PROTECTING THE AVATARS OF INTERNATIONAL PEACE AND SECURITY

WALTER GARY SHARP, SR.*

The world community needs, more than it has ever done, skilful and disciplined warriors who are ready to put themselves at the service of its authority. Such warriors must properly be seen as the protectors of civilisation, not its enemies.


I. FRAMING THE ISSUE

History will not view the twentieth century as one of peace. To the contrary, this century has been called "mankind's most bloody and hateful century," with international politics its greatest failure.1 As a result of this failure, this century over 87,000,000 combatants and civilians were lost to war, and another estimated 80,000,000 persons were deliberately killed by their own governments.2

History will, however, view the last half of the twentieth century as one of great transformation—from a system of independent sovereign states allowed by international law to wage war and to slaughter

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2. See id. at 7-18.
their own citizens with impunity to a system of interdependent sovereign states now attempting to govern itself, protect human rights, and enforce global peace. This peace, as defined by one of this century's preeminent statesmen, "implies a certain quality of social relationships such that no person within the domestic order, and no state within the international order, need seriously fear violence from his fellows."3

Despite its weaknesses, the United Nations has been the vehicle of this transformation and is the world community's real legacy of the twentieth century. The purposes of the United Nations are to "maintain international peace and security," "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character," and "to be a centre for harmonizing the actions of nations in the attainment of these common ends."4 In pursuing these purposes, the United Nations and its Member States5 are required to act in accordance with seven principles enumerated in Article 2 of the Charter of the United Nations (Charter). The most important of these principles, found in paragraph 4 of Article 2, is the prohibition on the aggressive use of force. Although the fundamental precepts underlying these principles are the sovereign equality of all Member States and the peaceful settlement of disputes, Article 2 explicitly recognizes the primacy of the Chapter VII enforcement authority of the United Nations Security Council (Security Council) in matters within the domestic jurisdiction of any state.6

The Member States of the United Nations have conferred upon the Security Council the "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."7 Two key chapters of the Charter provide the legal authority

5. Throughout the present Article, the term "Member States" refers to states that are members of the United Nations.
6. Article 2(7) states that 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 and Chapter VII.
for the Security Council to maintain international peace and security. Chapter VI provides for the pacific settlement of disputes, requiring the parties to any dispute that may endanger international peace and security to "seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."\(^8\) Within this pacific settlement mechanism, the Security Council has investigative powers and the authority to recommend appropriate procedures or methods of adjustment.\(^9\) Should Chapter VI conciliation fail, Chapter VII requires the Security Council, as the overseer of international peace and security, to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."\(^10\) Chapter VII of the Charter details the coercive\(^11\) authority of the Security Council without which the Security Council would be entirely ineffective and the proscriptions of the Charter against the aggressive use of force\(^12\) would have no deterrent value.

While the United Nations acts through regional organizations and Member States, it must depend upon the individual to conduct military operations. Regardless of whether the operation is a Chapter VI observer mission or a Chapter VII enforcement action, it is the individual peace-keeper or warfighter who actually accomplishes the U.N. mandate.\(^13\) John Keegan described these warriors in the epi-

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8. *Id.* art. 33.
9. See *id.* arts. 34, 36.
10. *Id.* art. 39.
11. The term "coercive" in this context includes all recommendations or measures imposed by the Security Council pursuant to its Chapter VII authority on a state that are binding on that state notwithstanding its lack of consent. In contrast, the term "enforcement" is a subset of coercive measures and connotes the use of military force.
12. These proscriptions on the aggressive use of force are found in paragraphs 3 and 4 of Article 2 of the Charter:
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
13. A "mandate" in the context of the United Nations is an authoritative resolution communicating the decision of the Security Council that certain activities are either authorized or directed. See Dep't of the Army, *Field Manual 100-23, Peace Operations*, app. A at 66 (1994). In practice, the term mandate is sometimes used to refer to any resolution of either the
These military personnel serve the world community and embody the Charter's most cherished purpose—they are the world community's avatars of international peace and security. Without these avatars to implement the Security Council's coercive authority, the world community has no enforcement mechanism and international law has no deterrent value. Therefore all military personnel who serve the United Nations deserve the maximum protection that the world community has to offer. This premise leads to the central point of the present Article: How should the rule of law protect military personnel who participate in U.N. peace operations?

While the safety of all personnel serving the world community, civilian and military, is of the greatest concern, the focus of this Article is limited to a discussion of the protection of military personnel. I have narrowed the focus in this manner because it is generally accepted that civilians who serve the international community always deserve protection and should never be lawful targets. In contrast, while the world community accepts that military personnel always deserve protection, it still clings to the antiquated notion that under certain circumstances military personnel should be lawful targets notwithstanding that they serve the international community under the authority of the United Nations. For example, the 1994 Convention on the Safety of United Nations and Associated Personnel (Safety Convention) adopted by the General Assembly clearly embraces the concept that military personnel serving as combatants under the authority of the Security Council are lawful targets of those engaging in illegal aggression. The domestic equivalent of this position would be to make police officers lawful targets of those unlawfully robbing a bank. This position reflects pre-Charter thinking condoning the aggressive use of force and is therefore unacceptable.

The dangerous effect on U.N. forces of this pre-Charter thinking can only be fully understood in the context of the range of operations that are conducted under the authority of the United Nations and in

General Assembly or Security Council authorizing certain activities. See id.


the context of the existing legal protections accorded military personnel who serve the international community under its authority. Accordingly, the next section will define and discuss the legal authorities for the different types of U.N. peace operations that may involve the deployment of military personnel. This analysis will be followed by a survey of the existing legal protections for military forces operating outside their flag state. An in depth analysis of the weaknesses of the Safety Convention will then be used to highlight the dangerousness of applying existing international law to modern U.N. peace operations. This Article determines that the international community expects and explicitly authorizes U.N. forces to use armed force in self-defense and to accomplish its assigned mission and concludes that U.N. forces are accorded in practice a special protected status. This Article recommends that the de facto protected status of U.N. forces should be advanced and codified by a proposed “Draft Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Civilians and Military Forces Operating Under the Authority of the United Nations.” This draft protocol would protect all personnel operating under the authority of the United Nations, civilians and military, whether noncombatant or combatant, and would make them unlawful targets under all circumstances.

II. UNITED NATIONS PEACE OPERATIONS—DEFINITIONS AND AUTHORITIES

Since there are no accepted definitions that clearly describe the different types of modern U.N. peace operations, it is essential to begin with an overview of the evolution of peace operations and a discussion of terminology. “U.N. peace operations” is a term I use generically to include all U.N. authorized operations involving the deployment of military forces or personnel into an area of tension or conflict in an effort to maintain or restore international peace and security. This term includes consensual, coercive, and enforcement operations, and is a subset of the conflict management mechanisms authorized by the Charter.

In An Agenda for Peace, the Secretary-General of the United Nations defined five types of conflict management mechanisms: preventive diplomacy, peacemaking, peace-keeping, peace-enforcement,
and peace-building. This set of terms, however, does not allow for distinctions between traditional and modern applications of peacekeeping and peace-enforcement. To reflect modern operations, I have subdivided two of the Secretary-General's terms, peace-keeping and peace-enforcement, into consensual peace-keeping, coercive peace-keeping, neopeace-enforcement, and traditional peace-enforcement. The end result is a set of seven terms that accurately describe the full spectrum of U.N. conflict management mechanisms. Nevertheless, in practice, conflict management is frequently tailored to fit the specific circumstances of a particular dispute or conflict. Consequently, all peace operations do not necessarily fall neatly into only one of the following categorical definitions of conflict management.

A. Preventive Diplomacy

Preventive diplomacy is the vanguard of conflict management mechanisms. It is defined in An Agenda for Peace as "action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur." Through confidence building measures (CBMs) such as arms control monitoring, information exchanges, and liaison officers, Member States develop transparency in their behavior, thus cultivating the trust and confidence that reduces the likelihood of tensions that may lead to conflict. Conceptually, should CBMs fail to prevent tensions, early warning institutions such as the Economic and Social Council analyze economic, social, and political trends to identify emerging threats to the peace, and fact-finding develops the basis for a decision as to how to deploy preventive measures. Preventive diplomacy may be conducted at the initiative of any person or organization—international, governmental, or nongovernmental.

18. Id. para. 20.
20. See id. para. 26. The Economic and Social Council is one of the six principal organs of the United Nations. Its function is to "make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters." U.N. Charter arts. 7, 62.
21. See An Agenda for Peace, supra note 17, para. 25.
22. See id. para. 23.
The two preventive measures discussed in *An Agenda for Peace* are preventive deployments and demilitarized zones. A preventive deployment is undertaken when it is believed that a U.N. presence will discourage the flare-up or spread of hostilities, or in the case of an internal crisis, will alleviate suffering or control violence. Similarly, demilitarized zones monitored by U.N. personnel can be established to separate belligerents during a cessation of hostilities or at the conclusion of a conflict. All preventive diplomacy mechanisms are exclusively consent-based activities.

B. Peacemaking

When preventive diplomacy fails to prevent conflict, peacemaking attempts to bring hostile parties to agreement, essentially through those peaceful means set forth in Chapter VI of the Charter. Entitled the "Pacific Settlement of Disputes," Chapter VI details a number of dispute resolution options that focus on the involvement of the Security Council. The first article of Chapter VI adds depth to the principle found in Article 2(3) that all "Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 33 provides that

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Chapter VI also authorizes the parties to any dispute to submit it to the attention of either the Security Council or General Assembly, and requires the parties who fail to settle a dispute to refer it to the Security Council, which has the authority to recommend such terms

23. *See id.* paras. 28-32.

24. *See id.* para. 33.


of settlement as it considers appropriate.\textsuperscript{27} The Security Council is authorized to "investigate any dispute, or any situation that might lead to international friction or give rise to a dispute,"\textsuperscript{28} and, at any stage of a dispute, "recommend appropriate procedures or methods of adjustment."\textsuperscript{29}

The General Assembly also has a role in peacemaking. Article 14 of the Charter provides that "[T]he General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations."\textsuperscript{30} All forms of peacemaking are exclusively consent-based activities.

C. Traditional Peace-Enforcement

Should peacemaking efforts fail to prevent conflict, the Charter authorizes measures that provide for the collective security of the international community. While Chapter VI only authorizes the Security Council to make recommendations to settle disputes, Chapter VII authorizes the Security Council to require parties to settle a dispute in a certain manner and to enforce its decisions through sanctions and, if necessary, the use of armed force. Although the desires of the parties may be considered, consent is not required for the Security Council to take action under Chapter VII. This coercive authority of the Security Council is limited, however, by the Purposes and Principles of the United Nations\textsuperscript{31} and to disputes that threaten international peace and security.\textsuperscript{32}

Articles 40 through 43 detail the coercive authority of the Security Council. Provisional measures, such as calling for a cease-fire between parties to a conflict, are authorized by Article 40. Article 41 allows the Security Council to require Member States to apply affirmative measures not involving the use of armed force. These measures include, but are not limited to, "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic,

\textsuperscript{27} See id. art. 37.
\textsuperscript{28} Id. art. 34.
\textsuperscript{29} Id. art. 36.
\textsuperscript{30} This authority is subject to the provisions of Article 12 of the Charter, which provides that while "the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." U.N. CHARTER art. 12.
\textsuperscript{31} Id. art. 24(2).
\textsuperscript{32} See id. arts. 25, 39.
radio, and other means of communication, and the severance of diplomatic relations." The Security Council is also authorized by Article 42 to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." These measures include, but are not limited to, "demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

The armed forces to be used by the Security Council for measures taken pursuant to Article 42 were to be established under Article 43 of the Charter, which provides that all Member States "undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." Accordingly, the mission of Article 43 forces was defined in terms of Article 39 of the Charter, i.e., to serve the Security Council in the exercise of its responsibility to maintain or restore international peace and security. In 1946, the Security Council directed the Military Staff Committee (MSC) to examine Article 43 and make recommendations to the Security Council for its implementation. The MSC, however, was unable to specify the parameters for Article 43 forces due to disagreements founded in political distrust among members of the Security Council over the total size of the force, the relative sizes of the contributions of the permanent members of the Security Council, the location of the forces when not in use, the provision of assistance and facilities, and logistical support. Fifty years later, it remains unlikely that Article 43 forces will be stood up in the near future.

This use of armed force by the Security Council is the only use of military forces clearly contemplated by the Charter. Under existing

33. Id. art. 41.
34. Id. art. 42.
36. See id. at 13. Article 47 of the U.N. Charter provides that a Military Staff Committee will be established "to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament."
38. See AN AGENDA FOR PEACE, supra note 17, para. 44. For a more hopeful view of the utility of Article 43, see Alan K. Henrikson, The United Nations and Regional Organizations: "King-Links" of a "Global Chain", 7 DUKE J. COMP. & INT'L L. 35, 62-68 (1996).
international law, these Article 43 forces would be belligerent forces in an international armed conflict and could be lawfully targeted by the state against which the Security Council was taking enforcement action. An Agenda for Peace defines this use of armed force as “peace-enforcement,” giving as examples situations where the Security Council authorizes military action in response to outright aggression, imminent or actual, with forces made available to the Security Council on a permanent basis under Article 43 of the Charter. To distinguish this use of military forces from other uses by the United Nations, I refer to these operations as “traditional peace-enforcement.”

D. Neopeace-Enforcement

Although the Security Council has never used its Article 42 authority as contemplated by the drafters of the Charter, it has authorized Member States to take military enforcement measures on its behalf four times. In two of these situations, the Korean War and the Persian Gulf War, the armed forces acting on behalf of the United Nations were belligerent forces in an international armed conflict, and therefore, under existing international law, the personnel who served in these armed forces were lawful targets.

In 1992, the Secretary-General identified the need for a new concept of peace-enforcement by Member States in An Agenda for Peace. In recognizing that the Security Council “chose to authorize Member States to take measures on its behalf” in the situation between Iraq and Kuwait, the Secretary-General recommended that the Security Council “consider the utilization of peace-enforcement

40. See An Agenda for Peace, supra note 17, paras. 42-44.
42. See Supplement to An Agenda for Peace, supra note 41, para. 78.
43. See 1907 Hague Regulations, supra note 39, arts. 22-28, 36 Stat. at 2301-03, 1 Bevans at 647-49.
44. See An Agenda for Peace, supra note 17, para. 42.
units [under the command of the Secretary-General] in clearly defined circumstances and with their terms of reference specified in advance.”

The thinking of the Secretary-General evolved in his 1995 Supplement to An Agenda for Peace, where he also recognized the need for the Security Council to entrust enforcement actions to groups of Member States. To distinguish the practice of the Security Council to contract out enforcement operations to Member States from traditional peace-enforcement, I refer to these operations as “neopeace-enforcement.”

E. Consensual Peace-Keeping

The Charter did not explicitly provide for any conflict management mechanisms that fall between Chapter VI diplomatic conciliation and Chapter VII coercive measures. Given the absence of Article 43 forces and the inability of the Security Council to maintain unity during the Cold War, a concept of peace-keeping evolved that allowed the United Nations to use armed forces volunteered by Member States to police the peace in a territory of a state when it had the state’s consent to do so. These consensual peace-keeping operations involved armed forces in the field as a practical way to “halt or contain the fighting in a conflict while concerted efforts are made to bring the warring parties to the negotiating table or otherwise provide the time and create the climate necessary to bring about a peaceful settlement.”

The first U.N. consensual peace-keeping force was established by the General Assembly in 1956 pursuant to its authority set forth in Chapter IV of the Charter. The 1949 General Armistice Agreement...
failed to prevent the relations between Egypt and Israel from deteriorating. Years of Egyptian-supported raids by the Palestinians and Israeli reprisals prompted Egypt in the early 1950s to restrict Israeli shipping through the Suez Canal. Poor relations turned to conflict when Israel invaded Egypt on October 29, 1956. On October 31, France and the United Kingdom, both of whom had cooperated with Israel in its attack, landed troops at the northern end of the Suez Canal in an effort to separate the belligerents and ensure the safety of shipping through the Canal. Although the Security Council was actively engaged, it was unable to adopt a condemnatory resolution over the vetoes of the United Kingdom and France. At the proposal of Yugoslavia, the matter was transferred to the General Assembly, which adopted a resolution on November 7 creating the United Nations Emergency Force (UNEF). The function of UNEF was to secure and supervise the cessation of hostilities. In its enabling resolutions, the General Assembly clearly stated that UNEF could only enter and operate in Egypt with the consent of all nations concerned.

After the historic UNEF precedent, the Security Council continued to use consensual peace-keeping forces in a variety of ways, such as dispute settlement mechanisms and humanitarian relief operations. For example, when Egyptian-Israeli hostilities flared up again on October 6, 1973, the Security Council created UNEF II at the request of Egypt to monitor the cease-fire between it and Israel.\(^5\) Also, in response to the tragic humanitarian conditions in Somalia and the inability of the international relief organizations to operate among the warring factions, the Security Council in 1992 established a United Nations Operation in Somalia (UNOSOM) to serve as a security force.\(^2\)

U.N. Secretary-General Boutros Boutros-Ghali defined these peace-keeping operations in 1992 as

the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.\(^3\)

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51. For a detailed discussion of UNEF II, see id. at 79-98.
53. AN AGENDA FOR PEACE, supra note 17, para. 20.
The key aspect of Chapter VI operations that deploy armed forces is that they are present in the territory of a sovereign state only because that state has consented to their presence. However, the Secretary-General defined peace-keeping as a deployment "hitherto with the consent of all the parties concerned." This is his recognition that peace-keeping has now evolved to include actions authorized by Chapter VII that do not require the consent of the parties concerned but are for limited purposes short of stopping an aggressor. To distinguish between these two types of peace-keeping, I refer to Chapter VI operations as "consensual peace-keeping" and Chapter VII operations as "coercive peace-keeping." Consensual peacekeepers are not belligerents and are not lawful targets, even though they may be deployed into areas of ongoing hostilities.

