

## **CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL**

### **OPTIONAL PROTOCOL TO THE CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL**

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#### **Convention on the Safety of United Nations and Associated Personnel**

The neutrality of the United Nations and the idea that every State and its people would accept and respect this universal organization and believe that it is acting for peace and the good of every human being was shattered almost at the early stages of the establishment and activities of the United Nations. As early as 1948, with the killing of United Nations peacekeepers in Palestine, culminating in the assassination of Count Bernadotte, the Palestine Mediator, and his assistant, Colonel Serot, in Jerusalem (see United Nations document S/1005 of 17 September 1948), it became clear that the United Nations was not always welcomed by all the parties involved in a conflict.

However, for the next 45 years, the sporadic threat to United Nations personnel in the field was not sufficiently serious to be considered an obstacle to the performance of the function of the Organization. It was accepted that United Nations personnel would be exposed to occasional threats. Minor and infrequent threats were viewed inherent in the environment in which the Organization operated. Like the constant threat of being bitten by a malaria mosquito or catching cholera in certain regions, it was simply taken for granted that United Nations personnel would be burglarized or even killed, if they happened to be in the wrong place at the wrong time.

But as of 1992 the nature and the frequency of threats began to change. The threat to United Nations personnel was directed explicitly to voice disagreement with and opposition to the decisions of the Organization with regard to its Charter mandates. United Nations personnel were now targeted precisely because they worked for the Organization. In addition, United Nations operations in impoverished areas of the world led to yet further resentment on the part of the local population who viewed United Nations personnel as representing a superior economic class. This generated animosity against United Nations personnel justifying, in the mind of the local population, attacking United Nations personnel and property.

By 1992, it became clear that the Organization should be taking some steps. In his An Agenda for Peace (A/47/277 – S/24111), the Secretary-General of the United Nations at the time, Boutros Boutros-Ghali, commented that an ineluctable consequence of the increased role of the Organization in preventive diplomacy, peacemaking and peacekeeping operations seemed to be an escalation to an intolerable level in risks to life and limb of United Nations and associated personnel. He admitted that there had been “an

unconscionable increase in the number of fatalities” of United Nations personnel and indicated that “innovative measures will be required to deal with the dangers facing United Nations personnel” (para. 66). It was against this factual background and in response to concerns expressed by the Secretary-General that in 1993 New Zealand and Ukraine proposed the drafting of a convention for the protection of United Nations personnel leading to the adoption of the Convention on the Safety of United Nations and Associated Personnel on 9 December 1994 (General Assembly resolution 49/59).

The Convention was a quick attempt to fill a legal vacuum, mindful that there were a number of reasons behind the escalation of attacks against United Nations personnel that could not be resolved by a legal instrument. Prevention of attacks against United Nations personnel requires operational measures which have little to do with legal steps. The Convention imposes an obligation on a State hosting a United Nations operation to protect United Nations personnel and property. Considering that many United Nations operations are conducted in failed States or States where Governments usually do not have complete police power over their territory, clearly there can be no realistic expectations for such protection. There was no illusion that the effect of the Convention on preventing or reducing attacks against United Nations personnel would be at best minimal. The purpose of the Convention is to prevent or at least reduce any impunity for those who attack United Nations personnel or property. As in the case of any other penal legal instrument, it was the hope of its negotiators that this Convention would have some indirect effect on reducing attacks against United Nations personnel and property. However, since the adoption and the entry into force of the Convention, attacks against United Nations personnel have continued and in some cases even escalated.

The Convention was negotiated in one year. It is a criminal law instrument, based on a prosecute or extradite approach similar to other conventions, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages, which were previously adopted. It has a modest goal of criminalizing certain offences against United Nations personnel. The Convention did not intend to apply to all operations nor to all United Nations personnel, but to specific operations and certain categories of personnel. Articles 1 and 2 of the Convention dealing with definitions and scope of application are the key provisions of the Convention and took most of the negotiating time.

