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The Need for Effective Protection of United Nations Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel

by Siobhán Wills*

If the United Nations hopes to continue commanding the world's respect, it is essential that the organization grow stronger, not only in its defiance of intransigent political leaders, but also in its willingness and ability to protect ordinary people from the violence and deprivation inflicted upon them in situations of armed conflict. States will be reluctant to contribute forces to peacekeeping missions if there is a high risk that their peacekeeping role will not be respected and that they may themselves become the subject of attack. An evaluation of the effectiveness of the 1994 Convention on the Safety of UN and Associated Personnel (Safety Convention) in protecting peacekeepers from attack and so facilitating them in their role as "the world community's avatars of international peace and security" will demonstrate the current inadequacy of existing protection for UN peacekeeping forces.

While the Geneva Conventions of 1949 and subsequent protocols regulate the conduct of combatants engaged in armed conflicts, prior to 1994, no instrument prohibited or provided legal remedies for attacks against forces performing traditional peacekeeping functions, such as facilitating ceasefires and maintaining buffer zones between the parties to the conflict in order to contain hostilities while the belligerents worked out a peace agreement. The Safety Convention was adopted by the UN General Assembly on December 9, 1994, and entered into force on January 15, 1999. Its purpose is to protect UN and associated personnel from becoming the object of attack by purporting to criminalize attacks by other armed forces on peacekeeping troops. The majority of states that have signed the Safety Convention have yet to ratify it.

The Safety Convention enhances the protection of peacekeepers by providing a means of prosecuting attacks on UN personnel as crimes under international law. It is not the only means of prosecuting such attacks, however. Article 8 of the Rome Statute for the International Criminal Court (Rome Statute) also provides a means of prosecuting these crimes, but only in situations where the law of international armed conflict applies. Article 8, paragraph 2(b) gives the International Criminal Court jurisdiction over serious violations of the laws and customs applicable in international armed conflict including, under 8(b) (iii), "intentionally directing attacks against personnel, installations, materials, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the Charter of the UN, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict." Article 8, paragraph 2(e) (iii) of the Rome Statute also prohibits attacks on peacekeepers "so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."

The scope of the Safety Convention is broader than the Rome Statute, but it is poorly drafted. Lack of clarity and the

failure to define key criteria will make it difficult to successfully prosecute crimes under this convention. An assessment of the merits and weaknesses of the Safety Convention will likely prove it more aspirational than effective.

The Genesis and Development of Peacekeeping and Peace-Support Operations

The UN has primary responsibility for the maintenance of international peace and security. In this context, the UN Charter provides for coercive measures to compel states to comply with resolutions taken by the Security Council. These coercive measures require achieving and maintaining a consensus among the permanent members of the Security Council. As a result of the divisions of the Cold War, effective action by the Security Council was blocked and the concept of UN peacekeeping came into existence. Although not specifically provided for in the Charter, peacekeeping operations

were intended to end hostilities by peaceful means and create a climate in which the peacemaking process could be successfully pursued. The first UN peacekeeping force, the United Nations Emergency Force, was deployed in response to the Suez crisis of 1956. Its purpose was to separate the belligerent forces and supervise the withdrawal of foreign troops from Egypt while a political settlement was being discussed. Other early peacekeeping missions such as the United Nations Peacekeeping Force in Cyprus, the United Nations Emergency Force II, and the United Nations Interim Force in Lebanon followed. These traditional peacekeeping

missions are often referred to as "first-generation" peacekeeping missions.

In recent years, the traditionally passive role engendered by such missions has been replaced by a more active role of peace making involving, *inter alia*, national reconstruction, facilitating transition to democracy, and providing humanitarian assistance. Initially referred to as "second-generation" or multi-dimensional peacekeeping, the more generic title of "peace support operations" has been adopted to cover the wide range of activities involved. Peace support operations differ from traditional first-generation peacekeeping in that mandates are generally more complex and often involve peace-building activities such as providing development aid, implementing arms control measures, organizing elections, and monitoring human rights violations. These measures go further than acting as a buffer to keep peace between belligerent parties, and are intended to assist in the rebuilding of states and the fostering of an environment for long-term peace.

