

## Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal

Walter Gary Sharp Sr.

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## ARTICLES

### REVOKING AN AGGRESSOR'S LICENSE TO KILL MILITARY FORCES SERVING THE UNITED NATIONS: MAKING DETERRENCE PERSONAL

WALTER GARY SHARP, SR.\*

*Every subject's duty is the king's; but every subject's soul is his own.*

William Shakespeare  
HENRY V<sup>1</sup>

*[T]he killing of combatants in war is justifiable, both in international and national law, only where the war is legal. But where the war is illegal . . . there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber band.*

Sir Hartley Shawcross  
before the Nuremberg Tribunal<sup>2</sup>

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\* Director, THE AEGIS Center for Legal Analysis, Aegis Research Corporation, Falls Church, Virginia; Adjunct Professor of Law, Georgetown University Law Center; and, Chair, International Criminal Law Committee, Section of International Law and Practice, American Bar Association. LL.M., Military Law, The Judge Advocate General's School, 1992; LL.M., International and Comparative Law, Georgetown University Law Center, 1988; J.D., Texas Tech School of Law, 1984; B.S., Aerospace Engineering, United States Naval Academy, 1978. Professor Sharp is a retired Marine Lieutenant Colonel and has served as: Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff; Head of the Law of Armed Conflict Branch, International Law Division, Office of the Judge Advocate General, Department of the Navy; and, Deputy Staff Judge Advocate and International Law Adviser, Unified Task Force, Somalia. The opinions and conclusions expressed herein are those of the author and do not necessarily reflect the views of any governmental agency or private enterprise.

1. WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE FIFTH, act 4, sc. 1, ll. 158-59, reprinted in HENRY V, at 137 (Bernard Lott & H. M. Hulme eds., 1986).

2. LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 122 n.148 (1956).

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## I. AN AGGRESSOR'S LICENSE TO KILL

The aggressive use of force by a state is a crime against peace that has been outlawed by the international community.<sup>3</sup> Accordingly, international law imputes individual criminal responsibility for a crime against peace; *i.e.*, the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing . . . ." <sup>4</sup> The punishment of those who are involved in a crime against peace through the aggressive use of force, however, is limited to individuals who operate at a policy-decision level of the aggressor state.<sup>5</sup> Combatants of the aggressor state who kill in furtherance of an unlawful use of force have absolute and complete immunity so long as they kill enemy combatants in accordance with the *jus in bello*, *i.e.*, the laws of armed conflict that govern the actual conduct of hostilities.<sup>6</sup>

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3. *See, e.g.*, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 111 (Bruno Simma ed., 1994); NATIONAL SECURITY LAW 85, 369-70 (John Norton Moore et al. eds., 1990); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112, 154 (1963).

4. *See, e.g.*, Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 280, *reprinted in* THE LAWS OF ARMED CONFLICTS 911, 914 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

5. *See, e.g.*, NATIONAL SECURITY LAW, *supra* note 3, at 369-70, which quotes the opinion of the International Military Tribunal in *United States v. Leeb et al. (The High Command Case)*:

If and as long as a member of the armed forces does not participate in the preparation, planning, initiating, or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace.

*Id.* at 370 (quoting *United States v. Leeb et al.*, 11 TRIALS AND WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 488, 489 (1948)). *See also Comments of the ILC on the Seven Nuremberg Principles*, U.N. GAOR, 5th Sess., Supp. No. 12, at 116, 117, U.N. Doc. A/1316 (1950), *reprinted in* SYDNEY D. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 163, 168 (1972).

6. *See* NATIONAL SECURITY LAW, *supra* note 3, at 359-60, 371-73. The so-called combatants' privilege during times of war has been explained as follows:

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

*Id.* at 359 (quoting TELFORD TAYLOR, NUREMBERG AND VIETNAM 19-20 (1970)). *See also* 3 CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW: 1981-88, at 3457-60 (Marian Nash (Leich) ed., 1995) [hereinafter CUMULATIVE DIGEST]. As Edward R. Cummings has stated:

It is well accepted under the Geneva Conventions and customary international

This immunity that grants combatants of an aggressor state the license to kill is rooted in the doctrine of equal application, which will be explored in detail in Part II of this Article. This doctrine provides that the *jus in bello* apply to all state parties of an armed conflict regardless of whether the conflict is lawful or unlawful in its inception under the *jus ad bellum*, *i.e.*, the laws that govern the resort to war.<sup>7</sup> When this doctrine is applied in its historical context of wars between states, its intended purpose remains intact and reflects sound public policy. When the Security Council of the United Nations [hereinafter Security Council], however, authorizes Member States<sup>8</sup> to use armed force to maintain international peace and security, the doctrine of equal application makes it lawful for the combatants of an aggressor state to kill an unlimited number of individuals authorized by the international community to enforce international law on its behalf. The rote application of this doctrine in the contemporary context of United Nations military operations reflects poor public policy, as demonstrated by the reluctance of the international community over the last decade to apply this doctrine to actions taken by and under the authority of the United Nations. Part III of this Article will chronicle this reluctance through an evolution of international law and state practice that reveals a marked decline in the application of the doctrine of equal application to military activities conducted by and under the authority of the United Nations.

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law that individuals who are entitled to prisoner-of-war status may not be prosecuted for legitimate acts of war, including the killing of enemy personnel in battle. They may, however, be prosecuted for violations of the law of war (*e.g.*, mistreating prisoners of war, willfully attacking noncombatants, misusing the Red Cross emblem).

*Id.* at 3459. The U.S. Department of the Navy defines combatants as follows:

[Combatants are] those persons who have the right under international law to participate directly in armed conflict during hostilities. Combatants, therefore, include all members of the regularly organized armed forces of a party to the conflict (except medical personnel, chaplains, civil defense personnel, and members of the armed forces who have acquired civil defense status), as well as irregular forces who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population.

U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 5.3 (1995) [hereinafter COMMANDER'S HANDBOOK]. "Belligerents" are specifically those combatants of a nation that is a party to an ongoing international armed conflict. *Id.* ¶ 7.1.

7. See, *e.g.*, NATIONAL SECURITY LAW, *supra* note 3, at 371-73.

8. Throughout the present Article, the term "Member States" refers to states that are members of the United Nations.

To allow the combatants of an aggressor state furthering unlawful aggression to maintain this immunity *vis-a-vis* the United Nations is a failure of system-wide deterrence that undermines collective self-defense, which is the most fundamental tenet of the Charter of the United Nations [hereinafter Charter]. Wars are not fought by some state entity or solely by those who operate at a policy-decision level, but by the individual members of the armed forces of a state. Effective deterrence demands that *any* person who commits a crime against peace, or kills in furtherance of that international crime, should be held accountable therefor and punished. To be effective, deterrence must be personalized to those individual combatants who make the illegal act of aggression possible. Deterrence, and its role in war avoidance, will be discussed in Part IV.

When applied in the context of collective self-defense authorized by the Security Council, the doctrine of equal application is an anachronism, *i.e.*, military forces acting under the authority of the United Nations are international policemen and should be unlawful targets under all circumstances.<sup>9</sup> Part V of this Article discusses this concept of international law enforcement, and analyzes the legal and practical consequences of revoking an aggressor's license to kill. Parts II through IV of this Article are then woven together in Part V to define a new modality of personal deterrence that will strengthen the rule of law by extending the criminality of aggression beyond the senior leadership of a state to encompass all of those persons who kill in furtherance of an illegal use of force. Such an exception to the doctrine of equal application is supported by international precedent as well as previous attacks on the doctrine that challenged its application to military forces serving the United Nations. This limited exception is also carefully crafted to ensure that it can be fairly

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9. See generally Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93 (1996). The cited article analyzes the existing legal protections accorded military forces operating outside their flag state. It prepares the foundation for an exception to the doctrine of equal application and the conceptual framework for the present Article by setting forth the proposition that all military forces acting under the authority of the United Nations, whether non-belligerent or belligerent, should be unlawful targets under all circumstances. The cited article also offers a "Draft Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Civilians and Military Forces operating under the authority of the United Nations (Protocol III)" to advance and codify this protection. See also MICHAEL WALZER, *JUST AND UNJUST WARS* 21-22, 62 (1977). Walzer analyzes the moral tension between the *jus ad bellum* and the *jus in bello* now that aggressive war has become a crime, stating that "[t]he dualism of *jus ad bellum* and *jus in bello* is at the heart of all that is most problematic in the moral reality of war." *Id.* at 21. In his legalist paradigm, Walzer concludes that aggression justifies "a war of law enforcement by the victim and any other member of international society." *Id.* at 62.

applied to the combatants of an aggressor state. This new modality makes it a crime for any person to knowingly attack military forces serving under the authority of the United Nations—whether these forces are non-belligerent observer missions as during the First United Nations Emergency Force (UNEF I) in the Sinai desert or belligerent forces such as the coalition forces during the Persian Gulf War.

The international community has already declared that all civilians and non-belligerent military forces serving under the direction of the United Nations are protected persons and unlawful targets.<sup>10</sup> This protected status includes coercive peace-keepers such as those in Somalia, Haiti, and the former Yugoslavia, *i.e.*, non-belligerent military forces that have been authorized by the Security Council under its Chapter VII authority to use military force to accomplish a limited mandate short of stopping an aggressor or imposing a cessation of hostilities.<sup>11</sup> This Article carves out an exception to the doctrine of equal application by extending this protected status to belligerent military forces that are authorized by the Security Council to fight aggression. The social, moral, and legal underpinning of this extension is the conviction that military forces which enforce international law should be treated and protected as international policemen, and should be unlawful targets under all circumstances. Military forces who defend the international community under the authority of the United Nations are not the moral equivalent of combatants of an aggressor state, and should not be treated as their legal equivalent. Recognizing that customary international law is constantly evolving, the time has come for the international community to embrace a new tenet of international humanitarian law stating that military forces who serve under the authority of the Security Council are international policemen and are unlawful targets under all circumstances.

## II. THE DOCTRINE OF EQUAL APPLICATION

War has existed during the entire history of human society.<sup>12</sup> Indeed, a study in 1968 calculated “that there had been only 268 years free of war in the previous 3,421 [years].”<sup>13</sup> From the organized food-gathering and wife-seeking raids of primitive man to the Persian Wars of the fifth

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10. See Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, art. 2, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), reprinted in 34 I.L.M. 482 (1995).

11. See Sharp, *supra* note 9, at 105-07.

12. See RICHARD A. PRESTON & SYDNEY F. WISE, MEN IN ARMS: A HISTORY OF WARFARE AND ITS INTERRELATIONSHIPS WITH WESTERN SOCIETY 1 (4th ed. 1979).

13. DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE 4 (1995).

century B.C. and the Second World War of the twentieth century,<sup>14</sup> war was accepted as a legitimate form of violence.<sup>15</sup> Motives for war were wide-ranging, and included the acquisition of territory, the domination of another people, the access to scarce resources, and the search for glory, prestige, and revenge.<sup>16</sup> Other motivations included the desire to pillage, rape, and murder because war was simply a culture and a way of life for some people such as the Cossacks.<sup>17</sup> In many respects, war simply began as organized armed robbery by plundering hordes among dissimilar peoples and tribes.<sup>18</sup>

#### A. *Jus ad bellum*

Virtually every recorded civilization developed some rules governing the initiation of war.<sup>19</sup> The Egyptians and the Sumerians developed rudimentary *jus ad bellum* during the second millennium B.C.<sup>20</sup> As a general rule, the Hittites of the fourteenth century B.C. formally exchanged letters and demands before commencing hostilities.<sup>21</sup> During the approximate period 335 B.C. to 1800, war was examined on a moral, philosophical level whereby war was approved if the cause was just.<sup>22</sup> This philosophy of war as an instrument of justice was replaced in the early 1800s by the acceptance of war as a political instrument of national policy.<sup>23</sup>

The Prussian philosopher and military theorist General Karl von Clausewitz is often quoted as describing war as the continuation of national policy by other means.<sup>24</sup> Two fundamental tenets of Clausewitz's

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14. See PRESTON & WISE, *supra* note 12, at 8, 19, 295.

15. See *id.* at 5-14.

16. See *id.* at 6.

17. See JOHN KEEGAN, A HISTORY OF WARFARE 7-9 (1993).

18. See KOTZSCH, *supra* note 2, at 25.

19. See 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 3 (Leon Friedman ed., 1972).

20. See *id.*

21. See *id.*

22. NATIONAL SECURITY LAW, *supra* note 3, at 51-57.

23. *Id.* at 57. The development of the law of conflict management can be divided into six approximate time periods: (1) just war, 335 B.C. to A.D. 1800; (2) war as fact, 1800-1918; (3) early League of Nations, 1919-1925; (4) Kellogg-Briand Pact and late League, 1928-1945; (5) early United Nations Charter, 1945-1958; and (6) contemporary Charter, 1959-present. *Id.* at 51.

24. See, e.g., KEEGAN, *supra* note 17, at 3. While noting that variations of the concept that war is the continuation of policy by other means are frequently quoted, Keegan challenges the simplicity of the translation. As Keegan explains, the original German expresses a more subtle and complex idea that "war is the continuation of political inter-



philosophy are the legitimacy of war as a normal phase in the relations among states and the absolute sovereignty of states.<sup>25</sup> Both of these tenets were soundly rejected by the international community in 1945 when it adopted the Charter.<sup>26</sup> The aggressive use of force is now clearly prohibited by Article 2(4) of the Charter.<sup>27</sup> Furthermore, while state sovereignty remains the most basic constitutional doctrine of state relations under international law,<sup>28</sup> absolute sovereignty no longer exists. Article 2(7) of the Charter explicitly recognizes the Chapter VII enforcement authority of the Security Council in matters essentially within the domestic jurisdiction of any state, and Article 39 imposes an obligation on the Security Council to either make recommendations or decide what measures shall be taken to maintain or restore international peace and security.<sup>29</sup> It is in this context of Clausewitz's thinking, however, that one can best understand the evolution of the doctrine of equal application.

