THE CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL: TIME TO DUST 'ER OFF, FIX 'ER UP, AND PROTECT SOME UN FORCES

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Thesis Abstract

THE CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL: TIME TO DUST 'ER OFF, FIX 'ER UP, AND PROTECT SOME UN FORCES

The international community has exposed UN forces to unnecessary risk over the last fifteen years because it has neglected to enforce the provisions of the Convention on the Safety of United Nations and Associated Personnel (the Safety Convention). In 1994, the United Nations and member states created the Safety Convention because they realized a dangerous and widening gap in protections for UN peacekeepers abroad. In establishing the Safety Convention, they filled a gap in the LOAC that had allowed UN forces to flounder under the minimal protections of common article 3 of the Geneva Conventions.

The Safety Convention is an international instrument that criminalizes attacks on UN forces and prohibits their detention. The Convention establishes individual criminal liability for those who attack UN forces during UN peacekeeping and peace enforcement operations. The Convention applies during all such UN operations, except those in which UN forces are party combatants to international armed conflict. The Convention is particularly beneficial for UN forces involved in non-international armed conflict: it criminalizes attacks on and capture of UN forces by non-state actors and unprivileged enemy belligerents, even if the UN forces are engaged in hostilities.

However, although the Safety Convention has been in force since 1999 and the United States participated heavily in negotiations for the Convention, the United States has not ratified the treaty and the international community does not depend upon it to protect UN forces. Most likely, the United Nations and member states have been disinterested in the Convention because the prosecution forums established within the Convention have proven ineffective. Under the Convention, offenders can be prosecuted in host nations, victims' states, or offenders' states. However, host nations rarely have the resources or judicial capacity to prosecute their own criminals, let alone those who attack UN forces. Victims' states, such as the United States, have too much bureaucratic uncertainty and inefficiency to prosecute numerous low-level attackers. Finally, offenders' states simply do not have sufficient interest in the crimes to prosecute attackers. Thus, in order to become a critical part of the "regime against impunity" for those who attack UN forces, the Safety Convention requires a more effective prosecution forum.

The best prosecution forum for the Safety Convention would be a multilateral or international tribunal. Such a tribunal should be modeled off of the UN's recently-proposed options for prosecuting piracy off the coast of Somalia. The UN Secretary-General has suggested several multilateral and international tribunal models that would translate well from piracy prosecutions to Safety Convention prosecutions. Establishing a prosecution tribunal under the Safety Convention would ensure standardized enforcement of its criminal provisions throughout the world, and would alleviate the burden on force-sending states to prosecute those non-state actors who attack their forces.

The United States should urge other states and the United Nations to establish a tribunal for prosecutions under the Safety Convention. Furthermore, the Department of Defense must champion the cause of this treaty; it is a tool to protect U.S. forces abroad. Overall, while the Safety Convention is not a perfect international instrument for protecting UN forces, it is far better than any other protections for UN forces involved in non-international armed conflict. Indeed, it is time to fix up this tool and send UN forces into battle with proper armor.

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I. Introduction

After a devastating earthquake in Haiti in January 2010, the United Nations Security Council significantly increased the number of peacekeepers participating in the United Nations Stabilization Mission in Haiti (MINUSTAH).[1] Under Chapter VII of the United Nations (UN) Charter, the Security Council authorized over 13,000 peacekeepers in Haiti to assist the Government of Haiti in protecting the population and preparing for elections.[2] As the peacekeepers assisted the country in recovering from the earthquake, a cholera outbreak threatened progress just before national elections.[3] In the heated political climate in mid-November, protesters attacked UN peacekeepers, firing weapons and throwing rocks at them. The UN forces (from Nepal) responded to the threat, shooting and killing a protestor. [4]

Two critical questions result from this encounter between protestors and UN peacekeepers: who, if anyone, will be punished and by whom? The Security Council resolution authorizes peacekeepers in Haiti to "ensure a secure and stable environment within which the constitutional and political process in Haiti can take place" and it demands "strict respect for the persons and premises of the United Nations and associated personnel . . . and that no acts of intimidation or violence be directed against personnel engaged in

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[1] After the 12 January earthquake, the Security Council authorized an increase to 8,940 military forces and 3,711 civilian police to support immediate reconstruction and stability efforts. S.C. Res. 1908, ¶ 2, U.N. Doc. S/RES 1908 (Jan. 19, 2010). The original mandate authorized up to 1622 Civilian Police and up to 6700 military advisors and forces to support the transitional government of Haiti, support human rights initiatives by the government, and support the political process. S.C. Res. 1542 ,¶ 4, U.N. Doc. S/RES/1542 (Apr. 30, 2004) [hereinafter S.C. Res. 1542]. Finally, in June the UNSCR increased the number of military forces to 8940 and civilian police to 4391. S.C. Res. 1927, U.N. Doc. S/RES/1927, ¶ 2 (June 4, 2010).

[2] *Id*.

[3] Joseph Guyler Delva, *Spoilers Trying to Sabotage Haiti Elections: U.N. Response*, REUTERS (Nov. 16, 2010), http://www.reuters.com/article/idUSTRE6AF5L220101116.

[4] *Id*.

humanitarian, development or peacekeeping work." [5] But it does not provide for prosecution of those who attack peacekeepers and it does not require the Haitian government to take action against attackers.[6]

Despite the fact that attacking peacekeepers is a war crime under the Rome Statute of the International Criminal Court (ICC),[7] the level of violence in this case is likely not sufficiently grave for the ICC to accept jurisdiction.[8] Haitian domestic courts could technically prosecute the attackers, but this is highly unlikely, as no international law requires domestic prosecution in Haiti.[9] On the other hand, will the peacekeepers be detained and prosecuted in Haiti for shooting and killing a protestor? Without a Status of Forces Agreement (SOFA), jurisdiction over potentially criminal acts committed by peacekeepers are seemingly left to the state in which the event occurs.[10]

Surprisingly, a multilateral treaty currently in force addresses these exact questions, preventing the detention of the peacekeepers and demanding the prosecution of the attackers. The Convention on the Safety of United Nations and Associated Personnel (Safety

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[5] S.C. Res. 1542, *supra* note 1, ¶ 2.

[6] *Id*.

[7] Rome Statute of the International Criminal Court, art. 8(3)(b), 17 July 1998, 2187 U.N.T.S. 90, *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm [hereinafter Rome Statute].

[8] A case must have sufficient gravity to justify action by the ICC. Rome Statute, *supra* note 7, art. 17(1)(d)); *see also* Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (Public Redacted Version), ¶¶ 28−34 (Feb. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf.

[9] Haiti is not a party to the Safety Convention. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363 [hereinafter Safety Convention]. No other international treaty requires domestic prosecution of UN force attackers.

[10] Note that in this case, the United Nations has a Status of Forces Agreement with Haiti which provides exclusive jurisdiction over U.N. peacekeepers in Haiti to the sending state. Agreement on the Status on the United Nations Mission in Haiti, ¶ 47, Mar. 15, 1995, 1861 U.N.T.S. 269.

Convention),[11] a key element in the "legal regime against impunity" for those who attack UN forces,[12] applies directly to this situation. Nepal, as it happens, is a state party to the Convention.[13] Under the Safety Convention, the Nepalese peacekeepers may not be detained or subjected to interrogation for shooting the attacking protesters.[14] In addition, Nepal has the right to assert jurisdiction over and prosecute the attackers.[15] However, despite its clear and critical application to current UN peacekeeping operations throughout the world,[16] the Safety Convention is rarely used to prosecute criminals who attack UN forces.[17] Indeed, the Safety Convention could be a primary weapon to fight the legal "regime of impunity"[18] for peacekeepers' attackers.

The premise of this paper is that the Safety Convention creates a distinct, important legal framework to protect UN forces, through prosecution of individuals who attack UN forces, and through prohibition of detention of UN forces. Although some provisions of the Safety Convention are controversial, it is a powerful tool to fight against a perceived "regime of impunity" for individuals who attack UN forces.

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[11] Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363 [hereinafter Safety Convention].

[12] OLA ENGDAHL, PROTECTION OF PERSONNEL IN PEACE OPERATIONS: THE ROLE OF THE 'SAFETY CONVENTION' AGAINST THE BACKGROUND OF GENERAL INTERNATIONAL LAW 3 (2007).

[13] Safety Convention, *supra* note 11.

[14] *Id*. art. 8.

[15] *Id.* art. 10.

[16] *See* Section V concerning the Scope of the Convention.

[17] ENGDAHL, *supra* note 12, at 6.

[18] *Id*. at 3.

However, without modification, the Safety Convention is not effective; states do not rely on it to prosecute those who attack UN forces. This paper asserts that the Safety Convention requires an improved prosecution forum to have more practical effect. Specifically, the UN and member states should establish a standing multilateral or international tribunal to efficiently try individuals who attack UN forces. The tribunal can be modeled after potential forums the UN is considering for prosecuting pirates off the coast of Somalia.

The paper is split into six primary parts[19] discussing the Safety Convention: its provisions, its supporting international law, its history, its scope, the U.S. position on the Convention, and proposals for improvement. The first part of the paper provides a synopsis of both the Convention's "prosecute or extradite" criminal liability framework, and other protections the Convention offers to UN forces. Second, the paper reviews customary international law background of the Safety Convention. This part also reviews the protections for UN forces under other current international instruments, including Status of Forces Agreements and UN Security Council Resolutions (UNSCRs). The third part of the paper details the history of the Safety Convention – why the UN initiated negotiations, why the U.S. became involved, and how the framers agreed on a final treaty. Fourth, the paper analyzes the intent, purpose, and scope of application of the Safety Convention. Such an evaluation is critical to understanding to whom and when the Convention applies, and why the Convention is still relevant today. The fifth part of the paper examines why the United States has not yet ratified the Safety Convention. The final, and most important, part of the paper suggests changes necessary to make the Safety Convention more practical and effective today. Specifically, the UN and member states should establish a multilateral or international

[19] Excluding the Introduction and Conclusion.

tribunal to prosecute offenders under the Safety Convention. Such a tribunal should be modeled after forums that the UN is considering for prosecuting piracy.

Finally, the paper will conclude with the proposal that, based on the unparalleled benefits the Safety Convention provides to UN forces, sending states should depend upon it more to protect their forces. States should ratify the Convention and require that it be incorporated into UN Security Council Resolutions authorizing the use of UN forces. Most importantly, the UN and member states must create and support a more effective forum for prosecution under the Convention, such as a multilateral or international tribunal. In the end, the United States should not provide troops for UN missions without proper recognition and application of the Safety Convention; to do so accepts unnecessary risk for U.S. forces.

II. What Is the Safety Convention?

The Safety Convention is "first and foremost, a criminal law instrument"[20] that establishes individual criminal liability for those who attack UN forces. In civilized societies, laws regulate individuals by establishing consequences for undesirable actions. The Safety Convention is the first international instrument to apply this conventional idea of criminal liability to regulate undesirable attacks on UN military forces. Thus, the Safety Convention protects UN forces through the use of criminal consequences. The Safety Convention also protects UN forces by requiring states party to protect UN forces from attack in their territory, and prohibiting detention of UN forces.

This part of the paper provides a synopsis of the critical "prosecute or extradite" provisions of the Convention. In addition, it provides an overview of other important protections that the Safety Convention provides to UN forces.

[20] ENGDAHL, *supra* note 12, at 272.

A. Overview of the Safety Convention's "Prosecute or Extradite" Mechanism

The Convention implements the idea of individual criminal liability through a "prosecute or extradite" (aut dedere aut judicare) mechanism.[21] The Safety Convention enumerates crimes, requires States Party to criminalize the crimes, establishes jurisdictional guidelines, and demands that States Party with jurisdiction either prosecute or extradite offenders.[22] The criminal prosecution elements of the Safety Convention are detailed in several articles in the middle of the treaty that were relatively uncontroversial during negotiations.[23] Article 9 of the Convention enumerates crimes for which individuals will be held individually criminally liable and requires that each state party to the Convention make the enumerated crimes illegal under their domestic law.[24] Article 10 discusses jurisdiction over the crimes enumerated in Article 9; Articles 13, 14 and 15 address the prosecution and extradition of offenders.[25] This section reviews each article in some detail.

Under Article 9, the following crimes "shall be made by each State party a crime under its national law:"

> "The *intentional* commission of: a) a murder, kidnapping or other attack upon the person or liberty of any 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

[21] *Id.* at 281.

[22] Safety Convention, *supra* note 11, art. 9−15.

[23] Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 HOUS. J. INT'L L. 359, 430 (1996).

[24] Safety Convention, *supra* note 11, art. 9.

[25] Safety Convention, *supra* note 11, arts. 10, 13−15.

attack… d) an attempt to commit any such attack; and e) an act constituting participation as an accomplice in any such attack…."[26]

Most of Article 9 was modeled directly after the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (IPP Convention), as discussed below.[27] Thus, it was relatively uncontroversial in negotiation. However, the "intentional" requirement inspired some debate.[28] State delegations wanted to include the intent element in Article 9 for different reasons: some thought it necessary because most all of the crimes enumerated require some intent under national codes; and some wanted to achieve the goal of separating intentional actions from negligent ones (such as car accidents).[29] Current scholarly debates also contemplates what type of evidence is required to prove intent. All agree that there must be some proof that the offender knew of the victim's status as a UN or associated person.[30] Article 3 of the Convention requires that police and military members of UN operations "bear distinctive identification," and requires that all UN and associated personnel carry proper identification.[31] While some scholars believe that proving proper identification under Article 3 may be a critical element in proving the offender's knowledge of the victim's status,[32] others do not believe that proving Article 3 identification of the victim is necessary to prove

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[26] *Id*. art. 9 (emphasis added).

[27] ENGDAHL, *supra* note 12, at 41.

[28] Lepper, *supra* note 23, at 430−31.

[29] *Id.*; *see also* Report of the Ad Hoc Committee on the Work Carried Out During the Period from 28 March to 8 April 1994, ¶P 112, U.N. Doc A/AC.242/2 (Apr. 13, 1994) [hereinafter the Report of the Ad Hoc Committee].

[30] Lepper, *supra* note 23, at 431; ENGDAHL, *supra* note 12, at 281−83.

[31] Safety Convention, *supra* note 11, art. 3.

[32] ENGDAHL, *supra* note 12, at 282−83

the offender's intent.[33] Overall, Article 9 is "one of the central provisions of [the Convention]" because it "defines the individual responsibility of persons who commit attacks against UN or associated personnel," despite debate surrounding the application of the "intent" element.[34]

Article 10 of the Safety Convention establishes circumstances under which states party establish criminal jurisdiction over offenders. A state party *must* establish jurisdiction over an offender when he commits an Article 9 crime in the territory of that state (generally, the host state), or the offender is a national of that state.[35] A state party *may* establish jurisdiction over an Article 9 crime or offender when a stateless offender resides in that State, when the crime is committed "with respect to" a national of the State (the victim is a national of the State), or if the crime is committed "in an attempt to compel that State to do or abstain from doing any act."[36] Finally, Article 10 creates a "universal jurisdiction" by requiring that a state party establish jurisdiction over an offender who is present in its territory, regardless of the State's "nexus to the offense, offender or victim."[37]

Articles 13 and 14 proactively require prosecution under the Convention, or extradition to another state for prosecution. Article 13 requires that the state in which the offender is present take appropriate measures to ensure "that person's presence for the purpose of prosecution or extradition."[38] Finally, Article 14 requires that, if a state in which an offender

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[33] Report of the Ad Hoc Committee, *supra* note 29, ¶¶ 111−12; *see also* Lepper, *supra* note 23, at 430−31.

[34] Lepper, *supra* note 23, at 430.

[35] Safety Convention, *supra* note 11, art. 10(1).

[36] *Id*. art. 10(2).

[37] *Id.* art. 10(4); *see also* Lepper, *supra* note 23, at 434 (discussing universal jurisdiction).

is present does not extradite the offender, the State submit the case to "competent authorities" for prosecution under the State's laws.[39]

Extradition is the focus of Article 15. The Convention recognizes that states have differing views on affecting extradition; some states, like the United States, require an extradition treaty as a condition of extradition, while others allow extradition with no treaty.[40] Article 15 allows states the option to consider the Convention a legal basis for extradition (in place of a treaty), if the state's domestic polices allow such consideration.[41] Notably, Article 15 does not specifically address the possibility of extradition to an international tribunal or an international body, such as the UN.[42] Though this is an unfortunate gap in the treaty's provisions, such extradition is likely still possible.[43]

Overall, the provisions of the "prosecute or extradite" mechanism of the Safety Convention are relatively straight forward and uncontroversial. A problem, however, exists in the Convention's assumption that prosecution in any state hosting UN forces (where the crimes occur) can and will happen. Host nation prosecution is unlikely during many UN operations because of the unstable nature of the host nations' legal systems, and because host nations may not be states party to the Safety Convention. Extradition to victims' or offenders' states is a more viable prosecution option, but likely will not result in efficient

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[38] Safety Convention, *supra* note 11, art. 13.

[39] *Id*. art. 14.

[40] Lepper, *supra* note 23, at 444−46.

[41] Safety Convention, *supra* note 11, art. 15.

