

United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict

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I. INTRODUCTION

With this new millennium comes a New World. Because of unprecedented advances in travel and communication over the previous century, it is a decisively smaller world. This smaller world emphasizes nation-state differences in ideologies, political economies, and cultures. Although the world is in constant turmoil and military conflict, this turmoil is currently manageable.

The United Nations (UN), with all its flaws, appears to be the foremost global structure capable of ensuring, maintaining, and making world peace in the new millennium. In 1945, the "Peoples of the United Nations" declared they were determined "to save succeeding generations from the scourge of war . . . to unite our strength to maintain international peace and security, and . . . to ensure . . . that armed force shall not be used, save in the common interest."¹ The hope was that nations, acting in concert and pursuing a common goal of peace, would produce a stable world.

In the Preamble to its Charter, the UN placed the maintenance of peace among nations as its primary reason for existence.² Similarly, Article 1 of the Charter states that the maintenance of "international peace and security" is one of the UN's purposes.³ Indeed, the fact that it is listed first suggests it is the overriding purpose. However, if the UN Member States wish to preserve their moral authority to maintain peace, they must not sit idle during times of conflict.⁴ Rather, they, through the UN, must be both reactive and proactive in maintaining peace and security.

The UN Charter obligates Member States to settle their disputes peacefully and to "refrain from the threat or use of force against the territorial

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¹ U.N. CHARTER preamble.

² G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 NETH. INT'L L.R. 297 (1988).

³ U.N. CHARTER art. 1, para. 1.

⁴ Vladimir V. Grachev, *Legal Considerations for Military and Peacekeeping Operations—United Nations Peacekeeping in Transition*, 45 NAVAL L. REV. 273, 280 (1998).

integrity or political independence of any state.”⁵ Members may not use force against one another, unless either exercising the “inherent right of individual or collective self-defence if an armed attack occurs,”⁶ or giving assistance to the UN when it is “taking preventive or enforcement action.”⁷ Further, Member States are obligated to “accept and carry out the decisions of the Security Council in accordance with the present Charter.”⁸

As the world enters this new millennium, conflicts will inevitably occur between nation-states and civil wars will arise. Armed conflict, both international and internal, will continue.⁹ However, the opportunity exists to make these conflicts less frequent and destructive as UN peacekeeping operations enter into a new era. The UN Charter provides the mechanisms, if they are properly applied, to manage conflicts throughout the globe. The UN Charter is a living political document, flexible enough to deal adequately with crises as they occur as long as the Member States have the collective political will to continue to effectively participate in peace operations.

These peace operations range from initial UN Charter classical peacekeeping operations under Chapter VI,¹⁰ to the current trend of “active and

⁵ U.N. CHARTER art. 2, para. 4.

⁶ U.N. CHARTER art. 51.

⁷ U.N. CHARTER art. 2, para. 5.

⁸ U.N. CHARTER art. 25.

⁹ Although armed conflict continues, the aspiration of every nation-state should be the end to conflict. In Geneva, on Aug. 12, 1999, United Nations Secretary General Kofi Annan “signed a solemn appeal calling on all peoples and governments to reject the idea that war is inevitable and to eradicate its underlying causes.” United Nations Press Release, *Calls for Renewed Efforts to Protect Civilians in War* (Aug. 13, 1999), available at <http://allafrica.com/stories/199908130003.html> (copy on file with the *Air Force Law Review*). *Accord* 22 USC § 2551:

An ultimate goal of the United States is a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule of law; and in which adjustments to a changing world are achieved peacefully.

¹⁰ Traditionally defined as “blue helmet” operations, in 1992, Secretary-General Boutros Boutros-Ghali defined peacekeeping as

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

BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE*, 45 (2d ed. 1995). Additionally,

[p]eace keeping has been described as the deployment of a United Nations presence in an area of conflict with the consent of the States, or where relevant, other entities concerned, and as an interim arrangement to contain

2-The Air Force Law Review

robust” Chapters VI¹¹ and VII peace-enforcement operations.¹² The number, diversity and spectrum of current peace operations present cogent issues regarding the application of the international law of armed conflict.¹³

fighting, prevent the resumption of hostilities and restore international peace and security. The functions of peace keeping, which have traditionally ranged from observance of cease-fire, demarcation lines, or withdrawal of forces agreements, have in recent years widened to include monitoring of election process, delivery of humanitarian supplies, assisting in the national reconciliation process and rebuilding of a State’s social, economic and administrative infrastructure. Peace-keeping forces have no military mandate of enforcement powers, and although equipped with light defensive weapons, they may use them only in self-defence.

Daphna Shraga & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical issues*, in INTERNATIONAL COMMITTEE OF THE RED CROSS SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 40 (Umesh Palwankar ed., 1994) [hereinafter Shraga & Zacklin].

[P]eacekeeping describes the inherently peaceful action of an internationally directed force of military, police and sometimes civilian personnel to assist with the implementation of agreements between governments or parties which have been engaged in conflict. It presumes cooperation, and the use of military force (other than in self-defense) is incompatible with the concept.

J.C. Waddell, *Legal Aspects of UN Peacekeeping*, in THE FORCE OF LAW: INTERNATIONAL LAW AND THE LAND COMMANDER 47, 47 (Hugh Smith ed., 1994) [hereinafter Waddell].

¹¹ In the early and mid-90’s, in Somalia and Bosnia-Herzegovina, classical peace-keeping principles and norms developed during the Cold War were “strained to the breaking point.” “[T]he Security Council proclaimed ‘no-fly zones’ and ‘safe areas,’ declared punitive actions against warlords, and acquiesced in NATO-declared ‘exclusion zones’; ... Member States established command arrangements that did not in all cases terminate in New York; ... peace-keepers mounted anti-sniping patrols and called in air strikes.” Shashi Tharoor, *The Changing Face of Peace-keeping and Peace-Enforcement*, 19 FORDHAM INT’L L.J. 408, 414 (1995). Such “robust” peacekeeping operations have also been called “coercive peace-keeping.” Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. INT’L L. 93, 105 (1996).

¹² Peace-enforcement operations generally refer to nonconsensual operations conducted by United Nations military personnel or United Nations Member State forces. Secretary General Boutros Boutros-Ghali succinctly defined such operations as “peace-keeping activities which do not necessarily involve the consent of the parties concerned. Peace enforcement is foreseen in Chapter VII of the Charter.” BOUTROS-GHALI, *supra* note 10, at 12. Put another way,

[p]eace enforcement is a Chapter VII mandated operation carried out by United Nations forces or by States, groups of States or regional arrangements on the basis of an invitation of the State concerned (Korea 1950), or an authorization by the Security Council (Gulf, 1990). They have a clear combat mission and are empowered to use coercive measures to carry out their mandate.

United Nations Peace Operations-3

The international law of armed conflict does not apply to classic “blue helmet” UN peacekeepers because they are not combatants,¹⁴ that is, they are not engaging in military offensive operations. Blue helmet peacekeepers are authorized to use force only in self-defense. Conversely, it is well settled that the law of armed conflict does apply when forces authorized by the UN are “engaged in hostilities as a belligerent,” such as in the Korean or the Persian Gulf Conflicts.¹⁵ In such cases, the UN forces are “treated in exactly the same way as the armed forces of a state.”¹⁶ However, how the international law of armed conflict applies to post-Cold war UN peacekeeping operations when

Shraga & Zacklin, *supra* note 10, at 40. “Peace enforcement’ . . . may be defined as a military operation in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and who may be engaged in combat activities.” Waddell, *supra* note 10, at 47-48.

¹³ Air Force Pamphlet 110-31, International Law—The Conduct of Armed Conflict and Air Operations, para. 1-2 (d)(1) (Nov. 19, 1976) (reissue pending as AFPAM 51-710) [hereinafter AFPAM 110-31], defines the international law of armed conflict as,

a part of the international law primarily governing relationships between states. The term refers to principles and rules regulating the conduct of armed hostilities between states. Traditionally known as the law of war, the term ‘law of armed conflict’ is preferred. Since World War II, states have avoided formal declarations of war. Recent multi-lateral conventions, notably the 1949 Geneva Conventions, refer to armed conflict rather than war. International law regulating armed conflict applies if there is in fact an international armed conflict. It may also apply to armed conflicts that traditionally have not been viewed as ‘international’ but which clearly involve the peace and security of the international community.

See also Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 296 (1995):

The Hague and Geneva Conventions embody the laws of war, referred to as the *jus in bello*. The Hague Conventions are a series of treaties concluded at the Hague in 1907, which primarily regulate the behavior of belligerents in war and neutrality, whereas the Geneva Conventions are a series of treaties concluded in Geneva between 1864 and 1949, which concern the protection of the victims of armed conflict. In 1977 two Protocols to the 1949 Geneva Conventions, which further developed the protection of victims in international armed conflicts and expanded protection to victims of non-international armed conflict, were opened for signature, but were not as universally accepted.

Id. (footnotes omitted).

¹⁴ Garth J. Cartledge, *International Humanitarian Law*, in INTERNATIONAL LAW AND AUSTRALIAN SECURITY 147, 150 (Shirley V. Scott & Anthony Bergin eds., 1997) [hereinafter Cartledge, *International Humanitarian Law*].

¹⁵ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 188 (1996).

¹⁶ *Id.*

4-The Air Force Law Review

these operations become more active and robust, approaching combat, is not clear. Such robust operations include, for example, Somalia and Bosnia-Herzegovina, as well as the continuing mission to enforce the no-fly zone in Iraq.¹⁷ The central issue is whether, and in what manner, the law of armed conflict applies to UN peacekeeping operations that arguably cross the threshold into armed conflict.

This article begins by detailing the history and applicable norms of UN peacekeeping and peace-enforcement operations, to include the use of force in self-defense as applicable to “classical” peacekeeping operations. The article then illustrates how the “principles and spirit” of the international law of armed conflict have been followed in traditional peacekeeping operations, as well as during robust peacekeeping operations. The article explains how, through practice, the international law of armed conflict has been followed in UN peace-enforcement operations, and argues the importance of keeping clear distinctions between UN peacekeeping and peace-enforcement operations. Additionally, the article briefly examines the recent Convention on the Safety of UN and Associated Personnel.

Following this, the article delves into the current uncertainty as to how and when the international law of armed conflict, the *ius in bello*,¹⁸ applies to UN military forces. The article illustrates the past practice and position of the UN to not apply the law of armed conflict to peacekeeping operations, instead applying only the “principles and spirit” of the law. The article explains the importance of, in certain circumstances, UN military forces following the law of armed conflict so that the forces they oppose will reciprocate. The article then discusses the application of the law of armed conflict to UN peace-enforcement operations.

¹⁷ See generally, Roberto Suro, *U.S. Air Raids on Iraq Become an Almost Daily Ritual*, WASH. POST, Aug. 30, 1999, at A3. After Iraq continued to fire anti-aircraft weapons against United Nations authorized aircraft enforcing the no-fly zone, it became clear that the previous policy of simply returning fire in self-defense against only the offending radar and surface-to-air missile sites was not effective. In order to deter future attacks against coalition aircraft, the definition of aircraft self-defense was expanded authorizing follow-on attacks against secondary targets that had not previously engaged the aircraft. Pilots carried previously approved lists containing targets that could be engaged whenever Iraq threatened their aircraft. Additionally, the targets did not have to be engaged immediately, rather the retaliation could occur a day or two later. Such secondary targets included “a military installation 28 miles away” and “a military depot deep in the desert.” *Id.* Whether or how the laws of armed conflict apply in such circumstances is not clear. What is clear, however, is that the expanded definition of self-defense and its resulting implementation worked, at least in the short term. Iraq temporarily stopped engaging coalition aircraft that were enforcing the no-fly zone.

¹⁸ The *ius in bello* means the law of armed conflict, international humanitarian law, or what was initially called the law of war. Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT’L L. 285, 287 n.5 (1996). In contrast, the *ius ad bellum* are the laws regarding the permissibility of employing the use of force in international law. *Id.* at 287 n.6. “*Ius*” is Latin meaning “law” or “right”. BLACK’S LAW DICTIONARY 837 (7th ed. 1999). In slight contrast, “*jus*” is Latin meaning “[I]aw in the abstract.” *Id.* at 863.

The article addresses whether the UN is bound by the international law of armed conflict, regardless of whether the UN is a signatory to the applicable Conventions. The article concludes that the law of armed conflict applies to peacekeeping forces if and when the forces cross the Geneva Conventions Common Article 2 threshold. However, the article posits that the armed conflict threshold for forces acting under the authority of the UN Security Council is somewhat higher than it is for conflicts between nation-states. Finally, the article asserts that the UN has the responsibility and duty to make clear the applicability or non-applicability of the international law of armed conflict to its peacekeeping forces, and recommends that if it is to be credible and effective in securing and maintaining global peace in this new millennium, the UN must do so.

II. VARIATIONS AND NORMS OF UNITED NATIONS PEACE OPERATIONS

A. Background and History of United Nations Chapter VI Peacekeeping

In 1945, the Security Council was conferred the “primary responsibility for the maintenance of international peace and security.”¹⁹ The five permanent Members of the Council²⁰ were each given veto power,²¹ pragmatically reflecting that, in order to maintain peace, there must be a consensus among the major powers. Following World War II, the drafters of the UN Charter presumed the victors, acting perhaps out of enlightened self-interest, would continue to cooperate with each other, in light of their recent successful joint effort. Instead, the opposite occurred. The world immediately became bipolar with conflicting Western democratic and Eastern communistic political ideologies undermining the new UN security mechanism.²² This was the start of the “Cold War.”

During the Cold War, instead of greater cooperation among world powers, the powers continued to grow apart.²³ The East-West rivalry rendered the security enforcement mechanism envisaged by the UN Charter utterly ineffectual. The veto power of the Security Council’s permanent Members frustrated any attempt to exercise its Chapter VII security and peace-

¹⁹ U.N. CHARTER art. 24, para. 1.

²⁰ The five permanent members are the Republic of China (originally occupied by Taiwan; now occupied by the People’s Republic of China), France, the Union of Soviet Socialist Republics (now occupied by Russia), the United Kingdom of Great Britain and Northern Ireland, and the United States of America. U.N. CHARTER art. 23, para. 1.

²¹ U.N. CHARTER art. 27, para. 3.

²² Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict after the Cold War*, 7 DUKE J. COMP. & INT’L L. 71, 73 (1996); See generally G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 NETH. INT’L L.R. 297 (1988).

²³ Alan K. Henrikson, *The United Nations and Regional Organizations: “King-Links” of a “Global Chain,”* 7 DUKE J. COMP. & INT’L L. 35, 44 (1996).

enforcement responsibility. Initiative after initiative failed as one or more of the permanent Members vetoed them. Yet, conflicts continued throughout the globe—some related to the end of the era of European colonialism and some growing out of local conflicts. Both types of conflicts were frequently “affected and aggravated” by the ongoing Cold War between the great world powers.²⁴

Indeed, the veto authority became a real impediment to peace. During the Cold War from 1945-1990, Security Council permanent Members vetoed 279 resolutions, effectively preventing the UN from taking constructive and determined action in over one hundred major conflicts. Those conflicts resulted in approximately twenty million deaths.²⁵ In response, and to facilitate the “adjustment or settlement of international disputes or situations which might lead to a breach of the peace,”²⁶ the UN generated a compromise—peacekeeping.²⁷

1. Classical United Nations Peacekeeping: United Nations Chapter VI—Pacific Settlement of Disputes²⁸

The UN Charter does not explicitly mention, nor authorize, peacekeeping. In actuality, the UN invented the concept. Peacekeeping operations loosely developed out of the UN Charter, specifically, Chapter VI, entitled “Pacific Settlement of Disputes.” Chapter VI directs that the Security Council may investigate situations that might lead to potential conflict. The Security Council, after considering any dispute settlement-procedures previously adopted by the parties to the conflict, may make recommendations to resolve the conflict.²⁹ Yet, peacekeeping is not expressly addressed within Chapter VI. Rather, it is inferred from Article 33 of the Charter.³⁰ A peacekeeping mission, in accordance with Article 33, is a “peaceful means”

²⁴ Edward J. Perkins, Comment, *United Nations Peace-Keeping*, 18 YALE J. INT’L L. 435 (1993).

²⁵ *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General*, para. 14, U.N. Doc. A/47/277/S/2411 (1992), at <http://www.un.org/Docs/SG/agpeace.html> (copy on file with the *Air Force Law Review*).

²⁶ U.N. CHARTER art. 1, para. 1.

²⁷ Perkins, *supra* note 24.

²⁸ U.N. CHARTER arts. 33-38.

²⁹ U.N. CHARTER art. 36, para. 1. See also, W. Michael Reisman, *Peacemaking*, 18 YALE J. INT’L L. 415, 416 n.9 (1993).

³⁰ U.N. CHARTER art. 33, para. 1 states: “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, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” (emphasis added).

chosen and consented to by the parties to pursue a peaceful settlement of a conflict.³¹

The Charter originally did not anticipate military forces, deployed under UN authority, interposing themselves between parties to an armed conflict. However, the Charter is a flexible political document containing many possibilities and interpretations, depending upon the international situation. The creation of peacekeeping is the pragmatic realization of one of these possibilities.³² In the words of a former UN Under Secretary-General for Political Affairs, “[t]he technique of peace-keeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947.”³³

Although not specifically mentioned in the UN Charter, peacekeeping is implied from the UN’s primary purpose. Article 1, as stated earlier, denotes that the primary purpose of the UN is to maintain international peace and security. It follows that the UN should be empowered with the means to fulfill its purpose.³⁴ The powers of the UN can not be ascertained by construing the Charter strictly. To do so would severely constrain the UN and could prevent it from ever acting. The UN must have implied powers to allow it to act to achieve its chartered mandate. Through its implied powers, the UN has created peace observer and peacekeeping units as an approved method of fulfilling its primary purpose.³⁵ Although peacekeeping operations are not specifically mentioned in the UN Charter, the International Court of Justice established that the Charter was sufficiently broad enough to allow the Security Council to monitor a conflict without having to resort to a Chapter VII peace-enforcement action.³⁶

³¹ J.M. Sanderson, *Dabbling in War: The Dilemma of the Use of Force in United Nations Intervention*, in PEACEMAKING AND PEACEKEEPER FOR THE NEW CENTURY 145, 148 (Olara A. Otunno et al. eds., 1998).

³² Berdal, *supra* note 22, at 74.

³³ Brian Urquhart, *The United Nations, Collective Security, and International Peacekeeping*, in NEGOTIATING WORLD ORDER: THE ARTISANSHIP AND ARCHITECTURE OF GLOBAL DIPLOMACY 59, 62 (Alan K. Henrikson ed., 1986).

³⁴ See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11) [hereinafter *Reparations Case*] (“[T]he Organization 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 it in the course of its duties.”) *Id.* at 182.

³⁵ Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT’L RET OG JUS GENTIUM 11, 12 (1985).

³⁶ *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 164-67 (Jul. 20). The I.C.J. agreed that the United Nations Charter authorized peacekeeping operations, to include peacekeeping operations authorized by the General Assembly. The I.C.J. cautioned, however, that “the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.” *Id.* at 163.

