 2013).

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powers. In the absence of any formal external mechanism to review the legality of its decisions—to determine whether they are ultra vires or otherwise contrary to law—and with only weak (if important) informal constraints acting upon it, the Council serves as its own control mechanism, delimiting for itself the parameters of its own capacities. In this way, the Council is continually reviewing and redefining its authorities and setting expectations (for itself and others) regarding the permissible scope of its current and future work, constantly adjusting and updating its operational code.[3]

That scope's leading edge—the farthest limits of the Council's Chapter VII powers—is ceaselessly in flux. It is substantively defined by (1) those situations that can trigger Council action because they constitute "threats to the peace" and (2) those measures that the Council can take to maintain or restore international peace and security. Where the line is drawn between those situations that properly prompt Council action and those that do not, and where it is drawn between those measures that fall within the Council's accepted authorities and those that go too far, is critical. It defines the boundary between subjects of international and national concern, and it provides the means allowable to enforce the one over the other. Together, they mark the outer extent of the organization's ability to intervene in a state's "internal affairs." The Council's decisions over the past twenty-five years have gradually expanded the breadth of both categories. And since 2013 that range has increased even further as the Council has conceptualized threats to state stability as serious threats to international peace and security.

Threats to the Peace

The Council's scope has increased, first, through the widening of the conditions that can constitute a "threat to the peace."[4] Interstate conflicts could always qualify as such threats, but the organization's foundational commitment to state sovereignty and noninterference meant that generalized threats or purely internal armed conflicts were presumptively beyond the Council's ambit. Even so, from the very beginning of the organization's work, it was clear that "internal conflicts" were seldom as self-contained as that term implied, and with the end of the Cold War, the Council became increasingly concerned with their spillover effects. As a consequence, internal armed conflicts were repeatedly designated as threats to the peace. Often, the Council's findings in this regard were set out in a conclusory fashion. Thus, in 1991, the Council recognized that the fighting in Yugoslavia amounted to a "threat to international peace and security" because of its "consequences for countries in the region, in particular in the border areas of neighbouring countries."[5] And a decade later, to take just one more example (from among many), when seized of the situation in Côte d'Ivoire, the Council noted, simply, that the "persistent challenges to the stability [of that country] . . . pose[d] a threat to international peace and security in the region."[6] But occasionally the Council went further and specified the aspects of the internal conflict that created the threat. Thus, the Council deemed as threats the

[3] On the term *operational code*, see W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 16 (1979).

[4] UN Charter, Art. 39.

[5] SC Res. 713, pmbl. paras. 3–4 (Sept. 25, 1991). More recently, see, for example, Resolution 2014 (Oct. 21, 2011).

[6] SC Res. 1528, pmbl. para. 17 (Feb. 27, 2004).

"massive flow of refugees [from Iraq] towards and across international frontiers and to cross-border incursions"[7] and the potential "outflow of people [from Haiti] to other States."[8] It also recognized *severe* humanitarian concerns as threats, acting in response to the "magnitude of the human tragedy caused by [the] conflict [in Somalia],"[9] the "magnitude of the humanitarian crisis in Rwanda,"[10] the "humanitarian catastrophe [in Darfur],"[11] the "gross and systematic violation of human rights [in Libya],"[12] and, in July 2014, the "deteriorating humanitarian situation in Syria."[13] Humanitarian concerns have also been reflected in the Council's thematic resolutions on civilians and armed conflict—which have noted that the "deliberate targeting of civilians as such and other protected persons, and the commission of systematic, flagrant and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security."[14] At other times the Council has gone so far as to categorize certain conduct, such as terrorism, the proliferation of weapons of mass destruction, and, in 2013, the use of chemical weapons as threats to the peace even outside the context of specific armed conflicts.[15]

The Council's identification of these particular issues as ones that merit its concern results from careful negotiations among its members, particularly the permanent five, against the backdrop of formal and informal controls. It represents a value judgment by the Council about what "internal" matters or subjects traditionally within a state's competence merit a concerted response by the international community. It allocates to the Council problems that may previously have been within the domain of other international organizations or UN bodies or that may have been handled by states extra-institutionally. It sets a precedent and expectation for Council action in the future. And it sends a signal to other actors about the significance of the topic, its characterization as a security concern (perhaps requiring coercive solutions), and the legitimacy of international action generally.[16] Accordingly, any variation in the Council's practice—by recognizing additional matters of common concern or failing to act on the types of threats previously identified as of concern (for example, in Syria from 2011 and Ukraine from 2013)—is consequential, for it modifies the Council's operational code and alters the international landscape beyond.

Such a change in the Council's approach to "threats to the peace" is evident in the resolutions that it has adopted since 2013. In Resolution 2127 (2013) the Council, operating under Chapter VII, expressed its "deep concern" about the "continuing deterioration of the security situation in the [Central African Republic], *characterized by a total breakdown in law and order*

[7] SC Res. 688, pmbl. para. 3 (Apr. 5, 1991).
[8] SC Res. 1529, pmbl. para. 9 (Feb. 29, 2004).
[9] SC Res. 794, pmbl. para. 3 (Dec. 3, 1992); *see also* SC Res. 733, pmbl. paras. 3–4 (Jan. 23, 1992).
[10] SC Res. 929, pmbl. para. 10 (June 22, 1994); *cf.* SC Res. 1078, pmbl. para. 18 (Nov. 9, 1996).
[11] SC Res. 1556, pmbl. para. 17 (July 30, 2004).
[12] SC Res. 1970, pmbl. para. 2 (Feb. 26, 2011); *see also* SC Res. 1973, pmbl. para. 5 (Mar. 17, 2011).
[13] SC Res. 2165, pmbl. para. 18 (July 14, 2014).
[14] SC Res. 1894, para. 3 (Nov. 11, 2009).
[15] *See, e.g.*, SC Res. 2178, pmbl. para. 1 (Sept. 24, 2014); SC Res. 2118, pmbl. para. 3 (Sept. 27, 2013); SC Res. 1540, pmbl. para. 1 (Apr. 28, 2004); SC Res. 1373, pmbl. para. 3 (Sept. 28, 2001); UN Doc. S/23500 (Jan. 31, 1992).
[16] *See* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 192 (2005).