[42] WALTER GARY SHARP, SR., JUS PACARII, EMERGENT LEGAL PARADIGMS FOR U.N. PEACE OPERATIONS N THE 21ST CENTURY 91 (1999).

[43] See discussion below in subsection VII.B.1.

prosecution of offenders.[44] Rather, the UN and sending states must establish a stronger forum, such as a multilateral or an international tribunal, for prosecution under the Safety Convention. Part VII below proposes multilateral and international tribunal alternatives for effective prosecution under the Safety Convention.

B. Other Protections Under the Safety Convention

While criminal liability for individual attackers is the primary protection that the Safety Convention provides UN forces, the Convention creates other safeguards as well. It requires states to take all measures to prevent attacks on UN forces within their territory,[45] and it requires the immediate release of any detained UN forces.[46] This section discusses those protections.

First, the Convention requires states to take affirmative measures to prevent attacks on UN forces. Article 7 states that United Nations and associated personnel "shall not be made the object of attack…."[47] Essentially, this prohibits states from attacking UN forces or preventing the forces from performing their mission.[48] Article 7 also requires that states "take all appropriate measures to ensure the safety and security of United Nations and associated personnel."[49] This clause places an affirmative duty on states to prevent nationals *and* non-state actors from attacking UN forces. In addition, Article 11 of the Convention

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[44] See discussion below in section VII.A.

[45] Safety Convention, *supra* note 11, arts. 7, 11.

[46] *Id*. art. 8.

[47] *Id*. art. 7.

[48] Lepper, *supra* note 23, at 423−24.

[49] Safety Convention, *supra* note 11, art. 7.

requires states party to prevent Article 9 offenses, and preparations for Article 9 offenses, against UN forces within their territory.[50] Though the Convention requires states to make Article 9 offenses illegal under national laws, Article 11 enables states to address preparations for Article 9 offenses in whatever manner they deem appropriate.[51]

The Safety Convention also protects UN forces against detention. While Article 9 criminalizes kidnapping of UN forces, Article 8 of the Convention requires states (or individuals) to immediately release captured or detained UN forces. Article 8 of the Convention states:

> Except as otherwise provided in an applicable status-of-forces agreement, *if United Nations or associated personnel are captured or detained* in the course of the performance of their duties and their identification has been established, *they shall not be subjected to interrogation and they shall be promptly released and returned to the United Nations* or other appropriate authorities. Pending their release, such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.[52]

Though not specified in the text, Article 8 arguably provides, on its own, exclusive jurisdiction over UN forces to sending states.[53] Thus, states could rely upon the Safety Convention to protect UN forces from host nation detention and prosecution;

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[50] *Id*. art. 11.

[51] Lepper, *supra* note 23, at 439−40.

[52] Safety Convention, *supra* note 11, art. 8. The Untied States actually proposed this clause for the Convention to satisfy the "immediate release" goal of PDD-25. Lepper, *supra* note 23, at 425.

[53] The US DoD delegate to the 1993 Convention, now Air Force Major General Lepper, suggests: "in an operation established under Chapter VII of the U.N. Charter – nonconsensual by definition – it is the United States' view that the sending State exercises exclusive jurisdiction and that a SOFA is unnecessary." Lepper, *supra* note 23, at 415. Alternatively, Professor Engdahl, a leading scholar on the Convention, believes that by rejecting proposals to include an exclusive jurisdiction clause in the Convention, it does not currently provide exclusive jurisdiction to sending states. ENGDAHL, *supra* note 12, at 272−74. Lepper suggests that the easiest solution is for the U.S. to ratify the Convention with a reservation or an understanding stating that the Convention does provide for exclusive jurisdiction to sending states. Lepper, *supra* note 23, at 416−17. Alternatively, states could enter into an additional protocol addressing the matter.

conducing Status of Forces Agreements with host nations not need be a sending state's primary concern. Most importantly, however, the Convention offers essentially complete protection from capture or detention for UN forces. When combined, Article 9's criminalization of kidnapping and Article 8's requirement for immediate release protect UN forces from capture and detention by state actors *and* non-state individuals and entities.

In sum, although the Safety Convention's strongest benefit to UN forces is its criminalization of attacks on UN forces, it provides ample additional protections. The Convention requires states to ensure the safety of UN forces, it requires states to prevent attacks and preparations for attacks on UN forces, it criminalizes kidnapping and capture of UN forces, and requires immediate release of any detained UN forces. As discussed immediately below, these protections may resemble clauses included in other international instruments, such as UNSCRs or SOFAs. However, the Safety Convention protections are much more thorough and dependable for UN military forces.

III. Protections for UN Forces under Customary International Law and Other International Instruments: Necessary, but not Sufficient

The Safety Convention builds upon customary international law principles of privileges and immunities for diplomats, and host states' duties to protect foreigners. Furthermore, the Safety Convention improves upon protections for UN forces that are offered under current instruments of international law. UN Security Council Resolutions (UNSCRs) and Status of Forces Agreements (SOFAs) generally mention safety and security of UN forces; however, their provisions are not as thorough or dependable as those detailed in the Safety Convention.

This part reviews the customary international law principles behind the Safety Convention, and reviews protections offered by current instruments of international law – UNSCRS, and SOFAs. Overall, these reviews will highlight the unique protections that the Safety Convention provides to UN forces.

A. Privileges and Immunities: Customary International Law Does Not Protect UN Military Forces

The idea of diplomatic immunity, protection for diplomats representing a sending state in a host state, has existed since the time of the Greek city-state.[54] The Vienna Convention on Diplomatic Relations codified customary international law on diplomatic immunity, granting diplomats complete immunity from criminal jurisdiction and partial immunity from civil jurisdiction in host states.[55] Also important is the idea of "international" immunity for representatives of international bodies. This section addresses the customary international law principles of diplomatic and international immunity; though these principles serve as a backdrop to the Safety Convention, they are not sufficient to protect UN forces from attack or detention.

"International immunities," or privileges and immunities for representatives of international bodies, began in the 19th century, but were first codified in the 1946 Convention on the Privileges and Immunities of the UN.[56] Traditional diplomatic immunity, retaining jurisdiction to the official's home state, did not apply properly to officials

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[54] Veronica L. Maginnis, *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 BROOK. J. INT'L. L., 989, 997 (2003).

[55] *Id*. at 100 – 1001; *see also* Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

[56] Maginnis, *supra* note 54, at 1010−12; *see also* Convention on the Privileges and Immunities of the United Nations, February 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16 [hereinafter Convention on the Privileges and Immunities of the UN].

representing international bodies.[57] The Convention on Privileges and Immunities of the UN protects high-level UN officials and representatives of members states, as well as officials of the UN and experts on mission. [58] The Convention allows officials to "be immune from legal processing with respect to words spoken or written and all acts performed by them in their official capacity."[59] United Nations staff members who qualify for protection as "UN officials" under the Convention are staff members who have been appointed by the UN Secretariat with a letter of appointment, according to regulations promulgated by the General Assembly. [60]

The Convention on Privileges and Immunities also protects "experts on mission," providing "immunity from personal arrest or detention" and "immunity from legal process of every kind. . . ."[61] The United Nations has extended this "experts on mission" to UN military forces in the past, but such extension was not a permanent solution to protect UN forces from attack or detention. In 1993, after Somali militants had captured CW2 Michael Durant in Mogadishu, the U.S. State Department and Department of Defense were uncertain and unclear as to CW2 Durant's legal status.[62] President Clinton directly addressed the issue and called for "broad legal status protection for U.S. personnel engaged in UN operations."[63]

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[57] Maginnis, *supra* note 54, at 1010−11.

[58] *Id*. at 1013.

[59] Convention on Privileges and Immunities of the UN, *supra* note 56, art. 18(a).

[60] U.N. Secretary-General, *Bulletin: Status, Basic Rights, and Duties of United Nations Staff Members*, U.N. Doc. ST/SGB/2002/13 (Nov. 1, 2002).

[61] Convention on the Privileges and Immunities of the UN, *supra* note 56, art. 22.

[62] Lepper, *supra* note 23, at 366. U.S. forces were participating in the United Nations Operation in Somalia II (UNOSOM II) in 1993.

[63] *Id*.

Supporting this effort, the U.S. mission to the UN pushed for the application of "experts on mission" status to some U.S. forces participating in UN peacekeeping operations.[64] The United Nations agreed that U.S. aircrews supporting the United Nations Protection Force (UNPROFOR) in Bosnia-Herzegovina should be granted diplomatic immunity and protections as "experts on mission" or their equivalent under the Convention on Privileges and Immunities.[65] However, this was an exception to normal practice. U.S. policy generally rejects parallels between military personnel and diplomats, as their missions, capabilities, and methods are very different.[66] Additionally, some UN members were reluctant to permanently extend "experts on mission" status to military personnel participating in UN missions.[67] Thus, extending protection to UN military forces under the Convention on Privileges and Immunities is not a sufficient or permanent solution to provide special protection and status to UN military forces.[68]

Furthermore, the Convention on Privileges and Immunities does not include criminal enforcement mechanisms to punish those who violate the Convention.[69] However, in 1973, the United Nations established a prosecution mechanism for anyone violating the protections provided for UN officials and experts on mission under the Convention on Privileges and

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[64] *Id*. at 368.

[65] *Id*.

[66] *See* Lepper, *supra* note 23, at 369.

[67] *Id*.

[68] *Id.* at 368−69 (calling the extension of the Convention on Privileges and Immunities of the UN to cover U.S. forces supporting UN missions a "band-aid" that provided a "quick short-term remedy for the Administration's concern that U.S. forces must be protected under international law").

[69] *Id*. at 367−68.

Immunities.[70] The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (IPP Convention) requires states party to criminalize the attack, kidnapping, and murder of "internationally protected persons."[71] It also requires States Party to take all practical measures to prevent such crimes, and requires States Party to ensure presence of offenders for prosecution or extradition for offenses (a "prosecute-or-extradite" mechanism).[72] As discussed in throughout this paper, the IPP Convention foreshadows much of what is covered by the Safety Convention.

Considering such foreshadowing, could the IPP Convention achieve the same goals as the Safety Convention in protecting forces participating in UN missions? "Internationally protected persons," as defined in the IPP Convention, are representatives or official of State or international organizations "entitled pursuant to international law to special protection from any attack on his person, freedom or dignity. . ."[73] It is unclear whether the IPP Convention could protect military forces participating in UN operations as "internationally protected persons." However, delegations to the Ad Hoc Committee discussing the Safety Convention considered this prospect and elected to create a separate international instrument specifically to protect UN military forces.[74] Delegates decided that merely creating an additional protocol applying the IPP Convention to military forces might not place sufficient

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[70] *Id*.

[71] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter IPP Convention].

[72] *Id*.; *see also* ENGDAHL, *supra* note 12, at 41. The Safety Convention is closely modeled on the IPP Convention.

[73] IPP Convention, *supra* note 71, art. 1.

[74] *See* ENGDAHL, *supra* note 12, at 209−10; *see also* Lepper, *supra* note 23, at 368−69.

importance on the special protections for such forces, and, more importantly, that the IPP Convention was designed to protect diplomats and officials, not military forces.[75]

Thus, the Safety Convention is rooted in customary international law principles of protections and immunities for diplomats and representatives of international bodies. Furthermore, it was foreshadowed by the IPP Convention, which instituted the mechanism of "prosecute-or-extradite" for those who violate the protections afforded to UN officials and experts on missions.[76] However, neither the customary principle of diplomatic immunity nor international agreements addressing diplomatic immunity is sufficient or specific enough to protect military forces participating in UN operations from attack, detention, or prosecution. Thus, the Safety Convention is a necessary tool, rooted in sound international law principles, to effectively protect UN forces.

B. Host States' Duty to Prevent Illegal Acts Against Foreigners: No Duty to Protect Foreigners Against Non-State Actors

Another customary international law principle imposes a requirement on all states to "exercise due diligence to prevent illegal acts against foreigners and to punish those convicted of perpetrating them." [77] However, as discussed in this section, this duty to protect foreigners does not require states to protect UN forces from belligerent, non-state actors.

Over a century of case law outlines a state's duty to protect foreigners, which is summarized in a Draft Convention on the International Responsibilities of States of Injuries

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[75] *Id*.

[76] ENGDAHL, *supra* note 12, at 41−3. Engdahl refers to the "prosecute-or-extradite" mechanism as *aut dedere aut judicare* and notes that the Convention Against the Taking of Hostages, Dec., 17, 1979, T.I.A.S. 11081, 1316 U.N.T.S. 206, also includes a "prosecute-or-extradite" mechanism.

[77] ENGDAHL, *supra* note 12, at 75.

to Aliens presented by Professors Louis Sohn and Richard Baxter of the Program of International Studies at Harvard Law School in 1974.[78] The Draft Convention states:

> Failure to exercise due diligence to afford protection to an alien, by way of preventative or deterrent measures, against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful if the act is criminal under the law of the State concerned, or the act is generally recognized as criminal by the principal legal systems of the world.[79]

However, international cases and arbitrations have indicated that Governments are not responsible for the acts of "revolutionaries," those whose purpose is to destroy the government, or responsible for those over whom the government has no control.[80] In general, states in which UN forces are present have significant insurgency problems and significant numbers of non-state sponsored (or sanctioned) fighters. Though the customary international standard may be due diligence to "prevent illegal acts against foreigners," if governments are not responsible for acts or punishment of "revolutionaries" or insurgents, states host to UN forces do not have a responsibility to protect peacekeepers from insurgent fighters. Thus, the affirmative duty created by the Safety Convention to prevent attacks by non-state actors on U.N forces is extremely important, even in light of the customary "due diligence" standard to protect aliens.

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[78] *Id*. at 71−2 (citing Louis B. Sohn & R.R. Baxter, *Convention on International Responsibility of States for Injuries to Aliens: Final Draft with Explanatory Notes By Louis B. Sohn and R.R. Baxter*, RECENT CODIFICATION 135 (1974).

[79] *Id*.

[80] *See* Monroe Leigh, *Judicial Decision, Decision of the Iran-United States Claims Tribunal*, 82 AM. J. INT'L L. 353 (1988); *see also* Yeager v. Islamic Republic of Iran, Case No. AWD 324-10199-1 (Iran-United States Claims Tribunal 1987); Rankin v. Islamic Republic of Iran, Case No.AWD 326-10913-2 (Iran-United States Claims Tribunal 1987) (these are cases between U.S. nationals and the Iranian Government affirming that the Government was not responsible for acts of revolutionaries until the revolutionaries had assumed a significant government role (and made policies regarding foreigners)); *see also* ENGDAHL, *supra* note 12, at 71 (discussing Sambaggio Case, Italy v. Venezuela, 10 R.I.A.A. 499 (Perm. Ct. Arb. 1903)).

Overall, customary and codified law regarding protections for diplomats and foreigners serve as a sound backdrop to the Safety Convention. However, the inapplicability of diplomatic protections to military forces and the unwillingness of the international community to hold states responsible for non-state actors leave a large gap for the Safety Convention to fill.

C. United Nations Security Council Resolutions (UNSCRs): All Bark and No Bite

Some United Nations Security Council Resolutions (UNSCRs) attempt to fill the gap between customary international law protections for foreign diplomats and special protection for military forces participating in UN operations. This section reviews past UNSCRs, revealing that the Security Council frequently does demand security and safety for UN forces. However, UNSCRs have no internal enforcement mechanisms, particularly against non-state actors. In fact, the Security Council has failed to follow-up on almost all UNSCR clauses "demanding" the safety and security of UN forces and "urging" host nations to enter into jurisdictional agreements regarding UN forces.

Reviewing past UNSCRs authorizing the use of UN forces under Chapter VII of the UN Charter reveals the weaknesses in UNSCRs' protections for UN forces. In 1993, the UN Security Council was very concerned with the number of attacks on UN forces.[81] Not only was this concern one of the driving forces behind the creation of the Safety Convention,[82] but it also lead the Security Council to pass a resolution emphasizing the importance of security of UN forces and host-nations' responsibilities to protect UN forces. Resolution 868 stated, in part, that the Security Council:

[81] S.C. Res. 868, U.N. Doc. S/RES/868 (Sep. 29, 1993) [hereinafter S.C. Res. 868].

[82] See discussion in section IV.A. (noting impetuses for the UN initiating the Safety Convention).

> 4. Confirms that *attacks and use of force against persons engaged in a United Nations operations* authorized by the Security Council *will be considered interference* with the exercise of the responsibilities of the council *and may require the Council to consider measures it deems appropriate;* 5. Confirms also that if, in the Council's view, the host country is unable or unwilling to meet its obligations with regard to the safety and security of a United Nations operation an personnel engaged in the operation, *the Council will consider what steps would be taken* appropriate to the situation; ….[83]

In Resolution 868, the Security Council noted that it may "consider measures" and "consider what steps should be taken" if host nations do not ensure the security of UN forces.[84] However, the Security Council did not create any type of enforcement mechanism to ensure that host nations actually abide by their stated responsibilities. Furthermore, the Security Council did not discuss what responsibility, if any, host nations have to prevent attacks by non-state actors.

