

The creation and control of places of protection during United Nations peace operations

by

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One means of providing protection to civilians who are being deliberately targeted during armed conflict¹ is to create and control places of protection² either with, or without, the consent of some or all the parties to the conflict.³ In recent years the Security Council has, without the consent of some or all the belligerents, authorized the creation of places of protection to safeguard civilians from the ravages of armed conflict (for example, safe areas in the former Yugoslavia,⁴ and the humanitarian protected zone in Rwanda⁵), and to varying extents has mandated United Nations peace operations⁶ to control them. It is in this context that the *Report of the Panel for United Nations Peace Operations* (the Brahimi Report)⁷ states:

“The Security Council has ... established, in its resolution 1296 (2000), that the targeting of civilians in armed conflict and the

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denial of humanitarian access to civilian populations afflicted by war may themselves constitute threats to international peace and security and thus be triggers for Security Council action.

1 An armed conflict exists “wherever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”. *The Prosecutor v. Dusko Tadic*, Decision of the Appeals Chamber, 2 October 1999, 105 *International Law Reports*, p. 488, para. 70.

2 In the context of this paper a “place of protection” is any area that affords protection to civilians who are being deliberately targeted during armed conflict.

3 This paper will not consider places of protection created and controlled with consent and pursuant to international humanitarian law. See e.g. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Conflicts in the Field, 12 August 1949, Art. 23; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Arts 14 and 15; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Protocol I), Arts 59 and 60, which provide for, *inter alia*, hospital zones and localities, neutralized zones and the immunity from attack of non-defended localities. For further discussion of these places see ICRC, *Hospital Localities and Safety Zones*, ICRC, Geneva, 1952; ICRC, *Report concerning Hospital and Safety Localities and Zones*, ICRC, Geneva, 1946, Series IV, No. 1; J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, vol. I, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 206-216 (dealing with Art. 23) and vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva,

1958, pp. 118-132 (dealing with Arts 14 and 15); Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, pp. 699-713 (dealing with Arts 59 and 60 of Protocol I). Nor will this paper address the creation of “open towns”, “undefended places” and “demilitarized zones”, as these are discussed in R. Y. Jennings, “Open Towns”, *British Yearbook of International Law*, vol. 22, Oxford, 1945, pp 258-263; H. W. Elliott, “Open Cities and (Un)defended Places”, *The Army Lawyer*, April 1995, pp. 39-45; and S. D. Bailey, “Non-military areas in UN Practice”, *AJIL*, vol. 74, 1980, pp. 499-524.

4 Safe areas were created in the former Yugoslavia pursuant to S/RES/819(1993), 16 April 1993; S/RES/824(1993-), 6 May 1993; and S/RES/836(1993), 4 June 1993.

5 A humanitarian protected zone was created in the south-east of Rwanda pursuant to S/RES/929(1994), 22 June 1994.

6 “UN peace operations” refers to military operations that are authorized by the United Nations. These operations are a means by which the UN fulfils its stated purposes, *inter alia*, maintaining international peace and security, strengthening universal peace, the peaceful settlement of disputes and the promotion of social, economic and humanitarian welfare. See UN Charter, preamble and Art. 1.

7 On 7 March 2000, the Secretary-General convened a high-level Panel, chaired by Lakhdar Brahimi, to undertake a review of UN peace and security activities. The Panel’s report to the Secretary-General is attached to “The identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council”, UN Doc. A/55/305-S/2000/809, 21 August 2000.

If a United Nations peace operation is already on the ground, carrying out those actions may become its responsibility, and it should be prepared.”⁸

In order for UN Forces⁹ to carry out their responsibilities in relation to the creation and control of places of protection they will want to know, *inter alia*, whether such places must be created explicitly by the Security Council; whether armed force may be used to defend the place of protection; and whether the UN Force may administer¹⁰ the place of protection.

The aim of this paper is to explore the UN’s competence during armed conflict to create and control, without the consent of belligerents, places of protection for humanitarian reasons,¹¹ including the protection of civilians who are being deliberately targeted by belligerents. Understanding the way international law applies to the creation and control of places of protection will help UN Forces to be better prepared to defend and assist civilians during armed conflict.

Creation of places of protection

Recently, in Resolution 1296(2000) on the protection of victims of armed conflict, the Security Council stated that it would:

“consider the appropriateness and feasibility of temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population”.¹²

Resolution 1296 indicates the Security Council’s willingness to create places of protection without the consent of the belligerents and an intention that UN Forces may be mandated by the

⁸ *Ibid.*, para. 50.

⁹ “UN Forces” are military forces authorized by the UN to conduct peace operations. These Forces, depending on the type of operation, may be under UN, coalition or national command and control.

¹⁰ “Administer” refers to the functions that would normally be conducted by the local authorities of a State, such as the mainten-

ance of law and order; maintenance of the local infrastructure, and the provision of health care and humanitarian assistance.

¹¹ These reasons may include denial to humanitarian access, mass displacements of population and gross violations of human rights.

¹² S/RES/1296(2000), 19 April 2000, para. 15.