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[and] the absence of the rule of law," and also about the "consequences of [the resulting] instability in the [Central African Republic], on the central African region and beyond."[17] In the same resolution, the Council emphasized "the risk of the situation in the [Central African Republic] providing a conducive environment for transnational criminal activity, such as that involving arms trafficking and the use of mercenaries as well as a potential breeding ground for radical networks."[18] In Resolution 2117 (2013) the Council adopted its first thematic resolution on small arms and light weapons, expressing grave concern that the "illicit transfer, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world continue to pose threats to international peace and security, . . . [and] contribute to instability and insecurity."[19] In the same resolution, the Council recognized the

> close connection between international terrorism, transnational organized crime, drugs trafficking, money-laundering, other illicit financial transactions, illicit brokering in small arms and light weapons and arms trafficking, and the link between the illegal exploitation of natural resources, illicit trade in such resources and the proliferation and trafficking of arms as a major factor fuelling and exacerbating many conflicts.[20]

In Resolution 2136 (2014) the Council, again acting under Chapter VII, recalled "the linkage between the illegal exploitation of natural resources, including poaching and illegal trafficking of wildlife, illicit trade in such resources, and the proliferation and trafficking of arms as one of the major factors fuelling and exacerbating conflicts in the Great Lakes region of Africa."[21] And in Resolution 2177 (2014) the Council "[d]etermin[ed] that the unprecedented extent of the Ebola outbreak in Africa constitute[d] a threat to international peace and security."[22]

These characterizations of "threats to the peace" represent larger steps that build upon earlier incremental initiatives taken by the Council. Previously, the Council has considered the topic of pandemics (and HIV/AIDS, in particular) many times and adopted two presidential statements and two resolutions.[23] For years, too, the Council has noted the connections between organized crime, armed conflicts, and terrorism, most notably in its consideration of arms, narcotics, human trafficking, money laundering, and illicit trade in, and exploitation of, natural resources.[24] It has issued numerous presidential statements[25] and held open debates on these

[17] SC Res. 2127, pmbl. para. 3 (Dec. 5, 2013) (emphasis added). This language was presaged in Resolution 2121, pmbl. para. 3 (Oct. 10, 2013), and repeated in Resolution 2134, pmbl. para. 3 (Jan. 28, 2014). The only previous times that the Council had referred to the "general absence of the rule of law" were in Resolutions 161, pmbl. para. B2 (Feb. 21, 1961), and 814, pmbl. para. 7 (Mar. 26, 1993).

[18] SC Res. 2127, *supra* note 17, pmbl. para. 5.

[19] SC Res. 2117, pmbl. para. 4 (Sept. 26, 2013).

[20] *Id.*, pmbl. para. 8; *cf.* SC Res. 2195, pmbl. para. 13 (Dec. 19, 2014) (expressing deep concern that "terrorist groups benefiting from transnational organized crime may contribute to undermining affected States, specifically their security, stability, governance, social and economic development").

[21] SC Res. 2136, pmbl. para. 10 (Jan. 30, 2014); *see also* SC Res. 2134, *supra* note 17, pmbl. para. 7; SC Res. 2146, pmbl. para. 5 (Mar. 19, 2014); SC Res. 2198, pmbl. para. 15 (Jan. 29, 2015).

[22] SC Res. 2177 (Sept. 18, 2014); *see also* UN Doc. S/PRST/2014/24 (Nov. 21, 2014).

[23] *See*, *e.g.*, SC Res. 1308 (July 17, 2000); SC Res. 1983 (June 7, 2011); UN Doc. S/PRST/2005/33 (July 18, 2005); UN Doc. S/PRST/2001/16 (June 28, 2001); UN SCOR, 55th Sess., 4087th mtg., UN Doc. S/PV.4087 (Jan. 10, 2000); UN SCOR, 58th Sess., 4859th mtg., UN Doc. S/PV.4859 (Nov. 17, 2003); UN SCOR, 66th Sess., 6668th mtg., UN Doc. S/PV.6668 (Nov. 23, 2011).

[24] *See generally* James Cockayne, *The UN Security Council and Organized Criminal Activity: Experiments in International Law Enforcement* (United Nations University Working Paper Series, No. 3, Mar. 2014), *at* http://unu.edu/publications/working-papers/the-un-security-council-and-organized-criminal-activity-experiments-in-international-law-enforcement.html.

topics.[26] Within the context of specific situations, the Council has recognized that illicit activities undermine stability and contribute to armed conflicts—conflicts that the Council has characterized as threats to the peace.[27] And in some situations it has authorized UN peacekeepers to assist states in combatting illegal activities and has subjected to sanctions those individuals who are engaged in illicit activities that support armed groups.[28] For years, too, the Council has recognized the importance of the rule of law to achieving stability in conflict and postconflict situations.[29] Assuming that a strong state is a prerequisite for order and the protection of human rights, the Council has conceptualized the "rule of law" as "rule by law" and has operationalized rule-of-law promotion through "securitization"—the bolstering of state institutions that provide domestic order, such as the police, courts, and security services.[30] As a consequence, the support and rebuilding of state authority has become one of the key functions of contemporary multidimensional peacekeeping operations, a fact that was bureaucratically acknowledged in 2007 with the establishment of the aptly named Office of Rule of Law and Security Institutions within the UN Department of Peacekeeping Operations.[31]

The Council's actions from 2013 onward build on these foundations but move appreciably beyond them. Whereas, heretofore, the suppression of illicit activities was recognized as a key component of the Council's attempts to maintain international peace and security, the illegal trafficking in arms was, until 2013, recognized at most as a contributing factor to threats. Thus, aside from nonproliferation,[32] until Resolution 2117 the Council had not designated any single form of illicit activity as a threat to international peace and security outside the context of specific armed conflicts. While previously the Council had expressed concerns about the stability of particular states, until Resolution 2127 it had not specifically described the total breakdown of law and order and the absence of the rule of law within a state as matters that undermine stability and hence lead to a threat to the peace. Though the Council had already

[25] *See*, *e.g.*, UN Docs. S/PRST/2007/22 (June 25, 2007), S/PRST/2009/32 (Dec. 8, 2009), S/PRST/2010/4 (Feb. 24, 2010), S/PRST/2012/16 (Apr. 25, 2012), S/PRST/2012/29 (Dec. 20, 2012), S/PRST/2013/4 (Apr. 15, 2013).

[26] UN SCOR, 67th Sess., 6760th mtg., UN Doc. S/PV.6760 (Apr. 25, 2012).

[27] *See*, *e.g.*, SC Res. 1459 (Jan. 28, 2003); SC Res. 1817 (July 11, 2008); SC Res. 1840 (Oct. 14, 2008); SC Res. 1885 (Sept. 15, 2009); SC Res. 1890 (Oct. 8, 2009); SC Res. 1892 (Oct. 13, 2009) (Haiti); SC Res. 2017 (Oct. 31, 2011).