In response to the intra-state conflicts that have become so prevalent in the post-Cold War period, coercive peacekeeping operations, often referred to as "peace enforcement operations," have also been deployed. These operations have stronger mandates than traditional peacekeeping or peace support operations. Peace enforcement operations are highly

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controversial because they blur the line between peacekeeping under the Safety Convention and enforcement action under Chapter VII of the UN Charter. UN forces can find themselves operating in complex political situations where the legal framework within which they must act is unclear. For example, in his report on UN operations in Bosnia, the secretary-general explained that there was confusion over the role of the UN Protection Force in the Former Yugoslavia (UNPROFOR). Some nations that had not contributed troops wanted to expand the UNPROFOR mandate to use the peacekeeping force to directly confront the Bosnian Serbs, but nations that had contributed troops wanted to avoid such confrontation. As a result, the forces deployed were largely configured and equipped for traditional peacekeeping duties rather than enforcement action, meaning that they were few in number and lightly armed. In an effort to find some consensus within the Security Council:

resolutions were adopted in which some of the more robust language favoured by the non-troop-contributing nations was accommodated. Chapter VII was invoked with increasing frequency, though often without specifying what that implied in terms of UNPROFOR operations. In this way, the efforts of Member States to find compromise between divergent positions led to the UNPROFOR mandate becoming rhetorically more robust than the Force itself.

Peace support operations have been mounted in conflict situations where clashes involving local actors and UN soldiers were inevitable because the local population had not consented to their presence. Recent conflicts in Bosnia and Rwanda, among others, have involved direct attacks on the civilian population as part of the war objective of belligerent factions. Often combatants are not soldiers of regular armies, but of militias or groups of armed civilians with little discipline and an ill-defined command structure. There is a danger in these situations that boundaries between the different types of peace support operations and their level of acceptable participation in the conflict can become blurred. In response to a 1993 incident in Somalia, one of several incidents in which UN troops killed a number of civilians, the UN military spokesman in Mogadishu commented, "Everyone on the ground in that vicinity was a combatant, because they meant to do us harm." Ultimately, forces deployed on a peace support mission may find that by using military power to protect an area, they are drawn inexorably into the struggle and cannot avoid taking sides.

The 1994 Convention on the Safety of United Nations and Associated Personnel

Peacekeeping forces established pursuant to a resolution of the Security Council or General Assembly are entitled to the privileges and immunities of the UN provided for in Article 105 of the UN Charter, and in the UN Convention on the Privileges and Immunities of the UN. The secretary-general usually tries to arrange a Status of Forces Agreement (SOFA) with the state involved to agree upon the applicable arrangements and conditions during the operation. The high rate of casualties sustained in the conflicts in Somalia, the former Yugoslavia, and Rwanda, however, has alerted troop-con-



Credit: UN/UNMEE photo by J. Aramburu

Kenyan Peacekeeper for the United Nations Mission in Ethiopia and Eritrea (UNMEE) before going on a patrol. UNMEE was established by the Security Council in July 2000 to verify a ceasefire agreement. In September 2000, the Council authorized deployment within UNMEE of up to 4,200 military personnel to monitor the ceasefire and assist in ensuring observance of security commitments.

tributing-states to the inadequacy of existing protection for peacekeeping forces.

After only nine months of deliberations, the UN adopted the Convention for the Safety of UN and Associated Personnel as a solution to the lack of international protection for UN peacekeeping forces. While attacks on peacekeepers are normally treated as domestic crimes under the criminal laws of the host state, the law enforcement capabilities of a state requiring outside forces for internal stability are generally insufficient to investigate, try, and prosecute persons for such crimes. The Safety Convention clarifies the protective duties of the host state, strengthening these duties in situations where the convention applies.

Protective Duties of the Host State under the Convention

Under Article 7 of the Safety Convention, states parties are required to "take all appropriate measures to ensure the safety and security of UN and associated personnel." Under Article 11, states parties must cooperate in preventing crimes against protected personnel. States parties are required to take "all practicable measures" to prevent preparations in their territories for such crimes, and to exchange information and coordinate "administrative and other measures" to prevent their commission. The Safety Convention is also the first international agreement to establish that captured peacekeepers are entitled to the protections of the Geneva Conventions, although under the Safety Convention the prisoners must be returned immediately. Under the Geneva Conventions prisoners can be held until the cessation of hostilities.

States parties are required to make attacks or threats against UN and associated personnel crimes under their national law and to either prosecute or extradite alleged offenders. The Safety Convention permits states party to it to establish extra-territorial jurisdiction over prohibited crimes where such crimes have allegedly been committed against that state's own nationals or where such crimes have allegedly been committed "in an attempt to compel that State to do or to abstain from doing any act." These broad jurisdictional provisions expand opportunities for enforcement by allowing the more

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activist states to prosecute where the host state is reluctant. The Safety Convention does not apply to all situations in which UN personnel are deployed on peacekeeping operations, however, and it is extremely difficult for both the UN and parties to the conflict to determine when the Safety Convention applies and when it does not.