Council to use armed force to protect those who have taken sanctuary in such places of protection. In these circumstances, the Security Council's competence to create places of protection without the belligerents' consent stems primarily from its enforcement powers pursuant to Chapter VII of the UN Charter. However, before looking at these provisions it is necessary to say a few words about the Security Council's powers to authorize the creation of places of protection under Chapter VI of the Charter.

Chapter VI has two key legal features of relevance when considering the creation of places of protection. First, the Chapter provides for the "peaceful settlement of disputes" and, secondly, it limits the Security Council to making recommendations to, rather than imposing binding decisions upon, the parties to a dispute. In relation to the peaceful settlement of disputes, Member States are encouraged to seek peaceful settlements to their disputes,¹³ and where this cannot be achieved, they are to refer their dispute to the Security Council.¹⁴ Upon referral, or in circumstances where it "deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security",¹⁵ the Security Council may recommend terms of settlement that it considers appropriate. These provisions raise the possibility of the UN creating places of protection in situations where the belligerents request the Security Council, or agree to a suggestion by the Council, to create a place of protection.

In practice it is usual for the belligerents to agree to the creation of a place of protection and for the Security Council to mandate UN Forces to control that place. For example, this was the case when the Armistice Demarcation Line and the demilitarized zones were created as a part of the Armistice Agreements between Israel and Syria and Israel and Egypt in 1949.¹⁶ Chapter VI therefore limits the Security Council to creating places of protection with the consent of

¹³ Art. 33, UN Charter.

¹⁴ Art. 37(1), UN Charter.

¹⁵ Art. 37(2), UN Charter.

¹⁶ See Armistice Agreement signed between Israel and Syria and Armistice Agreement signed between Israel and Egypt,

reprinted in R. Higgins *United Nations Peacekeeping 1946-1967: Documents and Commentary, The Middle East*, vol. 1, Oxford University Press, London, 1969, pp. 38-42 and 43-48 respectively.

the belligerents. Should the Security Council wish to create a place of protection without the consent of the parties it will need to do so pursuant to Chapter VII of the Charter.

Creation of places of protection pursuant to authorization by Chapter VII

The competence of the Security Council to authorize the creation of places of protection without the belligerents' consent is based primarily on Chapter VII of the Charter. Chapter VII is concerned with "action with respect to threats to the peace, breaches of the peace, and acts of aggression", and lays down the specific powers of the Security Council in relation to the maintenance of international peace and security.¹⁷ Article 39, the first provision of the Chapter, states:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."¹⁸

The Charter is silent on what constitutes threats to or breaches of the peace and consequently, the Security Council "is not bound by any rigid definition of the acts ... calling for measures of enforcement".¹⁹ It is clear that the threat, or use, of armed force between States would come within the scope of the phrase "threats or

¹⁷ The Security Council's responsibility for the maintenance of international peace and security also stems from Art. 24(1) of the UN Charter which states: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

¹⁸ In practice the Security Council often "acts under Chapter VII without discussing the question of jurisdiction under Article 39".

D. J. Harris, *Cases and Materials on International Law*, 5th ed., Sweet and Maxwell, London, 1998, p. 942.

¹⁹ L. Oppenheim, *International Law – A Treatise: Disputes, War and Neutrality*, Vol. II, 7th ed., Longmans, Green and Co, London, 1952, p. 163. See also M. Akehurst, *A Modern Introduction to International Law*, 6th ed., Harper Collins, London, 1991, p. 219: "a threat to the peace is whatever the Security Council says is a threat to the peace"; and Y. Dinstein, *War, Aggression and Self-Defence*, Grotius Publications, Cambridge, 1988, pp. 257-258.

breaches to the peace”.²⁰ The question must, however, be asked whether situations involving gross humanitarian violations, such as the deliberate targeting of civilians, may be considered to breach the peace? Rosalyn Higgins has argued that “[t]he only way in which ... military sanctions for human-rights purposes could lawfully be mounted under the Charter is by the legal fiction that human-rights violations are causing a threat to international peace”.²¹ She has acknowledged, however, that “there may be an increasing tendency for the Security Council to characterize humanitarian concerns as threats to international peace — and thus bring them within the potential reach of Chapter VII of the Charter”.²² It may therefore be concluded that if the Security Council acts in accordance with the principles and purposes of the UN Charter its actions are likely to be *intra vires*.²³ It should also be noted that a Chapter VII determination by the Security Council has the effect of overriding the constraints placed by Article 2(7)²⁴ of the Charter that restricts the UN from interfering in the internal affairs of another State.

²⁰ L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd ed., Columbia University Press, New York, 1969, p. 297.

²¹ R. Higgins, *Problems and Processes: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p. 255.

²² *Ibid.*, pp. 256-257.

²³ The principles and purposes of the UN are found mainly in the preamble and Arts 1 and 2 of the UN Charter, and include maintenance of international peace and security, international cooperation and human rights. See Goodrich *et al.*, *op. cit.* (note 21), pp. 23-72. Brierly has argued that except for the Security Council's general obligation to “act in accordance with ‘the Purposes and Principles of the United Nations’, there is nothing to ensure that the measures which it decides shall be taken shall either respect the legal rights of states affected or be just in themselves”. J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 5th ed., Oxford University Press,

Oxford, 1956, p. 302. Alston adds: “it is up to the Council itself to determine what matters it will treat as falling within its competence. In doing so, the Council must act in good faith and in conformity with the overall objectives of the Charter (...) [O]nce the Council has agreed to concern itself with a particular situation, it will not exclude human rights concerns from the purview of United Nations action taken in that regard.” P. Alston, “The Security Council and human rights: Lessons to be learned from the Iraq-Kuwait crisis and its aftermath”, *Australian Year Book of International Law*, vol. 13, 1982, pp. 107-176, 139.