F. Coercive Peace-Keeping

In December of 1992, the Security Council made an unprecedented departure from traditional, consensual peace-keeping philosophy when it adopted the following language in Resolution 794: "Acting under Chapter VII of the Charter of the United Nations, [the Security Council] authorizes the Secretary-General and Member States cooperating... to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." For the first time, the Security Council explicitly used Chapter VII authority to allow a coercive peace-keeping force to use all necessary means during a humanitarian intervention in a territory without the consent of the state or all parties to the conflict, while remaining a non-belligerent. The United States took the lead under the authority of Resolution 794 by forming "Joint Task Force-Somalia" to serve as the unified command and control element for the multinational force deploying to Somalia.

belligerent army of occupation; it was considered, without exception, a violation of a state's sovereignty to deploy armed forces in its territory without its consent. Member States, however, have ceded a portion of their sovereignty to the Security Council in matters of international peace and security. They have conferred upon the Security Council the primary responsibility for the maintenance of international peace and security, and have agreed that they will "accept and carry out the decisions of the Security Council in accordance with the present Charter." Should the Security Council decide under Article 39 of the Charter that it is necessary to deploy an armed force in the territory of a state without the its consent in order to maintain or restore international peace and security, it has the authority to do so. The only exception to this authority was carved out in Article 27 of the Charter, providing a veto for the five permanent members of the Security Council. Although the veto has been used much more broadly, the original understanding among the five permanent members was that "the veto was to be used only if the passage of a resolution could otherwise culminate in military action against one of them."

Since Resolution 794, the Security Council has continued to exercise its Chapter VII authority to deploy coercive peace-keeping forces under nonconsensual circumstances. In March 1993, the Security Council extended its Chapter VI humanitarian relief efforts in Somalia when it created an expanded United Nations Operations in Somalia (UNOSOM II) under Chapter VII. "All necessary means" were authorized again in 1994 when the situation in Haiti continued to constitute a threat to peace and security in the region. Similarly,


58. U.N. CHARTER art. 24(1). It is important to note that this delegation of authority does not derogate from a state's inherent right of individual and collective self-defense. See U.N. CHARTER art. 51.

59. U.N. CHARTER art. 25.

60. HIGGINS, supra note 48, at 174.


62. Security Council Resolution 940 paragraph 4 provides as follows:

Acting under Chapter VII of the Charter of the United Nations, [the Security Council] authorize Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of
the General Framework Agreement for Peace in Bosnia and Herzegovina\textsuperscript{63} and Security Council Resolution 1031 authorized such enforcement action by the multinational implementation force (IFOR) "as may be necessary to ensure implementation of the military aspects of the peace settlement and the protection of IFOR."\textsuperscript{64}

An Agenda for Peace preceded Resolution 794 and the historic operations in Somalia, and thus did not recognize the concept of coercive peace-keeping. The Supplement to An Agenda for Peace, however, clearly adopts a form of peace-keeping where the Security Council authorizes Member States to use armed force by deploying a neutral and impartial military presence in areas of tension or conflict, not necessarily with the consent of all the parties concerned, for the purposes of a limited mandate short of stopping an aggressor or imposing a cessation of hostilities.\textsuperscript{65} I refer to this new methodology as "coercive peace-keeping."

All peace-keepers deployed by the United Nations are authorized to use armed force in self-defense, but only coercive peace-keeping forces are authorized to use force for reasons other than in self-defense.\textsuperscript{66} Coercive peace-keeping forces begin their operation as non-belligerents and unlawful targets; however, under existing international law, at some undefined point on the spectrum of armed force, their use of force for reasons other than self-defense makes them belligerents and lawful targets.

G. Peace-Building

All peace operations must consider their end-state, i.e., that defined point when the operation can be declared successful and the U.N. presence in the field can be terminated. Critical to the successful termination of any operation is post-conflict "peace-building," which is that action taken to "identify and support structures which


\textsuperscript{65} See id. paras. 33-36.
## CONFLICT MANAGEMENT MECHANISMS UNDER THE CHARTER OF THE UNITED NATIONS

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*Table 1*

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<th>Mechanism</th>
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<th>Definition**</th>
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<td>Preventive Diplomacy</td>
<td>Consent</td>
<td>¶ 20: &quot;is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur.&quot; ¶ 23: performed by UN Secretary-General, senior staff, specialized agencies or programs, Security Council, General Assembly, or regional organizations in cooperation with the UN. Examples: ¶ 24, CBMs; ¶ 25, fact-finding; ¶¶ 26-27, early warning systems; ¶¶ 28-32, preventive deployment; ¶ 33, demilitarized zones.</td>
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<td>Peacemaking</td>
<td>Chapter IV and</td>
<td>¶ 20: &quot;is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations.&quot; Examples: ¶ 35, UNSC Chapter VI role; ¶ 36, UNGA Chapter IV role; ¶ 37, mediation and negotiation; ¶¶ 38-39, IJC dispute resolution; ¶ 40, amelioration through assistance; ¶ 41, resolution of special economic problems resulting from Chapter VII action.</td>
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<td>Consensual Peace-Keeper</td>
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¶ 44 recognized the need but did not fully define a mechanism to address new forms of conflict and humanitarian crisis. ¶¶ 8-22 and 34-36 of the Supplement to An Agenda for Peace, however, outlines situations where the UNSC authorizes Member States to use armed force by deploying a neutral and impartial military presence in areas of tension or conflict, not necessarily with the consent of all the parties concerned, for the purposes of a limited mandate short of stopping an aggressor or imposing a cessation of hostilities.

¶ 42: situations where the UNSC authorizes Member States to take military action in response to outright aggression, imminent or actual, on its behalf.

¶¶ 42-44: situations where the UNSC takes military action in response to outright aggression, imminent or actual, with forces made available to it on a permanent basis under Article 43 of the Charter.

¶ 21: post-conflict “action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.” Examples: ¶¶ 55-59: agreements ending civil strife; disarmament; repatriating refugees; advisory and training support for security personnel; monitoring elections; protection of human rights; reforming governmental institutions; promoting formal and informal processes of political participation; economic and social development; educational exchanges and reform; de-mining.

* In this and the following table, all chapter and article references refer to the United Nations Charter.

** Unless otherwise noted, all paragraph references in this and the following table refer to An Agenda for Peace.
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<td>Chapter IV and Consent</td>
<td>UNGA may recommend measures, to include use of military forces,* for the peaceful adjustment of disputes.</td>
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<td>Chapter VI and Consent</td>
<td>UNSC may call upon the parties to settle their dispute by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, regional agencies or arrangements, other peaceful means.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNSC may investigate any dispute.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNSC may refer any dispute to UN SC or UNGA.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNSC may recommend, on its own initiative, procedures or methods of adjustment.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>Referral of legal issues to ICJ.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNSC may recommend, on its own initiative, terms of settlement.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNSC may recommend, at request of parties, actions with a view toward pacific settlement.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNGA may recommend measures, to include use of military forces,* for the peaceful adjustment of disputes.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNSC may recommend, on its own initiative, use of military forces* as a method of adjustment.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNSC may recommend, on its own initiative, use of military forces* as a term of settlement.</td>
</tr>
<tr>
<td></td>
<td>Chapter VI and Consent</td>
<td>UNSC may recommend, upon request, use of military forces* as either a method or term of settlement.</td>
</tr>
<tr>
<td>COERCIVE</td>
<td>Coercive Peace-Keeping</td>
<td>UNSC may recommend action, to include use of military forces authorized to use armed force, to maintain or restore peace and security.</td>
</tr>
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<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td></td>
<td>UNSC may impose provisional measures, to include use of neutral and impartial military forces authorized to use armed force, to prevent aggravation of the situation.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>UNSC may call upon Members to apply measures, which may involve military forces but not the use of armed force, to give effect to its decisions. These measures include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.</td>
</tr>
<tr>
<td>Neopeace-</td>
<td>Neopeace-Enforcement</td>
<td>UNSC may authorize Members to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.</td>
</tr>
<tr>
<td>Enforcement</td>
<td></td>
<td>UNSC may direct a combined international enforcement action with national contingents made available to it.</td>
</tr>
</tbody>
</table>

* These military forces must be neutral and impartial, and are not authorized to use armed force except in self-defense.
will tend to consolidate peace and advance a sense of confidence and well-being among people. These actions may include disarmament, demilitarization, refugee repatriation, election monitoring, economic and social development, and protection of human rights.

Post-conflict peace-building should occur as an integral part of all ongoing peace operations, and may be conducted by the military force in the field, a separate civilian presence, or a joint effort of the two.

H. Summary of Conflict Management Mechanisms

It should be evident from the brief discussion above that every level of conflict management—from preventive deployments to traditional peace-enforcement—may involve the deployment of military forces. Table 1 summarizes the terminology used by the United Nations as I have refined it to accurately describe the current practice of the Security Council and the international community. In addition to understanding the different types of conflict management, one must also have a clear understanding of the international legal authorities discussed above under which U.N. peace operations are conducted to fully understand the following section which discusses the existing legal protections accorded military forces. Accordingly, Table 2 summarizes these legal authorities.

III. EXISTING LEGAL PROTECTIONS ACCORDED MILITARY FORCES

The status of U.N. or multilateral armed forces depends both on the underlying authority upon which the forces are present in the receiving state and on whether the force is non-belligerent or belligerent. This general observation allows us to analyze existing international protections accorded military forces operating outside their flag state in three categories: non-belligerent consensual forces; non-belligerent forces acting under the coercive authority of the Security Council; and belligerent forces.

The sovereignty of the receiving state, which includes jurisdiction over its territory that is prima facie exclusive, is the most fundamental doctrine of state relations under international law and is the cardinal consideration in determining the status of military forces op-

67. AN AGENDA FOR PEACE, supra note 17, paras. 21, 55-59.
68. See id. paras. 55-56.
erating outside their flag state. While the first category above acknowledges the territorial and political sovereignty of the receiving state, the last two categories recognize exceptions to the general rule of exclusive sovereignty.

A. Non-Belligerent Consensual Forces

1. Summary of Legal Protections. Non-belligerent consensual forces deployed in the territory of a sovereign state are fully exposed to the domestic law and regulation of the receiving state, subject only to protections provided by a stationing agreement, and those privileges, immunities, and protections afforded by international law. This exposure, if not altered by agreement or international law, includes subjecting members of the force to the full criminal and civil jurisdiction of the receiving state, as well as exposing the force itself to receiving state regulation such as import fees, customs, and taxes. Consequently, it is highly preferred during a consensual deployment to have an agreement with the receiving state to determine the status of the members of the force, to ensure that members of the force are protected by receiving state law, and to exempt the force itself from unnecessary regulation and expense—notwithstanding that some of these privileges and immunities are already granted by international law. Unless additional authorization is granted by the receiving state, military personnel deploying outside their own state may only use armed force for self-defense. Non-belligerent consensual forces are not lawful targets, even though they may be deployed into areas of ongoing hostilities.

2. Receiving State Law. The peacetime stationing of military forces on foreign territory did not become general state practice until the twentieth century, perhaps as a consequence of the evolving emphasis on collective security. Indeed, prior to 1914, military forces were generally present on foreign territory only as forces of hostile or peaceful occupation. During a hostile occupation, an occupied state retained its sovereignty as a matter of law, while

extensive portions of its governmental authority were displaced by
the occupying military force. In contrast, during a peaceful
occupation, which historically included only small contingents
present for a short time under exceptional circumstances, the
occupied state retained its full governmental authority.

Consent of the receiving state was required for a peaceful occu-
patation and the rights and obligations of the occupying force were
normally defined by mutual agreement. In the absence of an
agreement, an occupying force retained its internal disciplinary
power, but, with the exception of jurisdiction, was otherwise consid-
ered fully subject to the sovereignty of the receiving state. Propo-
nents of the doctrine of the law of the flag asserted that a military
force operating on foreign territory had exclusive jurisdiction over its
personnel; in practice, however, military personnel participating in a
peaceful occupation were prosecuted and sentenced for offenses
committed outside the performance of their official duty by receiving
states when no jurisdictional agreement existed.

It was this provisional custom of peaceful occupation that de-
veloped into the practice of a more permanent stationing of forces. As
this practice developed, consent of the receiving state remained a re-
quirement for the peacetime stationing of foreign forces, and the
conditions of their admission continued to be defined by mutual
agreement. The status of forces stationed in a foreign territory with
a receiving state’s consent but without an agreement on the condi-
tions of their admission, however, was a very contentious area of in-
ternational law for a number of years involving the exclusive jurisdic-
tional doctrine of the law of the flag and a restrictive jurisdictional
approach that balanced competing state interests. The law and state
practice is now well-established: Absent an express agreement to the
contrary, foreign forces are fully subject to receiving state sovereignty

72. See id. at 7-8; 1907 Hague Regulations, supra note 39, arts. 42-43, 36 Stat. 2306, 1 Be-
vans at 651.
73. See LAZAREFF, supra note 71, at 8.
74. See id.
75. See id. at 9.
76. For an excellent summary of the contentious issue of jurisdiction over military forces
in the absence of an agreement, see id. at 11-18.
77. See id. at 8.
78. See WOODLiffe, supra note 70, at 35-44.
79. See LAZAREFF, supra note 71, at 11-18; DEP’T OF THE ARMY, PAMPHLET 27-161-1,
THE LAW OF PEACE, VOLUME I, §§ 5-2 to 5-4, 10-3 (1979) [hereinafter DEP’T OF THE ARMY
PAM. 27-161-1].
and members of the force are fully subject to the jurisdiction of a receiving state for offenses committed outside the performance of their official duty. 80

This application of receiving state law can be very problematic for foreign forces because it includes subjecting the force to receiving state laws and regulations concerning entry and exit, customs, laws, and taxation, as well as criminal and civil jurisdiction. 81 Exposure to receiving state laws and regulations can have significant adverse operational impact on foreign forces because they govern the daily activities of the force, such as the requirements for driver's licenses and vehicle insurance, the wearing of uniforms, the display of foreign flags and other national markings, the possession and carrying of weapons, the use of force, the exercise of military discipline, the jurisdictional status of the force and its ability to contract for services and goods, and claims (both contractual and tort) against the foreign force. 82 Even if not misused, the pervasive nature of receiving state law and regulations can interfere with the basic functioning of foreign forces and significantly increase their operational costs. Receiving state sovereignty does not preempt the inherent right of foreign forces to defend themselves 83 and does not preempt the sending state from using additional forces to protect its own nationals from an imminent threat of injury or death when the receiving state is unwilling or unable to protect them. 84


81. These are the most important areas of concern when addressing the status of foreign forces and are the most commonly addressed issues in stationing agreements. See, e.g., DEP'T OF THE AIR FORCE PAM. 110-20, supra note 80, at 2-1.

82. The North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) provides a well-established example of how these and other interests of the receiving and sending state are balanced. See Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

83. See U.N. CHARTER art. 51; SUPPLEMENT TO AN AGENDA FOR PEACE, supra note 41, paras. 33-34, 36; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 589 (Bruno Simma ed., 1994).

84. See NATIONAL SECURITY LAW 188-90 (John Norton Moore et al. eds., 1990). But see IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 264-80, 431-34 (1963); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra note 83, at 124-26, 666 (stating that the forcible protection of nationals against the will of the territorial state is illegal under U.N. Charter Article 2(4) and does not justify use of self-defense under Article 51).
While the application of receiving state law can interfere with or hinder the purpose underlying the stationing of foreign forces, it can also serve to protect foreign forces. Receiving state criminal law, for example, is intended to prevent harm to society by protecting individuals and property within its territory. To the extent that a receiving state's system of criminal law is effective and enforced, members of foreign forces are protected from injury and the property of foreign forces is protected from damage or theft.

3. Stationing Agreements. Inherent in the authorization to station forces within a receiving state is the implied authorization that the foreign forces may exercise those rights and powers that are necessary for its effective operation; any further rights and powers, however, must be expressly granted by the receiving state. The uncertainty of the breadth of these implied powers and the exclusive nature of state sovereignty make detailed agreements a fundamental requirement to clarify the application of receiving state law and regulation to foreign forces. These agreements can take many forms, such as a collective defense treaty, a base agreement or lease, a security assistance sales contract, an international headquarters agreement, an exchange of diplomatic notes, or an informal arrangement.

When the rights, privileges, powers, duties, and obligations of a foreign force are addressed in a separate agreement, it is normally referred to as a "status of forces agreement" (SOFA). Key issues that should be addressed in any SOFA include the exercise of criminal jurisdiction over offenses committed by members of the foreign force; the exercise of civil jurisdiction over acts of the members of the foreign force; the settlement of civil claims arising out of the activities of the force; the allocation of responsibility for security over installations; passport and visa requirements; freedom of movement for official duties; on-site rights and powers; off-site rights, powers, and authority; rights of overflight; the right to conduct maneuvers and exercises; and dispute resolution.