8-The Air Force Law Review

Essentially, peacekeeping operations are a “stop-gap” measure that suspends a conflict in order to allow the peace process to occur.³⁷ In 1948, the UN mounted its first peacekeeping operation under Chapter VI. The United Nations Truce Supervision Organization (UNTSO) went to the Middle East to monitor the truce in the 1948 Arab-Israeli War. The unarmed observers of UNTSO continue their mission in the Middle East today. They work alongside the two armed Middle East peacekeeping organizations: the United Nations Disengagement Observer Force (UNDOF) in the Golan Heights and the United Nations Interim Force in Lebanon (UNIFIL).³⁸

To be effective, a peacekeeping mission must be constructed according to the nature of the conflict, the parties involved, and the stability or fragility of the negotiated stay of the hostilities. Consequently, peacekeeping missions are as diverse as are the conflicts that generate them. For example, the UNTSO was deployed to monitor a cease-fire, while the United Nations Force in Cyprus (UNFICYP) and the United Nations Interim Force in Lebanon (UNIFIL) placed themselves between the parties to the conflicts preventing one side from crossing into the territory of the other. The Suez Canal/Sinai Peninsula Middle East United Nations Emergency Force II (UNEF II) also occupied a “buffer zone,” assisting the parties to the conflict to disengage and withdraw their forces. The Golan Heights United Nations Disengagement Observer Force (UNDOF) mandate included inspecting and verifying that the sides were complying with their accepted force sizes and weapons limits. Further exemplifying the diversity of peacekeeping operations, peacekeepers in both the Operations des Nations Unies au Congo (ONUC) and the UNFICYP directly assisted the parties to resolve their numerous ongoing controversies³⁹ by acting as on-the-spot mediators, directly participating in negotiations between the parties.

2. Chapter VI ½: Classical/Traditional Peacekeeping—The Applicable Norms

Classical, or what is also referred to as traditional, peacekeeping necessarily grew out of East-West Cold War antagonism in order to “fill a void created by the Cold War.”⁴⁰ Something needed to be done to help resolve regional conflicts, but permanent Members of the Security Council on one side of the bi-polar Cold War world simply vetoed resolutions that appeared beneficial to the other side and vice-versa. The UN created an end-run around this persistent use of the Security Council veto. This development is now

³⁷ Reisman, *supra* note 29, at 415.

³⁸ BOUTROS BOUTROS-GHALI, *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING* 17 (3d ed. 1996).

³⁹ Lehmann, *supra* note 35, at 15-16.

⁴⁰ Michael Stopford, *Peace-Keeping or Peace-Enforcement: Stark Choices for Grey Areas*, 73 U. DET. MERCY L. REV. 499, 502 (1996) (quoting Dag Hammarskjöld).

known as “classical” peacekeeping, and its source—Chapter VI ½. As a result, the UN was able to do something to bring about the “adjustment or settlement of international disputes or situations that may lead to the breach of the peace.”⁴¹

Though classical peacekeeping is not explicitly authorized in either Chapter VI or VII, it has an ever-increasing scope. Peacekeeping is more than just investigating and making recommendations to the parties on how to resolve a conflict as envisioned within the context of UN Charter Chapter VI. As a result, Secretary-General Dag Hammarskjold quaintly, but poignantly, expressed that classical peacekeeping is authorized by “United Nations Chapter VI and ½.”⁴² This characterization by the former Secretary-General deftly acknowledged that classical peacekeeping is truly a creative endeavor. Yet, the Secretary-General’s jocose description also anticipated the great difficulty in determining precisely where classical peacekeeping lies on the international diplomacy spectrums between “consent and coercion” and “passivity and force.”⁴³

Ultimately, Chapter VI and ½ peacekeeping is much more restrained than a Chapter VII peace-enforcement action. Classical peacekeeping is a sort of hybrid action of the United Nations—more vigorous than what Chapter VI authorizes, but much less robust than a Chapter VII peace-enforcement action. The classical peacekeeping mission is but one of many peace maintenance instruments available. The UN may resort to any of several types of peace operations that exist along a spectrum denoting different levels of host nation consent and military force. Nevertheless, understandably, “[m]ost U.N. operations are taken with full local consent.”⁴⁴

Essentially, peacekeeping is the use of military forces to secure and maintain peace, rather than using them to engage in war. Military personnel were frequently used in the Cold War as peacekeepers out of the necessity to limit and resolve conflicts without formally, but futilely, presenting a proposal to the UN Security Council to face an almost certain permanent Member veto. The role of a UN peacekeeper is in many ways symbolic, an instrument that shows international resolve for restoring and enforcing peace. Peacekeepers, although usually armed, are “to remain above the battle and only to use their weapons in the last resort for self defence.”⁴⁵

Peacekeepers are not combat forces—they merely monitor previously agreed-upon cease-fires and truces. This is not to say that traditional

⁴¹ U.N. CHARTER art. 1, para. 1.

⁴² See Thomas G. Weiss, *New Challenges for UN Military Operations: Implementing an Agenda for Peace*, WASH. Q. 51, 52 (Winter 1993).

⁴³ Stopford, *supra* note 40.

⁴⁴ WILLIAM J. DURCH, *THE EVOLUTION OF U.N. PEACEKEEPING: CASE STUDIES AND COMPARATIVE ANALYSIS* 5 (1993).

⁴⁵ Brian Urquhart, *The Future of Peace-Keeping*, 36 NETH. J. INT’L L. 50, 52 (1989).

10-The Air Force Law Review

peacekeepers never use force, but it is the exception and not the rule.⁴⁶ In practice, UN field commanders have rarely used force, except in self-defense. To operate otherwise would run counter to the need for continued consent of the parties and impartiality to them.⁴⁷ In the words of one author, “[t]he weapons used by a peacekeeper in achieving his objectives are those of negotiation, mediation, quiet diplomacy, tact and the patience of Job – not the self-loading rifle.”⁴⁸

Peacekeepers are usually posted between rival factions. The peacekeeper’s role is not typical military duty, but to provide an international presence, one that hopefully discourages the parties to the conflict from resuming hostilities.⁴⁹ The real value of peacekeeping is its expression of international resolve. The peacekeepers wear blue helmets, display the UN’s blue flag, and above all, seek to remain impartial and neutral. Generally, the object of peacekeeping is not to resolve the conflict, but rather to encourage a passive environment that allows the parties to constructively negotiate.⁵⁰ In short, “peace-keeping is not a soldier’s job, but only a soldier can do it.”⁵¹

The innovation of peacekeeping allowed the UN to gain relevance in dealing with armed conflicts throughout the globe. From the 1950’s onward, it began to involve itself, albeit superficially, in mitigating and containing small regional conflicts.⁵² With the consent of the belligerent parties to a local conflict, the UN intervened with lightly armed military forces.⁵³ Not surprisingly, even though the Security Council Members had the “primary responsibility for the maintenance of international peace and security,”⁵⁴ armed forces of its permanent Members rarely, if ever, participated in the peacekeeping operations.⁵⁵ The permanent Members of the Security Council

⁴⁶ From 1960-64, the United Nations authorized a peacekeeping force to restore law and order to the Congo. The United Nations Operation in the Congo (Operations des Nations Unies au Congo - ONUC) redefined and expanded the use of force in self defense to prevent local factions from preventing the peacekeepers from carrying out their mandate and responsibilities. “The concept of self defense, as well as the principles of non-intervention and sovereignty, were loosely defined and greatly modified in the Congo Operation.” Jon E. Fink, *From Peacekeeping to Peace-Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT’L L. & TRADE 1, 15 (1995).

⁴⁷ Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force*, 27 DENV. J. INT’L L. & POL’Y 239, 255-56 (1999).

⁴⁸ INDAR JIT RIKHYE, PEACEKEEPING: APPRAISALS & PROPOSALS 6 (1983).

⁴⁹ L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 324 (1993).

⁵⁰ Stopford, *supra* note 40.

⁵¹ C.C. MOSKOS, JR., PEACE SOLDIERS: THE SOCIOLOGY OF A UNITED NATIONS MILITARY FORCE, 139 (1976).

⁵² Berdal, *supra* note 22.

⁵³ Berdal, *supra* note 22, at 73-74.

⁵⁴ See U.N. CHARTER art. 24, para. 1.

⁵⁵ Berdal, *supra* note 22, at 73 n.11. The Soviet Union usually was extremely skeptical of United Nations peacekeeping operations, even actively opposing specific missions. Then, in 1987, the Soviet Union conceded the value of such operations. As a result, there was finally

reached a "basic understanding" that their military presence in such an operation could easily be counter-productive and possibly escalate a conflict rather than defuse it. Therefore, the permanent Members informally agreed that they should rarely, if ever, contribute forces to classical peacekeeping operations.⁵⁶

As a result of the Security Council permanent Members' political pragmatism, in not operationally participating in these largely symbolic United Nations peacekeeping missions, peacekeeping forces consisted of military personnel culled from small neutral countries, such as Austria, Fiji, Canada, and the countries of Scandinavia. This arrangement was first realized in 1956, during the Suez Canal Crisis, when Israel, France, and Great Britain invaded and occupied Egyptian territory. This military invasion by Israel and two permanent Security Council Members could have easily provoked the Soviet Union, another Security Council permanent Member State, to enter the conflict on behalf of Egypt. This would not have been desirable.⁵⁷

To solve the dilemma, when Secretary-General Dag Hammarskjöld created the United Nations Emergency Force (UNEF I) in response, he expressly denied the participation of all Security Council permanent Members. The UNEF I, composed of small-state forces, deployed to the Egypt-Israeli border. The UNEF I acted as a buffer while the French and British forces withdrew. This astute political solution acted as precedent in future UN peacekeeping operations. It facilitated the acquiring of consent from the parties involved in the conflict, ensured that the UN remained impartial, and ultimately, prevented the potential escalation of conflicts by eschewing direct super-power involvement.⁵⁸

UNEF I set numerous precedents for future UN peacekeeping operations. The consent of the host nation was now required for Chapter VI peacekeeping operations. Deployed peacekeeping forces would be impartial neutral observers and operate under UN command and control. Forces would be multi-national, but permanent Members of the Security Council would not contribute to them. Finally, the UN peacekeeping forces would operate under defensive rules of engagement.⁵⁹ These limitations became the norms for classical UN peacekeeping operations.

unanimity among the major powers that the United Nations had international authority to conduct peacekeeping operations. See Urquhart, *supra* note 45, at 52.

⁵⁶ Richard Connaughton, *Military Intervention and UN Peacekeeping*, in *TO LOOSE THE BANDS OF WICKEDNESS* 171 (Nigel Rodley ed., 1992).

⁵⁷ Lori F. Damrosch, *The Role of the Great Powers in United Nations Peace-Keeping*, 18 *YALE J. INT'L L.* 429 (1993).

⁵⁸ *Id.*

⁵⁹ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What Are the Applicable Norms*, 2 *REVUE BELGE DE DROIT INT'L* 559, 561 (1994). In summary,

[A] consistent body of [classical peacekeeping] practice and doctrine evolved over the years: peace-keepers functioned under the command and

12-The Air Force Law Review

a. Host Nation Consent

Without host nation consent, the UN is without authority to deploy armed forces on otherwise sovereign territory. The UN Charter states that “[t]he organization is based upon the principle of the sovereign equality of all its Members”⁶⁰ and that the United Nations shall not “intervene in matters which are essentially within the domestic jurisdiction of any state.”⁶¹ Absent a Chapter VII peace-enforcement resolution, the Security Council may only make recommendations to a Member State. Chapter VI does not contain any express provision that allows the Security Council to create a multi-national armed force composed of military members from UN Member States and unilaterally deploy that force to another sovereign nation-state. If the UN were to do so, it would be intervening in a sovereign state’s domestic jurisdiction. However, if a nation consents to the deployment of UN peacekeeping forces on its soil, there is no violation of national sovereignty.⁶²

Consent from the host nation remains the keystone of classical peacekeeping. As such, regardless of the consequences, if a nation or party to the conflict withdraws its consent, UN peacekeepers must withdraw. In 1967, for example, the United Arab Republic (Egypt) withdrew the consent it previously granted that allowed the stationing of the UNEF I. Egypt called for the complete withdrawal of UN peacekeeping forces from its territory. UN Secretary-General Dag Hammarskjold, fully understanding that UN forces could legally remain in Egypt only as long as its government allowed them to, ordered all UN forces to withdraw. Unfortunately, almost immediately after the UN forces withdrew from Egypt, the 1967 Middle East War began.⁶³

control of the Secretary-General; they represented moral authority rather than the force of arms; they reflected the universality of the United Nations in their composition; they were deployed with the consent and cooperation of the parties; they were impartial and functioned without prejudice to the rights and aspirations of any side; they did not use force or the threat of force except in self-defence; they took few risks and suffered a minimal number of casualties; and they did not seek to impose their will on any of the parties.

Tharoor, *supra* note 11.

⁶⁰ U.N. CHARTER art. 2 para. 1.

⁶¹ U.N. CHARTER art. 2 para. 7.

⁶² Brown, *supra* note 59, at 561-62.

⁶³ Lehmann, *supra* note 35, at 15. Secretary-General Dag Hammarskjold said the United Nations “could not request the Force to be stationed or operate on the territory of a given country without the consent of the Government of that country.” *Report of the Secretary General*, UN Doc. A/3302 (1956). After Egypt withdrew its consent, the United Nations Security Council could have changed the Chapter VI peacekeeping force into a Chapter VII coercive peacekeeping force. The Security Council did not seriously entertain this alternative. Yoel Arnon Tsur, *The United Nations Peace-Keeping Operations in the Middle East From*

After a country withdraws consent, peacekeeper force protection immediately becomes much more problematic. The country withdrawing consent might no longer recognize the UN personnel as having privileges and immunities while in the territory.⁶⁴ Additionally, a Member State that has contributed forces to the peacekeeping force may begin the immediate unilateral withdrawal of its troops ahead of the rest of the UN force. These factors work toward the UN removing UN personnel as soon as possible following withdrawal of consent.⁶⁵

Finally, the UN and the host nation usually formalize the host-nation consent with a Status of Forces Agreement (SOFA). The host-nation agrees to afford UN military forces full respect and allow the forces freedom-of-movement throughout the area of operations. An additional provision of any such SOFA is that UN personnel have absolute jurisdictional immunity from the host nation regarding criminal matters. Jurisdictional immunity of peacekeepers has long been a prerequisite before UN Member States will contribute soldiers to a peacekeeping force.⁶⁶

b. Impartiality of the United Nations and United Nations Peacekeepers

In a classical UN peacekeeping operation, the UN and UN peacekeeping military forces must remain impartial. The UN Charter treats all Member States of the UN as equal sovereigns.⁶⁷ In order to mediate a conflict effectively, the UN must maintain its status as a neutral and objective third party.⁶⁸ This neutrality distinguishes peacekeeping from peace-enforcement. In peace-enforcement, the Security Council determines an aggressor-state and then usually sides with the state that the aggressor-state unlawfully attacked.⁶⁹

1965 to 1976, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 183, 207-08 (A. Cassese ed., 1995).

⁶⁴ See generally Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16.

⁶⁵ Antonietta Di Blase, *The Role of the Host-Nation's Consent with Regard to Non-Coercive Actions by the United Nations*, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 55, 78 (A. Cassese ed., 1995).

⁶⁶ R.C.R. Siekmann, *The Codification of General Principles for United Nations Peace-Keeping Operations*, 35 NETH. INT'L L. REV. 328, 331 (1988).

⁶⁷ U.N. CHARTER art. 2, para. 1.

⁶⁸ See Brown, *supra* note 59, at 561-66. In the words of one observer,

Impartiality is the oxygen of peace-keeping: the only way peace-keepers can work is by being trusted by both sides, being clear and transparent in their dealings, and by keeping lines of communication open. The moment they lose this trust, the moment they are seen by one side as the "enemy," they become part of the problem they were sent to solve.

Tharoor, *supra* note 11, at 417-18.

⁶⁹ U.N. CHARTER art. 39 states:

14-The Air Force Law Review

In classical peacekeeping, however, the UN must treat parties to a conflict equally and not support one over the other. Equal treatment is the norm unless, of course, one party is in clear violation of international law. This impartiality applies equally in international and civil conflicts. If the UN were to support a rebel movement over a nation-state government, this support would imply that the UN does not believe the government is equal to other nation-state governments. Conversely, if the UN supported a nation-state government over a rebel organization and the organization subsequently came into power, the UN and individual nation-states might be reluctant to then recognize the new government. Most importantly, however, impartiality is essential in order to ensure the safety of peacekeepers and obtain the consent, trust, and continued cooperation of the parties to the conflict.⁷⁰

c. Operational Control and the Chain-of-Command of United Nations Peacekeepers

The UN is responsible for the direction and control of its peacekeeping forces. UN peacekeeping forces are required to follow its operational orders. The authority of the Security Council flows to the UN Secretary-General. The Secretary-General then appoints the Task Force Commander, who reports directly to, and takes orders from, the Secretary-General. In this way, the UN maintains operational control over a peacekeeping unit. However, direction and control of individual peacekeepers is often the responsibility of the individual soldier's country. As a result, the individual contributing nations still wield significant political influence as they may withdraw their individual forces at any time. However, the UN, as a matter of practice, alleviates the problem of one country prematurely withdrawing its forces from an operation by making the total force politically and geographically diverse. Therefore, even if one country withdraws its individual forces, the entire peacekeeping force does not become operationally compromised.⁷¹

Thus, a UN peacekeeping force is, by its very nature, multi-national. An individual soldier in this multi-national force is subject to both the UN and the soldier's respective national chain-of-command. The soldier's country

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 [measures not involving force] and 42 [demonstrations, blockade, and other operations by air, sea, or land forces], to maintain or restore international peace and security.

⁷⁰ See Brown, *supra* note 59, at 574-77. Classical peacekeeping's "fundamental principles are those of objectivity and nonalignment with the parties to the dispute, ideally to the extent of total detachment from the controversial issues at stake." INDAR JIT RIKHYE ET AL., *THE THIN BLUE LINE* 11 (1974).

⁷¹ See Brown, *supra* note 59, at 574-77.

trains, arms, and equips the soldier. Further, soldiers may be disciplined only by their respective national contingents. Yet, the UN exercises operational control over, feeds, and houses the soldier. Both the UN and the contributing nation exercise some control over the soldier, but neither has complete control. This dual command arrangement, with its inherent divided loyalties, is oftentimes problematic.⁷² Presently, however, there is no politically viable alternative.

d. The Composition of United Nations Classical Peacekeeping Forces

Peacekeepers within a UN force generally speak different languages and have different cultures, political ideologies, and religions. Although these differences obviously make peacekeeping operations more difficult, this extensive diversity in peacekeeping units gives legitimacy to the concept of neutrality and, hence, fosters better cooperation from the parties to the conflict. Further, a multi-national peacekeeping unit tends to be more compliant to the will of the UN Secretary-General than if the peacekeeping organization were composed of military personal from only a single Member State. If all soldiers of a peacekeeping force came from a single Member State, that State could

⁷² See Brown, *supra* note 59, at 574-77. Most countries are reluctant to release complete control of the forces they provide to United Nations peacekeeping operations. The United States, for example, when providing forces to the United Nations, prohibits its personnel from taking an oath of loyalty to the United Nations. Specifically, 22 USC § 2387 states:

Whenever the President determines it to be in furtherance of the purposes of this chapter, the head of any agency of the United States Government is authorized to detail or assign any officer or employee of his agency to any office or position with any foreign government or foreign government agency, where acceptance of such office or position does not involve the taking of an oath of allegiance to another government or the acceptance of compensation or other benefits from any foreign country by such officer or employee.

