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American Bar Association Section of Interanational Law and Practice Standing Committee on World Order under Law Report to the House of Delegates - Safety of U.N. and Associated Personnel

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American Bar Association Section of International Law and Practice Standing Committee on World Order under Law Report to the House of Delegates*

Safety of U.N. and Associated Personnel

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports ratification by the United States of the CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL, and recommends that the United States and other parties interpret and apply the Convention in accordance with the following statements of understanding:

1. That Article 20(a) requires application of international humanitarian and human rights law to operations authorized not only under Chapter VII of the United Nations Charter, but also to those authorized under Chapter VI.
2. That the intent referred to in Article 9 means actual knowledge of the victim's status as United Nations or associated personnel.

*The House of Delegates adopted this Recommendation and Report in February 1996.

REPORT**

I. Explanation of Recommendation

This recommendation in intended to place the American Bar Association on record in favor of United States ratification of the Convention on the Protection of United Nations and Associated Personnel, subject to two clarifying statements of understanding.***

II. Background

The end of the Cold War has seen a radical expansion and transformation of United Nations peacekeeping operations. Between 1948 and 1988, according to the Congressional Research Service, the UN Security Council authorized only 13 peacekeeping operations, while in the five years between 1988 and 1993 it set up 20 such operations.[1]

The character of such operations has also changed. As the concept developed during the 1948–1978 period, peacekeeping, under Chapter VI of the UN Charter, involved the deployment of United Nations military, police and/or civilian personnel to a troubled region with the consent of all parties to a conflict, "to allow contending forces that wish to stop fighting to separate with some confidence they will not be attacked." This separation "is intended to create circumstances more conducive to political settlement."[2] Now, however, peace operations "are no longer limited to the interposition of small numbers of passive, unarmed observers. Today they also include more complex and sometimes more robust uses of military resources to achieve a range of political and humanitarian objectives."[3]

**The Recommendation and Report is the product of the Working Group on the Protection of U.N. and Associated Personnel. The Working Group was chaired by Burrus Carnahan and Richard Gaines. Its members included Lesley Freidman, Steven Goodman, and Carin Kahgen. The Working Group was part of the International Section's International Criminal Law Committee chaired by Stuart H. Deming. On behalf of the Section of International Law and Practice, Monroe Leigh and Professor Louis B. Sohn were extensively involved in working out the language of the Recommendation ultimately adopted by the Council.

***It should be noted that in both the Recommendation and Report the term "operations" is used interchangeably to refer to actions taken under Chapters VI and VII of the UN Charter. Enforcement operations are correctly characterized as "operations" under Chapter VII. However, technically, there is no such thing as a "Chapter VI operation." Chapter VI of the Charter does not refer to peacekeeping operations. The authority for consensual, nonenforcement actions is found in a combination of Chapters VI and VII, and, in particular, Article 40 of Chapter VII on provisional measures. "Operations" under Chapter VI has become a popular, shorthand reference to non-enforcement peacekeeping by the UN.

1. *See* Majorie Ann Browne, United Nations Peacekeeping Operations 1988–1993: Background Information (CRS Report for Congress, Nov. 15, 1993).

2. Stanley R. Sloan, Peacekeeping and Conflict Management Activities: A Discussion of Terminology 4 (CRS Report for Congress, Nov. 26, 1993).

3. *The Clinton Administration's Policy on Reforming Multilateral Peace Operations*, May 1994, at 11.

In principle, peacekeeping operations were, and are, to be distinguished from enforcement operations under Chapter VII of the UN Charter. The latter, as exemplified by the defense of South Korea in 1950[4] and the liberation of Kuwait in 1991,[5] may involve intensive armed conflict by forces acting under a UN mandate to take all necessary action to restore international peace and security in a region. Peacekeepers, on the other hand, are to fight only in self-defense against unlawful attacks against themselves.

In practice, however, it has often been difficult to maintain a clear distinction between peacekeeping and peace enforcement. The United Nations first faced this problem of "mission creep" in the Congo operations of the early 1960s, where a peacekeeping mandate gradually expanded to include the forcible disarming of mercenaries and eventually to the *de facto* conquest of the breakaway province of Katanga and its return to central government control by UN forces. As the UN role expanded, new and increasingly tougher UN Security Council resolutions were periodically adopted. Throughout this period, sometimes the UN forces in the Congo were fighting "defensively" as peacekeepers under Chapter VI, and at other times as enforcers in response to a threat to peace under Chapter VII.