The Convention applies to “United Nations personnel” and “associated personnel” (article 1 (a) and (b)). “United Nations personnel” are individuals engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation, or other officials and experts on mission. It also includes other officials and experts on mission of the United Nations and specialized agencies or the International Atomic Energy Agency (IAEA) who are present in an official capacity in the area where a United Nations operation is being conducted. This group of individuals may not have been deployed in connection with a particular operation covered by the Convention, but they happen to be in the area of risk and as such could become targets of attacks. The prime example is personnel of the High Commissioner for Refugees operating in the same zone where a peacekeeping operation is being conducted. These individuals are exposed to the same risk as those United Nations personnel engaged in the peacekeeping operation in the same zone.

“Associated personnel” includes other individuals assigned by the Secretary-General or by a specialized agency or the IAEA with the agreement of the competent

organ of the United Nations in support of the fulfilment of a United Nations operation. This group of individuals also includes those assigned by a Government or an intergovernmental body with the agreement of the competent organ of the United Nations or deployed by humanitarian non-governmental organizations (NGOs) or agencies under an agreement with the Secretary-General or with a specialized agency, to carry out activities in support of the fulfilment of the mandate of a United Nations operation. This group of individuals was included in recognition of the complexities of United Nations operations and of the reliance of the Organization on NGOs for the fulfilment of certain important aspects of the Organization's mandates, particularly in humanitarian relief operations. The negotiation on who would fall in the category of associated personnel was difficult precisely because it included NGOs. A number of States, particularly from developing countries, were suspicious of NGOs and did not want to assume any special responsibility for their protection.

Many of the negotiators agreed that the Convention should not apply to all United Nations operations. In their view, what justified the special imposition of certain obligations on States was the special risk that was inherent in certain types of United Nations operations. So the element of risk has to be evident in the United Nations operations to trigger the application of the Convention. The operations covered by the Convention are (i) those established by the competent organ of the United Nations, (ii) conducted under the authority and control of the United Nations, and (iii) fall within one of two specified categories (article 1 (c)). Under the first category, the operation should be for the purpose of maintaining or restoring international peace and security. These are peacekeeping operations. The second category includes any other operation where the Security Council or the General Assembly has declared for the purposes of the Convention that there exists an exceptional risk to the safety of the personnel participating in the operation. The requirement that the operation should be conducted under United Nations "authority and control", may be interpreted more broadly to include also those authorized by the Security Council or the General Assembly but under international or national command and control. This interpretation is also consistent with the object and purpose of the Convention; namely that United Nations operations are "conducted in the common interest of the international community and in accordance with the principles and purposes of the Charter" and that "existing measures of protection for the United Nations and associated personnel are inadequate" (preamble paras. 3 and 6).

Under Article 24 of the Charter of the United Nations, the Security Council is responsible for the maintenance of international peace and security, so it is reasonable to assume that all operations authorized by the Security Council fall within the scope of the Convention. The Convention does not define "operation", but throughout the negotiations, it was clear that the intention was for that word to apply to "peacekeeping" or "peace-enforcement" types of activities. Therefore it is reasonable to assume, *ceteris paribus*, that all the operations undertaken by the Security Council will fall within the scope of the Convention unless they are excluded by virtue of article 2, paragraph 2, of the Convention (see below). Likewise, operations authorized by the General Assembly for the maintenance of international peace and security through Uniting for Peace types of resolution, will fall within the scope of the Convention. For other operations, there is a requirement for a declaration of risk by the Security Council or the General Assembly. The Secretariat and some States were not happy with this restriction on other operations. They felt that for political reasons, neither the Security Council nor the General Assembly would make such a declaration, nor would troop-contributing States agree, for domestic political reasons, to send their troops to locations and operations which the Organization

publicly declares as risky. This political concern proved to be correct and was one of the reasons for the subsequent attempt to expand the scope of the Convention by a Protocol (which will be discussed below).

