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The Legitimacy of Article 4(B) And the Status of Unamsil as Civilians Under the International Law of Armed Conflict

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE SPECIAL COURT FOR SIERRA LEONE

ISSUE: THE LEGITIMACY OF ARTICLE 4(b) AND THE STATUS OF UNAMSIL AS CIVILIANS UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT

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TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

UN RESOLUTIONS AND DOCUMENTS

14. G.A. Res. 376(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (1950)

15. G.A. Res. 72, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/72 (1992)

16. G.A. Res. 120B, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/120B (1992)

17. G.A. Res. 37, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/37 (1993)

18. G.A. Res. 42, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/42 (1993)

19. G.A. Res. 59, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/59 (1994)

20. G.A. Res. 192, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/192 (1999)

21. G.A. Res. 2, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/2 (2000)

22. G.A. Res. 175, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/175 (2000)

23. G.A. Res. 89, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/89 (2001)

24. G.A. Res. 28, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/28 (2002)

25. Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, U.N. GAOR, U.N. Doc. A/50/60-S/1995/1 (1995)

26. Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, Report of the Secretary-General, U.N. GAOR, 5th Sess., U.N. Doc. A/58/187 (July 28, 2003)

27. S.C. Res. 83, U.N. Doc. S/1511 (1950)

28. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990)

29. S.C. Res. 776, U.N. SCOR, 47th Sess., 3114th mtg., U.N. Doc. S/RES/776 (1992)

30. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992)

31. S.C. Res. 814, U.N. SCOR, 3188th mtg., U.N. Doc. S/RES/814 (1993)

32. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993)

33. S.C. Res. 837, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/837 (1993)

34. S.C. Res. 868, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/868 (1993)

35. Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, U.N. Doc. S/PV.3217 (May 25, 1993)

36. Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994)

37. Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/1994/1125 (1994)

38. S.C. Res. 1244, U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (1999)

39. S.C. Res. 1265, U.N. SCOR, 4046th mtg. U.N. Doc. S/RES/1265 (1999)

40. S.C. Res. 1270, U.N. SCOR, 4054th mtg., U.N. Doc. S/RES/1270 (1999)

41. S.C. Res. 1272, U.N. SCOR, 4057th mtg., U.N. Doc. S/RES/1272 (1999)

42. S.C. Res. 1286, U.N. SCOR, 4091st mtg., U.N. Doc. S/RES/1286 (2000)

43. Statement by the President of the Security Council, U.N. SCOR, 4100th mtg., U.N. Doc. S/PRST/2000/4 (2000)

44. S.C. Res. 1289, U.N. SCOR, 4099th mtg., U.N. Doc. S/RES/1289 (2000)

45. S.C. Res. 1296, U.N. SCOR, 4130th mtg., U.N. Doc. S/RES/1296 (2000)

46. S.C. Res. 1313, U.N. SCOR, 4184th mtg., U.N. Doc. S/RES/1313 (2000)

47. S.C. Res. 1319, U.N. SCOR, 4195th mtg., U.N. Doc. S/RES/1319 (2000)

48. S.C. Res. 1378, U.N. SCOR, 4415th mtg., U.N. Doc. S/RES/1378 (2001)

49. S.C. Res. 1417, U.N. SCOR, 4554th mtg., U.N. Doc. S/RES/1417 (2002)

50. S.C. Res. 1445, U.N. SCOR, 4653rd mtg., U.N. Doc. S/RES/1445 (2002)

51. S.C. Res. 1493, U.N. SCOR, 4797th mtg., U.N. Doc. S/RES/1493 (2003)

52. S.C. Res. 1494, U.N. SCOR, 4800th mtg., U.N. Doc. S/RES/1494 (2003)

53. S.C. Res. 1502, U.N. SCOR, 4814th mtg., U.N. Doc. S/RES/1502 (2003)

54. S.C. Res. 1509, U.N. SCOR, 4830th mtg., U.N. Doc. S/RES1509 (2003)

55. First Report on the United Nations Mission in Sierra Leone (UNAMSIL), U.N. Doc. S/1999/1223 (Dec. 6, 1999)

56. Second Report of the Secretary-General Pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/13 (Jan. 11, 2000)

57. Third Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/186 (March 7, 2000)

58. Fourth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/455 (May 19, 2000).

59. Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/751 (July 31, 2000)

60. Sixth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/832 (Aug. 24, 2000)

61. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915 (Oct. 4, 2000)

62. Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/1055 (Oct. 31, 2000)

63. Eighth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/1199 (Dec. 15, 2000)

64. Twentieth Report of the Secretary-General on the United Nations Mission in Sierra Leone (UNAMSIL), U.N. Doc. S/2003/1201 (Dec. 23, 2003)

65. Aide-Memoire of the Secretary-General Concerning Some Questions Relating to the Function and Operations of the United Nations Peacekeeping Force in Cyprus, Note by the Secretary-General, U.N. SCOR, U.N. Doc. S/5653, para. 17(c) (April 10, 1964)

66. Report of the Secretary-General on the Implementation of Security Council Resolution 340 (1973), U.N. SCOR, U.N. Doc. S/11052/Rev.1 (1973)

67. Report of the Secretary-General on the Situation in Bosnia and Herzegovina, U.N. SCOR, 47th Sess., U.N. Doc. S/24540 (1992)

68. Report Pursuant to Paragraph 5 of Security Council Resolution 837 on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on Behalf of the Secretary-General, U.N. SCOR, Annex at 3, U.N. Doc. S/26351 (1993)

69. Report of the Commission of Inquiry Established Pursuant to Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them, U.N. Doc. S/1994/653 (1994).

70. Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, §1.2, U.N. Doc. ST/SGB/1999/13 (1999)

71. Situation of Human Rights in Sierra Leone, U.N. Commission on Hum. Rts., 54th Sess., U.N. Doc. E/CN.4/RES/1999/1 (1999)

COURT AND TRIBUNAL CASES

72. Asylum Case (Columbia v. Peru), 1950 I.C.J. Rep. 266 (Advisory Opinion)

73. Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 889 (2d Cir. 1981)

74. Certain Expenses of the United Nations, 1962 I.C.J. 151 (Advisory Opinion of July 20)

75. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.), 1984 I.C.J. Rep. 293, paras. 91-93 (1981-1984)

76. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)

77. Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Merits, 1986 ICJ REP. 14 (June 27)

78. North Sea Continental Shelf Case (Germany v. Denmark/Netherlands), 1969 I.C.J. Rep. 3

79. Prosecutor v. Dusko Tadic, IT-95-1-AR72 (Oct. 2. 1995)

80. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T (Sept. 2, 1998)

81. South West Africa Cases (Ethiopia v. S. Africa), 1966 I.C.J. 248 (Second Phase) (dissenting opinion of Judge Tanaka)

82. Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 1 (1978)

83. Western Sahara, 1975 I.C.J. Rep. 4 (Advisory Opinion)

84. Alex Tamba Brima, Case No. SCSL-2004-16-PT

85. Augustine Gbao, Case No. SCSL-2004-15-PT

86. Brima Bazzy Kamara, Case No. SCSL-2004-16-PT

87. Charles Ghankay Taylor, Case No. SCSL-2003-01

88. Foday Saybana Sankoh, Case No. SCSL-2003-02 (withdrawn)

89. Issa Hassan Sesay, Case No. SCSL-2004-15-PT

90. Johnny Paul Koroma, Case No. SCSL-2003-03

91. Morris Kallon, Case No. SCSL-2004-15-PT

92. Sam Bockarie, Case No. SCSL-2003-04 (withdrawn)

93. Santigie Borbor Kanu, Case No. SCSL-2004-16-PT

TREATISES AND BOOKS

94. ANTONIO CASSESE, PAOLA GAETA, & JOHN R.W.D. JONES, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME I (2002)

95. ANTONIO CASSESE, PAOLA GAETA, & JOHN R.W.D. JONES THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, MATERIALS (2002)

96. HILAIRE MCCOUBREY & NIGEL WHITE, THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS (1996)

97. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed. 1998)

98. J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969)

99. M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (1998)

100. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES (1985)

101. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1982)

102. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)

103. ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 119 (1999)

104. UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING, U.N. Sales No. E.90.I.18 (2d ed. 1990).

105. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, VOLUME I (1995)

JOURNALS AND LAW REVIEW ARTICLES

106. Boutros Boutros-Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89 (1992)

107. Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GEORGIA J. INT'L & COMP. L. 1 (1989)

108. Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, in HUMANITARIAN LAW (Judith Gardam ed., 1999)

109. Evan T. Bloom, *Current Development: Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621 (1995)

110. Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force*, 27 DENV. J. INT'L L. & POL'Y 239, 268 (1999)

111. Leila N. Sadat, *Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909 (2000)

112. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1998)

113. Major Joseph P. Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1 (2001)

114. Manoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999)

115. Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fisler Damrosch & David J. Scheffer eds., 1991)

116. Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 HOUSTON J. INT'L L. 359 (1996)

117. Theodor Meron, *International Criminalization of Internal Atrocities*, in HUMANITARIAN LAW (Judith Gardam ed., 1999)

118. Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93 (1996)

119. Walter Gary Sharp, Sr., *Revoking and Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT'L & TRADE 1 (1998)

MISCELLANEOUS

120. Ratification status of the Geneva Conventions and their Additional Protocols, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc

121. Ratification status of the Rome Statute of the International Criminal Court, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp

122. Ratification status of the Convention on the Safety of United Nations and Associated Personnel, available at http://untreaty.un.org/English/Status/Chapter_xviii/treaty8.asp

123. WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE: DELUXE ENCYCLOPEDIC EDITION (1987)

I. INTRODUCTION AND SUMMARY OF CONCLUSION

A. Issues

Article 4(b) of the Statute of the Special Court for Sierra Leone ("Special Court Statute") criminalizes "Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."[1] This provision raises two interrelated issues. First, Part IV of this memorandum addresses whether Article 4(b) is legitimate under customary international law. Second, Part V of this memorandum focuses on the final clause in Article 4(b) in order to determine if and when peacekeeping personnel are entitled to the protections given to civilians or civilian objects under the international law of armed conflict.

B. Summary of Conclusions

1. Viewing the Numerous Sources Criminalizing Attacks Against Peacekeeping Personnel Together, a Sound Legal Argument can be Made that Article 4(b) Represents Customary International Law

It is generally difficult for a particular rule of law to crystallize into customary international law. While the customary status of Article 4(b) of the Special Court Statute can not be firmly established by any one source, combining all the relevant sources criminalizing attacks against peacekeeping personnel provides a sufficient body of law to support the proposition that Article 4(b) is a legitimate provision. Common Article 3 of the four Geneva Conventions and portions of Additional Protocol II that have attained the status of customary law provide a measure of protection for peacekeeping personnel and lend some legitimacy to Article 4(b).

[1] Statute of the Special Court for Sierra Leone, art. 4(b). [Reproduced in the accompanying notebook I at Tab 11].

Coupled with international treaties such as the Convention on the Safety of United Nations and Associated Personnel and the Rome Statute of the International Criminal Court, as well as relevant General Assembly and Security Council resolutions, which contribute to the formation of customary law, one can make a sound legal argument that attacks on peacekeeping personnel represent a violation of customary international law.