The Congo operation was long regarded as a unique event that would never happen again. This assumption, like so many others, has proven to be a casualty of the end of the Cold War. As described by the Congressional Research Service, a similar situation of overlapping roles and mandates thus developed in Somalia:

> The UN operation in Somalia began as a humanitarian operation, accompanied by a peacekeeping presence. But opposition from Somali warlords and the military responses by UN forces have given the operation a clear peace-enforcing character, going beyond the expectations implied by the original mandate. The new mandate, known as UNOSOM II, which took effect on May 1, 1993, is referred to as the first UN peace-enforcement operation.[6]

Again, in the former Yugoslavia, the mandate for UN forces falls within the constraints of "traditional peacekeeping," "but some of the national units operating under UN Command in Bosnia have been forced into more active defense of their positions."[7] The Security Council mandate for NATO to carry out retaliatory air strikes in Bosnia refers to Chapter VII of the UN Charter, although such strikes are also considered, by the UN, to be essentially defensive.

All of these factors have made the world a more dangerous place for personnel involved in UN peace operations, most dramatically evidenced by violence against relief workers and peacekeeping forces in Somalia. Concerned with the dramatic increase in attacks on UN personnel, on December 9, 1993, the General Assembly

4. UNSC Res. 8 (1950).
5. UNSC Res. 678 (1991).
6. Stanley R. Sloan, Peacekeeping and Conflict Management Activities: A Discussion of Terminology 4 (CRS Report for Congress, Nov. 26, 1993).
7. *Id.*

adopted resolution 48/37 establishing an "*Ad Hoc* Committee on the Elaboration of an International Convention dealing with the Safety and Security of United Nations and Associated Personnel." The Committee met from March to August 1994, and recommended that the General Assembly establish a working group under the Sixth (Legal) Committee to continue the *ad hoc* Committee's work. This working group drafted the CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL, which was approved by the General Assembly on December 9, 1994.

III. Analysis of the Convention

General. The Convention broadly addresses two problems. Articles 3 through 7 deal with the status of UN peacekeeping personnel in relation to host governments. It thus replicates, in a general manner, the "status of forces" agreements the United States has concluded with host governments wherever its forces have been stationed. These articles are noncontroversial.

Articles 8–18 are aimed at the specific problems of attacks against and detention of UN personnel. Article 9 defines a series of new international crimes—"Crimes against United Nations and associated personnel."

Crimes against United Nations and associated personnel. Parties to the Convention will be required, where sufficient evidence exists, to either prosecute persons suspected of these crimes or extradite them to another party willing to prosecute. The Convention will thus assimilate crimes against UN personnel to other international crimes of universal jurisdiction, such as grave breaches of the 1949 Geneva Conventions on War Victims, aircraft hijacking and the taking of hostages.

Several members of the ABA Working Group noted with regret that the Convention does not provide for trial by an international tribunal, nor for extradition to such a tribunal. This may be an appropriate subject for future negotiation of a protocol to the Convention.

The crimes covered by the Convention are the "intentional commission" of the following:

(a) A murder, kidnapping or other attack upon the person or liberty of any of United Nations or associated personnel;
(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
(d) An attempt to commit any such attack; and
(e) An act constituting participation as an accomplice in any such attack, an attempt to commit such an attack, or organizing or ordering others to commit such attack.

The Convention is not self-executing, and the parties will be required to amend their national penal laws as necessary to make these offenses punishable. The

Convention does not define offenses with the precision required of a national penal code; rather, it describes types of offenses that must be covered in the national law of the parties. The meaning of key terms will vary from legal system to legal system (e.g., "intentional," "murder," "kidnapping," "attempt," "accomplice"), and a certain amount of flexibility must inevitably be accorded the parties to implement the Convention in good faith.

Persons protected. The terms "United Nations personnel" and "associated personnel" are broadly defined to include all persons engaged or deployed in support of a United Nations operation, regardless of whether they are military, police or civilian. As long as they are carrying out activities in support of the mandate of a "United Nations operation," the Convention protects those working for the United Nations, its specialized agencies, a government or intergovernmental organization, and persons deployed by a humanitarian non-governmental organization under an agreement with the United Nations (e.g., relief workers).

Operations covered. Under Article 1, United Nations operations are those established by a "competent organ" of the United Nations "in accordance with" the UN Charter and conducted under UN "authority and control," if one of two other conditions is met. Either the operation must be "for the purpose of maintaining or restoring international peace and security" *or* the Security Council or General Assembly must have declared, for purposes of the Convention, "that there exists an exceptional risk to the safety of the personnel participating in the operation."

The mandate authorizing an operation would presumably indicate that it was being conducted for the purpose of maintaining international peace and security. If not, a statement that the operation involved "exceptional risk" to UN and associated personnel could be included either in the original mandate or in a subsequent resolution.

Operations excluded. Article 2, paragraph 2 of the Convention excludes from its scope certain operations under Chapter VII. The Convention does not apply to Chapter VII enforcement actions "in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."[8] The Convention would not, therefore, have applied to United Nations–authorized combat operations in Korea (1950–53) and Kuwait and Iraq (1991).