²⁴ Art. 2(7) of the UN Charter states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

The Security Council has, in at least two cases, authorized the creation of places of protection based on humanitarian concerns. In Bosnia and Herzegovina the Security Council authorized the creation of a safe area in Srebrenica because it was “[d]eeply concerned ... [about] the continued and deliberate armed attacks and shelling of the innocent civilian population by Bosnian Serb paramilitary”.²⁵ In relation to Rwanda the Security Council determined “that the magnitude of the humanitarian crisis ... constitutes a threat to peace and security in the region”²⁶ and therefore authorized the creation of a place of protection in the south-west of Rwanda.

The Security Council, having determined the existence of a threat to the peace, a breach of the peace, or an act of aggression in accordance with Article 39 of the Charter, may take such action as it thinks necessary, including authorizing the creation of places of protection. Such enforcement action by the Security Council will be legally binding upon all UN member States,²⁷ and applicable to “States that are not members of the United Nations and to bodies not recognized as States”.²⁸

The practice of the Security Council in authorizing the creation of places of protection without the consent of the parties affirms the role that Chapter VII has to play. In Bosnia and Herzegovina, for example, the Security Council, acting pursuant to Chapter VII of the UN Charter, demanded that “all the parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act”.²⁹ In May 1993 the Security Council, again acting under Chapter VII, extended the concept of safe areas to apply to “Sarajevo, and other such threatened areas, in particular the towns of Tuzla, Zepa, Gorazde,

²⁵ S/RES/819(1993), 16 April 1993, preamble.

²⁶ S/RES/929(1994), 22 June 1994, preamble.

²⁷ Article 25 of the UN Charter states: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

²⁸ Oppenheim, *op. cit.* (note 19), p. 166.

²⁹ S/RES/819(1993), 16 April 1993, para. 1. Note that S/RES/770(1992) formally recognized, pursuant to Article 39 of the UN Charter, that “the situation in the Bosnia and Herzegovina constitutes a threat to international peace and security...”.

[and] Bihac ...".³⁰ Similarly, in 1994 French-led troops conducted *Operation Turquoise* which involved the creation of a place of protection to protect Rwandan civilians and combatants. The Security Council authorized the French-led troops, pursuant to Chapter VII, to create a "...humanitarian protected zone in the Cyanguu-Kibuye-Gikongoro triangle in south-western Rwanda".³¹

The Security Council decisions authorizing the establishment of safe areas in Bosnia and Herzegovina and the humanitarian protected zone in Rwanda were made without the consent of the belligerents, and the terms under which they were created were binding on all belligerents. Serb forces were against the creation of the safe areas, as evidenced, for example, by the fact that the Serb paramilitary forces continued to threaten and attack Srebrenica even after the Security Council adopted Resolution 819.³² In Rwanda, the Rwanda Patriotic Front, having recently taken control of most of the country from the previous regime, expressed its strong opposition to the French establishing the zone but did not use armed force to oppose the French-led forces.³³

From the above brief examination of Chapter VII and Security Council practice it may be concluded that the Security Council may explicitly mandate UN Forces to create places of protection without the consent of the belligerents. However, the Security Council may not always explicitly mandate the establishment of a

³⁰ S/RES/824(1993), 6 May 1993, para. 3. For a detailed account of the developments in relation to the safe areas in Bosnia and Herzegovina see M. Weller, "Peace-keeping and peace-enforcement in the Republic of Bosnia and Herzegovina", *Heidelberg Journal of International Law*, 1996, pp. 69-177, and Y. Akashi, "The use of force in a United Nations peace-keeping operation: Lessons learnt for the safe areas mandate", *Fordham International Law Journal*, vol. 19, 1995, pp. 312-323.

³¹ *The Blue Helmets: A Review of United Nations Peace-keeping*, 3rd ed., UN Department of Public Information, New York, 1996, p. 352.

³² Report of the Secretary-General pursuant to Security Council Resolution 819 (1993), para. 24, S/25700(1993), reprinted in D. Bethlehem and M. Weller (eds), *The Yugoslav Crisis in International Law: General Issues*, Part I, Cambridge University Press, Cambridge, 1997, pp. 612-619.

³³ Report of the Secretary-General on the situation in Rwanda, S/1994/924 (1994), reprinted in *The United Nations and Rwanda 1993-1996*, UN Department of Public Information, New York, 1996, p. 326.

place of protection, and the question consequently needs to be asked whether such authorization might be implied by the mandate to the UN Force? The answer is likely to be yes, if the Security Council has determined to take enforcement action pursuant to Chapter VII of the Charter. For example, a Chapter VII enforcement operation that mandates a UN Force to “provide security and protection to civilians at risk” implies that the Force may take necessary and reasonable steps, such as the creation of a place of protection, to discharge that mandate.