2. UNAMSIL is Likely Entitled to the Protection Afforded to Civilians Under the International Law of Armed Conflict

When United Nations ("UN") forces are operating impartially with the consent of the parties to a conflict, and under a self-defensive mandate, they will be entitled to the protections afforded to civilians under the international law of armed conflict because consensual peacekeepers are not belligerents taking part in the hostilities, and are therefore not lawful targets under the laws of war. Even if it becomes necessary for a peacekeeper to use force in self-defense, the peacekeeper will not lose his status as a non-belligerent and become a combatant, so long as the defensive response is necessary and proportional. Since UNAMSIL was established as a peacekeeping force with the consent of the parties in Sierra Leone, which only used force in self-defense when attacked or to pre-empt an imminent attack, they should be entitled to the status of civilian non-combatants.

II. FACTUAL BACKGROUND

Before proceeding to the legal analysis, it is necessary to discuss the background surrounding the UN peacekeeping mission in Sierra Leone. In March 1991, civil war erupted in Sierra Leone when soldiers of the Revolutionary United Front ("RUF") invaded from Liberia, and began battling the Sierra Leone Army ("SLA"). Conflict between these two factions and their respective allies continued until July 1999, when the two sides signed the Lome Peace

Agreement.[2] Article 16 of the Lome Peace Agreement called for the establishment of a "neutral peacekeeping force" sponsored by the UN,[3] and this provision was consented to by the leadership of the Government of Sierra Leone and the RUF.[4] Accordingly, on October 22, 1999, the Security Council adopted Resolution 1270 establishing the United Nations Mission in Sierra Leone ("UNAMSIL").[5]

Promptly following Resolution 1270, the UN began preparing for the deployment of UNAMSIL, and the first peacekeepers arrived in Sierra Leone in late November 1999.[6] UNAMSIL's primary responsibilities under the mandate set forth in Resolution 1270 included cooperating with the Government of Sierra Leone and the other parties to the conflict in implementing the Lome Peace Agreement, and assisting the Government achieve the disarmament, demobilization, and reintegration of former combatants.[7] Another significant feature of UNAMSIL's mandate was the responsibility to ensure the security and freedom of movement of UN personnel operating in Sierra Leone.[8] In this regard, the Security Council acting under Chapter VII of the UN Charter authorized UNAMSIL peacekeepers to "take the

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[2] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999. [Reproduced in the accompanying notebook I at Tab 12].

[3] *Id*. at art. 16.

[4] Second Report of the Secretary-General Pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/13, para. 4 (Jan. 11, 2000) [Reproduced in the accompanying notebook III at Tab 6]; Fourth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/455, para. 4 (May 19, 2000). [Reproduced in the accompanying notebook III at Tab 8].

[5] S.C. Res. 1270, U.N. SCOR, 4054th mtg., U.N. Doc. S/RES/1270 (1999). [Reproduced in the accompanying notebook II at Tab 40].

[6] First Report on the United Nations Mission in Sierra Leone (UNAMSIL), U.N. Doc. S/1999/1223, para. 30 (Dec. 6, 1999). [Reproduced in the accompanying notebook III at Tab 5].

[7] S.C. Res. 1270, *supra* note 5, at para. 8. [Reproduced in the accompanying notebook II at Tab 40].

[8] *Id*. at para. 8(d).

necessary action to ensure the security and freedom of movement of its personnel and. . .to afford protection to civilians under imminent threat of physical violence. . . ."[9]

Due to instances of violence and threats against UNAMSIL personnel in January and early February of 1999,[10] the Security Council revisited the conflict in Sierra Leone and opted to expand UNAMSIL's mandate by adopting Resolution 1289 on February 7, 2000.[11] Pursuant to its Chapter VII authority, the Security Council authorized UNAMSIL to take the necessary action to provide security at key Government installations, including the disarmament, demobilization, and reintegration sites, as well as guard all weapons and ammunition collected from ex-combatants, and facilitate the flow of people and humanitarian assistance along certain specified roadways.[12] It is important to note that based on the rules of engagement conferred upon UNAMSIL in Resolutions 1270 and 1289, peacekeeping personnel had the mandate to use force, including deadly force, but only in self-defense to counter any hostile act or intent.[13]

Despite UNAMSIL's attempts to remain impartial, tensions between peacekeeping personnel, RUF soldiers, and members of the Armed Forces Revolutionary Council ("AFRC") heightened in April 2000. By early May, these tensions culminated in a series of unprovoked attacks on UNAMSIL personnel by RUF and AFRC forces in which a number of UN soldiers were killed, several hundred peacekeeping personnel were detained and held hostage, and some

[9] *Id*. at para. 14.

[10] *See* Third Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/186, paras. 10-15 (March 7, 2000). [Reproduced in the accompanying notebook III at Tab 7].

[11] S.C. Res. 1289, U.N. SCOR, 4099th mtg., U.N. Doc. S/RES/1289 (2000). [Reproduced in the accompanying notebook II at Tab 44].

[12] *Id*. at para. 10.

[13] Fourth Report of the Secretary-General, *supra* note 4, at para. 89. [Reproduced in the accompanying notebook III at Tab 8].

of the disarmament and demobilization camps were destroyed by the RUF.[14] President Kabbah of Sierra Leone then requested the UN to assist Sierra Leone in establishing a special court to try those responsible for killing and taking UN peacekeepers hostage.[15] Attacks against UNAMSIL personnel continued into July 2000, and although several more UN personnel were killed or taken hostage, UNAMSIL forces were able to successfully repel many attacks by exercising their right of self-defense.[16] Significantly, on two occasions in July 2000, after peaceful measures were unsuccessful, UNAMSIL launched military operations to pre-empt an imminent attack from the AFRC/ex-SLA, and to free UNAMSIL personnel previously taken hostage by the RUF.[17]

As a result of the crises of early May, at the 4139th meeting of the Security Council some states supported the view that UNAMSIL should be given a strong peace enforcement mandate under Chapter VII of the UN Charter;[18] however, most of the troop contributing states would not accept an expansion of the mandate to the level of peace enforcement.[19] A compromise was reached in the form of Security Council Resolution 1313, adopted on August 4, 2000, in which UNAMSIL's mandate was strengthened to give the force the authority "[t]o deter and, where

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[14] *Id*. at paras. 56-71.

[15] Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/751, para. 9 (July 31, 2000). [Reproduced in the accompanying notebook III at Tab 9].

[16] *See* Fourth Report of the Secretary-General, *supra* note 4 [Reproduced in the accompanying notebook III at Tab 8]; *see also* Fifth Report of the Secretary-General, *supra* note 15. [Reproduced in the accompanying notebook III at Tab 9].

[17] Fifth Report of the Secretary-General, *supra* note 15, at paras. 23-27. [Reproduced in the accompanying notebook III at Tab 9].

[18] Fourth Report of the Secretary-General, *supra* note 4, at para. 100. [Reproduced in the accompanying notebook III at Tab 8].

[19] Sixth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/832, para. 45 (Aug. 24, 2000). [Reproduced in the accompanying notebook III at Tab 10].

necessary, decisively counter the threat of RUF attack by responding robustly to any hostile actions or threat of imminent and direct use of force."[20] Under the new mandate, UNAMSIL essentially remained a neutral peacekeeping force, and according to its new rules of engagement "the use of force by UNAMSIL troops would be limited to the defense of its personnel, assets and mandate, including its freedom of movement and the protection of civilians, to the extent that it is capable of doing so and within its areas of deployment."[21] The only real change in the rules of engagement was that UNAMSIL "would be expected to *respond robustly* to any action or to the threat of imminent use of force by hostile groups."[22]

While there were several more attacks against UNAMSIL personnel through October 2000, most of these attacks were successfully repelled as a consequence of reinforcements and UNAMSIL's strengthened mandate.[23] On November 10, 2000, dialogue between UNAMSIL and the leadership of the RUF produced the Abuja Ceasefire Agreement[24] in which the RUF recommitted itself to the terms of the Lome Peace Agreement by pledging to cooperate with UNAMSIL and recommit itself to the program of disarmament and demobilization.[25] This new cease-fire allowed UNAMSIL to recommit itself to assisting both sides recover from the years of

[20] S.C. Res. 1313, para. 3(b), U.N. SCOR, 4184th mtg., U.N. Doc. S/RES/1313 (2000). [Reproduced in the accompanying notebook II at Tab 46].

[21] Sixth Report of the Secretary-General, *supra* note 19, at para. 24. [Reproduced in the accompanying notebook III at Tab 10].

[22] *Id*.

[23] Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/1055, para. 15 (Oct. 31, 2000). [Reproduced in the accompanying notebook III at Tab 12].

[24] Abuja Ceasefire Agreement between the Government of Sierra Leone and the Revolutionary United Front ("Abuja Ceasefire Agreement"), 10 November 2000. [Reproduced in the accompanying notebook I at Tab 13].

[25] Eighth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/1199, para. 2 (Dec. 15, 2000). [Reproduced in the accompanying notebook III at Tab 13].

conflict in Sierra Leone.[26] The security situation in Sierra Leone has remained relatively stable since that time, and UNAMSIL is expected to completely withdraw by the end of 2004.[27]

Despite subsequent successes in Sierra Leone, the attacks and hostage taking of UNAMSIL personnel between approximately April and October of 2000 produced a number of indictments against the leadership of the RUF, AFRC/ex-SLA, and others, pursuant to Article 4(b), as well as other provisions of the Special Court Statute, that frame the issues subject of the legal analysis to follow.[28]

III. SPECIAL COURT JURISDICTION AND CUSTOMARY INTERNATIONAL LAW

The Special Court for Sierra Leone has jurisdiction to prosecute individuals found to have committed violations of the Special Court Statute which were also considered violations of customary international law at the time the offenses were committed. Viewing Article 4(b) of the Special Court Statute in its entirety, the legitimacy of this provision depends on whether it is a violation of customary international law to attack personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission. Thus, it becomes relevant to engage in a brief analysis of the subject matter jurisdiction of the Special Court and the formation of customary international law.

[26] *See*, *e.g.*, *id*. at para. 49.

[27] Twentieth Report of the Secretary-General on the United Nations Mission in Sierra Leone (UNAMSIL), U.N. Doc. S/2003/1201, paras. 2-4 (Dec. 23, 2003). [Reproduced in the accompanying notebook III at Tab 14].

[28] Charles Ghankay Taylor, Case No. SCSL-2003-01; Foday Saybana Sankoh, Case No. SCSL-2003-02 (withdrawn); Johnny Paul Koroma, Case No. SCSL-2003-03; Sam Bockarie, Case No. SCSL-2003-04 (withdrawn); Issa Hassan Sesay, Case No. SCSL-2004-15-PT; Alex Tamba Brima, Case No. SCSL-2004-16-PT; Morris Kallon, Case No. SCSL-2004-15-PT; Augustine Gbao, Case No. SCSL-2004-15-PT; Brima Bazzy Kamara, Case No. SCSL-2004-16-PT; Santigie Borbor Kanu, Case No. SCSL-2004-16-PT.