See also GLENN BOWENS, LEGAL GUIDE TO PEACE OPERATIONS 365 (1998):

No President has ever relinquished command over U.S. forces. Command constitutes the authority to issue orders covering every aspect of military operations and administration. The sole source of legitimacy for U.S. commanders originates from the U.S. Constitution, federal law and the Uniform Code of Military Justice and flows from the President to the lowest U.S. commander in the field. The chain of command from the President to the lowest U.S. commander remains inviolate.

See also U.S. v. New, 50 M.J. 729 (ACCA 1999), *pet. granted*, 52 M.J. 465 (1999) (lawful for U.S. commander to order U.S. soldier to wear United Nations insignia and beret during United Nations peacekeeping deployment).

16-The Air Force Law Review

potentially wield considerably more influence in the peacekeeping operation than either the UN or the Secretary-General.⁷³

As mentioned earlier, the UN generally excluded permanent Security Council Members from direct participation in peacekeeping operations. The Secretary-General, possibly at the implicit behest of the permanent Members, excluded them from peacekeeping duties to prevent peacekeeping operations from being embroiled in Cold War politics. Nevertheless, permanent Members did participate in a few peacekeeping operations. For example, Great Britain contributed to the peacekeeping force in Cyprus and the United States contributed to the peacekeeping force in Egypt following the Egyptian-Israeli peace-treaty. These two operations were the exceptions and not the rule. During the Cold War, the permanent Members of the Security Council generally did not participate in UN peacekeeping operations.⁷⁴

UN peacekeeping missions during the Cold War usually took place in generally civil operational environments.⁷⁵ The missions were often very successful. For example, the United Nations Disengagement Observer Force (UNDOF), deployed as observers to Syria in 1974 after the Yom Kippur War, masterfully facilitated the peaceful disengagement and withdrawal of both sides' armed forces from the disputed area.⁷⁶ After the successful withdrawal of forces, Egypt's President Nasser simply requested that UNDOF dissolve and it did.⁷⁷ Peacekeeping is, at present, internationally accepted as an appropriate vehicle for managing conflicts by acting as a buffer and giving parties to the conflict the ability to look for a long-term peaceful solution.⁷⁸

The end of the Cold War raised legitimate expectations that the number of international conflicts throughout the globe would significantly decrease. However, due to an epidemic of post-Cold War intra-national conflicts, the UN increased its peacekeeping operations, both in number and mission complexity. From 1948 to 1988, the UN authorized only 13 peace operations. From 1988 to 1998, a period of just ten years, the UN authorized thirty-six peace operations—over a 1000% increase from the preceding forty-year period. Such operations included the robust Article VI ½-Article VII hybrid

⁷³ See Brown, *supra* note 59, at 577-78.

⁷⁴ See Brown, *supra* note 59, at 578-79.

⁷⁵ The operative word is "generally." The conflict is usually held in abeyance. However, in most cases, the parties to the previous conflict remain armed, the land-area still heavily mined, and the underlying political problems far from resolved. Peacekeeping duty is never entirely safe.

⁷⁶ Berdal, *supra* note 22, at 74.

⁷⁷ Marianne von Grunigen, *Neutrality and Peace-Keeping*, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 125, 134 (A. Cassese ed., 1995).

⁷⁸ Unfortunately, parties to a conflict may sometimes illegitimately use the buffer created by the United Nations peacekeeping force as simply cover to avoid constructive negotiating toward a settlement. For this reason, United Nations peacekeeping missions should look to restoring and maintaining peace, and, simultaneously, pursue a negotiated settlement to the conflict. Lehmann, *supra* note 35, at 17.

peacekeeping actions in Somalia, Haiti, and the Balkans.⁷⁹ However, classical peacekeeping missions, the type of peace operations that occurred during and immediately after the Cold War, are becoming less frequent. Classical peacekeeping operations are being replaced by UN-authorized action performed by regional military organizations.⁸⁰

To illustrate, in mid-1993, UN peacekeepers numbered approximately 80,000 personnel. Four years later, at the end of 1997, the number of blue helmet peacekeepers dropped to 13,000.⁸¹ This reduction is attributable to regional military alliances and organizations such as the North Atlantic Treaty Organization (NATO), under the authority of the UN, assuming most of the responsibility of peacekeeping. When these UN-authorized multi-national and regional peacekeeping missions throughout the globe are taken into account, the number of peacekeepers has remained constant.⁸² This change in composition, from UN *ad hoc* classical peacekeeping forces to UN-authorized regional organization peacekeeping forces, has resulted in typically more robust, still dangerous, but more effective peacekeeping.⁸³

Currently, the UN, if it wishes to engage in a peace operation, must rely upon the good will of a limited number of its Member States able to conduct such an operation. Often, such Member States may want to control and demand to know exactly where and how their forces are to be used—understandably so. Additionally, Member States might only agree to participate if the peacekeeping force is organized under a regional alliance, authorized by the UN to perform a peacekeeping operation, but not under the UN command structure. As a result, the UN might not be able to remain directly involved in many future peacekeeping missions. This lack of UN direct involvement could lead to it losing legitimacy and credibility. Countries could perceive the UN as weak as it contracts out to regional military alliances its peacekeeping responsibilities and obligations rather than performing them itself.⁸⁴

⁷⁹ See United Nations, *UN Peacekeeping: Some Questions and Answers*, <http://www.un.org/Depts/dpko/dpko/ques.htm> (copy on file with the *Air Force Law Review*); and Willy Lubin, *Towards the International Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations: The Case of Somalia*, 52 INT'L COMM'N JURISTS 47 n.1 (1994).

⁸⁰ Grachev, *supra* note 4, at 277.

⁸¹ Examples of such missions include Bosnia-Herzegovina under the North Atlantic Treaty Organization (NATO), Liberia and Sierra Leone under the Economic Community of West African States (ECOMOG), multinational forces in Haiti led by the United States, forces in Rwanda led by France, and forces in Albania led by Italy. See Grachev, *supra* note 4, at 276.

⁸² Grachev, *supra* note 4, at 277.

⁸³ See generally Henrikson, *supra* note 23.

⁸⁴ See Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 FORDHAM INT'L L.J. 312, 320 (1995).

18-The Air Force Law Review

e. Self-Defensive Rules of Engagement and the Use of Force by United Nations Peacekeepers in Classical Peacekeeping Operations

The final customary norm of UN classical peacekeeping is that the use of force is restricted to self-defense. UN Charter Article 2(1) recognizes “the sovereign equality of all of its Members”⁸⁵ and Article 2(7)⁸⁶ restricts the UN from intervening in state domestic matters, except during Chapter VII enforcement actions.⁸⁷ Although the UN Charter does not explicitly address the use of armed force in a classical peacekeeping operation, nor provide any rules or guidelines,⁸⁸ authorized use of force in a classical peacekeeping operation is generally limited to self-defense. Further, the use of force must be proportional to the situation.⁸⁹

Although peacekeeping operations use professional military personnel, they generally do not envisage combat as the means to mission accomplishment. In this regard, Chapter VI peacekeeping is clearly distinguished from Chapter VII peace-enforcement combat operations. Classical peacekeeping is founded on consent of the parties to the conflict. Since the parties have consented to the presence of the peacekeepers, the need to resort to force is greatly diminished. As a result, classical peacekeepers are generally only equipped with weapons for use in self-defense.⁹⁰ As explained by William Durch, “[p]eacekeepers may be armed, but only for self-defense; what constitutes appropriate self-defense will vary by mission, but because they are almost by definition outgunned by the disputants they are sent to monitor, any recourse to force must be calibrated to localize and diffuse, rather than escalate, violence.”⁹¹

⁸⁵ U.N. CHARTER art. 2, para. 1.

⁸⁶ U.N. CHARTER art. 2, para. 7 states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

⁸⁷ Brown, *supra* note 59, at 570.

⁸⁸ See Siekmann, *supra* note 66, at 328.

⁸⁹ See generally Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

⁹⁰ Lehmann, *supra* note 35, at 15-16.

⁹¹ DURCH, *supra* note 44, at 4. In 1958, United Nations Secretary-General Dag Hammarskjöld warned against interpreting “self-defence” too broadly. He said that “a wide interpretation of the right of self-defence might well blur the distinction between [peacekeeping] operations and combat operations, which would require a decision under Chapter VII of the Charter and an explicit, more far-reaching delegation to the Secretary-General than would be required for [peacekeeping] operations.” *Summary Study of the Experience Derived from the Establishment and Operation of the Force*, UN Doc. A/3943 of Oct. 9, 1958, paras. 178-79.

When a UN peacekeeping unit resorts to force, its neutrality and its obligations under international law might be legitimately questioned.⁹² Restricting the use of force to self-defense attempts to ensure that the UN peacekeepers remain impartial to the conflict and do not take sides. Peacekeepers can maintain a presence in a country only if the country gives its consent. If a peacekeeping unit took sides in the conflict, it would, in essence, become a hostile force. The actions, and even the mere presence of such a force, could greatly damage relations with the host-country and easily lead the host-country to withdraw its consent. For this reason, it is imperative that UN peacekeeping units remain impartial and only use force in self-defense.⁹³

A classical Chapter VI ½ peacekeeping force has no authority or mandate for offensive operations. To use force offensively against a party to the conflict would violate the sovereignty of a state and constitute unauthorized intervention in violation of UN Charter Articles 2(1) and 2(7) which assume that all Member States are equal sovereigns.⁹⁴ However, UN Charter Article 104 grants the UN, operating within the borders of its Member States, whatever legal rights are “necessary for the exercise of its functions and the fulfillment of its purposes.”⁹⁵ In this regard, it is imperative that a peacekeeping unit has the legal right to defend itself if attacked.⁹⁶ Equally necessary, a peacekeeping unit must be able to use force when aiding another peacekeeping force being attacked. Peacekeeping forces, of course, may also collectively defend themselves.⁹⁷

Initially, the use of force in self-defense was generally limited to the most dire of circumstances. Such circumstances included the “imminent danger of death, bodily harm, arrest, or abduction.”⁹⁸ However, these restrictive rules of engagement proved unworkable. Out of operational necessity, the UN began to considerably broaden its definition of the use of force in self-defense. During the early 1960s, the UN authorized a 20,000-

⁹² See Lubin, *supra* note 79, at 48.

⁹³ See Brown, *supra* note 59, at 573. Sir Brian Urquhart explains: “Experience shows that a peace-keeping force which uses its weapons for purposes other than self-defence quickly becomes part of the conflict and therefore part of the problem. It loses its essential status as being above the conflict and acceptable to all sides.” Urquhart, *supra* note 45, at 54.

⁹⁴ See Brown, *supra* note 59, at 570.

⁹⁵ U.N. CHARTER art. 104.

⁹⁶ See Brown, *supra* note 59, at 570.

⁹⁷ See Brown, *supra* note 59, at 571.

⁹⁸ See Brown, *supra* note 59, at 571. Indeed, the Secretary-General first stated that members of a peacekeeping unit “could not use force on their own initiative.” A peacekeeping unit could legitimately use force in self-defense only if the force was taken in direct response to being attacked by a party using deadly force. *First Report of the Secretary-General*, para. 15, U.N. SCOR, 15th Sess., Supp., Jul.-Sep. 1960, at 19, U.N. Doc. S/4389 (1960), cited in Brown, *supra* note 59, at 571 n.90. This extremely restrictive authorization of the use of force in self-defense by a peacekeeping unit would only be viable when all parties to the conflict are entirely committed to resolving the conflict and, as a result, fully welcome and cooperate with the peacekeepers. Brown, *supra* note 59, at 571.

20-The Air Force Law Review

member force to establish law and order in the Congo. The UN peacekeeper rules of engagement initially authorized force only in self-defense. However, as the nature of the operation became more complicated, the UN resorted to an expansive definition of “self-defense”—to include even the authorization of pre-emptive strikes against parties to the conflict who were likely to attack the peacekeepers.⁹⁹ In subsequent classical peacekeeping operations, however, this expanded definition of self-defense has rarely been necessary or realistic.

To constitute the legitimate use of force in self-defense in a classical peacekeeping operation, the force must be both necessary and proportional. In other words, there must be a potential or real threat that justifies the use of force and the soldier may not use any greater force than is necessary to deal with the threat. If attacked with deadly force, a peacekeeper may respond with deadly force. After the threat is neutralized, the soldier must stop using force.¹⁰⁰ When a peacekeeper uses proportionate force in self-defense, the peacekeeper does not then lose noncombatant¹⁰¹ protection. However, a peacekeeper, if engaged in sustained conflict and no longer acting strictly in self-defense, could lose noncombatant status, become a combatant¹⁰² and then be *lawfully* engaged as a target.¹⁰³ As a practical matter, however, peacekeeping operations generally do not involve peacekeeping forces entering into a state of armed conflict with the actual parties to the conflict. Because peacekeepers in classical “blue helmet” peacekeeping operations have limited

⁹⁹ D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 202-203 (1964).

¹⁰⁰ See Brown, *supra* note 59, at 573.

¹⁰¹ The term noncombatant is used to describe individuals who may not be lawfully targeted. Such individuals include civilians, medical personnel, chaplains, and combat personnel who “have been placed out of combat by sickness, wounds, or other causes including confinement as prisoners of war.” AFPAM 110-31, *supra* note 13, at para. 3-4(a-d)(1976). The term also includes United Nations peace-keeping forces. See *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, § 1.2, ST/SGB/1999/13 (1999), available at http://www.un.org/peace/st_sgb_1999_13.pdf (copy on file with the *Air Force Law Review*) [hereinafter *Secretary-General's Bulletin*] (explaining that the “bulletin does not affect [United Nations peacekeepers’] status as non-combatants, as long as they are entitled to protection given to civilians under the international law of armed conflict.”).

¹⁰² One source defines “combatant” as follows:

A combatant is a person who engages in hostile acts in an armed conflict on behalf of a Party to the conflict. A lawful combatant is one authorized by competent authority of a Party to engage directly in armed conflict. He must conform to the standards established under international law for combatants . . . The combatant, thus invested with authority, must be recognizable as such.

AFPAM 110-31, *supra* note 13, at para. 3-2(a-d). Combatants are lawful targets and may be engaged at any time during an armed conflict. See U.S. Dept. of the Air Force, Air Force Pamphlet 110-34, Commander's Handbook on the Law of Armed Conflict, paras. 2-6 to 2-7 (1980) (reissue pending at AFI 51-709) [hereinafter AFPAM 110-34].

¹⁰³ See Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 625 n.12 (1995).

the use of force to self-defense, the application of the law of armed conflict to such operations has not been questioned.¹⁰⁴

B. United Nations Charter Chapter VI ¾ Peacekeeping Operations—Robust Operations

During post-Cold war active and robust Chapter VI ½ peacekeeping operations, the UN military forces tend to operate under more vigorous rules of engagement. Such robust operations are sometimes referred to as Chapter VI ¾ peacekeeping operations. In such cases, the definition of self-defense is expanded. For example, in 1992, the United Nations Protection Force (UNPROFOR) was given the mission in Bosnia-Herzegovina to protect convoys and supplies designated for humanitarian purposes. The Secretary-General, while not authorizing the UN peacekeepers to engage in offensive operations, again used an expanded definition of “self-defense.”¹⁰⁵ The Secretary-General declared that peacekeepers in Bosnia-Herzegovina “would follow normal peace-keeping rules of engagement [and] would thus be authorized to use force in self-defence . . . It is noted that in this context self-defence is deemed to include situations in which armed persons attempt by force to prevent UN troops from carrying out their mandate.”¹⁰⁶ He also said that UN peacekeepers would protect convoys, if requested to do so by the UN High Commissioner for Refugees. UN peacekeepers would also accompany repatriated prisoners of war to safe areas, if requested to do so by the International Committee of the Red Cross (ICRC).¹⁰⁷

This expanded (arguably loose) definition of self-defense is likely to become the applicable norm for UN peacekeeping forces in future robust peacekeeping operations. A UN force may protect itself in self-defense, and it may prevent another armed force from interfering with it, while it is carrying out a UN mandate. However, any response must be proportionate to the attack in that it is directed at subduing the attackers and it makes every reasonable effort to prevent the fight from escalating. Additionally, the use of armed force, taken in response to actions that prevent the accomplishment of the UN mandate, must be tied to humanitarian concerns. By limiting coercive use of force to humanitarian circumstances, the peacekeepers can maintain the moral authority necessary to ensure their safety and continue their mission.¹⁰⁸

Because of the very recent development of robust Chapter VI ½ peacekeeping operations, as well as their inherent complexities, the UN has yet to create consistent and workable rules regarding the use of force in such operations. Although it has formulated workable guidelines as to the use of

¹⁰⁴ See Gardam, *supra* note 18, at 291.

¹⁰⁵ GREEN, *supra* note 49, at 324.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

force in self-defense in classical Chapter VI ½ peacekeeping operations, there is little agreement as to how the laws of armed conflict apply during robust Chapter VI ½ operations.¹⁰⁹

C. United Nations Charter Chapter VII Peace-Enforcement Operations

Chapter VII of the UN Charter is entitled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.”¹¹⁰ A Chapter VII peace-enforcement action is not a peacekeeping mission. Yet, just as the UN Charter does not mention peacekeeping, neither does it mention the term “peace-enforcement.” Even so, essentially any Chapter VII operation is one of creating and then maintaining peace. As the UN cannot be expected to mount a peacekeeping operation when there is no peace to be kept, Chapter VII envisages that the UN will, in certain circumstances, affirmatively enforce and make peace.

Peace-enforcement is distinct from peacekeeping as it usually involves the use of force against a nation-state, whereas classical peacekeeping limits the use of force to self-defense.¹¹¹ Yet, to date, the UN has never conducted, nor authorized, a “pure” peace-enforcement action. Rather, in the form of “neopeace-enforcement,”¹¹² the UN has only “invited” or “requested” its Member States to take offensive military action on its behalf. Further, it has only authorized four such “neopeace-enforcement” operations.¹¹³ It is Article 43 of the UN Charter¹¹⁴ that was envisaged to be the primary instrument of the

¹⁰⁹ Akashi, *supra* note 84, at 320. Some say it is simply too difficult to apply the international law of armed conflict to United Nations peacekeeping operations. Instead, international humanitarian law should remain merely “relevant” to peacekeeping operations. Lehmann opines:

It is probably too complicated and not even necessary to try to incorporate the UN peace-keeping system into the negeal framework of international humanitarian law applicable in armed conflicts, but on a case by case basis special considerations might be given to the effect of that body of law on the proper functioning of the UN peace-keeping operations.