Paragraph 2 of article 2 excludes the application of the Convention to United Nations operations which are authorized by the Security Council as an enforcement action under Chapter VII of the Charter, in which any of the personnel are engaged as combatants against organized armed forces, and to which the law of international armed conflict applies. The intention was to exclude the application of the Convention in cases where international humanitarian law is applicable. The purport of the exclusion clause in paragraph 2 of article 2, however, is not entirely clear and is open to interpretations which may not have been anticipated at the time of the negotiation of the Convention (see Mahnoush H. Arsanjani, "Defending the Blue Helmets: Protection of United Nations Personnel", *The United Nations and International Humanitarian Law*, pp. 115, 132-145).

During the negotiations, some delegations requested that United Nations and associated personnel should bear their identifications so as to be easily recognizable. This was to prove that the attacker knowingly selected the United Nations personnel or property as target. This suggestion was not accepted since sometimes bearing the United Nations distinctive identification would in fact prompt attacks against the personnel. For this reason, article 3, while requiring that military and police components of United Nations operations and their vehicles, vessels and aircraft bear distinctive United Nations identification, nevertheless allows for exceptions "unless otherwise decided by the Secretary-General of the United Nations." Similarly, United Nations and associate personnel are only required to "carry" appropriate identification documents. This provides a degree of flexibility and discretion as to when and to what extent the United Nations identification should be visible.

The Convention requires the United Nations and associated personnel to respect the laws and regulations of the host States (article 6), while the host States have the duty to ensure the safety and security of the United Nations and associated personnel (article 7).

Article 8 aims at addressing the recurring practice of detaining or holding hostage United Nations personnel. It requires that except as otherwise provided in an applicable status-of-forces agreement, if any United Nations or associated personnel has been captured or detained in the course of the performance of their duties and their identity has been established, they shall not be subject to interrogation and they shall be promptly released and returned to the United Nations or other appropriate authority. Under this article, pending their release, United Nations or associated personnel shall be treated in accordance with universally recognized human rights and the principles and spirit of the Geneva Conventions of 1949. It is rather curious that a reference is made to the Geneva Conventions in article 8, while paragraph 2 of article 2 of the Convention specifically excludes its application to operations to which the law of international armed conflict applies.

Crimes against United Nations and associated personnel are defined in article 9. Articles 10 (establishment of jurisdiction), 13 (measures to ensure prosecution or extradition), 14 (prosecution of alleged offenders), 15 (extradition of alleged offenders) and 16 (mutual assistance in criminal matters) establish the principle of prosecute or extradite.

Article 20 lists five without prejudice provisions. Article 21 provides that “[n]othing in this Convention shall be construed so as to derogate from the right to act in self-defence.” As drafted, this provision applies to all individuals and States that might be involved in a United Nations operation covered by the Convention. It is unclear if this article would affect the application of any of the provisions of the Convention. This is particularly relevant with the expansion of the notion of self-defence and the revision of the rules of engagement of some peacekeeping operations which allow the use of force for the accomplishment of the mandate of the operation.

Article 22 selects the International Court of Justice as the final venue for dispute settlement between the parties to the Convention if attempts at negotiation and arbitration fail. A review conference may be held under article 23 if the majority of States parties so decide.

A few years following the conclusion and entry into force of the Convention, its shortcomings became more evident. First, it was manifestly clear that the Convention, like any other criminal law instrument, did not have any deterrent effect. In addition, many of the States in whose territory United Nations personnel were targeted had not ratified the Convention and were unlikely to do so in the near future. The shortcomings of the Convention, as a comprehensive legal instrument, drew sufficient attention to encourage some Governments to try to resolve them. The three main areas requiring further work were identified: first, how to apply the provisions of the Convention in the host States of United Nations operations that are not parties to the Convention; second, how to identify associated personnel covered by the Convention; and finally, how to expand the scope of operations not requiring a declaration of risk by the Security Council or the General Assembly.