Determining When the Convention Applies

Throughout the negotiations, those drafting the Safety Convention had to pursue two almost irreconcilable objectives: guaranteeing protection to as many UN personnel as possible while preventing extension of the convention's scope of application so widely as to prevent certain states from ratifying it. Many states were critical of the scope and expansion of the Security Council's activities in recent years, and sought to limit the application of the Safety Convention to traditional peacekeeping operations. The Preamble acknowledges the contribution of UN personnel in the fields of preventive diplomacy, peace making, peacekeeping, peace building and humanitarian and other operations, but there is no specific mention of "peace enforcement" operations. Rather, the traditional characteristics of peacekeeping operations are emphasized. The Preamble states that "the effectiveness and safety of United Nations operations are enhanced where such operations are conducted with the consent and cooperation of the host State," and Article 20 states that nothing in the Safety Convention shall affect, *inter alia*, "[t]he rights and obligations of States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories." Article 21 of the convention permits the use of force in self-defense. Article 6 calls on UN personnel to respect the laws of the host state and to refrain from any action or activity incompatible with the impartial and international nature of its duties. These provisions reflect traditional operations rather than operations that involve coercive measures against the host state or *de facto* powers involved in the conflict. Yet, it is in the more controversial peace enforcement operations that UN personnel are at greatest risk, and it was the extensive casualties that have occurred in these types of operations that initially triggered the demand for protection.

Originally, the Safety Convention was to be limited to operations "established pursuant to a mandate approved by a resolution of the Security Council," but its scope was eventually expanded. Article 1(c) provides that an operation covered by the convention must be one that is "established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control." Therefore, operations *authorized* as opposed to *mandated* by the Security Council, but carried out under the command and control of one or more states, are outside the scope of the Safety Convention. The mandated operations must be: (1) for the purpose of maintaining or restoring international peace and security; or (2) where an exceptional risk to the safety of the personnel participating in the operation exists, as decided by the Security Council or General Assembly.

Throughout the negotiations, those drafting the Safety Convention had to pursue two almost irreconcilable objectives: guaranteeing protection to as many UN personnel as possible while preventing extension of the convention's scope of application so widely as to prevent certain states from ratifying it.

The Safety Convention attempts to distinguish between situations in which the convention applies and those in which humanitarian law is applicable, so that UN and associated personnel and those who attack them will be covered by one regime or the other, but not both. This strategy enables the Safety Convention to avoid undermining the Geneva Conventions, which rely in part for their effectiveness on all forces being treated equally. Professor Sharp of Georgetown University Law Center is extremely critical of this approach, believing that it reflects pre-Charter thinking condoning the aggressive use of force. He claims that since UN forces serve the world community, all UN personnel should be made unlawful targets under all circumstances.

The negotiators of the Safety Convention believed that if it became a crime to engage in combat with UN forces when they act as combatants, this could have a dramatic impact on

other parties' willingness to adhere to accepted principles of humanitarian law. Negotiators feared that if UN forces acting as combatants were entitled to the protection of the Safety Convention (whereby an attack upon UN forces would be a crime even though they were engaged in combat) the belligerent parties would see it as gross injustice and not abide by any laws at all. A primary inducement to comply with any law is the belief that law applies equally to everyone and therefore it is in all parties' interests to comply.

To ensure consistency with the Geneva Conventions, Article 2(2) provides that the Safety Convention shall not apply to a UN operation authorized by the Security Council as an enforcement action under Chapter VII "if any of the forces are engaged as combatants against organized armed forces and the operation is one to which the law of international armed conflict applies." Even if only part of the operation fulfils these conditions, all of the UN elements participating in that operation will be excluded from its protection. Common Article 2 of the Geneva Conventions provides that the Conventions shall apply to armed conflict between "two or more of the High Contracting Parties, even if a state of war is not recognised by one of them." The same trigger point is used in the Safety Convention to determine when UN peacekeeping forces cease to be covered by the Safety Convention. There is a strong argument that where foreign troops are involved in an internal armed conflict the rules of international armed conflict should apply. The International Committee of the Red Cross (ICRC) has suggested that "the outsider status of United Nations forces logically [requires these forces to] be subject to the rules of international humanitarian law applicable in international armed conflicts."