When establishing the United Nations Stabilization Mission in Haiti (MINUSTAH), the Security Council included requirements for the safety and security of UN and other forces when it stated that it:

> Demands strict *respect for the persons and premises of the United Nations* and associated personnel, the OAS, CARICOM and other international and humanitarian organizations, and diplomatic missions in Haiti, and that *no acts of intimidation or violence be directed against personnel* engaged in humanitarian, development or peacekeeping work;….[85]

Again, the Security Council failed to establish any concrete consequences for the host or other nations if they failed to ensure the safety and security of UN forces against citizens or non-state actors.

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[83] S.C. Res. 868, *supra* note 81.

[84] *Id*.

[85] S.C. Res. 1542, *supra* note 1.

In its authorization for the United Nations Assistance Mission for Rwanda (UNAMIR) in1993, the Security Council simply demanded "that the parties take all appropriate steps to ensure the security and safety of the operation and personnel engaged in the operation…."[86]

Finally, the Security Council has referenced the safety and security of ISAF forces in two of its numerous UNSCRs authorizing ISAF operations in Afghanistan.[87] In December 2001, the Security Council established ISAF, in accordance with the Bonn Agreement "to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas."[88] In this UNSCR, the Security Council did "welcome[] the commitment of the parties to the Bonn Agreement to do all within their means and influence to ensure security, including to ensure the safety, security, and freedom of movement of all United Nations personnel…."[89] Again in 2010, the Security Council "reiterate[ed] the need to ensure security of United Nations Staff…."[90] Nonetheless, UN military forces and civilians continue to be attacked in Afghanistan.[91]

Generally, the Security Council takes passive preventative measures to ensure the security of UN forces, as seen in the UNSCRs mentioned above.[92] The clauses in the UNSCRs

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[86] S.C. Res. 872, U.N. Doc S/RES/872 (Oct. 5, 1993).

[87] The Security Council passed the UNSCR creating ISAF in 2001. S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001) [hereinafter S.C. Res. 1386]. It has passed UNSCRs renewing the ISAF mandate in 2003, 2008, 2009, and 2010. *See* S.C. Res. 1510, U.N. Doc. S/RES/1510 (Oct. 13, 2003); S.C. Res. 1833, U.N. Doc. S/RES/1833 (Sep. 22, 2008); S.C. Res 1890, U.N. Doc S/RES/1890 (Oct. 8, 2009); S.C. Res. 1917, U.N. Doc S/RES/1917 (Mar. 22, 2010) [hereinafter S.C. Res. 1917]; and S.C. Res. 1943, U.N. Doc S/RES/1943 (Oct. 13, 2010).

[88] S.C. Res. 1386, *supra* note 87.

[89] *Id*.

[90] S.C. Res. 1917, *supra* note 87.

[91] For example, in October 2004, a terrorist group in Afghanistan took three U.N. staff members hostage in Kabul. Carlotta Gall, *Video Shows Three U.N. Hostages, Afghan Rebels Follow Example of Iraqi Tactics*, PITTSBURGH POST-GAZETTE, Nov. 1, 2004, at A1.

demanding safety and security of UN forces are vague and do not create enforcement mechanisms. Furthermore, they generally do not address complicated issues, such as host nation responsibility for non-state actors who attack or capture UN forces within their borders.[93]

On the other hand, the Safety Convention's primary purpose is to establish criminal consequences against individuals (non-state actors) who attack UN forces. The Safety Convention demands that host nations protect UN forces from attack,[94] and it requires states to prosecute or extradite individuals *and* non-state actors who do attack UN forces.[95]

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[92] SHARP, *supra* note 42, at 60.

[93] In a notable exception, the Security Council did order action against individuals (but not a state) after UN forces were attacked in Somalia in June 1993. The Security Council stated that it:

> Reaffirms that the Secretary-General is authorized under resolution 814 (1993) to take all necessary measure against all those responsible for the armed attacks [on UNOSOM II forces on 5 June 1993] … to establish the effective authority of UNOSOM II through Somalia, including to security the investigation of their actions and their arrest and detention for prosecution, trial and punishment;… S.C. Res. 837, U.N. Doc. S/RES/837 (June 6, 1993)

The UN did conduct a thorough investigation of the attack, suggesting what caused the attacks on UNOSOM forces and who may have been responsible. *See* Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel which Led to Casualties Among Them, ¶¶ 179−88, U.N. Doc. S/1994/653 (June 1, 1994) [hereinafter Report of Investigation on Somalia]. However, the Security Council only granted authority for investigation, arrest, and prosecution regarding attacks on UN forces *after* the horrendous attacks had occurred. Furthermore, the Security Council never established a forum for prosecution or discussed jurisdiction over the suspects or particular crimes. *Id*. *See also* S.C. Res. 837, U.N. Doc. S/RES/837 (June 6, 1993). Finally, this reaction to attacks in Somalia is one of the only times that the Security Council has followed-up on its "demands" for safety and security of UN forces. SHARP, *supra* note 42, at 60−61.

[94] Safety Convention, *supra* note 11, arts. 7 and 11.

[95] *Id*. arts. 9–15.

D. Status of Forces Agreements (SOFAs): Important Contracts Between States that Do Not Apply to Non-State Actors

Status of Forces Agreements (SOFAs) are a second type of international instrument that the UN and member states use to protect UN forces. However, this section asserts, SOFAs do not provide sufficient protections to effectively prevent attack, capture, or detention of UN forces.

The Status of Forces Agreement (SOFA) between the UN, or a force sending state, and the host nation is an agreement on how to manage competing sovereign claims over property and personnel of a deployed force.[96] The traditional SOFA "deals mainly with logistical and financial issues and its aim is to facilitate the implementation of the operation's mandate."[97] In addition, it sets out privileges and immunities for the operation and for operating forces.[98] A critical aspect of the "privileges and immunities clause" of most SOFAs is sending states' retention of exclusive criminal jurisdiction over their operational forces.[99] Generally, nations participating in UN operations today rely on SOFAs to address the status of their forces in host nations.[100]

However, SOFAs are insufficient to protect UN forces because they only apply to signatory governments or international bodies; they do not create any liability or responsibility for non-state actors. Said another way, a SOFA is simply "a contract between

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[96] *See generally* Manuel E.F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW. , May 1994, at 1.

[97] ENGDAHL, *supra* note 12, at 151.

[98] *Id*.

[99] *Id*.

[100] *See, e.g,*. International Security Assistance Force (ISAF) – Interim Administration of Afghanistan ("Interim Administration"): Military Technical Agreement, Jan. 4, 2002, 41 I.L.M. 1032 [hereinafter ISAF SOFA].

parties"[101] where the parties are states or international bodies. The UN Model SOFA states: "The term Government as used in the present Agreement will be defined to mean the Government of the host country or Administration having de facto authority over the territory and/or area of operations in question."[102] The only actors referred to in the SOFA are the Government and the "Participating State," which is a state that contributes personnel to the UN mission.[103] Similarly, the 2002 International Security Assistance Force (ISAF) SOFA applies only to the "Interim Administration" (interim Afghan Government) and the Security Force itself.[104]

Also, the "non-capture" clauses of SOFAs apply only to states (or organizations) party to the SOFA. The UN Model SOFA states that government officials may take UN peacekeeping forces into custody if "apprehended in the commission or attempted commission of a criminal offence." However, it requires that "such person shall be delivered immediately . . . to the nearest appropriate representative of the United Nations Peace-keeping operation. . . ." Similarly, the ISAF Sofa states: "ISAF and supporting personnel, including associated liaison personnel, will be immune from personal arrest or detention. ISAF and supporting personnel, including associated liaison personnel, mistakenly arrested or detained will be immediately handed over to ISAF authorities."[105] This prohibition

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[101] R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2009), *available at* http://www.fas.org/sgp/crs/natsec/RL34531.pdf.

[102] U.N. Secretary-General, *Report of Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects: Model Status-of-forces-agreement for Peace-keeping Operations*, ¶ 3(c), U.N. Doc. A/45/594 (Oct. 9, 1990) [hereinafter UN Model SOFA].

[103] *Id.* at 3(b).

[104] ISAF SOFA, *supra* note 100.

[105] *Id*. Annex A, ¶ 4.

against detention of UN forces clearly applies only to official government apprehension or arrest; it makes no reference to capture or detention by non-state actors.

The problem for current and future UN operations and forces is that most UN forces encounter, and even deal primarily with, non-state actors. In Afghanistan, for example, Al Qaeda has been a significant actor since ISAF began. A contract between two states (or international bodies) cannot apply to a non-state actor over which neither party has control. Thus, the ISAF SOFA does little or no good for an ISAF Soldier attacked or captured by an Al Qaeda member – the SOFA provides no protection from capture because Al Qaeda is not privy to the agreement. The ISAF Soldier, or any UN Soldier participating in a contemporary UN operation, may be completely unprotected from capture or attack if his sending state's only protection measure is a SOFA.

Alternatively, the Safety Convention protects UN forces from detention by state *and* non-state actors. The Convention's prohibition on detention of UN forces, found in Article 8, is similar to the non-capture clauses of the Model UN SOFA and the ISAF SOFA; however, the Convention as a whole provides more thorough protections.[106] In Article 9, the Safety Convention criminalizes kidnapping of UN forces;[107] thus, any non-state actor who detains UN forces could be held individually criminally liable. Furthermore, the Convention not only requires states to immediately release detained UN forces,[108] but it also requires states to prevent crimes and preparations for crimes, including kidnapping, against UN forces.[109]

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[106] Safety Convention, *supra* note 11, art. 8.

[107] *Id*. art. 9.

[108] *Id*. art. 8.

[109] *Id*. arts. 7, 11.

Overall, SOFAs are important contracts between states to address numerous matters regarding military forces' presence in a host state. However, SOFAs do not protect UN forces from attack or detention by non-state actors. The Safety Convention's application to states *and* individuals, therefore, is critical to protect UN forces from detention.

In sum, customary international law principles of diplomatic immunity and duty to protect foreigners, and other international instruments, such as UNSCRs and SOFAs, provide some protections to UN forces. However, none of them applies to non-state actors, and none creates criminal consequences for attacking UN forces. Thus, even all of these tools together do not sufficiently protect UN forces from attack or detention. In 1992 and 1993, the United Nations and member states realized this critical gap and began negotiations on the Safety Convention.

IV. History of the Safety Convention

Understanding the history of the Safety Convention is critical to understanding the role that the Convention can play in today's world of increasing UN peacekeeping and peace-enforcing operations. Looking at the impetus behind the Convention is almost like looking at current events involving UN forces. This part details the critical aspects of the development of the Safety Convention: why the UN began negotiations, why the U.S. supported negotiations, and how the drafters compromised to create the final document.

A. Why the UN Initiated Discussions on a New International Instrument to Protect UN Forces

A leading scholar on the Safety Convention has suggested that: "the Convention on the Safety of United Nations and Associated Personnel of 1994 should … be regarded as a response by the international community to the persistent and growing number of attacks on

people participating in UN operations."[110] Indeed, in 1992 and 1993, 33 UN staff members were killed while participating in UN operations abroad (most were conducing humanitarian missions).[111] In 1993, an extraordinarily high number of military personnel – 202 – were killed while participating in UN missions.[112] Between 2002 and 2003, the UN and supporting nations suffered attacks on peacekeepers in Somalia, Rwanda, the former Yugoslavia, and Cambodia.[113] In March 1993, the President of the Security Council requested a report from the UN Secretary-General on the adequacy of security arrangements for personnel participating in UN operations.[114] As this section explains, the information gathered in the Secretary-General's report indicated that existing security measures for UN forces were insufficient.

The UN delegation from New Zealand assisted the Secretary-General in completing a comprehensive report on security.[115] After conducting a thorough review of UN security system, the New Zealand delegation concluded that neither customary international law nor existing international legal instruments established sufficient mechanisms to ensure security

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[110] ENGDAHL, *supra* note 12, at 205.

[111] U.N. Secretary-General, *Note: Elaboration, Pursuant to Paragraph 1 of General Assembly Resolution 48/37 of 9 December 1993, of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, with Particular Reference to Responsibility for Attacks on Such Personnel,* ¶¶ 5 and 6, U.N. Doc. A/AC.242/1 (Mar. 29, 1994) [hereinafter Note by the Secretary-General].

[112] *Id.* (noting that in 1993 the "grand total for all past and ongoing [UN-sponsored military] missions amounts to 1,074 fatalities. . ."; thus, almost one-fifth of total UN military casualties occurred in 1993 alone).

[113] *See generally* Note by the Secretary-General, *supra* note 111; Lepper, *supra* note 23, at 371; ENGDAHL, *supra* note 12, at 205−7; and Evan T. Bloom, *Current Development: Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L. L. 621, 621–22 (1995).

[114] ENGDAHL, *supra* note 12, at 206; *see also* U.N. Secretary-General, *Report of the Secretary-General on Security of United Nations Operations*, ¶1, U.N. Doc. A/48/349 (Aug.27, 1993) [hereinafter Secretary-General's Report on Security of UN Operations].

[115] ENGDAHL, *supra* note 12, at 206.

of UN personnel on peacekeeping or similar missions.[116] Furthermore, the delegation believed that there was an "urgent need to focus specific attention on the question of responsibility for attacks on UN and associated personnel. . ." because of "a serious risk that those who direct violence against [UN] personnel will believe that they can proceed with impunity. . ."[117] New Zealand's delegation did not believe that existing mechanisms to secure UN personnel could "effectively deter, prosecute or punish" individuals for committing violence against UN personnel.[118] Finally, and extremely relevant in light of today's UN operations, the "current norms of international law did not provide adequate protection since *entities not regarded as states could not be subject to the obligations of international law*."[119]

In August 1993 the UN Secretary-General issued his report, incorporating some of New Zealand's analysis, on the security of United Nations operations in response to the Security Council request.[120] The Secretary-General noted many "new issues" pertaining to UN operations in 1992 and 1993 that had negative impacts on the security of UN personnel participating in UN operations. [121] Specifically, new developments had "highlighted certain gaps in the existing [security] system as well as the need to strengthen it in certain areas."[122]

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[116] Letter from Charge d'affaires of the Permanent Mission of New Zealand to the U.N. Secretary-General (June 24, 1993) (U.N. Doc. A/48/144 (Jun. 25, 1993) [hereinafter New Zealand Letter].

[117] *Id*. Explanatory Memorandum.

[118] ENGDAHL, *supra* note 12, at 207.

[119] New Zealand Letter, *supra* note 116, Explanatory Memo (emphasis added); *see also* Engdahl, *supra* note 12, at 208.

[120] Secretary-General's Report on Security of UN Operations, *supra* note 114.

[121] *Id*. para. 18.

[122] *Id*.

The "new issues" the Secretary-General discussed in 1992 and 1993 remain significant concerns in UN operations today. The Secretary-General recognized the immediacy of danger to UN personnel:

> . . . personnel of the organizations of the United Nations system have increasingly been required to perform their functions in extremely hazardous conditions where decisions regarding their safety assume an immediacy not normally encountered in the past. This is particularly true in areas where government authority is not adequately exercise or is lacking altogether.[123]

In addition, the Secretary-General reported gaps in security during "multidimensional operations involving military operations, humanitarian assistance, electoral assistance, human rights monitoring and development projects."[124] The Secretary-General also noted a substantial deficit in security arrangements for tens of thousands of Soldiers and civilians who were not UN staff-members. Finally, the Secretary-General discussed Security Council enforcement operations under Chapter VII of the UN Charter.[125] He was concerned that such enforcement actions could have significant security risks because they are "not based on consent and cooperation and may face outright opposition."[126] A "new feature" in use by the Security Council in 1992 and 1993,[127] such enforcement operations are common today and remain a significant security risk for participating forces and civilians.

To address these serious threats to security, both the New Zealand delegation and the Secretary-General suggested that existing customary international law and new international requirements for the protection of UN forces should be codified in a new international

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[123] *Id*.

[124] *Id*. para. 20.

[125] *Id*. para. 26.

[126] *Id*.

[127] *Id*.

instrument.[128] The New Zealand delegation also believed that a new instrument of law was necessary not only to cure inadequacies of the current legal regime, but also, and more importantly, to provide a mechanism for criminal responsibility and prosecution of individuals who attack UN personnel. [129] The Secretary-General suggested short term strategies to address security in UN operations, such as declaring in Security Council authorization resolutions that attacks against UN personnel are unacceptable.[130] However, he also suggested that, in the long term, a new international instrument could both "codify and further develop international law relating to the security and safety of United Nations forces and personnel."[131]

Thus, on December 9, 1993, the UN General Assembly established the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel (Ad Hoc Committee) as a working group of the Legal (Sixth) Committee.[132] The charter of the committee was to "elaborate an international convention dealing with the safety and security of United Nations and associated personnel, with particular reference to responsibility for attacks on such personnel." [133]

Overall, the UN realized in 1993 that it was committing forces from member states to increasingly dangerous operations. The existing legal framework of diplomatic and

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[128] ENGDAHL, *supra* note 12, at 206–8.

[129] New Zealand Letter, *supra* note 116, Explanatory Memo.

[130] Secretary-General's Report on Security of UN Operations, *supra* note 114, para. 35.

[131] *Id.* para. 34.

[132] Lepper, *supra* note 23, at 370.