The laws of conflict management, *i.e.*, *the jus ad bellum*, are those rules that govern the resort to armed conflict and determine whether the conflict is lawful or unlawful in its inception.<sup>30</sup> Until the early-1900s, states were free to resort to war at any time and their freedom to do so was expressly recognized in international agreements.<sup>31</sup> The first restrictions on the freedom to resort to war began with the Hague Peace Conferences of 1899 and 1907, but no arrangement explicitly made the ag-

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course' . . . 'with the intermixing of other means.' " *Id.* See also NATIONAL SECURITY LAW, *supra* note 3, at 57 ("War is only a part of political intercourse. . . . War is nothing but a continuation of political intercourse, with a mixture of other means . . . . Accordingly, war can never be separated from political intercourse. . . ." (quoting KARL VON CLAUSEWITZ, ON WAR 402 (A. Rapoport ed. 1832)) (ellipses in original)); U.S. MARINE CORPS, FMFM 1, WARFIGHTING 19 (1989) ("War does not exist for its own sake. It is an extension of policy with military force."). General Karl von Clausewitz (1780-1831) served as the director of the war College in Berlin from 1818 to 1830 where he began his work on his 3-volume masterpiece, ON WAR, which was published posthumously in 1832. See *Karl von Clausewitz*, MICROSOFT ENCARTA '95 (CD-ROM Multimedia Encyclopedia, 1994).

25. See CLAUSEWITZ ON WAR 63-64 (Anatol Rapoport ed., 1968).

26. The Charter of the United Nations was signed on June 26, 1945, in San Francisco, California, and entered in force on October 24, 1945. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 12.

27. See, *e.g.*, *id.* at 111; NATIONAL SECURITY LAW, *supra* note 3, at 85, 369-70; BROWNLIE, *supra* note 3, at 112, 154.

28. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (3d ed. 1979).

29. U.N. CHARTER art. 2, para 7, art. 39.

30. See DOCUMENTS ON THE LAWS OF WAR 2-3 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

31. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 109.

gressive use of force unlawful until the Article 2(4) prohibition in the Charter.<sup>32</sup> Articles 2(4), 39, and 51 of the Charter now codify the contemporary *jus ad bellum* in their entirety.<sup>33</sup>

These Articles must be read together to determine the scope and content of the Charter's prohibition on the aggressive use of force and the responsibility of the Security Council to enforce this prohibition. Article 2(4) of the Charter prohibits the threat or use of force by any state except in individual or collective self-defense as authorized by international law and recognized by Article 51 of the Charter.<sup>34</sup> Specifically, Articles 2(4) and 51 provide:

*Article 2*

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: . . .

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

*Article 51*

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>35</sup>

As an exercise of the international community's inherent right of collective self-defense, Article 39 of the Charter imposes an obligation on the Security Council to maintain international peace and security:

*Article 39*

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore

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32. See *id.* at 109-11.

33. See *id.* at 111.

34. See NATIONAL SECURITY LAW, *supra* note 3, at 85.

35. U.N. CHARTER art. 2, para 4, art. 51.

international peace and security.<sup>36</sup>

Decisions taken by the Security Council under Article 39 are binding on all Member States.<sup>37</sup> Article 41 authorizes the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions,"<sup>38</sup> and Article 42 authorizes the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."<sup>39</sup> Article 42 includes the authority for the Security Council to conduct or authorize belligerent operations against an aggressor state, and to deploy or authorize the deployment of an armed force in the territory of an aggressor state without that state's consent, when such actions are necessary to maintain or restore international peace and security.<sup>40</sup>

### B. *Jus in bello*

The laws of war, *i.e. the jus in bello*, also commonly referred to as the laws of armed conflict, govern the actual conduct of hostilities and have developed as customary international law through the practice of almost all societies over thousands of years—from the era of the Greeks and Romans to the Middle Ages and the twentieth century.<sup>41</sup> During the fourth century B.C., the Hindu civilization of India produced a book of rules that governed land warfare that prohibited, for example, the use of poisoned or barbed weapons, and the killing of those belligerents who are asleep, naked, disarmed, or grievously wounded.<sup>42</sup> The *jus in bello* of the ancient Hebrews, that are set forth in Deuteronomy 20, required the ancient Hebrews to spare trees of the field but allowed them to kill every man, woman, and child of their immediate enemies.<sup>43</sup>

In these early times war was waged "with all the unalleviated cruelty of which human fiendishness is capable."<sup>44</sup> To mitigate this savagery, reciprocal restraints on the conduct of war were believed advantageous and became common as the means and methods of warfare

36. U.N. CHARTER art. 39.

37. U.N. CHARTER art. 25. See also THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 407-18.

38. U.N. CHARTER art. 41.

39. U.N. CHARTER art. 42.

40. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 632-35.

41. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 1-2; 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 19, at 3.

42. See 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 19, at 3.

43. See *id.* at 4.

44. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 3 (1959).

became more destructive.<sup>45</sup> Such self-imposed restraints became so universally observed that they gradually became legally binding customs of war, and offenders were punishable as war criminals.<sup>46</sup> In the seventeenth century, a Dutch lawyer, Hugo Grotius, compiled and recorded these customs of war in his seminal three-volume work entitled, *DE JURE BELLI AC PACIS LIBRI TRES (ON THE LAW OF WAR AND PEACE)*.<sup>47</sup> As the "most comprehensive attempt to bring together both classical and medieval thought on war," these volumes are considered the "starting point for the study and development of the modern law of war."<sup>48</sup> Appropriately, Grotius is now regarded as the "father of modern international law."<sup>49</sup>

Although belligerents are lawful targets, the most fundamental customary tenet of the existing *jus in bello* is that the right of belligerents to adopt means of injuring the enemy is not unlimited.<sup>50</sup> From this tenet, customary international law has derived two corollary principles: "proportionality," which seeks to establish criteria for limiting the use of force; and "discrimination," which governs the selection of methods, weaponry, and targets.<sup>51</sup> These two principles of proportionality and discrimination have been refined in military usage to three interrelated customary principles of international law: military necessity, humanity, and chivalry.<sup>52</sup> Since the customary *jus in bello* developed as self-imposed,

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45. *See id.* at 4.

46. *Id.*

47. *See* 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY*, *supra* note 19, at 14; GREENSPAN, *supra* note 44, at 4. Hugo Grotius (1583-1645) was

[a] Dutch jurist, humanist, and statesman, whose legal writings laid the foundation for modern international law. . . . [H]e began the practice of law [in 1599]. In 1607 he was appointed attorney general of the province of Holland. [His] . . . first published work on international law, *MARE LIBERUM (THE FREE SEA, 1609)*, challenged the right of any nation to claim any part of the open sea as exclusively its own. Such a claim, Grotius argued, was against natural law and the basic law of humanity. He took the same line of argument in his *DE JURE BELLI AC PACIS (ON THE LAW OF WAR AND PEACE, 1625)*: that war violates natural law, which applies to the conduct of nations and of individuals. His contention was that war can be condoned only if it is for a righteous cause and conciliation has failed, and he called for humanitarian limits on such warfare.

*Hugo Grotius*, MICROSOFT ENCARTA '95 (CD-ROM Multimedia Encyclopedia, 1994).

48. 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY*, *supra* note 19, at 14.

49. GREENSPAN, *supra* note 44, at 4.

50. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 4. This principle is codified in Article 22 of the Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex (Regulations), 36 Stat. 2295, 1 Bevans 643, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 48.

51. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 5.

52. *See id.* (referring to the definitions of these three terms in the *COMMANDER'S HANDBOOK*). The *COMMANDER'S HANDBOOK* defines these three customary principles of

advantageous restraints designed to mitigate the savagery of war,<sup>53</sup> they were never intended to impede the waging of hostilities.<sup>54</sup> To the contrary, the *jus in bello* complement and support "the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and security."<sup>55</sup>

While the customary *jus in bello* continue to exist independently, the practice of codifying the *jus in bello* in binding international agreements began in the nineteenth century with the 1856 Paris Declaration on Maritime War.<sup>56</sup> Following the Paris Declaration, codification accelerated at the turn of the twentieth century.<sup>57</sup> Since that time, the *jus in bello* have generally developed in two regimes: the Hague regulations that govern the means and methods of warfare, and the Geneva conventions that govern the protection of victims of war.<sup>58</sup>

international law as follows:

*Military necessity*: "Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied."

*Humanity*: "The employment of any kind or degree of force *not* required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited."

*Chivalry*: "Dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden."

COMMANDER'S HANDBOOK, *supra* note 6, ¶ 5.2.

53. See GREENSPAN, *supra* note 44, at 4.

54. See COMMANDER'S HANDBOOK, *supra* note 6, ¶ 5.2.

55. *Id.*

56. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 2-4.

57. See *id.* at 3.

58. See *generally id.* Nevertheless, despite the development of these extensive regimes and the threat of prosecution, barbaric cruelty remains a characteristic of twentieth century warfare. One study commissioned in 1913 by the Carnegie Endowment for International Peace recorded the atrocities among the Turks, Serbs, and Greeks during the Balkan war that ended in the early twentieth century. The International Carnegie Commission put on record these statements by Greek soldiers:

"These soldiers all state that everywhere they burned the Bulgarian villages. Two boast of the massacre of prisoners of war. One remarks that all the girls they met with were violated. Most [sic] the letters dwell on the slaughter of noncombatants, including women and children.

"Here we are burning the villages and killing the Bulgarians, both women and children.

"We picked out their eyes (five Bulgarian prisoners) while they were still alive . . . .

From Kukush to the Bulgarian frontier the Greek Army devastated the villages, violated the women and slaughtered the noncombatant men."

United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY

Most notable of the regime of Geneva conventions are the four Geneva Conventions of 1949 developed at the initiative of the International Committee of the Red Cross (ICRC).<sup>59</sup> These four conventions apply during international armed conflict and deal with the following four categories of victims of war, respectively: wounded and sick in armed forces in the field; wounded, sick and ship-wrecked in armed forces at sea; prisoners of war; and civilians.<sup>60</sup> The four Geneva Conventions of 1949 are adhered to by more states than any other agreements on the laws of armed conflict and are declaratory of customary international law.<sup>61</sup>

These conventions are linked by certain general principles and by common articles that are found throughout each of the four conven-

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TRIBUNALS 757, 1219 (1950) (ellipsis in original). The memoirs of an English traveler captured the demented enthusiasm exhibited by one of the Serbian combatants during this same war in the Balkans:

"From the occupied territory pitiful reports arrived about the atrocious cruelties committed by the Serbs as well as by Montenegrins against the Albanian population, and the conquerors boasted of their brave deeds, instead of trying to withhold them. A Serbian officer almost choked with laughter over his glass of beer, when he related how his people in Ljuma bayoneted women and children."

*Id.* (quoting EDITH DURHAN, *THE SLAV DANGER, 20 YEARS OF BALKAN MEMORIES*). Even during the war in the Balkans that began in 1992, as many as 100,000 women were taken hostage and systematically raped in an effort to defile and impregnate them so they would not be accepted back into their community. See Patricia Forestier, *Psychiatric Genocide! How the Barbarities of 'Ethnic Cleansing' Were Spawned by Psychiatry*, *FREEDOM*, May 1993, at 6, 6-11, 34-35. Other atrocities included soldiers who burned families alive in their homes, crushed the heads of young children, and raped pregnant mothers in front of their families. See Rod Nordland, *'Let's Kill the Muslims!'*, *NEWSWEEK*, Nov. 8, 1993, at 48, 48-49.

59. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 169. Collectively, these four conventions are referred to as the four Geneva Conventions of 1949. For the individual conventions, see Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention No. I], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 171; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention No. II], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 194; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention No. III], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 216; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention No. IV], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 272.

60. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 169.

61. See *id.* at 169-70.

tions.<sup>62</sup> Common Article 2 governs the application of the four Geneva Conventions of 1949 and is widely accepted as the threshold test for when an international armed conflict exists and, consequently, for when the *jus in bello* are to apply in their entirety.<sup>63</sup> This Article invokes the provisions of the Conventions upon one of three factual conditions: the declaration of war, the occurrence of "any other armed conflict" between two or more contracting parties even if the state of war is not recognized by one of them, and in all cases of partial or total occupation even if met with no armed resistance.<sup>64</sup> The existence of international armed conflict and the corresponding application of the *jus in bello* in cases of declared war<sup>65</sup> or occupation<sup>66</sup> are normally self-evident.

Although the terms 'war' and 'armed conflict' are frequently used interchangeably and refer to a state of hostilities that invoke the *jus in bello*, war refers to a state of *de jure* hostilities invoked by a formal declaration of one party<sup>67</sup> that creates an international armed conflict as a matter of law.<sup>68</sup> In contrast, armed conflict refers to a state of *de facto* hostilities invoked by the use of force by one party without any formal declaration of war.<sup>69</sup> Under exceptional circumstances, such as the invasion of Kuwait by three Iraqi Republican Guard Forces Command divisions on August 2, 1990,<sup>70</sup> *de facto* hostilities may also be self-evident.

62. See *id.* at 169.

63. See *id.* at 169-70; COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 17-21 (Jean S. Pictet ed., 1958) [hereinafter 1949 Geneva Convention No. IV COMMENTARY].

64. See 1949 Geneva Convention No. IV, *supra* note 59, art. 2, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 272; 1949 Geneva Convention No. IV COMMENTARY, *supra* note 63, at 20.

65. Although a declaration of war is not required to establish the existence of international armed conflict, such a declaration does define a legal state of armed hostilities between states even in the absence of the use of force. See U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 8 (1956) [hereinafter THE LAW OF LAND WARFARE].

66. Military occupation is a question of fact that "presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded." *Id.* ¶ 355.

67. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 1-2.

68. See THE LAW OF LAND WARFARE, *supra* note 65, ¶ 8. For an excellent historical discussion of the evolution and meaning of *de jure* and *de facto* wars, see KOTZSCH, *supra* note 2, at 36-65.

69. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 1-2.

70. For a detailed account of the Iraqi invasion of Kuwait and the response of the international community, see U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS PURSUANT TO TITLE V OF THE PERSIAN GULF CONFLICT SUP-

Without such exceptional circumstances, however, determining when "any other armed conflict" exists is a factual, subjective determination that centers on the use of force between the members of the armed forces of two states.

The commentary of the 1949 Geneva Convention No. IV published by the ICRC describes the Common Article 2 threshold for *de facto* hostilities as follows:

*Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.*<sup>71</sup>

Although not very clearly defined, this explanation depicts a low Common Article 2 threshold for the application of the Conventions designed to afford maximum protection to non-belligerents and belligerents by ensuring the Conventions apply to as many hostile interventions between the members of the armed forces of two states as possible.<sup>72</sup> This ICRC commentary of Common Article 2 does offer, however, three criteria that add structure to a factual analysis of the existence of *de facto* hostilities. The emphasized terms '[a]ny difference,' 'no difference how long the conflict lasts,' and 'no difference . . . how much slaughter takes place,' provide that the *scope*, *duration*, and *intensity* of a use of force between the members of the armed forces of two states are the central factors in determining the existence of *de facto* hostilities. Based upon this ICRC description of the Common Article 2 threshold, *de facto* hostilities exist and the *jus in bello* therefore apply when any use of force—regardless of its scope, duration, or intensity—occurs between the members of the armed forces of two states. Although this ICRC description is intended to create a very low threshold for the application of the *jus in bello*, the test remains situational and must be applied in the context in which the use of force between members of the armed forces of two states is actually used. Clearly, for example, the authorized use of force by the military

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PLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991 (PUBLIC LAW 102-25) (Apr., 1992) [hereinafter CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS].