The difficulty of distinguishing between peacekeeping and enforcement operations has not been properly recognized. The fact that an action is based on Chapter VII of the Charter does not automatically rule out application of the Safety Convention and render international humanitarian law applicable instead. The Safety Convention ceases to apply only in cases of armed confrontation between forces deployed by the United Nations and organized armed forces. The problem is when and who determines that a confrontation between UN

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troops and others reaches the threshold that the participants may be regarded as combatants under Article 2(2) of the Safety Convention. For example, capturing peacekeepers is illegal and can be prosecuted as a crime. Once UN forces begin acting as combatants against organized armed forces, and the operation is one to which the law of international armed conflict applies, they then have the status of combatants. As such, acts against them are covered by international humanitarian law rather than the Safety Convention. Capturing combatants is not a crime, provided that they are treated according to the rules of the Geneva Conventions.

Identifying if any personnel are engaged as *combatants* against *organized armed forces*, and whether the operation is one to which the law of international armed conflict applies may be difficult in practice. The American Bar Association noted that “it is asking too much for a Somali clan warrior or Bosnian militiaman” to understand the distinctions in levels of conflict. UN forces will have to constantly evaluate whether the situation can be classified as one of armed conflict, and then whether or not the use of force is sufficient to change their status from that of peacekeeper to that of combatant, in order to determine their obligations and protection status. It remains unclear at what point paramilitary forces engaged in a conflict constitute “organized forces” for the purposes of the Safety Convention.

The trend of the last 50 years has been to make the threshold for the application of the laws of international armed conflict as low as possible. The Safety Convention may work against this trend because it is likely that the UN and troop contributing states will be reluctant to recognize that the convention has ceased to apply. This may inflate the level of conflict required before acknowledging that “armed conflict” is taking place. The fact that there is no agreement on which provisions of humanitarian law apply to UN personnel, and in what circumstances, can only add to the confusion.

International Humanitarian Law and UN Operations

There is evidence that UN forces have themselves engaged in conduct and practices that are contrary to humanitarian law. One report on the Somalia peacekeeping mission concludes that these were “not cases of undisciplined actions by individual soldiers, but stem from the highest echelons of the command structure.” Respect for the privileged status of UN forces is likely to be undermined if such forces themselves violate humanitarian law. There is also the issue of whether UN forces should be bound under the obligation to ensure respect for the Geneva Conventions in Common Article 1 to prevent imminent violations of international humanitarian law. Most lightly armed peacekeepers are not able to prevent large-scale abuses.

The definition of when the Geneva Conventions apply, described in Common Article 2, was designed to avoid the need for a formal declaration of war as a preliminary to their application. The substitution of the more general expression “armed conflict” for “war” was intended to ensure that the Geneva Convention would apply to any difference arising between two states and leading to the intervention of mem-

bers of the armed forces, even if one of the states parties denied the existence of a state of war. But what are the criteria for determining when a conflict in which UN forces are deployed reaches the level of *armed conflict*? The United States argued that although thirty United States soldiers had been killed and nearly two hundred wounded, and despite many hundreds more Somali casualties, there had yet to be an event in Somalia “that makes it clear to everyone that this is combat, not peacekeeping.”

A number of national military courts held that the Geneva Conventions did not apply to the UNOSOM II (United Nations Operations in Somalia II) mission in Somalia. The Court Martial Appeal Court of Canada held in *R. v. Brocklebank* that Private Brocklebank, who was arrested for aiding and abetting the torture of a Somali teenager, had no legal obligation to ensure the safety of a prisoner because neither the Geneva Con-

ventions nor Additional Protocol II applied to peacekeeping operations. The Geneva Conventions and Additional Protocol therefore did not apply to Canadian Forces in Somalia. A Belgian military court investigating violations of humanitarian law by Belgian forces also came to a similar conclusion.

The UN argues that it is not a state and hence not legally bound by the Geneva Conventions. It also argues that there are political and practical difficulties if the UN were to be bound by the rules of international humanitarian law. Under the UN Model Agreement with troop contributing states and the Model SOFA between the UN and host states the UN undertakes to “observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel.” The ICRC has pushed

for recognition that international humanitarian law should apply whenever United Nations forces must resort to force. The secretary-general, in his Bulletin on the Observance by UN forces of International Humanitarian Law, stated that “the fundamental principles and rules of international humanitarian law are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. Therefore they are applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defense.” Determining at what point UN forces become combatants is problematic since there must be a threshold level of force to be crossed—soldiers may use some level of force in self-defense and yet not be considered combatants.

The Safety Convention has been criticized on the grounds that by retaining this ill-defined threshold mechanism the convention effectively puts control of the protection status of UN forces in the hands of the belligerent forces that are the target of the UN mission. If attacks against UN forces remain at a low level with only a few people killed, then response by the peacekeepers is unlikely to be strong enough to cross the threshold above which the Safety Convention no longer applies. If, however, the peacekeepers are subjected to merciless and relentless attacks, they may be forced into self-defensive action that crosses that threshold. This separation between convention regime and humanitarian law regime

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seems unworkable. Some of the uncertainty could be reduced by clearer statements on what principles of the law of war apply to all UN military operations despite their characterization.