A. Subject Matter Jurisdiction of the Special Court

"The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[29] In particular, the Court has jurisdiction to prosecute crimes against humanity,[30] war crimes pursuant to common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II ("Protocol II"),[31] other serious violations of international humanitarian law,[32] and crimes under particular laws of Sierra Leone that have been incorporated into the statute.[33] Based on the principle *nullum crimen sine lege* and the prohibition on retroactive criminal jurisdiction, however, all the international crimes over which the Special Court has jurisdiction must have achieved the status of customary international law by the time the offense was committed.[34] The legitimacy of Article 4(b), therefore, depends on whether the crimes defined in that provision represented serious violations of customary international humanitarian law by April of 2000, which is the earliest date cited in the relevant indictments against those charged with attacking UNAMSIL personnel.

[29] Statute of the Special Court for Sierra Leone, art. 1. [Reproduced in the accompanying notebook I at Tab 11].

[30] *Id.* at art. 2.

[31] *Id.* at art. 3; *see also* Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 3, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950 [Reproduced in the accompanying notebook I at Tab 5]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4, 1125 U.N.T.S. 609, *entered into force* Dec. 7 1978. [Reproduced in the accompanying notebook I at Tab 8].

[32] *Id.* at art. 4.

[33] *Id.* at art. 5.

[34] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, para. 12 (Oct. 4, 2000). [Reproduced in the accompanying notebook III at Tab 11].

B. Customary International Law

International tribunals have long enforced "international custom, as evidence of a general practice accepted as law."[35] Customary international law is comprised of two elements: state practice and *opinio juris*.[36] In other words, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[37] State practice merely means that a significant number of states act in a regular and repeated manner that establishes a customary norm, while the *opinio juris* element requires a state to act in particular manner out of a sense of legal obligation and "not merely for reasons of political expediency."[38] Evidence of custom may be found in "treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisors, [and the] practice of international organizations."[39] International tribunals have also shown some willingness to presume the existence of *opinio juris* based on a previous determination by other competent international tribunals that state practice has served to elevate a particular principle to the status of customary law.[40] Based on the standard set forth above, in

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[35] Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. [Reproduced in the accompanying notebook I at Tab 10].

[36] Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. ¶183 (June 27)(citing Continental Shelf, 1985 I.C.J. ¶27). [Reproduced in the accompanying notebook IV at Tab 27].

[37] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987). [Reproduced in the accompanying notebook IV at Tab 42].

[38] Asylum Case (Columbia v. Peru), 1950 I.C.J. Rep. 266, 277 (Advisory Opinion) [Reproduced in the accompanying notebook III at Tab 22]; *see also* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985) (*opinio juris* refers to the belief of a state "that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it"). [Reproduced in the accompanying notebook IV at Tab 40].

[39] VILLIGER, *supra* note 38, at 5. [Reproduced in the accompanying notebook IV at Tab 40].

[40] *See* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.), 1984 I.C.J. Rep. 293, paras. 91-93 (1981-1984) [Reproduced in the accompanying notebook III at Tab 25]; *see also* RESTATEMENT, *supra* note 37, at §102 cmt. c (*opinio juris* may be inferred from either acts or omissions). [Reproduced in the accompanying notebook IV at Tab 42].

this case, the existence of customary international humanitarian law is best evidenced from international treaties and the practice of states through international organizations, such as the UN General Assembly and the UN Security Council.

1. International Treaties and Conventions as a Source of Custom

"International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."[41] When a treaty purports to codify pre-existing customary law, its validity hinges on the legitimacy of the underlying principle of customary international law. It can also be the case that only parts of an international agreement codify customary law, while the rest of the instrument merely represents a progressive development of customary norms or completely new law.[42] Whether a treaty represents a codification of pre-existing law or not, however, treaties constitute the practice of states, and so binding agreements play a significant role in creating customary law.[43]

For a treaty to create customary law, there must be wide and near unanimous acceptance, and the rejection of a treaty by a significant number of important states could indicate that its provisions have not attained the status of customary law.[44] It is also particularly important that a treaty receive wide acceptance by the states most closely affected by terms of the instrument.[45] Finally, it is noteworthy that the International Court of Justice has determined that "the passage

[41] RESTATEMENT, *supra* note 37, at §102(3). [Reproduced in the accompanying notebook IV at Tab 42].

[42] *Id*. at §102 n. 5.

[43] *See* North Sea Continental Shelf Case (Germany v. Denmark/Netherlands), 1969 I.C.J. Rep. 3, 28-29, 37-43. [Reproduced in the accompanying notebook IV at Tab 28].

[44] *Id*. at 42.

[45] RESTATEMENT, *supra* note 37, §102 cmt. b. [Reproduced in the accompanying notebook IV at Tab 42].

of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law...."[46]

2. General Assembly Resolutions as a Source of Custom

Although General Assembly resolutions are not binding on UN member states[47] or considered a formal source of international law,[48] resolutions and declarations of the General Assembly do contribute to the making of customary international law because the votes and statements made in supporting those resolutions constitute evidence of both state practice and *opinio juris*.[49] As such, resolutions of international organizations, particularly the UN, are afforded some weight especially when adopted unanimously or by consensus.[50] While the customary norm creating value of a General Assembly resolution can be called into question if there is a strong dissenting minority, evidence that a state cast its vote for political reasons, or

[46] North Sea Continental Shelf Case, *supra* note 43, 1969 I.C.J. Rep. at 43. [Reproduced in the accompanying notebook IV at Tab 28]. This idea of "instant customary law" is important in that some of the relevant treaties criminalizing attacks on peacekeeping personnel are relatively new.

[47] *See* U.N. CHARTER, art. 10-14 [Reproduced in the accompanying notebook I at Tab 1]; Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 889 (2d Cir. 1981) (applying conventional customary law analysis, and noting the "considerable interest" of General Assembly resolutions even though they "do not have the force of law") [Reproduced in the accompanying notebook III at Tab 23]; JORGE CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 2-3 (1969) [Reproduced in the accompanying notebook IV at Tab 38]; *But see* U.N. CHARTER art. 17, 20-22 (General Assembly may make binding decisions as to procedural matters, subsidiary bodies, and financial decisions) [Reproduced in the accompanying notebook I at Tab 1]; Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 1, 30 (1978) (any resolution with the support of "a majority of member states representing all of the various groups" can serve as a binding source of law) [Reproduced in the accompanying notebook IV at Tab 32]; Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (citing numerous General Assembly resolutions and suggesting their binding authority as a source of law). [Reproduced in the accompanying notebook IV at Tab 26].

[48] *See* Statute of the International Court of Justice, *supra* note 35, at art. 38(1). [Reproduced in the accompanying notebook I at Tab 10].

[49] RESTATEMENT, *supra* note 37, at §102 n. 2 [Reproduced in the accompanying notebook IV at Tab 42]; *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 14 (5th ed. 1998). [Reproduced in the accompanying notebook IV at Tab 37].

[50] *Id*. at §103 cmt. c.

evidence that a state's vote is contradicted by its actual practice,[51] where this is not the case, courts have considered these resolutions as evidence of customary law.[52] Significantly, the "general will" of the international community as seen in General Assembly resolutions is best transformed into principles of law when a particular resolution is used as the basis for adopting a multilateral treaty,[53] which is a clear indication by the members of the General Assembly that the subject of the resolution should be incorporated into a binding instrument.

3. Security Council Resolutions as a Source of Custom

Resolutions of the Security Council under Chapter VII of the UN Charter are binding law for members of that organization.[54] Because of their binding nature, and the fact that the Security Council is not a representative forum, Security Council resolutions are not traditionally considered to assist in the creation of customary law. Even though these resolutions derive their authority from the UN Charter, Security Council actions and the actions of the individual state members of the Council "may reflect state practice or *opinio juris*."[55] This point is particularly important since the Security Council is composed of some of the most important states in the international legal system, including the permanent members of China, the United Kingdom,

[51] *Id.*

[52] *See* Western Sahara, 1975 I.C.J. Rep. 4, 31 (Advisory Opinion) [Reproduced in the accompanying notebook IV at Tab 33]; South West Africa Cases (Ethiopia v. S. Africa), 1966 I.C.J. 248, 291-93 (Second Phase) (dissenting opinion of Judge Tanaka) (the General Assembly can hasten the formation of customary law because it provides states "the opportunity, through the medium of the organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter"). [Reproduced in the accompanying notebook IV at Tab 31].

[53] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 85 (1982). [Reproduced in the accompanying notebook IV at Tab 41].

[54] U.N. CHARTER, art. 25, 103. [Reproduced in the accompanying notebook I at Tab 1].

[55] RESTATEMENT, *supra* note 37, at §102 n. 2. [Reproduced in the accompanying notebook IV at Tab 42].

France, Russia, and the United States.[56] As noted earlier, if a significant number of important states do not consider a principle customary law, there is a presumption that it is not. Thus, the voting history of relevant Security Council resolutions can give valuable insight into the practice and *opinio juris* of a number of significant states.

IV. THE EVOLUTION OF CUSTOMARY INTERNATIONAL LAW RELATED TO THE PROTECTION OF PEACEKEEPING PERSONNEL.

A. The Geneva Conventions and Additional Protocol II

The most fundamental instruments pertaining to international humanitarian law are the Geneva Conventions of 1949 and their Additional Protocols of 1977, which are among the most widely ratified treaties in the world.[57] Determining which of these instruments apply to a given conflict can be a challenge. While it could be argued that the conflict in Sierra Leone represented an international armed conflict based on the involvement of Liberia and Burkina Faso, the drafters of the Special Court Statute omitted the more extensive protections available to civilians and peacekeepers under the Geneva Conventions and Additional Protocol I, choosing only to include violations of common Article 3 of the Geneva Conventions and Protocol II. This decision indicates that the UN and the Government of Sierra Leone predetermined the situation in Sierra Leone to be a non-international armed conflict.[58] The focus of this memorandum, therefore, is to discuss only those rules of customary law that purport to protect peacekeeping personnel during an internal armed conflict.

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[56] U.N. CHARTER, art. 23. [Reproduced in the accompanying notebook I at Tab 1].

[57] Ratification status available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc (There are currently 191 parties to the Geneva Conventions of 1949, 161 parties to Additional Protocol I, and 156 parties to Additional Protocol II). [Reproduced in the accompanying notebook V at Tab 10].

[58] *But see* Prosecutor v. Dusko Tadic, Case No. IT-95-1-AR72, paras. 72, 77 (Oct. 2, 1995) (rejecting the notion that the Security Council had predetermined the conflict in the former Yugoslavia to be an international armed conflict and finding that the conflict had both internal and international characteristics). [Reproduced in the accompanying notebook IV at Tab 29]. With regard to Sierra Leone, the only case in which it could be argued that the conflict was of a mixed character might be the case against Charles Taylor.