71. 1949 Geneva Convention No. IV COMMENTARY, *supra* note 63, at 20 (emphasis added).

72. *See id.* at 17-21; HOWARD S. LEVIE, 59 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES: PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 14-26 (1977).



police of one state on one of its military installations to apprehend a visiting member of the armed forces of another state who is intoxicated and trespassing does not create *de facto* hostilities between the two states.

The United States utilizes this scope, duration, and intensity analysis in its determination of belligerent status. On December 3, 1983, for example, two unarmed U.S. Navy planes flying in support of the U.N. Multinational Force in Lebanon were fired upon by Syrian anti-aircraft guns and surface-to-air missiles.<sup>73</sup> When the United States responded the next day with airstrikes against the Syrian positions from which anti-aircraft fire had come, U.S. Navy Lieutenant Robert O. Goodman, Jr., was shot down and held by Syria.<sup>74</sup> The issue of his status as a prisoner of war under the 1949 Geneva Convention No. III was raised, and the U.S. Department of State issued the following press guidance:

*Question* – Is the captured airman a “prisoner of war” under the Third Geneva Convention?

*Answer* – Yes. The Third Geneva Convention accords “prisoner-of-war” status to members of the armed forces who are captured during “armed conflict” between two or more parties to the Convention. “Armed conflict” includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting and irrespective of whether a state of war exists between the two parties. The Third Convention also provides for the prompt return of prisoners when “active hostilities” have ceased. As we have made clear, the incident which occurred between our forces and those of Syria has terminated, and we are hopeful that Syria will promptly return our airman and cooperate with the Government of Lebanon in resolving the problems of that country.<sup>75</sup>

Syria released Lieutenant Goodman on January 3, 1984.<sup>76</sup>

United States practice, however, has continued to evolve. Ten years later, a situation similar to Lieutenant Goodman’s resulted in a determination that the downed pilot was not a prisoner of war, but an unlawful detainee. On October 3, 1993, U.S. Army Rangers operating in support of the expanded United Nations Operations in Somalia raided a house in Mogadishu in an attempt to arrest General Mohamed Farah Aidid for previous attacks on United Nations personnel conducting humanitarian

73. See CUMULATIVE DIGEST, *supra* note 6, at 3456-57.

74. See *id.*

75. *Id.* at 3456-57.

76. See *id.* at 3457.

relief operations.<sup>77</sup> When the raid was over, nineteen United Nations personnel were killed, and one U.S. Army helicopter pilot, Chief Warrant Officer 3 Michael Durant, was shot down and held by Somali clansmen.<sup>78</sup> The issue of his status as a prisoner of war under the 1949 Geneva Convention No. III was raised, and it was determined that he was an unlawful detainee because the United Nations operations did not rise to the level of a *de facto* international armed conflict that would trigger the *jus in bello*.<sup>79</sup> Warrant Officer Durant was released on October 14, 1993.<sup>80</sup>

During its ratification process of the Chemical Weapons Convention fourteen years after Lieutenant Goodman was declared a prisoner of war, the United States clearly adopted a more flexible and reasonable contextual approach to the application of the Common Article 2 threshold analysis. The Chemical Weapons Convention provides that "[e]ach State Party undertakes not to use riot control agents as a method of warfare."<sup>81</sup> On April 24, 1997,<sup>82</sup> the U.S. Senate conditioned its advice and consent to the Chemical Weapons Convention on the requirement that:

(26) RIOT CONTROL AGENTS.

(A) PERMITTED USES. Prior to the deposit of the United States instrument of ratification, the President shall certify to Congress that the United States is not restricted by the Convention in its use of riot control agents, including the use against combatants who are parties to a conflict, in any of the following cases:

(i) UNITED STATES NOT A PARTY. The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict (such

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77. See U.N. DEP'T OF PUBLIC INFO., *THE UNITED NATIONS AND SOMALIA: 1992-1996*, at 12, 50-54, U.N. Doc. DPI/1677, U.N. Sales No. E. 96.I.8 (1996) [hereinafter *THE UNITED NATIONS AND SOMALIA*]. This text is Volume VIII of the United Nations Blue Book Series.

78. See *id.* at 54-55.

79. See Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 *HOUS. J. INT'L L.* 359, 362-64 (1996).

80. See *THE UNITED NATIONS AND SOMALIA*, *supra* note 77, at 331.

81. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, art. 1, para. 5; S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) [hereinafter *Chemical Weapons Convention*], excerpted in *NATIONAL SECURITY LAW DOCUMENTS* 348 (John Norton Moore et al. eds., 1995)

82. See Helen Dewar, *Senate Approves Chemical Arms Pact After Clinton Pledge*, *WASH. POST*, Apr. 25, 1997, at A1. The Senate approved the treaty by a vote of 74 to 26. *Id.*

as recent use of the United States Armed Forces in Somalia, Bosnia, and Rwanda).

(ii) **CONSENSUAL PEACEKEEPING.** Consensual peacekeeping operations when the use of force is authorized by the receiving state, including operations pursuant to Chapter VI of the United Nations Charter.

(iii) **CHAPTER VII PEACEKEEPING.** Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the United Nations Charter.<sup>83</sup>

In response, the President's certification of April 25, 1997, provided that:

In accordance with Condition (26) on Riot Control Agents, I have certified that the United States is not restricted by the Convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the United States is not engaged in a use of force of a scope, duration and intensity that would trigger the laws of war with respect to U.S. forces.<sup>84</sup>

Both the Senate's condition and the President's letter explicitly recognize the authority of military forces who serve as consensual or coercive peace-keepers, or who are not a party to a conflict, to use force to accomplish their mission, even within an area of ongoing conflict against combatants who are parties to the conflict. The President's letter also specifically adopts the scope, duration, and intensity analysis as the U.S. methodology for interpreting the Common Article 2 threshold and determining the belligerent status of military forces during the conduct of peacetime military operations.

This evolution of state practice reflects the contemporary difficulty of this factual determination interpreting the Common Article 2 threshold for *de facto* hostilities. This difficulty arises because military forces are

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83. S. Exec. Res. 75, 105th Cong., CONG. REC. S3378 (daily ed. Apr. 17, 1997). The Senate gave its advice and consent to the Chemical Weapons Convention subject to a total of thirty-three conditions. *Id.* at S3373-79.

84. President's Certifications and Report to the Congress in Connection with the U.S. Senate Resolution of Ratification of the Chemical Weapons Convention (Apr. 25, 1997), available in *White House Virtual Library* <<http://library.whitehouse.gov>>. The United States deposited its instrument of ratification on April 25, 1997, and the Convention entered into force on April 29, 1997, with 107 of 168 signatory states having ratified. *Signatory States to the Chemical Weapons Convention* <<http://www.opcw.nl/memsta/namelist.htm>>.

authorized to use force in self-defense<sup>85</sup> and to accomplish their mission during the conduct of peacetime military operations<sup>86</sup> that may occur in an area of ongoing.<sup>87</sup> These peacetime military operations include law enforcement, peace-keeping, humanitarian and disaster relief, counter-terrorist, hostage rescue, and noncombatant evacuation operations.<sup>88</sup> A rote application of the Common Article 2 threshold allows a limited and intermittent use of force to invoke a state of *de facto* hostilities and unintentionally causes military personnel to become belligerents and lawful targets even though they are conducting a peacetime military operation. The lack of clarity in what level of use of force is required to trigger the Common Article 2 threshold further compounds the difficulty of this analysis. As a result of this unintended consequence when the Common Article 2 threshold is applied to peacetime military operations, the international community now analyzes the use of force by the military in the context of its assigned mission.<sup>89</sup> Such a contextual analysis fleshes out those uses of force that are below the Common Article 2 threshold that makes a combatant force conducting a peacetime military operation a belligerent force.

Under existing international law, therefore, the line of belligerency is that point on the "use of force" spectrum at which international armed conflicts begin and the *jus in bello* apply. This point is triggered by the declaration of war, the occurrence of *de facto* hostilities, and all cases of partial or total occupation. When combatants conducting peacetime military operations cross the line of belligerency, they become belligerents and lawful targets. Figure 1 graphically summarizes these principles of existing international law.

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85. U.N. CHARTER art. 51.

86. See Sharp, *supra* note 9, at 105; Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-keeping Forces*, 294 INT'L REV. OF THE RED CROSS 227 (May-June 1993) excerpted in WALTER GARY SHARP, SR., UNITED NATIONS PEACE OPERATIONS 145, 146 (1995).

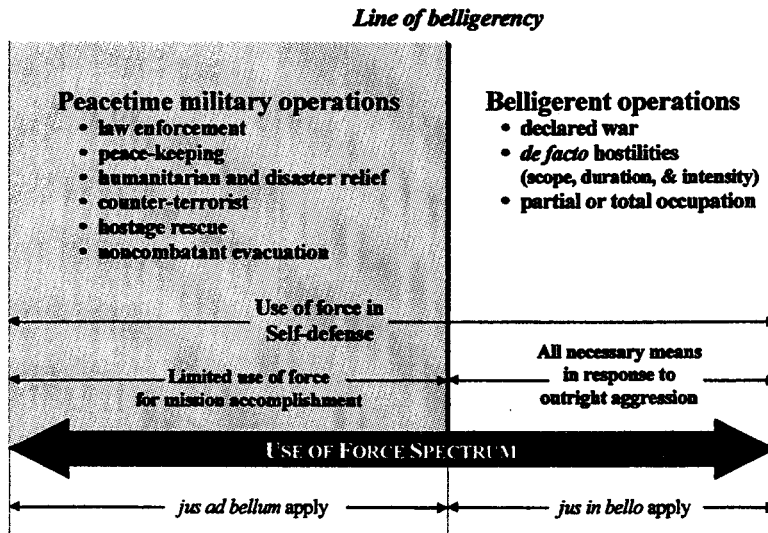
87. Although cast as a contemporary issue, the international community was also concerned in the early 1960s over the possibility that the United Nations peace-keeping forces in the Congo may have become involved in hostilities that invoked the *jus in bello*. See FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 60, 180 (1966).

88. See JOINT PUB 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR, III-1 (1995).

89. See discussion *infra* Part III.

### THE COMMON ARTICLE 2 THRESHOLD

(Figure 1: © 1997 Walter Gary Sharp, Sr.)



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

#### C. *Evolution of the Doctrine of Equal Application*

Until the seventeenth century, the *jus ad bellum* determined the ap-

plication of the *jus in bello*,<sup>90</sup> *i.e.*, it determined the rules governing the conduct of war for those parties that legitimately resorted to war.<sup>91</sup> The *jus in bello* were also regulated by the principle called "the distinction between peoples with respect to war."<sup>92</sup> This principle was founded on the fact that people are different in ways such as race, language, custom, and religion.<sup>93</sup> These differences not only provided a justification for war, but for those wars fought between dissimilar peoples, the combatants were not required to abide by the *jus in bello*.<sup>94</sup> In the ancient Greco-Roman civilization of the fourth and fifth centuries B.C., the *jus in bello* applied only to a legitimate war authorized by the gods between civilized sovereign states.<sup>95</sup> The *jus in bello* did not apply to wars fought with barbarians, *i.e.*, those peoples who did not live together in a society that met the Greek standard of a civilized sovereign state.<sup>96</sup> The Christian theology of the Middle Ages interpreted this interdependence of the *jus ad bellum* and the *jus in bello* to mean that *the jus in bello* applied to wars between Christians, but not to wars between Christians and infidels.<sup>97</sup>

In Europe, the rise of the sovereign nation state in the early seventeenth century caused the *jus ad bellum* to evolve away from an analysis of whether the war was based on a just cause, to issues addressing the procedural mechanisms for beginning a war.<sup>98</sup> Similarly, this evolving equality of states also eroded the discriminatory application of the *jus in bello* based upon the distinction between peoples.<sup>99</sup> The end result of this

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90. See KOTZSCH, *supra* note 2, at 85-89.

91. *Id.* at 33.

92. *Id.* at 86.

93. *Id.* at 25.

94. *Id.* 25-26.

95. *Id.* at 27.

96. *Id.* at 27-28.

97. *Id.* at 30-38.

98. *Id.* at 87-89. The Peace of Westphalia is frequently credited with the birth of the nation state system. See J. L. BRIERLY, *THE LAW OF NATIONS* 5 (Humphrey Waldock ed., 6th ed. 1963). The Peace of Westphalia was

[a] treaty, signed October 24, 1648, that closed the Thirty Years' War and readjusted the religious and political affairs of Europe. . . . The main participants were France and Sweden and their opponents Spain and the Holy Roman Empire. By the terms of the treaty, the sovereignty and independence of each state of the Holy Roman Empire was fully recognized, making the Holy Roman emperor virtually powerless. . . . The Peace of Westphalia marked the close of the period of religious wars. Thereafter, European armed struggles were waged principally for political ends.

*Peace of Westphalia*, MICROSOFT ENCARTA '95 (CD-ROM Multimedia Encyclopedia, 1994).

99. See KOTZSCH, *supra* note 2, at 89.

transition was a complete severance of the interdependence of the *jus ad bellum* and *jus in bello*.<sup>100</sup>

Through the influence of his 1625 treatise *DE JURE BELLI AC PACIS LIBRI TRES*, Hugo Grotius is credited with having established this separation between the *jus ad bellum* and the *jus in bello*, i.e., "the theory of the equal application of the *jus in bello* irrespective of the justice of a party's resort to force."<sup>101</sup> With the evolution of state sovereignty in his time, the principal rationale underlying Grotius' theory was the lack of an effective method of determining the lawfulness of the aggression.<sup>102</sup> Accordingly, the separation of these two bodies of law was the only way to ensure the general application of the *jus in bello* to all wars.<sup>103</sup> This doctrine of equal application remained unchallenged until the early twentieth century.<sup>104</sup>

Once the Charter outlawed aggressive war in 1945, the doctrine was challenged on a number of occasions.<sup>105</sup> However, the doctrine remains generally accepted as a valid principle of international law. The Nuremberg International Military Tribunal (IMT) declared in its 1948 *Hostage trial*, for example, that:

whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, may be done, and must be done by the belligerents and neutral States. This is so, even if the declaration of war is *ipso facto* a violation of International Laws as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or the General Treaty for Renunciation of war.<sup>106</sup>

It should be noted, however, that the *Hostage trial* case before the Nuremberg IMT occurred only three years after the Charter had outlawed the aggressive use of force and involved crimes during World War II that occurred before the Charter became law. Bound by these facts, the judges

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100. *Id.*

101. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 396 (1993) (emphasis added). See also GREENSPAN, *supra* note 44, at 9.