SOFAs may be either bilateral or multilateral, and may be used to detail the status of U.N. forces. Since a Chapter IV or a Chapter VI force operates in purely a consensual environment, SOFAs are as important to a U.N. force as to any national force stationed in a re-

85. See WOODLiffe, supra note 70, at 146.
86. See LAZAREFF, supra note 71, at 2-3.
87. See WOODLiffe, supra note 70, at 135-50.
ceiving state. Accordingly, the United Nations has recognized the importance of SOFAs since its first consensual peace-keeping force. In 1957, the United Nations entered into an Exchange of Letters with Egypt to specify the status of the United Nations Emergency Force (UNEF) in Egypt, which was established under the authority of Chapter IV of the Charter. This agreement on the status of UNEF was the first document of its kind to be used by the United Nations. Similarly, in 1989, the United Nations entered into an agreement with South Africa to detail the status of the United Nations Transition Assistance Group (UNTAG) in Namibia, which was established under the authority of Chapter VI of the Charter.

It is the established preference of the United Nations to attempt to work out an agreement on the status of its forces to be deployed within a receiving state. A review of the practice of the United Nations, however, reveals the lack of a specific written agreement for recent operations. For intrastate disputes, an agreement may not be reached because of the dispute within the receiving state over who has the authority to conclude such an agreement. At the request of the General Assembly, the Secretary-General prepared a model status of forces agreement to be used by the United Nations and receiving States. The Secretary-General's report stated that the model status of forces agreement was based upon established prac-

89. See THE BLUE HELMETS, supra note 50, at 54.
91. See THE BLUE HELMETS, supra note 50, at 87.
93. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra note 83, at 598.
The Office of the Legal Adviser to the United Nations has concluded in the context of a specific operation that in the absence of a signed agreement, the status of the United Nations forces and operations in Croatia are governed by the customary practices and principles applicable to UN peace-keeping or similar operations as codified in the Model Status-of-forces agreement issued as a General Assembly document dated 9 October 1990 (A/45/594).

In 1991, the Secretary-General restated this position in his Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-keeping Operations, which provides in paragraph 6 that, pending the conclusion of a status of forces agreement, the United Nations "shall apply the customary principles and practices which are embodied in the model status-of-forces agreement." This precise language from the model agreement recognizing the customary international law status of the U.N. Model SOFA was used in 1994 by the United Nations in making arrangements with Canada to provide personnel and equipment to the United Nations Mission in Haiti. Although considerably different in format, the SOFA arrangements concluded as a part of the General Framework Agreement for Peace in Bosnia and Herzegovina, are substantively consistent with the U.N. Model SOFA. The terms of the model SOFA, and thus customary international law, are limited to operations established under the authority of the United Nations and conducted under U.N. authority and control.

96. See id. para. 1.
100. Peace Agreement, supra note 63.
101. United Nations Model SOFA, supra note 95, §§ II-III.
102. This formula of application is parallel to the definition of "United Nations operations" as adopted by the General Assembly of the United Nations in the Safety Convention, supra
Section 3 of the U.N. Model SOFA provides that the Convention on the Privileges and Immunities of the United Nations (Privileges and Immunities Convention) applies to the U.N. peace-keeping operation, subject to the provisions of the model agreement. For example, the Privileges and Immunities Convention provides for varying levels of privileges and immunities for the representatives of Members, officials of the United Nations, the Secretary-General and Assistant Secretaries-General, and experts on mission. The U.N. Model SOFA grants military observers "experts on mission" status, the Commander of the force the protections of a diplomatic envoy accorded the Secretary-General, and members of the force the more limited privileges and immunities as detailed in the model agreement. Members of the force are immune from criminal and civil jurisdiction for all acts performed in their official capacity; exempt from all income taxes except on income received from sources inside the receiving state; exempt from all other direct taxes, registration fees or charges; and, exempt from those laws and regulations governing customs and foreign exchange for personal property required by reason of their presence in the receiving state. Additionally, the model SOFA contains detailed provisions commonly found in a status agreement such as the use of the U.N. flag, wearing of uniforms, carrying of weapons, use of force, arrest and detention powers of the force, vehicle markings, use of U.N. issued drivers licenses, communications capabilities, postal services, freedom of movement, designation and protection of facilities, cost of utility services, local contracting, hiring of local personnel, currency exchange rates, entry and departure requirements, required identity documents, and dispute settlement provisions.

4. The Four Geneva Conventions of 1949 and the two 1977 Geneva Protocols. World War II highlighted the lack of preciseness and clarity of those existing laws of armed conflict that protected victims of war and the need for more specific provisions on punishing

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note 16, art. 1.
104. The Privileges and Immunities Convention will be discussed in more detail infra Part III.A.7.
105. United Nations Model SOFA, supra note 95, § VI.
106. See id.
107. See id.
violations of the law.\textsuperscript{108} The laws of armed conflict, \textit{jus in bello}, are those rules that govern the actual conduct of hostilities regardless of whether the conflict is lawful or unlawful in its inception under the rules that govern the resort to armed conflict, \textit{jus ad bellum}.\textsuperscript{109} At the initiative of the International Committee of the Red Cross (ICRC), four conventions were drafted that adapted and developed the laws of armed conflict, resulting in the four Geneva Conventions of 1949.\textsuperscript{110} These four conventions apply during international armed conflict, and deal with the following four categories of victims of war, respectively: wounded and sick in armed forces in the field; wounded, sick and ship-wrecked in armed forces at sea; prisoners of war; and civilians.\textsuperscript{111} The four Geneva Conventions of 1949 are adhered to by more states than any other agreements on the laws of armed conflict and are declaratory of customary international law.\textsuperscript{112}

These conventions are linked by certain general principles and by common articles that are found throughout each of the four conventions.\textsuperscript{113} Common Article 2 governs the application of the four Geneva Conventions of 1949, and is widely accepted as the threshold test for when an international armed conflict exists.\textsuperscript{114} This article invokes the provisions of the Conventions, and the application of the laws of armed conflict, upon the declaration of war or the occurrence of \textit{de facto} hostilities.\textsuperscript{115}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{DOCUMENTS ON THE LAWS OF WAR} 169 (Adam Roberts & Richard Guelff eds., 2d ed. 1989) [hereinafter \textit{LAWS OF WAR}].
\item See \textit{id.} at 2-3.
\item See \textit{LAWS OF WAR, supra} note 108, at 169.
\item See \textit{LAWS OF WAR, supra} note 108, at 169.
\item See \textit{id.} at 169-70; \textit{COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR} 17-21 (Jean S. Pictet ed., 1958) [hereinafter 1949 \textit{GENEVA CONVENTION IV COMMENTARY}].
\item See 1949 \textit{GENEVA CONVENTION IV COMMENTARY, supra} note 114, at 20.
\end{enumerate}
\end{footnotesize}
vention IV published by the ICRC explains that

[any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.]

This threshold for the application of the Conventions was intended to afford maximum protection to belligerents and non-belligerents by ensuring the Conventions applied to as many interactions between the armed forces of states as possible.

As the first international agreement in the laws of armed conflict to exclusively address the protection of civilians, the Geneva Convention IV made a substantial contribution to international law. Generally, protected persons under this Convention are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Members of the armed forces of parties to an international armed conflict who violate the provisions of the four Geneva Conventions of 1949 are subject to criminal prosecution.

Article 4 of the 1949 Geneva Convention IV specifies who are protected persons under this Convention. This article provides that persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral state who find themselves in the territory of a belligerent State, and nationals of a co-belligerent

116. Id.
117. See id. at 17-21.
118. See LAWS OF WAR, supra note 108, at 271-72.
120. See id. art. 146, 6 U.S.T at 3616, 75 U.N.T.S. at 386.
state, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II [the general protection of populations against certain consequences of war] are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.\(^\text{121}\)

The provisions of the four Geneva Conventions do not explicitly address their application to the armed forces of states not a party to the conflict, i.e., neutral states, that are located in the area of hostilities. The 1949 Geneva Convention IV Commentary, however, provides that the language "at a given moment and in any manner whatsoever" was intended to ensure that all situations and cases were covered, and that the expression "in the hands of" is used in a general sense to include all persons in the territory under the control of a party to the conflict that are not nationals of that party.\(^\text{122}\) Article 4 was intended to cover everyone in the hands of a state party to a conflict who is not a national of that state.\(^\text{123}\) The exception in paragraph 2 of Article 4 for the nationals of neutral states applies only "in the territory of a belligerent State" and only "while the State of which they are nationals has normal diplomatic representation" with the belligerent state.\(^\text{124}\) In the case of this exception, neutrals are protected by other applications of the legal regime that protects military forces operating outside their flag state.\(^\text{125}\)

In the conclusion to its discussion of Article 4, the 1949 Geneva Convention IV Commentary states that

[I]n short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have

\(^{121}\) Id. art. 4, 6 U.S.T at 3520, 75 U.N.T.S. at 290 (emphasis added).

\(^{122}\) 1949 GENEVA CONVENTION IV COMMENTARY, supra note 114, at 46-47.

\(^{123}\) See id. at 46.

\(^{124}\) Id. at 48-49.

\(^{125}\) See id. at 49.
some status under international law: he is either a prisoner of war
and, as such, covered by the Third Convention, a civilian covered
by the Fourth Convention, or again, a member of the medical per-
sonnel of the armed forces who is covered by the First Convention.
There is no intermediate status; nobody in enemy hands can be out-
side the law.\footnote{126}

Accordingly, the armed forces of states not a party to the conflict op-
erating in areas of armed conflict are protected persons under the
1949 Geneva Convention IV and are not lawful targets.

This protection accorded the armed forces of neutral states is not
only reinforced but clarified by the protocols to the four Geneva
Conventions of 1949.\footnote{127} These two Geneva Protocols of 1977 were in-
tended to adapt the laws of armed conflict to the conditions of mod-
ern hostilities and to broaden the protections accorded the victims of
armed conflicts.\footnote{128} Members of the armed forces of parties to an in-
ternational armed conflict who violate the provisions of the two Ge-
neva Protocols of 1977 are also subject to criminal prosecution.\footnote{129}

Protocol I supplements the protections accorded victims of in-
ternational armed conflicts provided by the four Geneva Conven-
tions of 1949 and applies in situations referred to in common Article
2.\footnote{130} The first two paragraphs of Article 75 of Protocol I provide that:

\begin{enumerate}
\item In so far as they are affected by a situation referred to in Article
1 of this Protocol [international armed conflicts], \textit{persons who are in
the power of a Party to the conflict and who do not benefit from
more favourable treatment} under the Conventions or under this
Protocol shall be treated humanely in all circumstances and shall
enjoy, as a minimum, the protection provided by this Article . . .
Each Party shall respect the person, honour, convictions and reli-
gious practices of all such persons.
\item The following acts are and shall remain prohibited at any time
\end{enumerate}

\footnote{126} \textit{Id.} at 51.
\footnote{127} Collectively, these two conventions are referred to as the Geneva Protocols of 1977.
As of November, 1996, the United States is not a party to these two Conventions. Individual
citations are as follows: Protocol Additional to the Geneva Conventions of 12 August 1949, and
Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125
Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International
II].

\footnote{128} \textit{See} \textit{LAWS OF WAR}, \textit{supra} note 108, at 387.
\footnote{130} \textit{Id.} art. 1(3), 1125 U.N.T.S. at 7, 16 I.L.M. at 1397.
and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

(i) murder;
(ii) torture of all kinds, whether physical or mental;
(iii) corporal punishment; and
(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.\textsuperscript{131}

This article clearly broadens the protections of Article 4 of the 1949 Geneva Convention IV by granting the protections of Article 75 to all persons who “are in the power of a Party to the conflict and do not benefit from more favourable treatment” under the four 1949 Geneva Conventions or Protocol I.\textsuperscript{132}

Additionally, Protocol I specifically recognizes that the United Nations has a protected status. Article 37 makes “the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other states not Parties to the conflict” an unlawful act of perfidy.\textsuperscript{133} Similarly, Article 38 places the United Nations in the same category as other internationally protected organizations that are not lawful objects of attack unless being misused for hostile purposes.\textsuperscript{134} Article 38 makes the distinctive emblem of the United Nations an internationally protected emblem by providing that:

\textsuperscript{131} Id. art. 75(1)-(2), 1125 U.N.T.S. at 25, 16 I.L.M. at 1423 (emphasis added).


\textsuperscript{133} “Unlawful acts of perfidy” are defined in paragraph 1 of Article 37 as those acts “inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” Protocol I, supra note 127, art. 37(1), 1125 U.N.T.S. at 21, 16 I.L.M. at 1409.

\textsuperscript{134} For a thorough discussion of the law of targeting, see chapter eight of DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (1995) [hereinafter COMMANDER’S HANDBOOK].
1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.\(^\text{135}\)

It is important to note, however, that the report of the drafting Committee for Articles 37 and 38 limits the protected status of the United Nations to those situations where the U.N. forces are not belligerents engaged in an enforcement action involving armed combat.\(^\text{136}\) During these situations when U.N. forces are belligerents, existing international law governing the use of U.N. signs, emblems, and uniforms places the United Nations on equal footing with any other belligerent party to the conflict.\(^\text{137}\)

5. **Common Article 3 of the Geneva Conventions of 1949.** The ICRC was faced with almost universal opposition to its proposal that the four Geneva Conventions of 1949 would apply to all conflicts, international and internal.\(^\text{138}\) The resulting compromise was common Article 3, the only article in the Conventions that applies to a non-international armed conflict until such time that the parties to the conflict invoke, by special agreement, all or part of the other provisions of the Conventions.\(^\text{139}\) Common Article 3 of the 1949 Geneva Convention IV provides that

\[\text{in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:} \]

\[\text{(1) } \text{Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any} \]

\(^{135}\) Protocol I, supra note 127, art. 38, 1125 U.N.T.S. at 22, 16 I.L.M. at 1409.

\(^{136}\) See Bothe et al., supra note 132, at 206-11.

\(^{137}\) See id. at 206.

\(^{138}\) See 1949 Geneva Convention IV Commentary, supra note 114, at 26-32.

\(^{139}\) See id. at 34.
adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity; in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and the sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.140

The language of this article is clear and absolute: "Persons taking no active part in the hostilities... shall in all circumstances be treated humanely..."141 Common Article 3 grants the enumerated protections to U.N. military forces.

Protocol II develops and supplements common Article 3 and its protections accorded victims of all armed conflicts that are not covered by Protocol I.142 Article 4 of Protocol II uses the same clear and absolute formula for defining protected persons as all "persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices... [and] shall in all circumstances be treated humanely."143

According to their own terms, however, common Article 3 and Protocol II limit the protected status of the United Nations to those situations where the United Nations forces are taking no active part in the hostilities, in other words, where they are not belligerents en-

141. Id.
143. Id. art. 4, 1125 U.N.T.S. at 612, 16 I.L.M. at 1444.
gaged in an enforcement action involving armed combat. During
those situations when U.N. forces are belligerents, existing inter-
national law governing the rights and obligations of U.N. military forces
places the United Nations on equal footing with any other belligerent
party to the conflict.

6. Article 105 of the Charter of the United Nations. Article 105 of
the Charter provides that the United Nations "shall enjoy in the
territory of each of its Members such privileges and immunities as are
necessary for the fulfilment of its purposes" and similar privileges
and immunities for representatives of the United Nations "as are
necessary for the independent exercise of their functions." This
article established the principle of functional necessity of privileges
and immunities that balances the conflicting interests of the United
Nations and the receiving state. This principle of functional
necessity has become a fundamental rule and is reflected throughout
the international system of privileges and immunities.

Section 467 of the Third Restatement of the Law: The Foreign
Relations Law of the United States is also based on Article 105 of the
Charter. It provides that under "international law, an international
organization generally enjoys such privileges and immunities from
the jurisdiction of a member state as are necessary for the fulfilment
of the purposes of the organization, including immunity from legal
process, and from financial controls, taxes, and duties." With re-
spect to the United Nations, the legal counsel to the United Nations
and the Third Restatement conclude that these privileges and immu-
nities also apply to nonmember states as a matter of customary inter-
national law.

7. The Privileges and Immunities Convention. The Privileges and
Immunities Convention was the result of the General Assembly's

144. U.N. CHARTER art. 105.
145. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra note 83, at
1139.
146. See id.
147. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 467
cmt. b (1987) [hereinafter RESTATEMENT (THIRD)].
148. Id. § 467.
149. Annual Report of the Secretary-General, 208-209, 23 U.N. GAOR, Supp. No. 1 (1968);
RESTATEMENT (THIRD), supra note 147, § 467 cmt. a.
efforts to detail the general protections afforded by Article 105.\textsuperscript{150} The provisions of the Privileges and Immunities Convention have reached such universal acceptance that they are now considered customary international law.\textsuperscript{151} The Privileges and Immunities Convention creates a system of absolute immunity for the property, funds, and assets of the United Nations that has never been a matter of dispute.\textsuperscript{152} Sections 2 through 4 of the Privileges and Immunities Convention provide:

Section 2. The United Nations, its property and assets \textit{wherever located and by whomsoever held}, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, \textit{wherever located and by whomsoever held}, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

Section 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable \textit{wherever located}.\textsuperscript{153}

Additionally, section 5 exempts U.N. financial holdings from receiving state controls, regulations or moratoria of any kind, and section 7 exempts the United Nations, its assets, income and other property from taxes, customs duties, as well as import and export prohibitions and restrictions of receiving states. Immunity from interference by receiving states is required to ensure the independent action of the United Nations. Accordingly, the property, funds, and assets of military forces acting under the direction of the Security Council, as a subsidiary entity of the United Nations, enjoy absolute immunity as provided by the Privileges and Immunities Convention.