Creation of places of protection without Chapter VII authorization

A more legally controversial situation arises when the Security Council has not made a Chapter VII determination and a UN Force witnesses gross violations of human rights being committed by the belligerents. As discussed above, in such a case the Force will be acting under Chapter VI and will not have a mandate to create places of protection without the belligerents’ consent. Consequently, it is arguable that without a Chapter VII determination the Force is legally hamstrung, unable to create a place of protection to protect civilians from gross violations of human rights because of the limitation placed on intervention by Article 2(7) of the Charter. A Force that finds itself in this predicament should immediately seek a mandate from the Security Council, pursuant to Chapter VII of the Charter, permitting that Force to undertake military enforcement action to create a place of protection without the parties’ consent. However, this course of action may not be open to the Force where the humanitarian emergency urgently requires people to be protected. In such a situation, instead of standing by and watching violations of international law, the Force may create a place of protection without the consent of the belligerents, on the grounds that such a place was required for its own protection and that of the people who were being targeted. The legal justification for this act of survival may be based on the exercise of the right of individual and collective self-defence.³⁴ The Force would be

³⁴ The right of UN Forces to use force in individual and collective self-defence has been recognized since early peace-keeping operations. See for example Report of the

acting out of necessity and its actions would need to be limited to what was necessary and proportional at the time.

It is also contended here that in humanitarian emergencies, a further source of legal justification for the Force to create such places may derive from treaty law or general principles of international law. For example, if the attack was serious enough to qualify as an act of genocide,³⁵ then the creation of a place of protection by a UN Force may be justified under Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide.³⁶ The creation thereof may also be justified under customary international law principles that prohibit targeting or attacking civilians deliberately.³⁷ For example, it may be argued that there is a general right for UN Forces to protect persons in such places because “[a]cting for the protection of man...in time of armed conflict, accords with the aims of the United Nations no less than does the maintenance of international

United Nations Secretary-General, *United Nations Emergency Force: Summary Study of the Experience Derived from the Establishment and Operation of the Force*, UN Doc. A/3943, 9 October 1958, paras 178 and 179. It has been argued that the right of UN forces to use force in self-defence is similar to the defence of self-defence in municipal law. See P. Rowe, “The United Nations rules of engagement and the British soldier in Bosnia”, *International Comparative Law Quarterly*, vol. 43, October 1994, p. 954. See also D. W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice*, Stevens and Sons, London, 1964, pp. 486-487.

35 Art. 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide states: “...genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its

physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.”

36 Art. 1 of the Genocide Convention states: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” *Contra*: Y. Dinstein, “The Thirteenth Waldemar A. Solf Lecture in International Law”, *Military Law Review*, vol. 166, 2000, pp. 100-101. Dinstein argues that it is not sufficient to read Art. 1 in isolation. He maintains that the Genocide Convention does not permit States to use force unilaterally to prevent genocide. Prevention or termination of genocide by States must occur either through the Security Council (Art. 8, Genocide Convention) or the International Court of Justice (Art. 9).

37 A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, p. 14. See Arts 51(6), 52(1), 53(c), 54(4), and 56(4) of Protocol I.

peace and security”.³⁸ The Force should ensure that its actions in creating a place of protection are necessary and proportional to protect the civilians who are being deliberately targeted.

It is relevant to this discussion to note that the proposition of creating places of protection in the absence of an explicit Chapter VII authorization has been supported by the practice of some States with regard to the creation of safe havens in northern Iraq to protect the Kurds at the end of the Gulf War in 1991. The repression of Kurds by Iraqi authorities led the Security Council to insist that Iraq allow “immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations”.³⁹ However, the Iraqi repression of the Kurds reached a level which prompted British Prime Minister John Major to propose, pursuant to Security Council Resolution 688(1991), “the establishment of a safe haven in northern Iraq under United Nations control where refugees, particularly Kurds ... would be safe from attack and able to receive relief supplies in a regular and ordered way”.⁴⁰

Control of places of protection

Control of places of protection with Chapter VII authorization

It is accepted that where the Security Council, acting in accordance with its powers under Chapter VII, has determined that there is a threat to international peace and security in accordance with Article 39 of the Charter, it “may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security”.⁴¹ The Security Council may therefore authorize UN Forces to use all necessary measures, including recourse to armed force, to defend and administer such places. The use of force in such

³⁸ Sandoz *et al.*, *op. cit.* (note 3), para. 3596.

³⁹ S/RES/688(1991), 5 April 1991, para. 3.

⁴⁰ M. Weller (ed.), *Iraq and Kuwait: The Hostilities and their Aftermath*, Grotius Publications, Cambridge, 1993, pp. 714-715.

