



MEMORANDUM TO THE

PRESIDENTIAL INVESTIGATION PANEL TO REVIEW
COMPLIANCE OF THE ARMED FORCES WITH HUMAN
RIGHTS OBLIGATIONS AND RULES OF ENGAGEMENT

BEING A SUBMISSION BY

SAVANNAH CENTRE FOR DIPLOMACY, DEMOCRACY
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ABOUT SAVANNAH CENTRE

Savannah Centre is an authoritative research and advocacy Think-Tank on Nigeria as well as, Africa's peace-building and governance process, drawing largely on the nexus between peace, democracy and development.

The Centre collaborates and partners with state institutions, multi-lateral organizations, civil society groups and the private sector to promote institutional learning, democracy and good governance. Our comparative advantage is our strong convening power and strategic capability to take advocacy beyond the traditional space of civil society. Savannah Centre has partnered with the United Nations Economic Commission for Africa, Directorate of Technical Cooperation in Africa (DTCA) and the Washington based Centre for Strategic and International Studies. It is currently partnering with the MacArthur and Ford Foundations as well as the Stimson Centre, all in the USA.

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INTRODUCTION

1. This memorandum is in response to the publication dated Monday, August 14, 2017 calling for memoranda and public hearing. Savannah Centre submission specifically covers the following terms of reference:

- a. To review extant rules of engagement applicable to the Armed Forces of Nigeria and the extent of compliance thereto;
- b. To recommend means of preventing violations of international humanitarian and human rights law in conflict situations;
- c. To make further recommendations in line with these terms of reference as may be deemed necessary.

METHODOLOGY

2. This submission follows the pattern below:

2.1. A review of the concept of Rules of Engagement (ROE), its application by UN Security Council, NATO and the United States of America. It discusses an overview of contents of ROE.

2.2. Case Studies of reported violations by the Nigerian Armed Forces with a view to analyzing nature of violations and possible amelioration mechanisms. The Centre has no access to current military operational orders but has, however, relied on the knowledge of retired military commanders who are conversant with extant contents of operational orders. (OpO)

2.3. Recommendations have been made based on the case studies

CONCEPTUAL REVIEW OF RULES OF ENGAGEMENT

3.0. Among the measures used for assessing democracies are the extent of civil control of the armed forces. The degree of control ranges from legislative oversight, executive control and the level of military professionalism. The tool for the democratic control of the armed forces is the ROE. Each nation defines its Laws of Armed Conflict (LOAC) but

essentially domesticates best practices as codified by Geneva Convention and The Hague Convention. The international community measures compliance of armies in conflict by observing their operational conduct using LOAC. Amnesty International Reports consider the provisions in these various laws in forming conclusions. Nations are therefore better off complying with those standardized laws and conventions. For a good understanding of the concept of ROE we shall go into definitions governing the framework of ROE.

Definitions of Terminologies.

3.1. Definitions of Rules of Engagement. According to International Institute of Humanitarian Law, “ROE are issued by competent authorities and assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives.”¹ The Dictionary of Military and Associated Terms defines ROE as “directives issued by competent military authority that delineate the circumstances and limitations under which US forces will initiate and/or continue combat engagement with other forces encountered”.² The inference from these two definitions is that ROE is a document, albeit a legal one, without which a legitimate operation cannot hold. Drawing from the example of the UN Security Council(UNSC) all military deployments are preceded and authorized by resolutions. These UNSCR specify mission, force capacity and relational directives. In like manner, within a nation state, ROE in form of executive orders must precede the initiation of military operations.

3.2. Executive Order. It is the order provided by the civil authority; either the President or the Minister of Defence or any other political appointee to ensure that military commanders act legally in the use of arms and that military operations reflect the national policy and objectives intended by the civil authority. An example of an Executive Order is provided as Annex A.

3.3. Political Purposes. ROE must fulfill political purposes as the determination to avoid negative public opinion, international outrage, and also to attract diplomatic support. In aiming for public opinion and international support, limits to use of weapons e.g. Chemical weapons, artillery bombardments, use of mines may be prohibited by the law of that nation. Similarly local sensibilities of the Area of Operational Responsibility (AOR) and international treaties and laws must be factored into planning. For

¹ Sanremo Handbook on Rules of Engagement, (November 2009) Definition and Status, paragraph 3.

² Chairman of the Joint Chiefs of Staff Instr.3121.01B, Standing Rules of Engagement, Chapter 5 page 81. www.jag.navy.mil>distrib>instructions

example, mosques, purdah, churches, monasteries, local shrines, diplomatic compounds, historical areas and artifacts may not be assaulted. When faced with operational challenges requiring the assault on prohibited areas, authorization by civil authority shall be required. ROE provides the tool for the control of military training by prescribing limits of use of weapons and professional conducts.