[133] Sixth (Legal) Committee, Report on the Question of Responsibility for Attacks on United Nations and Associated Personnel and Measures to Ensure that Those Responsible for Such Attacks are Brought to Justice, U.N. Doc. A/49/742, (Dec. 9, 1993).

international immunity was not sufficient to protect these UN forces. The Secretary-General and the Security Council agreed that these forces deserved and required an international instrument specifically designed for their security and protection. The impetus behind United Nations' desire to create a new international instrument to protect UN forces came from challenges that are only more relevant, and more complicated, today.

B. Why the United States Participated in Discussions on a New International Instrument to Protect UN Forces

In 1993 and 1994, United States leaders were also searching for better security measures for UN forces. The U.S. delegation to the United Nations was very active on the Ad Hoc Committee because the nation's leadership was determined to improve protection for U.S. forces participating in UN missions.[134]

After the capture of CW2 Michael Durant in Somalia in late 1992 and the unwillingness of the U.S. State Department to confirm his status as a POW, both the executive and congressional branches of the U.S. government realized that a huge gap existed as to the legal status of U.S. forces involved in UN operations.[135] President Clinton issued Presidential Decision Directive 25 (PDD-25), addressing the need to "provide broad legal protections for U.S. personnel engaged in U.N. operations."[136] The PDD-25 stated that:

> The U.S. remains concerned that in some cases, captured UN peacekeepers and UN peace enforcers may not have adequate protection under international law. The U.S. believes that individuals captured while performing UN peacekeeping or UN peace enforcement activities . . . should, as a matter of policy, be immediately released to UN officials; until released, at a minimum

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[134] *See generally*, Lepper, *supra* note 23.

[135] *Id*. at 363. It is important to note that Major General Lepper, USAF, was a DoD Delegate to the Ad Hoc Committee and is now the Assistant Judge Advocate General for the Air Force.

[136] *Id*., at 366.

> they should be accorded protections identical to those afforded prisoners of war under the 1949 Geneva Convention III (GPW). . . .[137]

Indeed, when the United States entered negotiations for the Safety Convention, it intended to fill the gap between Geneva Convention POW protections and no such protections.[138] Furthermore, U.S. negotiators' guidance from PDD-25 was to create an international agreement requiring that captured U.S. forces participating in a UN operation were to be immediately released to UN officials.[139] The U.S. government and the Department of Defense specifically believed that because "someone like Durant might someday be considered to fall within the scope of [Common] Article 3 of the [Geneva Conventions] and thus become subject to its minimal protection, it was necessary to suggest that this new treaty supersede [Common] Article 3."[140]

Common article 3 is the primary portion of the Geneva Conventions that applies during non-international armed conflict, and it only protects individuals who are not taking an "active part. in hostilities."[141] Those who fall under common article 3 protections are

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[137] *Id*. (citing KEY ELEMENTS OF THE CLINTON ADMINISTRATION'S POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS, IN THE CLINTON ADMINISTRATION'S POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS 11 (May 1994) [hereinafter PDD – 25]). *See also*, PRESIDENTIAL DECISION DIRECTIVE/NSC – 25, POLICY GUIDANCE: U.S. POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS 6 (May 3, 1994) (this second version of PPD – 25 was declassified on 12/15/08).

[138] Lepper, *supra* note 21, at 368−9.

[139] *Id*. at 366−74.

[140] *Id*. at 395.

[141] Common article 3 of the Geneva Conventions requires humane treatment and fair prosecution for individuals who do not "take active part. in hostilities" during non-international armed conflict. It does not provide nearly the robust protections for POWs or civilians as the full Geneva Conventions provide for party combatants in international armed conflict. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian

guaranteed humane treatment and a proper trial;[142] those who do take part in hostilities are not protected under common article 3. Importantly, common article 3 does not create any criminal liability for those who attack UN forces, whether the UN forces are taking part in hostilities or not.

As the principle arm of the Law of Armed Conflict (LOAC) applying to non-international armed conflict, common article 3 had failed to sufficiently protection U.S. forces in Somalia. Warlords' fighters had attacked U.S. forces participating in the UNOSOM II mission; fighters had also captured CW2 Durant and subjected him to inhumane treatment.[143] At that time, no codified international law prohibited detention or attack on UN forces that were taking part hostilities.[144] Though the Security Council reacted to attacks on UN forces in Somalia by ordering investigations, it did nothing to *prevent* attacks.[145] Indeed, as the New Zealand delegation to the United Nations had noted, no international law instrument properly addressed these attacks; individuals were essentially allowed to attack UN (and U.S.) forces with impunity.[146] Furthermore, states were not being held responsible for actions of non-

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Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Article 3 in each of the GCs is identical, and referred to hereinafter as common article 3.

[142] Common article 3, *supra* note 141.

[143] Lepper, *supra* note 23, at 361–363.

[144] The IPP Convention criminalized attack and capture of UN officials, but had not been interpreted to apply military forces. IPP Convention, *supra* note 71.

[144] *Id*.; *see also* ENGDAHL, *supra* note 12, at 41.

[145] As discussed in section III.C. at footnote 93, the Security Council had passed a resolution condemning deadly attacks on Pakistani forces in 1992, and ordering an investigation into the matter and the arrest of the responsible individuals. S.C. Res. 837, U.N. Doc. S/RES/837 (June 6, 1993); *see also* Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel which Led to Casualties Among Them, paragraph 201, U.N. Doc. S/1994/653 (June 1, 1994) [hereinafter Report of Investigation on Somalia].

[146] New Zealand Letter, *supra* note 116, Explanatory Memo.

state actors.[147] Thus, in strongly supporting the development of the Safety Convention, the U.S. intended to create a new tool in international law to provide specific and sufficient protections to U.S. forces participating in UN operations.

C. First Drafts of Safety Convention: Combining Goals into One Effective Convention

By the time the Ad Hoc Committee first met late in 1993, both the New Zealand and the Ukraine delegations had drafted proposals for a new international instrument to improve security for UN personnel on peacekeeping missions.[148] This section reviews important aspects of these and other drafts, and how delegations compromised to create the final Safety Convention.

The focus of the New Zealand draft convention was "on the question of legal responsibility for attacks on United Nations and associated personnel."[149] The New Zealand draft created individual criminal liability for crimes against peacekeepers by requiring States to make such acts criminal under their national laws.[150] The New Zealand draft also created state responsibilities to "ensure the safety and security of United Nations personnel," to prevent crimes against UN personnel, and to prosecute or extradite individuals who had committed crimes against UN personnel.[151]

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[147] *Id*.

[148] *Id*., at 376−7.

[149] Sixth (Legal) Committee, New Zealand Delegation's Proposal for a Draft Convention on Responsibility for Attacks on United Nations Personnel, paragraph 4, U.N. Doc A/C.6/48/L.2 (Oct. 6, 1993) [hereinafter New Zealand Draft].

[150] See Lepper, *supra* note 23, at 376−7 and New Zealand Draft, *supra* note 149, para. 5 (noting that the New Zealand Draft was modeled after the IPP Convention and the International Convention on the Taking of Hostages, both instruments which address individual criminal liability and prosecution).

[151] New Zealand Draft, *supra* note 149, arts. 3, 4, and 8; *see also* Lepper, *supra* note 23, at 377.

The Ukraine delegation's draft proposal resembled a SOFA and focused on protecting UN personnel by reiterating privileges and immunities.[152] As a SOFA-type instrument, the draft addressed not only the privileges and immunities of UN personnel, but also the rights and responsibilities of UN personnel. In addition, the Ukraine draft did address criminal responsibility by requiring host states to "guarantee the criminal prosecution of persons initiating hostile acts against" against UN personnel.[153]

The working group in the Sixth Committee considered these two draft proposals, as well as other possible options to achieve better security for UN personnel. First, it contemplated the use of a non-binding declaration regarding safety and security of UN personnel.[154] The committee deemed this option insufficient to carry weight in the international community because of the history of nations ignoring UN declarations.[155] Second, the committee considered creating a Protocol to the IPP Convention; the committee disapproved this option because it would not highlight the importance of the issue of security for UN personnel, and because the IPP Convention was not written to protect peacekeeping forces or military personnel.[156]

Thus, the committee's goal became creating a new international instrument. It relied on the New Zealand and Ukrainian proposals, a joint proposal from those two delegations, a working document from the Nordic countries, and a Note by the Secretary General to create a

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[152] Lepper, *supra* note 23, at 377.

[153] Letter from the Permanent Representative of the Ukraine to the United Nations Secretary-General, art. 8 (Oct. 7, 1993) (U.N. Doc. A/C.6/48/L.3.

[154] ENGDAHL, *supra* note 13, at 209–10.

[155] *Id*.

[156] *Id.*

comprehensive draft convention.[157] After thorough discussions on scope, definition and text, the committee proposed a draft Convention on the Safety of the United Nations and Associated Personnel on 9 December 1994, only one year after the committee's formation.[158]

V. Scope of the Convention

During committee sessions, the most contested terms of the proposed new international instrument concerned the scope of its coverage and its application.[159] To whom should the Convention apply, to what types of operations, and during what kinds of conflicts? This part discusses the negotiated definitions of "UN and associated personnel" and "UN operation." Also critical, this part addresses the scope of the application of the Convention, the Law of Armed Conflict (LOAC) principles behind the scope of application of the Convention, and critics' concerns about both. Understanding the scope of the Convention is important, as it highlights the broad spectrum of UN operations and personnel who could benefit from Safety Convention protections.

A. Whom Does It Cover? Defining "UN and Associated Personnel"

The Safety Convention purports to protect "United Nations and Associated Personnel" from attack and detention. Article 1 of the Safety Convention defines the terms "UN personnel" and "associated personnel."[160] The term "UN personnel" encompasses persons

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[157] *Id. See generally* ENGDAHL, *supra* note 12 (discussing the committee's work before proposing the Draft Convention to the General Assembly).

[158] *See* Lepper, *supra* note 23, at 370; Siobhan Wills, *The Need for Effective Protection of United Nations Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 10 HUM. RTS. 26, 27 (2003) (regarding the remarkable speed of deliberations for the Safety Convention).

[159] Lepper, *supra* note 23, at 379.

[160] Safety Convention, *supra* note 11, art. 1.

"engaged or deployed by the UN Secretary-General as members of the military, police, or civilian components of a UN operation";[161] essentially "the core group of persons whom we think of as UN peacekeepers."[162] In addition, "UN personnel" includes UN officials and experts on mission who are serving in their official capacity (but not necessarily participating in a UN operation).[163] Notably, this definition does not appear to include national forces deployed in support of a UN operation but operating under national command.[164]

Instead, national forces deployed in support of UN operations but operating under national commander are considered, under most interpretations of the Convention, "associated personnel." In fact, experts point to three groups of personnel who the Convention protects as associated personnel: forces that remain under national command while supporting UN operations, nongovernmental organization (NGO) personnel, and personnel "engaged" by the UN or a subsidiary organ.[165]

The U.S. delegation to the Ad Hoc Committee sought to ensure that the Convention protected national forces not under UN command.[166] Such discussion was necessary because PDD-25, in addition to addressing protections and immunities for U.S. forces supporting UN operations, stated that "the President retains and will never relinquish command authority

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[161] Bloom, *supra* note 113, at 623.

[162] *Id.*

[163] *Id.*; *see also* ENGDAHL, *supra* note 12, at 216–18.

[164] ENGDAHL, *supra* note 12, at 217; Lepper, *supra* note 23, at 383.

[165] Bloom, *supra* note 113, 623 - 624.

[166] Lepper, *supra* note 23, at 384–85.

over U.S. forces."[167] Because "UN personnel" must, by definition, be deployed by the UN Secretary-General, the Convention would not have covered national (read "U.S.") forces supporting UN operations unless the delegations compromised on the definition of "associated personnel."[168] Though there was some debate as to what type of connection the national forces had to have to the UN operation,[169] the ultimate wording of the Convention is broad enough to support the general interpretation that "associated personnel" includes national forces supporting a UN mandate or operation.[170]

The second group defined as "associated personnel" are NGO or other humanitarian personnel deployed under a contractual agreement with the UN or its specialized agencies in support a mandate of a UN operation.[171] Many NGOs and other agencies argued for a broader interpretation of "associated personnel" that did not restrict protections under the Convention to personnel participating in or supporting particular UN operations. However, the Secretary-General specified in a report in 2000 that acting "in support of a United Nations operation or in the implementation of its mandate" was a necessary element for NGO personnel to qualify for protection under the Convention.[172] The Convention was likely so

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[167] *Id*., at 384; PDD-25, *supra* note 137, at 9 (although the PDD-25 allowed for the possibility of U.S. forces falling under operation control of "a competent UN commander for specific UN operations authorized by the Security Council").

[168] Lepper, *supra* note 23, at 384–85.

[169] *Id.* at 386; *see also* ENGDAHL, *supra* note 12, at 221 (discussing an interpretation of "associated personnel" that requires that national forces must not only support the UN mandate, but also must work in conjunction with actual "UN personnel").

[170] ENGDAHL, *supra* note 23, at 221; Safety Convention, *supra* note 11, art. 1 (a) (stating, in part "'Associated personnel' means" (i) *Persons assigned by a Government* or an intergovernmental organization with the agreement of the competent organ of the United Nations . . . *to carry out activities in support of the fulfillment of the mandate* of a United Nations operations" (emphasis added)).

[171] Bloom, *supra* note 113, at 624; Safety Convention, *supra* note 11, art. 1.

[172] U.N. Secretary-General, *Report on the Scope of Legal Protection Under the Convention on the Safety of United Nations and Associated Personnel*, para. 15, U.N. Doc A/55/637 (Nov. 21, 2000); *see also* ENGDAHL,

restrictive because of "strongly held views of certain states that this exercise was primarily about peacekeeping, not protection of all UN Personnel. . . ."[173]

The final group of "associated personnel" is those engaged by the UN Secretary-General or a specialized agency of the UN.[174] In general, this clause covers civilian contractors hired by the UN, its specialized agencies (such as the United Nations High Commissioner for Refugees) or the International Atomic Energy Association (IAEA). [175] An example of "engaged" personnel would be truck drivers hired to work for the World Food Program "as part of its relief mandate in a United Nations operation."[176]

B. What Does It Cover? Defining a "UN Operation"

The Safety Convention applies to UN and associated personnel participating in most all UN operations.[177] A "UN operation," as defined in the Safety Convention, is one

> *established by the competent organ of the United* Nations in accordance with the Charter of the United Nations and *conducted under the United Nations authority and control*: (i) where the *operation is for the purpose of maintaining or resorting international peace and security;* or (ii) where the Security Council or General Assembly has declared … that there exists an

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supra note 12, at 222–4 for a thorough discussion of NGO and other humanitarian personnel and the protection under the Convention).

[173] Bloom, *supra* note 113, at 624. Note that an Optional Protocol to the Safety Convention was signed on December 8, 2005 that expanded the Convention's application to all operations established by the UN dealing with humanitarian, political or developmental assistance. Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, U.N. Doc. A/RES/60/42 (2005).

[174] ENGDAHL, *supra* note 12, at 222; Bloom, *supra* note 113, at 624.

[175] Bloom, *supra* note 113, at 624.

[176] ENGDAHL, *supra* note 12, at 222 (citing Hugh M. Kindred, *The Protection of Peacekeepers*, 1995 Can. Y.B. Int'l. L. 257, 276 (1995).

[177] The Safety Convention does not apply to UN operations in which UN forces are party combatants in international armed conflict; see discussion in section V.C. regarding the scope of application of the Convention.

> exceptional risk to the safety of personnel participating in the operation . . . ."[178]

The term "UN operation" is clearly limited to peacekeeping and peace enforcement types of missions. Furthermore, a "UN operation" must be conducted under UN "authority and control." This requirement seems to be at complete odds with the Ad Hoc Committee's compromise to consider forces under national command as "associated personnel" for the Convention. Indeed, one interpretation of the wording of the Convention is that the two definitions are not synchronized and that national forces supporting a UN mandate, but not under UN command and control, are not protected by the Convention.

However, the Ad Hoc Committee did not use the words "UN command and control" in the definitional requirement for "UN operation." In fact, the phrase "authority and control" was a compromise between a basic requirement for mere UN "authority" and a more stringent requirement for UN "command and control."[179] To elaborate, the Secretary-General, in a position paper written on the Fiftieth Anniversary of the UN, discussed UN control in peacekeeping operations as having three levels: political direction, executive direction and command, and command in the field.[180] His comments discussed three levels of authority: Security Council, the Secretary -General, and the chief of mission or force commander.[181] Thus, according to the Secretary-General, "UN authority and control" can be anything from political direction to field command. UN "authority and control," therefore, for the purposes of the definition of "UN operation," can be interpreted to mean merely UN *political direction*

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[178] Safety Convention, *supra* note 11, art. 1(c).

[179] ENGDAHL, *supra* note 12, at 226–9.

[180] U.N. Secretary-General, *Report on the Work of the Organization, Supplement to an Agenda for Peace: Position Paper of the Secretary General on the Occasion of the Fiftieth Anniversary of the United Nations,* paras. 28–30, U.N. Doc. A/50/60 - S/1995 (Jan. 13, 1995).

[181] *Id.*

and does not require actual UN "command and control."[182] The Security Council, or other competent organ, conducts political direction and control when it authorizes an operation or concludes a mandate.