⁴¹ Art. 42, UN Charter.

circumstances must be “confined to what is necessary and proportionate to the achievement of the goals set out by the Security Council”.⁴²

In the case of the safe areas created in Bosnia and Herzegovina, the Security Council mandated the United Nations Protection Force (UNPROFOR) to:

“deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population”.⁴³

The Security Council added that UNPROFOR was authorized:

“in carrying out...[its] mandate...acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursions into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of the Force or of protected humanitarian convoys.”⁴⁴

Weller suggests that there are three possible interpretations of this authorization by the Security Council to use force to protect the safe areas. First, UNPROFOR was limited to using force to protect itself alone; second, UNPROFOR could use force in reply to bombardments against and armed incursions into the safe areas;⁴⁵ and third, UNPROFOR was authorized to use force to carry out the mandate. In practice UNPROFOR adopted the second interpretation,⁴⁶ as the first and third interpretations were seen as too narrow and too broad respectively.⁴⁷ However, had UNPROFOR chosen to

⁴² C. Greenwood, *International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899*, pursuant to A/RES/52/154 and A/RES/53/99, p. 19. Judith Gardam also argues that the limitations of necessity and proportionality apply to unauthorized Chapter VII operations as well. J. Gardam, “Proportionality and force in

international law”, *AJIL*, vol. 87, p. 392.

⁴³ S/RES/836(1993), 4 June 1993, para. 5.

⁴⁴ *Ibid.*, para. 9.

⁴⁵ Weller, *op. cit.* (note 30), pp. 108-109.

⁴⁶ S/1994/555, 9 May 1994, Report of the Secretary-General pursuant to Resolution 844 (1993), para. 4.

⁴⁷ Weller, *op. cit.* (note 30), pp. 108-109.

adopt the third interpretation, that is, the use of armed force to defend the mandate, it would not have acted beyond the authority given to it by the Security Council.⁴⁸ Perhaps the fact that the use of force to defend the mandate was expressed in terms of “self-defence” caused some confusion and consequently led the Force to adopt the second interpretation.

Resolution 836(1993) also authorized Member States (acting nationally or through regional organizations), in coordination with the Secretary-General and UNPROFOR, to take “...all necessary measures, through the use of air power, in and around the safe areas...to support [UNPROFOR]...in the performance of its mandate”.⁴⁹ The North Atlantic Treaty Organization (NATO) accepted this task and stated:

“if any Bosnian Serb attacks involving heavy weapons are carried out on the United Nations-designated safe areas of Gorazde, Bihac, Srebrenica, Tuzla and Zepa, these weapons and other Bosnian Serb military assets as well as their direct and essential military support facilities, including but not limited to fuel installations and munitions sites, will be subject to NATO air strikes.”⁵⁰

This interpretation as to when force could be used to protect the safe areas appears to have reflected the UNPROFOR interpretation.

In the case of Rwanda, the French-led troops were authorized to use “all necessary means to achieve humanitarian objectives set out in paragraphs 4(a) and (b)⁵¹ of Resolution 925(1994)”,⁵² thus permitting them to resort to the use of armed force to protect the

⁴⁸ *Ibid.*, pp. 172-173.

⁴⁹ S/RES/836(1993), 4 June 1993, para. 10.

⁵⁰ S/1994/498, 22 April 1994, para. 9(a), reprinted in Bethlehem/Weller, *op. cit.* (note 32), p. 697.

⁵¹ Paras. 4(a) and (b) of S/RES/925(1994), 8 June 1994, stated:

“Reaffirms that UNAMIR [United Nations Assistance Mission in Rwanda], in addition to continuing to act as an intermediary between the parties in an attempt to secure their

agreement to a cease-fire, will:

Contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas; and provide security and support for the distribution of relief supplies and humanitarian relief operations.”

⁵² S/RES/929(1994), 22 June 1994, para. 3.

area. Consequently, it was lawful for the French-led troops to prohibit all military activity and “oppose the entry of all armed persons, no matter what their origin, into the humanitarian safe area”.⁵³

The mandate may also explicitly state who may be defended in the place of protection. It may, for example, authorize the UN Force to protect all civilians, paramilitary and military forces of one of the belligerents. Such a step may be considered necessary to maintain or restore international peace and security and therefore within the power granted to the Security Council under Chapter VII. In the case of Srebrenica, this is what occurred when the Security Council extended the protection afforded by the area to civilians so as to include the military and paramilitary units of the Government of Bosnia and Herzegovina.⁵⁴

As evidenced by the resolutions relating to the places of protection in Bosnia and Herzegovina and Rwanda, the Security Council’s authorization of the use of armed force was broad and unspecific, with no guidance as to how much force could be used and what principles of law applied to the use thereof. It is clear that where a UN Force is a belligerent it is required, as a matter of law, to comply with the relevant principles of international humanitarian law which applies during armed conflict. In circumstances where the UN Force is not a belligerent, it is generally accepted that the Force is required to apply the principles and spirit of international humanitarian law when using force.⁵⁵

⁵³ Letter dated 2 July from the Secretary-General to the President of the Security Council, UN Doc. S/1994/798, 6 July 1994, reprinted in *op. cit.* (note 33), p. 311.

⁵⁴ S/RES/836(1993), 4 June 1993, para. 5 stated that UNPROFOR’s mandate was to “promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina”.

⁵⁵ The Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999, supports

this approach. For a detailed discussion of the application of international humanitarian law to UN Forces see D. Bowett, *United Nations Forces: A Legal Study of United Nations Practice*, Stevens and Sons, London, 1964; C. Greenwood, “International humanitarian law and the United Nations military operations”, *Yearbook of International Humanitarian Law*, vol. 1, T.M.C. Asser Press, The Hague, 1998, pp. 3-34; and P. Rowe, “Maintaining discipline in United Nations peace support operations: The legal quagmire for military contingents”, *Journal of Conflict and Security Law*, No. 1, 2000, pp. 45-62.