Some members of the Working Group were critical of this exclusion. On balance, however, it appears to be well-founded both as a matter of legal principle and on practical grounds.

Applying the Convention to operations like those in Korea, Kuwait and Iraq would mean that ordinary soldiers, sailors and low-ranking officers of the armed forces opposing the UN operation would be considered international criminals.

8. *Cf.* Article 20(a) of the Convention, which provides that "[n]othing in this Convention shall affect . . . [t]he applicability of international humanitarian law. . . ."

Upon capture by UN forces, all would be subject to prosecution just as if they had individually committed war crimes or crimes against humanity.

As a matter of principle, however, international law has always rejected the argument that ordinary soldiers and officers, not involved in policy-making, should be held criminally liable for fighting on the wrong side in an illegal war. In modern war all sides claim to be fighting in self-defense, and it is impossible for an ordinary citizen or soldier to tell whether his or her government's position is justified or only propaganda. This approach was adopted by Allied war crimes tribunals after World War II.[9]

As a practical matter, too, it is undesirable for all members of the armed forces opposing a UN Chapter VII operation in combat to be regarded as criminal. Soldiers expecting to be treated as criminals after capture would be much less likely to surrender, and much more likely to conduct a desperate resistance.

Also, it is generally conceded that an expectation of reciprocity lies behind the practical implementation of much of the law of armed conflict. It will be easier to secure humane treatment and early release of captured UN personnel if their captors know that they will be treated as prisoners of war if they surrender to UN forces. On the other hand, if is becomes generally known that any combatant capturing UN forces will be subject to trial or extradition under the Convention, a temptation will arise to eliminate the main potential witnesses for the prosecution by killing the UN personnel, or refusing to allow them to surrender in the first place.

Problems foreseen. Difficulty of determining when the Convention applies. While Article 2 excludes, for good reasons, enforcement actions authorized under Chapter VII of the UN Charter, that exclusion may not be sufficient in practice. In the Congo, Somalia and the former Yugoslavia, the line between Chapter VI peacekeeping and Chapter VII enforcement has not always been clear, either to the UN forces or to outside observers. Overlapping Security Council resolutions were passed in all these situations, and it is not always clear under what authority a particular operation was conducted. UN forces operating under Chapter VI have sometimes pushed their self-defense authority to the limit and, some would say, beyond those limits, as in the Congo.

International lawyers may, after discussion, come to a consensus that a particular operation was based on Chapter VI or on Chapter VII, but it is asking too much for a Somali clan warrior or Bosnian militiaman to know whether or not he is becoming an international criminal by firing at UN troops or aircraft. The

9. *See, e.g.*, The Hostages Case (US Military Tribunal, Nuremburg, Germany, 1948); The High Command Case (US Military Tribunal, Nuremburg, Germany, 1948); *In re* Zuehlke (Netherlands Special Court of Cassation 1948); *cf.* Judgement of the International Military Tribunal for the Far East (Tokyo, Japan, 1948) (not every combat death and injury caused by an aggressive war can be treated as criminal).

fog of war unfortunately obscures peace operations as well, and there is no reason to believe that *de facto* armed conflicts will not arise out of future peacekeeping operations as they have in the past.

The fog is thickened by Articles 20 and 21 of the Convention. The former, entitled *Savings clauses*, provides in pertinent part as follows:

> Nothing in this Convention shall affect:
> (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and associated personnel or the responsibility of such personnel to respect such law and standards.

The phrase "international humanitarian law" is a term of art, referring to that portion of the international law of armed conflict protecting war victims. Much of that law is codified in the four 1949 Geneva Conventions. These Conventions cover the sick and wounded on land (Convention I), the sick, wounded and shipwrecked at sea (Convention II), prisoners of war (Convention III) and civilians (Convention IV) in international armed conflicts.

This paragraph may have the practical effect of expanding the exception in Article 2, paragraph 2, of the Convention on UN personnel. If UN or associated personnel become involved in a *de facto* international armed conflict, Article 20(a) requires that the Third Geneva Convention on Prisoners of War be applied to combatants opposing the UN operation, whether or not that armed conflict is an "enforcement action" under Chapter VII of the Charter. It is true that the Third Geneva Convention permits prisoners of war to be tried for offenses committed before capture (*e.g.*, the US prosecution of General Noriega for drug offenses). However, the actions made criminal by Article 9 of the Convention on UN personnel are precisely those that combatants are privileged to engage in under the international law of armed conflict—attacking, killing and capturing members of the enemy force. Applying Article 9 of the Convention on UN personnel during an international armed conflict could eviscerate the protection accorded prisoners of war under the Geneva Conventions. In this situation, Article 20 could be read to require that the Geneva Conventions take precedence over Article 9 of the Convention on UN personnel.

