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**Scope of legal protection under the Convention on the
Safety of United Nations and Associated Personnel**

Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel

Chairman: Mr. Christian **Wenaweser** (Liechtenstein)

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–5	2
II. Proceedings of the Working Group.....	6–7	2
Annexes		
I. Proposals.....		3
A. Revised Chairman's text		3
B. Proposal by the United Kingdom of Great Britain and Northern Ireland on behalf of the European Union [A/C.6/60/WG.1/DP.1]		6
C. Proposal by Canada [A/C.6/60/WG.1/DP.2]		6
II. Informal summary of the discussion in the Working Group, prepared by the Chairman		7

I. Introduction

1. The General Assembly, in its resolution 59/47 of 2 December 2004, decided that the Ad Hoc Committee established pursuant to resolution 56/89 of 12 December 2001 should reconvene from 11 to 15 April 2005, with a mandate to expand the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, including by means of a legal instrument, and that the work should continue during the sixtieth session of the Assembly within the framework of a working group of the Sixth Committee.
2. At its 1st meeting, on 3 October 2005, the Sixth Committee established a Working Group in order to continue the work pursuant to resolution 59/47 and elected Christian Wenaweser (Liechtenstein) as its Chairman. At the same meeting, the Sixth Committee decided to open the Working Group to all States Members of the United Nations or members of the specialized agencies or the International Atomic Energy Agency.
3. The Working Group held four meetings, on 4, 5 and 10 October 2005. Informal consultations were also held on 5, 6 and 7 October. In view of the importance of the subject under consideration, the Working Group decided, at its 1st meeting, on 4 October, to hold the formal meetings of the Working Group in open sessions.
4. The Working Group had before it the report on the work of the fourth session of the Ad Hoc Committee¹ containing, inter alia, a revised Chairman's text of a draft protocol to be used as the basis of work of the Working Group and proposals by delegations. The report also contained a proposal by Costa Rica regarding the relationship between the Convention on the Safety of United Nations and Associated Personnel and international humanitarian law, to be considered by the Working Group separately.
5. The Working Group considered and adopted its report at its 4th meeting, on 10 October 2005.

II. Proceedings of the Working Group

6. At its 1st meeting, on 4 October, the Working Group held a brief general exchange of views regarding its organization of work. Subsequent substantive discussions focused on the revised Chairman's text. During the discussions, delegations made various written and oral proposals. An informal summary of the discussion in the Working Group prepared by the Chairman appears in annex II to the present report. The summary is intended for reference purposes only, not as an official record of the discussions.
7. The Working Group did not have time to consider the proposals made by Costa Rica and the Bolivarian Republic of Venezuela during the last meeting of the Ad Hoc Committee.²

¹ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 52 (A/60/52)*. The Ad Hoc Committee held its first, second and third sessions in 2002, 2003 and 2004, respectively. For the reports of the three sessions see, *ibid.*, *Fifty-seventh Session, Supplement No. 52 (A/57/52)*, *Fifty-eighth Session, Supplement No. 52 (A/58/52)*, and *Fifty-ninth Session, Supplement No. 52 (A/59/52)*. The reports of the Working Group's previous sessions are contained in documents A/C.6/58/L.16 and Corr.1 and A/C.6/59/L.9.

² *Official Records of the General Assembly, Sixtieth Session, Supplement No. 52 (A/60/52)*, annex II.A and C.

Annex I

Proposals

A. Revised Chairman's text

The States Parties to this Protocol,

Recalling the terms of the Convention on the Safety of United Nations and Associated Personnel done at New York on 9 December 1994,

Deeply concerned over the continuing pattern of attacks against United Nations and associated personnel,

Conscious of the particular risks faced by personnel engaged in United Nations operations conducted for the purposes of delivering humanitarian, political and development assistance in peacebuilding, [including in situations of [destabilizing civil unrest, societal breakdown], conflict and transitional reconstruction], and delivering emergency humanitarian assistance [and recognizing that such personnel should be protected inasmuch as there exists an element of risk],

Convinced of the need to have in place an effective regime to ensure that the perpetrators of attacks against United Nations and associated personnel engaged in United Nations operations are brought to justice,

Have agreed as follows:

Article I Relationship

This Protocol supplements the Convention on the Safety of United Nations and Associated Personnel, done at New York on 9 December 1994 (hereinafter referred to as "the Convention"), and as between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as a single instrument.

Article II Application of the Convention to United Nations operations

1. The Parties to this Protocol shall, in addition to those operations as defined in article 1 (c) of the Convention, apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of:

(a) Delivering humanitarian, political or development assistance [[in peacebuilding,] [including] in [pre-conflict,] [conflict and] [post-conflict situations]],
or

[(b) Delivering emergency humanitarian assistance].