3.4 Military Purposes. ROE influences training and operational planning. The restraints from ROE provides the guide for lawful use of force, combat planning and military training. Field Training Exercises (FTX), Command Post Exercises (CPX) and Tactical Exercise Without Troops (TEWT) are guided by ROE. Commanders are able to use ROE authorization to control the conduct of military servicemen. It provides the mechanism for withholding and authorizing limits of use of weapons as operations progress.

3.5. Legal Purposes. It is standard practice for civil inquisition to hold after military operations. The Chilcot Report of inquiry of the U.K. participation in the Iraq war is an example. Back home the commission of inquiry into the Nigerian Army/Shiite clash in Zaria is another example. Legal framework for the prosecution of armed conflict is a necessary component of legitimacy of operations.

3.6. Declared Hostile Force(DHF). DHF is the declaration of adversarial group or force by a legitimate authority as hostile force. There are laid down procedures for declaring belligerents DHF. Until such a declaration is made, armed conflict against such group or force is illegal.

3.7. Principles of Self-Defence. The use of force in defence of mission accomplishment, unit and individual self-defence is governed by principles:

- a. Necessity. The use of force to subdue a hostile act or hostile intent is permitted as long as the situation persists. Necessity subsides when hostile act or intent de-escalates. There is no justification for further action upon de-escalation by the belligerent.
- b. Proportionality. The measure of force to be used should not exceed what is required to achieve the objective. Losses of innocent civilians and properties not connected to the hostile act or intentions should be avoided. Such operation should not exceed the scope, duration and intensity required.

- c. Distinction. Operations should be directed to the object of military concern and to identify civilian non combatants, civilian properties not relevant to subduing the hostile act or intent. The principle of Positive Identification (PID) should apply. This means there is positive identification of Hostile Act(HA) or Hostile Intent(HI). Both terms, HA and HI should normally be explained in military manuals.
- d. Humanity. The destruction or suffering of people and properties not necessary for the accomplishment of legitimate objective is prohibited.

CASE STUDIES

4. The conceptual review above shall now be used to analyze cases of the Nigerian Armed Forces violations of ROE.

ODI MASSACRE OF NOVEMBER 1999.

4.1 After a protracted hostility between Ijaw youths and the security forces which led to the killing of some policemen, the army was sent in to secure Odi town in Bayelsa State. The military operations led to many deaths and the destruction of the town on 20 November 1999. Civilian casualties were estimated at 2,500. Allegations of extra-judicial killings and wanton destruction of the town was widely reported. On 23 February 2013, a Federal High Court had this to say in a judgement “brazen violation of the fundamental human rights of the victims to movement, life and to own property and live peacefully in their ancestral home”³ The destruction of Odi was comprehensive and complete; no aspect of the community was spared by what I saw in the pictures showed here. The respondents violated the fundamental human rights of the people of Odi, by the massacre. The people are entitled to fundamental rights to life, dignity and fair play, the destruction of Odi was not as a result of gun battle but clear bombardment, the destruction was malicious,” Justice Akanbi declared. The Federal High Court found the Federal Government guilty and N15 billion was paid in negotiated compensation on 26 May 2014. Please see Annex B.

4.2. Analysis of the Incident. The following ROE violations took place:

- a. Executive order. There was certainly no executive order on this operation. Was there to be one, there would have been a declaration of the hostile force, name it and order for their destruction. Second, no limitation of use of force was imposed on the military. Bombardment should be a prohibition in an armed conflict where the belligerents were lodged among civil population. The operation violated distinction, humanity and self-

³ www.old.nationaldailyng.com 25 Feb, 2013 written by Nwadike Ugochukwu.

defence. Damages were beyond proportion and thus proportionality was violated. There was no humanity and self defence that would have warranted bombardment. Distinction of the hostile forces from innocents were not made. These are adequate evidence of the fact that the absence or lack of ROE accounted for the gross violation.

- b. Legal Purpose. An inquiry into the issue by government was not conducted leaving the victims no option than to resort to civil litigation. The National Assembly need to enact a law prohibiting the use of certain weapons within the country. Such law should include the prohibition of bombardment, punitive expeditions and extra-judicial killings. A military Judge Advocate should be attached to every military operations. The judge Advocate shall have the knowledge and capacity to identify critical breach of LOAC. A lot has been said about the prosecution of soldiers who violate fundamental human rights and the laws of armed conflict. The answer is simple: service personnel are not served the ROE and therefore cannot observe one.
- c. Military Operational Orders. Operational orders of the military should have an attachment of ROE instructions detailing the procedure for upgrading self-defence and proportionality for successful mission accomplishment. An example from “Desert Storm” is attached as Annex C
- d. Illegality of the Use of Force. Any force used without the consent of civil authority or beyond the scope of national policy and objective is deemed illegal.
- e. Individual Criminal Responsibility. A departure from legal use of force by individuals makes the individual liable to criminal prosecution.