Consistent with the principle of functional necessity, the privileges and immunities for personnel within a U.N. military force varies depending upon their assigned position. The Privileges and Immunities Convention establishes four levels of privileges and

\textsuperscript{150} See \textit{The Charter of the United Nations: A Commentary}, \textit{supra} note 83, at 1138.

\textsuperscript{151} See \textit{id.}.

\textsuperscript{152} See \textit{id.} at 1140.

\textsuperscript{153} Privileges and Immunities Convention, \textit{supra} note 103, §§ 2-4, 21 U.S.T. at 1422, 1 U.N.T.S. at 16-18 (emphasis added).
immunities: representatives of Members, officials of the United Na-
tions, the Secretary-General and Assistant Secretaries-General, and
experts on mission. Since the U.N. Model SOFA reflects cus-
tomary international law, two of these levels of protection are relevant to
military forces. The U.N. Model SOFA grants military observers ex-
erts on mission status and the Commander of the force the protec-
tions of a diplomatic envoy accorded the Secretary-General.

The status of experts on mission accords military observers “such
privileges and immunities as are necessary for the independent exer-
cise of their functions,” makes them immune from arrest or deten-
tion, and immune from “legal process of every kind” during the
course of their official duties. Additionally, as an ad hoc arrange-
ment, personnel operating under a U.N. mandate are sometimes
specified by the Secretary-General to be “experts on mission” under
the Privileges and Immunities Convention. For example, United
States aircrews that flew missions in support of the United Nations
Protective Force (UNPROFOR) in the former Yugoslavia were re-
garded as experts on mission for the United Nations. Similarly, the
technical experts that provided integrated logistics support to the
Rapid Reaction Force of UNPROFOR were also regarded as experts
on mission.

The military commander of the force is accorded those privileges
and immunities enjoyed by diplomatic envoys under international
law, principally the Vienna Convention on Diplomatic Relations.
A diplomatic envoy is not subject to any form of arrest or detention
and enjoys complete immunity from the criminal jurisdiction of the

154. Id. §§ 11, 18, 19, 22, 21 U.S.T. at 1426, 1432, 1 U.N.T.S. at 20, 24, 26.
156. Privileges and Immunities Convention, supra note 103, § 22, 21 U.S.T at 1434, 1
157. See Letter from Ralph Zacklin, Director and Deputy to the Under-Secretary-General
for Legal Affairs, the United Nations, to Robert B. Rosenstock, Minister Counsellor, United
States Mission to the United Nations (Mar. 4, 1994) (on file with the Duke Journal of Com-
parative & International Law).
158. See Letter from Ralph Zacklin, Director and Deputy to the Under-Secretary-General
for Legal Affairs, the United Nations, to Carolyn Wilson, Counsellor, United States Mission to
the United Nations (July 12, 1995) (on file with the Duke Journal of Comparative & Interna-
tional Law).
159. See Privileges and Immunities Convention, supra note 103, § 19, 21 U.S.T. at 1432, 1
U.N.T.S. 95.
receiving state. An envoy also enjoys immunity from the civil and administrative jurisdiction of the receiving state except in the case of actions relating to private immovable property situated within the receiving state, to succession when the envoy is either an executor, administrator, or heir, or to any professional or commercial activity outside the envoy's official functions.

8. United Nations Security Council Resolutions. The Security Council has taken action on a number of occasions to ensure the security and safety of U.N. forces. Somalia is an excellent case study in this regard. Early in 1992, in preparation for an increased U.N. presence in Somalia, paragraph 8 of Resolution 733 urged “all parties to take all the necessary measures to ensure the safety of personnel sent to provide humanitarian assistance, to assist them in their tasks and to ensure full respect for the rules and principles of international law regarding the protection of civilian populations.” Similarly, when technical teams were dispatched to Somalia and a security force was deployed as United Nations Operations in Somalia (UNOSOM), the Security Council urged all parties to respect the security and safety of U.N. and humanitarian personnel. When UNOSOM failed, the Security Council authorized Chapter VII operations in Somalia under the command and control of the United States (Operation Restore Hope), and used its coercive authority to demand “that all parties, movements and factions in Somalia take all measures necessary to ensure the safety of U.N. and all other personnel engaged in the delivery of humanitarian assistance, including the military forces . . .” and affirmed that individuals will be held accountable for all violations of international humanitarian law.

In Resolution 814, the Security Council established the Expanded United Nations Operations in Somalia (UNOSOM II) to continue humanitarian assistance after Operation Restore Hope, and again used its coercive authority to demand that “all Somali parties, including movements and factions, take all measures to ensure the
safety of the personnel of the United Nations and its agencies as well as the staff of the International Committee of the Red Cross, intergovernmental organizations and non-governmental organizations.\textsuperscript{167}

On June 5, 1993, a series of armed attacks against UNOSOM II left twenty-four dead and fifty-seven injured.\textsuperscript{168} In response, the Security Council reaffirmed the Secretary-General's authority under Resolution 814 "to take all measures necessary against all those responsible for the armed attacks . . . [and] to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment."\textsuperscript{169}

Somali attacks on UNOSOM II forces continued over the next few months as UNOSOM II forces increased military operations for the capture of the warlord believed responsible for the June 5 attacks.\textsuperscript{170} The intensity of the hostilities peaked on October 3, 1993, when one Malaysian and eighteen U.S. soldiers were killed, and another nine Malaysian, three Pakistani, and seventy-eight U.S. soldiers were wounded.\textsuperscript{171} On November 16, 1993, the Security Council authorized the establishment of a Commission of Inquiry to investigate the armed attacks on UNOSOM II and requested the Secretary-General to suspend arrest actions against those individuals who might be implicated in the attacks.\textsuperscript{172} The Security Council noted that the members of the Commission would have the status of experts on mission within the meaning of the Privileges and Immunities Convention.\textsuperscript{173}

On March 31, 1993, before the attacks on UNOSOM II began, the Security Council requested the Secretary-General

to report as soon as possible on the existing arrangements for the protection of United Nations forces and personnel, and the adequacy thereof, taking into account, \textit{inter alia}, relevant multilateral instruments and status of forces agreements concluded between the United Nations and host countries, as well as comments he may re-

\textsuperscript{167} S.C. Res. 814, \textit{supra} note 61.


\textsuperscript{170} \textit{See Report of the Commission, supra} note 168, paras. 125-73.

\textsuperscript{171} \textit{See id.} para. 173.


\textsuperscript{173} \textit{See id.}
ceive from member States, and to make such recommendations as he considers appropriate for enhancing the safety and security of United Nations forces and personnel.174

In response to the Secretary-General's report,175 the Security Council passed Resolution 868 which states:

*The Security Council,* . . .

Recalling the provisions of the Charter of the United Nations concerning privileges and immunities and the Convention on the Privileges and Immunities of the United Nations, as applicable to United Nations operations and persons engaged in such operations, Expressing grave concern at the increasing number of attacks and use of force against persons engaged in United Nations operations, and resolutely condemning all such actions, . . .

3. Urges States and parties to a conflict to cooperate closely with the United Nations to ensure the security and safety of United Nations forces and personnel;

4. Confirms that attacks and the use of force against persons engaged in a United Nations operation authorized by the Security Council will be considered interference with the exercise of the responsibilities of the Council and may require the Council to consider measures it deems appropriate;

5. Confirms also that if, in the view of the Council, the host country is unable or unwilling to meet its obligations with regard to the safety and security of a United Nations operation and personnel engaged in the operation, the Council will consider what steps should be taken appropriate to the situation;

6. Determines that, when considering the establishment of future United Nations operations authorized by the Council, the Council will require, inter alia:

(a) That the host country take all appropriate steps to ensure the security and safety of the operation and personnel engaged in the operation;

(b) That the security and safety arrangements undertaken by the host country extend to all persons engaged in the operation;

(c) That an agreement on the status of the operation and all personnel engaged in the operation in the host country be negotiated expeditiously and come into force as near as possible


to the outset of the operation;

7. Requests the Secretary-General, when recommending the establishment or renewal of a United Nations Operation by the Security Council, to take into account the provisions of the present resolution;

8. Decides to remain seized of the matter.\(^{176}\)

As the examples above indicate, the practice of the Security Council has been to take preventive measures, such as requesting the Secretary-General to ensure a status agreement is in place or calling upon parties to ensure protection. The Security Council has also adopted resolutions condemning past behavior. Rarely has the Security Council specifically noted the status of personnel, as it did in the case of the members of the Commission of Inquiry,\(^{177}\) and never has it declared the status of a U.N. force under its coercive authority.

B. Non-Belligerent Forces Acting Under the Coercive Authority of the Security Council

1. **Summary of Legal Protections.** Non-belligerent forces acting under the coercive authority of the Security Council that conduct a coercive peace-keeping operation in the territory of a sovereign state have absolute immunity to the extent necessary for the independent exercise of their mandate as a matter of law from any receiving state authority against which the Security Council has taken coercive action. It is nevertheless desirable, to the extent possible, to provide for the status of the forces by agreement with the receiving state in order to ensure its cooperation. This arrangement allows a receiving state to become an active participant in the peace process sought by a coercive peace-keeping force that is not prepared to completely enforce its mandate on the parties to the conflict.

In practice, cooperation remains essential in the typical coercive peace-keeping scenario because the Security Council's Chapter VII coercive authority is being used only to overcome the lack of complete agreement and consent by all of the parties. Some form of an arrangement is vitally important if a coercive peace-keeping force is not manned and equipped adequately enough to protect itself without some level of cooperation from the receiving state. Military per-


\(^{177}\) See S.C. Res. 885, supra note 172.
sonnel participating in coercive peace-keeping operations may use armed force for self-defense and in accordance with their mandate to accomplish their mission. Under existing international law they are not lawful targets as long as they remain non-belligerents, even though they may be deployed into areas of ongoing hostilities.

2. Absolute Immunity for Chapter VII Forces. The previous section on non-belligerent consensual forces discussed the protections accorded military forces operating outside their flag state derived from receiving state law, the four Geneva Conventions of 1949, the two Geneva Protocols of 1977, applicable Security Council resolutions, and the general privileges and immunities accorded forces acting under the direction of the United Nations. Above and beyond these protections, this section discusses the principle that Chapter VII coercive forces enjoy and may assert absolute immunity to the extent necessary for the independent exercise of its mandate from any receiving state authority against which the Security Council has taken coercive action. As previously discussed, various forms of absolute and limited immunity for the United Nations have been explicitly recognized by the Privileges and Immunities Convention since 1946 and have never been a matter of dispute. For convenience, Table 3 summarizes the preceding discussions of the customary international law protections accorded a U.N. military force that is acting under the direction of the Security Council, i.e., a force established under the authority of the United Nations and conducted under U.N. authority and control.

It is important to reemphasize that these privileges and immunities from receiving State sovereignty only devolve to U.N. forces that are a subsidiary organ of the United Nations because they are acting under the direction of the Security Council (such as UNOSOM and UNOSOM II). They do not apply to those unilateral or multilateral forces simply acting under the authority of the United Nations (such as UNITAF).

Absolute immunity for all U.N. forces conducting peace operations, both directed and authorized, can be derived, however, from the coercive authority of the Security Council and its implied powers.

## CUSTOMARY INTERNATIONAL LAW PROTECTIONS ACCORDED MILITARY FORCES ACTING UNDER THE DIRECTION OF THE UNITED NATIONS

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*Table 3*

<table>
<thead>
<tr>
<th>Force Element</th>
<th>Protection Accorded</th>
<th>Source of Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property, Funds and Assets</td>
<td>Absolute immunity</td>
<td>Customary international law, as codified by the Privileges and Immunities Convention</td>
</tr>
<tr>
<td>Military Observers</td>
<td>Experts on mission status equivalent to that in the Privileges and Immunities Convention</td>
<td></td>
</tr>
<tr>
<td>Commander of the Force</td>
<td>Diplomatic envoy status equivalent to that of the Secretary-General in the Privileges and Immunities Convention</td>
<td></td>
</tr>
</tbody>
</table>
| Members of the Force    | — Immunity from criminal and civil jurisdiction for all acts performed in their official capacity  
                         | — Exemption from all income taxes except on income received from sources inside the receiving state  
                         | — Exemption from all other direct taxes, registration fees or charges  
                         | — Exemption from those laws and regulations governing customs & foreign exchange for personal property required by reason of their presence in the receiving state | Customary international law, as codified by the United Nations Model SOFA |
By means of Article 25 of the Charter, Member States have agreed "to accept and carry out the decisions of the Security Council."\(^{179}\) The drafters of the Charter viewed this coercive decision-making authority of the Security Council as indispensable for the effective functioning of the United Nations in the field of maintaining international peace and security, and considered this authority the core element of the concept of the United Nations.\(^{180}\) Given the central importance of the coercive authority of the Security Council in the field of maintaining international peace and security, Article 105 must be read to grant the Security Council, its subsidiary organs, and their constituent personnel, such privileges and immunities as are necessary to fulfill the purposes of the Security Council when acting under Chapter VII to maintain international peace and security, and as are necessary for the personnel of a U.N. force to independently exercise their functions. To infer otherwise would vitiate the Security Council's coercive authority and make it unable to act with the consent of the receiving state.

The International Court of Justice (I.C.J.) has ruled in an advisory opinion that under "international law, the Organization [United Nations] must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."\(^{181}\) The I.C.J. reasoned as follows:

This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization . . . and must be applied to the United Nations . . . . Having regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed . . . . Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection. This need of protection for the agents of the Organization, as a condition of the performance of its functions, has already been re-

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179. U.N. CHARTER art. 25.
alized, and ... was the unanimous view of the General Assembly.\textsuperscript{182}

While this case concerned the capacity of the United Nations to bring an international claim against a state that had caused an injury to an agent of the United Nations, it is an application of the principle of implied powers. This principle was also used as authority in a second I.C.J. case holding that the United Nations could require its Member States to contribute to its peace-keeping expenses.\textsuperscript{183} Similarly, a parallel application of this principle is the requirement that a Chapter VII coercive force operating without the consent of a receiving state must have such privileges and immunities as are necessary to prevent receiving state interference with the effective functioning of the force.

Additionally, if Article 105 of the Charter is universally implemented by the Privileges and Immunities Convention and customary international law to grant absolute immunity for the property, funds, and assets of the United Nations so as to ensure the United Nations can act independently when present in a receiving state with its full consent and cooperation, it is even more compelling that a U.N. force present in a receiving state without its consent have absolute immunity. This form of absolute immunity for a U.N. force is limited, however, to the extent necessary for the independent exercise of its mandate and only with respect to those receiving states against which the Security Council has taken coercive action.

Non-belligerent forces acting under the coercive authority of the Security Council have the right to use armed force in self-defense.\textsuperscript{184} The Security Council may also invoke its powers under Chapter VII to authorize the use of armed force to accomplish the mandate of the force.\textsuperscript{185} The first explicit assertion of this authority for non-belligerent forces was Security Council Resolution 794, authorizing the use of “all necessary means to establish as soon as possible a secure environment for humanitarian relief of operations in Somalia.”\textsuperscript{186} Under existing international law, non-belligerent forces acting under

\textsuperscript{182} Id.
\textsuperscript{183} See Certain Expenses of the United Nations (Advisory Opinion), 1962 I.C.J. 151 (July 20), excerpts reprinted in CASES ON UNITED NATIONS LAW, supra note 181, at 763, 787-790.
\textsuperscript{184} See U.N. CHARTER art. 51; SUPPLEMENT TO AN AGENDA FOR PEACE, supra note 41, paras. 33-34, 36; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra note 83, at 589.
\textsuperscript{185} See U.N. CHARTER arts. 25, 39, 42.
\textsuperscript{186} S.C. Res. 794, supra note 55.
the authority of the Security Council remain unlawful targets until their use of force meets the de facto test of common Article 2 of the four Geneva Conventions of 1949, at which time they become belligerents and lawful targets.\textsuperscript{187}

C. Belligerent Forces

1. Summary of Legal Protections. Belligerent forces, whether they operate unilaterally, multilaterally, or under Chapter VII of the Charter, are governed by the laws of armed conflict. Under these laws, belligerent forces are authorized to use force in self-defense and as required for the complete or partial submission of the enemy.\textsuperscript{188} Even though they are protected by the laws of armed conflict, belligerent forces may be lawfully targeted by enemy forces.

2. The Laws of Armed Conflict. The laws of armed conflict, \textit{jus in bello}, govern the actual conduct of hostilities and have developed as customary international law through the practice of almost all societies over thousands of years—from the era of the Greeks and Romans to the Middle Ages and the twentieth century.\textsuperscript{189} The practice of codifying the laws of armed conflict in binding international agreements did not begin until the nineteenth century with the 1856 Paris Declaration on Maritime War.\textsuperscript{190} Codification accelerated at the turn of the century, and the laws of armed conflict have generally developed in two regimes: the Hague regulations governing the means and methods of warfare, and the Geneva Conventions governing the protection of victims of war.\textsuperscript{191} Despite the proliferation of written agreements, the laws of armed conflict continue to exist independently as customary international law.\textsuperscript{192}

The laws of armed conflict are separate and distinct from the body of law known as \textit{jus ad bellum}, or the rules governing the resort to armed conflict.\textsuperscript{193} \textit{Jus in bello} applies to all parties of an armed

\textsuperscript{187} See supra text accompanying notes 114-117.