General Assembly resolution 57/28 made three important recommendations to the Secretary-General, which also addressed the first two problems mentioned above. It recommended that the Secretary-General should include key provisions of the Convention in future and existing status-of-forces, status-of-mission and host country agreements negotiated between the United Nations and those countries (clearly those not parties to the Convention) (para. 3). It recommended that the Secretary-General advise the Security Council or the General Assembly, as appropriate, where in his assessment circumstances would support a declaration of exceptional risk for the purposes of article 1 (c) (ii) of the Convention (para. 4). This was an attempt to turn the making of a declaration of risk into an administrative and technical assessment devoid of political implications.

The fact that some NGOs could fall under the category of associated personnel and therefore become beneficiaries under the Convention was not welcomed by some States suspicious of the NGOs anyway. What made the situation even more difficult was that there was no way for host States to know which NGOs had become associated personnel in a particular operation. It is a common practice for the United Nations and its related organizations, particularly those involved in humanitarian relief operations, to involve through loose arrangements other private humanitarian agencies in the fulfilment of their mandates. Governments requested that they should be told which of these NGO staff had been elevated to the status of associated personnel. To address this concern, the resolution recommended that the Secretary-General prepare a standardized provision for inclusion in the agreements with NGOs indicating that they are associated personnel for the purposes of the Convention (para. 6). It also requested that the Secretary-General should, at the request of a State, provide information as to which NGOs are operating in that State with the status of associated personnel (para. 5).

The following year, the Secretary-General, in a report (A/58/187), responded to the requests in General Assembly resolution 57/28 and provided a number of clarifications and proposals. One of the proposals was a standardized provision for inclusion in the agreements with humanitarian non-governmental agencies indicating their status as associated personnel. The standardized provision reads:

“For the purposes of the Convention on the Safety of United Nations and Associated Personnel, persons deployed by [the humanitarian nongovernmental organization or agency] under this Agreement shall be considered “associated personnel within the meaning of article 1 (b) (iii) of the Convention.” (para. 24)

The General Assembly took note of the provision but nevertheless reiterated its demand that the Secretary-General should make available to Member States the names of organizations or agencies that had concluded such agreements (General Assembly resolution 58/82, para. 9).

Concerns for the protection of United Nations and associated personnel did not stop with the adoption of the Convention. The International Law Commission in its final draft on the Draft Code of Crimes against the Peace and Security of Mankind included “Crimes against United Nations and associated personnel” (article 19). This was influential in the negotiations on the Rome Statute of the International Criminal Court for including something about United Nations operations. Article 8 of the Rome Statute in defining war crimes included in paragraph (2) (b) (iii) as war crimes “[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilian objects under the international law of armed conflict”.

#### **Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel**

The entry into force of the Convention on the Safety of United Nations and Associated Personnel did not deter or reduce attacks against United Nations personnel. In addition, it became clear that, as was predicted by the Secretary-General, the requirement of a declaration of risk by the Security Council or the General Assembly to cover a host of other activities of the United Nations operations whose personnel were the target of attacks was impractical. The World Summit in 2005 provided further impetus for the idea to negotiate a protocol expanding the scope of legal protection of United Nations and associated personnel (General Assembly resolution 60/1, para. 167). This led to support on the part of a sufficient number of States for the expansion of the scope of the Convention. However, many developing countries remained opposed to that expansion. To breach the gap, it was agreed to opt for an optional protocol which would leave the Convention intact and would affect only those parties to the Convention that choose to also become party to the protocol. As a result, the Optional Protocol to the Convention was adopted on 8 December 2005 (General Assembly resolution 60/42).