1. Common Article 3 and Article 4 of Protocol II

Only certain provisions of the Geneva Conventions and their Additional Protocols apply in non-international armed conflicts, and not the whole of international humanitarian law. [59] The relevant provisions include common Article 3 of the Geneva Conventions and Article 4 of Protocol II. Notwithstanding the fact that Sierra Leone is a party to the four Geneva Conventions, which it succeeded to in 1965, and Protocol II, which it ratified in 1986,[60] both common Article 3[61] and Article 4 of Protocol II[62] represent customary international law. Thus, these provisions are binding on all the parties to the conflict in Sierra Leone.[63]

2. Individual Criminal Responsibility

Traditionally, violators of common Article 3 and Protocol II would not incur individual criminal responsibility.[64] This rule began to erode with the debates surrounding the establishment of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in which France, the United States, and the United Kingdom all pressed for the criminalization of violations of the law of internal armed conflict.[65] It is also noteworthy that the military manuals

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[60] *See* Ratification status, *supra* note 57. [Reproduced in the accompanying notebook V at Tab 10].

[61] Military and Paramilitary Activities In and Against Nicaragua, *supra* note 34, 1986 I.C.J. ¶114. [Reproduced in the accompanying notebook IV at Tab 27].

[62] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T (Sept. 2, 1998) [Reproduced in the accompanying notebook IV at Tab 30]; Prosecutor v. Dusko Tadic, *supra* note 58, at para. 117 [Reproduced in the accompanying notebook IV at Tab 29];Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, *supra* note 34, at 4. [Reproduced in the accompanying notebook III at Tab 11].

[63] *See* Geneva IV, *supra* note 31, at art. 3 ("in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party* to the conflict shall be bound to apply, as a minimum, the following provisions"). [Reproduced in the accompanying notebook I at Tab 5].

[64] Theodor Meron, *International Criminalization of Internal Atrocities*, in HUMANITARIAN LAW 304 (Judith Gardam ed., 1999). [Reproduced in the accompanying notebook V at Tab 7].

[65] *See* U.N. Doc. S/PV.3217, at 11, 15, 19 (May 25, 1993)(no other member of the Security Council disputed this characterization). [Reproduced in the accompanying notebook II at Tab 35].

of the United States, the United Kingdom, Germany and Canada all include violations of the law of internal armed conflict as prosecutable offenses.[66] These important examples of state practice culminated in the decision of the Appeals Chamber in *Prosecutor v. Dusko Tadic* where it was held that any individual violating the law of internal armed conflict can incur individual criminal responsibility.[67] The trend became concrete when the Independent Commission of Experts on Rwanda determined that the principle of individual criminal responsibility does apply to violations of common Article 3 and Protocol II,[68] and this point is unequivocally reflected in the Statute for the International Criminal Tribunal for Rwanda[69] and the Rome Statute of the International Criminal Court.[70] Thus, the practice in contemporary international law is to treat violations of common Article 3 and Protocol II as prosecutable offenses.[71]

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[66] Meron, *supra* note 64, at 309-310 [Reproduced in the accompanying notebook V at Tab 7]; *see also* Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, in HUMANITARIAN LAW 360 (Judith Gardam ed., 1999). [Reproduced in the accompanying notebook IV at Tab 48].

[67] Prosecutor v. Dusko Tadic, *supra* note 58, at para. 129 [Reproduced in the accompanying notebook IV at Tab 29].

[68] U.N. Doc. S/1994/1125, paras. 84-93, 128 (1994). [Reproduced in the accompanying notebook II at Tab 37].

[69] Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955, art. 4 (1994). [Reproduced in the accompanying notebook II at Tab 36].

[70] Rome Statute of the International Criminal Court, art. 8(c) and (e) , U.N. Doc. A/Conf. 183/9, July 17, 1998. [Reproduced in the accompanying notebook I at Tab 9].

[71] *See* Situation of Human Rights in Sierra Leone, U.N. Commission on Hum. Rts., 54th Sess., U.N. Doc. E/CN.4/RES/1999/1 (1999) (In 1999, the UN Commission on Human Rights warned each party to the conflict in Sierra Leone that "In an armed conflict, including an armed conflict not of an international character, the taking of hostages, willful killing and torture or inhumane treatment of persons taking no active part in the hostilities constitutes a grave breach of international humanitarian law, and all countries are under an obligation to search for persons alleged to have committed or to have ordered to have committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts"). [Reproduced in the accompanying notebook III at Tab 21].

3. Application to Article 4(b) of the Special Court Statute

While only Article 3 of the Special Court Statute expressly invokes "violations of article 3 common to the Geneva Conventions and of Additional Protocol II,"[72] and the protection afforded peacekeeping personnel under Article 4 of the Special Court Statute appears to lend its legitimacy to "other serious violations of international humanitarian law,"[73] these two provisions are not mutually exclusive. The final clause of Article 4(b) is a qualifier, which provides that attacks on peacekeepers are international crimes only "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."[74] This language confirms that "[a]ttacks against peacekeeping personnel, to the extent they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime."[75] The crime defined in Article 4(b) is somewhat superfluous, then, as it is merely "a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection."[76] Part of the customary foundation for Article 4(b), therefore, can be found in common Article 3 and Article 4 of Protocol II, both of which represented customary international law before April of 2000 when UNAMSIL personnel became the target of routine attacks by rebel forces in Sierra Leone.

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[72] Statute of the Special Court for Sierra Leone, art. 3. [Reproduced in the accompanying notebook I at Tab 11].

[73] *Id*. at art. 4.

[74] *Id*. at art. 4(b).

[75] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, *supra* note 34, at 4. [Reproduced in the accompanying notebook III at Tab 11].

[76] *Id*.

These provisions protect any persons in an internal armed conflict "taking no active part in the hostilities,"[77] including any peacekeeping personnel who are not engaged as combatants. While common Article 3 prohibits violence to life, including killing, cruel treatment and torture, as well as hostage taking,[78] Article 4 of Protocol II applies in a narrower set of circumstances,[79] but supplements and expands common Article 3 by prohibiting collective punishments, acts of terrorism, pillaging, or threats to commit any of those acts.[80]

Assuming that peacekeeping personnel enjoy civilian status, the customary norms embodied in common Article 3 and Article 4 of Protocol II at least prohibit any violence to the life of a peacekeeper, including willful killing, cruel treatment, torture, or hostage taking, thereby lending legitimacy to the portion of Article 4(b) that prohibits attacks on peacekeeping personnel.[81] Moreover, it could be argued that the crime of pillage in Article 4 of Protocol II, which is defined as the taking of goods by force or the plundering of places,[82] provides some legitimacy to the portion of Article 4(b) that criminalizes attacks against the installations,

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[77] Geneva IV, *supra* note 31, at art. 3 [Reproduced in the accompanying notebook I at Tab 5]; Protocol II, *supra* note 31, at art. 4. [Reproduced in the accompanying notebook I at Tab 8].

[78] *Id.*

[79] Protocol II, *supra* note 31, at art. 4 (Protocol II applies in "[a]ll armed conflicts...not covered by Article 1 of [Protocol I]...which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II]...[but] shall not apply to situations of internal disturbances and tensions, such as riots [or] isolated and sporadic acts of violence...." Since the fighting between the armed forces of Sierra Leone and the RUF, which had an organized command structure and control over a portion of the eastern region of Sierra Leone, rose above the level of internal tensions, Protocol II clearly applies). [Reproduced in the accompanying notebook I at Tab 8].

[80] *Id.*

[81] *See* Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, Report of the Secretary-General, U.N. GAOR, 5th Sess., U.N. Doc. A/58/187, para. 28 (July 28, 2003). [Reproduced in the accompanying notebook II at Tab 26].

[82] WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE: DELUXE ENCYCLOPEDIC EDITION 762 (1987). [Reproduced in the accompanying notebook V at Tab 13].

material, units or vehicles of peacekeeping personnel.[83] The fact that these customary norms do not provide any express protection, but only protect non-combatant peacekeepers by implication, leads to an imprecise customary foundation on which to base the whole of Article 4(b). Thus, these norms alone are likely insufficient to make the provision entirely legitimate.

B. The Convention on the Safety of United Nations and Associated Personnel

Due to attacks on peacekeeping personnel in Somalia, the former Yugoslavia, and Rwanda, the General Assembly adopted the Convention on the Safety of United Nations and Associated Personnel ("Safety Convention") in 1994.[84] The Safety Convention is the first international instrument to explicitly focus on protecting UN peacekeeping personnel by criminalizing attacks against them, and it entered into force on January 15, 1999. The primary reason for adopting the Safety Convention was to address the absence in the Geneva Convention relative to the Protection of Civilian Persons in Time of War and the two Additional Protocols of 1977 of effective criminal sanctions for attacks on UN forces carrying out peacekeeping tasks. The Safety Convention, however, is meant to cover only those individuals that are not also protected under the Geneva Conventions. "The negotiators realized that it was necessary to have a clear separation between the new legal regime under the [Safety Convention] and the Geneva Conventions, so that UN and associated personnel and those who attack them would be covered under one regime or the other, but not both."[85] This construction ensured vital protection for

[83] Statute of the Special Court for Sierra Leone, art. 4(b). [Reproduced in the accompanying notebook I at Tab 11].

[84] Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59, preamble (1994), *reprinted in* 34 I.L.M 482 (1995). [Reproduced in the accompanying notebook I at Tab 2].

[85] Evan T. Bloom, *Current Development: Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 625 (1995) [Reproduced in the accompanying notebook IV at Tab 49].

peacekeepers, but also made certain that the Safety Convention would not be inconsistent with or have the effect of undermining existing humanitarian law.[86]

"Bearing in mind that attacks against, or other mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable, by whomsoever committed,"[87] the treaty prohibits attacks on UN and associated personnel. UN personnel are defined as any "persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation," which is in turn defined as any operation established by and conducted under "United Nations authority and control...[w]here the operation is for the purpose of maintaining or restoring international peace and security."[88]

The qualifying clause that enables the treaty to remain consistent with existing international humanitarian law is recited in Article 2(2) which provides that the Safety Convention does not cover UN personnel engaging as combatants in an enforcement action under the Security Council's Chapter VII authority.[89] Consequently, the Safety Convention protects traditional UN peacekeepers and forces acting under a limited Chapter VII mandate that is not an enforcement action, but not those forces involved in combat during an international

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[86] *See id*.; *see also* Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 HOUSTON J. INT'L L. 359, 375-6 (1996) (discussing the U.S. position that criminalizing attacks on UN forces engaged as combatants during an international armed conflict could promote disrespect for the laws of war by making it legal for UN forces to attack the other party, while simultaneously outlawing any attack on UN personnel). [Reproduced in the accompanying notebook V at Tab 6].

[87] Safety Convention, *supra* note 84, at preamble. [Reproduced in the accompanying notebook I at Tab 2].

[88] *Id*. at art. 1.