SOLDIERS MASSACRE CIVILIANS IN REVENGE ATTACK IN BENUE

5.1. According to Human Rights Watch(New York, October 25, 2001) “on Monday, October 22, 2001, soldiers from the 23rd Armoured Brigade of the 3rd Amoured Division rounded up residents in Gbeji village for a “meeting” made them sit on the ground, separated the men from the others and then opened fire upon the men indiscriminately. Witnesses reported that some of the victims’ bodies were then set ablaze.” Further killings took place as soldiers invaded the villages in Logo and Zaki-Biam Local Government Areas. The total number of victims was put as 100 people and thousands displaced from their villages. Reports also have it that this was a revenge attack

following the killing of 19 soldiers who were deployed to restore law and order by the locals.⁴ Similar questions on ROE need to be raised. These include:

- Declaration of Hostile Force by executive order (Positive Identification)
- Hostile Act as identified by the military commander
- Proportionality
- Distinction
- Humanity.

It should be noted that any military act not backed by law is an illegality. To launch the military into operation must be in national self-defence. In this particular case, and with due respect to the military, if it is true that 19 soldiers were killed by the locals then the military themselves breached principles of war namely, security. Each unit must secure its forces in operation. What some refer to as force protection. To put a unit in harms way and use the repercussion as excuse for reprisal is unacceptable even professionally. There is no provision in LOAC for reprisal attacks. Sadly this trend continues in the country till date. The recent Navy/police clash in Calabar resulting to the burning down of the police station is an example. Reprisal attack is prohibited in the law of war and our Armed Forces must be updated on such laws to guarantee appropriate levels of compliance.

THE CLASH BETWEEN THE MILITARY AND ISLAMIC MOVEMENT OF NIGERIA(IMN) IN ZARIA

6. The IMN obstructed the convoy of the Chief of Army Staff who was on duty tour to Zaria in December 2014. Indeed video clip of the incidence where efforts were made by military officers to persuade the group to desist from blocking the road was seen by the public through the social media. Later in the night, the military carried out night attack on the sect causing deaths and wanton destruction of properties. The issue was a subject of judicial inquiry by the state. Report of the inquiry and the white paper are public in the public domain and need not be retold. From the framework of ROE, a lot went wrong from both the state and the military using ROE test scale:

- Necessity for Self-Defence. Was the operation for national self-defence, unit self-Defence or personal self-defence?
- Distinction. What positive identification was used to single the victims out as perpetrating Hostile Act or Hostile Intent. Was there any Executive Order by the civil authority declaring IMN as DHF?
- Proportionality. Was the scale of destruction and victims proportional to the mission accomplishment?
- Humanity. How were the dead and wounded treated? Did the military attempt to rescue innocents trapped in the operation?

⁴ www.hrw.org/news/2001/10/25/nigeria-soldiers-massacre-civilians-revenge-attack-benue-state

Answers to all the above questions were negative: a clear indication of violation of LOAC and ROE. It is pertinent to say that illegal use of arms is established when it is not authorized by legal means. Many civil/military or Police/military clashes are criminal acts. The custody of state weapons does not authorize its use for self-help. All use of weapons must follow legal steps and must be laid down by the ROE. From all indications as far as the military operations to crush IMN was concerned it was illegal even as Kaduna State government seemed to have acquiesced to it. Going through the white paper of Kaduna State one does not see any lessons learnt in ROE.

THE BOMBING OF IDP CAMP

7. On 17 January, 2017 the Nigerian Air Force (NAF) in a mission against Boko Haram accidentally bombed the Internally Displaced Persons (IDP) camp in Rann, Borno State. Many civilians were killed including aid workers. The Federal Government commented that the incidence was “regrettable operational mistake” and the Minister of Information went further to say “the incident was not a reflection of the Air Force’s professionalism” and advised the Nigerian Air Force to take necessary measures to avoid civilian casualties as it carries out its challenging task of keeping Nigerians safe.⁵ Using ROE scale:

- Executive Order. The civil authority must prescribe by executive order limitations on the use of weapon. Bombardment was not the right weapon for such operation where civil population shall be encountered.
- Distinction. All targets must be clearly identified. The military commanders violated ROE by not identifying locations not to be violated. The claim of accidental discharge could have been avoided if proper ROE was in existence. In planning for operation, sensitive areas prohibited for targeting would have been mapped out.