\textsuperscript{188} See COMMANDER'S HANDBOOK, supra note 134, para. 5.2 (stating that the principle of military necessity allows "[o]nly that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources").

\textsuperscript{189} See LAWS OF WAR, supra note 108, at 1-2.

\textsuperscript{190} See id. at 2-3.

\textsuperscript{191} See generally id.

\textsuperscript{192} See id. at 4.

\textsuperscript{193} See id. at 1.
conflict regardless of whether the conflict is lawful or unlawful in its inception under *jus ad bellum*.

Until the early 1900s, states were free to resort to war at any time and their freedom to do so was expressly recognized in international agreements. The first restrictions on the freedom to resort to war began with the Hague Peace Conferences of 1899 and 1907, but no arrangement explicitly made the aggressive use of force unlawful until the Charter of the United Nations in 1945. Articles 2(4), 39, and 51 of the Charter now codify contemporary *jus ad bellum* in its entirety.

The laws of armed conflict evolved as obligations on states, and each state remains responsible for the application of the laws of armed conflict when its forces serve as belligerents under the authority of the United Nations. While belligerents are lawful targets, the most fundamental tenet of the laws of armed conflict is that the right of belligerents to adopt means of injuring the enemy is not unlimited. From this tenet, customary international law derives two corollary principles: proportionality which seeks to establish criteria for limiting the use of force, and discrimination, which governs the selection of methods, weaponry, and targets.

Since the laws of armed conflict impose reciprocal obligations on all parties to a conflict, they protect all belligerent military forces. For example, belligerents who are *hors de combat* must be respected and protected by enemy forces and belligerents who fall into enemy hands are protected by the detailed provisions of the 1949 Geneva Convention III.

D. Summary of Legal Protections Accorded Military Forces

The protections for non-belligerent forces are not mutually exclusive. In any given situation a combination of arrangements may provide varying levels of force protection. For example, a consensual

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194. See id.
196. See id. at 109-11.
197. See id. at 111.
198. See id. at 600; Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be engaged (Sept. 3, 1971), reprinted in LAWS OF WAR, supra note 108, at 372.
200. See id. at 5.
201. See, e.g., 1949 Geneva Convention I, supra note 110, art. 12, 6 U.S.T. at 3122, 75 U.N.T.S. at 38.
EXISTING INTERNATIONAL PROTECTIONS ACCORDERD MILITARY FORCES OPERATING OUTSIDE THEIR FLAG STATE  
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(Table 4)

<table>
<thead>
<tr>
<th>Type of Peace Operation</th>
<th>Status</th>
<th>Protections Accorded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consent Deployment, Peacemaking, and Peace-Keeping</td>
<td>Non-Belligerent, U.N. Chapter IV or Chapter VI Force</td>
<td>Host country law, if available.</td>
</tr>
<tr>
<td></td>
<td>Non-U.N. Force</td>
<td>SOFA or stationing arrangement, as agreed upon.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Article 105 of the U.N. Charter, for U.N. directed forces.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Privileges and Immunities Convention, for U.N. directed forces, as applicable.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>U.N. Security Council resolutions, as adopted.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Customary international law, for U.N. directed forces, as codified by the U.N. Model SOFA &amp; the Privileges and Immunities Convention.</td>
</tr>
<tr>
<td></td>
<td>Protecting the Avatars</td>
<td></td>
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<tr>
<td>---------------------</td>
<td>------------------------------------------------------------</td>
<td></td>
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<tr>
<td><strong>Coercive</strong></td>
<td></td>
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<tr>
<td>Peace-Keeping</td>
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<tr>
<td></td>
<td>To the extent necessary for the independent exercise of its</td>
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peace-keeping force may have minimum protections under the Privileges and Immunities Convention and have additional protections under a status of forces agreement. Similarly, a coercive peace-keeping force may have protections under a status of forces agreement even though it has absolute immunity.

Additionally, multilateral conventions that have recognized the need for special status and protection for members of a U.N. force may be applicable. For example, Article 8 of Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects\textsuperscript{202} seeks to protect U.N. forces and missions from the effects of minefields, mines, and booby-traps. Article 8 provides as follows:

1. When a United Nations force or mission performs functions of peace-keeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in that area, as far as it is able:
   (a) remove or render harmless all mines or booby-traps in that area;
   (b) take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties; and
   (c) make available to the head of the United Nations force or mission in that area, all information in the party’s possession concerning the location of minefields, mines and booby-traps in that area.

2. When a United Nations fact-finding force or mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area.\textsuperscript{203}

It is also important to note that the entire range of legal protections may not be available or effective. As in Somalia, host nation law may not even exist, or, as in Haiti, the host nation may not be willing or able to enforce its own laws. Table 4 summarizes the ex-

\textsuperscript{203} Id. art. 8.
existing international legal protections accorded military forces operating outside their flag state.

IV. THE CONVENTION ON THE SAFETY OF U.N. AND ASSOCIATED PERSONNEL

Fundamental principles of sovereignty would seem to dictate that those accused of attacks on U.N. forces should be prosecuted by the courts of the state where the attacks occurred as violations of national law. However, in the politically unstable territories where U.N. peace operations are most likely to occur—places like Somalia, Rwanda, Haiti, Burundi, Liberia, and Yugoslavia—prosecution by local national authorities is not an effective means of ensuring that a thorough investigation is conducted or that the accused are brought to justice. Moreover, during a peace operation conducted under the coercive authority of the Security Council, there is no reason to expect a local government to cooperate.

Another approach would be to prosecute those accused of attacks on U.N. forces for violations of international norms, such as the four Geneva Conventions of 1949 or the two Geneva Protocols of 1977. Unfortunately, the lack of an institutionalized international criminal court and the lack of political will and determination to enforce those international norms is an inertia seldom overcome. While options run short, relief workers and military forces continue to die needlessly in the service of the international community and those who attack them run free without fear of prosecution. No-where was the increase in gratuitous violence against relief workers and U.N. forces more rampant than during the three U.N. directed and authorized operations in Somalia—a land ruled only by anarchy where life had no value.

A. Evolution of the Safety Convention

The systemic weakness of the protections afforded U.N. forces by existing international law is that the international community is unable to rely upon the law to protect those acting on its behalf. The international community has made an effort, albeit unsuccessful, to strengthen the rule of law. In late 1993, the General Assembly adopted a resolution addressing the "[q]uestion of responsibility for attacks on U.N. and associated personnel and measures to ensure that those responsible for such attacks are brought to justice" (the
This Resolution established an "Ad Hoc Committee on the Elaboration of an International Convention dealing with the Safety and Security of United Nations and Associated Personnel" (Ad Hoc Committee) to consider the Question, and placed the issue on the agenda of the forty-ninth session of the General Assembly. Participation in the Ad Hoc Committee was open to all members of the United Nations.

The stated objective of the Ad Hoc Committee was to prepare a draft convention that would enter into force within a short period of time. During its meetings from March 28 to April 8, 1994, the Ad Hoc Committee considered a proposal submitted by New Zealand and Ukraine, a working document submitted by Denmark, Finland, Iceland, Norway, and Sweden; a Note by the Secretary-General; and a number of proposals submitted by participating delegations. The debates of the Ad Hoc Committee emphasized the need for an international convention to ensure that U.N. personnel were not considered legitimate military targets. The report of this first session included a negotiating text to be used at a second session. This negotiating text included a general discussion of Articles 1 and 2 concerned with definitions and the application of the convention, and a draft of Articles 3 to 27. The Ad Hoc Committee final report recommended that the General Assembly establish a Sixth Committee working group to continue the work of the Ad Hoc Committee on its
revised negotiating text.\textsuperscript{213}

On September 23, 1994, the General Assembly included the Question on its agenda and referred it to the Sixth (Legal) Committee for consideration. The Sixth Committee established a Working Group which used as its baseline document the work of the Ad Hoc Committee, and submitted its report to the Sixth Committee on 8 November.\textsuperscript{214} The Sixth Committee’s report contained a draft “Convention on the Safety of United Nations and Associated Personnel” (Safety Convention) which it recommended to the General Assembly for adoption.\textsuperscript{215} The General Assembly adopted the Safety Convention of the Sixth Committee on December 9, 1994.\textsuperscript{216}

B. Scope of Application

The second of the twenty-nine articles of the Safety Convention very carefully limits its applicability. Paragraph 1 of Article 2 provides as follows: “This Convention applies in respect of United Nations and associated personnel and United Nations operations, as defined in Article 1.”\textsuperscript{217} The terms “United Nations personnel” and “associated personnel” are broadly defined by Article 1 to include all persons either engaged in or deployed in support of a U.N. operation, regardless of whether they are military, police, or civilian.\textsuperscript{218} As long as they are engaged in or deployed in support of the mandate of a “United Nations operation,” as defined by Article 1, the Safety Convention protects those working for the United Nations, its specialized agencies, a government or intergovernmental organization, and per-

\begin{footnotesize}
\begin{enumerate}
\item Safety Convention, supra note 16, art. 2(1), 34 I.L.M. at 486 (emphasis added).
\item Id. art 1, 34 I.L.M. at 486.
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sons deployed by a humanitarian non-governmental organization.  

The term “United Nations personnel” provides coverage, for example, to officials and experts on mission of the United Nations, as well as blue-hatted personnel such as “members of the United Nations Protection Force in the former Yugoslavia (UNPROFOR), the United Nations Mission in Haiti (UNMIH) and the United Nations Assistance Mission for Rwanda (UNAMIR).” “Associated personnel” include those military personnel deployed by their government at the request of the United Nations to operate in support of a blue-helmeted force, such as members of the “forces of the North Atlantic Treaty Organization asked to assist UNPROFOR in Bosnia-Herzegovina, the Multinational Force assisting UNMIH, and U.S. assistance under the Unified Task Force in Somalia.”

Despite this broad coverage, Article 1 narrowly defines “United Nations operations” as only those “established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control.” This emphasized language restricts the protections of the Safety Convention to personnel engaged in or deployed in support of U.N. directed operations. It specifically excludes protection for personnel participating in U.N. authorized operations, i.e., not under U.N. authority and control, that are conducted by Member States independent of directed operations. This limitation creates a gap in the treatment of personnel serving the United Nations. Since the United Nations does not have its own military force, it is likely in a crisis situation—when protection is needed the most—that the Security Council may chose the option of authorized multinational operations to precede directed operations.

Article 1 further limits protected U.N. operations to only two categories: those conducted for the purpose of maintaining or restoring international peace and security and those specifically determined by the Security Council or General Assembly, for the purposes of the Safety Convention, to pose an exceptional risk to the safety of its personnel. These limitations are unnecessarily restrictive and create another gap in the treatment of personnel serving the United Nations.

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219. See id.
221. Id.
222. Safety Convention, supra note 16, art. 1, 34 I.L.M. at 486 (emphasis added).
223. See id.
224. See id.
Nations. By its own terms, the Safety Convention clearly does not offer any protection to a U.N. humanitarian operation authorized by the Security Council under its Chapter VI authority or by the General Assembly unless an operation-specific declaration is made that the personnel participating in the operation are at exceptional risk.\(^\text{225}\) This approach ignores the operational context of political, economic, or social instability that is normally the reason for a U.N. operation in the first place, and fails to protect personnel involved in an operation which may become dangerous without adequate notice that allows for a declaration of risk. Apparently the negotiators considered language that would automatically cover humanitarian operations and election-monitoring missions, but abandoned that option because they were unable to compile a comprehensive list of covered operations.\(^\text{226}\)

C. The Combatant Exception to the Scope of Application

Paragraph 2 of Article 2 further curtails the scope of application of the Safety Convention. While the Safety Convention affords a limited category of military personnel who participate in U.N. directed operations a protected status under international law, the unintended effect of paragraph 2 of Article 2 is to codify the principle that military personnel of a U.N. force who use armed force in self-defense or to accomplish their mission may easily be deemed lawful targets under international law. This combatant exception to the scope of application reads as follows:

\[
\text{This Convention shall not apply to a U.N. operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.}\]

\(^\text{227}\)

This exception is ill-conceived for two reasons. First, it applies a pre-Charter law of war threshold to post-Charter peace-keepers. This pre-Charter approach endangers the very personnel the Safety Convention was intended to protect by using a subjective, de facto threshold for the application of the law of international armed con-

\(^\text{225}\) See id.
\(^\text{226}\) See Bloom, supra note 216, at 623.
\(^\text{227}\) Safety Convention, supra note 16, art. 2(2), 34 I.L.M. at 487.
flict: (1) that is so low it excludes the application of the Safety Convention for most modern Chapter VII operations, and (2) that blurs the line of demarcation between the application of the Safety Convention and the law of international armed conflict.

Second, this exception intentionally excludes protection for those military personnel exposed to the greatest risk, i.e., those who have been authorized by the Security Council to protect the international community from outright aggression.

The intent of the drafters was to create "a clear separation between the new legal regime under the instrument being drafted and the [four] Geneva Conventions [of 1949], so that U.N. and associated personnel and those who attack them would be covered under one regime or the other, but not both." Although the application of the two legal regimes are mutually exclusive by the very terms of Article 2(2), there is not a clear separation between the two regimes. It is fundamentally important to clarify this separation of legal regimes and to maximize the application of the Safety Convention because the protections provided by the regimes are completely divergent; i.e., military personnel protected by the Safety Convention are unlawful targets and military personnel that are combatants protected by the law of international armed conflict are lawful targets and may be lawfully killed on sight by an enemy personnel. The Safety Convention further endangers members of a U.N. force by making all of them lawful targets if any of them are covered by the law of international armed conflict.

The threshold set forth in Article 2(2) for the application of the Safety Convention is described in negative terms, i.e., if the conditions of Article 2(1) are otherwise met, then the Safety Convention applies only if the U.N. operation is not "authorized by the Security Council as an enforcement action under Chapter VII . . . in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies." There are two general conditions of this paragraph 2 threshold which must be analyzed to determine the application of the Safety Convention.

The first condition is whether the U.N. operation has been "authorized by the Security Council as an enforcement action under

228. Bloom, supra note 216, at 625.
229. Safety Convention, supra note 16, art. 2(2), 34 I.L.M. at 487.
230. Id.
Chapter VII. 231 An Agenda for Peace defines situations where the Security Council authorizes military action in response to outright aggression, imminent or actual, with forces made available to it on a permanent basis under Article 43 of the Charter as peace-enforcement. 232 Due to the lack of standardized terminology in the international community, however, the term “enforcement action” has been applied to Security Council decisions that authorize coercive peace-keeping. 233 For example, even the Secretary-General of the United Nations referred to Chapter VII actions “to create conditions for humanitarian relief operations in Somalia and Rwanda” as enforcement actions. 234 In practice, therefore, what constitutes an enforcement action is not clear.

The second condition is whether “any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.” 235 This condition is the fatal flaw of the Safety Convention that must be reconciled before the Safety Convention is allowed to enter into force. As discussed in the previous section on the four Geneva Conventions of 1949, the test for the application of the law of international armed conflict is a de facto, subjective threshold codified by common Article 2 that is intentionally set very low to capture all differences between the armed forces of two states in order to afford maximum protection to noncombatants and combatants. 236 This intentionally low threshold for the application of the law of international armed conflict is antithetical to the very notion of maximizing protections for U.N. and associated personnel.

The difficulty in the context of the Safety Convention of applying this common Article 2 threshold is that all peace-keepers deployed by the United Nations are authorized to use armed force in self-defense, and coercive peace-keeping forces are authorized to use

231. Id.
232. AN AGENDA FOR PEACE, supra note 17, paras. 42-44.
233. As previously defined in the present Article, “coercive peace-keeping” signifies Security Council authorization to Member States to use armed force by deploying a neutral and impartial military presence in areas of tension or conflict, not necessarily with the consent of all the parties concerned, for the purposes of a limited mandate short of stopping an aggressor or imposing a cessation of hostilities.
234. SUPPLEMENT TO AN AGENDA FOR PEACE, supra note 41, para. 78.
235. Safety Convention, supra note 16, art. 2(2), 34 I.L.M. at 487.
236. See 1949 GENEVA CONVENTION IV COMMENTARY, supra note 114, at 17-21; LAWS OF WAR, supra note 108, at 169-70.
armed force to accomplish their mission in accordance with the mandate of the Security Council. Article 21 of the Safety Convention specifically states that nothing "in this Convention shall be construed so as to derogate from the right to act in self-defence." Consequently, coercive peace-keeping forces begin their operation as non-combatants and unlawful targets; however, when the Safety Convention applies the common Article 2 threshold to them, their authorized use of armed force, at some undefined level of intensity, makes them combatants and lawful targets. In addition to the lack of clarity in determining this undefined level of intensity of force, the application of this common Article 2 test to U.N. forces leads to a perversion of the rule of law.

For example, application of this test allows the intensity of the exchange of fire between the U.N. forces and their attackers to determine the legality of the attack—regardless of the defensive nature of the use of force by the U.N. personnel. It is untenable and patently absurd for the Safety Convention to allow members of "organized armed forces" to determine the legality of their own attacks on a U.N. force by controlling the amount of force used in the attack; i.e., minor, small-scale attacks that result in only a few deaths would be unlawful, but large-scale attacks with an intense exchange of fire that result in many deaths would be lawful. Ironically, since this level of intensity is unclear, Article 2 of the Safety Convention encourages would-be attackers to ensure the legality of their actions by increasing the size and intensity of their attack. Similarly, application of existing international law to U.N. forces without any modification allows members of "organized armed forces" to simply "declare" a state of hostilities, thereby invoking the application of the law of international armed conflict.