Overall, the definition of "UN operation" refers to peacekeeping and peace enforcement operations over which a competent UN body has some authority and control, whether it is political control or field command. Associated personnel under national control can and do participate in "UN operations."

C. To What Type of Conflicts Does It Apply? Scope of Application of the Safety Convention

The Safety Convention applies during all "UN operations," *unless* UN forces are participating as party combatants in international armed conflict (when the full protections of the Geneva Conventions apply).[183] A close reading of the Safety Convention text, and an understanding of the Laws of Armed Conflict (LOAC) and the Convention's negotiation history, clearly indicate this is a proper interpretation of the Convention's scope of application.

However, some scholars believe that the Convention's application is too narrow, so that it does not protect enough UN forces.[184] The primary concern over the scope of the Convention's application is a "switch-off" provision found in Article 2, paragraph 2 of the Convention. The clause states that the Convention does *not* apply during UN enforcement

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[182] *See generally* ENGDAHL, *supra* note 12, at 229.

[183] Safety Convention, *supra* note 11, para 2(2).

[184] *See generally* SHARP, *supra* note 42, at 77–94.

actions when UN forces are "combatants against organized armed forces and to which the law of international armed conflict applies."[185]

This section of the paper discusses the scope of application of the Convention and the proper interpretation, according to the LOAC and drafters' intent, of the "switch-off" provision of paragraph 2(2) of the Convention. A critical aspect of the scope of application of the Convention, discussed in subsection three below, is that it applies to protect UN forces when the LOAC does not – during non-international armed conflict when UN forces engage in hostilities. Finally, subsection four below addresses critics' concerns that the scope of application of the Convention is too narrow.

1. Proper Scope of Application: The Safety Convention Applies to UN Operations Unless *UN Forces are Party Combatants to International Armed Conflict*

The proper scope of application of the Convention is apparent from a reading of the text Article 2, combined with an understanding of the Geneva Conventions and delegations' intents when drafting the Convention.

Article 2 of the Safety Convention, titled "Scope of Application," states:

> 1. This Convention applies in respect of United Nations and associated personnel and United nations operations, as defined in article 1.
> 2. This Convention *shall not apply* to a United Nations *operation* authorized by the Security Council as an *enforcement action under Chapter VII of the Charter* of the United Nations *in which* any of the *personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies*.[186]

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[185] Safety Convention, *supra* note 11, art. 2.

[186] *Id*. (emphasis added).

This final wording of the paragraph 2(2) of the Convention is called the "switch-off provision."[187] It came as a compromise between two goals during negotiations: first, clearly delineating a line between application of the Convention and application of the full Geneva Conventions, and second, protecting UN forces participating in non-international armed conflict when the full protections of the Geneva Conventions do not apply.[188] The U.S. delegation to the Ad Hoc Committee strongly supported both goals.[189]

The U.S. delegation, with strong support from the Department of Defense, argued that the Convention should not undermine the LOAC and that it had to include provisions to allow the Convention to "switch-off" when the LOAC "switch-on."[190] Most other delegations to the Committee agreed with this concept and a "switch-off" was included in paragraph 2(2).[191]

The U.S. and the U.K delegations felt strongly that in creating the "switch-off" provision for the Convention's application, they needed to outline very specific criteria as to when the Convention would apply to UN forces.[192] Furthermore, the specific criteria had to be broad enough, according to U.S. goals, to protect U.S. forces participating in UN operations not considered to be international armed conflict.[193]

The U.S. and the U.K. proposed three criteria for application of the Convention, stating that the Convention should *not* apply when: (1) the UN operation was authorized by the

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[187] *See generally* ENGDAHL, *supra* note 12; Lepper, *supra* note 23; SHARP, *supra* note 42.

[188] *See generally* ENGDAHL, supra note 12, at 232−241.

[189] Lepper, *supra* note 23, at 393−5.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 397.

[193] *Id*.

Security Council as an enforcement action under Chapter VII of the UN charter; (2) any UN or associated personnel are engaged as combatants in an international armed conflict; *and* (3) if the international armed conflict "of the kind referred to in common Article 2 of the 1949 Geneva Conventions."[194]

The first requirement, for an enforcement action under Chapter VII of the UN Charter, is based upon the idea that the Security Council "is aware that the risk is high that UN forces will engage in the use of armed force" when Chapter VII actions are used.[195] Thus, the Security Council and Member States are aware that a Chapter VII action may require UN forces to act as combatants in an international armed conflict. This emphasis on Chapter VII actions was not controversial during Ad Hoc Committee meetings and most academics agree that it is reasonable on its face.[196] On the other hand, the idea that UN forces must be combatants participating in an international armed conflict for the Convention to "switch-off" has been more controversial.

2. When UN Forces are Combatants (and the Safety Convention Does Not Apply)

The term "combatant," as it is used in paragraph 2(2) of the Convention, is based on the definition of "combatant" under the Laws of Armed Conflict (LOAC) and the Geneva Conventions.[197] Specifically, combatants are "members of the armed forces of a Party to the conflict" under Article 4 of the Third Geneva Convention Relative to the Treatment of

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[194] *Id.* (citing Report of the Ad Hoc Committee, *supra* note 29, Annex, Section F.

[195] Lepper, *supra* note 23, at 398.

[196] ENGDAHL, *supra* note 12, at 236–7.

[197] Lepper, *supra* note 23, at 402.

Prisoners of War (GC III).[198] As Article 4 of GC III applies only to international armed conflict,[199] combatants are truly only members of a party to an international armed conflict.

A member of the U.S. delegation to the Safety Convention, now Air Force Major General Lepper, explains that the "concept of 'party' is the linchpin connecting the two ideas of 'combatant' and 'international armed conflict.'"[200] The UN forces must participate on the side of a party to an international armed conflict, and against another party to an international armed conflict, to be considered "combatants" under the Safety Convention (and for the "switch-off" provision of paragraph 2(2)).

How do UN forces come to participate as party combatants? Two mechanisms exist to make UN forces parties to international armed conflict: first, a UN Security Council Resolution (UNSCR) could authorize the UN forces to participate in an international armed conflict against a state's armed forces; or second, UN forces could be present in an area of international armed conflict and engage in hostilities against a state's armed forces.

A critical question, therefore, regarding the first mechanism: is it even possible for the UN to be a party to an international armed conflict? Scholars disagree as to whether the UN can be bound by international agreements, such as the Geneva Conventions,[201] but, based on historical actions, it appears that the UN can be a party to an international armed conflict.

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[198] GC III, *supra* note 141, art. 4. Article 4 of GC III also discusses other personnel who are to be considered POWs if captured: members of militias or volunteer corps *of a Party to the conflict*, members of armed forces who profess allegiance to a government, civilian members of armed forces, crews of the merchant marine *of the Parties to the conflict*, and "levee en masse." *Id.* (emphasis added)).

[199] GC III *supra* note 141, arts. 2, 4.

[200] Lepper, *supra* note 23, at 402.

[201] Brian D. Tittemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 96–97, n.178 (1997) (providing an overview of different opinions as to whether the UN can be a party to the Geneva Conventions).

One scholar suggests four occasions during which the UN has authorized the use of UN force in "offensive operations" – Korea in 1950, the Congo in 1960, Iraq in 1990, and Somalia in 1993.[202] Looking at the wording of some of these the Security Council force authorizations, the UN clearly establishes itself as having a party-interest in the conflicts. The Security Council Resolution of 7 July 1950, authorizing the use of UN force against North Korea states that the Security Council:[203]

> "1. Welcomes the prompt and vigorous support which governments and peoples of the United Nations have given to its resolutions … to *assist the Republic of Korea in defending itself against armed attack [by North Korea*] and thus restore international peace and security in the area… 3. Recommends that all Members providing military forces … make such forces and other assistance available to a unified under the United States of America… 5 *Authorizes the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of various nations participating;…*

The Security Council went so far in the authorization of the use of UN force (under U.S. command) against North Korea as to promote the display of the UN flag during all operations. Similarly, in its authorization for the use of force against Iraq in 1990, the Security Council was very direct with its wording. In Resolution 660 in August 1990, the UN stated that it: "1. Condemns the Iraqi invasion of Kuwait; [and] 2. Demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990…."[204] The Security Council then very clearly authorized the use of UN force against Iraq in Resolution 678 when it stated:

> "Acting under Chapter VII of the Charter, [the Security Council] 1. Demands that Iraq comply fully with resolution 660 (1990)… 2. Authorizes Member

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[202] *Id.* at 83.

[203] S.C. Res 84, U.N. Doc. S/1588 (Jul. 7, 1950).

[204] S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

> States *co-operating with the Government of Kuwait* … to use all means to uphold and implement resolution 660 (1990) and subsequent relevant resolutions to restore international peace and security in the area…"[205]

Again, in this resolution, the Security Council clearly stated that it authorized the use of UN force *against* Iraq and *in support* of Kuwait.

In both authorizations for the use of UN force against North Korea and Iraq, the Security Council used very clear language that the UN forces entered the conflict on the side of one of the conflicting parties (states) and against another party. The UN made itself a party to an international armed conflict; it made itself a combatant. Had the Safety Convention been in force at the time of those conflicts, it would have "switched-off" under paragraph 2(2) and traditional Laws of Armed Conflict and the Geneva Conventions would have applied.[206]

On the rare occasion that the UN makes itself a combatant under international law and the Safety Convention, the Security Council is clear that UN forces participate as a party to the conflict. On those occasions, the Safety Convention would not protect UN forces, but the Geneva Convections would.

The second way that UN forces act as party combatants is for UN forces to engage in hostilities against another states' armed forces. Fittingly, the International Committee for the Red Cross (ICRC), defines an "enemy combatant" is "a person who, either lawfully or unlawfully, engages in hostilities *for the opposing side* in an international armed conflict."[207]

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[205] S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

[206] Based either on the theory that the UN is a party to the Geneva Conventions, or that Soldiers' States are bound and protected by the Geneva Conventions during international armed conflict.

[207] Mary Ellen O'Connell, *Essay: Combatants in the Combat Zone,* 43 U. RICH. L. REV. 845, 853 (2009) (citing Official Statement, International Committee of the Red Cross, The Relevance of IHL in the Context of Terrorism (July 21, 2005), http:// www.icrc.org/Web/Eng/siteeng0.nsf/html/terrorism-ihl-210705 (last visited

Professor Gary Sharp, a DoD international law attorney and expert on UN operations, cites an example during which he believes UN forces became party combatants in Somalia in 1993.[208] The conflict the UN forces entered was a non-international conflict; it arguably devolved into international armed conflict when members of rival warring factions attacked UN forces and UN forces engaged in hostilities with them.[209] If rival warlords' forces qualified as party combatants under GC III,[210] then UN forces' engagements with them became international armed conflict. More specifically, when they attacked UN forces and the Security Council authorized UN forces to respond with force,[211] the UN forces had become party combatants in an international armed conflict with Somalia. The Safety Convention would no longer have applied and the Geneva Conventions would have protected the UN forces.

Overall, paragraph 2(2) "switches-off" the Safety Convention when UN forces are party combatants and are protected under the full Geneva Conventions. Thus, the Safety Convention does not apply when the Security Council has made UN forces parties to an international armed conflict, or when UN forces engage in hostilities with the armed forces

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Feb. 26, 2009)) [hereinafter ICRC Statement].

[208] See Walter Gary Sharp, Sr., *Biography*, on Georgetown Law, http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=192 (last visited 26 Jan 2011).

[209] SHARP, *supra* note 42, at 86−87. Professor Sharp seems to interpret the "warring factions" as combatants under the GC III, Article 4(2) ("members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict…"). GC III, *supra* note 141, article 4(2). This interpretation is different than the U.S. DoD and the State Department had regarding warring factions in Somalia in 1993 (as discussed above, neither DoD nor the State Department believed operations in Somalia were international armed conflict or warranted POW protections). Lepper, *supra* note 23, 362–4.

[210] GC III, *supra* note 141, art. 4(2). Though General Aideed's forces, responsible for most of the attacks, were called the "Somali National Army," it is not clear if General Aideed's forces were legitimate state forces or supported the state government to qualify under the definition of party combatant for GC III. *See* Report of Investigation on Somalia, supra note 145, paras 179–188.

[211] SHARP, *supra* note 42, at 86−87.

of a state. Despite the switch-off provision of paragraph 2(2), the Safety Convention does apply in all other circumstances.

3. When the Safety Convention Does Apply: When UN Forces are Not Party Combatants in an International Armed Conflict

As mentioned above, the ICRC defines an "enemy combatant" as "a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an *international armed conflict*."[212] Furthermore, the US DoD delegate to the Safety Convention asserts that "it is not possible for UN forces to be combatants [for purposes of the Convention] without the conflict being an international armed conflict."[213] In non-international armed conflict, therefore, UN forces are not party combatants for the purposes of the LOAC and the Safety Convention. The Safety Convention does not "switch-off"; rather, it protects UN forces. As this subsection discusses, Safety Convention protection during non-international armed conflict is critical because UN forces are often without LOAC protection, particularly if they engage in hostilities. Furthermore, the Safety Convention protects UN forces from attack and capture during non-international armed conflict even if they *do* engage in hostilities.

In non-international armed conflict, the only LOAC protections that apply to UN forces are those of common article 3 and Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).[214] The United States and many other delegations deemed

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[212] O'Connell, supra note 207, 853 (emphasis added).

[213] Lepper, *supra* note 23, at 402.

[214] Common article 3, *supra* note 141; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), June 8, 1977, 1125 U.N.T.S.609 [hereinafter AP II]. In special circumstances, customary international law and treaties on privileges and immunities for diplomats and experts on mission may apply to UN forces. Furthermore, if

these provisions insufficient to protect UN forces participating in non-international conflict.[215] In particular, neither common article 3 nor AP II criminalizes attacks on UN forces. Furthermore, both common article 3 and AP II only protect UN forces "taking no active part. in hostilities."[216]

This last point is critical: while UN forces are generally considered civilians under the LOAC,[217] they often find themselves participating in hostilities with insurgents or unprivileged enemy belligerents. Under the LOAC, these forces, such as those participating in ISAF, lose their minimal protections. However, the Safety Convention does not discriminate between civilian UN forces and those taking part in hostilities in non-international armed conflict. Rather, the Safety Convention criminalizes attacks on all UN forces in non-international armed conflict.

Another crucial point to understanding the scope of the Safety Convention is the idea that UN forces do not simply become combatants because they engage in hostilities in general. Rather, UN forces are only combatants if they are authorized to engage in hostilities with the armed forces of a state.[218] In the case of Somalia in 1993, for example, the hostile actions of

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UN forces support a state government in a civil war or against instruction, UN forces most likely benefit from customary international law principles that allow state armed forces to quell rebellions.

[215] Common article 3 requires humane treatment and fair trials; Additional Protocol II provides similar protections, but adds special protections for children and persons whose liberty has been restricted. Common article 3, *supra* note 141; AP II, *supra* note 214. See discussion in sections IV.A. and IV.B regarding insufficiency of existing LOAC to protect UN forces.

[216] Common article 3, *supra* note 141; AP II, *supra* note 214, art. 4.

[217] *See generally* Alice Gadler, *The Protection of Peacekeepers and International Criminal Law: Legal Challenges and Broader Protection*, 11 GER. L.J. 585, 589–90 (2010) (discussing the general consensus that UN forces are treated as civilians unless they specifically do not qualify); *see generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3, art. 50 [hereinafter AP I] (defining "civilian" for the purposes of AP I and the Geneva Conventions); *see also* Rome Convention, *supra* note 7, art. 8(b)(iii) (enumerating the attack of UN humanitarian and peacekeeping forces as a war crime, so long as they are "entitled to the protection given to civilians…").

UN forces, alone, did not make the UN forces combatants for purposes of the Safety Convention. Rather, engaging in hostilities *against another state's armed forces* made the UN forces combatants. If insurgents or other non-state actors had committed the attacks on UN forces, the Safety Convention would not have "switched- off." [219] Indeed, Soldiers may be "fighters"[220] or "tak[ing] active part. in hostilities,"[221] but not be "combatants" under the LOAC. UN forces always retain the right to use force in self-defense.[222] Thus, UN forces present in an area of non-international armed conflict may use weapons in self defense against insurgents, or mount a counter-attack against an illegal offensive committed by unprivileged enemy belligerents. These UN forces are probably "fighters," and they may even be "take[ing] active part. in hostilities," but they have not *become* "combatants" for the

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[218] Confusion as to the definition of the term "combatant" is illustrated in a study of international law, conducted under guidance of the ICRC:

> Persons taking a direct part in hostilities in non-international armed conflicts are *sometimes labeled "combatants."* For example, in a resolution on respect for human rights in armed conflict adopted in 1970, the UN General Assembly speaks of "combatants in all armed conflict" … However, this *designation is only used in its generic meaning a*nd indicates that these persons do not enjoy the protection against attack accorded to civilians, *but does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts*

(emphasis added).
O'Connell, *supra* note, 207, at 852 (citing I Customary International Humanitarian Law 13 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005)).

[219] Again, the U.S. DoD and State Department did not believe that forces in Somalia were state forces; thus it was a non-international armed conflict. Lepper, *supra* note 23, 362–4.

[220] *See generally* O'Connell, *supra* note 207, at 853 (discussing the definition of the term "combatant" in English and an international attempt to introduce the word "fighter" in relevant scenarios, rather than continued reliance on the word "combatant").

