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verfolgte Personen?**

## Summary

### UN-Safety Zones – a Means of Protection for Persecuted Persons?

During the 1990s the international community established the idea of internationally created and protected areas within the war zone: In 1990 the USA initiated *safe havens* for the Kurds in Northern Iraq, in 1993 the UN-Security Council declared six *safe areas* in Bosnia and Herzegovina in order to protect the Muslim population from the Serbian aggression and in 1994, during the civil war between the Hutu and Tutsi in Rwanda, France – with authorization from the UN-Security Council – created a *safe humanitarian zone*. Although the humanitarian situation was grave, the degree of safety in these areas was partly very low and the UN-*safe area* Srebrenica even ended with mass killings and the death of more than 7000 persons. The UN-Security Council in 2000 considered temporary *safety zones* as a means for the protection of civilians and the delivery of humanitarian assistance in situations of mass persecution as a result of genocide, crimes against humanity or war crimes. But until now the UN still lack a clear concept as well as rules and guidelines as to the creation, organization and protection of such *safety zones*.

This book analyses the nature and legal framework of *safety zones* created under the auspices of the UN (UN-*safety zones*), focusing on the human rights obligations within such UN-*safety zones* and the corresponding responsibility of the UN-Security Council. On this basis the analysis evaluates UN-*safety zones* as in-land protection means for persecuted persons and elaborates legal and political guidelines for the creation and organization of UN-*safety zones*.

## I.

The overall aim of the *safety zones* created by the international community in Iraq, Rwanda and Bosnia was to keep a certain area free of attacks in order to protect persecuted persons, to insure access of humanitarian aid, prevent mass flights to neighbouring countries and, in the long term, to enable peace talks. They can be seen as reactions to the

increasing ethnic conflicts and the insufficiencies of the consensual *safety zones* under international humanitarian law – neutral zones, undefended cities and demilitarised zones – to cope with these problems. International *safety zones* had been built in situations where civilians had become the primary object of warfare like genocide, crimes against humanity and war crimes, i.e. where the *safety zones* under international humanitarian law failed due to their consensual character. By granting protection of civilians in certain areas within the war zone, international *safety zones* take up the concept of the *safety zones* under international humanitarian law. But they develop it further by imposing this zone against the will of at least one party to the conflict and protecting it from falling under enemy control.

The creation of *safety zones* falls within the competence of the UN if triggered by a humanitarian crisis which endangers world-peace and international security. Bearing the primary responsibility for maintaining international peace and security, the UN-Security Council may proclaim the creation of temporary *safety zones*. This can be done – as was the case in Bosnia – by demanding the neutralization (and demilitarisation) of a certain area on the basis of a provisional measure according to Art. 40 UNC and subsequently, if necessary, enforcing the neutralization through measures based on Arts 41 – and 42 UNC –. A second option is for the UN-Security Council – as in Rwanda – to directly authorize the member states to occupy a certain area on the basis of Art. 42 UNC in order to create such a *safety zone*. Both options are binding on the parties of the conflict and independent from the consent of the host-state. Due to the principle of proportionality, the UN-Security Council has to try to achieve the consent of the parties first and prefer a *safety zone* built on Art. 40 UN.

In deciding upon and implementing a UN-*safety zone* the UN-Security Council enjoys wide discretion. Criteria like demilitarisation, delimitation and delineation of the *safety zone*, which usually apply according to the principle of proportionality and the humanitarian principle of separation, are not binding as such for the UN-Security Council. – However, they must be balanced with the overall objective of securing world peace.

## II.

The powers of the protecting forces in a UN-*safety zone* may derive from eventual arrangements with the host-state and from the respective mandate. If there is no agreement or mandate or if it lacks detailed regulations with regard to the administrative powers like in Bosnia, the protecting forces in the UN-*safety zone* may only assume these powers on the basis of their general authorization to keep the peace or to self-defence if these measures are necessary for their own or the peoples' defence. Further administrative or protective powers, especially those concerning the maintenance of public order within the UN-*safety zone* may also derive from the law of occupation in situations where the forces have the factual control over the UN-*safety zone*. This was the case e.g. with the military coalition in Rwanda. On the basis of the law of occupation the protecting forces may even be obliged to maintain public order in the *safety zone*.