102. See *id.* at 410-11.

103. See KOTZSCH, *supra* note 2, at 89.

104. See Gardam, *supra* note 101, at 410.

105. See discussion *infra* Part III.E.

106. KOTZSCH, *supra* note 2, at 121-22 (citation omitted).

of the IMT declared that they had “to accept th[is] imperfect state as existing law,”<sup>107</sup> when considering if the doctrine of equal application applies when a state has patently engaged in aggressive war.

Similarly, Morris Greenspan provides in his 1959 treatise on *THE MODERN LAW OF LAND WARFARE* that:

[i]t is clear international law that however international war breaks out, and whether the waging of that war is justifiable or not, so long as a state of war exists the rules of war apply. ‘Even a war, illegal . . . is nevertheless . . . regulated by the laws of war. This rule of international law is firmly established and recognized by all leading international lawyers.’<sup>108</sup>

As stated in its preface, the purpose of this treatise “is to present an accurate, comprehensive, and systematic statement of the international law of war on land *as it exists today*.”<sup>109</sup>

*THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, an official publication adopted in 1995 by the U.S. Navy, the Marine Corps, and the Coast Guard, also echoes this principle:

It is important to distinguish between resort to armed conflict, and the law governing the conduct of armed conflict. Regardless of whether the use of armed force in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful), the manner in which the resulting armed conflict is conducted continues to be regulated by the law of armed conflict.<sup>110</sup>

This publication is intended to provide commanding officers and their staffs with an overview of *existing* rules of law governing naval operations in peacetime and during armed conflict.<sup>111</sup>

Finally, one scholar, Professor Christopher Greenwood, specifically examined this issue of carving out an exception to the doctrine of equal application for military forces serving the United Nations. He concluded:

There is considerable logical force to . . . [this] argument. The principle that the laws of armed conflict apply equally to both parties to an armed conflict, irrespective of who is the aggressor,

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107. *Id.* at 122 n.147 (citation omitted).

108. GREENSPAN, *supra* note 44, at 9 (footnote omitted) (citation omitted).

109. GREENSPAN, *supra* note 44, at vii (emphasis added).

110. *COMMANDER'S HANDBOOK*, *supra* note 6, ¶ 5.1.

111. *Id.* at 21.



is difficult to reconcile with the general legal principle *ex injuria non oritur jus*. . . . Despite its apparent logic, . . . [this] theory is a dangerous one which is open to criticism on several grounds. . . . In particular, I believe it would not be realistic to criminalize all acts of violence against U.N. forces or forces authorized by the United Nations, in circumstances where those forces are engaged in fighting a war. To do so would be likely to weaken, rather than enhance, the protection which the law affords.<sup>112</sup>

Professor Greenwood refers to Protocol I as one basis for his criticism of such an exception for belligerents. The Preamble to Protocol I specifically rejected the North Vietnamese suggestion that the United States was an aggressor during the Vietnam war and therefore not entitled to benefit from the *jus in bello*.<sup>113</sup> Protocol I supplements the protections accorded victims of international armed conflicts provided by the four Geneva Conventions of 1949, and applies in situations referred to in Common Article 2.<sup>114</sup> The language of the preamble referred to by Professor Greenwood provides:

*Reaffirming* further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature of origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.<sup>115</sup>

As the excerpts above demonstrate, the doctrine of equal application remains a generally accepted principle among international law scholars. These reaffirmations of the doctrine of equal application, for the most part, are either a codification or a reflection of *existing* international law. Part III of this Article will reveal, however, an evolution in international law and state practice not yet universally recognized as existing law that

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112. Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185, 203-04, 207 (1996).

113. *Id.* at 204.

114. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1, para. 3, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 389.

115. Protocol I, *supra* note 114, pmbl., *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 389-90.

identifies a *de facto* decline in the application of this doctrine to military forces serving the United Nations.

D. *The Application of the Doctrine to Military Forces Serving the United Nations*

The *jus in bello* evolved as obligations on states, and each state remains responsible for the application of the laws of armed conflict when its forces serve as belligerents under the authority of the United Nations.<sup>116</sup> The President of the ICRC addressed this issue in a memorandum to Member States, and concluded that since the United Nations is not a party to the four Geneva Conventions of 1949, "each State is personally responsible for the application of these Conventions, when supplying a contingent to the United Nations."<sup>117</sup> In contrast, other scholars have concluded it "is uncontested that the United Nations is bound by the customary rules of IHL [international humanitarian law] when engaged in hostilities."<sup>118</sup> The Institute of International Law has taken the latter approach. In a 1971 resolution, the Institute concluded that:

[t]he humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities.<sup>119</sup>

Similarly, in a 1975 resolution, the Institute declared that

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116. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 600.

117. Letter from Leopold Boissier, President, International Committee of the Red Cross, to the Governments of States Party to the Geneva Conventions and Members of the United Nations (Nov. 10, 1961), 9 INT'L REV. OF THE RED CROSS 490, 490 (Dec. 1961) (addressing the application of the four Geneva Conventions of 1949 by military units placed at the disposal of the United Nations), *reprinted in* SHARP, *supra* note 86, at 143, 144.

118. Dietrich Schindler, *United Nations Forces and International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 521, 526 (Christophe Swinarski ed., 1984), *excerpted in* SHARP, *supra* note 86, at 152, 156.

119. Institute of International Law, *Resolutions and Voeux Adopted By the Institute at Its Zagreb Session (26 August - 3 September, 1971): I. Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged*, art. 2, 54-II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 465-66 (1971), *reprinted in* SHARP, *supra* note 86, at 138, 139.

[t]he rules of armed conflict shall apply to hostilities in which United Nations Forces are engaged, even if those rules are not specifically humanitarian in character.<sup>120</sup>

Regardless of whether the rationale is founded on the United Nations being bound in its own right as a juridical entity, or only through proxy of the obligations of its constituent members, the conclusion remains that military forces serving the United Nations must abide by international law, including the *jus ad bellum* and the *jus in bello*. This is consistent with the Purposes of the United Nations, which provides that the United Nations must act "in conformity with the principles of justice and international law" when taking collective measures for the prevention and removal of threats to the peace and responding to acts of aggression.<sup>121</sup>

Military forces serving the United Nations generally fall into one of three categories determined by the underlying authority upon which they operate, and whether the force is non-belligerent or belligerent: consensual peace-keepers, coercive peace-keepers, and peace-enforcers.<sup>122</sup> In addition to their inherent right to use armed force in self-defense,<sup>123</sup> all military forces are authorized to use varying levels of force to accomplish their respective missions. Although authorized by Chapter VI of the Charter, consensual peace-keepers are present in the territory of a sovereign state only because that state has consented to their presence.<sup>124</sup> Their right of self-defense includes the authority to use limited force to overcome attempts by forceful means to prevent them from discharging their assigned mission,<sup>125</sup> but consensual peace-keepers are not belligerents and are not lawful targets, even though they may be deployed into areas of ongoing hostilities.<sup>126</sup> Coercive peace-keepers are authorized by the Security Council under Chapter VII to use all necessary means, not necessarily with the consent of all the parties concerned, for the purposes of a limited mandate short of stopping an aggressor or imposing a cessation

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120. Institute of International Law, *Resolutions Adopted and Recommendations Made By the Institute at Its Wiesbaden Session, (August 6-15, 1975): II. Conditions of Application of Rules, Other Than Humanitarian Rules of Armed Conflict, to Hostilities in Which United Nations Forces May Be Engaged*, art. 2, 56-II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 540 (1975), reprinted SHARP, *supra* note 86, at 141, 142.

121. U.N. CHARTER art. 1, para 1.

122. See Sharp, *supra* note 9, at 97-112.

123. U.N. CHARTER art. 51.

124. Sharp, *supra* note 9, at 105.

125. See, e.g., Palwankar, *supra* note 86, at 227, excerpted in SHARP, *supra* note 86, at 145, 146.

126. See Sharp, *supra* note 9, at 105.

of hostilities.<sup>127</sup> Similarly, these forces are not considered belligerents and are not lawful targets even though they may also be deployed into areas of ongoing hostilities.<sup>128</sup> Peace-enforcers are authorized by Chapter VII of the Charter to use all necessary means to provide for the collective security of the international community by responding to outright aggression, either imminent or actual.<sup>129</sup> Under existing international law, these forces are belligerents in an international armed conflict and could be lawfully targeted by the state against which the Security Council is taking enforcement action.<sup>130</sup>

The international community has already declared that all civilians and non-belligerent military forces serving under the direction of the United Nations are protected persons and unlawful targets.<sup>131</sup> This protected status includes consensual peace-keepers, and coercive peace-keepers such as those in Somalia, Haiti, and the former Yugoslavia.<sup>132</sup> The international community's concern over attacks on these peace-keeping forces is in direct conflict, however, with the application of the doctrine of equal application to military forces serving the United Nations.

The conflict arises with a rote application of the Common Article 2 threshold for the existence of an international armed conflict. As previously discussed in Part II.B, existing international law intended at its inception a low threshold for when an international armed conflict exists and when the *jus in bello* apply. This occurs at the line of belligerency, which is that point on the "use of force" spectrum determined by the declaration of war, the occurrence of *de facto* hostilities, and all cases of partial or total occupation.

The application of the factual, subjective determination for *de facto* hostilities for peace-keeping forces is what causes this direct conflict between the international community's desire to maximize the application of the *jus in bello* and the protection for its peace-keepers. When consensual and coercive peace-keepers use force in self-defense or to accomplish their assigned mission, they run the risk of triggering the Common Article 2 threshold, thereby establishing an international armed conflict, and *establishing themselves as belligerents and lawful targets*. This is clearly contrary to the international community's desire to maximize protection for its peace-keepers and make them unlawful targets. Figure 2

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127. *Id.* at 105-09.

128. *Id.* at 107.

129. *Id.* at 100-03, 109.

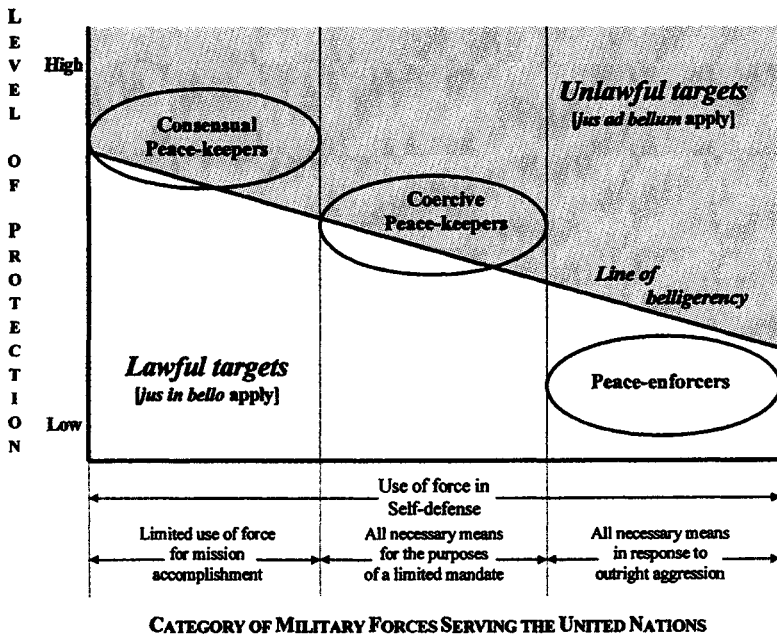
130. *Id.* at 101-02.

131. See Convention on the Safety of United Nations and Associated Personnel, *supra* note 10, art. 2, reprinted in 34 I.L.M. 482 (1995).

132. See Sharp, *supra* note 9, at 105-07.

graphically illustrates the continuum of existing legal protections accorded these three categories of military forces serving the United Nations when diagramed along the line of belligerency. This figure demonstrates that the line of belligerency becomes a slippery slope when applied to military forces serving the United Nations, allowing even *consensual* peace-keepers to become lawful targets while in the performance of their assigned duties.

**CONTINUUM OF EXISTING LEGAL PROTECTION  
ACCORDED MILITARY FORCES SERVING THE UNITED NATIONS**  
(Figure 2: © 1997 Walter Gary Sharp, Sr.)



This *de facto* Common Article 2 analysis creates the untenable situation that peace-keepers who begin their operation as non-belligerents and unlawful targets may become belligerents and lawful targets when they exercise their authority to use force either in self-defense or to accomplish their assigned mission. The tragic irony of this rote application of existing international law is highlighted by considering the conclusion of some international lawyers that peace-keepers become peace-enforcers (and therefore lawful targets) in situations such as in Somalia when peace-keepers use authorized force to arrest a war criminal accused of

previously killing other peace-keepers.<sup>133</sup> Such an unacceptable conclusion would allow an attacking force to determine the legality of its attack on peace-keepers by ensuring that the scope, duration, and intensity of the attack exceeds the Common Article 2 threshold. To prevent such unintended consequences, the international community has rejected such a rote application of international law and has recognized a higher *de facto* threshold for military forces serving the United Nations.<sup>134</sup>

### III. THE DECLINE OF THE DOCTRINE OF EQUAL APPLICATION

Heuristics is a uniquely appropriate methodology for determining the direction of change and status of customary international law. Contemporary state practice makes a distinction between military forces acting independently under the authority of a state, and those military forces serving at the behest of the international community. In the limited circumstances of military forces serving under the authority of the United Nations, the following case-studies reveal a *de facto* decline in the doctrine of equal application, and a modification to the Common Article 2 threshold for determining when such forces become belligerents and lawful targets.