7. The incident narrated above underscores the necessity for ROE planning staff to be part of Operational headquarters. From the experience of this writer and good record, none of the three armed services and the police nor any paramilitary service has trained personnel who man ROE cells in operational headquarters.

ROE AS THE CENTREPIECE FOR MILITARY OPERATIONS

8. ROE is the operationalization of LOAC. It is the mechanism to launch into armed combat and to sustain it. Humanitarian aspect of armed conflict is such a crucial component to the extent that conflicts can be won or lost by ROE. Local and international support can be rallied around military operations if LOAC is strictly observed. The siege at the UN compound in Maiduguri is a

⁵ www.vanguardngr.com/2017/01/on-the-accidental-bombing-of-IDP-camp-in-borno

good evidence of lack of a well defined and understood ROE in military operations. Indeed, radicalization of combatants begins with the violation of fundamental human rights. The Zaria incident provide example. IMN members who ordinarily would have stayed out of combat mobilized to the venue on account of perceived injustice. No efforts at winning the hearts and minds of the civil populace will make impact as long as fundamental human rights are violated. In the war against Boko Haram de-radicalization can only be successful if incidences of prolong and unjust detention and torture continue to take place. To avoid breach of fundamental human rights, best practices as triggered by executive orders are put in place. Please see Annex D, an example of executive order for establishing proper rule of law. Political decision-makers may need to consider international law in initiating military operations because the objective and outcome may cause international indignation far outweighing the advantage gained from the military operation. While ROE does not remove the right of self-defence of an individual in military operations, his knowledge of limitations of use and his culpability must be taught to him. Adequate training is therefore required to get the individual serviceman to be professional and understand the application of ROE including seeking extension of rights in peculiar scenarios. In some armies, particularly the US, ROE Card is issued to all individuals as aide memoirs. One makes bold to say non of our armed services has ROE Card, evidence of non-existence of a codified ROE. Attached as Annex E please find a training module of US Marine Corp for young officers. The US Armed Forces have Chairman Joint Chief of Staff's Rules of Engagement for the US Armed Forces. Nigeria has none. It has been argued in many quarters that ROE is a security document and therefore subject to official secret act. This assertion is not entirely correct. Those areas that do not negate military operation are far wider in scope than the narrow aspect of tactical operational orders. Many of the principal provisions of ROE are already codified in LOAC and published worldwide. The executive orders issued by President Barack Obama and attached herewith are examples to debunk the claim the ROE is a secret document in its entirety.

9. Administration of Justice. Justice system in the military violates natural justice where parties interested in cases are also adjudicators. This creates impunity and black box. A case in point is the Air Force investigation of the accidental bombing of the IDP camp. The opening up of justice system in the Armed Forces to civil authority aids the promotion of rule of law and ROE. Therefore, the Ministry of Justice must be fully involved in the administration of justice in the military.

MILITARY-INDUSTRIAL COMPLEX: A PARADIGM SHIFT

10. The Nigerian Army, created by the colonial masters, was used for restoring law and order by the colonial government. The historical perspective is therefore that of coercion, oppression and violence. The use of the military even today is that of operations to restore law and order by repression. The presence of the military in any community creates apprehension and fear. This paradigm of terror and fear of the military has to change to a more positive posture. Military training and mentality need to change to embrace the concept of human security. The clause in the constitution that states that the military shall be used in aid of civil government has been interpreted to mean the use of the military to restore law and order. This interpretation is too conservative. A more dynamic interpretation should include nation-building through national infrastructural development. The military should now be funded for research on many emergent challenging areas of national development where the private sector is not prepared to invest in. Examples include:

- Engineering. It is common for our roads to collapse. Within each Area of Operational Responsibility there should be engineering assets to fix broken roads. Modular bridges of various classes should be available to construct emergency bridges on highways that can be dismantled afterwards.
- Communication. Cyberattacks of national critical infrastructure is an emergent threat for the country. The military should be funded to develop and warehouse expertise in counter cyberattack measures, in satellite technology for environmental management and agricultural use. As we continue to rely on digital technology in commerce and industry, urban development, democracy and electioneering we must be ahead of criminals who can destroy the critical national assets of the country within seconds. The military should be funded to carry out research work and hold expertise in areas not attractive to business entrepreneurs. By so doing the military will gradually create a new image that creates friendly perceptions and removes apprehensions and repulsion of the military.