Do UN Forces have a duty to protect places of protection? Unless the Security Council states otherwise, it is difficult to find the legal source of such a duty.⁵⁶ A military commander must be able to judge whether the use of force is appropriate in the circumstances. For example, a commander may have a reasonable belief that because his or her troops are heavily outnumbered, it is better to refrain from the use of force in order not to further jeopardize the lives of those in the place of protection.

In concluding this brief exploration of the use of armed force to defend a place of protection, a few words need to be said about the perceived impartiality of a UN Force should it defend a place to the detriment of the interests of one or more of the belligerents. In the context of the safe areas in Bosnia and Herzegovina, it has been argued that UNPROFOR's existence in the safe areas "appeared to thwart only one army in the conflict, thus jeopardizing ... [its] impartiality".⁵⁷ However, as Weller correctly emphasizes, failing to defend places of protection on the basis that to do so would adversely affect the Force's impartiality in the conflict "reveals a profound confusion" as to the role of a Force in circumstances where a belligerent profits militarily from the atrocities that it commits and acts in violation of Security Council determinations.⁵⁸ There can be little argument that a place of protection created without the consent of the parties is likely to require a credible military force to defend the place from attacks by one or more belligerents.

Article 2(7) of the UN Charter limits a UN Force from interfering in the domestic jurisdiction of a Member State unless the Force has the consent of that State or the Security Council has authorized enforcement action pursuant to Chapter VII of the Charter. Consequently, should the Security Council wish to authorize the UN Force to undertake activities such as maintaining law and order, restricting the freedom of movement of people, and disarming people

⁵⁶ Greenwood, *op. cit.* (note 55), p. 32.

⁵⁷ UN Doc. S/1994/555, 9 May 1994, para. 15, reprinted in Bethlehem/Weller, *op. cit.*, (note 32), p. 700.

⁵⁸ Weller, *op. cit.* (note 30), p. 143.

in the place of protection, then the Force will need either the consent of the belligerents or due authorization to take enforcement action.

If the mandate does not explicitly authorize a Force to administer a place of protection, may the Force infer that it has such a power? The answer is likely to be “yes” if the Force has the consent of the local authorities or is in belligerent occupation. If the Force has the parties’ consent it may administer the place within the limits stipulated by the agreement between the belligerents and the Force. In situations where a military force is a belligerent in occupation, international humanitarian law requires it to administer the place of protection in accordance with the laws of occupation.⁵⁹ It is possible that a UN Force could “find itself in belligerent occupation of territory, and that most or all of customary and conventional laws of war would apply to them”.⁶⁰ In this context, Christopher Greenwood has argued:

“It is perfectly possible that the United Nations itself or a State or States acting under its authority could occupy part or all of the territory of an adversary in the course of an international armed conflict. In such a case, the law of belligerent occupation could apply but only unless and until the Security Council used its Chapter VII powers to impose a different regime as a part of the measures which it considered necessary for the restoration of peace and security.”⁶¹

If the UN Force does not have the consent of the local authority, is not in belligerent occupation, and the Security Council’s mandate does not expressly authorize the Force to administer the place of protection, it may be *ultra vires* for the Force to conclude that it has such powers. Much depends on what aspects of life in the place of protection the Force wishes to administer. For example, facilitating humanitarian assistance and restoring and/or maintaining the

⁵⁹ The law in relation to belligerent occupation is found principally in sections III and IV of the Fourth Geneva Convention. The law of occupation covers the following issues with regard to administration in the area under occupation: inviolability of rights; deportations, transfers and evacuations;

hygiene and public health; and penal legislation and treatment of detainees.

⁶⁰ A. Roberts, “What is military occupation”, *British Yearbook of International Law*, vol. 50, 1984, p. 291.

⁶¹ Greenwood, *op. cit.* (note 55), p. 28.

infrastructure are unlikely to prove controversial in the circumstances of a humanitarian emergency. However, a UN Force taking on the role of carrying out legislative and/or executive governmental functions, without the consent of the local authorities or explicit Security Council authorization, may well find that it is acting *ultra vires*.

Danesh Sarooshi argues that the Security Council must delegate the power of internal governance in express terms and that one cannot assume such authorization by implication.⁶² He examines the case of the UN's involvement in Somalia and concludes that the competence of the Secretary-General's Special Representative to promulgate a law that had the effect of being legally binding within Somalia was questionable. Sarooshi argues that the "reference of the consolidation and maintenance of a secure environment throughout Somalia cannot justify the exercise of what is in fact a legislative power: the promulgation of a legal code".⁶³

It is contended here that, in situations where the belligerents are unable to administer a place of protection, a UN Force may be legally justified in administering it until the Security Council is able to give its express authorization or until the local authorities are able to resume governance. It is difficult to see why a UN Force, with a Chapter VII mandate to "use all necessary means" cannot assume that it may, in very limited circumstances, administer the place of protection. Clearly, the extent of administration that the Force would be justified in undertaking would be limited to what was reasonable and necessary in the circumstances and would not go beyond the time it takes the local authorities to resume responsibility for the area.