Conclusion

The 1994 Convention on the Safety of UN and Associated Personnel is an important step forward in advancing the protection and safety of UN peacekeepers. It creates a regime for the prosecution or extradition of persons accused of attacking UN peacekeepers and other persons associated with operations under UN mandates, which may help counter the impression that UN forces can be attacked with impunity. Due to the relatively short timeframe in which the convention was drafted, many essential criteria are left vague and undefined, resulting in a lack of clarity in its application. Hence, it provides only a preliminary and partial solution to averting and redressing the dangers facing UN personnel in the field.

Protection of UN peacekeeping forces is a priority for both humane and pragmatic reasons. Troop contributing states are unlikely to be willing to send forces to keep the peace in a foreign conflict if they are likely to be attacked. The special protection afforded peacekeeping forces reflects their status as non-combatants, but many peace support missions involve “robust” measures to enforce peace in which it may be difficult to determine at what point UN forces cease to be non-combatants. While the Safety Convention does not expressly mention “peace enforcement” operations, it is in precisely these types of operations that UN personnel are at greatest risk. Further, for political and constitutional reasons no troops have ever served under the full command and control of the UN, and it is unlikely that they will do so in the foreseeable future. From the point of view of the states or ethnic groups that are the targets of the mission, “coalitions of the willing” on coercive peace enforcement operations may seem indistinguishable from combatants.

The responsibility for working out whether a situation is governed by the Safety Convention regime or humanitarian law will lie with the commanders and soldiers in the field, and the criteria on which they must rely are ill defined and probably unworkable in practice. It is difficult to know what regime is applicable to a situation such as Somalia, in which the Geneva Conventions were stated not to apply, yet the UN forces viewed “everyone on the ground in that vicinity [as] a combatant.”

The crucial questions of UN liability for violations of humanitarian law and the extent to which UN forces deployed in an area are responsible for preventing imminent violations are also left vague. Respect for UN forces is likely to be undermined if they make no effort to prevent violations of humanitarian law, and it will certainly be undermined if they actively participate in such violations. Most lightly armed peacekeepers will not be in a position to prevent large-scale abuses, but it does not seem right to allow UN forces to stand idly by in circumstances where breaches of humanitarian law are taking place in their area of operations. The Security Convention provides that nothing shall affect the applicability of humanitarian law and universally recognized standards of human rights to UN operations. This does not, however, clarify when humanitarian law applies, or the extent of UN obligations to uphold the relevant norms and principles.

As a compromise document, troop contributors may take some solace from the fact that the troops serving with missions are protected by the terms of the Safety Convention. Although the convention represents an important step forward and accession by all states party to it should be encouraged, it will be ineffective as a means of prosecuting criminals if the criteria by which such crimes are defined remains unclear. ☹

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the Bush administration has sent mixed messages about its support. The administration has twice notified the Senate Foreign Relations Committee that it supports ratification of CEDAW, but a small minority on the far right has been pressuring the administration to change its position, citing objections to elements of the treaty that have already been addressed in the RUDs, or taking the non-binding recommendations of the CEDAW Committee out of context. The administration is now showing signs of yielding to that pressure. In July, the administration cited the need for the Department of Justice to conduct another review of the treaty. It has not been forthcoming with results of that review, or even a timeline.

While U.S. Senate action has been stalled, support for ratification has continued to come from the states. To

date, legislatures in nine states have endorsed U.S. ratification: California, Hawaii, Iowa, Maine, Massachusetts, New Hampshire, New York, North Carolina, and Vermont. The Connecticut State Senate and the House of Representatives in Florida, South Dakota, and Illinois also have endorsed U.S. ratification.

Secretary of State Colin Powell observed, “In today’s world, any American secretary of state, male or female, must pay attention to the issues affecting the rights and well-being of women—over half the world’s population. Women’s issues affect not only women; they have profound implications for all humankind. Women’s issues are human rights issues. . . . We, as a world community, cannot even begin to tackle the array of problems and challenges confronting us without the full and equal participation of

women in all aspects of life.”

Strong rhetoric on women’s human rights is important, but action is more important. With Republican control of Congress, the president’s leadership will hold more sway than ever. As a treaty that establishes a badly needed human rights standard for the treatment of women and girls, CEDAW deserves strong U.S. backing. U.S. ratification of CEDAW will give action to President Bush’s statement: “A thriving nation will respect the rights of women because no society can prosper while denying opportunity for half its citizens.” ☹

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