[28] *See* WALTER KEMP, MARK SHAW & ARTHUR BOUTELLIS, THE ELEPHANT IN THE ROOM: HOW CAN PEACE OPERATIONS DEAL WITH ORGANIZED CRIME?, annex (2013); SC Res. 2078, para. 4(g) (Nov. 28, 2012).

[29] The term *rule of law* has been used in many presidential statements and resolutions, and the Council has hosted six open debates on the topic (including one in February 2014). *See*, *e.g.*, S/PRST/2014/5 (Feb. 21, 2014). On the Council's consideration of the rule of law, see generally JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW (2007), and Jeremy Farrall, *Impossible Expectations? The UN Security Council's Promotion of the Rule of Law After Conflict*, *in* THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT: GREAT EXPECTATIONS 134 (Brett Bowden, Hilary Charlesworth & Jeremy Farrall eds., 2009).

[30] *See* STEPHEN HUMPHREYS, THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE (2010); Per Bergling, Erik Wennerström & Richard Zajac Sannerholm, *Rule of Law and Security Sector Reform: Casual Assumptions, Unintended Risks and the Need for Norms*, 4 HAGUE J. ON RULE L. 98 (2012); Richard Zajac Sannerholm, *Looking Back, Moving Forward: UN Peace Operations and Rule of Law Assistance in Africa, 1989–2010*, 4 HAGUE J. ON RULE L. 359 (2012).

[31] *See* Jake Sherman, *Peacekeeping and Support for State Sovereignty*, 2012 ANN. REV. GLOBAL PEACE OPERATIONS 12.

[32] *See*, *e.g.*, SC Res. 2141 (Mar. 5, 2014).

recognized the illicit trade in inanimate natural resources (such as rough diamonds and charcoal) as matters of concern in particular armed conflicts, Resolution 2136 was the first time that the Council singled out wildlife trafficking and poaching as matters of concern. And although the Council had earlier, when considering the topic HIV/AIDS, "[borne] in mind [its] primary responsibility for the maintenance of international peace and security," Resolution 2177 was the first time that the Council unequivocally "determined" that a pandemic "constitute[d] a threat to international peace and security."[33]

Despite the long-evident contribution of small arms to armed conflicts, despite the equally clear connection between the absence of the rule of law and such conflicts, and despite the evident dangers posed by health crises to an increasingly interconnected world, the Council had not previously elevated these topics to the level of threats to the peace or (in the case of the breakdown of the rule of law) as contributors to such threats. Doing so would have implied that the Council should play a greater role in matters considered to be within the scope of traditional state authorities or the long-standing prerogatives of other UN bodies and international institutions. Thus, the Council's recognition of trafficking in small arms and light weapons as a threat outside the context of specific conflicts suggests the possibility that the Council might take broader action in this area that had previously been primarily the domain of the General Assembly. The reference to wildlife trafficking potentially imposes the Council's priorities over the choices made in other international regimes and threatens strong state sensitivities over the management of their natural resources.[34] The characterization of the breakdowns in law and order and in the rule of law as representing potential threats to the peace suggests that the Council can judge when national governments cannot uphold their domestic responsibilities and that the Council should take action when such a finding is made. And the Council's determination that Ebola constituted a threat to the peace "securitizes" health in ways that may have both positive and negative effects but that inserts the Council in matters previously considered within the domain of the World Health Organization and the General Assembly. These steps represent a clear widening of the scope of the Council's purview.

The Council's increasing concern with all matters that may threaten the stability of states reflects the strengthening of its commitment to the idea that strong states are the bulwark of contemporary international peace and security. Turning the traditional apprehension of international intrusion into domestic matters on its head,[35] the Council has seen these resolutions as supporting state sovereignty rather than violating it. And instead of seeing state power as a danger to human rights, the Council has seen the authority of states as a boon to rights protection. As threats to the stability of states have become nearly synonymous with threats to international peace and security, it is no wonder that the category of threats to the peace has encompassed a widening array of phenomena.

Measures to Maintain International Peace and Security

If the Council's scope is delineated, in part, through its articulation of what subjects constitute a threat to the peace, it is also defined by the types of measures that it adopts to maintain

[33] *Compare* SC Res. 1983, *supra* note 23, pmbl. para. 16, *with* SC Res. 2177, *supra* note 22, pmbl. para. 5.
[34] *See, e.g.*, SCOR, 68th Sess., 6982nd mtg., UN Doc. S/PV.6982 & Resumption 1 (June 19, 2013).
[35] *See* UN Charter, Art. 2(7).

international peace and security. The means employed by the Council mark its understanding of the proper ambit of its powers. By all accounts, the most extreme measures are those in which the Council assumes functions, such as legislating or adjudicating allegations of individual wrongdoing, or authorizes the organization to act in ways, such as securing, policing, and administering territory, that are traditionally within the competences of states. The Council has done all this within the past two decades—establishing criminal tribunals and sanctions committees, requiring states to criminalize terrorist financing and to prohibit the proliferation of nuclear, chemical, and biological weapons, and running territorial administrations in East Timor and Kosovo—though the use of such measures has been sparing (sanctions committees aside) and often controversial. Thus, whenever the Council takes on such roles or tasks the organization to take such action, it signals a change in—an extension of—the scope of its powers.

Here, too, the Council has pushed the boundaries in an attempt to stabilize states—particularly in its specification of the mandates of three peacekeeping operations. In March 2013, the Security Council adopted Resolution 2098, establishing an "Intervention Brigade" as part of the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), which had been in operation since 2010.[36] As envisioned in the resolution, the Intervention Brigade would "consist[] inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander."[37] Its responsibilities included

> neutralizing armed groups . . . [by] carry[ing] out targeted offensive operations . . . either unilaterally or jointly with the [Forces armées de la République démocratique du Congo (FARDC)], in a robust, highly mobile and versatile manner . . . 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 [Democratic Republic of the Congo (DRC)] and to make space for stabilization activities.[38]

Nearly a month later, the Council adopted Resolution 2100, establishing the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). The Council authorized "MINUSMA to use all necessary means . . . to carry out [certain parts of] its mandate," including "stabiliz[ing] key population centres, . . . and, in this context, to deter threats and take active steps to prevent the return of armed elements to those areas . . . [and] [t]o support the transitional authorities of Mali to extend and re-establish State administration throughout the country."[39] A year later, in Resolution 2149 (2014), the Council established the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) with a robust mandate, including authorization "to take all necessary means" to "protect . . . the civilian population from threat of physical violence . . . , including through active

[36] SC Res. 2098, para. 9 (Mar. 28, 2013). The idea for establishing a peace-enforcement force was first raised by governments in the region and subsequently recommended to the Council by the secretary-general. *See* Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region, para. 60, UN Doc. S/2013/119 (Feb. 27, 2013).