The mandate or an agreement with the host-state may also bind a power in the UN-*safety zone* to guarantee fundamental rights when taking over public authority by defending the territory or supervising public order. But even if these instruments do not or only scarcely foresee such obligations they arise out of or are specified by the general rules of public international law. A power creating, supervising and protecting a UN-*safety zone* is bound by the prohibition of genocide as well as the general human rights standards as laid down in conventional and customary public international law. In case the power occupies the territory of the *safety zone*, these general human rights standards are superseded by the special obligation under the laws of occupation to protect and ensure the well-being of the civilian population. The obligation to respect conventional and customary public international law when organizing a UN-*safety zone* arises without respect to whether the UN or the member states command the UN-*safety zone* mission. For the prohibition of genocide is always applicable and human rights obligations as well as those arising from the laws of occupation only depend on the amount of the protecting power's factual control over the UN-*safety zone*.

Thus, when exercising its assigned competences in a UN-*safety zone* the protecting power is bound by general international law to protect the population against internal and external aggression as well as to assure the access of humanitarian aid. When encountering threats of genocide or strong and systematic killings like in Srebrenica the power can even be obliged to maintain the UN-*safety zone* and defend the

people or to offer alternative protection by evacuation. The protecting power must also omit disproportionate restrictions on the people's freedom of movement and the right to leave the UN-*safety zone*. The right of persecuted persons to enter the UN-*safety zone* may only be restricted for reasons of capacity or because of overwhelming security threats. The protecting power must also contribute to the safe return of displaced people in the UN-*safety zone*.

The fundamental human rights obligations of the protecting power must only be fulfilled within the means at hand and only as long as there are no overwhelming threats for itself. This is why the UN-*safe area* mission in Srebrenica failed. In considering the protecting power's security threat it must be kept in mind that soldiers as part of their duty assume a greater risk for their lives especially when acting under a mandate to protect people. Thus, a general proposition according to which the soldiers' safety precedes the safety of the people – as was promulgated in the case of Srebrenica – is not acceptable in a UN-*safety zone*. Moreover, UNPROFOR lacked the necessary enforcement means to guarantee the access of humanitarian aid to the *safe area*, to divert the permanent attacks on the *safe area* and finally to avoid the brutal invasion by the Serbian troops. The UN-administration failed to furnish UNPROFOR with the necessary enforcement powers and did not make effective use of the NATO air power at hand. Additionally, it neither had a clear plan for the defence of the *safe area* nor for the evacuation of the civilian population.

### III.

Ensuring the safety of the people in a UN-*safety zone* and guaranteeing their fundamental rights is not only a duty of the protecting power but also entails the responsibility of the UN-Security Council which declared or at least authorized the *safety zone*. If the UN-Security Council declares or authorizes the creation of a *safety zone*, it is obliged to guarantee a minimal standard of fundamental rights in the *safety zone* by providing the necessary protection measures. This duty arises from the UN-Security Council's obligation to obey the *ius cogens* rules of international law, like the prohibition of genocide, the principle of humanity and the obligation to prevent systematic killings when exercising its discretionary power under Art. 39 UNC. As a consequence the UN-Security Council, before declaring a *safety zone*, is obliged to authorize and assure the necessary protection measures in order to pre-

vent an infraction of these rights. Likewise, when subsequently recognizing evident infractions of the minimum human rights standard in a UN-*safety zone* like in Srebrenica, the UN-Security Council may also be obliged to authorize and ensure further enforcement measures. In Srebrenica the UN did not carry out its assessment with due diligence when the UN-Security Council, although aware of the fact that the *safe areas* could not be sufficiently protected against potential attacks from Serbian troops, failed to provide the necessary protection means.

At the same time the UN-Security Council can be obliged to foresee the necessary protection measures for the *safety zone* on the basis of an effectiveness requirement for enforcement measures when ordering the demilitarisation of the UN-*safety zone* or even collecting the weapons of the host-state. Effectiveness as a part of the principle of proportionality is inherent in Chapter VII and explicitly stated in Art. 51 UNC. Thus, a host-state's sovereignty over its defence capacity in general and its right of self-defence may only be restricted by effective UN-Security Council measures to achieve international peace. Because of the UN-Security Council's wide discretionary power when making a determination under Art. 39 UNC this requirement of effectiveness is limited to obvious cases. But still, the creation of a UN-*safety zone* by ordering the neutralization and demilitarisation of the *safety zone* under Art. 40 can be or becomes an obviously ineffective measure in the sense of Art. 51 or becomes evidently ineffective for the protection of peace, if it is clear that the protection of the people and their fundamental rights can not be guaranteed. Srebrenica was such an obvious case, where the Serbian troops did not stop the attacks on the *safe area* and permanently hindered the access of humanitarian aid. If in such a case the UN-Security Council keeps up the *safe area* without taking the necessary measures to enforce the protection and the supply of humanitarian aid, the restriction of the host-state's sovereignty or its right to self-defence becomes illegal. The UN-Security Council either has to end the measure or allow the necessary enforcement actions.