However, in the view of the U.S. negotiators of the Convention, the Article 20(a) savings clause is not intended to cause the Geneva Conventions regime to take precedence over the Convention, but merely reflects the fact that the Convention does not replace or prevent application of the humanitarian law regime. It is Article 2 of the Convention which specifies when the Convention applies or does not apply.

Further confusion may be created by Article 21 of the Convention, which states that, "[n]othing in this Convention shall be construed so as to derogate from the right to act in self-defense." It is not clear whether this Article refers to the right of individual self-defense under national penal law or the right of

national self-defense in international law, or both. If the former, it is not clear whether the right of self-defense should be determined by the law of the forum or the law of the state in which the alleged offense occurred.

Finally, it should be noted that, except perhaps for the ambiguous provisions of Article 21, the Convention does not state whether the protection of UN personnel can be defeated if they act outside their mandate. If a UN peacekeeping force acting under Chapter VI goes beyond the strict limits of self-defense, it can be argued that it is acting *ultra vires* and should lose any protection it may have under the Convention.

Beyond this, in both the Congo and Somalia, serious allegations were made that UN forces had themselves engaged in human rights violations. It is not clear how such violations of international legal standards would affect the position of UN personnel under the Convention. In the case of the young thief who was tortured and eventually killed by Canadian forces in Somalia, suppose that his relatives had used force to attempt to rescue him from his tormentors. If the Convention was applied literally, they would thereby have become international criminals for attacking UN personnel.

Punishing combatants merely because they fight on the wrong side is contrary to long-standing principles of international law. From a criminal law policy standpoint it is also questionable whether punishment should be threatened for specific acts when the perpetrators have little opportunity to know the facts (e.g., whether the UN is acting under Chapter VI or VII of the Charter) that make those acts criminal. The deterrent effect of such threats will be minimal.

It is worth repeating that attempts to apply the Convention to ambiguous situations could reduce the protection accorded UN personnel in practice. If members of a force that is *de facto* in an armed conflict with UN forces learn that, despite Article 20(a), they will not be treated as prisoners of war, but rather be regarded as criminals, then they will have little motivation to grant quarter to UN troops or to treat humanely those they do capture.

IV. Recommended Action

In the view of many, the Convention provides important protections for persons who attack peacekeepers under UN mandates, and that criminalizing all such attacks, unless involving combat in a Chapter VII situation, is an appropriate response to the current realities of international peacekeeping. Peacekeepers under non-Chapter VII mandates are acting in a police function, and it is not appropriate to simply punish combatants simply because they fight on the wrong side; it does no more than define and prescribe punishments for a set of impermissible acts, analogous to grave breaches under the Geneva Conventions, and thus is consistent with the application of humanitarian law.

The object and purpose of the Convention are laudable and worthy of support by the American Bar Association. If the Convention is applied literally, however,

there are situations in which it could actually decrease the safety of UN and associated personnel. The United States can and should contribute to preventing such a result by ratifying the Convention subject to specific statements of understanding.

While the Convention refers to "intentional commission" of the offenses defined in Article 9, it does not further define the required *mens rea*. Some of the difficulties noted above could be avoided if the required intent is defined to include actual knowledge of the victim's status as part of the United Nations or associated personnel. A statement of understanding to that effect should accompany the US instrument of ratification.

Although the *mens rea* language in this Convention is the same as in the Convention on the Protection of Internationally Protected Persons, Including Diplomatic Agents, and in that context the United States did not place a special *mens rea* requirement in its implementing legislation, to be precise, the *mens rea* for this Convention should include knowledge of the victim's association with the United Nations.[10] It need not include knowledge of the legal consequences of that fact, i.e., that such persons are defined as United Nations or associated personnel by the Convention, or that the Convention protects them. Neither should it be required that the accused know the exact legal classification of the victim under the Convention (as "United Nations personnel" or "associated personnel"), nor that the accused know the international legal bases for the peacekeeping mission (e.g., Chapter VI or VII of the Charter, and the scope of the resolutions authorizing the action). Disposition of such issues would be governed by the generally accepted principle that ignorance of the law is no excuse.

In most cases, the required actual knowledge, if not admitted by the accused, would have to be proven by circumstantial evidence. This might include, *inter alia*, the uniform and insignia worn by the victim, the victim's presence in or around a marked UN vehicle, the posting of signs and flags identifying peacekeeper facilities, and general knowledge in the neighborhood of the international status of certain persons, areas and vehicles.

Most remaining problems could be handled if it were made clear that the Convention does not apply to *any* situation that has risen to the level of an armed conflict to which the international laws of war apply, and not merely to conflicts under Chapter VII authorization. Again, a statement of understanding to that effect should accompany US ratification.

Respectfully submitted,
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Chair

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10. *See* Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AJIL 621, 626-27 (1995).