[37] SC Res. 2098, *supra* note 36, para. 9.

[38] *Id.*

[39] SC Res. 2100, paras. 16(a)(i)–(ii), 17 (Apr. 25, 2013).

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patrolling," to "support and work with the Transitional Authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country," to "provide support . . . to the [Central African Republic] police, justice and correctional institutions . . . , including through assistance in the maintenance of public safety and basic law and order," and, "at the formal request of the Transitional Authorities and in areas where national security forces are not present or operational, . . . [to] maintain basic law and order and fight impunity."[40]

The Council's actions represented a significant extension of its earlier decisions. Previously, the Council has issued mandates that authorized UN missions to use "all necessary means," principally (though not exclusively) to protect civilians "under imminent threat of physical violence, in particular violence emanating from any of the parties engaged in the conflict."[41] Those existing mandates did not explicitly limit the use of force to defensive operations, but even "forward-leaning" actions, such as those taken by UN Operation in Côte d'Ivoire in 2011, were typically responsive to attacks on civilians and UN personnel.[42] After all, in keeping with the vision of peacekeepers as facilitators of peace processes between combatants, the organization's basic principles of peacekeeping require that missions be deployed with the consent of the parties, that they act impartially, and that they use force only in self-defense and defense of the mandate.[43] When the Council has sought to enforce the peace through the offensive use of force, it has, instead, authorized states or other organizations to do so, not its peacekeeping missions. The creation of MONUSCO's Intervention Brigade with the specific task of "neutralizing armed groups . . . [by] carry[ing] out targeted *offensive* operations," with or without the assistance of DRC forces, thus enlarged the role of UN peacekeeping missions well beyond conventional operational boundaries.[44] Though the Council did not establish intervention brigades for MINUSMA and MINUSCA, those missions were also charged with taking "active" measures: in the case of MINUSMA, "to deter threats and take *active* steps to prevent the return

[40] SC Res. 2149, paras. 30(a)(i), (f), 40 (Apr. 10, 2014). A subsequent resolution required MINUSCA to "assist . . . in the establishment of the national Special Criminal Court" and "arrest[] and hand[] over to the CAR authorities those responsible for serious human rights violations and abuses and serious violations of international humanitarian law in the country so that they can be brought to justice." SC Res. 2217, paras. 32(g), 33(a) (Apr. 28, 2015).

[41] SC Res. 1925, paras. 11, 12(a) (May 28, 2010); *see also*, *e.g.*, SC Res. 1967, para. 8 (Jan. 19, 2011). A 2014 report by the UN Office of Internal Oversight Services noted, however, "a persistent pattern of peacekeeping operations not intervening with force when civilians are under attack," even when their mandates bestowed on them such authority. Office of Internal Oversight Services, Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations, at 1, UN Doc. A/68/787 (2014).

[42] *See* Twenty-Eighth Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, paras. 4–8, UN Doc. S/2011/387 (June 24, 2011); Adam Nossiter, *U.N. and France Strike at Ivory Coast Strongman's Bases and Residence*, N.Y. TIMES, Apr. 4, 2011, at A8; *see also, e.g.*, Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, para. 15, UN Doc. S/2012/355 (May 23, 2012) [hereinafter May 2012 MONUSCO Report] (reporting on a joint operation of the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and Forces armées de la République démocratique du Congo (FARDC) "to enhance the protection of civilians").

[43] *See* Departments of Peacekeeping Operations and Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* 34 (2008). Among the voluminous literature on UN peacekeeping operations and the use of force, see, for example, TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS (2002), and JAMES SLOAN, THE MILITARISATION OF PEACEKEEPING IN THE TWENTY-FIRST CENTURY (2011).

[44] SC Res. 2098, *supra* note 36, para. 12(b) (emphasis added). The Council's mandate that the Intervention Brigade was to "neutraliz[e] armed groups" seemed to imply that the brigade was a party to the conflict. That would mean that the brigade was a lawful target itself and subject to international humanitarian law. If the brigade was a party, questions would arise as to whether MONUSCO as a whole was also a party. *See generally Peace Forces at War: Implications Under International Humanitarian Law*, 108 ASIL PROC. 149 (2014).

of armed elements" to key population centers,[45] and in the case of MINUSCA, to "protect . . . the civilian population from threat of physical violence . . . , including through *active* patrolling."[46] In contrast to the traditional model, the Council tasked these missions to engage in ongoing conflicts (not implement peace agreements), choose sides in those conflicts (the governments'), use force proactively against specified aggressors that threaten states (nonstate actors), and otherwise extend state authority and preserve states' territorial integrity. As intimated in the names that the Council chose for these missions,[47] this shift in approach toward partiality reflects the Council's enhanced commitment to an established goal—the stabilization of states—even while paradoxically being more and more intrusive in states' internal concerns and authorities.[48]

The overriding concern with the stability of states is also seen in the Council's resolution on foreign terrorist fighters, Resolution 2178 (2014).[49] Motivated by the "unprecedented flow of fighters and facilitation networks fuelling multiple conflicts worldwide [and] increasing the threat of home-grown terrorist attacks," the Council imposed extensive obligations on states outside its consideration of a specific situation.[50] Only in resolutions 1373[51] and 1540[52] had the Council previously "legislated" in this way,[53] creating permanent obligations beyond the confines of discrete (geographic or group-specific) disputes—general rules for generic threats.[54] Paragraph 5 of the Resolution 2178 decided that member states shall

> prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities.[55]

The next paragraph required states to "establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize" the following offenses "in a manner duly reflecting [their] seriousness": traveling, attempting to travel, the willful financing of travel, or the willful organization or facilitation of travel "for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training."[56]

[45] SC Res. 2164, para. 13(a)(i) (June 25, 2014).

[46] SC Res. 2149, *supra* note 40, para. 30(a)(i).

[47] Created in 2004, the UN Stabilization Mission in Haiti (MINUSTAH) is the lone prior "stabilization mission."

[48] *See United Nations Peacekeeping Operations*, *supra* note 43, at 23 (listing one of the core functions of peacekeeping as "[c]reat[ing] a secure and stable environment while strengthening the State's ability to provide security, with full respect for the rule of law and human rights"). One of the possible consequences of this focus on stabilizing existing governments is to decrease the mission's ability to play a constructive role in a peace process, given that the mission's impartiality would be called into question.

[49] SC Res. 2178, *supra* note 15.

[50] UN Doc. S/2014/648, annex (Sept. 3, 2014).

[51] *Supra* note 15.

[52] *Supra* note 15.

[53] By contrast, Resolution 1624, para. 1 (Sept. 14, 2005), only "called upon" members to adopt measures to prohibit the incitement to commit terrorist acts.