#### A. *Jus contra bellum*

For four millennia, the *jus ad bellum* generally allowed states to engage in war at any time.<sup>135</sup> The first attempt to place juristic restrictions on this freedom to resort to war did not begin until the Hague Peace Conferences of 1899 and 1907.<sup>136</sup> Article 1 of the 1907 Hague Convention III, for example, required parties to present a "previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war."<sup>137</sup> This was nothing more, however, than a formal recognition that the resort to war was le-

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133. See Michael D. Sandler, *Recommendation and Supporting Report on the Convention on the Safety of United Nations and Associated Personnel*, 1996 A.B.A. SEC. INT'L L. & PRAC., reprinted in 31 INT'L LAW. 195, 197 (1997).

134. See discussions *supra* Part II.B and *infra* Part III.F.

135. See discussion *supra* Part II.A.

136. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 109-11. The Hague Peace Conference of 1899 adopted three conventions and three declarations that were signed by the delegates but never ratified by the participating states. See THE LAWS OF ARMED CONFLICTS, *supra* note 4, at 49-51.

137. Hague Convention III Relative to the Opening of Hostilities, Oct. 18, 1907, art. 1, 36 Stat. 2259, 1 Bevans 619, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 4, at 57.

gal.<sup>138</sup> Similarly, the series of nineteen Bryan Treaties concluded by the United States and a number of other states between 1913 and 1916 imposed an obligation on contracting parties to submit all of their disputes to a conciliation commission, and not to begin hostilities prior to the commission's report.<sup>139</sup>

After World War I, the League of Nations also attempted to restrict the right of states to resort to war.<sup>140</sup> As in the Bryan Treaties, members of the League of Nations were required to submit their disputes to judicial settlement, arbitration, or to the Council of the League, and were prohibited to begin war within a period of three months from the judicial decision, arbitral award, or the Council's report.<sup>141</sup> The only prohibition on the resort to war was against any state that complied with the judicial decision, arbitral award, or a unanimous decision of the Council.<sup>142</sup> The League of Nations was unsuccessful in its attempt to prohibit or, in practice, restrict the resort to war.<sup>143</sup> The international community attempted to correct the shortcomings of the League of Nations by adopting the 1924 Geneva Protocol for the Pacific Settlement of International Disputes.<sup>144</sup> This Protocol prohibited the resort to war except in self-defense or in the case of collective enforcement measures, but it never became binding law.<sup>145</sup>

The decisive turning point in the history of the *jus ad bellum* was the adoption of the Briand-Kellogg Pact on August 27, 1928.<sup>146</sup> Article 1 of this Pact provides that "[t]he High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."<sup>147</sup> Nearly all existing states of the time became parties to the Briand-Kellogg Pact, and it soon became customary international law.<sup>148</sup> Despite

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138. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 109.

139. *Id.* at 109-10.

140. *Id.* at 110.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. 1, 46 Stat. 2343, *quoted in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 110.

148. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 110-11.

its significance in principle, the Pact had its weaknesses.<sup>149</sup> Most notably, it merely prohibited war and not the use of force, allowing states to engage in devastating hostilities while claiming that no offenses under the Pact were being committed.<sup>150</sup>

Article 2(4) of the Charter was the *coup de grâce* for the theory and practice of the *jus ad bellum* that recognized the right of states to resort to war. This Article requires all Member States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ."<sup>151</sup> The Charter clearly outlaws the aggressive use of force while recognizing a state's inherent right of individual and collective self-defense in Article 51 and the Security Council's obligation under Article 39 to maintain or restore international peace and security.<sup>152</sup> As previously discussed, Articles 2(4), 39, and 51 of the Charter now codify the contemporary *jus ad bellum* in its entirety.<sup>153</sup>

Until the twentieth century, the relationship between the *jus ad bellum* and *jus in bello* was based upon the same underlying principle of the right of states to resort to war.<sup>154</sup> With the creation of the Charter norm prohibiting the right of states to resort to war, there was a very important change in this relationship as the contemporary concept of the *jus ad bellum* evolved to one of the *jus contra bellum*, i.e., the law against war.<sup>155</sup> The underlying principle of the *jus contra bellum* has become penal law,<sup>156</sup> prohibiting all aggressive use of force while retaining a state's right of individual and collective self-defense.

Notwithstanding this severance of common, underlying principle, it is generally accepted that the *jus in bello* retain their validity and binding force under the contemporary Charter law of the *jus contra bellum* with respect to all military forces regardless of the authority upon which they act.<sup>157</sup> It is important to note, however, that the shift in *raison d'être* for pre-Charter and post-Charter *jus in bello* marks a decline in the rationale for the doctrine of equal application with respect to military forces serving the United Nations.

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149. *See id.*

150. *Id.* at 111.

151. U.N. CHARTER art. 2, para 4.

152. *See discussion supra* Part II.A for the text and a brief analysis of Articles 2(4), 39, and 51.

153. *See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra* note 3, at 111.

154. *See KOTZSCH, supra* note 2, at 83.

155. *See id.*

156. *See id.*

157. *See id.*



The pre-Charter *jus in bello* were a set of humanitarian rules that governed interstate warfare at a time when no method was available among sovereign states to determine the justness of the war.<sup>158</sup> The interdependence of the two concepts of the *jus ad bellum* and the *jus in bello* allowed warring states to each declare their enemy unjust, and thereby set aside the humanitarian obligations of the *jus in bello*. Since all states believed their respective causes were just, the only way of ensuring the applicability of the *jus in bello* was to sever its interrelationship with the *jus ad bellum*.

In contrast, the underlying rationale for the application of post-Charter *jus in bello* is solely the humanitarian nature of the rules, because the Charter establishes the *per se* rule that war and the aggressive use of force is unjust and unlawful.<sup>159</sup> With the present role of the Security Council, the rationale for Grotius' doctrine of equal application no longer exists. In a very central way, the Charter has restored a nexus between the *jus ad bellum* and the *jus in bello* in the limited context of military forces defending the international norm of the *jus contra bellum*.

A contemporary discussion by one author, Professor Judith Gail Gardam, notes that traditional principles of the *jus ad bellum* have been fundamentally changed by the Charter-system and restricted to the use of force principles codified in the Charter.<sup>160</sup> Professor Gardam points out that the distinction between the *jus ad bellum* and the *jus in bello* is eroding in practice.<sup>161</sup> In a discussion that focuses on how the international rule of proportionality (as a component of both the *jus ad bellum* and the *jus in bello*) has evolved under the Charter-system of conflict management, Professor Judith Gail Gardam has made the following observations:

The *jus ad bellum* and the *jus in bello* are themselves generally regarded as independent sets of rules and the relationship between the two has also remained largely unexplored. What debate there has been has arisen in the context of whether the rules on the conduct of hostilities are affected by the legality of the resort to force. *Most commentators take the position that the rules must be applied equally, as exemplified in the Preamble to Protocol I. Events in the recent gulf conflict demonstrate that this analysis is too simplistic.* The practice of states in that conflict reveals that the legality of a state's resort to force has a subtle impact on the perception by that state of the means that can legitimately be

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158. See discussion *supra* Part II.C.

159. See Gardam, *supra* note 101, at 411.

160. *Id.* at 403.

161. *Id.* at 393-94.

used to achieve its goal. *Thus, in reality, the jus ad bellum to some extent may determine the jus in bello. . . .* Moreover, the almost-unprecedented role of the Security Council in determining the aggressor is clearly a significant factor in any analysis of these events.<sup>162</sup>

. . . .  
Since the gulf conflict, it is difficult to see how it can be argued that the rules regulating the conduct of armed conflict are unaffected by considerations relating to the use of force. . . . *Clearly, as long as there is any prevailing theory of the jus ad bellum, it will always affect the jus in bello.*<sup>163</sup>

Based upon her detailed case study of the international community's response to unlawful aggression during the Persian Gulf War, Professor Gardam concludes that it "appears in practice that the *jus ad bellum* has subtly influenced the *jus in bello* ever since the demise of the view of the legal neutrality of the resort to force by states."<sup>164</sup> This *de facto* erosion observed by Professor Gardam under the Charter-system is a reflection of state practice and evolving customary international law that treat military forces serving under the authority of the United Nations differently than military forces acting only under the authority of their respective states.

#### B. *Jus in bello* and the Law of Neutrality

The political notion of neutrality was first recognized in the fourteenth century as a method for princes to declare their intent to abstain from joining ongoing hostilities.<sup>165</sup> Neutrality first acquired legal status within the *jus in bello* after the 1648 Peace of Westphalia when it evolved into a series of rights and duties imposed upon neutral and belligerent states.<sup>166</sup> Although codification of these laws of neutrality first began in 1899, they were not extensively addressed until the 1907 Hague Peace Conference, which resulted in two conventions on the rights and duties of neutral powers and persons in case of war on land and in case of naval war.<sup>167</sup> These two conventions emphasized the impartiality towards all belligerents.<sup>168</sup>

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162. *Id.* at 392-94 (emphasis added) (footnotes omitted).

163. *Id.* at 412 (emphasis added) (footnotes omitted).

164. *Id.*

165. See KOTZSCH, *supra* note 2, at 128.

166. See *id.* at 129.

167. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 61, 109.

168. *Id.* at 61.

The League of Nations and the Briand-Kellogg Pact, however, raised questions concerning the legitimacy of neutrality in the face of an unlawful use of force.<sup>169</sup> During the Second World War, for example, a number of neutral states took non-violent discriminatory measures against states they regarded as unlawfully resorting to force.<sup>170</sup> While some states urged that a new status of non-belligerency was emerging, these actions were generally viewed as contrary to the laws of neutrality.<sup>171</sup>

The contemporary law of neutrality is found in customary international law.<sup>172</sup> It confers the right of inviolability upon neutral states, and imposes on them an obligation to abstain from supporting the war efforts of a belligerent state and to exercise their rights in an impartial manner toward all belligerent states.<sup>173</sup> Conversely, a belligerent state has the duty to respect a neutral state's right of inviolability, and the right to insist that a neutral state fulfill its duties of abstention and impartiality.<sup>174</sup>

The Charter's regime of collective security can impact a state's obligations under the law of neutrality.<sup>175</sup> Article 2(5) requires all Member States to "give the United Nations every assistance in any action it takes . . . [and to] refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."<sup>176</sup> Moreover, Article 25 requires all Member States to "accept and carry out the decisions of the Security Council . . . ."<sup>177</sup> Similarly, Articles 48 and 49 require Member States to carry out the decisions of the Security Council and to "join in affording mutual assistance in carrying out the measures decided upon by the Security Council."<sup>178</sup> The internationally accepted view is that the Charter modifies all Member States' obligations and responsibilities under the law of neutrality when the Security Council takes action under Chapter VII of the Charter.<sup>179</sup> When the Security Council does not act, then the laws of neutrality are unaffected by the Charter.<sup>180</sup>

169. *Id.*

170. *Id.*

171. *Id.*

172. See COMMANDER'S HANDBOOK, *supra* note 6, ¶ 7.2.

173. *Id.*

174. *Id.*

175. See *id.* ¶ 7.2.1; DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 62.

176. U.N. CHARTER art. 2, para 5. See also DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 62.

177. U.N. CHARTER art. 25. See also DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 62.

178. U.N. CHARTER arts. 48, 49.

179. See COMMANDER'S HANDBOOK, *supra* note 6, ¶ 7.2.1; DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 62.

180. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 62.

The international community's acceptance of the Charter's authority to modify the law of neutrality is a clear example of how the Charter's regime of collective security and its norm of the *jus contra bellum* can modify the *jus in bello* in the context of military operations under the authority of the United Nations. Recent examples of the exercise of this authority can be found in the Security Council resolutions relating to the Persian Gulf War. Resolution 661, for example, prohibited all states from trading with Iraq and authorized all states to assist the Government of Kuwait.<sup>181</sup> Similarly, Resolution 678 requested all states to provide support for the enforcement action authorized by the Security Council against Iraq.<sup>182</sup>

### C. *Absolute Immunity for Military Forces Serving the United Nations*

International law establishes a special status for the property and personnel of military forces serving the United Nations.<sup>183</sup> Article 105 of the Charter provides that the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes" and that its representatives "shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions . . . ."<sup>184</sup> The Convention on the Privileges and Immunities of the United Nations<sup>185</sup> details the general protections of Article 105<sup>186</sup> by creating an undisputed regime of *absolute immunity* for the property, funds, and assets of the United Nations.<sup>187</sup> This Convention makes it clear that this immunity applies to all property, funds, and assets wherever located and by whomsoever held.<sup>188</sup> This immunity from receiving state interference is required to ensure the independent exercise of the United Nations and its organs.<sup>189</sup> Accordingly, the property, funds, and assets of military peace-keeping forces created under the authority of the Security Council, as a subsidiary organ of the United

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181. S.C. Res. 661, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/661 (1990).

182. S.C. Res. 678, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/678 (1990).

183. For a more detailed analysis of this issue, see Sharp, *supra* note 9, at 127-38.

184. U.N. CHARTER art. 105.

185. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, available in 1946 WL 673 [hereinafter Privileges and Immunities Convention].

186. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 1138.

187. See *id.* at 1140. These provisions are considered customary international law and have never been disputed. *Id.* at 1138-40.

188. Privileges and Immunities Convention, *supra* note 185, arts. 2-4.

189. See U.N. CHARTER art. 105.

Nations,<sup>190</sup> enjoy absolute immunity as provided by the Privileges and Immunities Convention.

The model status of forces agreement (SOFA) used by the United Nations and receiving states further extends the protections of the Privileges and Immunities Convention to the military personnel of peace-keeping forces serving the United Nations.<sup>191</sup> The provisions of the United Nations model SOFA are considered customary international law<sup>192</sup> and thus apply to military forces serving the United Nations even if the operation-specific SOFAs are not concluded. The terms of this United Nations model SOFA,<sup>193</sup> and thus customary international law, are limited to operations established under the authority of the United Nations *and* conducted under United Nations authority and control.<sup>194</sup>

Under this model SOFA, the privileges and immunities for personnel within a military force serving the United Nations vary depending upon their assigned position. Military observers receive "experts on mission" status that accords them "such privileges and immunities as are necessary for the independent exercise of their functions," makes them immune from arrest or detention, and immunizes them from "legal process

190. See U.N. CHARTER art. 29 ("The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 485 ("It is widely held that the peace-keeping forces established by the SC as subsidiary organs find their legal basis in Art. 29, since they support the SC in its responsibilities under Art. 24(1) of maintaining international peace.").

191. See *Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General*, U.N. Doc. A/45/594 (Oct. 9, 1990) [hereinafter *Model SOFA for U.N. operations: Report of the Secretary-General*]. SOFAs address the rights, privileges, powers, duties, and obligations of a foreign military force. See SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 2, 3 (1971).