Lehmann, *supra* note 35, at 17.

¹¹⁰ U.N. CHARTER arts. 39-51.

¹¹¹ See Gardam, *supra* note 18, at 290-92.

¹¹² Neopeace-enforcement refers to “the practice of the Security Council to contract out enforcement actions to Member States.” Sharp, *supra* note 11, at 103.

¹¹³ Sharp, *supra* note 11, at 100-01. The four “neopeace-enforcement” actions were the authorization of Member States to repel North Korea’s invasion of South Korea in 1950, the authorization to intercept oil tankers bound for Southern Rhodesia in 1966, and two authorizations for Member States to eject Iraq from Kuwait in 1990-91. Sharp, *supra* note 11, at 102, n.41.

¹¹⁴ U.N. CHARTER art. 43 states:

UN Security Council in peace-enforcement. The goal was creation of a standing UN military force to be used to secure and maintain international peace. Due to Member State political differences, this force has yet to come into being.¹¹⁵

As there are no military forces at the Security Council's direct disposal, its Military Staff Committee has no forces to direct in a "pure" peace-enforcement action. Instead, the Security Council occasionally has authorized Member States to conduct Chapter VII "neopeace-enforcement actions"¹¹⁶ on behalf of the UN. The two most notable of these include the 1950 Korea neopeace-enforcement action and the 1991 neopeace-enforcement action against Iraq. In both cases, although it was the UN that authorized offensive military action, the operations were not under the command of the UN.¹¹⁷ Further, in both cases, the forces authorized by the UN were "belligerent forces in an international armed conflict," and therefore, under existing international

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, 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.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

¹¹⁵ Sharp, *supra* note 11, at 101. One international law authority has proffered an idealistic, albeit presently politically impossible, approach to achieve more effective peacekeeping and increase United Nations credibility. Burns H. Weston has recommended that Member States specially train military forces for peacekeeping duties and agree to place them on permanent standby in accordance with United Nations Charter Article 43. See RICHARD A. FALK, ROBERT C. JOHANSEN, & SAMUEL S. KIM, *THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE* 362 (1993). Military equipment and supplies would be stockpiled and available for immediate use by peacekeeping forces activated on short notice. The United Nations would have much more flexibility to respond immediately with peacekeeping forces to crises as they arise. They would be available to be deployed into immediate action. If a regional crisis reached a certain established threshold, the United Nations would begin peacekeeping operations automatically, without consulting the Security Council. The peacekeeping forces could enter the territory of a country without first gaining that country's consent. United Nations peacekeeping operations would be directed toward securing an expeditious end to the conflict. However, more importantly, peacekeeping efforts would be directed toward the long-term stability of the region. *Id.* Such an arrangement would put the United Nations in the forefront of international peace and security.

¹¹⁶ See Sharp, *supra* note 11, at 102-03.

¹¹⁷ BOUTROS-GHALI, *supra* note 38, at 6.

24-The Air Force Law Review

law, the personnel who served in these armed forces were lawful targets.¹¹⁸ For the purposes of this article, however, peace-enforcement actions refer to both “pure” peace-enforcement and “neopeace-enforcement” actions.

UN Charter Chapter VII provides the authority to enforce peace in the spirit of international collective defense. UN Member States, when authorized by the Security Council under Chapter VII, may take military action against an unlawfully expansionist military state or power.¹¹⁹ Chapter VII of the Charter envisages that the UN Security Council would enforce the peace initially through provisional measures such as “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.”¹²⁰ If these measures should prove to be inadequate, UN Charter Article 42¹²¹ authorizes the Member States to pursue collective military offensive operations against the offending state or states.¹²² The Security Council may “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”¹²³

1. *The Cold War—The Korean War*

During the Cold War, the UN Security Council authorized a Chapter VII peace-enforcement action to repel North Korea's invasion of South Korea. A unique set of circumstances led to this authorization. In 1950, to protest the UN decision to seat the Chinese Nationalist Formosa government instead of the Chinese Communists at the Security Council, the Soviet Union recalled its permanent representative from the Council.¹²⁴ On June 24th of that year, the North Koreans, supported by the Soviet Union, invaded South Korea. The United States called an emergency meeting of the Security Council. As a result of the fortuitous absence of the Soviet Union's representative and,

¹¹⁸ Sharp, *supra* note 11, at 102.

¹¹⁹ Sanderson, *supra* note 31, at 148.

¹²⁰ U.N. CHARTER art. 41.

¹²¹ U.N. CHARTER art. 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, or other operations by air, sea, or land forces of Members of the United Nations.

(emphasis added).

¹²² Sanderson, *supra* note 31, at 148.

¹²³ U.N. CHARTER art. 42.

¹²⁴ BRIAN CROZIER ET AL., *THIS WAR CALLED PEACE* 92, 93 (1984). The Soviet Union recalled its Security Council permanent representative from Jan. 10, 1950 to Aug. 1, 1950. Berkhof, *supra* note 2, at 300 n.6.

concomitantly, the absence of the Soviet Union's permanent Member veto authority, the Council was able to denounce the invasion, order North Korea to withdraw its forces from South Korea,¹²⁵ and recommend that Member States provide military forces to counter North Korea's invasion of South Korea.¹²⁶

If the Soviet Union had been present at the Security Council, there is little doubt that they would have vetoed the UN peace-enforcement operation. Countries, if they acted at all, would have had to take action in their sovereign national capacity instead of under the authority of the UN.¹²⁷ The absence of the Soviet Union permanent representative was an anomaly that never happened again.¹²⁸ The Soviet Union permanent representative did not miss future meetings of the Security Council.¹²⁹ The Security Council was again at an impasse.¹³⁰ As a result, the United States turned to the UN General Assembly, which passed the famous "Uniting for Peace Resolution."¹³¹ This resolution authorized continuing military action against North Korea until the conflict concluded. With the Uniting for Peace Resolution, the General Assembly assumed a cooperative, but unequal, role with the Security Council in international peace and security.

¹²⁵ J.D. Godwin, *NATO's Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1, 15 (1999). The Soviet Union was fully informed that the Security Council was going to vote to condemn the invasion of North Korea. The Soviet Union responded, taking the position that any vote without their presence would be illegal. The Soviet Union miscalculated in believing their absence was, in effect, a veto of any Security Council action. Instead, the Security Council voted without them, condemning North Korea's invasion of the South and authorizing a United Nations force to repel it. See Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 238 (1998).

¹²⁶ Henrikson, *supra* note 23, at 44.

¹²⁷ Lehmann, *supra* note 35, at 14.

¹²⁸ Berkhof, *supra* note 2, at 301.

¹²⁹ Godwin, *supra* note 125, at 15. The Soviet Union permanent representative returned to the Security Council on July 27, 1950. The representative then made numerous unsuccessful attempts to unseat the Formosa Nationalist Chinese representative from the Security Council. The Soviet Union permanent representative attended every subsequent Security Council meeting regarding Korea, vetoing every subsequent resolution pertaining to the Korean conflict. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 67 (1993).

¹³⁰ A. B. FETHERSTON, *TOWARDS A THEORY OF UNITED NATIONS PEACEKEEPING* 27 (1994).

¹³¹ U.N. GAOR 5th Sess., Supp. No. 20, at 10 (UN Doc. A/1775) (1950). The General Assembly made the following resolution:

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security [the General Assembly] may make appropriate recommendations for collective measures, including in the case of a breach of the peace or act of aggression the use of armed forces when necessary, to maintain or restore international peace and security.

Id.

26-The Air Force Law Review

The Korean conflict was the only time that the UN has undertaken a peace-enforcement action in the name of the UN. It condemned North Korea, a non-Member, for its aggression against South Korea. Because the Members of the UN had not created any military force as envisaged by UN Charter Article 43, the Security Council requested Member States to contribute military forces to be used in opposing North Korea's aggression. These forces were then organized and placed under the command of the UN. However, the United States provided the most forces and, most importantly, the command and control for the unified UN Command.¹³² Ultimately, the UN Command and the United States Command were, for all practical purposes, the same. As a result, the UN had a very limited role in military operations throughout the Korean conflict.¹³³

On July 27, 1953, the parties to the conflict signed an armistice at Panmunjom.¹³⁴ The borders were reestablished to substantially what they were prior to North Korea's invasion, and a demilitarized zone (DMZ) roughly along the 38th parallel still separates the two countries. Although the parties agreed to end active hostilities, it was merely the beginning of an unsettled peace. North Korea and South Korea are still technically in a state of war. The UN accepted victory in the form of a stalemate, a stalemate that still exists.¹³⁵ Today, the UN Command—with the United States continuing to act as the United Nations' named executive agent—remains vigilant, effectively deterring North Korea from resuming hostilities.

2. *Post-Cold War—The Persian Gulf War*

The Persian Gulf War is the second notable Security Council peace-enforcement action. The underpinnings of the conflict trace back to when Kuwait provided millions of barrels of oil on credit to Iraq during its 1980-88

¹³² GREEN, *supra* note 49, at 321-22. The United States contributed approximately 250,000 troops to Korean operations. Fifteen Member States contributed an additional 36,000 troops. Lehmann, *supra* note 35, at 14. United States personnel killed-in-action numbered 33,629. Other contributing countries' personnel losses numbered 3195. The high losses to the contributing nations made the United Nations Member States very reluctant to again choose this method of peace-enforcement. BERKHOF, *supra* note 2, at 301.

¹³³ Lehmann, *supra* note 35, at 14. See also Bruce Russett & James S. Sutterlin, *The U.N. in a New World Order*, FOREIGN AFF., Spring 1991, at 69, 73-74 ("The U.S. Commander of the U.N. Force in Korea never reported directly to the Security Council and the Military Staff Committee and the Security Council did not have any role in directing the military operations of the unified command.")

¹³⁴ BERKHOF, *supra* note 2, at 301. An armistice is merely a "temporary suspension of hostilities by agreement between the opponents." (emphasis added). WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 103 (9th ed. 1984).

¹³⁵ Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 238 (1998).

armed conflict with Iran.¹³⁶ When Kuwait would not forgive Iraq's extensive debt, Iraq became belligerent. Iraq accused Kuwait of "slant drilling" and taking disproportionate shares of a common oil field along the Iraq-Kuwait border. It further made accusations that Kuwait was exceeding oil quotas agreed to by the members of the Organization of Petroleum Exporting Countries (OPEC) and thereby was responsible for Iraq's lagging economy. Finally, Iraq demanded that Kuwait relinquish its sovereignty of certain islands in the Persian Gulf. Even though Iraq had previously assured its Arabian neighbors that it would not resort to military force, on August 2nd, 1990, Iraq attacked Kuwait. Iraq crossed its southern border and invaded Kuwait with over 100,000 troops. Kuwait's military was quickly routed. The Security Council, at the request and urging of the United States, convened an emergency meeting, condemned the invasion and demanded that Iraq immediately withdraw from Kuwait. This was the first of numerous Security Council actions leading up to the Persian Gulf War.

Military forces "invited" by the Security Council conducted the UN peace-enforcement action in Korea from 1950-53. In contrast, forces "authorized" by the Security Council conducted the UN peace-enforcement action in the Persian Gulf War in 1991.¹³⁷ Yet, the military action taken against Iraq also was not a true UN peace-enforcement action.¹³⁸ It was an action in collective self-defense. The Security Council first officially affirmed that Kuwait had "the inherent right of individual or collective self-defense, in response to an armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."¹³⁹ The Amir of Kuwait then requested the United States to assist Kuwait in collective self-defense to restore the legitimate Kuwaiti government.¹⁴⁰ After this request, the Security Council authorized "Member

¹³⁶ For a discussion of the events leading up to armed conflict, see L.C. Green, *The Gulf 'War,' the UN and the Law of Armed Conflict*, 28 ARCHIV DES VOLKERRECHTS 369, 373-74 (1991).

¹³⁷ Lubin, *supra* note 79, at 49 nn.4-5.

¹³⁸ GREEN, *supra* note 49, at 322.

¹³⁹ S.C. Res. 661, U.N. SCOR, U.N. Doc. S/RES/661 (1990), *reprinted in* 29 I.L.M. 1325 (1990).

¹⁴⁰ The full text of the Aug. 12, 1990 letter from the Kuwaiti Amir to the President of the United States reads as follows:

Dear Mr. President,

I am writing to express the gratification of my government with the determined actions which the Government of the United States and other nations have taken and are undertaking at the request of the Government of Kuwait. It is essential that these efforts be carried forward and that the decisions of the United Nations Security Council be fully and promptly enforced. *I therefore request on behalf of my government and in the exercise of the inherent right of individual and collective self-defense as recognized in Article 51 of the UN Charter that the United States Government take such military or other steps as are necessary to ensure that economic measures designed to fully restore our rights are effectively implemented.* Further, as

28-The Air Force Law Review

States co-operating with Kuwait . . . to use all necessary means to uphold and implement” the resolutions.¹⁴¹ The Security Council gave Iraq an ultimatum to withdraw from Kuwait by January 15, 1991. After Iraq failed to do so, the Persian Gulf War Coalition began massive air strikes and, approximately a month later, conducted a ground assault that overwhelmed Iraqi forces in only three days. The Coalition fully liberated Kuwait, ejecting all Iraqi forces, by the end of February 1991.¹⁴²

The action against Iraq was, ultimately, a UN authorized military action in “collective self-defense” in accordance with Article 51, and not a pure peace-enforcement action.¹⁴³ Coalition military forces remained under their own national contingents. The national contingents were organized and placed under the strategic command of United States General H. Norman Schwarzkopf. The Coalition forces did not wear UN insignia and were not bound to follow UN tactical instructions.¹⁴⁴

D. Peacekeeping Versus Peace-Enforcement

Distinctions between peacekeeping missions authorized under UN Charter Chapter VI and peace-enforcement operations authorized under Chapter VII need to be clearly defined. Any use of force by a Chapter VI peacekeeper must be strictly construed, as Chapter VI peacekeepers may only use armed force in self-defense. UN peace-enforcement operations, on the other hand, routinely involve the use of force, oftentimes actual combat, as a means of securing peace. Accordingly, the two operations, peacekeeping and peace-enforcement, are fundamentally different.

Chapter VI peacekeeping operations should be specifically tailored to the situation or crisis and, generally, preclude offensive military operations. The rules of engagement regarding the use of force must be clear and

we have discussed, I request that the United States of America assume the role of coordinator of the international force that will carry out such steps.

With warmest regards,
Amir of the State of Kuwait

(emphasis added) (copy on file with the *Air Force Law Review*).

¹⁴¹ S.C. Res. 678, U.N. SCOR, 45th Sess., 2963 mtg., U.N. Doc. S/RES/678 (1990), reprinted in 29 I.L.M. 1565 (1990). This resolution was in sharp contrast to the Security Council’s 1950 Korea conflict resolution in which the Soviet Union “abstained” (was not present to vote) and the Republic of China voted affirmatively. In the Security Council’s resolution authorizing Member States to use all necessary means to eject Iraq from Kuwait, the People’s Republic of China abstained and Russia voted affirmatively.

¹⁴² HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATIONS OF UNITED NATIONS MILITARY OPERATIONS* 17-18 (1996).

¹⁴³ Article 51 of the United Nations Charter states in pertinent part: “Nothing in the present Charter shall impair the inherent right of collective self-defence if an armed attack occurs against a Member of the United Nations . . .” U.N. CHARTER art. 51.

¹⁴⁴ GREEN, *supra* note 49, at 322-23.

peacekeeping soldiers must apply them equally to all parties to the conflict. In order to avoid losing credibility and to prevent escalating the conflict, Chapter VI peacekeeping soldiers must exercise great discretion in the use of force. If Chapter VI peacekeepers regularly use force, the mission becomes expanded to a *de facto* peace-enforcement mission for which the peacekeepers are not likely adequately prepared or equipped.¹⁴⁵

The distinction between peacekeeping and peace-enforcement is, currently, not nearly as clear as many believe or would wish. The Security Council can change a peacekeeping mission or mandate so that it begins to take on the character of a peace-enforcement action. Secondly, peacekeeping operations frequently are animated and fluid, subject to rapid changes in intensity. As one highly experienced UN peacekeeper explains:

Once violence erupts the peacekeeper must often wait until the smoke of battle clears and the parties have agreed to take their first steps toward conflict resolution. In cases where the fighting does not stop and a decision is taken to intervene regardless, we are no longer talking about peacekeeping, but rather enforcement, intervention, or plain old war. Whatever we call it, we are in a totally different province from peacekeeping.¹⁴⁶

The UN commander on the ground, duty-bound to protect his force, must then ascertain what laws apply. The commander is given a mission and is duty-bound to carry it out. Yet, as the commander's responsibilities and mission implicitly change from peacekeeping toward peace-enforcement, so do the applicability or non-applicability of the law of armed conflict. Unfortunately, the commander will not usually have a military lawyer immediately available to sort out whether or not the UN military force has become a party to the conflict resulting in the attendant application of the law of armed conflict.¹⁴⁷

This is why there should continue to be a clear distinction between peacekeeping and peace-enforcement operations. UN “[f]orces must not cross the impartiality divide from peacekeeping to peace enforcement. If perceived to be taking sides, the force loses its legitimacy and credibility as a trustworthy third party, thereby prejudicing its security.”¹⁴⁸ Nevertheless, the distinction has of late been blurred as UN peacekeeping forces are given more robust operational contingencies causing peacekeeping missions to creep toward active peace-enforcement. This has the highly undesirable effects of eroding

¹⁴⁵ Akashi, *supra* note 84, at 320-21.

¹⁴⁶ JAMES H. ALLEN, PEACEKEEPING: OUTSPOKEN OBSERVATIONS BY A FIELD OFFICER 39 (1996).

¹⁴⁷ Thomas B. Baines, The Laws of War and the Rules of Peacekeeping 3-4, Paper Presented to the Joint Services Conference on Professional Ethics (Jan. 31, 1997), at <http://www.usafa.af.mil/jscope/JSCOPE97/Baines97.htm> (copy on file with the *Air Force Law Review*).

¹⁴⁸ Max R. Berdal, *Fateful Encounter: The United States and UN Peacekeeping*, 36 SURVIVAL 1, 5-6 (1994).