Thus, the UN-Security Council may either directly delegate the creation of the *safety zone* to the member states and authorize all necessary means to protect the population and ensure humanitarian aid like in Rwanda or it must authorize and ensure the necessary protection means and safety corridors and draw up a potential evacuation plan before declaring a *safety zone* itself.

Additionally the UN-Security Council has to exercise the permanent supervision and control over the human rights situation in the *safety zone* – another reason for the dramatic fall of the *safe area* Srebrenica.

News reports about massacres or inhuman conditions were lost in the complicated and slow information flow. In addition repeated warnings from the UN-Special Rapporteur for human rights in Bosnia were not heeded by the UN-Security Council. Although the UN-Security Council is not obliged to react to reports and urgent recommendations by other human rights bodies, it cannot close its eyes to reported gross violations of human rights in a UN-*safety zone*. To ensure the protection of the fundamental rights in UN-*safety zones* and to contribute to a successful and reliable *safety zone* policy, a reform of the UN-human rights system seems to be indispensable. In such a process the call for a stronger influence of the UN-human rights bodies in general as well as for a more direct and institutionalised supervision and reporting for UN-*safety zones*, e.g. by special committees for the rights of the population, seems to be elementary.

#### IV.

When determining the responsibility for the dramatic failure of the UN-*safe area* in Srebrenica, mistakes were made in London, Moscow, Paris and Washington. – However, there is also a case for responsibility of the UN. The failure to protect the population in a UN-*safety zone* results in the individual responsibility of decision makers within the UN and the corresponding obligation of the UN to prosecute the perpetrators – those from the conflicting parties but also those within the UN-administration. The creation of the ICTY and the condemnation of Serbian military and governmental personnel remain patchwork in light of the fact that the main persons accountable for the massacre in Srebrenica, the Serbian leader Radovan Karadzic and his general Ratko Mladić, have not been tried so far. As to the individuals within the UN-administration the world still waits for prosecutions or clear disciplinary consequences. It should also be kept in mind that the UN as an international organization may incur international responsibility for its organs and may be obliged to pay compensation to victims or their heirs. But indemnification claims from Bosnian people have been kept in silence and have so far been rejected. The infinite number of investigation reports on the fall of Srebrenica does not suffice for exculpation. If at all, they may only serve as symbolic excuses, but cannot replace remedies in international law.

## V.

The idea of UN-*safety zones*, i.e. the protection of persecuted people in their homeland, can be valued as a necessary and suitable complement for the protection of civilians in conflicts. By providing in-country protection, UN-*safety zones* prevent mass flights to other countries and the relating problems of prolongation of the conflict, costly and difficult integration and the return of the refugees.

But there is a need for guidelines and a clear distribution of responsibilities for a UN-*safety zone*. Additionally a permanent supervision of the human rights situation in a UN-*safety zone* seems indispensable to ensure the adjustment of the means to the actual needs in the UN-*safety zone*. The main lesson from Srebrenica is that UN-*safety zones* can only play a role in the protection of displaced persons if the states are willing to protect the people – if necessary, by use of military force.

When formulating guidelines for the creation and organization of UN-*safety zones* it must be kept in mind that they can only offer protection to a very small number of people living in the designated geographical area and only for a limited time period. UN-*safety zones* are an emergency instrument, since they require a declaration of an endangerment of international peace under Chapter VII and since they restrict the host-state's sovereignty. Moreover, they are an exception to the general rule of non-intervention. Especially the discretion of the UN-Security Council as to the human rights standard in a UN-*safety zone* limits the instrument to situations where displaced persons have no other chance to flee from the aggression than seeking refuge in a UN-*safety zone*.

The protection through UN-*safety zones* can and shall only complement the protection of persecuted people outside their country. States may not deny asylum to people because there is a UN-*safety zone* in their home country, even if they fled from a UN-*safety zone*. The international community cannot sit back after creating UN-*safety zones*. Rather at the same time it has to offer alternatives like the evacuation from the war zone to safer regions. Also, the adjustment of the refugee law to the phenomenon of mass flights in ethnic conflicts and a better protection of internally displaced persons seem indispensable.

In the end UN-*safety zones* are a case of responsibility. Only if the international community is willing to take this responsibility and to exercise it faithfully, can UN-*safety zones* leave the dark shadow of Srebrenica behind and become a successful instrument in the fight against

the greatest enemies of civilians in armed conflicts – genocide, crimes against humanity and war crimes.