[221] Term used in common article 3. Common article 3, *supra* note 141.

[222] Under Article 21 of the Safety Convention, UN forces always retain the right use force in self defense. Safety Convention, *supra* note 11, art. 21. An attorney advisor in the US State Department and delegate to the Safety Convention negotiations, Evan Bloom, reiterates: "use of force in self-defense by United Nations and associated personnel in isolated cases, without sustained fighting, does not by itself take an incident out of this Convention's coverage because the UN forces are not necessarily engaged as combatants when they defend themselves." Bloom, *supra* note 113, at 625.

purposes of the Safety Convention. Therefore, the Safety Convention applies and criminalizes all attacks on and capture of these UN forces.

Overall, the scope of application of the Safety Convention is wide, and apparent on an informed reading of paragraph 2(2). The Convention protects UN forces during all UN operations, unless the forces are a party combatant to an international armed conflict. Under the LOAC, UN forces are party combatants only if the Security Council authorizes them to fight on the side of one state against another state, or if the forces themselves engage in hostilities with the armed forces of a state. The "switch-off" provision of paragraph 2(2) of the Convention ensures that the Convention applies to most all UN forces, particularly those in non-international armed conflict, but does not override the more robust protections of the Geneva Conventions that apply during actual international armed conflict. Finally, and most importantly, the Safety Convention protects all UN forces in non-international armed conflict, even those who engage in hostilities.

4. Taking on Critics: It is OK for the Geneva Conventions to Trump the Safety Convention

Critics of the Safety Convention believe that the "switch-off" provision of paragraph 2(2) of the Convention limits the application of the Convention unnecessarily and provides insufficient protections to UN forces. In fact, the critics misinterpret terms in the "switch-off" provision, causing unneeded concern about a lack of protection for many UN forces. Furthermore, critics' concerns about the limited application of the Convention are misplaced because they don't properly consider importance of other protections under the LOAC.

First, the misinterpretation of the "switch-off" provision stems from confusion about term "combatant" in paragraph 2(2) of the Convention. While "combatant" is a term of art

defined in the Geneva Conventions, as discussed above, scholars have tried to interpret it using plain-text definitions, causing unnecessary debate and devaluing of the Safety Convention.

One scholar asserts that the U.S. interpretation of Article 2 of the Safety Convention "states that the Safety Convention does not apply if part of the peacekeeping force becomes involved in combat."[223] This is a misinterpretation of paragraph 2(2) of the Convention and a misreading of the U.S. delegation's position on the "switch-off" provision. The U.S. position actually states that if some members of UN forces became involved in the "*type* of combat which turns off coverage under [the Safety Convention]," then the Convention would no longer apply to any of the participating UN forces.[224] The "type of combat" is international armed conflict, not simply hostile actions taken by individual Soldiers or units. To say that UN forces lose protection of the Safety Convention if they become "involved in combat" (or become fighters) indicates a misunderstanding of the term "combatant," as used in the Convention and GC III.

A second concern with the "switch-off" of the Convention is that it dilutes the effectiveness of the Convention. Professor Walter Gary Sharp[225] believes that the "switch-off" provision of paragraph 2(2) leaves many UN forces unnecessarily subject to attack.[226] Sharp argues that paragraph 2(2) is the "fatal flaw of the Safety Convention that must be

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[223] Tracey Fisher, *At Risk in No-Man's Land: United States Peacekeepers, Prisoners of "war," and the Convention on the Safety of United Nations and Associated Personnel*, 85 MINN. L. REV. 663, 690 (2000).

[224] Bloom, *supra* note 113, at 626 (citing U.S. Statement in the UN General Assembly at the Adoption of the Convention, UN Doc. A/49/PV.84, 15 (Dec. 9, 1994)).

[225] Professor at Georgetown Law School and Senior Associate Deputy General Counsel for Intelligence, Department of Defense.

[226] SHARP, *supra* note 42, at 82–94.

reconciled before the Safety Convention is allowed to enter into force."[227] Sharp's concern about the effect of the "switch-off" provision of the Safety Convention is based on his extraordinary goals for protection of peacekeepers. He does not believe that UN forces are the "moral equivalent" of other armed forces; thus, he believes UN forces require special protection, even if they are party combatants in a conflict.[228] In his ideal international instrument, all attacks on UN forces would be illegal; no member of an armed force would have combatant immunity for attacking a UN Soldier.[229] He believes that all individuals who attack UN forces, whether members of an armed force or not, should be prosecuted as criminals under the Safety Convention or a similar international instrument.[230] However, many in the international legal community disagree with this disregard for reciprocal combatant immunity.

Specifically, Professor Greenwood notes the historic "principle of equal application" which requires that both parties to an international armed conflict follow, and benefit from, the Geneva Conventions.[231] If only one party, the UN, benefits from Geneva Convention protections, many ideals upon which current jus in bello is built could deteriorate. The

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[227] Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 149 (1996).

[228] SHARP, *supra* note 42, at 99.

[229] Professor Sharp proposes a new instrument of international law: a third protocol to the Geneva Conventions which makes any attack on UN or associated personnel an individual crime. SHARP, *supra* note 42, at 198. Though Professor Sharp is vehemently opposed to the Safety Convention in its current form, his proposed third protocol mirrors the Safety Convention very closely. *Id*., at 77−94, 361.

[230] *Id*. at 99.

[231] Christopher Greenwood, *Symposium: The United Nations, Regional Organizations, and Military Operations: Article: Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L. L. 185, 204 (1996). Greenwood is currently a Judge on the International Court of Justice and was a professor of international law at the London School of Economics from 1996 – 2009. *See* Biography of Judge Christopher Greenwood, International Court of Justice, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=169, last viewed Mar. 10, 2011.

American Bar Association, in its Recommendation on the Safety Convention, notes that the Convention was not intended to replace the laws of armed conflict and that during international armed conflict, forces of both parties should still expect to be bound to and protected by the Geneva Conventions.[232] Overall, Sharp's disdain for the "switch-off" provision stems from his belief that the LAOC should never "switch-on" to protect armed forces from attacking UN forces. The delegates to the Safety Convention, many scholars, and traditional jus in bello disagree.

A third concern among scholars is that a shifting definition of "international armed conflict" could limit the scope of application of the Safety Convention. Professor Greenwood and other scholars assert that "the trend of the last fifty years has been to make the threshold for the application of the laws of international armed conflict as low as possible."[233] Greenwood notes the U.S. State Department statement that "'armed' conflict includes any situation in which there is hostile action between the armed forces of two parties, regardless or the duration, intensity or scope of the fighting…."[234] However, a lower-trending threshold for the application of the laws of international armed conflict does not devalue the Safety Convention's protection for UN forces. First, even if the definition of international armed conflict changes over time, the laws of international armed conflict still apply during international armed conflict. Second, scholars agree that the application of the

[232] American Bar Association Section of International Law and Practice Standing Committee on World Order under Law, *Report to the House of Delegates on the Safety of U.N. and Associated Personnel*, 31 INT'L L. 195, 200–202 (1997).

[233] Greenwood, *supra* note 231, at 200 (1996); *see also* Wills, *supra* note 158, at 29.

[234] *Id.* at 200–201 (citing 3 CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW: 1981–1988, 3456 (Marian Nash (Leich)) ed. (1989)).

Safety Convention will actually help to raise the threshold for the definition of international armed conflict to the original interpretation of the Geneva Conventions.[235]

Finally, military forces do not object to the determination that they are participating as combatants in international armed conflict because the Geneva Conventions provide more protections than the Safety Convention or any other LOAC provisions. As the U.S. Department of Defense delegate to the Ad Hoc Committee explains, military forces would rather have the robust protections of the full Geneva Conventions whenever possible.[236] If UN forces participate in an international armed conflict as combatants, they are protected by all of the Geneva Conventions. However, during non-international conflicts, military forces only benefit from the protections of a small portion of the Geneva Conventions (common article 3 and APII) and the Safety Convention (if states come to rely upon it). Military forces would prefer the robust protections of the Geneva Conventions whenever possible.

Overall, critics of the Safety Convention claiming too-limited application are generally misreading the terms of the Convention and misunderstanding the protections available for peacekeeping forces. Scholars misinterpret the term "combatant" in the scope of application paragraph 2(2), leading to an improperly narrow view of when the Convention applies. Professor Sharp's argument that the Safety Convention should never switch-off is based on an unusual belief that combatant immunity should not apply to anyone who attacks UN forces. However, his position goes against basic tenets of jus in bello and does not enjoy support in the international legal community. Finally, concerns that the Convention might

[235] *Id.* at 202; Wills, *supra* note 158, at 29.

[236] *See* Lepper, *supra* note 23, at 393−4.

"switch-off" too easily are misplaced because be alternative protections are the more robust protections of the Geneva Conventions.

In the end, if arguments claiming limited application of the Safety Convention are the reason that the U.S. and international community do not rely more on the Convention, then policy makers should broaden their understanding of the true scope of the Convention's application. The Safety Convention is a critical tool in the relatively new world of international peacekeeping; its scope is wide and protects peacekeepers when the rest of the LOAC leaves them up a creek with a only a (proverbial) small paddle.

VI. Why Has the United States Not Ratified the Safety Convention?

Although the U.S. delegation was a driving force during the Safety Convention negotiations, and the resulting instrument reflects most all of the U.S. preferences, the Senate has not provided advice and consent to ratify the treaty. Furthermore, U.S. foreign policy leaders have not relied upon or implemented the provisions of the Safety Convention to protect U.S. forces participating in numerous UN operations throughout the world.[237] Overall, there is no clear reason as to why the U.S. has, essentially, ignored the Safety Convention. However, because the Convention provides special protections for U.S. forces participating in most all UN operations, the U.S. should ratify the Safety Convention and foreign policy leaders should ensure that the Security Council and other nations abide by its provisions. This part reviews the executive and congressional treatment of the Safety Convention, and suggests possible reasons that U.S. has not ratified the treaty.

[237] ENGDAHL, *supra* note 12, at 6 (noting that practice relating to the Safety Convention is "limited, if any exists at all" and that very few articles are written on the subject).

The Safety Convention entered into force on January 15, 1999 when 22 nations had ratified, accepted or approved it.[238] As the U.S. was a signatory, ratification was a reasonable and common assumption.[239] Indeed, on November 8, 2000, Secretary of State Madeline Albright submitted the Safety Convention to the President for transmittal to the Senate; on, January 3, 2001, President Clinton transmitted the Convention to the Senate requesting advice and consent for ratification.[240] Both President Clinton and Secretary Albright requested that the Senate give advice and consent for ratification of the Convention, adding only one understanding and one reservation.[241] However, since 2001, Congress has done nothing with the Safety Convention.[242]

What objections U.S. policymakers or the Senate have to the Safety Convention are not evident in any public forum. Upon transmittal of the Convention to the Senate, Secretary Albright recommended only minor U.S. understandings and reservations to the Convention.[243] Nonetheless, it is possible that policymakers are concerned with a number of issues regarding the Safety Convention, such as: the requirement for implementation of

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[238] Major Newton, *International and Operational Law Note: United Nations Convention on the Safety of United Nations (UN) and Associated Personnel Enters into Force*, ARMY LAW., Feb. 1999, at 21.

[239] *Id*. at 25. Notably, the Safety Convention was included in the 1998 version of the International and Operational Law Department's Law of War Documentary Supplement. *Id*. at n.56.

[240] U.S. Treaty Doc. 107-1, Convention on the Safety of U.N. and Associated Personnel, Jan. 3, 2001 [hereinafter U.S. Treaty Doc. 107-1].

[241] *See* Legislative Actions Report on U.S. Treaty Doc. 107-1, http://www.thomas.gov/cgi-bin/ntquery/D?trtys:77:./temp/~trtyssKkS8k [hereinafter Legislative Action Report on U.S. Treaty Doc. 107-1] (last visited Jan 26, 2011).

[242] U.S. Treaty Doc 107-1, *supra* note 240.

[243] *Id*. The recommended understanding to the Convention was to elaborate the U.S's expansive view on the definition of "associated personnel," and the reservation was aimed to ensure that the United States did not submit to compulsory jurisdiction of the International Court of Justice.

domestic legislation to criminalize attacks on UN forces,[244] a potential requirement for an adjustment to U.S. extradition techniques,[245] and its lack of an exclusive jurisdiction clause retaining U.S. jurisdiction over U.S. forces. [246] However, none of these small concerns are likely the reason the U.S. has not ratified the Convention; rather, politics are a much more viable roadblock.

Soon after President Clinton transmitted the Safety Convention to the Senate for advice and consent, President George W. Bush was sworn into office.[247] Political motives of the new administration may not have supported the Safety Convention. Professor Walter G. Sharp, who strongly opposes ratification of the Safety Convention, served as the Defense Department's Associate Deputy General Counsel for International Affairs under President Bush, and has since served as the Defense Department's Senior Associate Deputy General Counsel for Intelligence, under President Bush and President Obama.[248] Possibly his appointment as a senior legal advisor on international affairs in the Bush Administration influenced leaders to take no action on the Safety Convention. In October 2007, the Safety Convention was on the Secretary of State's list of "Treaties Currently on the [Senate Foreign Relations] Committee Calendar on which the Administration Does Not Support Senate

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[244] Safety Convention, *supra* note 11, art. 9(2).

[245] *Id.* arts. 14, 15; ENGDAHL, *supra* note 12, at 287.

[246] ENGDAHL, *supra* note 12, at 274; Lepper, *supra* note 23, at 414−16.

[247] January 20, 2001. David Stout, *Transition in Washington: The Weather: Ah, January. (March Wasn't That Great, Either),* N.Y. TIMES, Jan. 20, 2001., *available at* http://www.nytimes.com/2001/01/20/us/transition-in-washington-the-weather-ah-january-march-wasn-t-that-great-either.html?src=pm.

[248] *See* Walter Gary Sharp, Sr., *Biography,* on Georgetown Law, http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=192 (last visited 26 Jan 2011). Also discussion in subsection V.C.4. regarding Sharp's disagreement with the Safety Convention.

Action At This Time."[249] By 2009, the Obama Administration had moved the Safety Convention to the list of "Treaties Currently on the Committee Calendar on which the Administration Supports Senate Action at This Time" on its Treaty Priority List for Congress. [250] Nonetheless, the Senate took no action on the Safety Convention in 2009 or 2010.[251]

Despite having no clear objection to the Safety Convention, neither the Senate nor the last three Presidents have affected ratification of the treaty. Furthermore, foreign policy leaders in the State Department and the Department of Defense have not relied at all on the Safety Convention to protect U.S. forces serving as part of UN operations. This failure to use the Convention properly as a tool to prevent attacks on U.S. peacekeepers has worked to the detriment of U.S. forces serving under UN mandates.

Current examples illustrate the detrimental effect on UN and U.S. forces serving under UN mandates. International Security Assistance Force, Afghanistan, (ISAF) operations would fall within the scope of application of the Convention,[252] and those who attack U.S. forces participating in the ISAF mission could be criminally prosecuted under the Safety

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[249] Letter from Jeffrey T. Bergner, Assistant Secretary of State for Legislative Affairs, to the Chairman of the Senate Foreign Relations Committee (Feb. 7, 2007), *available at* http://www.state.gov/documents/organization/116355.pdf.

[250] Letter from Richard Verna, Assistant Secretary of State for Legislative Affairs, to the Chairman of the Senate Foreign Relations Committee (May 11, 2009), *available at* http://globalsolutions.org/files/general/White_House_Priorities_List.pdf.

[251] *See* Legislative Actions Report on U.S. Treaty Doc. 107-1, *supra* note 241.

[252] The ISAF mission is a common article 3 internal armed conflict. *See* Lieutenant Colonel Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy,* ARMY LAW., June 2010, 9, at n.12. The ISAF is a peace-enforcement mission under Chapter VII of the UN Charter that is lead by NATO under the authority of the Security Council. ISAF Mandate on NATO Website, http://www.nato.int/isaf/topics/mandate/index.html (last visited on Jan. 29, 2011) [hereinafter ISAF Mandate]. Based on these facts, ISAF falls within the scope of the Convention, as stated in paragraph 2(2). *See also* Gerhard Hafner, *Certain Issues of the Work of the Sixth Committee at the Fifty-sixth General Assembly,* 97 A.J.I.L. 147, 154–5 (2003) (discussing the application of the Safety Convention to ISAF).

Convention. Instead, U.S. forces rely on a detention and quasi-prosecution system based on fledgling Afghan laws and U.S. regulations.[253] Furthermore, U.S. courts and Congress have disagreed significantly as to who can be prosecuted, and in what forum, for attacking U.S. and UN forces.[254] However, the Safety Convention does not require complicated definitions of "unprivileged enemy belligerents," nor does it require that attackers be tried in "regularly constituted courts" as common article 3 requires.[255] If the U.S. and international community relied on the Safety Convention, then those who attack UN forces could be effectively prosecuted in much more standard forums without continuous debate.