CONCLUSIONS

11. The following conclusions are made:

- a. There are no codified ROE running through the entire military operations from the executive branch, legislature through the military command structure to the serviceman.
- b. There is no Defence Headquarters manual on ROE the like of US Chairman Joint Chiefs of Staff Standing Rules of Engagement for US Armed Forces (SROE)

- c. There are no ROE planning cells in the operational headquarters of the military command.
- d. Judge advocates are appointed on ad hoc basis when court marshals are established.
- e. No ROE training curriculum nor training manuals for the military.
- f. There are no ROE forms to request for and approval granted to change status of ROEs.
- g. Reprisal attacks are still prevalent in the Armed Forces.
- h. Continuous poor reports from Amnesty International and Human Rights Watch are due to poor observance of ROE in military operations.
- i. Radicalization of population can ensue from breach of fundamental human rights by the military and it is suspected to be the case in the North East.
- j. International support is lost from violation of LOAC and ROE.
- k. The Nigerian Armed Forces are still trapped in colonial usage. It's role in aide of civil development should be explored broadly.
- l. Armed Forces judiciary system does not follow the rule of law. The accusers are also the judges. There is breach of fundamental human rights even within the military. Since one cannot give what one does not have, the military should embark on a comprehensive training programme to enable its personnel internalize fundamental human rights.

RECOMMENDATIONS

12. The following are recommended as way forward:

12.1. Legislations.

- a. The Law of Armed Conflict should be domesticated by the National Assembly. It should include clauses such as Declaration of Hostile Force, Hostile Acts and Hostile Intent, National guideline on use of military by Federal and State governments, Protection of properties and sensitivity to cultures.
- b. Rules of Engagement and Use of Force. The prohibition of specific weapons in domestic conflicts, principles of self defence; definitions of

national self-defence, unit self-defence and individual self-defence in armed conflict. Humanitarian Assistance/Disaster Relief. Prohibition of targeting and non violability of specific locations and religious and cultural sensitivities and defining the use of force should be clearly spelt out.

- c. Budgeting and Oversight Functions. The use of the armed forces for national development by equipment, development of specialists in critical areas and research grants to support military-industrial complex should be urgently explored.
- d. Legislation on military justice system to include the role of the Ministry of Justice and the inclusion of civil judges in dispensation of justice should be initiated as soon as possible.

12.2. Executive Orders.

All operations must be authorized by executive orders signed by either the President or his designated official e.g. the Minister of Defence. The executive order must include rules of engagement, scope and weapons authorization. It must include administration of detainees and participation of civilian staff and agencies as partners in medical evacuations and detention facilities. The terminal period for mission accomplishment and its periodic review should be clearly spelt out.

12.3. The Armed Forces.

12.3.1 Operations.

- a. The Chief of Defence Staff should produce a manual on ROE asap. Once produced, it should not be a secret document but a public one. It brings the nation into full picture of guideline for military operations and a step further in democratic management of the armed forces.
- b. All Services should create ROE cell in their operational headquarters up to tactical level. A judge advocate should be part of the ROE planning cell.
- c. A ROE paragraph in Operational Orders(OpO) should sketchy but refer to a standing rules of engagement (SROE) This should be similar to Unit Standing Operational Procedures (SOP). Annex C refers.
- d. Each Unit must have a SROE
- e. Each individual service personnel should have ROE Card. It is an aide memoirs

- f. There should be formats like template for the request and approval to upgrade or adjust the scope of ROE according to situation. Such documentation fulfills the legal purposes.
- g. Office of Judge Advocate should be created at strategic and operational level
- h. command levels and be part of operational planning.

12.3.2. Training. The purpose of training in ROE is to instill reflexes and sense of civil responsibility in military character.

- a. Training curricula and modules should be prepared and taught at all levels, beginning from Young Officer Training, Staff College and Defence College training.
- b. ROE should be injected into all training exercises like FTX, CPX and TEWT.

SAVANNAH CENTRE OFFER OF SERVICE

13. Savannah Centre for Diplomacy, Democracy and Development is prepared to provide expertise service to the Federal Government and the Armed Forces for the development of sound and international standards on LOAC and ROE. We are prepared to produce training manuals and the facilitation of clearer and understandable and easy to follow ROE to the Armed Forces at all levels. We hope that this memorandum shall be of help to further deepen the democratic management of our Armed Forces as well as shape the professionalism of our service personnel. It is also hoped that this effort shall lead to improved reportage and ranking from international organizations like the Amnesty International and Human Rights Watch.

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ANNEXES

- A. Sample Executive Order
- B. News Report of Odi Massacre
- C. Rules of Engagement: Desert Storm
- D. Sample of Executive Order on National Policy