[54] *See* Jan Wouters & Jed Odermatt, Quis custodiet consilium securitatis? *Reflections on the Lawmaking Powers of the Security Council*, *in* THE SECURITY COUNCIL AS GLOBAL LEGISLATOR 71 (Vesselin Popovski & Trudy Fraser eds., 2014).

[55] SC Res. 2178, *supra* note 15, para. 5.

[56] *Id.*, para. 6.

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The resolution also required that "Member States shall prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the acts" that states must criminalize.[57] It further called upon "Member States to require that airlines operating in their territories provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories, or attempted entry" of listed terrorists.[58]

Resolution 2178, which elaborated on Resolution 1373's obligation that states "[p]revent the movement of terrorists or terrorist groups," confirmed that international counterterrorism lawmaking is now, in the first instance, a matter for the Council and not treaty negotiators, as it had been prior to 2001.[59] In that respect, Resolution 2178 reaffirmed its predecessor's innovative extension of the Council's powers, with all the advantages (speed, uniformity) and disadvantages (decreased political legitimacy, lack of state consent) that Council legislative decisions entail. But this move should not obscure that the intended effect of the Council's action was to enhance and protect state authority: the Council's legislation required states to take actions themselves—executive, legislative, and judicial, including preventive measures—against individuals and groups. If the Council was empowering itself by acting outside of a specific situation, it was doing so in order to empower and protect states.

II. Human Rights Due Diligence Policy

As UN entities, particularly UN peacekeepers, are tasked with broader and more active roles in stabilizing states in the ways just described—through rebuilding institutions, providing security to civilians, and consolidating state control over a country's full territory—they necessarily work increasingly closely with national and regional security forces to accomplish their mandates.[60] Today, for example, the UN Operation in Côte d'Ivoire works with the Forces Républicaines de Côte d'Ivoire; MONUSCO works with the FARDC; the UN Support Office for the African Union Mission in Somalia and the UN Assistance Mission in Somalia work with the Somali Armed Forces and the African Union Mission in Somalia; and UN personnel work jointly with their African Union counterparts in the African Union/UN Hybrid Operation in Darfur. Yet, according to the United Nations itself, some of these same non-UN forces have committed serious violations of human rights law and international humanitarian law,[61]

[57] *Id.*, para. 8.

[58] *Id.*, para. 9.

[59] SC Res. 1373, *supra* note 15, para. 2(g).

[60] In Resolution 2086, para. 8 (Jan. 21, 2013), the Council set out ten possible components of contemporary UN multidimensional peacekeeping missions.

[61] *See, e.g.*, *Report of the United Nations Joint Human Rights Office on Human Rights Violations Committed by Agents of the Congolese National Police*, at 11 (Oct. 2014) [hereinafter Likofi Report] (concluding that "at least nine men, including a minor, were victims of summary and extrajudicial executions, and at least 32 men, including three minors, who were victims of enforced disappearances by [Congolese National Police] agents in the scope of Operation Likofi"); UN Mission in the Republic of South Sudan, *Conflict in South Sudan: A Human Rights Report* 51 (May 2014) (concluding that "[t]here are reasonable grounds to believe that both parties to the conflict have perpetrated violations" of human rights and international humanitarian law); *Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Soldiers of the Congolese Armed Forces and Combatants of the M23 in Goma and Sake, North Kivu Province, and in and Around Minova, South Kivu Province, from 15 November to 2 December 2012*, at 15 (May 2013) [hereinafter UN Joint Human Rights Office Report] (concluding that

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including while they "were the beneficiaries of United Nations assistance."[62] Collaboration with human rights violators poses a critical challenge to the United Nations, for the organization seeks simultaneously to maintain international peace and security, support state building, and abide by and promote human rights and international law. Association of UN peacekeepers with human rights abusers undermines the organization's credibility globally, undercuts its reputation with the population of the country that it seeks to rebuild (thereby impeding the success of its mission), and possibly opens up the organization to claims of responsibility for the wrongful acts committed by its partners under theories of "aiding or assisting" or "effective control."[63] Yet, the organization must work with local, national, and regional forces to achieve its goals.

In response to this dilemma, the secretary-general issued the "Human Rights Due Diligence Policy on United Nations Support to Non–United Nations Security Forces"[64] (HRDDP). The

FARDC soldiers and combatants of the Mouvement du 23 mars (M23) armed group are responsible for "gross violations of human rights law and serious violations of international humanitarian law").

[62] Responsibility of International Organizations: Comments and Observations Received from International Organizations 18, UN Doc. A/CN.4/637/Add.1 (2011) (comments of the United Nations on then draft Article 13 of the International Law Commission's draft Articles on the Responsibility of International Organizations).

[63] The possible responsibility of international organizations for aiding or assisting a state or another international organization in the commission of an internationally wrongful act is set out in draft Article 14 of the International Law Commission's Draft Articles on the Responsibility of International Organizations. *See* Report on the International Law Commission on the Work of Its Sixty-Third Session, para. 87, UN Doc. A/66/10 (2011). Draft Article 14 and its commentary establish a high threshold for aiding and assisting; they required, among other things, that the organization have prior "knowledge of the circumstances of the internationally wrongful act," that the organization intended that its actions would facilitate the wrongful act, and that the organization's aid or assistance contributed significantly to the commission of that act. *See id.*, para. 88 (commentary on Draft Article 14). Aside from its possible aiding and assisting responsibility, the organization itself may have an obligation under international law not to assist states if it knows that those states are committing violations of international humanitarian law. *Cf.* Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT'L REV. RED CROSS 401, 413 (2002). There does not appear to be a due diligence obligation, however, that required the organization to implement the Human Rights Due Diligence Policy (HRDDP), UN Doc. A/67/775–S/2013/110, annex (Mar. 5, 2013). Thus, the secretary-general simply wrote that the HRDDP seeks to ensure that UN support to non-UN forces is "consistent with the purposes and principles as set out in the Charter of the United Nations and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law." UN Doc. A/67/775–S/2013/110. Some states have rules that are similar to the HRDDP, such as the "Leahy Law." *See*, *e.g.*, Foreign Assistance Act of 1961, as amended, sec. 620M, 22 USC §2378d; Consolidated Appropriations Act, 2014, Pub. L. 113-76, Div. C, Dept. of Defense Appropriations Act, 2014, sec. 8057 (Jan. 17, 2014).