VII. Critical Changes to the Safety Convention: Fixin' It Up to Make it an Effective Prosecution Tool

As presented above, the Safety Convention, in theory and in drafting, establishes more protections for UN forces than any other instrument of international law; it is a positive addition to the international regime of protection for peacekeepers and punishment of rogue attackers. However, the Convention requires some practical improvements so that the United Nations and member states will rely on it, and so that it can effectively govern prosecution of criminal attackers. This part first discusses problems with the prosecution forums contemplated under the Convention. Second, and most importantly, this section proposes the creation of a new multilateral or international tribunal to effectively prosecute individuals for crimes under the Safety Convention. This tribunal should be modeled off of prosecution

[253] *See generally Bovarnick, supra* note 252 (explaining the complicated history of the detainee review boards in Afghanistan and the numerous different authorities (including the President's authority) relied upon to detainee and prosecute "unlawful enemy combatants" in Afghanistan).

[254] Bovarnick, *supra* note 252, at 9−11 (discussing numerous U.S. court rulings and other executive decisions regarding prosecution of unlawful enemy combatants and common article 3).

[255] *See* Common article 3, *supra* note 141.

forums the UN is considering for prosecuting pirates off of the coast of Somalia.[256] Finally, this part discusses pre- and post-trial imprisonment of attackers.

A. Problems with Current Prosecution Forums Contemplated under the Safety Convention

While a critical tool in the emerging "legal regime against impunity"[257] for individuals who attack UN forces, the Safety Convention is not without flaws. Likely the most prominent flaw is the lack of practical options, on the face of the Convention, for the prosecution of individuals who commit Article 9 crimes. As discussed previously, the Convention does establish many jurisdictional options for prosecution – offenders may be prosecuted in the state in which the crime occurred, in the victim's state, in the offender's state of origin, in a state in which the offender habitually resides, or in a state where the offender is found (the "universal jurisdiction" provision).[258] Unfortunately, as discussed in this section, most of these forums are impractical or ineffective.

The default forum for prosecution under Articles 10,13 and 14 of the Safety Convention is the host state;[259] it is where the UN forces are located and most likely the state in which the crime occurred and the offender is located. But prosecution in and by the host state is a practically difficult undertaking. The states in which UN operations occur are generally

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[256] U.N. Secretary-General, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning person responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results* U.N. Doc. S/2010/394, July 26, 2010 [hereinafter UN Secretary-General Piracy Report].

[257] *See generally* ENGDAHL, *supra* note 12, (coining the phrase "legal regime of impunity").

[258] Safety Convention, *supra* note 11, art. 10.

[259] The Convention does not establish, per se, a default forum, but it does require prosecution in (or extradition by) the state where the crime occurred or the offender is a national. Because the host state of the UN forces is where the crime occurred, prosecution by the host state is therefore required, and essentially a default under the Convention.

unstable; governments, if they exist at all, are unable to lead or control people within the state's borders. Over the last 20 years, UN peacekeeping operations have deployed UN forces to Somalia, Haiti, the former Yugoslavia, Sierra Leone, Rwanda, and Afghanistan. During all of these operations, UN peacekeepers were attacked. [260] During none of these operations have domestic courts, under their own initiative, prosecuted individuals who attacked UN forces.[261] Indeed, when a UN peacekeeping force enters a nation in an attempt to end internal armed conflict,[262] the UN force cannot rely on the faltering government for any judicial actions. Court systems deteriorate during internal armed conflicts, and it can take years for UN forces to assist in rebuilding the systems. Thus, calling upon the host nation to prosecute individuals who attack UN forces within their borders is a request almost certain to remain unanswered.

The Safety Convention does detail other jurisdictions for the prosecution attackers of UN forces. Though these may be more viable options, they remain impractical for today's high tempo UN operations. One prosecutorial option is for the victim's state to assume jurisdiction over the crime and the offender. Article 10 of the Convention allows a state party to establish jurisdiction over a crime done "with respect to a national of that State."[263] A state party to the Convention can thus assume jurisdiction to prosecute individuals who

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[260] *See* SHARP, *supra* note 42, at 87 (discussing UN Security Council authorization for the capture of individuals who attacked UN forces in Somalia); Gadler, *supra* note 217, at 598–604 (discussing prosecution at international tribunal of individuals who attacked UN peacekeepers in Rwanda and Sierra Leone); *see generally* Bovarnick, *supra* note 252 (discussing US and ISAF force participation in "detainee review boards" for individuals who attack ISAF forces in Afghanistan, rather than prosecution in Afghan courts. Afghan prosecution is progressing, but only at the urging of U.S. and UN forces).

[261] *Id*. (all discussing attacks and prosecution by outside entities, rather than host states).

[262] Safety Convention, *supra* note 11, art. 2 (the scope provision of the Safety Convention indicates that it applies during internal armed conflict).

[263] *Id.* art.10.

attack that state's military forces participating in UN operations. States may equate this provision in the Safety Convention to similar domestic provisions that allow them to establish jurisdiction, world-wide, to detain individuals who attack their forces.[264] However, if the United States serves as a model for prosecution by victims' states, the jurisdictional provision will likely prove to be ineffective.

The U.S. policy regarding the authority to detain and prosecute attackers and terrorists world-wide remains controversial and unsettled, and ultimately, too inefficient to have positive affect. The U.S. Supreme Court and the legislature continue to wrangle about proper trial forums for unprivileged enemy belligerents. The Supreme Court has disapproved of military commissions[265] and asserted that detainees have rights to challenge, in federal court, their categorization as enemy combatants.[266] The legislature has responded with the Military Commissions Acts of 2006 and 2009, asserting that unlawful enemy combatants (deemed "unprivileged enemy belligerents" in the latter Act) can be tried by military commission.[267] As a result of indecision and inefficiency, very few cases have been heard through the military commission forum.[268] In contrast, the U.S. forces and UN ISAF forces

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[264] *See, e.g.,* Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

[265] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[266] Boumediene v. Bush 553 U.S. 723 (2008); *see also* Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantanamo*, N.Y. TIMES, June 13, 2008, at A1, *available at* http://www.nytimes.com/2008/06/13/washington/13scotus.html?scp=3&sq=Boumediene%20v.%20Bush&st=cse (last viewed Mar. 20, 2011).

[267] Daniel H. Benson & Calvin Louis, *Repeal of the Military Commissions Act*, 19 S. CAL. REV. L. & SOC. JUST. 265, 277 (2010) (citing Military Commissions Act of 2006, Pub. L. No.109-366, 120 Stat. 2600 (2006) (previously codified at 10 U.S.C. §§ 948a-950w(2006)) amended by Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (to be codified at 10 U.S.C. §§ 948a-950t)). *See also* Captain Ron Alcala, Notes: International and Operational Law, ARMY LAW., June 2010, at 3 (discussing the Military Commissions Act of 2009).

[268] The DoD Military Commissions website identifies, as of 2010, approximately twenty cases being heard by military commissions. Department of Defense, Military Commissions, http://www.defense.gov/news/commissions.html (last viewed Mar. 20, 2011).

in Afghanistan have detained many unprivileged enemy belligerents on the battlefield.[269] These individuals are not tried in the United States, even though many have attacked U.S. forces.[270] Likely, they are not tried in the U.S. because of the inefficiency and uncertainty regarding trials of unprivileged enemy belligerents.

Other prosecution forums contemplated by the Safety Convention involve offenders' states, which have little incentive to prosecute. The offender's state of origin, the state in which the offender habitually resides, and the state in which the offender is located could all prosecute under the Safety Convention.[271] However, those states have little interest in prosecution. Simply, if the crime did not occur in a state, and the victim is not in a state, the state has little incentive in expending the effort to prosecute an alleged offender.

Overall, though the Safety Convention is a critical tool in the fight against impunity for those who attack UN forces, the drafters failed to create practical and effective forums for prosecution under the Conventions. Possibly, they did not realize what a significant problem that attacks on UN forces would become, or they could not contemplate what a substantial role UN forces would play in international policing. The result has been that sending states bear the burden of prosecuting attackers, if attackers are to be prosecuted at all. For example, U.S. and ISAF forces have the burden of orchestrating the prosecution of attackers in Afghanistan by creating and managing quasi-prosecution forums.[272] In other UN operations,

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[269] In 2009, for example, the detention facility in Bagram, Afghanistan, housing ISAF (and U.S.) detainees had almost 900 detainees. Bovarnick, *supra* note 252, app. A, at 47.

[270] *Id. at n.*39−41 (discussing Detainee Review Boards conducted by U.S. forces in Afghanistan, noting that the first habeas petitions of detainees in Afghanistan are just now working their way through U.S. courts).

[271] Safety Convention, *supra* note 11, art. 10.

[272] *See generally* Bovarnick, supra note 252.

such as MINUSTAH in Haiti, no state forces are committed to prosecuting attackers;[273] thus, no prosecution occurs. Creating a more practical and effective prosecution forum under the Safety Convention could ensure standardized prosecution of individuals who attack UN forces, no matter where the UN operation occurs or what states send forces.

B. More Practical Alternatives for Prosecution: International Tribunals

Though not specifically contemplated in the Safety Convention, an international or multilateral tribunal may be the most effective and efficient forum for prosecuting individuals who attack UN forces. A special tribunal for Safety Convention prosecutions would eliminate the difficulties with host nation, victims' state and offenders' state prosecutions. Such a tribunal would also alleviate the burden of prosecution that currently rests almost squarely on sending states. This section discusses the possibility of extraditing offenders under the Safety Convention to international tribunals in general. Furthermore, this section examines the possibility of extraditing offenders to the International Criminal Court, concluding that such extradition would be ineffective. Finally, and most importantly, this section proposes that the UN and member states establish a new multilateral or international tribunal for prosecutions under the Safety Convention. The tribunal should be modeled after one of the UN's newly-proposed tribunals for prosecuting piracy.

1. Extradition to International Tribunals

Though the Safety Convention does not address extradition of offenders to international tribunals, such extradition is possible under international and domestic law.

Professor Sharp, a critic of the Safety Convention, notes that one of its weaknesses is the failure to include the option to extradite offenders to an international tribunal for

[273] See discussion in Part I (Introduction).

prosecution.[274] In fact, the Nordic countries' delegation to the negotiations for the Convention proposed an addition to Article 14 of the convention that stated: "A State Party may also submit the case to such international criminal tribunal as may have jurisdiction with regard to crimes alleged to have been committed."[275] The proposal did not enjoy wide support during negotiations for several reasons.[276] Primarily, delegations were concerned that an international tribunal provision in the Convention would force delay in the implementation of the Convention.[277] Negotiations had otherwise gone quickly and relatively smoothly; adding the requirement to establish an international tribunal could upset consensus and give some nations a reason to renege on their support for the Convention.[278]

In the end, the delegations did not include any reference to prosecution by international tribunal in the text of the Safety Convention, but they did decide that the issue would be ripe for inclusion in a subsequent protocol.[279] In addition, the delegations believed that an international tribunal could have jurisdiction over the crimes enumerated in Article 9 of the Convention "whether or not the Convention expressly referred to [a tribunal]."[280]

Though the idea of extraditing an offender from a state with custody to an international tribunal has faced challenges, it is a viable option under international and U.S. law. Existing tribunals have addressed the issue of extradition from custodial states. For example, the guidelines for national implementation legislation for the International Criminal Tribunal for

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[274] SHARP, *supra* note 42, at 91.

[275] Report of the Ad Hoc Committee, *supra* note 29, para. 133.

[276] ENGDAHL, *supra* note 12, at 286.

[277] Report of the Ad Hoc Committee, *supra* note 29, para.133.

[278] ENGDAHL, *supra* note 12, at 286.

[279] Report of the Ad Hoc Committee, *supra* note 29, para. 133.

[280] *Id.*

Yugoslavia (ICTY) stated that the "transfer of an accused to the custody of the tribunals [can] be carried out 'without resort to extradition proceedings.'"[281] Though many states still insisted upon following normal extradition proceedings, they did extradite offenders to the ICTY.[282]

United States federal courts settled the question as to what authority is required to extradite offenders in U.S. custody to an international tribunal in the case *Ntakirutimana v. Reno* in 1999.[283] Mr. Ntakirutimana fought extradition from the United States to the International Criminal Tribunal for Rwanda (ICTR), claiming that no valid extradition treaty existed upon which to base extradition to ICTR.[284] The U.S. Court of Appeals for the 5th Circuit held that national legislation implementing ICTR was sufficient for extradition and that a treaty was not required.[285] Thus, the United States can extradite offenders in its custody to international tribunals based solely on national legislation implementing the tribunal treaty. Though other states may continue to require extradition treaties to extradite to international tribunals, no question exists as to whether "prosecution or extradition" under the Safety Convention can include extradition to international tribunals.[286]

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[281] Sunil Kumar Gupta, *Sanctum for the War Criminal: Extradition Law and the International Criminal Court*, 3 CAL. CRIM. L. REV. 1, 35−36 (2000) .

[282] *Id.*

[283] Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999), *cert. denied,* 528 U.S. 1135 (2000).

[284] Gupta, *supra* note 281 (citing Ntakirutimana v. Reno, 184 F. 3d 419 (5th Cir. 1999)).

[285] *Id*.

[286] *See generally* Gupta, *supra* note 281(discussing hurdles in extradition to international tribunals, but affirming the general idea that if the custodial state has some way to affect extradition, such extradition can be to an international tribunal or another state).

2. Extradition to the International Criminal Court (ICC)?

It is possible that states party to the Safety Convention could extradite offenders to an established international tribunal that focuses on war crimes – the International Criminal Court (ICC). The ICC Statute does specifically enumerate attacks on peacekeepers as a war crime attacks.[287] The problem with prosecuting attackers of UN forces at the ICC, however, is that the limitations on prosecution at the ICC would stifle the positive affects the Safety Convention.

Specifically, the ICC requires justification of the gravity of a crime before the ICC will prosecute an offender for a crime.[288] Thus, the ICC would only prosecute individuals who commit gross atrocities against UN forces. The goal of the Safety Convention as a criminal instrument, however, is to use prosecution to deter all attacks on UN forces. Furthermore, detention and prosecution under the Safety Convention enables UN forces to remove offenders from the operational area and prevent future and further danger to the forces. Thus, in order to protect UN forces under the Safety Convention, individuals who "merely" attack, detain, kidnap, and threaten UN forces must be prosecuted, just as those individuals who commit mass atrocities or murder. Relying on the ICC to prosecute would essentially "tie the hands" of the Safety Convention, sapping almost all of its strength as a criminal law instrument.

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[287] Rome Statute, *supra* note 7, art. 8(3)(b).

[288] A case must have sufficient gravity to justify action by the ICC. *See* Rome Statute, *supra* note 7, art. 17(1)(d); Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09, Decision on the Confirmation of Charges (Public Redacted Version), ¶ 28−34 (Feb. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf.

3. An International Tribunal Tailored for Safety Convention Prosecutions

Considering that Safety Convention offenders can be extradited to international tribunals under international and U.S. law, and that the ICC is an imperfect forum for Safety Convention prosecutions, the most effective prosecution forum to achieve the goals of the Safety Convention would be an international tribunal tailored to the provisions and the aspirations of the Convention. Such a tribunal would ensure standardized prosecutions, rather than relying on capabilities and whims of host nations, victims' states, and offenders' states. It would also alleviate the burden on sending states to create a system to prosecute their own attackers. Finally, an international tribunal for the Safety Convention would ensure consistent interpretation of the treaty for all UN operations.[289]

Many standing international tribunals could serve as models, such as the ICTY, ICTR, and the Special Court for Sierra Leone (SCSL).[290] These tribunals have tried individuals who committed atrocities against UN peacekeeping forces (as well as other war crimes).[291] For the most applicable and innovative tribunal options, however, the United Nations and member states should look to recent UN developments concerning the prosecution of pirates off the coast of Somalia.

a. Piracy and Attacks on UN Forces: Similar Problems

Over the last few years, the UN Secretary-General and the Security Council have considered how to effectively prosecute pirates off the coast of Somalia; they have

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[289] Scholars have noted that local or host nation states may have difficulty interpreting provisions of the Safety Convention, particularly the "switch-off" provision of paragraph 2(2). *See* ENGDAHL, *supra* note 12, at 241.

[290] *See generally* Gadler, *supra* note 217 (discussing these international tribunals and prosecution of individuals who have committed war crimes against UN peacekeepers).

[291] *Id*.

researched domestic and international prosecution models. As of July 2010, the Secretary-General had identified seven prosecution options for the Security Council to consider. [292] Some of these prosecution models would serve well to prosecute offenders under the Safety Convention because the problem of piracy off the coast of Somalia mirrors, in many ways, the problem of attacks on UN forces in unstable nations.

Numerous similarities exist between piracy and attacks on UN forces. First, both offenses are unlawful under instruments of international law. Just as piracy on the high seas and exclusive economic zones is unlawful under the United Nations Convention on the Law of the Seas (UNCLOS),[293] attacking UN peacekeepers is unlawful under the ICC Statute and the Safety Convention. [294] Second, just as the problem of piracy has increased significantly over the last 20 years,[295] attacks on UN peacekeepers have significantly increased throughout the last two decades.[296] Third, UNCLOS establishes universal jurisdiction over pirates so that any affected state can detain and prosecute them,[297] while the Safety Convention establishes universal jurisdiction over individuals who attack UN forces.[298] Finally, the nature and gravity of the offenses is similar. The goal of UNCLOS and the international

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[292] UN Secretary-General Piracy Report, *supra* note 256.