It is an equally absurd application of the law to conclude that the very act of arresting a criminal makes the arresting personnel, if they are military and not civilian, lawful targets. On June 5, 1993, a series of armed attacks against UNOSOM II left twenty-four Pakistani peace-keepers dead and fifty-seven injured. In response, the Security Council reaffirmed the Secretary-General's existing authority under Resolution 814 "to take all measures necessary against all those responsible for the armed attacks . . . [and] to secure the inves-

237. See SUPPLEMENT TO AN AGENDA FOR PEACE, supra note 41, paras. 33-36.
238. Safety Convention, supra note 16, art. 21, 34 I.L.M. at 492.
239. See supra text accompanying notes 114-117.
tigation of their actions and their arrest and detention for prosecution, trial and punishment." Similarly, the leaders of the main Somali parties and other Somali community leaders urged the United Nations to apply strong and effective sanctions against those responsible for the attacks. It was feared by the Secretary-General that the failure to respond to these heretofore unlawful attacks upon UNOSOM II would send a message to the "world that attacks on U.N. personnel could be carried out with impunity."

Not surprisingly, however, those suspected of the attacks failed to voluntarily surrender and armed force was necessary to implement the "arrest warrant" issued by the Security Council. The Commission of Inquiry authorized by the Security Council to investigate the armed attacks on UNOSOM II concluded that if "the actions by UNOSOM II on June 5 were enforcement actions as the SNA [Somali National Alliance] had been given unmistakable reasons to view them, then the ensuing clash was not a peace-keeping but a peace enforcement operation." The Commission of Inquiry compounded the issue of determining whether peace-keepers have become combatants by suggesting that the determination should be made by the criminals subject to arrest. Furthermore, if the efforts of UNOSOM II to arrest suspects in the limited area of southern Mogadishu were enforcement actions, then application of Article 2 of the Safety Convention declares that all U.N. forces throughout Somalia are combatants and lawful targets.

The dilemma of applying this threshold in an operational setting is also captured by a particularly cogent footnote in the commentary of one of the members of the United States delegation that negotiated the Safety Convention. In drawing upon this experience as a delegate and as an Attorney-Adviser for United Nations Affairs in the Office of the Legal Adviser for the U.S. Department of State, Evan Bloom made the following personal observation:

There may be some situations in which attacks against peacekeepers, criminalized under this Convention, lead to a level of conflict that results in the applicability of common Article 2, i.e., interna-

242. See THE UNITED NATIONS AND SOMALIA, supra note 41, at 50.
243. Id.
244. See id. at 50-55.
246. See id.
tional armed conflict. Nevertheless, the negotiators of the Convention intended that all attacks outside the context of Chapter VII enforcement operations be criminalized. As a result, there is a narrow band of cases (combat situations in non-Chapter VII peacekeeping operations) where attackers can be both criminals and subject to the rules applicable to combatants in international armed conflicts. An important reason for permitting this overlap is to ensure that peacekeepers do not lose the benefits of the Convention simply because they respond in self-defense and fighting ensues. Domestic courts, reviewing such self-defense situations and misconstruing the Geneva Conventions or having difficulty figuring out when "combat" has commenced, might otherwise leap to the conclusion that actions of the attackers are covered by the Geneva Conventions and not by this Convention.\(^\text{247}\)

This observation acutely outlines the lack of clarity in the implementation of Article 2 of the Safety Convention by recognizing the likelihood of confusion in domestic courts, and by observing that the Safety Convention and the Geneva Conventions must be interpreted to overlap in some circumstances to maintain the intent of the negotiators to criminalize all attacks outside the context of Chapter VII enforcement operations. This overlap is contrary to the explicit terms of Article 2(2) which provides for two mutually exclusive legal regimes, and contrary to the earlier expressed intent of the negotiators that only one regime would apply, not both.

The lack of clarity of the separation between the application of these two regimes has also been highlighted by the American Bar Association (ABA). In its Recommendation on the Safety Convention, the ABA supported ratification of the Safety Convention by the United States.\(^\text{248}\) It also recommended that the United States and other parties interpret the convention in such a way as to require the application of the law of international armed conflict to Chapter VI and Chapter VII operations.\(^\text{249}\) Thus, the ABA clearly endorses the principle that the defensive use of force by members of a Chapter VI force may make them combatants and lawful targets. In its supporting Report, the ABA states that in "practice, however, it has often been difficult to maintain a clear distinction between peacekeeping and peace enforcement .... In the Congo, Somalia and the former

\(^{247}\) Bloom, supra note 216, at 625-26.


\(^{249}\) See id.
Yugoslavia, the line between Chapter VI peacekeeping and Chapter VII enforcement has not always been clear, either to the UN forces or to outside observers.”

D. Additional Provisions

The Safety Convention obligates Member States to criminalize enumerated acts against U.N. or associated personnel under its national law. This national approach was prudent because most states do not recognize international criminal conventions as self-executing. However, in addition to creating a crime of universal jurisdiction, this convention creates a substantive crime under international law that would be subject to prosecution in an appropriate international tribunal or national court.

Although the remaining articles could have been drafted with more specificity to overcome problems encountered under similar conventions, they are an excellent start in establishing protections for U.N. personnel. Articles 3 through 8 define the status of United Nations and associated personnel. In its requirement that protected units, vehicles, vessels, and aircraft shall bear distinctive identification, and that protected personnel shall carry identification documents, Article 3 should have explicitly provided that the protections of the Convention are not contingent on whether proper identification is displayed, but on the status of the personnel and equipment. This distinction is important when considering the language of Article 8, which imposes a duty to release detained persons protected by the Convention when “their identification has been established.” While proper identification is important to ensure recognition of protected persons, it should be clear that the failure to carry or the loss of identity documents does not deprive a person from the protections of the Convention.

The duties of States Parties are outlined in Articles 7 through 16. Article 7 provides that “United Nations and associated personnel, their equipment and premises shall not be made the object of attack

250. Id. Only a “Recommendation” becomes ABA policy. Supporting reports accompany the Recommendation through the approval process within the ABA and are frequently published alongside the Recommendation. See id.

251. Safety Convention, supra note 16, art. 9, 34 I.L.M. at 488.

252. See Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, supra note 212, paras. 20, 23; Safety Convention, supra note 16, art. 10, 34 I.L.M. at 488-89; Bloom, supra note 216, at 626-27.
or of any action that prevents them from discharging their mandate." Collectively, they impose a duty on all States Parties to ensure the safety of protected personnel from the crimes enumerated in Article 9, to cooperate with one another in the prosecution of alleged offenders, and to prosecute or extradite. Most importantly, States Parties are also required to take such measures to establish national jurisdiction over the specified crimes, which include the intentional commission of murder, kidnapping, an attack upon the person, a violent attack upon the official premises or vehicle in a manner likely to endanger a protected person, and a threat to commit any specified crime.\footnote{253}{See Safety Convention, \textit{supra} note 16, art. 9, 34 I.L.M. at 488.} Accomplices and conspirators can also be prosecuted under the Convention.\footnote{254}{See id.}

No recognition is made, however, that an international tribunal could have concurrent jurisdiction, and there are no exceptions to preclude the Safety Convention from applying to crimes among members of a force of different nationalities. Thus, the Safety Convention could arguably give criminal jurisdiction to an international tribunal, or even the domestic courts of another state, over United States service members who got in a fight with another protected person. This would clearly be in conflict with the agreements between the Secretary-General and contributing states that normally provide for exclusive criminal jurisdiction for members of national contingents.

Articles 17 through 19 impose upon State Parties the duty to treat alleged offenders fairly, notify the Secretary-General of the final outcome of any proceedings, and to disseminate the Convention as widely as possible. The remaining articles consist of a savings clause, an acknowledgment that the Convention does not impair the right to act in self-defense, and the final clauses typically found in an international convention.

E. Conclusion

On the surface, the Safety Convention is a commendable step toward the protection of persons acting on behalf of the United Nations, but it has created disparate treatment for and endangered the very personnel it was intended to protect. Its greatest value is that it reflects an international consensus to create a new category of internationally protected persons. Its greatest shortcoming is that its de-
fined category of protected U.N. personnel is too narrowly circumscribed and the line that it attempts to draw between peace-keeping and peace-enforcement is unclear. Although the approach taken reflects existing international law, albeit pre-Charter, it is an ill-conceived application of the law in the context of coercive peacekeepers and short-sighted application of the law in the context of peace-enforcers.

By way of summary, the Safety Convention restricts its protections to personnel engaged in or deployed in support of U.N. directed operations. It specifically excludes protection for personnel participating in U.N. authorized operations that are not under U.N. authority and control and conducted by Member States independent of directed operations. Additionally, the Safety Convention clearly does not offer any protection to a U.N. humanitarian operation authorized by the Security Council under its Chapter VI authority or by the General Assembly unless an operation-specific declaration is made that the personnel participating in the operation are at exceptional risk.

Both of these gaps are created by the language in Article 1 that defines U.N. operations. Accordingly, the definition of U.N. operations in Article 1 should be changed to automatically include all U.N. operations, either directed or authorized, without the requirement of any specific declaration. This can be accomplished by modifying the definition of a U.N. operation in Article 1(c) as follows:

(c) "United Nations operation" means an operation established or authorized by the competent organ of the United Nations in accordance with the Charter of the United Nations, and conducted under United Nations authority and control:

(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or

(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

Article 2(2) also curtails the scope of application of the Safety Convention. The Safety Convention applies only if the U.N. operation is not "authorized by the Security Council as an enforcement ac-

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255. Additional language is indicated by the bold attribute and deleted language is lined-out.
tion under Chapter VII . . . in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies." Paragraph 2 should be deleted in its entirety. These two corrections to Articles 1 and 2 of the Safety Convention would allow coverage for members of all U.N. forces, noncombatants and combatants alike, without exception. This draws a clear line that puts potential offenders on notice of the internationally protected status of U.N. forces and affords maximum protection to military personnel serving the international community.

Ironically, in one of the first drafts submitted to the Ad Hoc Committee, New Zealand proposed that persons who attack U.N. personnel should be individually responsible, and included within the protection of its draft Safety Convention all persons deployed by the Secretary-General to participate in an operation established pursuant to a mandate approved by Security Council resolution. Protection for persons involved in enforcement operations was not excluded by the initial New Zealand draft. Additionally, the working document submitted by Denmark, Finland, Iceland, Norway, and Sweden specifically included within the protection of its draft Safety Convention "all personnel authorized by the United Nations to participate in a peace-keeping or a peace-enforcement operation." The broad approach of the Nordic draft had the support of other delegations during the general debates of the Ad Hoc Committee; however, the approach that enforcement operations should be excluded from the scope of application of the Safety Convention was adopted.

The remaining articles should be redrafted for consistency with the new category of protected persons that include members of all U.N. authorized or directed operations, to clarify the duty to release protected persons that are unlawfully detained, and to clarify that the

256. Safety Convention, supra note 16, art. 2(2), 34 I.L.M. at 487.
258. See id.
260. See Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, supra note 212. The reports of the Ad Hoc Committee are summarized reports that do not record in any detail the debates of the Committee on this issue or the rationale for the adoption of the approach to exclude enforcement operations. See, e.g., id.; Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, supra note 213. The Report of the Sixth Committee, supra note 215, also fails to record any discussion on this fundamental issue of application.
crimes enumerated in the Safety Convention do not apply to crimes among members of a U.N. force of different nationalities. Reservations or understandings to the Safety Convention, or operation-specific pronouncements of the Security Council, cannot correct all of the shortcomings of the Safety Convention. These weaknesses must be addressed by modifying its text before ratification and entry into force. As it is written, the Safety Convention does not protect the U.N. forces—rather, it endangers them.

V. CONCLUSIONS: PROTECTING U.N. FORCES & GENEVA PROTOCOL III

The difficulty in the implementation of the Safety Convention and the application of existing international law to U.N. forces turns upon the use of force. Since U.N. forces by definition operate in high threat areas of actual or potential hostilities, the use of force is a critical issue. The international community is now in the era of the U.N. Charter which prohibits the aggressive use of force. War between states, as known in the pre-Charter era, is outlawed, and the international community no longer stands by idly while a government slaughters its own citizens.

Collectively, the Member States have granted the authority and obligation to the Security Council to maintain international peace and security, and when the peaceful settlement of dispute mechanisms fail, the Security Council has the obligation to make recommendations or decide what measures will be taken to maintain or restore international peace and security, including the possible use of armed force. There is a revolution within the international community—a tectonic shift in thinking—as to the very nature of peacekeeping and the proper role for the use of armed force in U.N. peace operations. In resolving this issue, the international community must consider its policy in light of existing international law, and decide whether that law needs to be changed to reflect the current practice and the role being shaped for U.N. forces.

A. The International Community and the Use of Force on its Behalf

The principle that U.N. forces have the right to use force in self-defense has not been much of a contested issue, but the issue of how far this right of self-defense extends and the breadth of the right of peace-keepers to use force to accomplish their mandate has proven to be very contentious. Consider, for example, the recommendation
of the British commander of U.N. forces in Bosnia to use a heavily armed, rapid reaction force to allow the delivery of humanitarian aid to besieged cities such as Sarajevo and to protect innocent civilians from random mortar and artillery attacks.\textsuperscript{261} The senior U.N. diplomat in the Balkans rejected this proposal as too aggressive.\textsuperscript{262} The same U.N. diplomat had earlier issued orders that no operations will be carried out in Bosnia by this Chapter VII force without the consent of the Bosnian Serbs.\textsuperscript{263}

The breadth of the right of U.N. forces to use armed force has been a difficult issue for the international community. Historically, peace-keeping has been purely a consensual activity, and a U.N. force was only authorized to use force in self-defense.\textsuperscript{264} Internal conflicts and humanitarian emergencies, however, have pressured the international community to become increasingly more involved in coercive peace-keeping. Consequently, the more a U.N. force must rely upon armed force to accomplish its mission, the larger and more heavily armed the force has to be, and the more difficult it is to muster international political will.

The international community is caught in a struggle between the desire for its forces to remain completely impartial and the need to use force to maintain international peace and security. When it has tried to face this struggle and shape a use of force policy during ongoing operations, it has been criticized in the media for its pattern of making half-hearted threats and then publicly backing down without results.\textsuperscript{265} While some scholars have found the recent coercive peace-keeping practice of the Security Council troubling,\textsuperscript{266} one Italian peace-keeper has written:

\textit{[T]raditional international peacekeeping initiatives are likely to be useless in the face of complex conflicts, especially ethno-religious ones, even for safeguarding basic human rights, let alone resolving the crises... As a result, there is ever wider acceptance of a UN

\textsuperscript{261} See John Pomfret, Reaction Force for Bosnia is Rapidly Fading Away: Role now Limited to Protecting U.N. Troops, WASH. POST, July 1, 1995, at A1.

\textsuperscript{262} See id.


\textsuperscript{264} See supra text accompanying notes 47-53; SUPPLEMENT TO AN AGENDA FOR PEACE, supra note 41, paras. 33-36.

\textsuperscript{265} See, e.g., Robert D. Kaplan, Catch the Bad Guys Now, WASH. POST, July 10, 1996, at 17.

\textsuperscript{266} See, e.g., Frederic L. Kirgis, Jr., The Security Council's First Fifty Years, 89 AM. J. INT'L L. 506 (1995).
policy of armed intervention in the name of humanitarianism.\textsuperscript{267}

This peace-keeper also noted the disagreements within the multinational force that arose during the armed intervention in Somalia as to the breadth of the force sanctioned by the United Nations, highlighting the difficulties of implementing a use of force policy in a multinational setting.\textsuperscript{268}

Despite the complexity and contentious nature of this issue, the international community has demonstrated a clear trend in its desire to authorize coercive peace-keeping forces to use force when necessary to accomplish their respective missions. This trend began in December, 1992, when the Security Council authorized UNITAF to use "all necessary means,"\textsuperscript{269} and has continued to date in the ongoing operations in the former Yugoslavia.\textsuperscript{270}

In an address on November 27, 1995, President Clinton described the United States' role in implementing the General Framework Agreement for Peace in Bosnia and Herzegovina.\textsuperscript{271} He assured the American public that the risks to United States forces operating in the multinational implementation force (IFOR) authorized by the Peace Agreement would be minimized:

They will be heavily armed and thoroughly trained. By making an overwhelming show of force, they will lessen the need to use force. But unlike the UN forces, they will have the authority to respond immediately - and the training and equipment to respond with overwhelming force - to any threat to their own safety or any viola-

\textsuperscript{267} Captain Fabio Ghia, \textit{Armed Intervention in UN Peacekeeping: The Necessity for Change}, XLIX NAVAL WAR C. REV. 131, 132 (Summer 1996) (Captain Ghia is an officer in the Italian navy).

\textsuperscript{268} See id. at 131, 134.

\textsuperscript{269} S.C. Res. 794, supra note 55.

