

40th Round Table on Current Issues of International Humanitarian Law
“The Additional Protocols 40 Years Later:
New Conflicts, New Actors, New Perspectives”
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Key note address

It is a great pleasure for me to be able to attend this Round Table once again, and I thank the International Institute of Humanitarian Law for inviting me and giving me the opportunity to deliver this keynote address.

This is my second time to participate in this Round Table, and I truly value this opportunity to share some of the issues related to international humanitarian law which my Office has been dealing with recently, and to exchange views with this distinguished audience. Interactions with the academia and fellow practitioners have been a key part of my work, and I am keenly aware of the importance of these interactions.

The theme of this year’s Round Table is a timely one, which is “The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives”.

The adoption of the two Additional Protocols in 1977 was undoubtedly an extraordinary achievement in international humanitarian law, and I wish to emphasize that the United Nations played a crucial role in developing certain rules that were eventually included in the Additional Protocols.

The Additional Protocols supplemented the Geneva Conventions in many respects, such as the rules applicable to non-international armed conflict, but most importantly, the Protocols, for the first time, provided for comprehensive protection for civilians and civilian objects against the effects of military operations.

As the achievements of the Additional Protocols in the past 40 years and the contemporary challenges will be discussed extensively by other speakers during this Round Table, I have decided to speak about a topic that was left out from the Additional Protocols, namely United Nations peacekeeping operations. I would particularly like to speak about one specific aspect, which is the protection of UN peacekeeping personnel under IHL.

Protection of peacekeeping personnel under IHL

It is interesting to note that, in the process of drafting the Additional Protocols, there were some discussions concerning compliance with IHL by UN forces. But the official records do not indicate that there were discussions concerning the protection of UN peacekeeping personnel in times of armed conflict. The Additional Protocols do not make any specific reference to UN peacekeeping personnel.

However, subsequent practice indicates that UN peacekeeping personnel are also protected by the relevant provisions of the Geneva Conventions and the Additional Protocols.

Here, I would like to focus on the rules of IHL that apply in non-international armed conflict, as UN peacekeeping personnel are increasingly deployed to situations of non-international armed conflict.

As far as the rules concerning the humane treatment of persons are concerned, they are formulated broadly, and they therefore clearly cover UN peacekeeping personnel.

Article 3 common to the Geneva Conventions refers generally to “persons taking no active part in hostilities”, and Additional Protocol II further refers to “all persons who do not take a direct part or who have ceased to take part in hostilities”, and require that these persons be treated humanely in all circumstances.

Notably, these rules do not make a distinction between civilians and fighters, and do not provide that they apply only to specific categories of persons. All persons who are not or no longer taking a direct part in hostilities are covered and must be treated humanely.

It is also noted that the International Criminal Tribunals for Rwanda and the former Yugoslavia have specifically dealt with the question whether common Article 3 and Additional Protocol II apply to UN peacekeeping personnel.

In the *Bagosora* case, the ICTR examined an incident in which 10 Belgian military personnel of the UN Assistance Mission in Rwanda were beaten to death by members of the Rwandan armed forces in April 1994. The ICTR determined that the Belgian military personnel qualified as “persons taking no active part in hostilities” and concluded that their killings constituted serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II.

More recently, in the *Karadzic* case, the ICTY dealt with a case in which over 200 military personnel of the United Nations Protection Force were taken hostage in 1995.

The ICTY in this case concluded that these military personnel were “persons taking no active part in hostilities” and were afforded the protection of Article 3 common to the Geneva Conventions, which prohibits taking of hostages.

These cases clearly indicate that UN peacekeeping personnel, including military personnel, are covered by the rules concerning humane treatment in IHL.

On the other hand, the rules concerning the conduct of hostilities are different in nature from the rules concerning humane treatment. Unlike the rules on humane treatment, the rules concerning the conduct of hostilities make a clear distinction between civilians and fighters. These rules require parties to the conflict not to direct attacks against civilians, and require them to only target fighters. Therefore, the determination of whether a person is a civilian or a fighter becomes crucial in the context of the conduct of hostilities.

While the Additional Protocols do not specifically provide whether UN peacekeeping personnel, including military personnel, could be considered as civilians, subsequent practice has clarified that they are generally treated as civilians.

In this regard, the Rome Statute of the International Criminal Court provides that it is a war crime to direct attacks against personnel of a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict. The phrase “as long as they are entitled to the protection given to civilians under the international law of armed conflict” clearly indicates that UN peacekeeping personnel are entitled to the IHL protection given to civilians.

The ICRC's publication on customary IHL also mentions that directing an attack against personnel of a peacekeeping mission is prohibited, as long as they are entitled to the protection given to civilians under IHL.