[64] *Supra* note 63. The secretary-general initially decided to institute this policy on July 13, 2011, in his Decision 2011/18. On October 25, 2011, the secretary-general advised member states of the policy. But the policy's full text was transmitted to the General Assembly and the Security Council (and published as a UN document) only in February 2013. The HRDDP originated in the organization's response to FARDC abuses in 2008–09 while that army was being supported by the UN Organization Mission in the Democratic Republic of the Congo (MONUC, MONUSCO's predecessor). *See* Responsibility of International Organizations: Comments and Observations Received from International Organizations, *supra* note 62, at 18; SC Res. 1856 (Dec. 22, 2008), para. 14; Jeffrey Gettleman, *U.N. Told Not to Join Congo Army in Operation*, N.Y. TIMES, Dec. 10, 2009, at A8. By late 2009, the secretary-general instituted a "conditionality policy" whereby MONUC would

> immediately intercede with the FARDC command if the Mission ha[d] reason to believe that elements of a unit receiving its support [was] committing grave violations of human rights, international humanitarian law or refugee law, and it [would] suspend support for a unit if FARDC takes no action against those responsible or if the elements of the unit nevertheless continue[d] to commit violations.

Thirtieth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, para. 13, UN Doc. S/2009/623 (Dec. 4, 2009). This approach was subsequently codified by the Council in December 2009. *See* SC Res. 1906, para. 22 (Dec. 23, 2009) ("the support of MONUC to FARDC-led military operations against foreign and Congolese armed groups is strictly conditioned on FARDC's compliance with international humanitarian, human rights and refugee law"). In 2010 and 2011, the conditionality policy that

policy's purpose is to "ensure that any support that [UN entities] may provide to non–United Nations forces [author's note: this term is defined broadly to include national police and intelligence services and the forces of regional organizations] is consistent with the purposes and principles as set out in the Charter . . . and with [the organization's] responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law."[65] Pursuant to the policy, the "United Nations support [author's note: this term is also defined broadly] cannot be provided where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures."[66] Similarly,

> if the United Nations receives reliable information that provides substantial grounds to believe that a recipient of United Nations support is committing grave violations of international humanitarian, human rights or refugee law, the United Nations entity providing such support must intercede with the relevant authorities with a view to bringing those violations to an end.[67]

If that does not happen, "the United Nations must suspend support to the offending elements."[68] Before engaging with non-UN forces, the UN entity must conduct a risk assessment to determine the likelihood of those forces committing grave violations and inform the forces they are assisting of the "core principles governing provision of support."[69]

Issued under the secretary-general's own authority, the HRDDP potentially limits the secretariat's execution of the Council's decisions and hence raises constitutional questions concerning the relationship between the two bodies. In particular situations, the secretary-general's implementation of the HRDDP may undercut the ability of peacekeeping operations (and other UN missions) to fulfill their mandates (and hence undermine the Council's chosen approach to the maintenance of international peace and security) by necessitating UN entities to withhold or withdraw support from non-UN security forces. Indeed, apparently with this possibility in mind, when the secretary-general transmitted the policy to the Council and the General Assembly, he suggested that, "[i]nsofar as the General Assembly and the Security Council may decide to mandate United Nations entities to provide support to non–United Nations security forces, I trust that both the Assembly and the Council will take the policy into account in their deliberations."[70] To date, though, any possible conflict between the secretariat and the Council concerning the HRDDP has been avoided. Indeed, the Council has noted the importance of

applied to UN operations in the DRC was generalized to all UN entities in the form of the HRDDP. *See* Jérémie Labbé & Arthur Boutellis, *Peace Operations by Proxy: Implications for Humanitarian Action of UN Peacekeeping Partnerships with Non-UN Security Forces*, 95 INT'L REV. RED CROSS 539, 554–55 (2013). On the HRDDP, see also Helmut Philipp Aust, *The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?*, 20 J. CONFLICT & SECURITY L. 61 (2015).

[65] HRDDP, *supra* note 63.

[66] *Id.* While "support" is broadly defined, the United Nations does work with non-UN security forces in ways that might not constitute "support" (for example, by coordinating parallel operations) and hence not trigger the policy even when grave violations of human rights have been committed. *See*, *e.g.*, Somini Sengupta, *French Army Investigates an Allegation of Sex Abuse*, N.Y. TIMES, Apr. 30, 2015, at A11.

[67] HRDDP, *supra* note 63.

[68] *Id.*

[69] *Id.*

[70] *Id.*

the policy generally.[71] And when the Council has established new peacekeeping operations or extended or updated the mandates of previously authorized operations or missions subsequent to the issuance of the policy—such as those in the Central African Republic,[72] Côte d'Ivoire,[73] DRC,[74] Liberia,[75] Mali,[76] Somalia,[77] South Sudan,[78] and Sudan[79] —it has requested that missions "ensure that any support provided to non–United Nations security forces is provided in strict compliance with the human rights due diligence policy."[80]

The HRDDP is the latest in a series of internal rules instituted to bring increasingly active UN peacekeeping operations within evolving human rights standards. Previously, Secretary-General Kofi Annan issued a policy on the observance by UN forces of international humanitarian law[81] and a zero-tolerance policy on sexual exploitation and abuses.[82] Importantly, whereas those previous policies sought to govern UN personnel, the HRDDP, insofar as it conditions UN assistance on compliance with existing international law, goes further by seeking to alter the behavior of non-UN forces.[83] Indeed, the policy explicitly recognizes that "mitigatory" or "corrective" measures might be taken, such as holding perpetrators accountable for violations and putting in place procedures to prevent their recurrence.[84] In this way, if it is normalized within the routine operations of UN missions as designed, the HRDDP provides the organization with constructive "advocacy opportunities"—moments when it can actively monitor and promote human rights observance by non-UN forces.[85] Thus, the purpose of the HRDDP is threefold: to meliorate the actions of the forces that the United Nations assists; to preserve the organization's credibility; and to protect the

[71] SC Res. 2106, pmbl. para. 12 (June 24, 2013) (women, peace, and security); SC Res. 2143, para. 21 (Mar. 7, 2014) (children and armed conflict); SC Res. 2185, para. 23 (Nov. 20, 2014) (UN policing in peacekeeping and peace building).

[72] SC Res. 2217, *supra* note 40, para. 44; SC Res. 2149, *supra* note 40, para. 39; SC Res. 2127, *supra* note 17, para. 40.

[73] SC Res. 2162, para. 22 (June 25, 2014); SC Res. 2112, para. 23 (July 30, 2013).

[74] SC Res. 2147, paras. 4(b), 5(f), (i) (Mar. 28, 2014); SC Res. 2098, *supra* note 36, paras. 12(b), 15(f).

[75] SC Res. 2190, para. 12 (Dec. 15, 2014).

[76] SC Res. 2100, *supra* note 39, para. 26; SC Res. 2164, *supra* note 45, paras. 13(a)(vi), 16.