\textsuperscript{270} For example, the rules of engagement for UNOSOM II authorize deadly force when necessary to "resist attempts by forceful means to prevent the Force from discharging its duties." \textsc{The Judge Advocate General's School, JA 422, Operational Law Handbook}, at 8-10 to 8-12 (1996) (providing a general discussion of rules of engagement, and contains copies of selected unclassified pocket cards that summarize applicable rules of engagement for training and guidance purposes at the tactical level) [hereinafter \textsc{Operational Law Handbook}]. The Combined Joint Task Force that conducted civil-military operations in Haiti (CJTF-Haiti), was authorized to use deadly force, when necessary, to detain persons observed committing serious criminal acts. See id. Similarly, the United Nations Mission in Haiti (UNMIH), which authorized the use of necessary force as required to carry out assigned duties. See id..

tions of the military provisions of the peace agreement.272

Subsequently, the Security Council authorized Member States to establish IFOR and "to take all necessary measures, at the request of IFOR, either in defence of IFOR or to assist the force in carrying out its mission, and recogniz[ed] the right of the force to take all necessary measures to defend itself from attack or threat of attack." 273 In keeping with this grant of authority, NATO issued rules of engagement for IFOR that authorize the use of minimum force necessary to accomplish assigned missions.274

Senator D’Amato stated that the United States has the legal authority and the moral obligation "to seek out, collect, protect, and provide to the tribunal much evidence of violations of international humanitarian law as we are able to discover within the United States zone in Bosnia."275 Armed with Bradley fighting vehicles and machine guns, IFOR protected a team of war crimes investigators, who were working at a suspected mass grave outside Srebrenica, from any potential interference by the Bosnian Serbs.276 IFOR has also been authorized to arrest indicted war criminals if they encounter them for transfer to the International Tribunal for the former Yugoslavia, but despite pressure otherwise, IFOR has not been authorized by its political leadership in NATO to actively seek out these indicted criminals.277

During his Commencement address to the University of Maryland’s European Division at Mannheim, Germany, on May 26, 1996, Judge Richard Goldstone, the Chief Prosecutor of the International Tribunal for the former Yugoslavia, noted that IFOR has the right to use force, if necessary, to arrest suspected war criminals.278 He also urged IFOR to take a more robust approach in arresting suspects and condemned IFOR’s policy of refraining from action because of the

272. Id. at 2063.
273. S.C. Res. 1031, supra note 64, paras. 14, 17 (emphasis added).
274. See OPERATIONAL LAW HANDBOOK, supra note 270, at 8-13.
278. Judge Richard Goldstone, Address at the University of Maryland European Division at Mannheim, Germany (May 26, 1996) (copy on file with the Duke Journal of Comparative & International Law).
dangers involved.\textsuperscript{279} Comparing IFOR's role to that of national policemen, Judge Goldstone said that it is not conceivable that an attorney-general would call off arrests because of the possible risks to the policemen whose duty it is to effect the arrests.\textsuperscript{280}

The United Nations Under-Secretary-General for Peace-keeping Operations has also noted this trend in the change in the nature of peace-keeping operations. Mr. Kofi Annan stated in 1993 that at "no time since its inception has the nature or the concept of peace-keeping been as open to redefinition as it is at this juncture . . . the view we had held during the first four decades of the United Nations existence on the essence of peace-keeping has begun to change."\textsuperscript{281}

The revolution in the international community on the issue of the use of force during coercive peace-keeping operations has not ended, but it has begun to take shape. Despite the problems of implementation and application of existing international law, it is clear that the international community desires its peace-keepers to be its international police force with the authority to use force to defend itself and accomplish its assigned missions, such as arresting international criminals and maintaining international peace and security.

B. The Contentious Issue of Protecting U.N. Peace-Keepers and Combatants

If the international community is willing to allow the majority of its U.N. forces to be lawful targets under the coercive peace-keeping circumstances in which these forces are most likely to be deployed, then the status quo of international law is adequate. This status quo accepts the existing international legal regime that protects U.N. forces as adequate, and embraces the Safety Convention as all that is necessary to fill in the gap.

If, however, the international community is concerned about the safety of those military personnel who serve as its peace-keepers in its new paradigm, even though they may be authorized to use armed force in self-defense and to accomplish their mission, then international law must be changed and the Safety Convention must not be allowed to enter into force as it is written. The application of existing international law by the Safety Convention allows members of
"organized armed forces" to determine the legality of their own attacks on a U.N. force by controlling the amount of force used in the attack or by simply making a declaration of war. This application also makes the arresting military personnel lawful targets if force is necessary to arrest suspected war criminals. Furthermore, the Safety Convention unnecessarily restricts its protections to a very limited category of military personnel, and intentionally excludes protection for those peace-enforcers who have been authorized by the Security Council to protect the international community from outright aggression.

The General Assembly has expressed its concerns about the safety of U.N. forces on numerous occasions, and the Security Council has frequently declared that individuals will be held accountable for violations of international humanitarian law and attacks on U.N. forces and relief personnel. Professor Tom Farer of The American University was engaged by the Secretary-General to investigate the June 5, 1993 attacks on UNOSOM II. Professor Farer concluded that

[n]o act could by its very character more perfectly exemplify an international crime than the use of force against United Nations soldiers to prevent them from carrying out their responsibilities. Such use of force is a plain challenge to the ability of the United Nations to maintain international peace and security and hence to that minimum order on which all other collective human interests depend.

To adequately protect military personnel involved in U.N. peace operations, the international community should take a three-step approach. First, the Safety Convention should be rewritten as suggested above. Reservations or understandings to the Safety Convention cannot correct all of the shortcomings of the Safety Convention

283. See discussion supra Part III on United Nations Security Council resolutions in the previous section on existing legal protections accorded military forces.
285. Id. para. 7.
as it is written. The corrections proposed would allow coverage to members of all U.N. forces, without exception, and clarify a number of ambiguities. This approach affords maximum protection to military personnel serving the international community. Second, existing international law must be changed to protect all military personnel who serve in U.N. forces, noncombatants and combatants alike. Even without the Safety Convention in place, common Article 2 of the four Geneva Conventions of 1949 still endangers the safety of military personnel who are directed by the international community to use force. The only way to create a new category of protected persons of this nature under international law is by convention. A draft convention that will accomplish this is discussed in the next section. Finally, until the Safety Convention can be rewritten and a new convention that protects peace-keepers enters into force, each enabling U.N. resolution, whether it be under the authority of Chapter IV, VI, or VII, that authorizes the deployment of a U.N. force should declare that the members of the force are not combatants so long as their use of force is within the mandate, and that all attacks on the force constitute an international crime.

C. The Draft Geneva Protocol III

One mechanism to create a new category of protected persons that includes all military personnel involved in United Nations peace operations is the attached "Draft Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Civilians and Military Forces operating under the authority of the United Nations" (Draft Protocol III). Unlike the Safety Convention, the scope of application of Draft Protocol III includes all personnel, civilians and military, whether they are U.N. peace-keepers or peace-enforcers, i.e., whether they are noncombatants or combatants, and makes them unlawful targets under all circumstances.

No one would dare suggest that officials or representatives of the United Nations, members of the ICRC, members of nongovernmental organizations, or even international civilian policemen who are authorized to use deadly force, should be lawful targets. It

286. Appendix to the present Article. The format and substance of the Draft Protocol III is generally based on a number of other conventions and documents such as the Safety Convention; various Security Council resolutions; the four Geneva Conventions of 1949; Protocol I; Protocol II; and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975.
seems incomprehensible to reason that military personnel deserve lesser protection while in the service of the international community. Civilians and military personnel alike have volunteered to risk their lives for those worthy principles the international community has enumerated in the Charter, and there is no rational argument to place a lesser value on the lives of those civilians who chose to serve the international community in uniform.

Several key principles underpin the rationale for the proposed rule of law reflected in the Draft Protocol III. First, all personnel who serve the international community, military as well as civilians, deserve the maximum protection that the international community has to offer. Second, as a corollary principle to the first, no one, military or civilian, who serves the international community deserves to be a lawful target. Third, military personnel who serve the international community do so under the legal authority of and at the political direction of the Security Council or the General Assembly. Fourth, military personnel who serve the international community are expected to serve as its police force, and they have a duty to use armed force, when necessary, to accomplish their mission. Fifth, these military personnel are international personnel who perform an international function by enforcing the laws of the international community. Accordingly, the use of force should be attributed to the United Nations and not individual states. Sixth, without these avatars of international peace and security who implement the Security Council's coercive authority, the international community has no enforcement mechanism and international law.

It is undisputed that the law of international armed conflict applies to United Nations forces. The Draft Protocol III does not change the application of the existing law of international armed conflict to U.N. forces or any other party to a conflict but for one exception. It simply creates a new category of protected persons under international law—persons who serve the international community under the authority of the United Nations that are unlawful targets under all circumstances. This category of protected persons reflects the new role of military forces that serve the international community during U.N. peace operations.

Coercive peace-keeping and peace-enforcement action under the Charter should not be viewed as mutual combat between states in a pre-Charter era when waging war was lawful. To the contrary, coercive peace-keeping and peace-enforcement actions are a concerted attempt by the international community to address a humanitarian
crisis or to thwart a threat to international peace and security. It is only a visceral fright of undermining the pre-Charter, outdated distinction between *jus in bello* and *jus ad bellum* that most rely upon to discredit a protected status for all U.N. forces, noncombatants and combatants alike.

Hugo Grotius is credited with having developed the pre-Charter distinction between *jus in bello* and *jus ad bellum*, that is, "the theory of the equal application of the *jus in bello* irrespective of the justice of a party's resort to force." At the time Grotius developed this theory of equal application, the just war theories of *jus ad bellum* were more highly developed than the *jus in bello*. The rationale for the theory was the lack of an effective method of determining the lawfulness of the aggression. Given the modern justification that an unequal application would undermine *jus in bello*, it is ironic that those rules were so undeveloped when the theory of equal application was developed. Indeed, given the role of the Security Council, the rationale for Grotius' theory of equal application no longer exists in contemporary Charter practice.

A contemporary discussion by one author notes that the traditional principles of *jus ad bellum* have been fundamentally changed by the Charter system and restricted to the use of force principles codified in the Charter, eroding in practice the distinction between *jus in bello* and *jus ad bellum*. In a discussion focusing on the evolution of international rule of proportionality (as a component of both the *jus ad bellum* and the *jus in bello*) under the Charter system of conflict management, Professor Judith Gail Gardam made the following observations:

The *jus ad bellum* and the *jus in bello* are themselves generally regarded as independent sets of rules and the relationship between the two has also remained largely unexplored. What debate there has been has arisen in the context of whether the rules on the conduct of hostilities are affected by the legality of the resort to force. *Most commentators take the position that the rules must be applied equally*, as exemplified in the Preamble to Protocol I. Events in the

288. See id.
289. See id. at 411.
290. See id. at 403.
291. See id. at 393-94.
recent gulf conflict demonstrate that this analysis is too simplistic. The practice of states in that conflict reveals that the legality of a state's resort to force has a subtle impact on the perception by that state of the means that can legitimately be used to achieve its goal. Thus, in reality, the jus ad bellum to some extent may determine the jus in bello . . . . Moreover, the almost-unprecedented role of the Security Council in determining the aggressor is clearly a significant factor in any analysis of these events. 292

And:

Since the gulf conflict, it is difficult to see how it can be argued that the rules regulating the conduct of armed conflict are unaffected by considerations relating to the use of force . . . . Clearly, as long as there is any prevailing theory of the jus ad bellum, it will always affect the jus in bello. 293

Professor Gardam concluded, however, that this de facto erosion of the theory of equal application is alarming because it “will result in the application of lower standards by states in the pursuit of their objectives.” 294 This conclusion is not supported by a single example, and fails to acknowledge that this de facto erosion that she observed under the Charter system is a reflection of state practice and evolving customary international law. To the contrary, Professor Gardam reinforced the evolving state practice in her observation that

[the] suggestion that the rules regulating the conduct of armed hostilities may be affected by the legal status of the resort to force is not new. Ever since the attempts to outlaw the use of force began in this century, it has been possible to argue that there should not necessarily be complete equality in the application of the laws of war, as one state will have resorted to unlawful aggression. 295

Professor Gardam did support her proposition that the equal application of the jus in bello should continue under the Charter system with a three-point analysis. First, she noted that any theory of unequal application “assumes an effective method of determining the lawfulness of the aggression.” 296 While noting that this determination is the role of the United Nations, she concluded that such a determi-

292. *Id.* at 392-94 (emphasis added).
293. *Id.* at 412 (emphasis added).
294. *Id.* at 394.
295. *Id.* at 410.
296. *Id.* at 410.
nation by the Security Council "should have no legal impact on the \textit{jus in bello} of the conflict" because the basis of the contemporary theory of equal application is the humanitarian nature of the \textit{jus in bello}.\textsuperscript{297} The humanitarian concern is that all "soldiers and civilians are entitled to the benefit of the rules even if the state is engaged in illegal hostilities."\textsuperscript{298}

Second, Professor Gardam relied upon the judgment of the Nuremberg Military Tribunals that had the opportunity to modify the theory of equal application, but declined to do so.\textsuperscript{299} While Nuremberg serves as an excellent judicial interpretation of the \textit{jus in bello}, these tribunals only had the authority to interpret existing international law. The Nuremberg precedent must be placed in historical perspective—the United Nations did not even exist during World War II and the states did not fight under the authority of the Security Council. Accordingly, the Nuremberg Tribunals did not have the opportunity to rule upon whether the Charter system has modified the theory of equal application of \textit{jus in bello}.

Finally, Professor Gardam relied upon the practice of states during the Persian Gulf War to support her proposition that the international community had the opportunity to modify the theory of equal application, but declined to explicitly do so.\textsuperscript{300} She observed that the "Security Council confirmed that the invasion of Kuwait by Iraq was contrary to Article 2(4) of the United Nations Charter \ldots [and that no state] suggested that the illegality of this act relieved opposing states of the necessity of complying with the law of armed conflict."\textsuperscript{301} In practice, however, she concluded that it can be strongly argued that reality was otherwise—that "the \textit{jus ad bellum} has subtly influenced the \textit{jus in bello} ever since the demise of the view of the legal neutrality of the resort to force by states."\textsuperscript{302} Despite Professor Gardam's explicit recognition of contemporary state practice under the Charter to the contrary, she concluded her three-point analysis and her article with the following conclusion:

It would be a regrettable outcome of the new effectiveness of the

\begin{footnotes}
\footnotetext[297]{Id. at 411.}
\footnotetext[298]{Id.}
\footnotetext[299]{See id.}
\footnotetext[300]{See id. at 411-12.}
\footnotetext[301]{Id. at 411.}
\footnotetext[302]{Id. at 412.}
\end{footnotes}
Security Council if it has had the effect of undermining one of the most fundamental principles of the law of armed conflict: the equal application of the rules irrespective of the legal status of a party's resort to force.  

Notwithstanding Professor Gardam's conclusions, most of her underlying analysis and observations concerning current state practice does support the Draft Protocol III and its approach to the *jus in bello*. The Draft Protocol III retains the application of the *jus in bello* in its entirety to all belligerents and is consistent with Professor Gardam's humanitarian concerns. The only change to the *jus in bello* proposed by the Draft Protocol III is to create a new category of protected persons that includes belligerent military forces acting under the coercive authority of the Security Council. The Draft Protocol III does not affect the theory of equal application *vis-à-vis* armed conflicts that have no military forces acting under the coercive authority of the Security Council.

Professor Gardam's concerns that an unequal application of the *jus in bello* "will result in the application of lower standards by states in the pursuit of their objectives" is not supported by any empirical data. To the contrary, the reaction of Iraqi troops to the psychological operations of the coalition during the Persian Gulf War strongly suggests that a rule of law making an attack on coalition forces illegal would have only encouraged Iraqi troops to surrender. An Iraqi division commander stated after the cease fire that psychological operations were "the greatest threat to his troops' morale." These psychological operations consisted of leaflet drops and radio broadcasts that "provided instructions on how to surrender, instilled confidence that prisoners would be treated humanely, and provided advanced warning of impending air attacks, thus encouraging desertion." Certainly, the knowledge of individual Iraqi troops that their participation in unlawful aggression by attacking coalition forces would add greater incentive for them to surrender and would add a new dimension to the deterrence of unlawful aggression.  

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303. *Id.* at 413.
304. *Id.* at 394.
306. *Id.* at 20.
307. *Id.* at 20-21.
professor Gardam’s conclusion that the international community should maintain a clear distinction between the *jus ad bellum* and *jus in bello* is a pre-Charter distinction that is invalid when applied to military forces acting under the coercive authority of the Security Council.

In a more recent article, Professor Gardam considered "the extent to which legal restraints derived from the *ius in bello* and the *ius ad bellum* apply to the Security Council when it is taking military enforcement action under Chapter VII of the United Nations Charter." In discussing the scope of the *jus ad bellum* during military enforcement actions under the coercive authority of the Security Council, Professor Gardam recognized the view that a fundamental difference exists between states waging war and the Security Council taking enforcement action:

> Whereas, traditionally, a State waging war was entitled to do so to the stage of complete annihilation and subjugation of the other side, it can scarcely be maintained that United Nations action can be pursued so far. Such "collective" or "enforcement" action, as distinct from war, is limited to the measures necessary to resist aggression and to maintain and restore international peace and security.

She then stated that there are difficulties in assuming states involved in military enforcement actions remain bound by their individual obligations under the *jus in bello*, because the Security Council could override these treaty obligations by operation of Articles 25 and 103 of the Charter. In her analysis of the application of the *jus in bello* during military enforcement actions under the coercive authority of the Security Council, Professor Gardam concluded that

> [t]o apply the customary law of armed conflict to the Security Council is not, however, the ideal situation. For example, as we have seen, some of its provisions are not adapted for the United Nations. Moreover, customary rules inevitably lag behind treaty

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309. *Id.* at 308-09 (quoting Bowett, supra note 35, at 54-55 (1964)).