192. See *Model SOFA for U.N. operations: Report of the Secretary-General*, *supra* note 191, ¶ 1; Letter from Ralph Zacklin, Director and Deputy to the Under-Secretary-General for Legal Affairs, the United Nations, to Robert B. Rosenstock, Minister Counsellor, United States Mission to the United Nations (Apr. 25, 1995) (on file with author); *Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations*, U.N. Doc. A/46/185 (May 23, 1991); Agreement between the United Nations and Canada regarding the provision of Military personnel and equipment to the United Nations Mission in Haiti (UNMIH) (Nov. 30, 1994) (on file with author).

193. *Model SOFA for U.N. operations: Report of the Secretary-General*, *supra* note 191, §§ II-III.

194. This formula of application is parallel to the definition of *United Nations operations* in art. 1 of the Convention on the Safety of United Nations and Associated Personnel, *supra* note 10, reprinted in 34 I.L.M. 482 (1995). For a detailed analysis and criticism of the Safety Convention, see Sharp, *supra* note 9, at 143-63, 172-73.

of every kind" during the course of their official duties.<sup>195</sup> As an *ad hoc* arrangement, other personnel operating under a U.N. mandate are sometimes specified by the Secretary-General to be experts on mission. American aircrews who served as coercive peace-keepers and flew missions in support of the United Nations Protective Force (UNPROFOR) in the former Yugoslavia, for example, were regarded as experts on mission for the United Nations.<sup>196</sup>

The Commander of the force receives the protections of a diplomatic envoy accorded the Secretary-General under international law.<sup>197</sup> Commanders are not subject to any form of arrest or detention and enjoy complete immunity from the criminal jurisdiction of the receiving state.<sup>198</sup> They also enjoy immunity from the civil and administrative jurisdiction of the receiving state except in the case of actions relating to: private immovable property situated within the receiving state; succession when the envoy is either an executor, administrator, or heir; or, any professional or commercial activity outside the envoy's official functions.<sup>199</sup>

Members of the force receive the more limited privileges and immunities as detailed in the United Nations model SOFA. They are immune from criminal and civil jurisdiction for all acts performed in their official capacity; exempt from all income taxes except on income received from sources inside the receiving state; exempt from all other direct taxes, registration fees or charges; and, exempt from those laws and regulations governing customs and foreign exchange for personal property required by reason of their presence in the receiving state.<sup>200</sup>

Limited by its own terms, the privileges and immunities from receiving state sovereignty derived from the United Nations model SOFA only devolve, however, to United Nations forces that are a subsidiary organ of the United Nations because they are acting under the *direction* of the Security Council (e.g., UNOSOM<sup>201</sup> and UNOSOM II<sup>202</sup>).<sup>203</sup> These

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195. Privileges and Immunities Convention, *supra* note 185, art. 22.

196. See Letter from Ralph Zacklin, Director and Deputy to the Under-Secretary-General for Legal Affairs, the United Nations, to Robert B. Rosenstock, Minister Counsellor, United States Mission to the United Nations (Mar. 4, 1994) (on file with author).

197. See Privileges and Immunities Convention, *supra* note 185, art. 19. These protections under international law are principally contained in the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

198. See Vienna Convention on Diplomatic Relations, *supra* note 197, arts. 29, 31.

199. *Id.* art. 31.

200. See generally *Model SOFA for U.N. operations: Report of the Secretary-General*, *supra* note 191.

201. The United Nations Operations in Somalia (UNOSOM) initially consisted of fifty consensual peace-keepers under the supervision of the Secretary-General authorized to monitor the cease-fire in Mogadishu, Somalia. It later evolved into a security force of

privileges and immunities do not apply to those unilateral or multilateral forces that are simply acting under the authority of the United Nations (e.g., UNITAF<sup>204</sup>).

Absolute immunity for *all* United Nations forces conducting peace operations, both directed and authorized, can be derived, however, from the coercive authority of the Security Council and its implied powers. Member States have agreed "to accept and carry out the decisions of the Security Council."<sup>205</sup> The drafters of the Charter viewed this coercive decision-making authority of the Security Council as *indispensable for the effective functioning* of the United Nations in the field of maintaining international peace and security, and considered this authority to be the core element of the United Nations concept.<sup>206</sup>

Given the central importance of the Security Council's coercive authority in the field of maintaining international peace and security, Article 105 *must* be read to grant certain privileges and immunities to the Security Council and all of those military forces serving under its authority. The Security Council must be granted those privileges and immunities that are necessary for it to fulfill its Chapter VII responsibilities; similarly, the personnel of a United Nations force must be given those privileges and immunities necessary to independently exercise their functions. To interpret Article 105 differently or infer otherwise would vitiate the Security Council's coercive authority and make it unable to act without

approximately 500 Pakistani military personnel. See S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/RES/751 (1992).

202. The Expanded United Nations Operations in Somalia (UNOSOM II) was authorized by the Security Council under Chapter VII of the Charter to consolidate, expand, and maintain the secure environment throughout Somalia established by UNITAF. See S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993).

203. See U.N. CHARTER art. 29 ("The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 485 ("It is widely held that the peace-keeping forces established by the SC as subsidiary organs find their legal basis in Art. 29, since they support the SC in its responsibilities under Art. 24(1) of maintaining international peace.").

204. When UNOSOM failed to adequately establish security for international relief agencies, the Security Council authorized the Unified Task Force Somalia (UNITAF) as a chapter VII operation in Somalia under the command and control of the United States. UNITAF was authorized "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992).

205. U.N. CHARTER art. 25.

206. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 408-09.

the consent of the receiving state. <sup>207</sup>Article 105 is universally implemented by the Privileges and Immunities Convention and customary international law to grant absolute immunity for the property, funds, and assets of the United Nations to ensure the United Nations can act independently when present in a receiving state *with its full consent and cooperation*. It is even more compelling, therefore, that a United Nations force present in a receiving state without a receiving state's consent *must* have absolute immunity. This form of absolute immunity for a United Nations force is limited, however, to the extent necessary for the independent exercise of its mandate and only with respect to those receiving states against which the Security Council has taken coercive action.

Military forces serving the United Nations are granted privileges and immunities beyond what the military forces of a state are granted when they act solely pursuant to state authority. The absolute immunity for the property, funds, and assets of military forces serving under the direction of the United Nations is undisputed, and the privileges and immunities of the personnel of these military forces now reflect customary international law. Coercive peace-keepers also have absolute immunity to the extent necessary for the independent exercise of its mandate.

This regime of privileges and immunities, which treats military forces serving the United Nations different than those deployed under state authority, is an example of how the Charter has modified the *jus in bello*. Previously, the deployment of a military force in the territory of a state without that state's consent could be considered an act that constitutes *de facto* hostilities and invokes the application of the *jus in bello*.<sup>208</sup> When serving under the authority of the Charter, however, a coercive peace-keeping force deployed in the territory of a state without that state's consent may exert absolute immunity *vis-a-vis* the receiving state to the extent necessary for the independent exercise of its mandate.

#### D. *The Concept of "Peaceful Purposes"*

<sup>A</sup>The most essential purpose of the United Nations is to maintain international peace and security through effective collective measures.<sup>209</sup>

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207. See *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion), 1949 I.C.J. 174 (Apr. 11) (holding that, under "international law, the Organization [United Nations] must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."), *excerpts reprinted in CASES ON UNITED NATIONS LAW* 33, 39 (Louis B. Sohn ed., 2d ed. 1967).

208. See discussion *supra* Part II.B.

209. See *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 3, at 50-51.



The decisions of the organs of the United Nations<sup>210</sup> implement this essential purpose, and are "evidence of the application and interpretation in practice of the Purposes of the Charter."<sup>211</sup> Specifically, the Security Council is required to act in accordance with the purposes of the United Nations in the discharge of its responsibility for the maintenance of international peace and security.<sup>212</sup> It is undisputed that if an act of an organ of the United Nations is unnecessary to accomplish the purposes of the United Nations, or is inconsistent with such purposes, the act is *ultra vires* and void under international and domestic law.<sup>213</sup> Consequently, all acts of the Security Council must be for peaceful purposes, or they are void *ab initio*. Since it is internationally accepted that the Security Council has the coercive authority to deploy an armed force in the territory of a state without that state's consent in order to maintain or restore international peace and security,<sup>214</sup> it follows that *all* military actions authorized by the Security Council must be for peaceful purposes.

This syllogism is supported by state practice. The International Maritime Satellite Organization<sup>215</sup> [hereinafter Inmarsat], for example, is required to "act exclusively for peaceful purposes."<sup>216</sup> Inmarsat was established "to make provision for the space segment necessary for improving maritime communications, thereby assisting in improving distress and safety of life at sea communications, efficiency and management of

210. There are six principal organs of the United Nations: (1) General Assembly, (2) Security Council, (3) Economic and Social Council, (4) Trusteeship Council, (5) International Court of Justice, and (6) Secretariat. U.N. CHARTER art. 7.

211. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 50.

212. See U.N. CHARTER art. 24. The Article provides in relevant part:

(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

(2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

*Id.*

213. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 29, 1129. In its 1962 *Certain Expenses* opinion, the International Court of Justice established a rebuttable presumption that acts of the United Nations are *intra vires*. *Id.* at 1129.

214. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 590-91, 608-16.

215. Convention on the International Maritime Satellite Organization, Sept. 3, 1976, 31 U.S.T. 1, 1143 U.N.T.S. 105 [hereinafter Inmarsat Convention].

216. *Id.* art. 3, para. 3.

ships, maritime public correspondence services and radiodetermination capabilities."<sup>217</sup> The space segment owned or leased by Inmarsat is open for use by ships of all nations without discrimination based on nationality.<sup>218</sup> The term "peaceful purposes" is not further defined in the Inmarsat Convention.<sup>219</sup>

As a result of the increasing interest by parties to the Inmarsat Convention to use the Inmarsat system for their military forces, the Inmarsat legal directorate reviewed the Inmarsat Convention's requirement that Inmarsat act exclusively for peaceful purposes.<sup>220</sup> Dr. Wolf D. Von Noorden, Special Counsel to Inmarsat, undertook a comprehensive legal analysis of the meaning of "peaceful purposes" in light of an increasingly active use of military forces by the Security Council.<sup>221</sup> Dr. Von Noorden reviewed the extensive use of the Inmarsat system during the Persian Gulf War and the Falklands conflict, as well as United Nations operations such as Somalia and Bosnia, and concluded that military forces serving the United Nations are subject to a different legal regime than military forces acting under state authority alone.<sup>222</sup>

Dr. Von Noorden begins his analysis of the Inmarsat Convention's peaceful purposes requirement in the context of other international agreements, such as the Outer Space Treaty from which the Inmarsat language was taken.<sup>223</sup> The Preamble of the Outer Space Treaty recognized the "common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes."<sup>224</sup> Specific provisions applica-

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217. *Id.* art. 3, para. 1. The term "space segment" is defined as "the satellites, and the tracking, telemetry, command, control, monitoring and related facilities and equipment required to support the operation of these satellites." *Id.* art. 1, para. d.

218. *Id.* art. 1, para. E, art. 7, para. 1.

219. *See generally id.*

220. *See* Memorandum from Alan Auckenthaler, General Counsel, Inmarsat, to all Inmarsat Signatories and Routing Organisations, (Nov. 8, 1994) (on file with author).

221. *See* Memorandum of law on *The "Peaceful Purposes" Requirement and Inmarsat use by Armed Forces*, Dr. Wolf D. Von Noorden, Special Counsel, Inmarsat, to Alan Auckenthaler, General Counsel, Inmarsat 1 (June 29, 1994) (on file with author) [hereinafter *Inmarsat Memorandum of Law*].

222. *See id.* at 16.

223. *Id.* at 4.

224. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, pmbl., 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter the Outer Space Treaty]. In an effort to contribute to international peace and cooperation, this treaty prohibits any national appropriation by claim of sovereignty and declares that outer space, including the moon and other celestial bodies, is free for the exploration and use by all States without discrimination of any kind. *Id.* pmbl., arts. I, II. State Parties are required to "carry on activities in the exploration and use of outer space, including the moon and other celestial

ble to military activities in outer space are found in Article IV, which provides that:

States Parties to the treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.<sup>225</sup>

These restrictions do not, however, preclude the employment of space-based systems "to perform essential command, control, communications, intelligence, navigation, environmental, surveillance and warning functions to assist military activities on land, in the air, and on and under the sea."<sup>226</sup> The United States has consistently interpreted peaceful purposes to mean nonaggressive purposes.<sup>227</sup> This interpretation recognizes that a state's inherent right of self-defense extends to outer space and allows any military activity not otherwise inconsistent with the Charter.<sup>228</sup>

After this contextual analysis, Dr. Von Noorden analyzes the Inmarsat Convention's requirement that its activities must be consistent with

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bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding." *Id.* art. III.

225. *Id.* art. IV. This article embraces three, very narrowly drafted restrictions. First, States Parties are prohibited from placing weapons of mass destruction in orbit around the Earth, installing such weapons on celestial bodies, or stationing them in outer space in any manner, regardless of their intended purpose. Second, States Parties are prohibited from establishing military bases, testing any type of weapons, and conducting military maneuvers on celestial bodies—regardless of their intended purpose. Finally, all other activities of State Parties on the moon and other celestial bodies must be used exclusively for peaceful purposes.

226. COMMANDER'S HANDBOOK, *supra* note 6, ¶ 2.9.2.

227. See OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. DEP'T OF THE NAVY, NWP 9 (REV. A), ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 2-48 n.99 (1989) [hereinafter COMMANDER'S HANDBOOK (SUPP.)].

228. *Id.*

the purposes of the Charter.<sup>229</sup> After concluding that United Nations enforcement measures to prevent or suppress aggression are done for peaceful purposes within the meaning of the Charter,<sup>230</sup> he proposes the following

**GUIDELINES FOR INMARSAT USE BY ARMED FORCES:**

(i) Use of Inmarsat by armed forces (military use) not involved in armed conflict and any threat to or breach of the peace is consistent with [the Inmarsat] Convention, Article 3(3).