30-The Air Force Law Review

the credibility of the mission and endangering peacekeepers.¹⁴⁹ In the words of former Secretary-General Boutros Boutros-Ghali:

The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.¹⁵⁰

Unfortunately, the UN and its Member States do not have a clear and consistent policy regarding the use of force, except in the case of a classical peacekeeping operation in which peacekeepers are limited to the use of force in self-defense. Absent a cogent policy on the use of force in situations outside classical peacekeeping, a peacekeeping mission should not be allowed to become something it is not—a peace-enforcement mission. In other words, peacekeeping and peace-enforcement, in accord with their different mandates, must remain distinctly different missions. Peacekeeping should only be authorized under Chapter VI and peace-enforcement operations should only be authorized under Chapter VII. If a classical peacekeeping mission begins to change and take on the character of a peace-enforcement operation, the UN should formally change the mission. It should withdraw its noncombatant peacekeepers, modify its previous mandate to a Chapter VII operation, and deploy a more appropriately trained and equipped combat force to accomplish the mission.¹⁵¹

The decision to mount a Chapter VI peacekeeping mission results from political and military considerations that are quite different from those that would dictate a Chapter VII peace-enforcement action. Peacekeeping is intended to suspend a conflict and allow the parties to pursue a long-term peaceful solution. A peace-enforcement action, on the other hand, is the use of military force to compel the desired result. The dynamics of the peacekeeping and peace-enforcement are entirely distinct from each other. If the clear distinction between these two separate UN security mechanisms becomes blurred, other ongoing peacekeeping missions can lose credibility and peacekeepers could be endangered. Peacekeeping, in which force may only be used in self-defense, and peace-enforcement, in which force is used to obtain a desired result, must be kept as separate and distinct alternatives. They should not be looked upon as points on a continuum in which a peacekeeping mission

¹⁴⁹ See *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fifteenth Anniversary of the United Nations, Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 50th Sess., para. 35, U.N. Doc. A/50/60, S/1995/1 (1995).

¹⁵⁰ *Supplement to an Agenda for Peace: Report of the Secretary General*, 9 para. 35, U.N. Doc. S/1995/1A/50/60 (1995).

¹⁵¹ Akashi, *supra* note 84, at 320-21.

would, if the military or political situation should change, simply change with it and expand into a peace-enforcement action.¹⁵²

If such a significant change in political or military circumstances occurs within a peacekeeping mission, the UN must re-evaluate its collective position. Should it wish to continue its mission as one of peace-enforcement, the UN should then withdraw its peacekeeping forces. It should exclusively and expressly undertake peace-enforcement missions only under Chapter VII. Then, Member States could contribute appropriately trained and equipped peace-enforcement military forces. As a practical matter, however, these forces, authorized under Chapter VII, might have both peacekeeping and peace-enforcement duties. The forces should be given the appropriate resources to adequately perform the enforcement operation and, if necessary, to escalate it. The peacekeeping forces should be given clear rules of engagement, tailored to the specific mission, as to when and in what circumstances armed force is to be used in order to avoid inappropriately escalating the conflict and undermining the UN intended end-state to the conflict.¹⁵³

E. Protection of Peace-Keepers

Over the past decade, the size and complexity of peacekeeping operations have greatly increased.¹⁵⁴ Concomitantly, the danger to

¹⁵² BOUTROS-GHALI, *supra* note 10, at 15-16; *see also* Marrack Goulding, *The Evolution of United Nations Peace-Keeping*, 69 INT'L AFF. 451 (1993). Goulding notes:

Creating this kind of grey area between peace-keeping and peace-enforcement can give rise to considerable dangers. In political, legal and military terms, and in terms of survival of one's own troops, there is all the difference in the world between being deployed with the consent and cooperation of the parties to help them carry out an agreement they have reached and, on the other hand, being deployed without their consent and with powers to use force to compel them to accept the decisions of the Security Council.

Id. at 461.

¹⁵³ Akashi, *supra* note 84, at 322.

¹⁵⁴ *See generally* Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, in THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW, 121 (Helen Durham & Timothy L.H. McCormack eds., 1999) [hereinafter Cartledge, *Legal Constraints*].

Peacekeeping operations in the 1990s have seen the following activities being undertaken: military, including cease-fire monitoring, cantonment and demobilisation of troops, and ensuring security for elections; policing; human rights monitoring and enforcement; information dissemination; observation, organisation and conduct of elections; rehabilitation and reconstruction of State structures; repatriation and resettlement of large

peacekeeping personnel has also dramatically increased. Many countries have become reluctant to contribute troops to peacekeeping operations due to the dramatic increase in risks. In order to be able to better protect UN peacekeepers, the UN General Assembly has entertained several proposals by Member States. Ukraine, for example, proposed that the UN create an international mobile peacekeeping force, specifically trained and equipped to be used to provide back-up assistance to peacekeepers should they come under prolonged attack. New Zealand advocated that UN peacekeepers should be designated internationally protected persons. As such, anyone who harmed them would be criminally prosecuted.¹⁵⁵

Some within the UN Secretariat believed the problem of protecting peacekeepers was so serious that it was imperative that the UN immediately act with a resolute response and policy. Others argued against the UN providing additional protections to its peacekeepers. These people were concerned that the UN would eventually have to negotiate with the same people who have been attacking the peacekeepers. In other words, if the UN were to criminalize these attackers, these people argued that it would then be impossible for the UN to work with them after hostilities had ceased.¹⁵⁶ Still others were concerned that if the UN enforced the protection of its peacekeepers through additional and possibly more destructive military action, the parties to the conflict might blame and then attack the peacekeepers for causing the additional action.¹⁵⁷

This is not to say that peacekeepers were not afforded any protection. For example, the 1980 UN Convention on the Prohibition or Restriction on the Use of Conventional Weapons expressly provided that peacekeepers receive information regarding the location of mines within an area of operations. Specifically, Article 8 of the Convention's second Protocol requires that each party to the conflict must provide all available information regarding the number, types, and locations of mines and booby traps in the area to the UN peacekeeping force.¹⁵⁸ However, it was clear that much more had to be done.

numbers of people; administration during transition of one regime to another; [and] working with or overseeing the operations of regional or non-UN peacekeeping operations.

Id. at 124, n.7 (citing Ramesh Thakur, *Introduction: Past Imperfect, Future Uncertain*, in *THE UNITED NATIONS AT FIFTY: RETROSPECT AND PROSPECT 7* (Ramesh Thakur, ed., 1996)).

¹⁵⁵ Connie Peck, *Summary of Colloquium on New Dimensions of Peacekeeping*, in *NEW DIMENSIONS OF PEACEKEEPING* 181, 190 (Daniel Warner ed., 1995); see also Bloom, *supra* note 103, at 622. When finalized, the Safety Convention had drawn upon both the approaches of New Zealand and the Ukraine. *Id.*

¹⁵⁶ Peck, *supra* note 155, at 190.

¹⁵⁷ See generally *id.*

¹⁵⁸ Lehmann, *supra* note 35, at 16-17. Article 8 reads as follows:

Protection of United Nations forces and missions from the effects of minefields, mines and boobytraps.

In 1992, the UN General Assembly set up a committee to draft a Convention to protect UN peacekeepers. Three years later, the General Assembly adopted the Convention on the Safety of UN and Associated Personnel.¹⁵⁹ This Convention criminalizes attacks on UN personnel engaged in peacekeeping operations. In no way does the Convention limit the right of UN personnel to defend themselves.¹⁶⁰

The Geneva Conventions do not address circumstances where the parties to a conflict attack UN peacekeepers and the peacekeepers respond in self-defense, but do not become “parties to the conflict.”¹⁶¹ However, should an attack on a classical peacekeeper escalate into an armed conflict, the peacekeeper will not lose protection under the Safety Convention. If a classical peacekeeper engages an attacker strictly in self-defense, regardless of whether combat has taken place, the peacekeeper is still a noncombatant and not a party to the conflict, and, therefore, not a lawful target. The attacker, on the other hand, is a war criminal engaging in an unlawful attack on a noncombatant.¹⁶²

1. When the United Nations force or mission performs functions of peacekeeping, 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 the 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 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.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or Have Indiscriminate Effects, art. 8, 1342 U.N.T.S. 137, 171, *reprinted in* 19 I.L.M. 1523, 1533 (1980).

¹⁵⁹ Convention on the Safety of United Nations Personnel, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994) [hereinafter Safety Convention], *reprinted in* 34 I.L.M. 482, 492 (1995); *see generally* Gardam, *supra* note 18, at 287 n.4; and Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 HOUS. J. INT'L L. 359, 370-464 (1996).

¹⁶⁰ Bloom, *supra* note 103, at 630. Article 21 of the Convention states that “Nothing in this Convention shall be construed so as to derogate from the right to act in self-defense.” Safety Convention, *supra* note 159.

¹⁶¹ Greenwood, *supra* note 15, at 189.

¹⁶² *See* Bloom, *supra* note 103, at 625-26 n.12.

34-The Air Force Law Review

III. THE APPLICATION OF THE INTERNATIONAL LAWS OF ARMED CONFLICT TO UNITED NATIONS FORCES: HOW AND WHEN DOES THE LAW OF ARMED CONFLICT APPLY?

A. United Nations Classical Peacekeepers as Noncombatants

The law of armed conflict generally does not apply to peacekeepers because they are not in a state of armed conflict with anyone.¹⁶³ As noncombatants, UN peacekeepers are protected as such under Geneva Convention Common Article 3¹⁶⁴ and Additional Protocol I, Articles 37(1)(d)¹⁶⁵ and 38.¹⁶⁶ To designate themselves clearly as noncombatants, peacekeepers wear blue helmets and armbands. Only the UN may authorize the wearing of its emblems and symbols. It is unlawful for a non-peacekeeper to wear UN insignia to avoid being targeted. A party to the conflict that does so is guilty of perfidy¹⁶⁷ and may be punished accordingly.¹⁶⁸ It follows that Protocol I assumes that UN peacekeeper personnel have protected standing. However, the Protocol does not define or explain the extent or attributes of this "protected status."¹⁶⁹ It is clear, however, that Protocol I is meant to apply to

¹⁶³ Cartledge, *International Humanitarian Law*, *supra* note 14, at 150 ("[Traditional] UN peace-keeping operations by their very nature do not normally involve armed conflict.").

¹⁶⁴ The four Geneva Conventions of 1949 provide identical language at Common Article 3, protecting "[p]ersons taking no active part in the hostilities." *See, e.g.*, Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 19, 6 U.S.T. 3114 (entered into force Oct. 21, 1950).

¹⁶⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 37, 1125 U.N.T.S. 7. The Protocol prohibits "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." Art. 37(1)(d), 1125 U.N.T.S. at 21, *reprinted in* 16 I.L.M. at 1409.

¹⁶⁶ Article 38 of Protocol I makes it unlawful to misuse the United Nations flag or emblem. Article 38 states: "[I]t is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 38, 1125 U.N.T.S. 3, 22, *reprinted in* 16 I.L.M. 1391, 1409.

¹⁶⁷ Perfidy is a violation of the international law of armed conflict. Perfidy involves a party to the conflict "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 Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature*, Dec. 12, 1977, art. 37(1), 1125 U.N.T.S. 3, 22, *reprinted in* 16 I.L.M. 1391, 1409.

¹⁶⁸ *See* GREEN, *supra* note 49, at 323-24. Although the United States has not ratified Protocol I, the United States views the art. 37 & 38 perfidy provisions as customary international law. UNITED STATES ARMY OPERATIONAL LAW HANDBOOK, 5-2 & 5-3 (Manuel E. F. Supervielle et al. eds., 2000) [hereinafter OPS LAW HANDBOOK].

¹⁶⁹ Greenwood, *supra* note 15, at 190.

classical peacekeeping missions and not to apply during peace-enforcement actions where UN forces are engaged as combatants.¹⁷⁰

However, the law of armed conflict will apply if the UN peacekeepers become a party to an armed conflict through the use of force for reasons other than self-defense. Should this happen, there are many resulting consequences. When the law of armed conflict applies, "captured force members would be entitled to prisoner of war status, forces actively engaged in hostilities would be lawful military targets, and enemies would be entitled to combatants' privilege."¹⁷¹ Of primary importance, however, if UN peacekeepers are parties to the conflict and the law of armed conflict applies, is that the peacekeepers are no longer protected as noncombatants. As a result, the "participants in a conflict will target U.N. forces as enemies."¹⁷²

B. The Law of Armed Conflict as Applicable to Classical Peacekeeping Operations—The "Principles and Spirit" of the Law

Classical peacekeeping forces are part of and act under the authority of the UN. The UN as an organization is not bound by the Conventions relating to the law of armed conflict, except in cases where the Conventions represent international customary law.¹⁷³ The international law of armed conflict, historically, has always been directed toward obligating parties to a conflict to conduct themselves in a manner that prevents unnecessary suffering. The law of armed conflict refers to belligerent parties, parties to the conflict, states,

¹⁷⁰ Greenwood, *supra* note 15, at 190 n.26.

¹⁷¹ Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 58-59 (1993). The combatant's privilege entitles a combatant to kill or wound an enemy combatant without criminal penalty. In addition, Goldman writes that "[a] lawful combatant possessing [the] privilege must be given prisoner of war status upon capture and immunity from criminal prosecution under the domestic laws of his captor for his hostile acts which do not violate the laws and customs of war." *Id.* See also Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 110 (1997). Telford Taylor explains the combatant's privilege as follows:

War consists largely of acts that would be criminal if performed in time of peace - killing, wounding, kidnapping, and destroying or carrying off other people's property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over its warriors.

cited in NATIONAL SECURITY LAW 359 (John Norton Moore et al. eds., 1990)

¹⁷² Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 111 (1997).

¹⁷³ REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 115 (Patricia S. Rambach et al eds., 1971) [hereinafter REPORT OF THE CONFERENCE]. However, individual states that are signatories to the respective conventions are bound.

enemy forces, powers, High Contracting Parties, and signatories. A UN peacekeeping force, however, does not nicely fit into any of these categories.¹⁷⁴ The UN is not a signatory to the Geneva Conventions and therefore, arguably, the UN forces are not obligated to follow the terms of the Conventions. Regardless of this view, the Geneva Conventions capsule a great deal of customary international law that would then apply to all parties to an international armed conflict.¹⁷⁵ As noted by Daphna Shruga and Ralph Zacklin of the ICRC:

[T]he argument that the United Nations cannot become a party to the Geneva Conventions because their final clauses preclude participation by the Organization, although still valid, is largely irrelevant to the question of applicability of these conventions to UN operations. The Geneva Conventions which have now been widely recognized as part of customary international law are binding upon all States, and therefore, also upon the United Nations, irrespective of any formal accession.¹⁷⁶

Although the ICRC had long maintained that all international humanitarian law applies to UN peacekeepers whenever they use force, the UN had officially taken the position that peacekeepers are obligated to follow only the "principles" and "spirit" of the international law of armed conflict.¹⁷⁷ For example, the instructions given to the 1957 United Nations Emergency Force (UNEF) in the Sinai stopped well short of naming the UN as a party to the international law of armed conflict conventions. Instead of requiring UN forces to follow the Conventions, the Secretary-General directed that "[t]he force shall observe the *principles and spirit* of the general international conventions applicable to the conduct of military personnel."¹⁷⁸

Similarly, the United Nations Force in Cyprus (UNFICYP) guidelines instructed the peacekeeping forces to respect the "principles and spirit" of international law regarding the conduct of military forces. Generally speaking, this meant that peacekeepers were not bound by all international law, such as the technical rules regarding the creation and operation of a prisoner of war camp. However, the peacekeeping forces, in keeping with the principles and spirit of the law of armed conflict were to conduct themselves in accordance with general principles of proportionality, military necessity, martial honor, chivalry, humanity, and the prevention of unnecessary suffering. Additionally, they were to avoid military action that could potentially discredit the UN or

¹⁷⁴ Lehmann, *supra* note 35, at 16. However, individual participating states do fit into the categories.

¹⁷⁵ Bloom, *supra* note 103, at 624 n.11.

¹⁷⁶ Shruga & Zacklin, *supra* note 10, at 47.

¹⁷⁷ Cartledge, *Legal Constraints*, *supra* note 154, at 127.

¹⁷⁸ REGULATIONS FOR THE UNITED NATIONS EMERGENCY FORCE OF 20 FEBRUARY 1957: APPLICABILITY INTERNATIONAL CONVENTIONS, OBSERVANCE OF CONVENTIONS, para. 44, *reprinted in* R.C.R. SIEKMANN, BASIC DOCUMENTS ON UNITED NATIONS AND RELATED PEACE-KEEPING FORCES 168 (2d ed. 1989) (emphasis added).

negatively affect the legitimacy of the mission. For example, in keeping with these principles, the peacekeepers were to distinguish between civilian and military forces and between civilian and military objectives. The UN forces could only use authorized weapons, prohibiting the use of weapons designed to cause unnecessary suffering.¹⁷⁹

In writing the general operational guidelines for UNFICYP, the Secretary-General explicitly authorized the use of force when protecting UN posts. Further, the Secretary-General allowed UNFICYP to use armed force if a party attempted to gain unauthorized entrance to their posts, if peacekeeping forces were compelled to leave their posts, and if a party attempted to disarm them. Finally, the Secretary-General authorized peacekeepers to use force when required to stop a party from forcibly attempting to impede peacekeeping operations or attempting to prevent peacekeepers from fulfilling their responsibilities.¹⁸⁰

The UN, as a “non-party” to the Geneva Conventions, sought to ensure the peacekeeping operations, both in theory and in practice, were entirely distinct from peace-enforcement combat operations. Applying the law of armed conflict to peacekeeping operations could ultimately lead to tragic consequences. For example, one fundamental law of armed conflict, specifically the combatant's privilege,¹⁸¹ allows a military member of one force to shoot and kill an enemy combatant virtually at any time.¹⁸² If peacekeepers shoot and kill hostile local inhabitants because of a misconception as to the application of the law of armed conflict to the peacekeeping operation, in addition to the actual tragedy, the entire operational mission would deteriorate. In short, it is unnecessary, dangerous and counterproductive to apply the law of armed conflict to most peacekeeping operations.¹⁸³ For this reason, and others, the UN has been very reluctant to endorse the application of the law of armed conflict to classical peacekeeping operations.

Even though it repeatedly declined to become a party to the Geneva Conventions, many called upon the UN to respect the Conventions and ensure UN forces complied with them.¹⁸⁴ In 1969, one commentator proposed that

¹⁷⁹ Lehmann, *supra* note 35, at 16.

¹⁸⁰ Brown, *supra* note 59, at 571, citing *Aide-Memoire*, in *N. concerning the function and operation of UNFICYP*, U.N. SCOR, 19 Sess., Supp. For Apr.-Jun. 1964, at 13, U.N. Doc. S/5653 (1964). See also, discussion at *supra* note 46.

¹⁸¹ See generally, discussion at *supra* note 171.

¹⁸² Cartledge, *International Humanitarian Law*, *supra* note 14, at 153. Of course, there are exceptions to the combatant's privilege. Combatants who are *hors de combat*, such as a soldier in the act of surrendering, a prisoner of war, or one who is wounded or sick, may not lawfully be engaged. See, e.g., AFPAM 110-31, *supra* note 13, at para. 3-3(a).

¹⁸³ Cartledge, *International Humanitarian Law*, *supra* note 14, at 153.

¹⁸⁴ For example, the 1954 Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, made this resolution: “The Conference expresses the hope that the competent organs of the United Nations should decide, in the event of military action being taken in implementation of the Charter, to ensure application of the Convention by the armed

38-The Air Force Law Review

the UN enact a resolution binding itself and its military forces to follow the Geneva Conventions.¹⁸⁵ In 1971, the Institute of International Law adopted a resolution entitled "The Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which UN Forces may be Engaged." Article 2 of the resolution states:

The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces, which are engaged in hostilities.