[89] Article 2(2) provides:

> 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 apples.

armed conflict pursuant to Article 2 of the Geneva Conventions. Moreover, the "use of force in self-defense by United Nations and associated personnel in isolated cases, without sustained fighting, does not by itself take an incident out of this Convention's coverage because the UN forces are not necessarily engaged as combatants when they defend themselves."[90] This principle is reflected in Article 21 of the treaty which provides that "Nothing in this Convention shall be construed so as to derogate from the right to act in self-defense."[91]

The Safety Convention's criminal provisions state that UN personnel, "their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate."[92] Specifically, the intentional commission of murder, kidnapping, any other violent attack upon the person, premises or vehicle of any peacekeeper, or any threat or attempt to commit any of the above acts are prohibited.[93]

The Safety Convention is a positive and important step forward in the fight to secure criminal penalties for attacks on peacekeeping and other humanitarian personnel, and the significance of the first multilateral treaty to specifically prohibit crimes against peacekeepers and call for penal sanctions against those who commit such crimes cannot be understated. The treaty is also definitive evidence of the practice and *opinio juris* of at least those states that have ratified the instrument. While the Safety Convention strengthens the pre-existing customary law found in common Article 3 and parts of Protocol II, it is unlikely that the Safety Convention

[90] Bloom, *supra* note 85, at 625. [Reproduced in the accompanying notebook IV at Tab 49].

[91] Safety Convention, *supra* note 84, at art. 21. [Reproduced in the accompanying notebook I at Tab 2].

[92] *Id.* at art. 7(1).

[93] *Id*. at art. 9(1)(a-d).

represents customary international law by itself because it only has 43 signatories and 71 state parties.[94]

C. The Rome Statute of the International Criminal Court

Another significant development is the Rome Statute of the International Criminal Court ("Rome Statute"), where attacks against peacekeeping personnel were first explicitly defined as a war crime.[95] The Rome Statute was completed on July 17, 1998, and it entered into force on July 1, 2002. The relevant portion of the Rome Statute for purposes of this analysis is Article 8(2)(e)(iii) because it covers war crimes against peacekeeping personnel in internal armed conflicts.[96] This provision is identical to Article 4(b) of the Special Court Statute.[97]

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[94] Ratification status available at http://untreaty.un.org/English/Status/Chapter_xviii/treaty8.asp. [Reproduced in the accompanying notebook V at Tab 12].

[95] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, *supra* note 34, at 4. [Reproduced in the accompanying notebook III at Tab 11].

[96] Article 8(2)(e)(iii) provides:

> Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
>
> Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

[97] The elements of Article 8(2)(e)(iii) include:

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/1/Add.2, *reprinted in* ANTONIO CASSESE, PAOLA GAETA, & JOHN R.W.D. JONES, THE ROME STATUTE OF THE INTERNATIONAL

The Rome Statute was intended to reflect existing rules of customary international law, not to make new law.[98] Since humanitarian law makes a distinction between international and non-international armed conflicts, and different rules apply in each situation, the war crimes provisions in the Rome Statute were drafted in four distinct sections as evidenced by Articles 8(2)(a), 8(2)(b), 8(2)(c), and 8(2)(e).[99] Article 8(2)(e) was meant to reflect existing customary norms established in common Article 3 and Protocol II,[100] and there is also evidence in the drafting history that the provision is based on the Safety Convention as well.[101]

Despite skepticism on the part of some states about the customary status of Article 8(2)(e), the majority of the states accepted that prior to the drafting of the treaty there was already a customary foundation on which to base Article 8(2)(e).[102] Notwithstanding the debate, the Rome Statute significantly advances the plight of peacekeeping personnel as a free standing multilateral instrument. Not only does it specifically criminalize attacks against peacekeepers, but it establishes them as a prosecutable war crime. The Rome Statute currently has 139

CRIMINAL COURT: A COMMENTARY, MATERIALS, 179 (2002). [Reproduced in the accompanying notebook IV at Tab 35].

[98] Mahnoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 25 (1999) [Reproduced in the accompanying notebook V at Tab 4]; *see also* Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909, 913 (2000). [Reproduced in the accompanying notebook V at Tab 1].

[99] *Id*. at 32.

[100] *See* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1998) [Reproduced in the accompanying notebook V at Tab 2]; *see also* ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 119 (1999). [Reproduced in the accompanying notebook IV at Tab 43]. It is also significant that the drafters of the Rome Statute lowered the threshold for the application of Protocol II in Article 8(2)(f), which provides that Article 8(2)(e) applies to any "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. *Id*. at 121.

[101] *See* M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 402 (1998) [Reproduced in the accompanying notebook IV at Tab 39]; *see also* ANTONIO CASSESE, PAOLA GAETA, & JOHN R.W.D. JONES, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, VOLUME I, 410, 422 (2002). [Reproduced in the accompanying notebook IV at Tab 34].

[102] *See* LEE, *supra* note 100, at 104-105. [Reproduced in the accompanying notebook IV at Tab 43].

signatories and 92 state parties, including Sierra Leone, which ratified the treaty on September 15, 2000.[103]

The fact that the treaty has not garnered unanimous acceptance and has yet to be ratified by the four largest nations in the world in terms of population, including China, India, Indonesia, and the United States,[104] however, hinders its ascension to the realm of customary international law. Another problem is that the Rome Statute did not enter into force until 2002, well after UNAMSIL's difficulties in Sierra Leone. One could argue in response that the Rome Statute was drafted in 1998 to reflect pre-existing customary law, and that any opposition to the treaty is based primarily on its jurisdictional provisions and not those provisions seeking to provide protection to peacekeepers. Nevertheless, the Rome Statute should be cited as evidence of the customary status of crimes against peacekeeping personnel

D. Relevant General Assembly Resolutions

As the primary deliberative organ of the UN composed of delegations from each member state,[105] which has the right to discuss any matters related to the UN and make recommendations related to those matters,[106] the General Assembly has addressed the protection of peacekeeping personnel on numerous occasions. While these resolution do represent evidence of state practice and *opinio juris* as noted above, it is important to keep in mind that General Assembly resolutions are not binding on states, and therefore do not represent an independent source of international law.

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[103] Ratification status available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp. [Reproduced in the accompanying notebook V at Tab 11].

[104] *Id*.

[105] U.N. CHARTER, art. 9. [Reproduced in the accompanying notebook I at Tab 1].

[106] *Id*. at art. 10.

In the early 1990s, deliberate attacks on UN personnel and corresponding casualties brought the protection of UN peacekeepers to the fore, and the General Assembly condemned such actions by demanding that "all parties to a conflict take all measures possible to ensure the safety of peace-keeping and other United Nations personnel."[107] Shortly thereafter, the General Assembly decided that more comprehensive action was required to shore up protection for peacekeeping personnel,[108] and it began preparation for an "international convention dealing with the safety and security of United Nations and associated personnel, with particular reference to responsibility for attacks on such personnel."[109] The Assembly stressed that "that any state in whose territory a United Nations peace-keeping operation is conducted should act promptly to deter and prosecute those responsible for attacks and other acts of violence against all personnel of United Nations peacekeeping operations."[110] On December 9, 1994, the General Assembly's efforts culminated in resolution 49/59 adopting the Safety Convention.[111]

Despite the entry into force of the Safety Convention, the General Assembly continued to pass resolutions addressing the protection of peacekeepers in which it specifically condemned certain enumerated acts of violence against UN personnel.[112] The Assembly also noted with

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[107] G.A. Res. 72, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/72 (1992)(adopted by consensus). [Reproduced in the accompanying notebook I at Tab 15].

[108] G.A. Res. 120B, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/120B (1992)(adopted by consensus). [Reproduced in the accompanying notebook I at Tab 16].

[109] G.A. Res. 37, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/37 (1993)(adopted by consensus). [Reproduced in the accompanying notebook I at Tab 17].

[110] G.A. Res. 42, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/42 (1993)(adopted by consensus). [Reproduced in the accompanying notebook I at Tab 18].

[111] G.A. Res. 59, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/59 (1994)(adopted by consensus). [Reproduced in the accompanying notebook I at Tab 19].

[112] G.A. Res. 192, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/192 (2000) (adopted by consensus and "strongly condemning acts of murder and other forms of physical violence, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which those participating in humanitarian operations are increasingly exposed, as well as acts of destruction and looting of their property") [Reproduced in the accompanying notebook I at Tab 20];

satisfaction the entry into force of the Safety Convention and the inclusion of attacks on peacekeeping personnel as a war crime under the Rome Statute,[113] urged all parties involved in armed conflict to follow their obligations under the Geneva Conventions and the Additional Protocols of 1977, as well as other applicable laws, with regard to the safety of peacekeepers and humanitarian personnel,[114] and urged states to ensure the prosecution of perpetrators of crimes against peacekeepers.[115] The UN also vowed to "promote adherence to" the Safety Convention in the United Nations Millennium Declaration proving the importance of the issue to the member states.[116]

The General Assembly has been steadfast in its mission to ensure adequate protection for peacekeepers, and when one considers the subject of its focus, these resolutions represent good evidence of state practice and *opinio juris*. As one commentator notes, the question of whether to criminalize attacks on UN peacekeepers was easy to move through the General Assembly because "what UN member state could publicly oppose the idea of protecting the personnel the organization sends into the field?"[117] That insightful comment merits a note of caution, however, because while it could very well be the case that states acted through the General Assembly out

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G.A. Res. 175, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/175 (2001)(adopted by consensus). [Reproduced in the accompanying notebook I at Tab 22].

[113] *Id*.; G.A. Res. 175, *supra* note 112. [Reproduced in the accompanying notebook I at Tab 22].

[114] *Id*. ("Guided by the relevant provisions on protection contained in the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, the Conventions on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, the Convention on the Safety of the United Nations and Associated Personnel, the Fourth Geneva Convention of 12 August 1949 and the Additional Protocols, and Amended Protocol II to the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980"); G.A. Res. 175, *supra* note 112. [Reproduced in the accompanying notebook I at Tab 22].

[115] *Id*.; G.A. Res. 175, *supra* note 112. [Reproduced in the accompanying notebook I at Tab 22].

[116] G.A. Res. 2, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/2 (2000)(adopted by consensus). [Reproduced in the accompanying notebook I at Tab 21].

[117] Lepper, *supra* note 86, at 371. [Reproduced in the accompanying notebook V at Tab 6].

of a strong sense of legal obligation, it is also true that some states might support a resolution for fear of being ostracized for opposing it.[118] It is significant in this regard that the General Assembly continues to call upon states to ratify the Safety Convention, and remains mindful "of the need to promote the universality of the Convention,"[119] which is not yet widely ratified. Notwithstanding the status of the Safety Convention, each General Assembly resolution cited in this section was adopted by consensus, thereby strengthening the value of these resolutions as evidence of state practice and *opinio juris* with respect to the customary nature of the legal regime protecting peacekeeping personnel.

E. Relevant Security Council Resolutions

The Security Council has likewise been vocal about its expectations that peacekeeping personnel be protected and the situation in Somalia is a particularly relevant example. From the outset of that conflict, the Council demanded that "all parties, including movements and factions in Somalia take all measures necessary to ensure the safety of United Nations and all other personnel engaged in the delivery of humanitarian assistance, including the military forces...," and it stressed that individuals will be held to account for any violations of humanitarian law.[120] Those violations occurred when on June 5, 1993, Somali militiamen attacked a contingent of the

[118] SCHACHTER, *supra* note 53,at 88 [Reproduced in the accompanying notebook IV at Tab 41]; *See*, *e.g.*, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, *supra* note 81, at para. 28 (Of the 198 civilians, not including civilian peacekeepers, that lost their lives in the service of the UN since 1992, states have only taken criminal action in 21 of the cases). [Reproduced in the accompanying notebook II at Tab 26].