310. *See* Gardam, supra note 308, at 313. Article 25 of the U.N. Charter provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 103 of the U.N. Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
developments and there is always scope for disagreement as to the exact status of any particular rule at any particular time.\textsuperscript{311}

She concluded her analysis with the recommendation "to devise some mechanism by which the United Nations can undertake to comply with the conventional rules of international humanitarian law and to ensure that the States involved in peacekeeping and peace-enforcement activities are aware of these obligations."\textsuperscript{312} The Draft Protocol III is a mechanism that would clearly delineate the application of international humanitarian law to military forces acting under the authority of the United Nations.

In analyzing the application of the law of international armed conflict to U.N. military forces, many institutions and writers suggested as long ago as 1963 that U.N. forces should have a special code and should not be governed in all respects by the same law of international armed conflict as national armies.\textsuperscript{313} The approach envisioned by the Draft Protocol III is clearly supported by the precedent of current practice. Security Council Resolution 1031, for example, demands that all "parties respect the security and freedom of movement of IFOR and other international personnel," while explicitly authorizing "such enforcement action by IFOR as may be necessary to ensure implementation of that Annex [Annex 1-A: Military Aspects of the Peace Settlement] and the protection of IFOR."\textsuperscript{314} This resolution clearly incorporates a new rule of law, one that recognizes U.N. forces are a separate category of protected persons.

The recent conduct of maritime operations is another excellent example of the international community's de facto recognition of a protected status for U.N. forces. At a Symposium on Maritime International Law in Chile, the United States participated in a discussion on the status and scope of the rights of warships while conducting operations under the Chapter VII authority of the Security Council.\textsuperscript{315} The purpose of the meeting, attended by eighteen coun-

\textsuperscript{311} Gardam, \textit{supra} note 308, at 319.
312. \textit{Id.} at 319-20.
314. S.C. Res. 1031, \textit{supra} note 64, paras. 15, 18.
tries, was "to establish a legal order or doctrine which would determine and govern with greater clarity Chapter VII of the U.N. Charter, the possible operations, obligations and rights of the countries and of naval forces in time of war or armed conflict on the sea."\textsuperscript{316}

The United States representative, Navy Captain Bruce B. Davidson, Judge Advocate General's Corps, focused his cogent presentation on Chapter VII operations short of armed conflict. He concluded that the status of naval forces enforcing Chapter VII resolutions is inconsistent with the pre-Charter status accorded neutrals and belligerents, and that this is an area that may require some further development of the law.\textsuperscript{317} During the course of his analysis Captain Davidson discussed the application of existing international law:

While the law of neutrality defines who is a belligerent and who is a non-belligerent, Chapter VII has modified the law of neutrality to permit forces carrying out Chapter VII mandates to do certain things without becoming belligerents. Forces in these circumstances should not be viewed as 'parties to the conflict' . . . . I do not believe that, at this point, we can conclude that multinational naval forces, because they are implementing a Chapter VII mandate, could never be viewed as belligerents; that is, that they could not legally be the object of attack by a party to the conflict . . . . Determination of their status thus will rely on an objective, factual assessment . . . . Of course, the exact point of transition between not being a party to the conflict and belligerency will be very difficult to determine. However, there is a variety of actions that should not be viewed as crossing the line—which would make these forces lawful targets.\textsuperscript{318}

Captain Davidson then discussed six maritime-related activities that do not cross the line and thus give definition to the de facto protected status of U.N. forces during Chapter VII operations: presence and deterrence operations for the purpose of showing resolve and deterring aggression; peace operations involving interpositional forces or the monitoring of a cease fire agreement; humanitarian operations potentially involving the use of force for noncombatant evacuation

\textsuperscript{316} Hernan Cisternas, Belligerents or Neutrals: The Status of U.N. Naval Forces is Analyzed, EL MERCURIO (Santiago, Chile), June 28, 1996 (author's translation) (on file with the Duke Journal of Comparative & International Law).

\textsuperscript{317} See Status and Rights of Warships, supra note 315, at 8.

\textsuperscript{318} Id. at 8-9, 11-12.
operations; escorting flag vessels of non-belligerents possibly requiring the use of force in either individual or collective self-defense; maritime interception operations structured to be as non-intrusive as possible but authorizing warning shots and disabling fire; and the exercise of the inherent right of self-defense imposing on a military commander the obligation to use all necessary means available to defend his or her unit.\(^{319}\) In shaping the final contours of the protected status of U.N. forces, it is important to note that maritime intercept operations, as defined by Captain Davidson to be within the authority of a noncombatant U.N. maritime force, have been traditionally viewed in customary practice as either a belligerent act of blockade or visit and search.\(^{320}\)

The potential for the use of armed force is inherent in every U.N. peace operation. Existing international law requires too much subjective guesswork to determine whether U.N. forces are noncombatants or have become combatants because they have used armed force at some undefined level of intensity. The proposed Draft Protocol III draws a clear line and protects members of U.N. forces under all circumstances. It also codifies and advances the de facto protected status accorded U.N. forces by the Security Council and the international community. This approach deters attacks against U.N. forces, under all circumstances. In cases of unlawful aggression, this approach holds the offending state, its head of state, and the individual soldier who knowingly attacks members of a U.N. force all criminally responsible, while otherwise maintaining the integrity of the law of international armed conflict.

D. Final Reflections

The United Nations is on the cusp of formulating a new policy toward coercive peace-keeping. Existing international law does not provide clear or adequate protections for U.N. forces, particularly in the context of their authority to use force to accomplish their mission. The same logical process that has extended international protections little by little to a number of categories of war victims—from wounded and sick military personnel protected by the first Geneva Convention in 1864; to civilians, prisoners of war, medical personnel, and religious personnel protected by the four Geneva Conventions of 1949; and, later to the victims of internal armed conflicts protected by

\(^{319}\) See id. at 12-13.

\(^{320}\) See, e.g., COMMANDER'S HANDBOOK, supra note 134, ¶¶ 7.6 - 7.7.5.
Protocol II—dictates that U.N. forces should likewise have a special protected status.\(^{321}\)

In keeping with this development of international law, it seems more appropriate to address the issue of a special protected status for U.N. and associated personnel in a separate protocol to the four Geneva Conventions of 1949 instead of trying to rewrite the Safety Convention to correct its many flaws. Although some of the articles are very similar to the Safety Convention, the attached *Draft Protocol III* is substantially different. The protocol greatly enhances the protections accorded U.N. and associated personnel, and increases the responsibilities of State Parties.

Although the Safety Convention was intended to create a protected status for U.N. and associated personnel, its incorporation of the common Article 2 threshold to determine when the Safety Convention applies actually endangers the limited category of U.N. forces it attempts to protect, particularly those authorized by Chapter VII of the Charter. Indeed, the ambiguity in existing international law that allows military personnel participating in a U.N. peace-enforcement operation to be lawfully targeted is a traditionalist, pre-Charter approach that undermines deterrence, undermines the rule of law, and undermines the Charter prohibition on the use of force. The international community must consider the impact of existing international law on the safety of U.N. forces as it develops its use of force policy for its new coercive peace-keeping paradigm.

It is clear that the international community expects U.N. forces to take on new coercive peace-keeping missions that involve the use of force to accomplish the mission assigned to them by the international community. The rule of law must be clarified and advanced to protect military personnel who participate in U.N. peace operations; however, the safety of U.N. forces cannot be assured simply because the rule of law is made plain. Once a protected status is defined for U.N. forces, it must be consistently enforced to be effective.

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APPENDIX

DRAFT PROTOCOL ADDITIONAL
TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949,
AND RELATING TO THE PROTECTION OF CIVILIANS
AND MILITARY FORCES
OPERATING UNDER THE AUTHORITY OF THE UNITED
NATIONS (PROTOCOL III)

PREAMBLE

The High Contracting Parties,

Proclaiming that civilian and military personnel operating under
the authority of the United Nations are servants of the international
community and deserve the maximum protection of international and
domestic law under all circumstances,

Recalling that every State has the duty, in conformity with the
Charter of the United Nations, to refrain in its international relations
from the threat or use of force against the sovereignty, territorial in-
tegrity or political independence of any State, or in any other manner
inconsistent with the purposes of the United Nations,

Condemning the threat or use of force by any State except in
lawful self-defense as authorized by international law and recognized
by Article 51 of the Charter,

Recognizing the critical role of United Nations military forces in
the maintenance of international peace and security,

Aware of the changing nature of peace operations and the neces-
sity, under some circumstances, to authorize military forces to use
armed force to accomplish the mandate of the Security Council,

Reaffirming the rules of international humanitarian law per-
taining to the conduct of hostilities, particularly the rules contained in
the four Geneva Conventions of 1949 and the two Geneva Protocols
of 1977 pertaining to the protection of victims of armed conflicts,

Confirming the application of these rules of international hu-
manitarian law to military forces operating under the authority of the
United Nations,

Noting, however, that traditional distinctions between jus in
bello and jus ad bellum are not applicable in the contemporary era of
the United Nations,

Declaring, therefore, that civilians and military members of
United Nations forces are protected persons at all times,

*Endorsing* the customary practices and principles applicable to United Nations operations codified in the draft Model Status-of-forces agreement between the United Nations and Host Countries,

*Concerned* over the growing attacks against civilians and military forces operating under the authority of the United Nations,

*Emphasizing* the need to ensure better protection for all civilians and military forces who serve the United Nations,

*Conscious* of the international nature of crimes against the safety of these civilians and military forces who serve the United Nations,

*Mindful* of the role of international criminal tribunals, and

*In honor* of the memory of those civilian and military personnel who have died while in the service of the international community,

*Have agreed* on the following:

**PART I: GENERAL PROVISIONS**

**Article 1 - Scope of Application**

1. This Protocol, which develops and supplements international humanitarian law without modifying its existing conditions of application except as expressly provided herein, shall apply to all United Nations and associated personnel during the conduct of all United Nations operations in a host State and while in transit to such host State.

2. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter ‘adverse distinction’), to all persons affected by the application of Article 1.

3. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

4. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of any State in the territory of which that conflict occurs.
Article 2 - Definitions

For the purposes of this Protocol:

1. "United Nations personnel" means:
   a. Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation; or,
   b. Other officials and experts on mission of the United Nations, its specialized agencies, or the International Atomic Energy Agency who are present in an official capacity in either a host or transit State.

2. "Associated personnel" means persons:
   a. Assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
   b. Engaged by the Secretary-General of the United Nations, a specialized agency, or the International Atomic Energy Agency; or,
   c. Deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations, a specialized agency, or the International Atomic Energy Agency;
   to carry out activities in support of the fulfilment of the mandate of a United Nations operation.

3. "United Nations operation" means an operation established or authorized by the competent organ of the United Nations in accordance with the Charter of the United Nations.

4. "Host State" means a State in whose territory a United Nations operation is conducted.

5. "Transit State" means a State, other than the host State, in whose territory United Nations and associated personnel are in transit or temporarily present in connection with a United Nations operation.

6. "Intentional commission" means actual knowledge of the victim's status as United Nations or associated personnel.

7. "International criminal tribunal of competent jurisdiction" means any tribunal established by the competent organ of the United Nations in accordance with the Charter of the United Nations or established by international convention that has jurisdiction over any of the offenses as set forth in Article 4 of this Protocol.
PART II: REPRESSION OF BREACHES

Article 3 - Duty of all States to Respect and Protect

1. United Nations and associated personnel may in no circumstances be attacked or subject to any action that prevents them from discharging their mandate; they shall be respected and protected in all circumstances. They shall be treated humanely and cared for by all States without any adverse distinction.

2. Fixed establishments and all means of transportation of any United Nations or associated personnel may in no circumstances be attacked.

Article 4 - Enumerated Crimes

1. The intentional commission of:
   a. murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
   b. a violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
   c. a threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
   d. an attempt to commit any such attack; and,
   e. an act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack;

shall be made by each State Party a crime under its national law.

2. Each State Party shall make the crimes set out in paragraph 1 of this Article, wherever and by whomever they may occur, punishable by appropriate penalties which shall take into account their grave nature, and shall take all appropriate steps to protect United Nations and associated personnel from such crimes.

Article 5 - Identification

1. To facilitate identification and ensure maximum protection, all United Nations and associated personnel may be issued appropriate identification documents to carry, and shall wear, whenever practicable, the distinctive emblem of the United Nations in addition to any other national markings.
2. Fixed establishments and all means of transportation of any United Nations or associated personnel shall be similarly marked, whenever practicable, with the distinctive emblem of the United Nations and may fly the distinctive flag of the United Nations in addition to any other national markings or flags.

3. The protected status of United Nations and associated personnel attaches by virtue of their association with the United Nations. The failure of United Nations and associated personnel to carry appropriate identification documents or to wear distinctive markings shall not in any way affect their protected status.

Article 6 - Duty Within Host and Transit States to Release

1. Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained within a host or transit State and their identification has been established, they shall not be subjected to interrogation, and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release, such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the four Geneva Conventions of 1949.

2. The United Nations or other appropriate authorities shall be immediately notified of the detention of persons who claim to be United Nations or associated personnel whose identification cannot be promptly established. Such detained persons shall not be subjected to interrogation and shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949 until their identification has been established.

3. Any dispute that arises concerning the identification of United Nations or associated personnel shall be submitted promptly to the Secretary-General. The decision of this matter by the Secretary-General shall be final.

Article 7 - Duty of State Parties to Ensure Safety and Security

1. State Parties shall disseminate this Protocol as widely as possible, and, in particular, to include the study thereof in their programs of military instruction and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

2. State Parties shall take all appropriate measures within and
outside their respective territories to ensure the safety and security of United Nations and associated personnel, and shall cooperate with the United Nations, any international criminal tribunal of competent jurisdiction, and all other States, as appropriate, in the implementation of this Protocol, particularly in any case where the host State is unable itself to take the required measures.

3. State Parties shall cooperate with the United Nations, any international criminal tribunal of competent jurisdiction, and all other States in the prevention of the crimes set forth in Article 4 by:
   a. taking all practicable measures to prevent preparations in their respective territories for the commission of such crimes within or outside their territories; and,
   b. exchanging information and coordinating the taking of administrative and other measures as appropriate to prevent the commission of such crimes.

4. State Parties have an affirmative obligation to search for, arrest, and either prosecute or extradite, all persons suspected of having committed a crime as set forth in Article 4. This obligation is not limited to the national territory of a State Party; it extends to all territories where a State Party is authorized by international law to exercise jurisdiction.
   a. State Parties which elect not to extradite a suspect, shall, without exception and without undue delay, submit the case to its competent authorities for the purpose of prosecution. The final outcome of these proceedings shall be promptly reported to the Secretary-General of the United Nations and announced publicly.
   b. To the extent necessary, State Parties shall utilize this Protocol as the legal basis for extradition to any international criminal tribunal of competent jurisdiction or to any other State, and shall enact national legislation as required to implement their obligation to extradite as set forth in this paragraph.

5. State Parties shall, upon request, cooperate to the greatest extent possible with the United Nations, any international criminal tribunal of competent jurisdiction, and all other States in their respective efforts to search for, arrest, prosecute, or extradite any person suspected of having committed a crime as set forth in Article 4.

6. State Parties shall promptly transmit, to the Secretary-General of the United Nations, any international criminal tribunal of competent jurisdiction, and all other States concerned, all pertinent information it has concerning the victim, alleged offender, or circum-
stances of any crime set forth in Article 4.

PART III: FINAL PROVISIONS

Article 8 - Savings Clause

Nothing in this Protocol shall affect:

1. The inherent right of United Nations and associated personnel to act in self-defense;

2. The rights and obligations of all States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories;

3. The obligation of United Nations and associated personnel to act in accordance with the terms of the mandate of a United Nations operation;

4. The right of all States which voluntarily contribute personnel to a United Nations operation to withdraw their personnel from participation in such operation; or,

5. The entitlement to appropriate compensation payable that may be due from whatever source in the event of death, disability, injury, or illness attributable to peace-keeping service claimed by persons, or their heirs, voluntarily contributed by States to United Nations operations.

Article 9 - Dispute Resolution

1. Except as provided in paragraph 3 of Article 6 of this Protocol, any dispute between two or more State Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by application in conformity with the Statute of the Court.

2. Except for the dispute settlement provision of paragraph 3 of Article 6 of this Protocol, a State Party may at the time of signature, ratification, acceptance, or approval of this Protocol, or accession thereto, declare that it does not consider itself bound by all or part of paragraph 1 of this Article. The other State Parties shall not be bound by paragraph 1 of this Article or the relevant part thereof with
respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this Article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 10 - Review Meetings

At the request of one or more State Parties, and if approved by a majority of the State Parties, the Secretary-General of the United Nations shall convene a meeting of the State Parties to review the implementation of the Protocol, and any problems encountered with regard to its application.

Article 11 - Signature

This Protocol shall be open for signature at United Nations Headquarters in New York by all States for six months after the signing of the Final Act and will remain open for a period of twelve months.

Article 12 - Ratification, Acceptance or Approval

This Protocol is subject to ratification, acceptance, or approval. Instruments of ratification, acceptance, or approval shall be deposited with the Secretary-General of the United Nations.

Article 13 - Accession

This Protocol shall be open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 14 - 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 the Protocol after its entry into force, 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.
Article 15 - 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 16 - 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.