The rules referred to in the preceding paragraph include in particular:

- (a) the rules pertaining to hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives;
- (b) the rules contained in the Geneva Conventions of August 12 1949;
- (c) the rules which aim at protecting civilian persons and property.¹⁸⁶

The resolution never attracted a following. However, in 1991, the UN formulated its Model Participation Agreement to be used in peacekeeping operations. Before commencing a peacekeeping operation, the UN and the Member States that contribute forces agree to the following:

forces taking part in such action." *Reprinted in R.C.R. SIEKMANN, BASIC DOCUMENTS ON UNITED NATIONS AND RELATED PEACE-KEEPING FORCES* 78 (2d ed. 1989).

¹⁸⁵ REPORT OF THE CONFERENCE, *supra* note 173, at 111. Finn Seyersted of the Embassy of Norway proposed the following United Nations resolution:

[The . . . United Nations . . .]

1. *Declares* that, should any force of the United Nations become involved in any armed conflict, it will apply the provisions of the Geneva Conventions of August 12, 1949, and the Hague Convention of May 14, 1954.
2. *Declares* that the United Nations will require the States providing personnel to any United Nations force to take, in respect for such personnel, such penal and other action as is necessary for the enforcement of the said Conventions.
3. *Declares* that, when the Conventions refer to the law or the courts of the Detaining or the Occupying Power or to the conditions of treatment of its nationals, the law courts and conditions of one or more of the States providing personnel will be applied, if the Organisation has no applicable law, competent courts or relevant conditions of its own.
4. *Requests* the Secretary-General to transmit this resolution to the International Committee of the Red Cross and to U.N.E.S.C.O.

REPORT OF THE CONFERENCE, *supra* note 173, at 111 n.23.

¹⁸⁶ Institute of International Law, *Resolutions Adopted and Recommendations Made by the Institute at its Wiesbaden Session, August 6-15, 1975, Conditions of Application of Rules, Other Than Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged*, 56-II ANNUAIRE DE L'INSTITUT DE DROIT INT'L 540 (1975), *reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 903 (Dietrich Schindler & Jiri Toman, eds., 1988).

[The United Nations peacekeeping operation] shall observe and respect *the principles and the spirit* of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of Armed Conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving with [the United Nations peacekeeping operation] be fully acquainted with the *principles and spirit* of these Conventions.¹⁸⁷

The principles and spirit of international humanitarian law can be an illusive concept. Yet, the concept has, for the most part, protected the noncombatant status of UN peacekeepers and has provided a framework for appropriate conduct in peacekeeping operations.

Military personnel participating in 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 in areas of ongoing hostilities.¹⁸⁸

C. Equal Application of the Laws of Armed Conflict

Since 1928, international law has outlawed war.¹⁸⁹ As a result, some have argued that an aggressor-state should not be entitled to equal application of the law.¹⁹⁰ In other words, an aggressor-state and the state it unlawfully attacked should no more be on an equal legal footing than should a criminal be

¹⁸⁷ *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Operations, Report of the Secretary-General*, U.N. GAOR, 46th Sess., Annex, para. 28, U.N. Doc. A/46/185 (1991) (emphasis added). Once a Member State contributes forces to a peacekeeping operation, the forces come under the Secretary-General who directs the forces through the United Nations Force Commander. The forces are under operational control of the United Nations, but concurrently serve under officers of their respective national contingents. Tittlemore, *supra* note 171, at 79-80.

¹⁸⁸ Sharp, *supra* note 11, at 134-35.

¹⁸⁹ GENERAL TREATY FOR RENUNCIATION OF WAR AS AN INSTRUMENT OF NATIONAL POLICY 2 Bevens 732; 46 Stat. 2343; Treaty Series 796; 94 L.N.T.S. 57 (1928). Since 1928, "war" between nations has been prohibited. According to the 1928 Paris Treaty, the use of force is only authorized in self-defense or to punish unlawful aggression. The treaty essentially made war an international crime. REPORT OF THE CONFERENCE, *supra* note 173, at 94.

¹⁹⁰ See, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112, 154 (1963); NATIONAL SECURITY LAW, *supra* note 171, at 369-70. A fundamental principle of the international law of armed conflict is that it applies equally to all parties to a conflict. The principle of "equal application" operates independently from the issue of the legality of the use of force, the *ius ad bellum*. See generally Gardam, *supra* note 18.

40-The Air Force Law Review

equal to the victim of a crime.¹⁹¹ This theory of “unequal application,” however, presumes the existence of a legitimate means to determine the aggressor. The UN, for one, has not traditionally made decisions that name the aggressor and the subject of aggression to an armed conflict.¹⁹² Further, neither the Hague nor the Geneva Conventions provide any basis for providing one party to the conflict more or less protection than another party.¹⁹³ Even more specifically, Article 1 of all four Geneva Conventions clearly states the Conventions are applicable in “all circumstances.”¹⁹⁴

Yet, regarding peacekeeping operations, it has been suggested that UN forces “are soldiers without enemies and therefore fundamentally different from belligerent forces.”¹⁹⁵ If UN personnel were to be subject to the international law of armed conflict, this would place the UN, the global organization charged with maintaining international peace and security, on a plane equal to that of an aggressor nation-state whose use of force presumably violated international law.¹⁹⁶ However, the equality of the UN versus the nation-state waging an armed conflict of aggression is not at issue.

At issue is the equality of *military conduct* as between UN military personnel and the armed forces of the opposing nation-state in a robust-peacekeeping or peace-enforcement action. The UN should be at the forefront of respecting, and promoting respect among its Member States for the international law of armed conflict. The way to show such respect to the law, as well as to foster respect by its Member States, is to lead by example and adhere to the Conventions.¹⁹⁷ One might then expect that the principles of the law of armed conflict, as followed by UN forces, would also be followed by the belligerent parties taking action against the peacekeepers. For example, should a belligerent party detain UN military forces, rules regarding prisoners-of-war could be applicable.¹⁹⁸

¹⁹¹ See REPORT OF THE CONFERENCE, *supra* note 173, at 98.

¹⁹² The exception, of course, would be UN peace-enforcement actions.

¹⁹³ See REPORT OF THE CONFERENCE, *supra* note 173, at 99.

¹⁹⁴ See REPORT OF THE CONFERENCE, *supra* note 173, at 98.

¹⁹⁵ THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 598 (Bruno Simma ed., 1994).

¹⁹⁶ Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, in I YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 14 (Horst Fischer et al. eds, 1998).

¹⁹⁷ Toni Pfanner, *Application of International Humanitarian Law and military operations undertaken under the United Nations Charter*, in SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 49-58 (Umesh Palwankar ed., 1994); See also Titemore, *supra* note 171, at 105 (“[L]ess than strict adherence to the law of armed conflict by U.N.-authorized forces engaged in hostilities may actually encourage other parties to armed conflicts to disregard humanitarian law vis-à-vis U.N. forces.”).

¹⁹⁸ Lehmann, *supra* note 35, at 16. Additionally, Bowens notes:

The U.S. believes that individuals captured while performing UN peacekeeping or UN peace enforcement activities, whether as members of a UN force or a U.S. force executing a UN Security Council mandate, should,

As Sharp notes, “[u]nder existing international law, non-belligerent forces acting under 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.”¹⁹⁹ However, in light of more frequent and robust UN peace operations, one possible solution is to change the law of armed conflict to give absolute protected status to all “persons who serve the international community under the authority of the United Nations”²⁰⁰ and make them “unlawful targets under all circumstances.”²⁰¹ This argument loosely analogizes UN military forces to police officers in a global domestic society. However, “[i]nternational society does not replicate the features of a national community and the United Nations does not at this stage command the degree of support and respect for its authority which is accorded to the organs of government within most national societies.”²⁰²

UN military forces are not global police officers and any push to develop them into some kind of global police force is, although not utterly utopian, most certainly approaching a utopian view. In reality, the protection discussed above, if granted to UN military forces, would ultimately serve to endanger them. If the *same* penalty would inevitably attach to both the killing of noncombatant UN peacekeepers and the killing of combatant UN peace-enforcers, a party to a conflict might believe it prudent to preemptorily engage and eliminate lightly-armed noncombatant UN peacekeepers to forego any possibility of having to later oppose them as aggressive and more lethal combatant UN peace-enforcers. In other words, it would “encourage an approach that one might as well be hanged for a sheep as a lamb.”²⁰³

as a matter of policy, be immediately released to UN officials; until released, at a minimum they should be accorded protections identical to those afforded prisoners of war under the 1949 Geneva Convention III (GPW) In appropriate cases, the U.S. would seek assurances that U.S. forces assisting the UN are treated as experts on mission for the United Nations, and thus entitled to appropriate privileges and immunities and are subject to immediate release when captured.

GLENN BOWENS, LEGAL GUIDE TO PEACE OPERATIONS 366 (1998). According to the Convention on the Privileges and Immunities of the United Nations, UN “experts on mission” are accorded “[i]mmunity from personal arrest or detention . . . [i]nviolability for all papers and documents . . . [and] [t]he same immunities and facilities in respect to their personal baggage as are accorded to diplomatic envoys.” Convention on the Privileges and Immunities of the United Nations, Feb. 12, 1946, 1 U.N.T.S. 15, art. VI, sec. 22. See also Lepper, *supra* note 159, at 365-69.

¹⁹⁹ Sharp, *supra* note 11, at 137-38.

²⁰⁰ *Id.* at 164.

²⁰¹ *Id.*

²⁰² Greenwood, *supra* note 15, at 204.

²⁰³ Greenwood, *supra* note 15, at 206.

42-The Air Force Law Review

Additionally, and perhaps more importantly, if UN forces were privileged with *superior* rights as to the use of force in a peace-enforcement operation, the law of armed conflict could become much more difficult to enforce in other conflicts against other parties. If UN personnel were not accountable under the law of armed conflict, the other parties to the conflict could very well believe they also should not be held accountable.²⁰⁴

The law of armed conflict is based on the principle of equality of application. A state or party to a conflict follows the law because it anticipates the other party will reciprocate, *non facio ne facias*. No examples exist where one state has bound itself to the law of armed conflict without asserting and expecting reciprocity. Without equal application and reciprocity among both parties to a conflict, the law of armed conflict could become meaningless.²⁰⁵ As Sir Hersch Lauterpacht succinctly explained, "it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them."²⁰⁶

Nevertheless, during the Korean Conflict, some believed that the UN needed only to comply with those *ad hoc* international laws of armed conflict it chose. In 1952, the Committee on the Study of Legal Problems of the UN argued that the law of armed conflict was not designed to apply to UN operations. It explained:

The Committee agrees that the use of force by the United Nations to restrain aggression is of a different nature from war-making of a state. The purposes for which the laws of war were instituted are not entirely the same as the purposes of regulating the use of force by the United Nations. This we may say without deciding whether United Nations enforcement action is war, police enforcement of criminal law, or *sui generis*. In the present circumstances then, the proper answer would seem to be, for the time being, that the United Nations should not feel bound by the laws of war, but should select such of the laws of war as may seem to fit its purposes (e.g., prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible

²⁰⁴ Peck, *supra* note 155, at 190. McCoubrey & White note the following:

It could hardly be appropriate for forces acting under UN authority to be seen as licensed to practice barbarities greater than anything permissible for the parties already engaged in the situation which they are emplaced to terminate. In short, those who seek to act in the cause of lawfulness and humanity must surely themselves, in principle, be willing to be bound, at the minimum, by the basic humanitarian norms of the *jus in bello*.

HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATIONS OF UNITED NATIONS MILITARY OPERATIONS* 155-56 (1996).

²⁰⁵ See REPORT OF THE CONFERENCE, *supra* note 173, at 98.

²⁰⁶ Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 212 (1953).

with its purposes. We think it beyond doubt that the United Nations, representing practically all the nations of the earth, has the right to make such decisions.²⁰⁷

As a matter of practice, however, during both the Korean and the Persian Gulf conflicts, the peace-enforcement military forces authorized by the UN made every attempt to comply with the law of armed conflict. The peace-enforcement forces scrupulously complied with the applicable Conventions, despite continued blatant violations by both North Korea and Iraq.²⁰⁸ Even though the Security Council determined that Iraq's invasion of Kuwait violated UN Charter Article 2(4),²⁰⁹ the Security Council never maintained that Iraq's illegal act relieved Coalition military forces from their obligation to follow the law of armed conflict.²¹⁰ The Security Council did, however, rightly declare on numerous occasions that Iraq was legally bound to follow the international law of armed conflict.²¹¹

To foster reciprocal adherence to the international law of armed conflict, the UN, when obligated to do so, must also follow it. As the Air Force stated in one of its handbooks on the law of armed conflict:

The law of armed conflict applies equally to both sides in all international wars or armed conflicts. This is true even if one side is guilty of waging an illegal or aggressive war. The side that is acting in self-defense against illegal aggression does not, because of that fact, gain any right to violate the law of armed conflict. Even forces under the sanction of the United Nations as were United States forces in the Korean Conflict (1950-1953), are required to follow the law of armed conflict in dealing with the enemy. The military personnel of a nation may not be punished simply for fighting in an armed conflict. This is so even if the side they serve is clearly the aggressor and has been condemned for this by the United Nations. . .

²⁰⁷ William J. Bivens et al., *Report of Committee on the Study of the Legal Problems of the United Nations, Should the Laws of War Apply to United Nations Enforcement Action?*, 46 AM. SOC'Y INT'L L. PROC. 216, 220 (1952); see also GERHARD VON GLAHN, LAW AMONG NATIONS 699-700 (1992). Many have criticized the proposal that the United Nations should be able to unilaterally select the international laws of armed conflict with which it wishes to comply. See, e.g., LORHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 292-96 (1956); Roda Mushkat, *Jus in Bello, Revisited*, 21 COMP. & INT'L L. J. S. AFR. 1, 17 (1988); AFPAM 110-31, *supra* note 13, at 1-17 n.47 ("If the United Nations picked and chose among the laws of war this would seem to be an invitation for the opposing belligerents to do the same. During the Korean War, as a matter of fact, the United Nations carefully observed the laws of war. This seems a more practical way of manifesting a superior legal and moral position.").

²⁰⁸ See GREEN, *supra* note 49, at 320-23.

²⁰⁹ Article 2(4) provides in pertinent part: "All Members shall refrain . . . from the . . . use of force against the territorial integrity or political independence of any state." UNITED NATIONS CHARTER art. 2(4).

²¹⁰ Gardam, *supra* note 89, at 411.

²¹¹ See Christiane Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 DENV. J. INT'L L. & POL'Y. 335, 341-42 (1993).

44-The Air Force Law Review

Because, as a practical matter, all nations claim that their wars are wars of self-defense, the courts . . . [are] unwilling to punish officials for waging aggressive war if they are not at the policy-making level of government. . .

'a private citizen [or soldier must not] be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or if it starts right, when it turns wrong.'²¹²

The recent Convention on the Safety of UN and Associated Personnel,²¹³ in light of the principle of equal application, recognized that there must be a clear distinction between the Safety Convention and the Geneva Conventions so UN personnel would be covered either by the Safety Convention or the Geneva Convention. However, a member of a UN military force would not be covered by both Conventions. The Safety Convention drafters likely made this clear distinction in order to prevent eroding the Geneva Convention principle of equal application. The overriding concern was that, if the Safety Convention criminalized the use of force against UN forces engaged in a peace-enforcement action, the principle of equal application would no longer exist. The attacking forces would no longer feel bound to follow the law of armed conflict.²¹⁴ The principle of equal application is indispensable if the UN wishes similar treatment from the aggressor-state.²¹⁵

D. The Law of Armed Conflict as it applies to Chapter VII Peace-Enforcement Operations

Traditionally, the Security Council will specifically state, within a resolution itself, whether the action it authorizes is being taken under Chapter VII. However, determining whether a Security Council-authorized action involves "peace-enforcement" can be problematic. Further, the Security Council does not consistently use the term "enforcement" in its resolutions

²¹² AFPAM 110-34, *supra* note 102, at para. 1-4(b)(1-3).

²¹³ Safety Convention, *supra* note 159.

²¹⁴ Bloom, *supra* note 103, at 625. The Safety Convention clearly delineated peacekeeping from peace-enforcement actions:

This Convention shall not apply to a United Nations 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.*

Safety Convention, *supra* note 159, at art. 2(2) (emphasis added).

²¹⁵ "During the American Revolution, for example, the United States was able to obtain prisoner of war status for its troops in enemy hands only after threatening to deny such status to captured British personnel." AFPAM 110-34, *supra* note 102, at para. 8-4(a)(1).

which authorize enforcement actions. As a result, one must look to the "object and purposes of the resolution."²¹⁶

In both the Korean and Persian Gulf peace-enforcement actions, the law of armed conflict applied. In both conflicts, forces authorized by the UN adhered to the international law of armed conflict. In Korea, the UN Command, after an initial reluctance, agreed that it would follow and enforce the law of armed conflict. This included the Geneva Conventions, even though they had not yet entered into force for any of the nations contributing military forces to the UN Command. Similarly, when the Security Council authorized its Member States to take military action against Iraq in 1990, the law of armed conflict unquestionably applied. In fact, the Coalition frequently informed the world of its meticulous compliance with the law of armed conflict.²¹⁷

It is well settled that UN military personnel who participate in peace-enforcement operations that breach the Common Article 2 threshold are combatants. Accordingly, the 1994 Convention of the Safety of United Nations and Associated Personnel clearly envisages that UN personnel engaging in a Chapter VII peace-enforcement action are *combatants* and may be lawfully targeted by the opposing force.²¹⁸ Additionally, in his Bulletin regarding UN forces and international humanitarian law, Secretary-General Kofi A. Annan, recently implied that UN forces, at times, may be actively be engaged as combatants.²¹⁹ Conversely, the Secretary-General expressly recognized the *noncombatant* status of UN classical peacekeepers, as long as the peacekeepers do not become parties to the conflict.²²⁰ The Secretary-General also envisaged that certain circumstances and peacekeeper actions could cause the loss of noncombatant status making the peacekeeping forces parties to the conflict. In such a case, the international law of armed conflict would apply, in accordance with the Secretary-General's Bulletin.²²¹

²¹⁶ Bloom, *supra* note 103, at 625.

²¹⁷ Greenwood, *supra* note 15, at 187-88.

²¹⁸ Article 2 states:

This Convention shall *not* apply to a United Nations 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.*

Safety Convention, *supra* note 159, at art. 2 (emphasis added).

²¹⁹ See *Secretary-General's Bulletin*, *supra* note 101, at § 1.1.

²²⁰ The Secretary-General said the "[B]ulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel *or their status as noncombatants as long as they are entitled to the protection given to civilians under the international law of armed conflict.*" *Secretary-General's Bulletin*, *supra* note 101, § 1.2 (emphasis added).

²²¹ See *Secretary-General's Bulletin*, *supra* note 101, § 1.2.