Since there was strong opposition to the expansion of the scope of “personnel”, the Optional Protocol only expands the scope of “operations” and as such it makes it applicable to a larger number of staff. Article II, paragraph 1, of the Optional Protocol expands the scope of the Convention to the following operations without the declaration of risk:

“(a) Delivering humanitarian, political or development assistance in peacebuilding, or

(b) Delivering emergency humanitarian assistance.”

Paragraph 3 of the preamble of the Optional Protocol recognizes that these operations entail “particular risks for the United Nations and associated personnel”. Therefore, the Protocol recognizes that a much wider category of United Nations operations involve risk of similar degrees confronting the personnel in operations for the purpose of maintaining international peace and security covered under article 1 (c) (i) of the Convention. This expansion of the definition of a United Nations operation in the Optional Protocol might make it easier and provide further justification for the Security Council or the General Assembly to treat a declaration of risk as routine and technical and to minimize its political significance in the context of the Convention and for those States not parties to the Optional Protocol.

Since the negotiations on the Convention, many delegations were concerned that the Convention should not apply to any permanent United Nations office such as headquarters of the Organization or its specialized agencies established under an agreement with the United Nations. While this exclusion was not included in the Convention, it was included in article II, paragraph 2, of the Optional Protocol.

Some States were opposed to the inclusion in article II, paragraph 1 (b), of operations delivering emergency humanitarian assistance. To agree to the adoption of the Optional Protocol they asked that there should be an opt-out option for States with respect to that paragraph. Paragraph 3 of article II provides that opt-out option, but with a twist. It is limited to emergency operations for the “sole purpose of responding to a natural disaster”. It therefore does not apply to complex emergencies which may also involve natural disasters. There is also an ambiguity as to whether a State may make a general opt-out declaration, for example at the time of ratification of the Optional Protocol. The language of paragraph 3 supports the argument that such a declaration shall be made each time prior to the deployment of the operation. The provision does not mention “a State” or “any State”, but refers to a “host State” which is defined in article 1 (d) of the Convention as a State in whose territory a United Nations operation is conducted. This construction requires an opt-out declaration for every time that such an operation is planned to take place in a host country. This difference in interpretation existed at the time of drafting and adoption of the Protocol, but neither side attempted to change the language of the provision.

## **Related Materials**

### ***A. Legal Instruments***

Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, Treaty Series, vol. 2187, p. 3.

### ***B. Documents***

Cablegram from Foreign Minister of Provisional Government of Israel dated 17 September 1948 addressed to the Secretary-General concerning the assassination of United Nations mediators (S/1005), 17 September 1948.

An Agenda for Peace. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992 (A/47/277 – S/24111), 17 June 1992.

General Assembly resolution 57/28 of 19 November 2002 (Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel).

Report of the International Law Commission on the work of its forty-eighth session, 6 May to 26 July 1996 (A/51/10, reproduced in Yearbook of the International Law Commission, 1996, vol. II, Part Two, chapter II, para. 50) (Draft Code of Crimes against the Peace and Security of Mankind).

Report of the Secretary-General on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (A/58/187), 28 July 2003.

General Assembly resolution 58/82 of 9 December 2003 (Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel).

General Assembly resolution 60/1 of 16 September 2005 (2005 World Summit Outcome).

***C. Doctrine***

M. H. Arsanjani, "Defending the Blue Helmets: Protection of United Nations Personnel", in L. Condorelli (ed.), *The United Nations and International Humanitarian Law*, Paris, Pedone, 1995, pp. 115-147.

Ch. Bourloyannis-Vrailas, "The Convention on the Safety of United Nations and Associated Personnel", *International and Comparative Law Quarterly*, vol. 44, 1995, pp. 560-590.

E. T. Bloom, "Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel", *American Journal of International Law*, vol. 89, 1995, pp. 621-631.

S. J. Lepper, "The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis", *Houston Journal of International Law*, vol. 18, 1995-1996, pp. 359-464.

H. Llewellyn, "The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel", *International and Comparative Law Quarterly*, vol. 55, 2006, pp. 718-728.