[119] G.A. Res. 89, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/89 (2001)(adopted by consensus) [Reproduced in the accompanying notebook I at Tab 23]; G.A. Res. 28, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/28 (2002)(adopted by consensus). [Reproduced in the accompanying notebook I at Tab 24].

[120] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992). [Reproduced in the accompanying notebook II at Tab 30].

UNOSOM II peacekeeping mission, killing 24 and injuring 57.[121] Following that attack the Security Council issued a report stating that "no act could by its very character more perfectly exemplify an international crime than the use of force against United Nations soldiers...,"[122] and it passed a resolution authorizing the Secretary-General "to take all measures necessary against those responsible for the armed attacks...[in order] to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment."[123] Resolution 837, constituting the first time that the Security Council implied that attacks on peacekeeping personnel were prosecutable offenses under customary international law, likely represented a logical extension of the emerging consensus that attacks against any humanitarian relief workers or the impediment of relief efforts violated contemporary customary norms triggering individual criminal responsibility.[124]

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[121] *See* Report of the Commission of Inquiry Established Pursuant to Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them, para. 117, U.N. Doc. S/1994/653 (1994). [Reproduced in the accompanying notebook III at Tab 19].

[122] Report Pursuant to Paragraph 5 of Security Council Resolution 837 on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on Behalf of the Secretary-General, U.N. SCOR, Annex at 3, U.N. Doc. S/26351 (1993) [Reproduced in the accompanying notebook III at Tab 18]; *see also* Report of the Commission of Inquiry Established Pursuant to Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them, *supra* note 121, para. 173 (the conviction of some states that attacks against peacekeepers must be punished was so strong that soldiers from the United States and other nations risked their lives, and some were killed, in an attempt to capture for prosecution Mohammad Farah Aideed, the leader of the militia responsible for the atrocities of June 5, 1993). [Reproduced in the accompanying notebook III at Tab 19].

[123] S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg., U.N. Doc. S/RES/837 (1993). [Reproduced in the accompanying notebook II at Tab 33].

[124] *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, VOLUME I, 69-72 (1995) [Reproduced in the accompanying notebook IV at Tab 45]; *see also* Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GEORGIA J. INT'L & COMP. L. 1, 74-77(1989). [Reproduced in the accompanying notebook IV at Tab 47].

The Security Council has continued to call for the prosecution of perpetrators accused of attacking peacekeeping personnel,[125] and it has passed innumerable resolutions demanding the unhindered access, safety and security of peacekeeping and humanitarian and associated personnel, including demanding that all combatants ensure the safety of those personnel in accordance with humanitarian law under the penalty of prosecution.[126] The Council has also explicitly stressed that all parties must respect the provisions of the Safety Convention,[127] and demanded that parties comply with their obligations under applicable humanitarian law, including the Geneva Conventions, which the Council obviously believes provides a measure of protection to peacekeeping personnel.[128]

[125] Statement by the President of the Security Council, U.N. SCOR, 4100th mtg., U.N. Doc. S/PRST/2000/4 (2000). [Reproduced in the accompanying notebook II at Tab 43].

[126] *See* S.C. Res. 1244, U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244, para. 9(h) (1999) [Reproduced in the accompanying notebook II at Tab 38]; *see also* S.C. Res. 1265, U.N. SCOR, 4046th mtg. U.N. Doc. S/RES/1265, paras. 7-10 (1999) [Reproduced in the accompanying notebook II at Tab 39]; S.C. Res. 1270, U.N. SCOR, 4054th mtg., U.N. Doc. S/RES/1270, paras. 8, 13-14 (1999) (on Sierra Leone) [Reproduced in the accompanying notebook II at Tab 40]; S.C. Res. 1272, U.N. SCOR, 4057th mtg., U.N. Doc. S/RES/1272, para. 10 (1999) [Reproduced in the accompanying notebook II at Tab 41]; S.C. Res. 1286, U.N. SCOR, 4091st mtg., U.N. Doc. S/RES/1286, para. 9 (2000) [Reproduced in the accompanying notebook II at Tab 42]; S.C. Res. 1296, U.N. SCOR, 4130th mtg., U.N. Doc. S/RES/1296, para. 12 (2000) [Reproduced in the accompanying notebook II at Tab 45]; S.C. Res. 1319, U.N. SCOR, 4195th mtg., U.N. Doc. S/RES/1319, para. 1 (2000) [Reproduced in the accompanying notebook II at Tab 47]; S.C. Res. 1378, U.N. SCOR, 4415th mtg., U.N. Doc. S/RES/1378, paras. 2, 5 (2001) [Reproduced in the accompanying notebook II at Tab 48]; S.C. Res. 1417, U.N. SCOR, 4554th mtg., U.N. Doc. S/RES/1417, para. 7 (2002) [Reproduced in the accompanying notebook II at Tab 49]; S.C. Res. 1445, U.N. SCOR, 4653rd mtg., U.N. Doc. S/RES/1445, para. 14 (2002) [Reproduced in the accompanying notebook II at Tab 50]; S.C. Res. 1493, U.N. SCOR, 4797th mtg., U.N. Doc. S/RES/1493, para. 25 (2003) [Reproduced in the accompanying notebook III at Tab 1]; S.C. Res. 1494, U.N. SCOR, 4800th mtg., U.N. Doc. S/RES/1494, paras. 25-26 (2003) [Reproduced in the accompanying notebook III at Tab 2]; S.C. Res. 1502, U.N. SCOR, 4814th mtg., U.N. Doc. S/RES/1502, paras. 1, 3-4, 5(a-c), 6 (2003) [Reproduced in the accompanying notebook III at Tab 3]; S.C. Res. 1509, U.N. SCOR, 4830th mtg., U.N. Doc. S/RES/1509, paras. 3(j), 5 (2003). [Reproduced in the accompanying notebook III at Tab 4].

[127] S.C. Res. 1265, *supra* note 126. [Reproduced in the accompanying notebook II at Tab 39].

[128] *See* S.C. Res. 1378, *supra* note 126 [Reproduced in the accompanying notebook II at Tab 48]; *see also* S.C. Res. 1502, *supra* note 126. [Reproduced in the accompanying notebook III at Tab 3].

Although the Security Council represents only a small segment of the international community at any given time, albeit one that includes many of the major powers, [129] Security Council resolutions are binding law on UN member states, and so they are less susceptible to the same criticisms faced by General Assembly resolutions in that the states that vote to pass them understand they are binding themselves and others. Moreover, there can be no doubt that the Security Council considers attacks on UN personnel a crime under customary international law. Following the attack against the Headquarters of the United Nations Assistance Mission in Iraq on August 19, 2003, the Council unanimously passed Resolution 1502, which remained consistent with the Council's practice since the early 1990s, and declared deliberate attacks on any individuals engaged in humanitarian or peacekeeping missions to be a war crime.[130] These resolutions, therefore, signify evidence of strong state practice and *opinio juris* on the part of members of the Council in favor of criminalizing attacks on peacekeepers, even those members such as the United States that have not ratified the Safety Convention or the Rome Statute.

V. PEACEKEEPERS AS CIVILIANS UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT

In the context of internal armed conflicts, UN peacekeepers "taking no active part in the hostilities" are entitled to the same protection as civilians under the international laws of armed conflict.[131] The distinction between civilian and combatant depends in large part on the classification of the UN force, the extent of its mandate, and the facts surrounding the operation.

[129] U.N. CHARTER, art. 23 (Security Council only consists of fifteen states, including ten non-permanent, and five permanent members). [Reproduced in the accompanying notebook I at Tab 1].

[130] S.C. Res. 1502, *supra* note 126. [Reproduced in the accompanying notebook III at Tab 3].

[131] Geneva IV, *supra* note 31, at art. 3. [Reproduced in the accompanying notebook I at Tab 5].

Traditional UN peacekeepers are not combatants for purposes of the laws of war,[132] however, forces involved in a UN peace-enforcement action are considered combatants,[133] not civilians, and because it is not uncommon for a neutral peacekeeping force to become entangled in a conflict there is considerable gray area where the line between peacekeeping and peace-enforcement becomes blurred.[134]

A. The Distinction Between Civilians and Combatants

Civilians are classified as non-combatants, and this category includes civilians in the traditional sense, medical personnel, chaplains, and former combatants who "have been placed out of combat by sickness, wounds, or other causes including confinement as prisoners of war."[135] The term civilian also encompasses UN peacekeeping personnel who are entitled to "status as noncombatants, as long as they are entitled to protection given to civilians under the international law of armed conflict."[136] A combatant, on the other hand, "is a person who engages in hostile acts in an armed conflict on behalf of a Party to the conflict."[137] Combatants

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[132] Major Joseph P. Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 4 (2001) [Reproduced in the accompanying notebook V at Tab 3]; Walter Gary Sharp, Sr., *Revoking and Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT'L & TRADE 1, 3 (1998). [Reproduced in the accompanying notebook V at Tab 9].

[133] *Id*.

[134] HILAIRE MCCOUBREY & NIGEL WHITE, THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS 19-20 (1996) [Reproduced in the accompanying notebook IV at Tab 36]; Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force*, 27 DENV. J. INT'L L. & POL'Y 239, 268 (1999). [Reproduced in the accompanying notebook IV at Tab 50].

[135] Bialke, *supra* note 132,at n. 101 (citing Air Force Pamphlet 110-31, International Law—The Conduct of Armed Conflict and Air Operations, paras. 3-4(a-d) (Nov. 19, 1976)). [Reproduced in the accompanying notebook V at Tab 3].

[136] Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, §1.2, U.N. Doc. ST/SGB/1999/13 (1999). [Reproduced in the accompanying notebook III at Tab 20].

[137] Bialke, *supra* note 132, at n. 102 (citing Air Force Pamphlet 110-31, International Law—The Conduct of Armed Conflict and Air Operations, paras. 3-2(a-d) (Nov. 19, 1976)). [Reproduced in the accompanying notebook V at Tab 3].

are lawful targets under international law, and it is not a violation of the law to attack such forces.

B. The Classification of the Force

The UN Charter does not expressly authorize "peacekeeping" or "peace- enforcement" forces, yet the Security Council's authority to create a peacekeeping force is implied by Chapter VI of the Charter detailing the methods of "Pacific Settlement of Disputes,"[138] and inherent in Chapter VII of the Charter is the Council's right to engage in peace-enforcement activities.[139] Whereas peacekeeping and peace-enforcement operations represent opposite ends on the spectrum of UN peace activities, the need to respond flexibly to the various and unique problems associated with different conflicts has led to the creation of peacekeeping operations coupled with a limited Chapter VII element. The spectrum of peace activities, then, is often visualized in three categories: consensual peacekeeping, coercive peacekeeping, and peace-enforcement.[140] The rules of engagement, and the corresponding distinction between civilian and combatant as it relates to the UN troops partaking in a mission varies for each category.