46-The Air Force Law Review

A UN peace-enforcement mission can and should be mandated only by Chapter VII. All Chapter VII operations, however, do not necessarily equate to directives to engage an opposing force in an all-out war. Rather, UN forces carrying out a Security Council Chapter VII peace-enforcement mandate may very well find it desirable and appropriate to operate under some Chapter VI peacekeeping principles tailored to the specific mission. Yet, these UN peace-enforcement military personnel are combat troops given a combat mission. They must be in sufficient numbers and have proper armaments and clear rules of engagement. They must be given precise instructions as to what circumstances that they are authorized to use force. If force is ever used indiscriminately, a coercive but restrained peace-enforcement action could become full-scale combat. Such a development would escalate, rather than contain, the conflict and unfortunately defeat the purpose of the mission.²²² UN peace-enforcement military forces will further their mission, depending upon the intensity of the operation, by using sound discretion in the use of force and by making every attempt to foster the cooperation of the parties to the conflict, as do their classical peacekeeping counterparts.

E. Can the United Nations be a Signatory to the Geneva Conventions?

The Geneva Conventions do not technically apply to UN peacekeeping forces that perform classical peacekeeping missions. First, the UN is not a nation-state. At present, only nation-states may be parties to the Geneva Conventions.²²³ The UN is not a signatory, as Article 2 (3) of the Geneva Conventions explicitly allows only nation-states to be parties.²²⁴ Further, the context of the Geneva Conventions' reference to "Powers" suggests the phrase

²²² Akashi, *supra* note 84, at 322.

²²³ GREEN, *supra* note 49, at 323.

²²⁴ Article 2, para. 3 is common to all four Geneva Conventions. It states:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The UN Charter entered into force on June 25, 1945, four years before the adoption of the Geneva Conventions. Yet, the Geneva Conventions and subsequent protocols, even to this day, do not reference United Nations peacekeeping or peace-enforcement actions.

means nation-states, and does not extend to insurgent groups or international organizations.

However, a number of commentators have postulated that since the UN has international personality²²⁵ to enter into treaties and multi-national conventions, the UN has the capacity to enter into the Geneva Conventions, provided the Conventions allowed it.²²⁶ If the UN wished to accede to the Conventions, the parties to Conventions could simply consent to the accession by amending the accession clauses to the Conventions and allow it.²²⁷ Even this consent and amendment may not be necessary, however, as the UN could potentially accede to all the Conventions under article 96 of Protocol I to the Geneva Conventions.²²⁸ This article allows a party other than a nation-state to

²²⁵ Reparations Case, *supra* note 34. With respect to whether the United Nations had authority to enter into treaties, the Court held,

[T]he attribution of international personality is indispensable. . . . the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, but entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. . . [The United Nations] is a subject of international law and capable of possessing international rights and duties

Reparations Case, *supra* note 34, at 178-79.

²²⁶ See, e.g., F. SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR, 344 (1961). "[T]here can be no doubt that the United Nations has the inherent capacity to become a party to the conventions on warfare if their terms permit it to accede." *Id.*

²²⁷ See REPORT OF THE CONFERENCE, *supra* note 173, at 106.

²²⁸ Article 96 states:

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.
3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect; (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party

affirmatively declare it will abide by the Geneva Conventions. Such a declaration then obligates the other parties to the conflict to reciprocate and follow the Conventions.

Even so, it may not be desirable to have the UN become a party to the Conventions. In peacekeeping operations, the UN forces are noncombatants, not combat forces. If it became a party to the Conventions, the parties to a conflict may look at peacekeepers differently, that is, as they might more aggressively view fellow combat troops.²²⁹ In short, UN peacekeeping “forces might appear as ‘combatants.’”²³⁰ This possibility is not attractive.

Ultimately, the UN is unlikely to become a party to the Conventions. Accessing to the Conventions could fatally wound classical peacekeeping operations. “[A] *United Nations action*, even if governed by the same laws as war in its traditional sense, *must be clearly distinguished from war* [A]ccession by the United Nations to the conventions on warfare might blur the distinction.”²³¹

The UN has consistently maintained that it is not, nor shall it become, a party to the Conventions.²³² However, this is not to say that the international

to the Conventions and this Protocol; and (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, Dec. 12 1977, 1125 U.N.T.S. 3, 6, *reprinted in* 16 I.L.M. 1391, 1399 (1977).

Regardless of the wording of Article 96, there is no consensus as to whether the United Nations could become a party to the Conventions. As the International Committee for the Red Cross (ICRC) explains, “[n]or is it out of the question that the United Nations could be ‘a party to the conflict’ in the material sense, although the problem of accession of the United Nations to the Geneva Conventions and the Protocols remains a delicate question which has not yet been resolved.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 507 (Y. Sandoz et al. eds., 1987). Further, the UN, precisely because it is not a state, does not possess the adequate administrative and juridical authority to carry out the obligations inherent to the Conventions.

²²⁹ REPORT OF THE CONFERENCE, *supra* note 173, at 111.

²³⁰ Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces*, 294 INT’L REV. RED CROSS 227, 232 (1993).

²³¹ SEYERSTED, *supra* note 226, at 387.

²³² See generally R. SIMMONDS, LEGAL PROBLEMS ARISING FROM THE UNITED NATIONS MILITARY OPERATIONS IN THE CONGO 185 (1968). Simmonds notes that during peacekeeping operations in the Congo, the United Nations “refused to undertake the duty of compliance with the detailed provisions of the Conventions or to make any kind of official declaration by which it would engage itself to apply them in all circumstances.” *Id.* Nevertheless, even though the United Nations was not a party to the Conventions, customary law applied and was “equally binding without the necessity for any accession to them by the United Nations.” *Id.* at 180. In 1993, the United Nations in Somalia (UNISOM) peacekeeping force initially denied the International Committee of the Red Cross access to detained supporters of General Aidid. A United Nations military officer allegedly told the media: “The United Nations is not a signatory to the Geneva Convention and its Protocols. Consequentially, the United Nations has no duty to respect international human rights law.” Willy Lubin, *Towards the International*

law of armed conflict is not applicable to UN forces. Individual Member States that contribute forces to UN operations are bound. Further, the majority of Geneva Convention provisions are now universally recognized as customary international law.²³³ The law of armed conflict is therefore pertinent to UN peacekeeping operations. As Roberts and Guelff note:

The United Nations itself is not a party to any international agreements on the laws of war. Moreover, these agreements do not expressly provide for the application of the laws of war to UN forces. However, it is widely held that the laws of war remain directly relevant to such forces.²³⁴

Even though a party to a conflict is not a signatory or party to the Geneva or Hague Conventions, it is still bound to follow any customary international law of armed conflict. Moreover, such parties to the conflict, in order to secure and maintain international credibility, usually will announce they will follow the principles of the Conventions. In the Korean War, neither the UN nor North Korea were parties to the Conventions. Nevertheless, both the Supreme Commander of the UN Forces and the North Korean Minister of Foreign Affairs stated their military forces would abide by the Conventions.²³⁵

Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations: The Case of Somalia, 52 INT'L COMM'N JURISTS 47, 54-55 (1994).

²³³ See, e.g., Gardam, *supra* note 18, at 319 n.117 (1996). "Although much of the law of armed conflict is codified, the majority of its provisions would now be reflected in custom." *Id.*

²³⁴ Adam Roberts & Richard Guelff, *Prefatory Note*, in DOCUMENTS ON THE LAWS OF WAR 371 (A. Roberts & R. Guelff eds., 2d. 1989).

²³⁵ GREEN, *supra* note 49, at 55. General Douglas MacArthur, Commander of United Nations Command, said his forces would comply with principles of the international law of armed conflict, specifically dealing with prisoners of war:

My present instructions are to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly the common Article three. In addition, I have directed the forces under my command to abide by the detailed provisions of the prisoner-of-war convention, since I have the means at my disposal to assure compliance with this convention by all concerned and have fully accredited the ICRC delegates accordingly. I do not have the authority to accept, nor the means to assure the accomplishment of responsibilities incumbent on sovereign nations as contained in the detailed provisions of the other Geneva Conventions and hence I am unable to accredit the delegations to the UNC (United Nations Command) for the purposes outlined in those conventions. All categories of non-combatants in custody or under the control of military forces under my command, however, will continue to be accorded treatment prescribed by the humanitarian principles of the Geneva Conventions.

Cited in SEYERSTED, *supra* note 226, at 184-85. Although the United Nations Command did not believe it was obligated to follow the Geneva Conventions because neither the United Nations nor North Korea were parties to them, the United Nations Command adhered to most terms of the Conventions. Further, "no state providing contingents maintained that the United

50-The Air Force Law Review

The law of armed conflict does not expressly refer to the UN, nor do the Conventions deal with the applicability of the law of armed conflict to UN forces. However, when a UN force abandons its neutral peacekeeping role and becomes a party to the conflict, or engages in a peace-enforcement action as a party to the conflict, the UN should be treated as a state. Concomitantly, the law of armed conflict would apply both to the UN forces, and the forces they oppose. In such cases, both the UN and the opposing forces are parties to the conflict required to treat each other as lawful combatants. Consequently, for example, captured forces of either side would be afforded all protections and rights provided under the third Geneva Convention.²³⁶

F. Common Article 2 of the Geneva Conventions: The Armed Conflict Threshold

Common Article 2 of the Geneva Conventions²³⁷ contemplates that the Conventions apply only during an international armed conflict. It is the threshold test for whether an international armed conflict exists causing the concomitant application of the international law of armed conflict.²³⁸ A UN

Nations collective action was not governed by the general laws of war." SEYERSTED, *supra* note 226, at 187.

On July 13, 1950, both South and North Korea said they were following the Geneva Conventions regarding prisoners of war and cooperating with the International Red Cross. N.Y. TIMES, July 5, 1950, at 2.

²³⁶ Greenwood, *supra* note 15, at 189.

²³⁷ Article 2, common to all 4 Geneva Conventions, states:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²³⁸ See Adam Roberts & Richard Guelff, *Prefatory Note*, in DOCUMENTS ON THE LAWS OF WAR 169-70 (A. Roberts & R. Guelff eds., 2d ed. 1989); according to Sharp,

force that limits its use of force strictly to self-defense will not cross the Common Article 2 threshold. However, a military force attacking a UN peacekeeping force, combined with the force used by the peace-keepers in self-defense and subsequent offensive counter-attack, might reach the threshold of international armed conflict that invokes Common Article 2. Once the parties reach this level of conflict, the rights and obligations of the law of armed conflict apply.²³⁹

However, what constitutes an “armed conflict” is difficult to define.²⁴⁰ The ICRC, interpreting the Geneva Convention, provided the following definition:

[S]hort of an actual declaration of war or a case of occupation, military forces do not become a party to an international armed conflict until such time they become engaged in a use of force of a scope, duration, and intensity that would trigger the *jus in bello* with respect to these forces. This threshold is a factual, subjective determination that centers on the use of force between the members of the armed forces of two states. These factors are to be considered conjunctively, and in the context of the assigned mission of the forces. For example, military forces conducting a noncombatant evacuation operation do not become a party to an armed conflict when they use limited force to rescue personnel. Similarly, military forces do not become a party to an armed conflict when they use limited force to accomplish an assigned humanitarian relief or peace operation. In contrast, individual or collective military action in response to outright aggression, such as the coalition response to the Iraqi aggression that led to the Persian Gulf war, does cross the Common Article 2 threshold and then triggers the application of the *jus in bello*.

Walter Gary Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22-23 (1997) (unpublished manuscript on file with author).

²³⁹ See Bloom, *supra* note 103, at 625-26 n.12. Another observer writes:

The Laws of Armed Conflict do not normally apply to UN or other peacekeeping forces because neither they nor the UN are in armed conflict with anyone. They are there, *inter alia*, to separate the parties, provide protection for the delivery of humanitarian aid and, hopefully, provide a more rational atmosphere or environment in which the factions may come to a peaceful solution. However, they do (and are legally entitled to) take self-protective actions involving the use of force from time to time. *It goes without saying that if they cross the armed conflict threshold and enter into armed conflict then the Laws of Armed Conflict would apply.*

Garth Cartledge, *International Military Law*, <http://www.ozemail.com.au/~garthc/Index.html> [hereinafter *International Military Law*] (copy on file with the *Air Force Law Review*) (emphasis added).

²⁴⁰ Armed Conflict has been defined as a

conflict involving hostilities of a certain intensity between armed forces of opposing Parties . . . There are, of course, obvious cases. Nobody will

[a]ny 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. The respect due to the human person as such is not measured by the number of victims.²⁴¹

The ICRC definition is purposely worded very broadly in order to include an entire spectrum of conflicts and bring them under the Conventions.²⁴² Still, according to the ICRC, there is a prerequisite to the application of the international law of armed conflict—there must be “the presence of an armed conflict.”²⁴³ One very practical definition is that an armed conflict exists when the Common Article 2 threshold is crossed. “That threshold is crossed when there is an identified enemy. There is an identified enemy when there are members of the enemy military or para-military forces belonging to another state committing acts of war in the apparent furtherance

probably doubt for a moment that the Second World War, or the Vietnam war, were armed conflicts, nor that the Paris students’ revolt of May 1968 did not qualify as such. For the less obvious cases, however, one will have to admit that thus far no exact, objective criterion has been found which would permit us to determine with mathematical precision that this or that situation does or does not amount to an armed conflict.

FRITS KALSHOVEN, *THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT* 10-11 (1973). See also *Prosecutor v. Tadic*, Case No. IT-94-AR72, 37 (App., Oct. 2, 1995) (“Armed conflict” is when “there is resort to armed force between states or protracted armed violence between government authorities and organized armed groups or between such groups within a State.”); AFPAM 110-31, *supra* note 13, at para. 1-2(b) (“[A]rmed conflict—conflict between states in which at least one party has resorted to the use of armed force to achieve its aims. It may also embrace conflict between a state and organized, disciplined and uniformed groups within the state such as organized resistance movements.”); Sylvie Junod, *Additional Protocol II: History & Scope*, 33 AM. U.L. REV 29, 30 (1983) (“[T]he concept of armed conflict is generally recognized as encompassing the idea of open, armed confrontation between relatively organized armed forces or armed groups.”); and, 3 CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW: 1988-91 (Marian Nash-Leich ed., 1989) (“Armed conflict includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting. . .”). *Id.* at 3457.

²⁴¹ COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean S. Pictet ed., 1958).

²⁴² See RICHARD I. MILLER, *THE LAW OF WAR* 275 (1975); See also AFPAM 110-31, *supra* note 13, at para. 1-5(c) (“Generally, the international community has encouraged broad application of the law of armed conflict to as many situations as possible to protect victims of conflicts.”); Greenwood, *supra* note 196, at 6 (“While the term ‘armed conflict’ is not defined in any of the conventions, it has generally been given a very broad definition.”); Sharp, *supra* note 11, at 121 (“[T]he 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.”).

²⁴³ Pfanner, *supra* note 197, at 56.

of that state's policy.”²⁴⁴ The question of whether the threshold has been crossed is a question of fact, not of politics.²⁴⁵

Yet, the Common Article 2 *de facto* threshold is not a bright line test. Although the UN accepts that its traditional peacekeeping forces may theoretically become combatants, and hence lawful targets, when its peace operation reaches “*some undefined level of intensity*,”²⁴⁶ the UN has so far declined to specify any potential circumstances that would result in its peacekeepers crossing the threshold. As a result, UN military forces currently do not have clear guidance as to what level of intensity crosses the Common Article 2 threshold amounting to armed conflict. Further complicating the problem, in some recent peacekeeping operations, peacekeepers in pursuing their mandated missions have more frequently and robustly used military force. This increase in the use of force has raised a great deal of concern about whether such force is in accordance with the law of armed conflict.²⁴⁷

The United Nations Operation in Somalia (UNOSOM), for example, illustrates the difficulties and controversies inherent when attempting to determine whether a peacekeeping force has crossed the threshold into armed conflict and has therefore become a party to it. On October 3, 1993, the Unified Task Force (UNITAF) abandoned its previously impartial role and took military action against a specific Somali warlord, General Aideed. When

²⁴⁴ Cartledge, *International Humanitarian Law*, *supra* note 14, at 154.

²⁴⁵ See Cartledge, *International Humanitarian Law*, *supra* note 14.

[W]hether or not there is armed conflict is a matter of fact, not a matter for declaration by some government or governing body. The application of laws of armed conflict is a matter which flows (and must flow) automatically upon the crossing of the threshold into armed conflict. The commencement of its application is not and cannot be retarded or denied because some person, body, body of persons or institution has decided or determined that laws of armed conflict are not to be applied. If its application was dependent upon the determination of such a body the question would become a political one which it quite clearly should not be.

Cartledge, *International Humanitarian Law*, *supra* note 14, at 152.

²⁴⁶ Sharp, *supra* note 11, at 150.

²⁴⁷ Gardam, *supra* note 18, at 288-89 n.10. Bowens opines:

The majority view, consistent with the United States position, is that international forces (composed of various national elements) are bound to the same extent by the law of war as national forces. We are to look beyond the guise of ‘international force,’ and to the individual state forces that make up the international force. If an individual state is involved in a (1) contention, (2) with another state, (3) where at least one side employs military force, (4) in an effort to overpower the other state, then despite the label used by the state parties for the their actions or the reason for the contention, the event is an article 2 conflict.

BOWENS, *supra* note 72, at 321 (footnotes omitted).

54-The Air Force Law Review

attempting to arrest him, intense fighting ensued. Eighteen U.S. soldiers and one Malaysian soldier were killed. Another seventy-eight U.S. soldiers, nine Malaysian soldiers, and three Pakistani soldiers were wounded. The UN Commission established to investigate the attack concluded that once UNITAF began taking action against General Aideed, they, arguably, crossed the threshold and were no longer "persons taking no active part in the hostilities" and hence became "parties to the conflict." As a result of this change of status, UNITAF arguably was no longer guaranteed the minimal humane treatment protection accorded noncombatants under Common Article 3 of the Geneva Conventions.²⁴⁸ However, the UN Secretary-General and the United States concluded the opposite: "It [is] the U.S. [and] UN . . . opinion that their forces [did] not become combatants, despite carrying out some offensive-type operations (e.g. Task Force Ranger in Somalia)."²⁴⁹

In order to avoid dealing with the knotty factual uncertainty of whether a given military operation has crossed the armed conflict threshold, the United States Chairman of the Joint Chiefs of Staff (CJCS) directs that United States military forces "will comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations."²⁵⁰ Similarly, the U.S. Army Operational Law Handbook supports that view:

The [law of war] (LOW) applies to all cases of declared war or any other armed conflict which may arise between the U.S. and other nations, even if the state of war is not recognized by one of them. FM 27-10, para. 8. It

²⁴⁸ See *Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them*, paras. 117-73, U.N. SCOR, 49th Sess., U.N. Doc S/1994/653 (1994).