[293] United Nations Convention on the Law of the Sea, arts. 100−105, Dec. 10, 1982, 21 I.L.M. 1245 [hereinafter UNCLOS], *available at* www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

[294] Rome Statute, *supra* note 7, art. 8(3)(b); Safety Convention, *supra* note 11, art. 9.

[295] "The number of attacks off the coast of Somalia has steadily increased since 1991, and over the past two years has increased from 111 vessels attacked in 2008 to 217 vessels attacked in 2009." UN Secretary-General Piracy Report, *supra* note 256, para. 7.

[296] See discussion of attacks in Section III.A.

[297] UN Secretary-General Piracy Report, *supra* note 256, para. 12; UNCLOS, *supra* note 293, art 105.

[298] See discussion in section II.A.

community is to prosecute and punish all pirates and to stop piracy on the high seas near Somalia.[299] Similarly, the goal of the Safety Convention is to stop attacks on UN forces conducting peacekeeping and peace enforcing missions. In both cases, prosecution of the most severe criminals or most outrageous crimes is not sufficient; rather, prosecution is a means to an ends of stopping the illegal activity all together.

b. The Proper Forum for Safety Convention Prosecution: A Multilateral or an International Tribunal

Because of the similarities in the two areas of international law, some of the Secretary-General's suggested prosecution forums for piracy can serve as ideal models for a prosecution forum under the Safety Convention. The Secretary-General suggests domestic and host nation prosecution options, as well as regional and international tribunal options. While domestic and host nation prosecution are certainly contemplated by the Safety Convention, they are not ideal (as discussed above). Thus, the Secretary-General's recommended regional and international tribunals for piracy prosecution are the most useful models.

The Secretary-General suggests the following three regional and international tribunal prosecution options:

> Option [1]: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation . . . ; Option [2]: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations . . . ; [and] Option [3]: The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations . . . [300]

[299] UN Secretary-General Piracy report, *supra* note 256, para. 9.
[300] *Id.* at 2.

In the context of piracy prosecution, Option 1, the establishment of a regional tribunal based on a multilateral treaty, would require regional negotiations among nations in close proximity to Somalia and the piracy problem. The tribunal would include some UN judges and staff and some regional judges and staff. The disadvantages of Option 1 include having to establish the jurisdiction of the tribunal and defining crimes and tribunal procedures. The advantages of using a regional model for piracy prosecution include building judicial capacity in the region and easy transfer of convicted criminals for imprisonment (because of proximity of the tribunal to the states in which convicts are imprisoned).[301]

Option 2, also in the context of piracy prosecution, would require a treaty between UN and Somalia (or another State in the region) to create an international tribunal for piracy prosecution. A majority of judges and staff for the tribunal would be from the UN, but some would come from the regional State. The advantages and disadvantages for piracy prosecution are similar to those of Option 1.[302]

The final option is for the Security Council to establish an international tribunal under Chapter VII of the UN Charter for prosecution of pirates. The Security Council would have to create the statute governing the tribunal and establish jurisdiction over people and crimes. In addition, the Security Council would have to find piracy to be a threat to international peace and security in order to establish the tribunal under Chapter VII of the UN Charter.[303] The advantage of a Chapter VII tribunal is that it would be comprised entirely of experienced

[301] *Id.* pt. V, paras. 80–89 (Option 1 discussed in this paper is actually the Secretary-General's Option 5).

[302] *Id*. pt. V, paras. 90−96 (the Secretary-General's Option 6).

[303] *Id.* pt. V, paras. 97−104.

UN judges and staff; the disadvantages include extensive costs for the tribunal and the lack of judicial capacity-building opportunity in the region.[304]

While these three prosecution options for piracy don't translate into perfect prosecution solutions under the Safety Convention, they can serve as models for functional criminal prosecutions under the Convention. Option 1 and Option 2 are similar in that they involve negotiations between the most-affected states and the United Nations. Concerning piracy, the states involved in negotiations would be those closest geographically to the problem of piracy, allowing a regional tribunal to address a relatively local problem. Attacks on UN forces, however, are not localized or regionalized problems. Rather, the UN deploys forces worldwide to address unstable situations. The states most affected by attacks on UN forces are not states in which UN forces operate, but states that send forces to participate in UN missions. The critical element to translate from regional piracy tribunals to a Safety Convention tribunal is the joint involvement of the most affected states and the UN.

Thus, a Safety Convention tribunal modeled after the regional piracy tribunal options would involve the states that contribute the bulk of forces to UN missions. Instead of being a regional tribunal, this would be considered a multilateral tribunal. During negotiations, the UN and national delegations would establish the jurisdiction of the multilateral tribunal, over people and crimes. Because the Safety Convention already defines crimes against UN forces and discusses jurisdiction at-length, the negotiations regarding those issues should be relatively simple. Just as the piracy tribunals would include judges and staff from the UN and affected nations, the Safety Convention tribunal could include judges and staff from the UN and nations participating in UN operations. An advantage to establishing a multilateral tribunal as an agreement between states and the UN is that states can advance their own

[304] *Id.*

particular interests. For example, the United States could champion the inclusion of an "exclusive jurisdiction" clause in the tribunal statute to avoid the possibility of U.S. (or other national) forces being subject to the tribunal's jurisdiction.[305] Overall, a multilateral tribunal, modeled after regional piracy tribunals, would be an excellent forum for Safety Convention prosecutions; the UN and interested states simply need to create the tribunal.

In creating the statute for the multilateral tribunal, the UN and interested states would author a new international instrument. It could be a stand-alone document created at UN-hosted conference, such as the Rome Statue governing the ICC.[306] Alternatively, the statute for the multilateral tribunal could be a treaty between the United Nations and interested states, such as the statue governing the Special Court for Sierra Leone (SCSL).[307] Probably most suitable instrument, however, would be an additional protocol to the Safety Convention. The protocol would be its own international instrument created at a UN-hosted convention. In addition, the United Nations could be a signatory to the statute governing the multilateral tribunal, as it is a signatory to the statute governing the SCSL.[308] A benefit of creating an additional protocol to the Safety Convention is that states could address other potential

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[305] *See* Lepper, *supra* note 23, at 437–8 (discussing U.S. exclusive jurisdiction). The U.S. has historically been concerned with international tribunals asserting jurisdiction over U.S. military personnel. In the years after the ICC Statute went into effect, he U.S. negotiated bilateral treaties with many States Party to the ICC to ensure that the States would not subject U.S. service-members to the jurisdiction of the ICC.

[306] The UN hosted the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to create the Rome Statute. *See* Provisional Agenda, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Apr 13, 1998, U.N.Doc A/CONF.183/1, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/104/18/PDF/N9810418.pdf?OpenElement.

[307] The UN can sign such a document as a party, as it has done for the Statute for the Special Court for Sierra Leone. Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Freetown, Jan. 16, 2002 .

[308] *Id*.

shortfalls of the current Convention.[309] Ultimately, the Security Council would apply the multilateral tribunal to UN operations by referencing the tribunal statute, and the Safety Convention, in all UNSCRs authorizing the use of UN forces.

The second viable option for a Safety Convention prosecution forum is an international tribunal that the Security Council could create under Chapter VII of the UN Charter. As required for a Chapter VII tribunal, the Security Council would have no problem finding that attacks on UN forces are a threat to international peace and security.[310] Negotiations would be relatively simple, as the Chapter VII tribunal could rely on the definitions of jurisdiction and crimes already established in the Safety Convention. The disadvantage of a Security Council tribunal is that affected nations, those who send forces for UN operations, might not play as big a role in creating the tribunal statute. Thus, they might not be able to champion their own causes, and ultimately might not be as invested in the success of the tribunal. Alternatively, advantages of a Security Council tribunal include: it should not take long to negotiate (because the Security Council is an established body ready for negotiations), and nations would not be asked to provide judges or staff to sit on the tribunal. As with the multilateral treaty tribunal discussed above, the Security Council would reference the

[309] A primary shortfall is the failure of the Safety Convention to clearly include an exclusive jurisdiction clause. The Safety Convention, may, on its own (without a SOFA) provide for exclusive jurisdiction over UN forces; scholars disagree on the matter. The US DoD delegate to the 1993 Convention, now Major General Lepper, suggests: "in an operation established under Chapter VII of the U.N. Charter – nonconsensual by definition – it is the United States' view that the sending State exercises exclusive jurisdiction and that a SOFA is unnecessary." Lepper, *supra* note 23, at 415. Alternatively, Professor Engdahl, a leading scholar on the Convention, believes that by rejecting proposals to include an exclusive jurisdiction clause in the Convention, it does not currently provide exclusive jurisdiction to sending states. ENGDAHL, *supra* note 12, at 272–4. Lepper suggests that the easiest solution to this concern is that when the US ratifies the Convention, it does so with a reservation or an understanding stating that the Convention does provide for exclusive jurisdiction to sending states. Lepper, *supra* note 23, at 416–7. Alternatively, states could enter into an additional protocol addressing the matter.

[310] UN Secretary-General Piracy Report, *supra* note 256, pt. V, paras. 97–104.

Chapter VII prosecution tribunal and the Safety Convention in each new authorization for the use of UN forces.

Overall, the United Nations already has considered, in-depth, the advantages, disadvantages and procedures for creating a tribunal to prosecute piracy. The UN Secretary-General and Security Council can and should use this research to create a functional tribunal to prosecute individuals who violate the Safety Convention. If the United Nations is truly concerned by continuously-increasing attacks on its peacekeeping forces, it must make prosecutions under the Safety Convention practical. Either a multilateral tribunal or an international tribunal established by the Security Council would be an effective means for prosecuting individuals who attack UN forces. The United Nations should establish a Committee to discuss the benefits of both tribunals and decide which the international community would prefer. States who stand to benefit from effective prosecutions, particularly the U.S., should push the United Nations to initiate discussions on a tribunal and should participate heavily in the formation of such a tribunal.

In sum, the United Nations and member states can enforce Safety Convention prosecutions in numerous forums. However, the prosecution forums detailed in the Convention itself are not ideal. Host nation prosecution, the default forum discussed in the Convention, is severely limited in its practical application. UN forces primarily operate in unstable nations and regions that do not have the judicial capacity to prosecute individuals who commit crimes against their own citizens or UN forces. Similarly, prosecution of offenders in victims' states is inefficient, particularly in U.S. forums. Finally, prosecution in offenders' states is simply not effective because the states have no particular interest in the

crime or the victim. This does not mean, however, that the international community should ignore the prosecution requirements under the Safety Convention.

The best forum for prosecution under the Safety Convention is a multilateral tribunal or a Chapter VII tribunal established by the Security Council, both modeled after the UN Secretary-General's options for piracy prosecution. The UN would bear significant responsibility for prosecuting those who attack UN forces, and member states would ensure that the offenders are removed from operational areas and deterred from further attack. Functional, effective prosecution at a tribunal will result in the imprisonment of attackers, decreases in the number of attacks during UN operations, and deterrence of future attacks on UN forces.

4. Imprisonment

However, before any State or tribunal prosecutes an attacker, some entity must detain the attacker. Similarly, after an offender is convicted by a state or at a tribunal, some entity must imprison the convict. Host nations or other states party to the Safety Convention may assume responsibility for detention if they establish jurisdiction and prosecute attackers. However, these nations may not have the capacity to humanely imprison pre-trial or post-trial individuals. Furthermore, neither multilateral nor international tribunals will have any inherent detention capability and will rely on third (and fourth, fifth, etc) party detention arrangements. This subsection discusses possibilities for both pre- and post-trial detention of Safety Convention offenders.

The pre-trial detention location of individuals who attack UN forces likely does not depend on the ultimate prosecution forum. When the Security Council authorizes the use of

UN forces, it generally grants authority to detain those who attack the UN forces.[311] In past and current operations, UN forces have been able to establish robust detention operations.[312] Likely being the most capable organization within a State, and the most interested in the prosecution of individuals who attack them, UN forces will remain the primary choice to conduct pre-trial detention of attackers to be prosecuted under the Safety Convention. The collection and retention of evidence for prosecution has been a constant challenge for U.S. and UN forces and would likely remain an area of emphasis for Safety Convention prosecutions.[313] However, if UN forces see that a competent state or tribunal regularly prosecutes UN attackers, forces may be more likely to collect and retain sufficient evidence. Overall, pre-trial detention will likely remain the responsibility of UN forces and sending states, even after the Safety Convention is put into more effective and robust use.

On the other hand, the UN and member states will have to contemplate new systems of post-trial imprisonment for individuals convicted of Safety Convention crimes. Fortunately, these new systems are not without precedent or previous United Nations consideration. Logically, if a host nation or victim's state prosecutes an individual who attacks UN forces, then that state bears responsibility for pre-trial and post-trial detention. However, the state may be unable to provide adequate, humane detention facilities. In those cases, the states establishing jurisdiction must arrange for other states to assume responsibility for imprisonment. The United Nations can oversee detention arrangements and ensure humane

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[311] *See, e.g.*, ISAF Mandate, *supra* note 252.

[312] *See generally* Bovarnick, *supra* note 252.

[313] *See generally id.* at 16 (discussing the affects of insufficient evidence on detainee releases and prosecution).

treatment for detainees. For example, the Special Court for Sierra Leone (SCSL) employs treaties with third-party nations to arrange for post-conviction imprisonment of criminals.[314]

For imprisonment after tribunal convictions, the United Nations and member states will also have to depend upon treaties and arrangements with willing states. Post-conviction imprisonment of pirates, for example, will require that the UN make arrangements with third party states.[315] In fact, the UN Secretary-General reports that : "all of the United Nations and United Nations assisted tribunals, with the exception of the Extraordinary Chambers in the Courts of Cambodia, are … dependent on the willingness and ability of third States to enter into agreements with them on the enforcement of sentences."[316] As post-conviction imprisonment arrangements are necessary, the United Nations and member states should include the matter in negotiations when they establish a multilateral or international prosecution tribunal.

In sum, the Safety Convention is a critical tool in the regime against impunity for individuals who attack UN forces. However, the Convention requires a more effective prosecution forum to enable standardized prosecution for offenders. Relying on prosecution in host nations, victims' states, and offenders' states has proven unsuccessful, as none of those forums have the capabilities, or the interest, to prosecute those who attack UN forces. The result has been that prosecution of offenders either rests on the shoulders of sending states and UN forces, or is simply not done. Establishing a multilateral or an international tribunal specific to the tenets of the Safety Convention will standardize prosecutions and

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[314] J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT'L L. REV. 37 (2006).

[315] UN Secretary-General Piracy Report, *supra* note 256, paras. 82 and 98.

[316] *Id.*

alleviate the burden on sending states. It will ensure that those who attack UN forces in any part of the globe do not proceed with impunity.

VIII. Conclusion

The international community has exposed UN forces to unnecessary risk during UN operations over the last fifteen years because it has neglected to enforce the provisions of the Safety Convention. The United Nations and member states created the Safety Convention because they realized a dangerous and widening gap in protections for UN peacekeepers abroad. In the Safety Convention, the United Nations and member states established an international instrument with a very wide scope of application and the ability to prosecute individuals who attack UN forces throughout the world. They filled a gap in the LOAC that allowed UN forces to flounder under the minimal protections of common article 3 of the Geneva Conventions, or under no international law protections if the UN forces were engaged in hostilities. It is time to use this tool for its intended purpose: to improve the safety and security of UN forces by prosecuting criminals who attack them.

The Safety Convention does need some maintenance and updating to be an effective tool for prosecution. The prosecution forums contemplated in the Convention have proven ineffective against the legal regime of impunity for individuals who attack UN forces. The best prosecution forum for the Safety Convention would be a multilateral or an international tribunal. Fortunately, the UN has virtually written prosecution models for itself in its options for prosecuting piracy. States that send forces for UN operations must insist on negotiations to establish such a multilateral or international tribunal. Creating a tribunal for Safety Convention prosecutions will alleviate the burden currently resting on sending states to

prosecute attackers, and it will ensure standardized prosecution of offenders in all parts of the globe.

Not only do states need to establish a prosecution tribunal, but they also must ensure implementation of the Safety Convention. One method for the member states to affect the implementation of the Safety Convention is to insist that the Security Council reference the Convention in all authorizations for the use of UN force. Furthermore, member states should insist that Security Council authorizations of force also reference the Safety Convention prosecution tribunal and imprisonment agreements. A second method for member states to affect the implementation of the Safety Convention is to ratify the instrument. The United States participated heavily in the Convention's negotiations and essentially had all of its interests included in the instrument. However, since 1999, the Convention has waited, untouched, in the Senate Foreign Relations Committee.

The Department of Defense must champion the cause of this treaty; it is a tool to protect U.S. forces abroad. Currently, U.S. forces are without any special legal status when participating as UN peacekeepers. They are without assurances (or any indication) that those who attack them illegally will be prosecuted. Simply allowing these gaping holes to continue when a solution has been written and implemented is nonsensical and irresponsible.

Overall, while the Safety Convention is not a perfect international instrument for protecting UN forces, it is far better than any other protections for UN forces involved in non-international armed conflict. The Convention can be made more effective with a small amount of effort on the part of the UN and member states. Indeed, it is time to fix up this tool and send UN forces into battle with proper armor.