1. Consensual Peacekeeping

Since the authority for traditional peacekeeping operations is derived from Chapter VI of the UN Charter, but is not explicitly mentioned therein, former Secretary-General Dag Hammarskjold aptly stated that these peacekeeping missions are permitted by United Nations

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[138] *See* U.N. CHARTER, art. 33-38 [Reproduced in the accompanying notebook I at Tab 1]; *see also* Certain Expenses of the United Nations, 1962 I.C.J. 151, 164-167 (Advisory Opinion of July 20) (the International Court of Justice recognized that the UN Charter authorized peacekeeping operations). [Reproduced in the accompanying notebook III at Tab 24].

[139] *See id*. at art. 39-43

[140] Sharp, *supra* note 132, at 12. [Reproduced in the accompanying notebook V at Tab 9].

Chapter "Six and a Half."[141] The traditional purpose of peacekeeping operations was to assist the former warring parties in implementing and monitoring pre-existing cease fire agreements, and to act as a buffer against renewed fighting in order to facilitate the peace process.[142] As such, traditional peacekeeping operations generally contain three elements that distinguish them from enforcement actions: namely, the consent of the parties to the conflict, a logical extension of which is that peacekeepers are defined by their neutrality or impartiality, and finally, peacekeeping mandates only authorize the use of force in self-defense.[143] Often consensual peacekeeping missions "are [also] much more clearly under the command and control of the UN with regular Security Council review and day-to-day direction from the Secretary-General or his representative."[144]

When UN forces are operating impartially with the consent of the parties to the conflict, and under a self-defensive mandate, they will be entitled to the protections afforded to civilians under the international law of armed conflict, because consensual peacekeepers are not belligerents taking part in the hostilities, and are therefore not lawful targets under the laws of war.[145] If it becomes necessary for a peacekeeper to use force in self-defense, the peacekeeper will not lose his status as a non-belligerent and become a combatant, so long as the defensive

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[141] UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING at 5, U.N. Sales No. E.90.I.18 (2d ed. 1990). [Reproduced in the accompanying notebook IV at Tab 44].

[142] *Id.*; Peacekeeping duties have subsequently expanded to include ten general categories: (1) military matters, (2) elections, (3) human rights, (4) national reconciliation, (5) law and order, (6) refugees, (7) humanitarian relief, (8) governmental administration, (9) economic reconstruction, and (10) relationships with outside actors.

[143] MCCOUBREY & WHITE, *supra* note 134, at 19. [Reproduced in the accompanying notebook IV at Tab 36].

[144] *Id*.

[145] Bialke, *supra* note 132, at 4 [Reproduced in the accompanying notebook V at Tab 3]; Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 105 (1996) ("Consensual peacekeepers are not belligerents and are not lawful targets, even though they may be deployed into areas of ongoing hostilities"). [Reproduced in the accompanying notebook V at Tab 8].

response is necessary and proportional.[146] There has never been any doubt, for example, that peacekeeping personnel attacked with deadly force can respond with deadly force.[147] While the original definition of self-defense was limited to those situations in which a peacekeeper responded to a forceful attack,[148] the concept of self-defense has subsequently been expanded to authorize peacekeeping personnel to engage in anticipatory self-defense against hostile parties when there is an imminent danger of attack,[149] or when necessary to carry out the peacekeeping mandate.[150] Peacekeeping personnel that engage in prolonged conflict, however, in which they cease to act only in self-defense "could lose noncombatant status, become a combatant and then be lawfully engaged as a target."[151]

2. Coercive Peacekeeping

Peacekeeping operations carrying a right of self-defense coupled with a limited Chapter VII authorization to use force in order to accomplish the mandate of the mission are commonly

[146] *Id*. at 21; Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 65, 80 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (arguing that there is an inherent right of individual self-defense under Article 51 of the UN Charter). [Reproduced in the accompanying notebook V at Tab 5].

[147] *Id*.

[148] *Id*. at 20.

[149] *See* Aide-Memoire of the Secretary-General Concerning Some Questions Relating to the Function and Operations of the United Nations Peacekeeping Force in Cyprus, Note by the Secretary-General, U.N. SCOR, U.N. Doc. S/5653, para. 17(c) (April 10, 1964) (authorizing the use of force in self-defense "[w]here specific arrangements accepted by both communities have been or in the opinion of the commander on the spot *are about to be*, violated, thus risking a recurrence of fighting or endangering law and order"). [Reproduced in the accompanying notebook III at Tab 15].

[150] Report of the Secretary-General on the Implementation of Security Council Resolution 340 (1973), U.N. SCOR, U.N. Doc. S/11052/Rev.1, para. 4(d) (1973) [Reproduced in the accompanying notebook III at Tab 16]; Boutros Boutros-Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89, 91 (1992) ("existing rules of engagement allow [peacekeepers to use force in self-defense] if armed persons attempt by force to prevent them from carrying out their orders"). [Reproduced in the accompanying notebook IV at Tab 46].

[151] Bialke, *supra* note 132, at 21. [Reproduced in the accompanying notebook V at Tab 3].

referred to as coercive peacekeeping or quasi-enforcement operations.[152] Coercive peacekeeping operations are often undertaken without the consent of the parties to the conflict, and although these UN forces generally follow the peacekeeping rules of engagement, their mandate usually includes a limited right to use force for reasons other than in self-defense but "short of stopping an aggressor or imposing a cessation of hostilities."[153] This expansion in the concept of peacekeeping is likely due to parties unwillingness to abide by cease-fire agreements, the increase in attacks against UN forces and the corresponding need for strengthened rules of engagement, and to assist peacekeeping personnel in carrying out more complex and difficult mandates.[154]

The operations in both Somalia and Bosnia are considered to contain some characteristics common to coercive peacekeeping. In response to the hostilities in Somalia, in 1992, the Security Council acting under its Chapter VII authority adopted resolution 794 authorizing the UNOSOM II to "take appropriate action, including enforcement measures, to establish throughout Somalia a secure environment for humanitarian assistance."[155] This explicit recognition of the use of force went beyond the normal rules of engagement allowing a UN peacekeeping force to use self-defense, yet, the mission in Somalia remained classified as peacekeeping.

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[152] MCCOUBREY & WHITE, *supra* note 134, at 32-36. [Reproduced in the accompanying notebook IV at Tab 36].

[153] Sharp, *supra* note 145, at 105-109. [Reproduced in the accompanying notebook V at Tab 8].

[154] MCCOUBREY & WHITE, *supra* note 134, at 33 [Reproduced in the accompanying notebook IV at Tab 36]; Cox, *supra* note 131, at 257. [Reproduced in the accompanying notebook IV at Tab 50].

[155] S.C. Res. 794, *supra* note 120 [Reproduced in the accompanying notebook II at Tab 30]; *see also* S.C. Res. 814, U.N. SCOR, 3188th mtg., U.N. Doc. S/RES/814 (1993). [Reproduced in the accompanying notebook II at Tab 31].

In Bosnia, UNPROFOR was responsible for ensuring the delivery of humanitarian relief, and while force was not explicitly authorized in this regard,[156] recent practice at the UN indicates that the right to use force to protect humanitarian convoys is inherent in the peacekeepers authority to exercise self-defense when hostile forces attempt by force to prevent them from carrying out their mandate.[157] This broad grant is considered to have expanded the original concept of self-defense to include the protection of third parties.[158] The Security Council also authorized UNPROFOR, "in carrying out its mandate in self-defense, to take the necessary measures, including the use of force, to ensure its security and its freedom of movement."[159] The explicit reference to the use of force is also thought to have expanded UNPROFOR's self-defense mandate.[160] While the peacekeeping status of UNPROFOR was not questioned despite the Security Council's explicit invocation of Chapter VII to authorize the use of force,[161] there were worries in the Secretariat that supporting UNPROFOR with UN authorized NATO air strikes would eviscerate UNPROFOR's neutrality and possibly make it a party to the conflict.[162]

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[156] S.C. Res. 776, U.N. SCOR, 47th Sess., 3114th mtg., U.N. Doc. S/RES/776 (1992). [Reproduced in the accompanying notebook II at Tab 29].

[157] Report of the Secretary-General on the Situation in Bosnia and Herzegovina, U.N. SCOR, 47th Sess., para. 9, U.N. Doc. S/24540 (1992). [Reproduced in the accompanying notebook III at Tab 17].

[158] *Id*.

[159] S.C. Res. 871, U.N. SCOR, 3286th mtg., U.N. Doc. S/RES/871 (1993).

[160] Schachter, *supra* note 146, at 80. [Reproduced in the accompanying notebook V at Tab 5].

[161] MCCOUBREY & WHITE, *supra* note 134, at 65 ("UNPROFOR, which for all practical purposes, despite Security Council attempts at tinkering with its mandate, was a traditional peacekeeping force"). [Reproduced in the accompanying notebook IV at Tab 36].

[162] S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., at 3, U.N. Doc. S/RES/836 (1993). [Reproduced in the accompanying notebook II at Tab 32].

While non-belligerent peacekeepers acting under the coercive authority of the Security Council remain unlawful targets until their use of force meets a certain level of intensity,[163] the attempts to shore up the mandates of peacekeeping forces has caused considerable confusion, blurring the line between peacekeeping and peace-enforcement, thereby making it difficult to determine whether UN forces are civilians or combatants for purposes of the international laws of armed conflict. Specifically, giving a peacekeeping unit like UNOSOM II explicit authorization to use offensive force in limited circumstances, and allowing UNPROFOR to work in conjunction with a regional military organization such as NATO posed problems with regard to the status of these forces. Consequently, following the operations in Bosnia and Somalia, the Secretary-General recognized that blurring "the distinction between the two can undermine the validity of the peacekeeping operation and endanger its personnel," and so the UN has worked recently to reassert the clear line between the different operations.[164]

3. Peace Enforcement

Peace-enforcement operations are justified by Chapter VII of the UN Charter which provides that the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take whatever action it deems appropriate to maintain international peace and security.[165] Peace-enforcement is distinguishable from peacekeeping in that it is a non-consensual engagement where UN authorized forces take part in an offensive war against a hostile party.[166] These missions are usually undertaken by coalitions

[163] Sharp, *supra* note 145, at 137-138. [Reproduced in the accompanying notebook V at Tab 8].

[164] Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, U.N. GAOR, U.N. Doc. A/50/60-S/1995/1 (1995). [Reproduced in the accompanying notebook I at Tab 25].

[165] U.N. CHARTER, art 39. [Reproduced in the accompanying notebook I at Tab 1].

[166] MCCOUBREY & WHITE, *supra* note 134, at 19. [Reproduced in the accompanying notebook IV at Tab 36].

under the command of one or more state parties, and not the UN, because many states are unwilling to allow their troops to be under the command of anyone other than their own military leaders in war like situations.[167] The best examples of peace-enforcement operations are the UN operations in Korea (1950-1953)[168] and in Kuwait and Iraq (1990-1991).[169]

Peace enforcers acting under a robust Chapter VII mandate are considered combatants, and they are not entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[170] The reason for this is that the level of force used by a peace-enforcement unit is usually enough to trigger the threshold set forth in common Article 2 of the Geneva Conventions concerning international armed conflicts.[171] Once UN personnel cross that threshold by engaging in offensive military action against the forces of another state they become combatants, and although any combatant is entitled to be treated according to the Geneva Conventions grave breaches provisions, there are no penalties in the Geneva Conventions criminalizing attacks on belligerent forces.[172] Thus, no UN personnel meeting the

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[167] *See id*.