[77] SC Res. 2093, para. 4 (Mar. 6, 2013); SC Res. 2102, para. 11 (May 2, 2013); SC Res. 2124, paras. 15–16 (Nov. 12, 2013); SC Res. 2158, para. 9 (May 29, 2014).

[78] SC Res. 2109, para. 16 (July 11, 2013); SC Res. 2155, paras. 4(a), 14 (May 27, 2014); SC Res. 2187, paras. 4(a)(vi), 14 (Nov. 25, 2014).

[79] SC Res. 2113, para. 18 (July 30, 2013); SC Res. 2173, para. 20 (Aug. 27, 2014).

[80] *See*, *e.g.*, SC Res. 2190, *supra* note 75, para. 12.

[81] Secretary-General's Bulletin, Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (1999).

[82] Secretary-General's Bulletin, Special Measures for Protection from Sexual Exploitation and Sexual Abuse, UN Doc. ST/SGB/2003/13 (2003).

[83] While the United Nations has not explicitly conditioned its support for non-UN forces on adherence to these other policies, as it has with the HRDDP, the organization has still sought their application. *See*, *e.g.*, SC Res. 2093, *supra* note 77, paras. 1, 14 (authorizing the African Union Mission in Somalia to "to take all necessary measures, in full compliance with its obligations under international humanitarian law and human rights law" and requesting that that mission "apply[] policies consistent with the United Nations zero-tolerance policy on sexual exploitation and abuse in the context of peacekeeping").

[84] HRDDP, *supra* note 63, para. 14(b), (c); *see also id.*, paras. 26–27.

[85] *See* Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo, para. 59, UN Doc. S/2014/453 (June 30, 2014) ("The conduct of joint military operations in the context of the implementation of the MONUSCO human rights due diligence policy created additional opportunities to advocate the protection of children with the FARDC military authorities.").

organization, through proactive and preventive action, against claims that it is responsible for the wrongful acts of its partners.

While its aims are commendable, the HRDDP's successful implementation presents challenges. For the HRDDP to work in practice, UN entities conducting risk assessments must have the ability to acquire information and assess that information's reliability. Thus, the United Nations will need to devote resources on the ground (and provide institutional incentives to its personnel) to generate serious evaluations of non-UN security forces.[86] In some situations, though, resources will not be enough, as UN officials (and also others) will not be able to gain entry to the places where abuses may be occurring or may have occurred, and witnesses might not be willing, for fear of retaliation, to cooperate with UN investigators.[87] In other situations, political or operational considerations may impede the policy's application, in whole or in part.

Two recent incidents provide some examples of these difficulties. In 2014, the Council revised the UN Mission in South Sudan's mandate to address the changed security and humanitarian situation in that state, including reports of human rights abuses by its security agencies.[88] The resulting resolution eliminated the state-building elements present in the mandate's earlier incarnation and focused, instead, on protecting civilians.[89] Yet, to "foster a secure environment for the eventual safe and voluntary return of internally displaced persons (IDPs) and refugees," the revised mandate still tasked the UN Mission in South Sudan (subject to the HRDDP) to "coordinat[e] with [South Sudan's] police services in relevant and protection-focused tasks."[90] In the DRC, MONUSCO continues to work with the FARDC despite the history of the latter's human rights abuses, applying the HRDDP on a case-by-case basis.[91] For a time, MONUSCO granted HRDDP waivers to two generals allegedly involved in "human rights violations," though it subsequently halted cooperation with FARDC forces under their command when the DRC failed to take action against them.[92]

[86] Reports made by the Secretary-General to the Security Council indicate that UN missions are taking seriously their obligation to implement the HRDDP. *See*, *e.g.*, Report of the Secretary-General on South Sudan, paras. 70, 82, UN Doc. S/2014/158 (Mar. 6, 2014); Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, para. 38, UN Doc. S/2014/157 (Mar. 5, 2014); Report of the Secretary-General on Somalia, paras. 46, 76, 78, UN Doc. S/2014/140 (Mar. 3, 2014).

[87] See Likofi Report, *supra* note 61, at 5. Scott Campbell, director of the UN Joint Human Rights Office in the Democratic Republic of the Congo, was expelled from the country following the publication of the Likofi Report. *See* Nicholas Bariyo, *Congo Expels U.N. Human Rights Official After Report on Police*, WALL ST. J. (ONLINE), Oct. 17, 2014.

[88] *See Conflict in South Sudan: A Human Rights Report*, *supra* note 61.

[89] *Compare* SC Res. 2109, *supra* note 78, *with* SC Res. 2155, *supra* note 78.

[90] SC Res. 2155, *supra* note 78, para. 4(a)(vi).

[91] *See* UN Joint Human Rights Office Report, *supra* note 61; May 2012 MONUSCO Report, *supra* note 42, para. 15 (noting that a MONUSCO-FARDC joint operation was taken only "following the screening of FARDC battalion commanders in accordance with the United Nations Human Rights Due Diligence Policy"); Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, para. 70, UN Doc. S/2014/450 (June 30, 2014) (reporting that MONUSCO confirmed that FARDC soldiers raped at least eleven women in North Kivu and that "[h]igh-level advocacy was undertaken with the leadership of FARDC to hold the perpetrators accountable, in line with the human rights due diligence policy, urging action and warning that MONUSCO support to the regiment involved would be cut, should no action be taken").

[92] *See* Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, paras. 37, 51, UN Doc. S/2015/172 (Mar. 10, 2015); UN Doc. S/PV.7410, 3–4 (Mar. 19, 2015) (statement of Martin Kobler); Michelle Nichols, *U.N. Peacekeepers Previously Supported Blacklisted Congo Generals*, REUTERS, Mar. 19, 2015; *UN Waived Human Rights Concerns over 2 Congo Generals*, ASSOCIATED PRESS, Mar. 19, 2015.