It has also been argued that a Force may not be in belligerent occupation but may nonetheless find itself "organizing some kind of 'occupation by consent'".⁶⁴ Adam Roberts suggests that the law of occupation may apply in situations where:

"(i) There is a military force whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose

⁶² D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Clarendon Press,

Oxford, 1999, p. 63.

⁶³ *Ibid.*

⁶⁴ *Op. cit.* (note 60), p. 291.

activities there involve an extensive range of contacts with the host society not adequately covered by the original agreement under which it intervened; (ii) the military force has either displaced the territory's ordinary system of public order and government, replacing it with its own command structure, or else has shown the clear physical ability to displace it; (iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other, with the former not owing allegiance to the latter; (iv) within an overall framework of a breach of important parts of the national or international legal order, administration and the life of society have to continue on some legal basis, and there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants."⁶⁵

Michael Kelly adds that the extent of the application of the Fourth Geneva Convention:

“will depend on the instruments a State is party to and the circumstances of the case. Such situations can be summarised as those where there is no consent to the intervention from a recognisable sovereign apparatus, regardless of whether an armed conflict is in existence either between the intervening force and the State or local armed elements.”⁶⁶

Without entering into a debate as to whether the law of belligerent occupation applies in situations short of armed conflict, there can be little objection in international law to using the framework of the 1949 Fourth Geneva Convention⁶⁷ to ensure that the rights and obligations of both the UN Force and the people in the place of protection are maintained. For example, the UN Force may

⁶⁵ *Ibid.*, pp. 300-301.

⁶⁶ M. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework*, Kluwer Law International, The Hague, 1999, p. 227.

⁶⁷ The Convention may be used to provide military forces with a framework for dealing with such issues as restoring public order,

general treatment of the population, minimum standards to be applied to any legal process taken by the Force, basic humanitarian standards to be applied to detainees, and preventative security measures that may be taken against the population in the place of protection.

find it appropriate to use the provisions of this Convention to provide an interim justice system that strikes a balance between the military imperative of achieving the mandate and the rights of the people in the place of protection to natural justice and due process.

In the case of the safe areas in Bosnia and Herzegovina and that of the humanitarian protection zone in Rwanda, there was no explicit Security Council authorization mandating the UN Forces to administer them. In relation to safe areas created in Bosnia and Herzegovina, UNPROFOR was mandated to: (1) deter attacks against the safe areas; (2) monitor the cease-fire; (3) promote the withdrawal of military or paramilitary units other than those of the Government of Bosnia and Herzegovina; (4) occupy some key points on the ground; and (5) participate in the delivery of humanitarian relief to the population.⁶⁸ Use of the words “deter”, “monitor”, “promote” and “participate” by the Security Council suggests that it was consciously limiting UNPROFOR’s mission to administering the safe areas. There was no suggestion by UNPROFOR that it exercised any administration powers without the consent of the belligerents, this notwithstanding the Secretary-General’s report to the Security Council that the infrastructure had collapsed and that there were serious law and order problems in Srebrenica.⁶⁹ UNPROFOR’s contact with the local population in the safe areas appeared to have been limited and consequently there did not appear to have been any issue as to whether the Force could have taken on activities that may have been considered as interfering with the authority of the Bosnian authorities. In Srebrenica, for example, the Dutch Battalion’s closest contact with the locals came through its medical unit, mine-awareness classes and the rebuilding of schools.⁷⁰

In the humanitarian protection zone in Rwanda the task of the French-led troops was to contribute “... in an impartial way to the security and protection of displaced persons, refugees and civilians at risk in Rwanda...”.⁷¹ The French-led troops also undertook the

⁶⁸ S/RES/836(1993), 4 June 1993, para. 5.

⁶⁹ UN Doc. S/1994/291, 11 March 1994, para. 17.

⁷⁰ J. W. Honig and N. Bothe, *Srebrenica:*

Record of a War Crime, Penguin Books, London, 1996, p. 132.

⁷¹ S/RES/918(1994), 17 May 1994, para. 3.

distribution of humanitarian aid in the zone⁷² and emphasized to the UN that they were seeking to maintain a presence "... pending the arrival of an expanded UNAMIR [United Nations Assistance Mission in Rwanda]".⁷³ The French led troops do not appear to have considered that the law of occupation applied to them, nor do they appear to have administered the territory that they controlled. However, Kelly submits that the Fourth Convention "applied to south-western Rwanda in Operation Turquoise where the French had no permission from any Rwandan entity in the confused aftermath of the civil war"⁷⁴ and that consequently, they should have applied the law of occupation.

Control of places of protection without Chapter VII authorization

Defending a place of protection in circumstances where the UN Force has not been given Chapter VII enforcement powers is likely to be more controversial. In such a case the Force may have to rely upon the right of individual and collective self-defence, and/or defence of the mandate, and/or general principles of international law. For example, during the conflict in the former Yugoslavia the UN accepted that "... the use of force in self-defence is an inherent right of United Nations Forces exercised to preserve a collective and individual defence".⁷⁵ Thus, the UN Force could lawfully use armed force to protect itself and others in the place of protection. The right to use force in defence of the mandate was also recognized during the conflict in the former Yugoslavia by the Secretary-General stating that

⁷² Letter dated 2 July from the Secretary-General to the President of the Security Council, UN Doc. S/1994/798, 6 July 1994, reprinted in *op. cit.* (note 33), p. 311.