[168] G.A. Res. 376(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950). [Reproduced in the accompanying notebook I at Tab 14]. S.C. Res. 83, U.N. Doc. S/1511 (1950). [Reproduced in the accompanying notebook II at Tab 27].

[169] S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990) (authorizing U.N. members to use "all necessary means" to assist Kuwait expel Iraq from its territory). [Reproduced in the accompanying notebook II at Tab 28].

[170] Safety Convention, *supra* note 84, at art. 2 (protection not afforded to UN personnel engaged in an "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"). [Reproduced in the accompanying notebook I at Tab 2].

[171] Geneva IV, *supra* note 31, art. 2 ("the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties"). [Reproduced in the accompanying notebook I at Tab 5].

[172] *See generally* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [Reproduced in the accompanying notebook I at Tab 3]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [Reproduced in the accompanying notebook I at Tab 4]; Geneva

definition of a peace-enforcer could claim the protection of Article 4(b) of the Special Court Statute.

C. UNAMSIL

Traditional peacekeeping units are entitled to the protection afforded to civilians, while peace-enforcement units are not, but it is clear from the outset that UNAMSIL was not a peace-enforcement operation. According to the terms of the Lome Peace Agreement, UNAMSIL was envisioned as a "neutral peacekeeping force," and it entered the conflict with the consent of all the parties involved, [173] not as a partisan of either side.[174] When a proposal was made to amend UNAMSIL's mandate to peace-enforcement,[175] that proposal was rejected by the troop contributing states.[176] It is also important to note that while UNAMSIL did enjoy limited Chapter VII authority, it was never given the Chapter VII authority to "use all necessary means," which is the language used to signify enforcement actions in which offensive force is permitted.[177] Finally, UNAMSIL was at all times under the direction of the Secretary-General, with oversight from the Security Council, it was not a multinational coalition commanded by a member state like those in Korea and Iraq.

Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 238. [Reproduced in the accompanying notebook I at Tab 6].

[173] *See* Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. 16, July 7, 1999. [Reproduced in the accompanying notebook I at Tab 12].

[174] Third Report of the Secretary-General, *supra* note 10, at para. 41. [Reproduced in the accompanying notebook III at Tab 7].

[175] Fourth Report of the Secretary-General, *supra* note 4, at para. 100. [Reproduced in the accompanying notebook III at Tab 8].

[176] Sixth Report of the Secretary-General, *supra* note 19, at para. 45. [Reproduced in the accompanying notebook III at Tab 10].

[177] *See* S.C. Res. 678, *supra* note 169 (authorizing the use of force in Iraq). [Reproduced in the accompanying notebook II at Tab 28].

Although it is not difficult to distinguish UNAMSIL from a peace-enforcement operation, the distinction between whether the mission in Sierra Leone constituted a consensual peacekeeping or coercive peacekeeping force is harder to make. UNAMSIL clearly began as a consensual and neutral peacekeeping force as envisioned in Article 16 of the Lome Peace Agreement. It did not take long, however, before RUF leaders began to make hostile public statements concerning UNAMSIL,[178] and coupled with the fact that UN forces were attacked on numerous occasions between January 2000 and the signing of the Abuja Ceasefire Agreement in November 2000, it appears that the RUF at least *de facto* revoked its consent to the presence of UN forces for a time creating the unfortunate environment in which UNAMSIL's neutrality could be questioned. Whatever its intentions, the RUF did continue to voice its approval of UNAMSIL to the Secretary-General during the relevant time period,[179] and there is no question that the Government of Sierra Leone has strongly supported UNAMSIL throughout its deployment.

Turning to the rules of engagement under which UNAMSIL operated, Resolution 1270 authorized UNAMSIL peacekeepers to "take the necessary action to ensure the security and freedom of movement of its personnel and. . .to afford protection to civilians under imminent threat of physical violence. . . ."[180] This is indicative of a modern peacekeeping mandate, expanding the original concept of self-defense, which included only self-protection, but remaining in effect a self-defensive set of rules. While Resolution 1289 expanded UNAMSIL's mandate to provide security at key Government installations, including the disarmament,

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[178] *See* Third Report of the Secretary-General, *supra* note 10, at para. 60. [Reproduced in the accompanying notebook III at Tab 7].

[179] Fourth Report of the Secretary-General, *supra* note 4, at para. 4. [Reproduced in the accompanying notebook III at Tab 8].

[180] S.C. Res. 1270, *supra* note 5. [Reproduced in the accompanying notebook II at Tab 40].

demobilization, and reintegration sites, as well as guard all weapons and ammunition collected from ex-combatants, and facilitate the flow of people and humanitarian assistance along certain specified roadways,[181] under Resolutions 1270 and 1289, peacekeeping personnel had the mandate to use force, but only in self-defense to counter any hostile act or intent.[182] Finally, Security Council Resolution 1313 strengthened UNAMSIL's mandate again to allow it "[t]o deter and, where necessary, decisively counter the threat of RUF attack by *responding* robustly to any hostile actions or threat of imminent and direct use of force."[183] Even this Chapter VII authorization to respond robustly to hostile action or threat of imminent attack remains essentially self-defensive. The only significant modification is that the Security Council authorized a robust response in self-defense rather than simply a response, and that does not equate to the right to use offensive force.

The rules of engagement of the operation in Sierra Leone reflects the UN's recognition that coercive peacekeeping forces blur the line between peacekeeping and peace-enforcement. UNAMSIL's unambiguous self-defense mandate was a clear attempt by the UN to reassert the clear line between these different operations following the confusion in Somalia and Bosnia.[184] A comparison with the mandates of two often cited coercive peacekeeping forces illustrates this point. Security Council Resolution 794 authorized UNOSOM II to "take appropriate action, including enforcement measures, to establish throughout Somalia a secure environment for

[181] S.C. Res. 1289, *supra* note 11. [Reproduced in the accompanying notebook II at Tab 44].

[182] Fourth Report of the Secretary-General, *supra* note 4, at para. 89. [Reproduced in the accompanying notebook III at Tab 8].

[183] S.C. Res. 1313, *supra* note 20, at para. 3(b). [Reproduced in the accompanying notebook II at Tab 46].

[184] *See* Supplement to An Agenda for Peace, *supra* note 164. [Reproduced in the accompanying notebook I at Tab 25].

humanitarian assistance."[185] This is an explicit authorization to use force beyond self-defense, and the term enforcement measures brought UNOSOM II dangerously close to becoming an enforcement action. In contrast, UNAMSIL's mandate only authorized force in self-defense and never went so far as to expressly permit enforcement measures. Although UNAMSIL's mandate is similar to that of UNPROFOR in that the Security Council authorized UNPROFOR, "in carrying out its mandate in self-defense, to take the necessary measures, including the use of force, to ensure its security and its freedom of movement,"[186] UNAMSIL did not work in conjunction with another force like NATO, which was authorized to use offensive force in Bosnia, thereby blurring the role of UNPROFOR in that conflict.[187]

Perhaps the most troubling aspect regarding the civilian/combatant distinction and UNAMSIL is the fact that on two occasions in July 2000, after peaceful measures were unsuccessful, UNAMSIL launched military operations to pre-empt an attack by the AFRC/ex-SLA, and to free UNAMSIL personnel previously taken hostage by the RUF.[188] Depending on the intensity of the fighting that took place, it is conceivable that a defendant might argue that UNAMSIL lost both its neutrality and its status as a non-combatant by engaging in a pre-emptive strike against rebel forces. The counter to this argument would be that UN peacekeepers are entitled to the right of self-defense, even anticipatory self-defense, and as long as they neutralized the threat and saved their comrades without engaging in a prolonged battle, there is no reason why they should lose their civilian status. Allowing a peacekeeping force with a self-

[185] S.C. Res. 794, *supra* note 120 [Reproduced in the accompanying notebook II at Tab 30]; *see also* S.C. Res. 814, *supra* note 155. [Reproduced in the accompanying notebook II at Tab 31].

[186] S.C. Res. 871, *supra* note 159.

[187] *See* S.C. Res. 836, *supra* note 162. [Reproduced in the accompanying notebook II at Tab 32].

[188] Fifth Report of the Secretary-General, *supra* note 15, at paras. 23-27. [Reproduced in the accompanying notebook III at Tab 9].

defense mandate to keep its non-combatant status even after fending off attacks by hostile forces should be firmly rooted in public policy. If any tribunal, including the Special Court, were to rule otherwise, then hostile forces could attack and strategically draw any peacekeeping unit into combat for the purpose of stripping the UN forces of their non-combatant status in order to make them lawful targets under the laws of war. Such a ruling would set a dangerous precedent and give an advantage to those who wish to derail the peace process in any given conflict.

VI. CONCLUSION

It is unlikely that any single source cited in Part IV of this memorandum is sufficient to make Article 4(b) of the Special Court Statute wholly legitimate under customary international law, especially when one considers the limited ratification status of the treaties explicitly criminalizing attacks on peacekeeping personnel, and the narrow use of General Assembly and Security Council resolutions in the making of customary law. The sources cited above in support of the position that Article 4(b) is consistent with customary international law need not be viewed in isolation, however. Common Article 3 of the four Geneva Conventions and Article 4 of Protocol II have likely attained the status of customary international law, and these provisions do provide a measure of protection for peacekeeping personnel. Building on that foundation, and taking into account state practice and *opinio juris* as evidenced by the Safety Convention, the Rome Statute, and the plethora of General Assembly and Security Council resolutions that unequivocally seek to criminalize attacks on peacekeeping personnel, there is a sufficient basis, when viewing these sources together, upon which to make a sound legal argument that attacks on peacekeeping personnel are a violation of customary international law. This argument is bolstered even further by what it seeks to achieve. There is much truth in the statement that “no

act could by its very character more perfectly exemplify an international crime than the use of force against United Nations soldiers...."[189]

Moving to the civilian/combatant distinction, it is likely that UNAMSIL is entitled to the status of civilians or civilian objects under the international law of armed conflict. UNAMSIL is clearly a peacekeeping rather than a peace-enforcement force. Although it could be argued that between the Spring and Fall of 2000, UNAMSIL was a coercive peacekeeping force that approached the level of a peace enforcement operation, such an argument is not likely to succeed bearing in mind that UNAMSIL only ever used force in self-defense. The facts also indicate that the peacekeeping force in Sierra Leone remained neutral and took every available precaution to avoid armed conflict throughout their deployment except when forced into violent situations by rebel forces. The alternative to conferring non-combatant status on UNAMSIL personnel would be to punish them for protecting themselves by concluding that their self-defensive response turned them into lawful targets under international law. Such a bizarre result is unacceptable, and should be avoided for reasons of policy. Thus, if the crime of attacking peacekeeping personnel can be established as a violation of customary international law, UNAMSIL should be entitled to the protection of civilian non-combatants under the laws of armed conflict.

[189] Report Pursuant to Paragraph 5 of Security Council Resolution 837 on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on Behalf of the Secretary-General, *supra* note 122. [Reproduced in the accompanying notebook III at Tab 18].