Even so, the policy, which is intricately and carefully drafted, is a necessary response to the operational environment that UN entities—in particular, peacekeeping operations—increasingly find themselves in as a consequence of the Council's expansion of their mandates. Some might critique the HRDDP as merely a cover for new, multidimensional peacekeeping. But by providing a written and public set of rules that govern UN entities, the HRDDP not only has changed the way the organization operates and led to some apparent positive changes on the ground[93] but has also created a focal point that allows those within and without the organization to criticize the United Nations, as well as the states and organizations with which it works, for not abiding by the rules.[94]

III. A New Paradigm

The Council is well aware that it is acting at the edge of its established authorities. In the past, the Council has often signaled the novelty of its actions by highlighting the unusualness of the circumstances confronting it,[95] by emphasizing the wide political support of states and regional organizations for its innovative moves,[96] and by stating that its decisions are temporary and will have no precedential effect. It employed these same techniques again here. Thus, when the Council decided to create an Intervention Brigade, it indicated that it was acting "on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping," which the resolutions "reaffirmed."[97] A year later, when it established MINUSCA with robust authorities of its own (but without an Intervention Brigade), the Council again pointed out that these were "urgent temporary measures on an exceptional basis and without creating a precedent and without prejudice to the agreed principles of peacekeeping operations, which are limited in scope [and] time bound."[98] That resolution also carefully characterized the extraordinary circumstances that spurred the Council to act. Thus, in the resolution's preambular paragraphs, the Council noted the "*total* breakdown in law and order" in the Central African Republic and the "*absence* of the rule of law" there.[99] When it adopted a resolution on the Ebola epidemic, the Council similarly pointed out "the *unprecedented* extent of the . . . outbreak in Africa."[100] The Council also sought to de-radicalize these resolutions by highlighting the consent of the operations' host countries and the political support of important

[93] The UN High Commissioner for Human Rights has stated that "[i]n some cases, the implementation of the human rights due diligence policy has led to improvements in the behaviour of FARDC troops and has resulted in a generally safer environment for civilians." Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation and the Activities of Her Office in the Democratic Republic of the Congo, para. 23, UN Doc. A/HRC/27/42 (Sept. 1, 2014).

[94] *See* Human Rights Watch, *"The Power These Men Have Over Us": Sexual Exploitation and Abuse by African Union Forces in Somalia* (Sept. 2014), *at* https://www.hrw.org/report/2014/09/08/power-these-men-have-over-us/sexual-exploitation-and-abuse-african-union-forces. The African Union rejected these claims. *See* Press Release, The African Union Strongly Rejects the Conclusions Contained in the Report of the Human Rights Watch on Allegations on Sexual Exploitation and Abuse by [the African Union Mission in Somalia] (Sept. 8, 2014), *at* http://au.int/en/content/african-union-strongly-rejects-conclusions-contained-report-human-rights-watch-allegations-s.

[95] *See, e.g.*, SC Res. 794, *supra* note 9, pmbl. paras. 2–3; SC Res. 808, pmbl. para. 9 (Feb. 22, 1993); SC Res. 940, pmbl. para. 4 (July 31, 1994); SC Res. 929, *supra* note 10, pmbl. para. 9; SC Res. 955, pmbl. para. 7 (Nov. 8, 1994); *see also supra* text accompanying notes 7–12.

[96] *See, e.g.*, SC Res. 1973, *supra* note 12, pmbl. para. 10; SC Res. 1078, *supra* note 10, pmbl. para. 9.

[97] SC Res. 2098, *supra* note 36, para. 9. When the force's mandate was subsequently renewed, the Council reiterated the point. *See* SC Res. 2211, para. 1 (Mar. 26, 2015); SC Res. 2147, *supra* note 74, para. 1.

[98] SC Res. 2149, *supra* note 40, para. 40. The point was emphasized again when MINUSCA was renewed. *See* SC Res. 2217, *supra* note 40, para. 32(f).

[99] SC Res. 2127, *supra* note 17, pmbl. para. 3 (emphasis added).

[100] SC Res. 2177, *supra* note 22, pmbl. para. 5 (emphasis added).

regional organizations.[101] Yet, despite these attempts to confine the implications of its decisions, these are new lines in the sand, beyond where the old ones once lay.[102]

While it would be premature to infer that such decisions will become commonplace, the Council's recent choices, which are a function first and foremost of the common interests of its permanent members, show us how it imagines its role going forward. The distinctive character of the Council's expanded forms of activity, which it has developed for more than a decade but which has been put into even greater relief over the past two years, is its commitment to the stabilization of states (and its concomitant fear of fragile and failed states).[103] Though the Council has been asserting authorities and has tasked the organization to act in ways that are intrusive to the internal affairs of states (traditionally understood), the aim of the stabilization paradigm is not to enhance the role of the United Nations for its own sake and at the expense of state power. Rather, the goal is precisely the opposite: to reduce the need for Council action over the long-term by bolstering states in their actions against the diverse and mounting threats to their rule. Indeed, the Council's actions are a part of a broad range of unilateral and multilateral initiatives, including the use of force, that have been led by states (such as France and the United States) and other international organizations (such as the African Union), especially since 2001, with and without the Council's approval and UN participation. These initiatives perceive the dissolution of state authority through the attacks of terrorists, insurgents, and other nonstate actors as one of the key threats to contemporary world order.[104] It is the widespread agreement on that policy—state stability—that has allowed the Council to take the innovative actions analyzed here.

THE 2013 JUDICIAL ACTIVITY OF THE INTERNATIONAL COURT OF JUSTICE

*By Sienho Yee**

The year 2013 was eventful at the International Court of Justice.[1] The Court rendered two judgments: on April 16, 2013, a ruling on the merits in *Frontier Dispute* (Burkina Faso/Niger),

[101] SC Res. 2149, *supra* note 40, para. 40; SC Res. 2100, *supra* note 39, pmbl. paras. 18–19; Letter Dated 7 March 2013 from the Commissioner for Peace and Security of the African Union Addressed to the Secretary-General, annex, UN Doc. S/2013/163 (Mar. 15, 2013); SC Res. 2098, *supra* note 36, pmbl. para. 28; UN SCOR, 68th Sess., 6943rd mtg., UN Doc. S/PV.6943, at 5, 8 (Mar. 28, 2013) (statements of Marita Perceval of Argentina and Li Baodong of China).

[102] *Cf.* ALVAREZ, *supra* note 16, at 194 ("once the Council had crossed a line once, it appears that it is easier for it to cross it again").

[103] This is not to suggest that the Council has applied or will apply the stabilization paradigm consistently or that the paradigm describes the full range of the Council's decisions.

[104] *See* Robert Muggah, *Reflections on United Nations-Led Stabilization: Late Peacekeeping, Early Peacebuilding or Something Else?*, *in* STABILIZATION OPERATIONS, SECURITY AND DEVELOPMENT, *supra* note 2, at 56, 57–62.

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[1] For a list of the judicial work products issued in 2013 (thirteen in total) by the International Court of Justice (ICJ), see ICJ, Judgments, Advisory Opinions and Orders by Chronological Order (2013), *at* http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=2013. Not included in this list were the presidential urgent communication to Australia on December 20, 2013, in *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia) and the Court's denial around March 11, 2013, of a request for *proprio motu* indication of provisional measures in *Certain Activities Carried Out by Nicaragua* (Costa Rica v. Nicar.).