It is clear that UN peacekeeping personnel are generally treated as civilians and protected as such under IHL in times of armed conflict.

However, as UN peacekeeping operations become increasingly involved in hostilities, a question has arisen as to whether peacekeeping personnel, particularly military personnel, would lose the protection given to civilians under IHL, and if so, how that happens.

This question has been addressed in several cases before international tribunals and I would like to briefly refer to them.

In the *Sesay* case, the Special Court for Sierra Leone examined a number of incidents that occurred in 2000, in which the Revolutionary United Front, an armed group in Sierra Leone, ill-treated, captured or attacked a number of military personnel of the United Nations Mission in Sierra Leone. The Court first stated that personnel of peacekeeping missions are entitled to protection as long as they are not taking a direct part in hostilities. The Court then went on to say that "where peacekeepers become combatants, they can be legitimate targets for the extent of their participation in accordance with international humanitarian law."

In this particular instance, the Court found that UNAMSIL personnel were not taking a direct part in hostilities at the relevant time. Therefore, attacks against them were considered as a crime.

The International Criminal Court also dealt with the issue in the *Abu Garda* case and *Banda and Jerbo* case, although these cases involved an African Union peacekeeping operation rather than a UN peacekeeping operation. In these cases, the Court dealt with an incident in which armed groups in Darfur directed an attack against a base of the African Union Mission in Sudan in 2007.

In the *Abu Garda* and *Banda and Jerbo* cases, the ICC took a similar approach to the Special Court for Sierra Leone and stated that "personnel involved in peacekeeping missions enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities".

In this particular case, the ICC found that AMIS personnel did not take any direct part in hostilities and that there were substantial grounds to believe that they were entitled to the protection given to civilians under IHL.

These cases seem to indicate that peacekeeping personnel would lose the protection given to civilians under IHL on an individual basis rather than collectively. In other words, these cases seem to indicate that only those individuals who are directly engaged in hostilities would lose the protection given to civilians, while others who are not would continue to benefit from such protection. These cases also seem to indicate that the personnel concerned would lose the protection given to civilians under IHL only while they take a direct part in hostilities, and that they would retain such protection outside that timeframe.

However, we are also aware that others have taken a different approach and have argued that all military personnel could collectively lose the protection given to civilians under IHL when a peacekeeping operation as a whole becomes a party to a conflict.

These are important questions that require further reflections and our Office is closely following the discussions on these questions.

Safety Convention

Before I conclude, I would like to briefly mention another issue that has arisen with respect to the protection of UN peacekeeping personnel.

As a result of the sharp rise in the number of casualties suffered by peacekeeping operations in the early 1990s, Member States have decided to elaborate a new instrument on the protection of UN personnel.

In a short period of time, the Convention on the Safety of United Nations and Associated Personnel was negotiated, and eventually adopted in 1994.

The Safety Convention, among other things,:

- Prohibits attacks against United Nations and associated personnel;
- Requires States parties to criminalize such attacks in their national laws;
- Requires them to submit relevant cases to the competent authorities of the State party concerned for the purpose of prosecution; and
- Requires States parties to take all appropriate measures to ensure the safety and security of such personnel.

This was an important step to supplement the protection provided for in IHL.

It is noted that the Convention specifically provides that it does not apply to a UN operation authorized by the Security Council as an enforcement action under Chapter VII of the UN Charter that is engaged in an international armed conflict. In other words, personnel of such a UN operation are not protected by the Convention but are, instead, covered by IHL.

However, the Convention does not specifically address the question of whether it applies when a UN peacekeeping operation is engaged in a non-international armed conflict.

Therefore, there is lack of clarity as to whether the Safety Convention applies in instances where peacekeeping personnel are engaged in an armed conflict with armed groups.

Different positions have been taken on this question ever since the Safety Convention was being negotiated in 1993 and 1994.

Some have argued that the Safety Convention ceases to apply, whereas others have argued that the Convention was intended to apply to peacekeeping personnel even when they were engaged in a non-international armed conflict. It appears that subsequent practice has not resolved this difference.

Therefore, it remains to be seen whether further practice might clarify this point in the future.

Concluding remarks

In this address, I have tried to put UN peacekeeping operations in the context of IHL and highlight some issues that are related to the protection of UN peacekeeping personnel. It is evident that there are difficult questions to be addressed, and these questions may become more and more prominent in the context of the rapidly changing nature of peacekeeping operations.

There are, of course, other pressing issues related to the Additional Protocols and IHL in general, and I am confident that this Round Table offers an excellent forum to exchange views on critical issues.

I wish you all a successful Round Table.

Thank you.