2. Paragraph 1 does not apply to any permanent United Nations office, such as headquarters of the Organization or its specialized agencies established under an agreement with the United Nations.

3. [A host State may make a declaration to the Secretary-General that it shall not apply the provisions of this Protocol with respect to an operation under article II(1)(b) which is conducted for the sole purpose of responding to a natural disaster. [Such a declaration shall be made subsequent to the natural disaster and prior to the deployment of the operation.]]

Article III

[The duty of a State Party to this Protocol with respect to the application of article 8 of the Convention to United Nations operations defined in article II of this Protocol shall be without prejudice to its right to take action in the exercise of its national jurisdiction over any United Nations or associated personnel who violates the laws and regulations of that State, provided that such action is not in violation of any other international law obligation of the State Party.]

Article IV **Signature**

This Protocol shall be open for signature by all States at United Nations Headquarters for the twelve months from x/x/xxxx to x/x/xxxx.

Article V **Consent to be bound**

1. This Protocol shall be subject to ratification, acceptance or approval by the signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
2. This Protocol shall, after x/x/xxxx, be open for accession by any non-signatory State. Instruments of accession shall be deposited with the Secretary-General of the United Nations.
3. Any State that is not a State Party to the Convention may ratify, accept, approve or accede to this Protocol if at the same time it ratifies, accepts, approves or accedes to the Convention in accordance with articles 25 and 26 thereof.

Article VI* **Entry into force**

1. This Protocol shall enter into force thirty days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to this Protocol after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Protocol shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

* The remaining final clauses have been prepared by the Secretariat upon the request by the Ad Hoc Committee. The final clauses are based on articles 27, 28 and 29 of the Convention on the Safety of United Nations and Associated Personnel.

Article VII

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations.
2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article VIII

Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

Done at New York this ... (day) ... (month) ... (year).

B. Proposal by the United Kingdom of Great Britain and Northern Ireland on behalf of the European Union [A/C.6/60/WG.1/DP.1]

Compromise proposal for article II.3

Amend the second option in article II.3 of the Chairman's text to read:

A host State may make a declaration *to the Secretary-General* that it shall not apply the provisions of this Protocol with respect to an operation under article II (1) (b) *which is conducted for the sole purpose of responding* to a natural disaster. Such a declaration shall be made subsequent to the natural disaster and prior to the deployment of the operation.

Delete the remainder of the paragraph.

C. Proposal by Canada [A/C.6/60/WG.1/DP.2]

Supplementary to the proposal by the United Kingdom of Great Britain and Northern Ireland on behalf of the European Union

Add the following at the end of document A/C.6/60/WG.1/DP.1 (proposal by the United Kingdom of Great Britain and Northern Ireland on behalf of the European Union):

..., and shall be communicated by the Secretary-General to all States contributing personnel to the operation prior to deployment.

Annex II

Informal summary of the discussion in the Working Group, prepared by the Chairman

1. The Chairman briefly apprised the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel of developments since the April meeting of the Ad Hoc Committee, noting that open-ended informal intersessional consultations on the revised Chairman's text, contained in annex I to the report of the Ad Hoc Committee,^a had been convened by the Chairman. In particular, the Chairman stressed that the consultations had focused on the text within brackets in the third preambular paragraph and in article II, paragraphs 1 (a) and 3. The consultations revealed a willingness to work around certain approaches and proposals. During the consultations, delegations agreed in principle to the use of the term "peacebuilding" in the optional protocol. However, two aspects of the question remained to be addressed, namely, whether the term "peacebuilding" would need to be defined and, if so, what kind of definition should be used. Furthermore, the Chairman clarified that it had been generally agreed to continue working on the bracketed language in the third preambular paragraph reading, "situations of destabilizing civil unrest, societal breakdown, conflict and transitional reconstruction", which offered an illustrative list of situations in which peacebuilding operations were conducted. It was also understood that the language to be used in the third preambular paragraph was linked to article II, paragraph 1 (a).

2. Regarding article II, paragraph 3, relating to operations undertaken for the purpose of delivering emergency humanitarian assistance in case of natural disaster, the Chairman identified four main positions held by delegations. First, the optional protocol would apply to all such United Nations operations. Second, the optional protocol would provide a host State with the possibility of making a declaration, at the time of ratification, that it would not apply the optional protocol to such operations. Third, such a declaration of non-applicability would be made only on a case-by-case basis and prior to the deployment of an operation. Fourth, the optional protocol would not apply to operations undertaken for the purpose of delivering emergency humanitarian assistance in case of natural disaster unless a host State explicitly consented thereto. The sentiments in the informal consultations seemed to gravitate towards the second option, which contained an opt-out procedure with additional safeguards and qualifications. It was also understood during the consultations that the issues were closely linked and should be taken as forming part of an overall package. He encouraged the Working Group to focus on questions relating to the definition of peacebuilding in the preamble and in draft article II, paragraph 1 (a), and to the opt-out clause in respect of natural disasters.