²⁴⁹ OPS LAW HANDBOOK, *supra* note 168, at 5-2. AFPAM 110-31, takes a similar position: "[T]he international community has not regarded a few sporadic acts of violence, even between states, as indicating a state of armed conflict as existing." AFPAM 110-31, *supra* note 13, at para. 1-2(b).

²⁵⁰ CJCSI 5810.01A, Implementation of the DOD Law of War Program, para. 5a, (Aug. 27, 1999). Further, the Chairman's standing rules of engagement provide:

U.S. forces will always comply with the Law of Armed Conflict. However, not all situations involving the use of force are armed conflicts under international law. Those approving operational rules of engagement must determine if the internationally recognized Law of Armed Conflict applies. In those circumstances when armed conflict, under international law, does not exist, Law of Armed Conflict principles may nevertheless be applied as a matter of national policy. If armed conflict occurs, the actions of U.S. forces will be governed by both the Law of Armed Conflict and rules of engagement.

CJCSI 3121.01, Enclosure A, Standing Rules of Engagement for U.S. Forces, para. 1.i (Oct. 1, 1994).

also applies to cases of partial or total occupation. The threshold is codified in common article 2 of the Geneva Conventions. Armed conflicts such as the Falklands War, the Iran-Iraq War, and Desert Storm were clearly international armed conflicts to which the law applied. . . . In peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the LOW legally applies to those operations. The issue hinges on whether the peace operations undertake a combatant role. . . . Despite the legal inapplicability of the LOW to [operations such as Somalia and Bosnia], it is nonetheless, the position of the US, UN and NATO that their forces will apply the "principles and spirit" of the LOW in these operations. . . . In applying the [Department of Defense] policy, however, allowance must be made for the fact that during these operations U.S. Forces often do not have the resources to comply with the LOW to the letter. It has been U.S. practice to comply with the LOW to the extent "practicable and feasible."²⁵¹

In essence, the United States applies the principles and spirit of law of armed conflict to all military operations, yet reserves that its forces will be bound by the law of armed conflict only in cases when it is clear that the Common Article 2 threshold has been crossed. This pragmatic resolution to an issue of international law that is far from settled serves United States interests well. Yet, it does not address the larger question, that is, "what level of combat intensity is required before UN peacekeepers cross the Common Article 2 threshold, lose their noncombatant status, and become parties to the conflict, rendering them lawful military targets?"

The answer as to peacekeeping operations and UN-authorized peace-enforcement operations may very well be that, "the threshold for determining whether a force has become a party to an armed conflict [is] somewhat higher in the case of UN and associated forces engaged in a mission which has a primarily peace-keeping or humanitarian character than [is] the normal case of conflicts between states."²⁵² This theoretical "higher threshold," specific to UN peace operations, would bring international law in line with the UN's past practice and official policy regarding the peace operations in Haiti, Somalia and Bosnia. A formalized higher Common Article 2 threshold would allow the UN more flexibility and options during robust peacekeeping operations. Further, it would ensure UN personnel do not routinely lose their noncombatant status, and therefore become lawful targets, when engaged in robust peacekeeping operations. Yet, even if the Common Article 2 threshold existed at a somewhat higher level than that applicable to nation-states, peacekeepers would still have ample incentives to restrain their peace operations in such a way to stay beneath it. Such incentives include, for

²⁵¹ OPS LAW HANDBOOK, *supra* note 168, at 5-2. *Accord* HUMANITARES VOLKERRECHT IN BEWAFFNETEN KONFLIKTEN—HANDBUCH ¶ 211, DSK AV207320065 (Aug. 1992): "Members of the German Army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts."

²⁵² Greenwood, *supra* note 196, at 24.

example, peacekeeper protection, mission legitimacy, and the obvious desire to avoid unnecessarily escalating the conflict.

G. The United Nations' Code of Conduct for Peacekeepers—Half a Solution

There have been numerous and resounding demands that the UN should promulgate clear directives regarding the applicability of the international law of armed conflict to UN personnel.²⁵³ In 1997, after decades of apparent apathy from the UN, the ICRC announced it had been recently working with the UN to prepare a Code of Conduct for UN peacekeepers. Previously, in May 1996, the ICRC and the UN had jointly prepared a proposed set of Directives for UN Forces Regarding Respect for International Humanitarian Law.²⁵⁴ The ICRC explained that its directives would clarify the principles and spirit of international humanitarian law to which the UN has implicitly bound its forces for the past fifty years.²⁵⁵

Finally, the UN had provided its long-awaited official response, albeit a somewhat disappointing one. Secretary-General Kofi A. Annan, in his August 6, 1999 Bulletin, attempted to take a significant step towards clarification of the applicability of the international law of armed conflict in UN peacekeeping and peace-enforcement operations.²⁵⁶ Instead, he merely provided half a solution with a one-size-fits-all code of conduct regarding all peace operations. He promulgated a directive that specified the very minimum standards of behavior expected of UN peace operations personnel. The Secretary-General's Bulletin entered into force on August 12, 1999, to coincide with the 50th anniversary of the adoption of the four Geneva Conventions.²⁵⁷ The Bulletin declared the "fundamental principles and rules of international humanitarian law" pertaining to UN peacekeepers.²⁵⁸

The Bulletin is "applicable to United Nations forces conducting operations under United Nations command and control."²⁵⁹ Unfortunately, the Bulletin does not clarify how the law of armed conflict applies during the

²⁵³ See, e.g., Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152, 182 (1999); Richard D. Glick, *Lip Service to the Laws of War: Humanitarian Law and the United Nations Armed Forces*, 17 MICH. J. INT'L L. 53, 105-07 (1995); Tittmore, *supra* note 171, at 115-17; HOWARD S. LEVIE, WHEN BATTLE RAGES, HOW CAN LAW PROTECT?: WORKING PAPER PROCEEDINGS OF THE FOURTEENTH HAMMARSKJOLD FORUM 64-65 (1971); *International Military Law*, *supra* note 239.

²⁵⁴ Cartledge, *Legal Constraints*, *supra* note 154, at 121.

²⁵⁵ Cartledge, *Legal Constraints*, *supra* note 154, at 121.

²⁵⁶ *Secretary-General's Bulletin*, *supra* note 101.

²⁵⁷ *Secretary-General's Bulletin*, *supra* note 101, at para. 10; see also *United Nations Calls for Renewed Efforts to Protect Civilians in War*, AFR. NEWS SERV., Aug. 13, 1999.

²⁵⁸ *Secretary-General's Bulletin*, *supra* note 101, at Purpose Stmt.

²⁵⁹ *Id.*

different types of UN peacekeeping operations. It simplistically states that the principles apply “to UN forces when in situations of armed conflict they are actively engaged as combatants, to the extent and for the duration of their engagement. [The principles of the Bulletin] are accordingly applicable in enforcement actions, or in peace-keeping operations when the use of force is permitted in self-defense.”²⁶⁰

In its desire to provide simple guidance, the Bulletin treats the use of force during a peace-enforcement action the same as the use of force in self-defense during a peacekeeping operation. Such reductionism fails to recognize that totally separate and different legal foundations authorize, as well as limit, the two forms of the uses of force, one being the law of armed conflict and the other being an inherent right to defend oneself.²⁶¹ A better solution would have been to clearly define the three predominant peace operations—classical peacekeeping operations, robust peacekeeping operations, and peace-enforcement operations—and then promulgate different directives with separate rules for each. This would have helped keep the different operations distinct and reduced potential confusion.

Further, the Bulletin tends to concentrate on the use of force in accordance with the international law of armed conflict and does not clearly acknowledge that peacekeepers rarely use force in order to accomplish their mission. The use of force during classical peacekeeping operations is the exception, not the rule, and then only in self-defense. The use of force in peace-enforcement operations, on the other hand, is authorized if permitted under the rules of engagement and the specific UN mandate. By implicitly merging the concepts of peacekeeping and peace-enforcement and concentrating on the principles of the international customary law of armed conflict, the Bulletin risks that peacekeepers may view the two types of peace operations as the same. This could result in some peacekeepers believing, albeit erroneously and regardless of their rules of engagement, that the authorization for the use of force in both circumstances, is similar and possibly even the same.²⁶²

Moreover, the Bulletin is potentially under-inclusive because it only applies to “United Nations forces.” For example, the guidelines do not appear to apply to UN “Associated Personnel.”²⁶³ Nor do the guidelines appear to

²⁶⁰ *Id.* at para. 1.1.

²⁶¹ See Cartledge, *Legal Constraints*, *supra* note 154, at 121-22.

²⁶² See Cartledge, *Legal Constraints*, *supra* note 154, at 135-36.

²⁶³ United Nations Associated Personnel are defined as:

- (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
- (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
- (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations

apply to military forces authorized by the UN, but under the control of regional military alliances. The guidelines would not apply, for example, to the NATO-led Stabilization Force (SFOR) in Bosnia-Herzegovina, forces in West Africa led by Nigeria, or the NATO-led Kosovo Force (KFOR). These forces are authorized by the UN, but are not under its command and control.²⁶⁴ Such forces, of course, are still bound by customary international law, as well as their own respective national laws.

Yet, the Secretary-General's Bulletin represents the first time the UN has officially recognized that UN forces are bound by the same principles that bind national troops. The guidelines were formulated over the past several years, the principles underlying the guidelines having been drawn from the Geneva Conventions *mutatis mutandis*.²⁶⁵ The Secretary-General promulgated

or with a specialized agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfillment of the mandate of a United Nations operation.

Safety Convention, *supra* note 159, at art. 1, para. b.

²⁶⁴ See generally Godwin, *supra* note 125, at 58-79. The International Committee of the Red Cross makes the following statement:

[T]he Bulletin applies only to UN forces conducting operations under the command and control of the United Nations. It does not apply to organizations authorized by the Security Council which are placed under the command of a state or regional organization. In such cases the States, or the groups of States concerned, must comply with the customary and treaty-based rules by which they are bound.

International Committee of the Red Cross, Comprehensive Review of the Whole Question of Peace-Keeping Operations in all its Aspects, Statement to the United Nations General Assembly (Oct. 20, 1999), available at <http://www.icrc.org/eng/search> (copy on file with the *Air Force Law Review*).

²⁶⁵ See *U.N. Issues Guidelines for Peace Forces' Behaviour*, DEUTSCHE PRESS-AGENTUR, Aug. 10, 1999. Consider also the following statement from the International Committee of the Red Cross:

[T]he [International Committee for the Red Cross] has considered the question of the applicability of international humanitarian law to peace-keeping and peace-enforcement forces. It was felt essential to clarify this issue because troops of this kind are intervening with increasing frequency to situations of extreme violence in which they may have to resort to armed force. . . . For its part, the [United Nations] maintains that only the principles and spirit of [International Humanitarian Law] are applicable to these forces. Experts have formulated draft guidelines that spell out those 'principles' and the 'spirit' that the [United Nations] has undertaken to respect, within the framework of peace-keeping and peace-enforcement operations, whenever the use of force is authorized for reasons of legitimate defence or pursuant to a specific mandate issued by the Security Council.

the Bulletin, despite numerous objections from Member States. Upon release of the document he stated that “[t]he guidelines are not cast in stone, they will be revised in a few years time.”²⁶⁶

The three-page Bulletin succinctly restates what amount to uncontroversial and near-universal principles of customary international humanitarian law. UN military personnel may not attack “civilians or civilian objects.”²⁶⁷ The UN personnel “shall respect the rules prohibiting or restricting weapons and methods of combat.”²⁶⁸ Civilians will be “treated humanely,”²⁶⁹ and women and children are afforded special protections from attack.²⁷⁰ If the UN forces detain military personnel or civilians, the detained persons must be “treated in accordance with the relevant provisions of the Third Geneva Convention of 1949.”²⁷¹ Additionally, “[m]embers of the armed forces and other persons in the power of the UN who are wounded or sick shall be treated humanely and protected in all circumstances.”²⁷²

According to the Bulletin, if a UN military member violates these guidelines or other binding international humanitarian law, the member is “subject to prosecution in [the member's own] national courts.”²⁷³ However,

International Committee of the Red Cross, *Is International Humanitarian Law Applicable to Peace-Keeping and Peace-Enforcement Operations Carried Out by or Under the Auspices of the United Nations?* (Dec. 1, 1999), at <http://www.icrc.org/eng/search> (copy on file with the *Air Force Law Review*)

²⁶⁶ See DEUTSCHE PRESS-AGENTUR, *supra* note 265. Several Member States have indicated that they may be less inclined to participate in peacekeeping operations as a result of the issuance of the guidelines. However, the UN does not believe that the guidelines will cause any Member State to either stop participating or reduce participation in United Nations peacekeeping operations. See Farhan Haq, *Rights: U.N. to Adhere to Geneva Conventions*, INT'L PRESS SERV., Aug. 10, 1999.

²⁶⁷ *Secretary-General's Bulletin*, *supra* note 101, at para. 5.1. Although the Bulletin is generally uncontroversial, encapsulating customary international humanitarian law, it does contain at least one provision to which the United States would object. Paragraph 6-2 of the Bulletin states: “The use of certain conventional weapons, such as . . . anti-personnel mines, . . . is prohibited.” *Secretary-General's Bulletin*, *supra* note 101, at para. 6.2. Approximately two million anti-personnel mines are deployed in the Republic of Korea (South Korea) along the Demilitarized Zone (DMZ) to deter an invasion from the North. Both the United States and South Korea take the position that if they were to remove the mines, it would effectively allow North Korea to invade South Korea. More importantly however, North Korea may misperceive the removal of the mines along the DMZ as a pre-cursor to South Korea preparing to invade the North.

²⁶⁸ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 6.2, ST/SGB/1999/13 (1999), available at http://www.un.org/peace/st_sgb_1999_13.pdf (copy on file with the *Air Force Law Review*).

²⁶⁹ *Id.* at para. 7.1

²⁷⁰ *Id.* at paras. 7.3 & 7.4.

²⁷¹ *Id.* at para. 8.

²⁷² *Id.* at para. 9.1.

²⁷³ *Id.* at para. 5; see also BOWETT, *supra* note 99, at 504 (“[N]ational contingents in the service of the United Nations are bound to the same extent and degree, to all those rules of warfare

60-The Air Force Law Review

this is voluntary on the part of the Member State. As one UN official explained, “‘there is nothing in this bulletin that will compel a member state to try its peacekeepers,’ although he noted that all signatories to the Geneva Conventions are obliged to do so.”²⁷⁴

Although overly simplistic, the Secretary-General's Bulletin is a notable and positive step. It is, for the most part, uncontroversial in that it simply restates customary international humanitarian law. It is equally applicable in both peacekeeping and peace-enforcement operations.²⁷⁵ It does not “affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as noncombatants.”²⁷⁶ Finally, the Bulletin expressly does not supersede the respective national laws of UN personnel, nor is it an “exhaustive list of principles and rules of international law binding upon military personnel.”²⁷⁷ At present, it is little more than a minimum legal standard for the military conduct of UN forces.

This set of minimum standards of behavior is only half a solution however. Unfortunately, while the Bulletin expressly recognizes that UN forces, under UN Command, may effectively be engaged as combatants, it does not specifically address the circumstances in which this may occur. The Secretary-General does not provide any guidelines as to when and how a noncombatant UN peacekeeper may become a combatant. The Secretary-General implies that a noncombatant peacekeeper may lose the protection of the 1994 Safety Convention,²⁷⁸ but does provide the circumstances under which this may occur.

If UN peacekeepers are to be protected and maintain their protected noncombatant status, they must be provided clear guidelines as to appropriate conduct and rules of engagement that are specific to each form of peace operation. To achieve this, the UN must first articulate a cogent definition of “armed conflict.” With this definition, there must be an unambiguous threshold of when a UN military operation becomes an armed conflict in which UN personnel become combatants and lose protection of the 1994 Safety Convention. In such a case, the international law of armed conflict would apply and the UN personnel would become lawful targets. Due to the obvious gravity of such a scenario, it is imperative the UN clarify this gap in the international law of armed conflict.

which would obtain if the same forces were engaged in international armed conflict for the State alone.”).

²⁷⁴ Haq, *supra* note 266.

²⁷⁵ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 1.1, ST/SGB/1999/13 (1999), available at http://www.un.org/peace/st_sgb_1999_13.pdf (copy on file with the *Air Force Law Review*).

²⁷⁶ *Id.* at para. 1.2.

²⁷⁷ *Id.* at para. 2.

²⁷⁸ *Id.* at para. 1.2.

IV. CONCLUSION

Classical peacekeeping customs and norms have developed over fifty years of operations. The characteristics of impartiality, consent of the parties, command and control of the UN force by the Secretary-General, and most importantly, the use of force limited to circumstances involving self-defense have led to successful missions and the protection of peacekeepers.

However, as peacekeeping missions become more robust, missions have become ambiguous and peacekeepers endangered. To better the chances of mission success, ensure the mission is performed in accordance with international law, and to provide more protection to the peacekeepers themselves, the UN must clearly define the different forms of peace operations. The UN must lead a coherent and determined effort to keep peacekeeping missions distinct from peace-enforcement missions. Additionally, the UN must collectively strive to fill the recognized gaps in the international law of armed conflict regarding its application to UN peace operations.

However, ultimately, the lack of clarity in the international law of armed conflict regarding UN peace operations is a failing on the part of the Member States. To successfully fill this void, the Member States must seek consensus to clearly define the legal status of UN military personnel for each specific form of peace operation.²⁷⁹ The UN, at the behest of its Member States, should convene an international convention to delineate the level and intensity of armed conflict that changes the status of a noncombatant peacekeeper to that of a combatant peace-enforcer. If UN peace operations are subject to a higher Common Article 2 armed conflict threshold, the UN should affirmatively and formally say so. A peacekeeper has a fundamental right to know what circumstances change the peacekeeper from a noncombatant to a combatant, result in the loss of protection of the 1994 Safety Convention and, ultimately, make the peacekeeper a target that can be lawfully engaged.

These are momentous times. The UN may now come of age. Its envisaged role in 1945 can come to fruition if its Member States continue to collectively agree to practical and realistic methods of peacekeeping and peace-enforcement and, more importantly, the Security Council continues to garner the collective political will to cooperate and act for the common good.

The international community, and specifically the UN, still struggles with the vision of international peace and security. It does not often act with one voice and, as a result, oftentimes fails to act at all. Yet, despite the UN's many flaws and failings, it is indispensable. It remains the best hope for world security and the maintenance of peace.

²⁷⁹ See Ralph Zacklin, *Managing Peacekeeping from a Legal Perspective*, in *NEW DIMENSIONS OF PEACEKEEPING* 159 (Daniel Warner ed., 1995) ("Insistence on clarifying the nature of peacekeeping is not merely a lawyer's obsession with clarity and legal definition; it is necessary because the legal character and nature of the operation has a direct bearing on the legal issues which arise and their resolution.").

The post-Cold War world is one of uncertainty, but also one of promise and optimism. It will remain so only as long as the Member States of the UN effectively endeavor to “save succeeding generations from the scourge of war” and “unite our strength to maintain international peace and security.”²⁸⁰

²⁸⁰ U.N. CHARTER preamble.