⁷³ Letter dated 20 June from the Permanent Representative of France to the United Nations addressed to the Secretary-General, UN Doc. S/1994/734, 21 June 1994, *ibid.*, p. 307.

⁷⁴ *Op. cit.*, (note 66), pp. 155-156.

⁷⁵ Letter in reply to the Special Representative of the Secretary-General in

the former Yugoslavia from a UN Legal Counsel, 19 July 1993, quoted in B. de Rossanet, *Peacemaking and Peacekeeping in Yugoslavia*, Kluwer Law International, The Hague, 1996, p. 91. This opinion is consistent with the traditional UN approach to the use of force in self-defence. See e.g. United Nations Emergency Force: Summary study of the experience derived from the establishment of the operation of the Force, UN Doc. A/3943, 9 October 1958, para. 165.

UNPROFOR was authorized to use force in “situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate”.⁷⁶ Consequently, if the Force was mandated to “provide protection and security to displaced persons, refugees and civilians at risk” it would be lawful for it to defend a place of protection as a means of achieving that mandate. Finally, the use of force to defend a place of protection may be justified on general principles of international law, such as preventing genocide.

The authority of UN Forces to administer places of protection without the consent of the parties or without a Chapter VII mandate is also likely to be controversial. For example, in a place of protection where the local authorities are no longer functioning the UN Force may, in order to maintain its own security, find it necessary to administer certain aspects of life, such as law and order. In this situation, the UN Force should first seek the consent of the local authorities to administer the place until those authorities are in a position to resume their responsibilities. If this course is not possible, then the Force may have to administer the place of protection until then on the basis of necessity. The UN has accepted that, in some circumstances, the Force may have to carry out functions that are not specifically mandated by the Security Council but are nonetheless necessary for the efficient functioning of the Force. For example, in 1958 the Secretary-General acknowledged:

“[a] right of detention which normally would be exercised only by local authorities is extended to UNEF [United Nations Emergency Force] units. However, this is so only within a limited area where the local authorities abstain from exercising similar rights, whether alone or in collaboration with the United Nations”.⁷⁷

⁷⁶ UN Doc. S/24540, 10 September 1992, para. 9. This view is consistent with the traditional UN approach that force may be used to defend the mandate. See e.g. S/11052/Rev.1, 27 October 1973, para. 4(d) concerning the

use of force by UN Emergency Force II to resist attempts to prevent it from discharging its mandate.

⁷⁷ A/3943, 9 October 1958, para. 165.

Conclusion

It is uncontroversial that the Security Council may authorize a UN Force to create a place of protection with the consent of the belligerents. It is also uncontroversial that in situations where there is no consent, the Security Council is competent to explicitly mandate a UN Force pursuant to Chapter VII of the United Nations Charter to create a place of protection. It is suggested here that if a UN Force has not been explicitly authorized to create a place of protection it may infer such an authority if it has a Chapter VII mandate. It is also suggested that in situations where the UN Force does not have a Chapter VII mandate it may, on the basis of self-defence and/or wider principles of international law, be legally justified in creating a place of protection to protect civilians at risk. In such situations the UN Force should seek, and the Security Council should give, approval for the place of protection as soon as possible. The UN Force's decision to create such a place without Security Council authorization would be based on what is necessary and proportional at the time.

It is also clear that the Security Council may authorize UN Forces to control places of protection pursuant to Chapter VII of the Charter. If there is no explicit authority to defend the place of protection, the UN Force may infer such authority as being implicit in its Chapter VII mandate. If there is no Chapter VII mandate, the Force may justify its defence of a place of protection as being based on self-defence and/or general principles of international law. A UN Force in belligerent occupation of a place of protection is required to apply the law of belligerent occupation at least until such time as the Security Council directs otherwise. Where the UN Force does not have the consent of the belligerents, is not a belligerent occupier, and there is no explicit mandate given to the Force, the administration of the place of protection will need to be justified on the basis of necessity and proportionality.



Résumé

La création et le contrôle de zones protégées lors des opérations de paix des Nations Unies

par BRUCE M. OSWALD

La création de zones protégées est un moyen de mettre la population civile à l'abri des hostilités. Cet article examine le régime juridique de la création et du contrôle de zones protégées lors des opérations de paix des Nations Unies. L'auteur se penche sur le droit international et la pratique des États dans les cas où les forces des Nations Unies ont, en application du Chapitre VII de la Charte, établi et contrôlé des zones protégées, sans le consentement de certaines ou de l'ensemble des parties au conflit. Il étudie en outre les éléments juridiques, sur lesquels se fondent les forces des Nations Unies pour créer et contrôler des zones protégées, alors qu'aucun mandat ne leur a été explicitement donné. L'auteur conclut que les casques bleus peuvent, dans certaines circonstances, être juridiquement fondés à agir de la sorte même s'ils n'ont pas un mandat explicite du Conseil de sécurité.