3. With regard to article III, which was still in brackets, the Chairman stated, based on his informal consultations, that the article was not difficult to address once there was agreement on all other outstanding issues.

4. The Chairman also recalled that the General Assembly, in the 2005 World Summit Outcome (resolution 60/1), stressed the need to conclude the negotiations on a protocol expanding the scope of legal protection under the 1994 Convention during its sixtieth session (para. 167).

^a *Official Records of the General Assembly, Sixtieth Session, Supplement No. 52 (A/60/52).*

Third preambular paragraph

Inclusion of the concept of peacebuilding

5. Many delegations supported the inclusion of the concept of peacebuilding in the third preambular paragraph and in article II, paragraph 1 (a), of the Chairman's text. In that regard, some delegations pointed out that they would have preferred the preparation of a protocol with a broader scope, which would cover all categories of United Nations operations. In particular, they were of the view that pre-conflict situations should fall within the scope of the optional protocol. However, they expressed their willingness to accept the inclusion of the concept of peacebuilding as a compromise. Some delegations, however, opposed the inclusion of the concept on the grounds that it was ambiguous and still evolving.

6. As to whether peacebuilding required a general definition, various views were expressed. Some delegations supported the inclusion of a general definition, which would add clarity and precision to the concept. In their view, the protocol was a criminal law instrument and, as such, it required legal precision to facilitate the task of enacting national legislation for its implementation.

7. Some other delegations pointed out that since peacebuilding was an evolving concept, it was difficult to arrive at a generally agreed definition. It was also stated that if a definition for peacebuilding was needed at the national level, it could be provided for in the implementing legislation of the future protocol by States choosing to become party to it.

8. The view was expressed that the concept of peacebuilding should be defined drawing from paragraph 97 of the 2005 World Summit Outcome. That paragraph, in the context of peacebuilding, referred to "countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development". Those elements, according to that view, could form the basis for a definition. According to another view, paragraph 97 of the outcome document related to the establishment and the mandate of the Peacebuilding Commission, which was different from the mandate of the Ad Hoc Committee. A suggestion was also made to define the concept by employing the elements of peacebuilding incorporated in the statement by the President of the Security Council of 20 February 2001 (S/PRST/2001/5).

Illustrative list

9. Concerning the inclusion of the list of operations, in the bracketed language in the third preambular paragraph, within the category of peacebuilding, divergent views were expressed. Some delegations favoured the retention of the bracketed language in its entirety. In their view, such an illustrative list would provide a scope for the concept of peacebuilding and add clarity to it. In their view, peacebuilding was a broad concept including operations in pre-conflict, conflict and post-conflict situations and the illustrative list served to illustrate that concept.

10. Others felt that certain elements in the illustrative list, such as the determination of situations of destabilizing civil unrest and societal breakdown, fell within the domestic jurisdiction of States and therefore should not be included in the list. They preferred the inclusion of a list of elements limited to situations of conflict, post-conflict and transitional reconstruction. Some delegations expressed opposition to the inclusion of pre-conflict situations. The view was expressed that the elements of

peacebuilding, as contained in paragraph 97 of the outcome document, made it clear that peacebuilding covered only post-conflict situations.

11. The view was expressed that the words in brackets in the third preambular paragraph could not provide elements of a definition of peacebuilding. They were factors that made peacebuilding necessary or advisable.

12. In terms of treaty-making technique, it was stated that it was not customary to refer in the preamble to details that were found in the articles of a treaty. In that particular case, some of the elements that were included in the third preambular paragraph could not be found in article II, paragraph 1 (a). The suggestion was made that the third preambular paragraph should be transferred in its entirety to article II, paragraph 1 (a). In that regard, the Chairman clarified that the paragraph in question carried its own history, which began with the aforementioned presidential statement of the Security Council (S/PRST/2001/5).

Element of risk in the last bracketed phrase

13. It was noted that, with the inclusion of the last bracketed phrase of the third preambular paragraph, two references were made to the element of risk in the paragraph. The first reference, at the beginning of the paragraph, was explanatory in nature, whereas the second reference was a qualifier. Delegations that spoke in favour of the retention of the sentence pointed out that while there was an agreement to expand the scope of the 1994 Convention, there was no agreement for its application to all United Nations operations. The element of risk was still important in determining which additional operations should fall under the Convention by way of a protocol. Therefore, that reference to risk would preserve the harmony between the protocol and the 1994 Convention and would also serve as a guiding principle for national courts in the application of the protocol.

14. Other delegations favoured the deletion of the last bracketed phrase which, in their view, if included, would impose an additional trigger mechanism for the application of the protocol, whereas removing the trigger mechanism was the rationale behind elaborating an optional protocol. According to those delegations, peacebuilding operations and the illustrative list were based on the presumption that there was already an inherent risk in those operations, hence the required protection. However, the last bracketed phrase seemed to introduce a further risk element and limit protection in case of those operations inasmuch as they already entailed an element of risk.

Article II, paragraph 3

15. Discussions on article II revolved around a proposal made by the United Kingdom of Great Britain and Northern Ireland, on behalf of the European Union, which provided, first, a procedure by which a host State could declare the non-applicability of the optional protocol with respect to an operation under article II, paragraph 1 (b), conducted for the sole purpose of responding to a natural disaster and, second, that such a declaration would be made subsequent to the natural disaster and prior to the deployment of the operation [see annex I.B].

16. The sponsors were of the view that natural disasters had an inherent element of risk. Nevertheless, they agreed to provide for States that wished to opt out to do so, but on a case-by-case basis in accordance with the second sentence. In their view, a declaration on a case-by-case basis was a realistic way to address the opt-out issue,

since it provided an opportunity for a State to determine whether the conditions in a particular natural disaster required the application of the protocol. It was further clarified that the proposal should be seen as a compromise package under which the term peacebuilding, which would remain undefined, would characterize, in the third preambular paragraph and article II, paragraph 1 (a), the other categories of United Nations operations to which the optional protocol would apply.

17. Several delegations expressed support for the proposal and stated that, while it expanded the scope of protection under the Convention to natural disaster situations, it properly maintained the notion of risk. Some other delegations pointed out that, while the natural disaster itself did not constitute risk, a breakdown of the rule of law and order often arose in such situations, and thus posed an element of risk to the personnel delivering the assistance. Those delegations recognized that the proposal constituted a balanced compromise between delegations that preferred to apply the optional protocol to all such operations and those that wanted to exclude them from its scope.

18. Some delegations reiterated their position that the optional protocol should not apply to natural disaster situations at all. It was pointed out that natural disasters often occurred in situations of minimal or no risk in which personnel delivering assistance would be adequately protected by the host State's national legislation. It was also unreasonable to expect a host State to provide additional protection to United Nations personnel at a time when its resources were already mobilized to address the effects of the natural disaster. Nevertheless, those delegations considered that the idea of providing the host State with the option not to apply the optional protocol to such situations would constitute an acceptable compromise.

19. Comments were also made regarding the mechanism by which a host State would decide when to apply the optional protocol to a natural disaster situation, as contained in the second sentence of the proposal. Some delegations were of the view that making the declaration subsequent to the natural disaster properly reflected the notion that the element of risk was not always present in those situations and that it thus needed to be addressed on a case-by-case basis. However, other delegations preferred making such a declaration at the time of ratification. It was considered that the procedure to opt out on a case-by-case basis would provide an additional burden upon host States suffering from a natural disaster. Some of those delegations preferred the opt-in alternative.

20. In response to those concerns, the point was made that the burden was not so much administrative as legal and that all States parties involved were affected. The application of the optional protocol would entail important rights and obligations of the States parties involved, including, in particular, the duty to prosecute or extradite. The host State and the United Nations would communicate with each other prior to the deployment of the operation and a declaration not to apply the optional protocol could easily be made at that time. Furthermore, the point was made that both the opt-out and opt-in alternatives seemed to entail the same burden for a host State, that of having to declare its intent with regard to the applicability of the optional protocol to a particular situation.

21. Some delegations raised questions regarding the practical consequences of making the declaration to opt out prior to deployment, in particular as to whether such a declaration constituted or could be construed as a condition precedent for such deployment.

22. Some delegations also expressed support for the proposal by Canada to amend the second sentence of the proposal by the United Kingdom on behalf of the European Union in order to clarify that contributing States should be notified of any opt-out declaration made by a host State [see annex I.C]. Such an amendment would ensure that contributing States that were not parties to the optional protocol would know whether it applied or not to the situation at hand and whether its nationals would be exposed to a risky situation.

23. While some delegations expressed support for the proposal by Canada and found that it added clarity, other delegations considered it superfluous since the Secretary-General, in his practice as depositary, already circulated information related to treaty action to all States, not only to States parties to a particular treaty. Concern was also expressed that such a provision might be seen as rendering the applicability of the optional protocol a precondition by the contributing State to sending assistance.

24. Some delegations reiterated their preference for the opt-in procedure, as contained in the third bracketed paragraph in the revised Chairman's text. It was agreed, in principle, to use the wording of the first sentence in the United Kingdom proposal, it being understood that such agreement was conditional on an agreement on the second sentence as well.