(ii) *Use of Inmarsat by UN peacekeeping or peacemaking forces acting under the auspices of the UN in implementation of UN Security Council decisions in order to maintain or restore international peace and security is consistent with [the Inmarsat] Convention, Article 3(3), irrespective of such UN forces becoming involved in armed conflict in the accomplishment of their UN mission; involvement in armed conflict is a possibility implicit in the maintenance or restoration of international peace and security by UN forces.*

(iii) *Use of Inmarsat by armed forces - other than UN forces acting under the auspices of the UN Security Council - involved in international or non-international armed conflict is, in principle, not permitted under [the Inmarsat] Convention, Article 3(3), without prejudice to the exceptional case of legitimate individual or collective self-defense against armed attack and within the limitations established by UN Charter, Article 51. The latter prohibit preventive action and self-help involving armed force in the absence of armed attack.*

(iv) Use of Inmarsat by armed forces engaged in armed conflict is permitted for D&S [distress & safety] communications, and for communications relating to the protection of the wounded, sick, shipwrecked, prisoners of war and civilians, pursuant to the Geneva Red Cross Conventions, 1949, and the Protocols Additional to the Geneva Conventions, 1977. The same applies to personal and private, non-tactical communications by members of the armed forces that are not related to or in support of the war effort.<sup>231</sup>

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229. See Inmarsat Memorandum of Law, *supra* note 221, at 5.

230. *Id.* at 6-7.

231. *Id.* at 15-16 (emphasis added).

The basis for these GUIDELINES is the recognition that military forces involved in international armed conflict under the authority of the Security Council are engaged in activities consistent with the "peaceful purposes" requirements of the Charter. The emphasized portions of these GUIDELINES reinforce with perfect clarity that Inmarsat treats military forces serving the United Nations as separate legal entities that have greater rights under international law, even when they are belligerents engaged in armed conflict, than military forces serving solely pursuant to state authority. A logical extension of this recognition that belligerent military forces serving the United Nations are engaged in peaceful activities, is that they deserve a greater protected status under international law than belligerents who serve solely pursuant to state authority.

#### E. *Previous Challenges to the Doctrine*

There have been a number of challenges to the application of the doctrine of equal application to military forces serving the United Nations ever since the Charter outlawed the aggressive use of force.<sup>232</sup> Some have even concluded that the *jus in bello* do not automatically apply to collective measures of the United Nations.<sup>233</sup> Others have often said that United Nations peace-keeping forces "are soldiers without enemies and therefore fundamentally different from belligerent forces."<sup>234</sup> A number of institutions and scholars continue to raise this issue, and many suggest that United Nations forces should have a special code and should not be governed in all respects by the same law of international armed conflict as national armies.<sup>235</sup> Perhaps, the most notable of these challenges was that of Sir Hartley Shawcross before the Nuremberg IMT reflected in the epigraph to this Article. As the senior British prosecutor at Nuremberg,<sup>236</sup> Shawcross argued in his closing argument that the killing of combatants in war is justifiable only where the war is legal.<sup>237</sup> While these challenges have been unsuccessful to date, they failed for reasons that either no longer apply or do not apply to the creation of a special protected status for belligerent military forces serving the United Nations. Professor Gardam, for example, discusses four reasons why these chal-

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232. See Gardam, *supra* note 101, at 410-11; NATIONAL SECURITY LAW, *supra* note 3, at 371-75; BROWNLIE, *supra* note 3, at 406.

233. See BROWNLIE, *supra* note 3, at 400.

234. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 3, at 600.

235. See SEYERSTED, *supra* note 87, at 179.

236. See Hartley Shawcross, *Let the Tribunal Do Its Job*, N.Y. TIMES, May 22, 1996, at A17.

237. See KOTZSCH, *supra* note 2, at 122 n.148.

lenges have not succeeded in the past.<sup>238</sup>

First, Professor Gardam explains that any argument concerning the unequal application of the *jus in bello* "assumes an effective method of determining the lawfulness of the aggression."<sup>239</sup> She then notes, however, that this determination can properly be made by the United Nations, and provides a recent example of the Security Council fulfilling this role by condemning the unlawful use of force by Iraq against Kuwait.<sup>240</sup> Second, she concludes that the contemporary basis for the equal application of the *jus in bello* are their humanitarian nature, noting that all soldiers and civilians should be entitled to the benefit of the rules even if a state is engaged in the unlawful use of force.<sup>241</sup> The real merit of her second reason to continue to support the doctrine is to counter the suggestion by some that without the doctrine of equal application, none of the *jus in bello* would apply to military forces serving the United Nations, or that the United Nations could choose those rules that would apply to its military forces.<sup>242</sup> In contrast, the revocation of the aggressor's license to kill proposed by this Article only creates a protected status for military forces serving the United Nations. Under this proposal all of the humanitarian rules of the *jus in bello* would remain in force.<sup>243</sup>

Third, Professor Gardam notes that the Nuremberg IMT embraced the doctrine of equal application.<sup>244</sup> The Charter of the IMT, however, was limited to the application of international law as it existed at the time of its creation on August 8, 1945,<sup>245</sup> and the Charter did not enter into force until two months later on October 24, 1945.<sup>246</sup> Thus, the IMT was not authorized to consider the impact of the coercive authority of the Security Council and the unique role of military forces authorized by the international community to use force to maintain or restore international peace and security.<sup>247</sup> However, when specifically considering this issue in the 1948 *General Devastation Case*, the judges of the IMT did express their view that they had "to accept that imperfect state as existing

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238. See Gardam, *supra* note 101, at 410-12.

239. *Id.* at 410.

240. See *id.* at 410-11.

241. See *id.* at 411.

242. See *id.* 410 n.103.

243. See discussion *infra* Part V.C.

244. See Gardam, *supra* note 101, at 411.

245. See *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95 (I), 1st Sess., pt. 2, (Dec. 11, 1946) [hereinafter *Affirmation of the Nuremberg Principles*], reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 4, at 921.

246. *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 3, at 12.

247. See *id.* at 632-35 (discussing permissible Security Council measures).

law.”<sup>248</sup> Finally, Professor Gardam notes that the practice of states during the Persian Gulf War “supports the theoretical independence of the *jus in bello* from the *jus ad bellum*.”<sup>249</sup> Although she regrets the direction of evolving state practice, Professor Gardam concludes that the recent Persian Gulf War demonstrates that an analysis which equally applies the *jus in bello* to all parties engaged in hostilities is too simplistic and that “in reality, the *jus ad bellum* to some extent may determine the *jus in bello*.”<sup>250</sup>

#### F. *Contemporary State Practice: Military Operations*

Several international conventions explicitly recognize the special protected status of military forces conducting operations under the authority of the United Nations. The Certain Conventional Weapons Convention accords special consideration for United Nations forces from the effects of minefields, mines and booby-traps:

1. When a United Nations force or mission performs functions of peacekeeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in that area, as far as it is able:

(a) remove or render harmless all mines or booby traps in that area;

(b) take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby traps while carrying out its duties; and

(c) make available to the head of the United Nations force or mission in that area, all information in the party's possession concerning the location of minefields, mines and booby traps in that area.<sup>251</sup>

Article 38 of Protocol I makes the distinctive emblem of the United Nations an internationally protected emblem.<sup>252</sup> Article 37 specifically

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248. KOTZSCH, *supra* note 2, at 122 n.147.

249. Gardam, *supra* note 101, at 411.

250. *Id.* at 393-94.

251. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects, Protocol II art. 8, Apr. 10, 1981, 19 I.L.M. 1523 [hereinafter Certain Conventional Weapons Convention], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 479, 483-84.

252. Protocol I, *supra* note 114, art. 38, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 389.

recognizes the protected status of United Nations forces and other military forces serving under the authority of the United Nations that are not a party to an armed conflict. Paragraph 1(d) of Article 37 makes "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict" an unlawful act of perfidy.<sup>253</sup>

The report of the Protocol I drafting committee for Articles 37 and 38, however, limited the protected status of the United Nations to those situations where the United Nations forces are not belligerents engaged in an enforcement action involving armed combat.<sup>254</sup> During these situations when United Nations forces are belligerents, the view of the drafters in the late-1970s was that existing international law governing the use of United Nations signs, emblems, and uniforms places the United Nations on equal footing with any other belligerent party to the conflict.<sup>255</sup> State practice and specific resolutions of the Security Council since the drafting of Protocol I and the Certain Conventional Weapons Convention, however, specifically reject the rote application of the Common Article 2 threshold to military operations under the authority of the United Nations.

### 1. Military Operations in Somalia

In December of 1992, the Security Council invoked its Chapter VII authority to authorize a coercive peace-keeping force to use all necessary means to establish a secure environment in Somalia for humanitarian relief operations.<sup>256</sup> Even though military forces were deployed under the authority of the United Nations without the consent of the parties to the ongoing internal armed conflict in Somalia, the Security Council demanded "that all parties, movements and factions in Somalia take all measures necessary to ensure the safety of United Nations and all other

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253. Protocol I, *supra* note 114, art. 37, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 389. Unlawful acts of perfidy are defined in paragraph 1 of Article 37 as those acts "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." *Id.*

254. See MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 206-11 (1982).

255. See *id.* at 206.

256. S.C. Res. 794, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/794 (1992). For an excellent operational history and political reflection on the international community's policy in Somalia, see JOHN L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE—REFLECTIONS ON PEACEMAKING AND PEACEKEEPING (1995).



personnel engaged in the delivery of humanitarian assistance, including the military forces . . . ,” and affirmed that individuals will be held accountable for all violations of international humanitarian law.<sup>257</sup> As the United Nations operations in Somalia later expanded, the Security Council once again demanded that “all Somali parties, including movements and factions, take all measures to ensure the safety of the personnel of the United Nations and its agencies as well as the staff of the International Committee of the Red Cross, intergovernmental organizations and non-governmental organizations . . . .”<sup>258</sup>

On June 5, 1993, a series of armed attacks against United Nations military personnel left 24 dead and 57 injured.<sup>259</sup> In response, the Security Council reaffirmed the Secretary-General’s authority “to take all measures necessary against all those responsible for the armed attacks . . . [and] to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment.”<sup>260</sup> Attacks on United Nations military forces continued as the United Nations increased its military operations for the capture of the warlord believed responsible for the attacks on 5 June.<sup>261</sup> The intensity of the hostilities peaked on October 3, 1993, when nineteen peace-keepers were killed and another ninety were wounded.<sup>262</sup>

In response to the report of the Commission of Inquiry established to investigate these armed attacks<sup>263</sup> and the subsequent Secretary-General’s report,<sup>264</sup> the Security Council passed Resolution 868. The Resolution declared these attacks unlawful:

*The Security Council, . . .*

*Recalling* the provisions of the Charter of the United Nations concerning privileges and immunities and the Convention on the

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

258. S.C. Res. 814, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/814 (1993).

259. See *Report of the Commission of Inquiry established pursuant to resolution 885 (1993) to investigate armed attacks on UNOSOM II personnel*, ¶ 117, U.N. Doc. S/1994/653 (June 1, 1994) [hereinafter *Report of the Commission*], reprinted in *THE UNITED NATIONS AND SOMALIA*, *supra* note 77, at 368, 376.

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

261. See *Report of the Commission*, *supra* note 259, ¶¶ 125-173, reprinted in *THE UNITED NATIONS AND SOMALIA*, *supra* note 77, at 368, 377-80.

262. See *Report of the Commission*, *supra* note 259, ¶ 173, reprinted in *THE UNITED NATIONS AND SOMALIA*, *supra* note 77, at 368, 380.

263. See generally *Report of the Commission*, *supra* note 259, reprinted in *THE UNITED NATIONS AND SOMALIA*, *supra* note 77, at 368, 380.

264. *Security of United Nations Operations: Report of the Secretary-General*, U.N. Doc. S/26358, Aug. 27, 1993.

Privileges and Immunities of the United Nations, as applicable to United Nations operations and persons engaged in such operations,

*Expressing grave concern* at the increasing number of attacks and use of force against person engaged in United Nations operations, and resolutely condemning all such actions, . . .

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

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

5. *Confirms also* that if, in the view of the Council, the host country is unable or unwilling to meet its obligations with regard to the safety and security of a United Nations operation and personnel engaged in the operation, the Council will consider what steps should be taken appropriate to the situation; . . .<sup>265</sup>

After a full investigation of the facts and a report on the use of force used to arrest those believed responsible for the attacks on United Nations personnel, this Resolution explicitly declares that the coercive peace-keepers serving under the authority of the United Nations in Somalia are protected persons immune from attack despite their use of armed force. This declaration is consistent with the view of the United States that it was not a party to an armed conflict during its military operations in Somalia.<sup>266</sup>

## 2. Military Operations in the Former Yugoslavia

The dissolution of the federal state of the former Yugoslavia in the early 1990s resulted in an international armed conflict<sup>267</sup> that shocked the

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

266. S. Exec. Res. 75, 105th Cong., CONG. REC. S3373, S3378 (daily ed. Apr. 17, 1997); President's Certifications and Report to the Congress in Connection with the U.S. Senate Resolution of Ratification of the Chemical Weapons Convention (Apr. 25, 1997), available in *White House Virtual Library* <<http://library.whitehouse.gov>>.

267. See M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 1 (1996). The former Yugoslavia consisted of six republics: Serbia, Montenegro, Slovenia, Bosnia and Herzegovina, Croatia, and Macedonia. *Id.* at 1 n.1.

international community by the level of its barbaric cruelty.<sup>268</sup> The principal response of the international community was organized under the authority of the United Nations. In 1993, for example, the Security Council used its coercive authority to create the International Criminal Tribunal for the former Yugoslavia for the "sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" since 1991.<sup>269</sup> After more than three years of diplomatic efforts by the international community and the United States-led Balkan peace talks in Dayton, Ohio, from November 1-21, 1995, the Presidents of Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia, signed the General Framework Agreement for Peace in Bosnia and Herzegovina on December 14, 1995.<sup>270</sup> The eleven annexes of this Agreement made provisions for: the military aspects of a peace settlement, regional stabilization, an inter-entity boundary line, democratic elections, a new constitution for Bosnia and Herzegovina, binding arbitration of disputes, respect for human rights, arrangements for refugees and displaced persons, the preservation of national monuments, infrastructure and economic reconstruction, and the creation of an international police task force assistance program.<sup>271</sup>

Pursuant to its coercive authority, the Security Council authorized Member States to establish a multinational implementation force (IFOR) to use all necessary means to ensure compliance with the provisions of the military annex to the peace agreement.<sup>272</sup> The Security Council explicitly authorized Member States "to take all necessary measures . . . either in defence of IFOR or to assist the force in carrying out its mission . . . [and recognized] the right of the force to take all necessary measures

268. See, e.g., Peter Cary, *War casualties: Bosnia by the numbers*, U.S. NEWS & WORLD REP., Apr. 10, 1995, at 53; Robin Knight et al., *The hunt for the killers of Bosnia*, U.S. NEWS & WORLD REP., Apr. 10, 1995, at 52; Rod Nordland, 'Let's Kill the Muslims!', NEWSWEEK, Nov. 8, 1993, at 48; Patricia Forestier, *Psychiatric Genocide! How the Barbarities of 'Ethnic Cleansing' Were Spawned by Psychiatry*, FREEDOM, May 1993, at 6, 9.

269. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993). For an excellent review of all aspects of the International Criminal Tribunal for the former Yugoslavia, see generally BASSIOUNI & MANIKAS, *supra* note 267; VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (1995).

270. See *Peace Agreements bring a 'long-delayed birth of hope': Multinational Force set up in Bosnia to replace UNPROFOR*, UN CHRONICLE, Vol. XXXIII, No. 1, Spring 1996, at 25.

271. *The General Framework Agreement for Peace in Bosnia and Herzegovina*, U.N. Doc. S/1995/999 (Dec. 14, 1995) [hereinafter Dayton Peace Agreement].

272. S.C. Res. 1031, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1031, pmbll., ¶ 15-16 (1995).

to defend itself from attack or threat of attack."<sup>273</sup> Notwithstanding this explicit authority to use force to establish a lasting cessation of hostilities, Security Council Resolution 1031 also demanded that all "parties respect the security and freedom of movement of IFOR and other international personnel."<sup>274</sup> The parties to the conflict also specifically agreed to grant "experts on mission" status to IFOR personnel under the provisions of the Privileges and Immunities Convention.<sup>275</sup> This resolution is an explicit rejection of the rote application of the Common Article 2 threshold for military forces serving the United Nations. It clearly incorporates a new rule of law that recognizes United Nations forces are a separate category of protected persons even when authorized to use force to maintain international peace and security.

### 3. Military Maritime Operations

The international community has also recognized a *de facto* protected status for military maritime forces serving under the authority of the United Nations.<sup>276</sup> In 1996, eighteen countries met in Chile "to establish a legal order or doctrine which would determine and govern with greater clarity Chapter VII of the U.N. Charter, the possible operations, obligations and rights of the countries and of naval forces in time of war or armed conflict on the sea."<sup>277</sup> The representative from the United States, Captain Bruce B. Davidson focused his presentation on the impact of Chapter VII authority on peacetime maritime operations.<sup>278</sup> He concluded that the status of naval forces enforcing Chapter VII resolutions is inconsistent with the pre-Charter status accorded neutrals and belligerents, and that the Charter has modified the application of the *jus in bello* to military forces serving under the authority of the United Nations:

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273. S.C. Res. 1031, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1031, ¶ 17 (1995).

274. S.C. Res. 1031, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1031, ¶ 18 (1995).

275. Dayton Peace Agreement, *supra* note 271, App. B to Annex 1-A, para. 2. See discussion *supra* Part III.C for a detailed description of the protections accorded experts on mission.

276. This section of the Article is, in part, a summary of a more detailed analysis of this issue that can be found in Sharp, *supra* note 9, at 170-72.

277. Hernan Cisternas, *Belligerents or Neutrals: The Status of U.N. Naval Forces is Analyzed*, EL MERCURIO (Santiago, Chile), June 28, 1996 (rough translation) (on file with author).

278. Captain Bruce B. Davidson, Judge Advocate General's Corps, U.S. Navy, *Status and Rights of Warships in a Multinational Force Tasked to Enforce Security Council Resolutions in accordance with Chapter VII of the United Nations Charter*, Remarks at the Symposium on Maritime International Law, Valparaiso, Chile (June 25, 1996) (transcript on file with author).

While the law of neutrality defines who is a belligerent and who is a non-belligerent, *Chapter VII has modified the law of neutrality to permit forces carrying out Chapter VII mandates to do certain things without becoming belligerents*. Forces in these circumstances should not be viewed as 'parties to the conflict'. . . . I do not believe that, at this point, we can conclude that multinational naval forces, because they are implementing a Chapter VII mandate, could never be viewed as belligerents; that is, that they could not legally be the object of attack by a party to the conflict. . . . Determination of their status thus will rely on an objective, factual assessment. . . . Of course, the exact point of transition between not being a party to the conflict and belligerency will be very difficult to determine. However, there is a variety of actions that should not be viewed as crossing the line – which would make these forces lawful targets.<sup>279</sup>

Captain Davidson then listed six examples of maritime-related activities that do not cross the line: *presence and deterrence operations* for the purpose of showing resolve and deterring aggression; *peace operations* that involve interpositional forces or the monitoring of a cease fire agreement; *humanitarian operations* that potentially involve the use of force for noncombatant evacuation operations; *escorting flag vessels of non-belligerents* which may require the use of force in either individual or collective self-defense; *maritime interception operations* that are structured to be as non-intrusive as possible, but authorize warning shots and disabling fire; and *the exercise of the inherent right of self-defense* which imposes on a military commander the obligation to use all necessary means available to defend his or her unit.<sup>280</sup>

Since a number of these operations, such as the maritime intercept operations, have been traditionally viewed in customary practice as either a belligerent act of blockade or visit and search,<sup>281</sup> this view clearly establishes a separate regime of international law applicable to military forces serving the United Nations. While the Australian representative to this symposium did not address the non-belligerent or belligerent status of military maritime forces serving the United Nations, Commander Robin Warner, the Deputy Director of the Naval Legal Services for the Royal Austrian Navy, did analyze how coercive measures authorized by the Security Council may be inconsistent with existing rights and obliga-

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279. *Id.* at 8-9, 11-12 (emphasis added).

280. *Id.* at 12-13.

281. See, e.g., COMMANDER'S HANDBOOK, *supra* note 6, ¶¶ 7.6-7.7.5.

tions of states under international law.<sup>282</sup> One example of such an inconsistency is the ability of the Security Council to authorize Member States to conduct a blockade at sea by laying sea mines in a coastal state's internal waters without that state's consent. Under the 1982 Law of the Sea Convention, the coastal state has the right to refuse entry into its internal waters.<sup>283</sup> Commander Warner concluded that the Chapter VII authority of the Security Council can modify the international norms reflected in the 1982 United Nations Law of the Sea Convention on maritime zones and navigation regimes.<sup>284</sup>

### G. Summary

International conventions, such as Protocol I and the Certain Conventional Weapons Convention, explicitly recognize the special protected status of non-belligerent military forces conducting operations under the authority of the United Nations. State practice has clearly established that this protected status includes coercive peace-keepers serving the United Nations, even though they are authorized to use armed force in self-defense and to accomplish a limited mission. In the context of these coercive peace-keepers, the international community has rejected the rote application of the Common Article 2 threshold for military forces serving the United Nations in a number of situations, and has significantly raised the threshold of its application. A maritime intercept operation that ten years ago would have crossed the line of belligerency, for example, now remains a peacetime military operation if it is conducted under the Chapter VII authority of the Security Council. While state practice has not yet extended a special status to belligerent military forces serving under the authority of the United Nations, it is only a matter of time before this evolution of customary international law reaches its logical and reasonable conclusion.

The proposition of revoking an aggressor's license to kill military forces serving the United Nations will carve out an exception to the doctrine of equal application that would establish all military forces serving the United Nations, non-belligerents and belligerents, as protected per-

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282. Commander Robin Warner, Royal Australian Navy, *The Compatibility of 1982 United Nations Law of the Sea Convention Norms with the Execution of Force Measures that Might be Adopted by the Security Council in Accordance with Chapter VII of the United Nations Charter*, Remarks at the Symposium on Maritime International Law, Valparaiso, Chile (June 25, 1996) (transcript on file with author).

283. *Id.* at 5. See also United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 [hereinafter 1982 LOS Convention], reprinted in UNITED NATIONS, *THE LAW OF THE SEA* 1 (1983).

284. Warner, *supra* note 282, at 5, 15-16.

sons and unlawful targets. Part III of this Article supported this proposition with case studies that reveal a *de facto* decline in the doctrine of equal application in the treatment of military forces serving the United Nations. Even in the context of belligerent military forces serving the United Nations during the Persian Gulf War, Professor Gardam notes the evolving relationship between *jus ad bellum* and *jus in bello* caused by the Charter's prohibition on the aggressive use of force. In addition to offering greater protection for military forces who serve the United Nations, this proposition will also strengthen deterrence against aggressive war.

#### IV. EFFECTIVE DETERRENCE AND WAR AVOIDANCE

##### A. *Elements of Deterrence*

Effective deterrence must be considered "in its broadest sense both negative and positive, and including military and non-military incentives."<sup>285</sup> More precisely, Professor John Norton Moore, the Walter L. Brown Professor of Law and Director of the Center for National Security Law at the University of Virginia School of Law, defines system-wide deterrence as:

the totality of positive and negative actions influencing expectations and incentives of a potential aggressor, including: potential military responses and security arrangements, relative power, level and importance of economic relations, effectiveness of diplomatic relations, effective international organizations (or lack

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285. John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 841 (1997). This definition and the concept of deterrence was also explored in depth in a seminar on "War & Peace: New Thinking About the Causes of War and War Avoidance" offered by Professor John Norton Moore and Professor Robert F. Turner at the University of Virginia School of Law during the 1997 Spring semester. According to the overview of the syllabus to this seminar, the seminar

explores the latest research about controlling war, particularly the important emerging consensus on the 'democratic peace' and the parallel and chilling new information on the staggering human toll wrought by totalitarian 'democide,' economic, and environmental failures. This seminar also seeks to explore a new paradigm in war avoidance developed by Professor Moore . . . based on the importance of democracy, deterrence, governmental structures, government failure, and the rule of law.

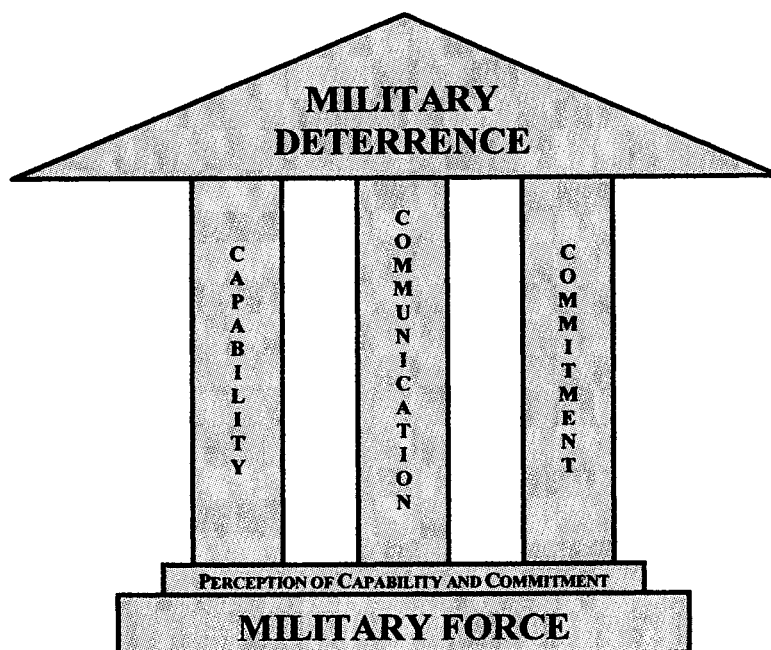
John N. Moore and Robert F. Turner, *Overview to Syllabus and Assignments—War & Peace: New Thinking About the Causes of War and War Avoidance* (Spring 1997) (on file with author).

thereof), effective international law (or lack thereof), alliances, collective security, effects on allies, and the state of the political or military alliance structure, if any, of the potential aggressor and target state, etc.<sup>286</sup>

The most important single feature of effective deterrence with respect to war avoidance is the military component.<sup>287</sup> The four classic elements of military deterrence are the ability to respond, the will to respond, the communication of the ability and will to respond, and a potential adversary's perception of the ability and will to respond.<sup>288</sup> Figure 3 illustrates these elements of military deterrence, casting them in terms of the military capability and political commitment to respond with armed force, the communication of this capability and commitment, and the perception of capability and commitment.

#### THE ELEMENTS OF MILITARY DETERRENCE

(Figure 3: © 1997 Walter Gary Sharp, Sr.)



286. Moore, *supra* note 285, at 841.

287. *See id.*

288. *See id.*



In military deterrence theory, the United States Department of Defense focuses on the negative incentives by defining deterrence as “[t]he prevention from action by fear of the consequences . . . [and] a state of mind brought about by the existence of a credible threat of unacceptable counteraction.”<sup>289</sup> It defines its deterrent options in both a negative and positive context as “[a] course of action, developed on the best economic, diplomatic, political, and military judgment, designed to dissuade an adversary from a current course of action or contemplated operations.”<sup>290</sup> Given the central importance of the rule of law as evidenced by the far-reaching impact of the Charter’s prohibition on the aggressive use of force, general deterrence must be defined in the context of legal deterrent options that dissuade an adversary from an undesirable course of action. The three fundamental elements of legal deterrence are a set of clear proscriptive norms, an established court system that ensures individual and state accountability for violations of those norms, and the international community’s demonstrated commitment to condemn all violations of these proscriptive norms consistently and unequivocally.<sup>291</sup> To be effective, the normative component of any legal deterrent option must be enforced.<sup>292</sup>

### B. *The Moore Paradigm of War Avoidance*

Although the *jus ad bellum* and the *jus in bello* address the rules governing the resort to war and the conduct of war, they do not address the cause or causes of war. Some of the most popular theories that attempt to explain the causes of war include: specific disputes among nations; absence of dispute settlement mechanisms; ideological disputes; ethnic and religious differences; communication failures; proliferation of weapons and arms races; social and economic injustice; imbalance of power; balance of power; competition for resources or other values; incidents, accidents, and miscalculations; violence in the nature of man; aggressive national leaders; and economic determinism.<sup>293</sup> While all of these theories contribute to our understanding of the causes of war to varying degrees, none of them powerfully correlates with the occurrence or

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289. JOINT PUB 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 115 (1994).

290. *Id.*

291. See Walter Gary Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1, 4-5 (1992).

292. See Robert F. Turner, *Don't Let Saddam Escape Without Trial*, ATLANTA J/ATLANTA CONST., Aug. 31, 1991, at B2.

293. See Moore, *supra* note 285, at 819.

non-occurrence of war.<sup>294</sup>

After twenty-five years of comparative, historical analysis of the causes of war, Professor Donald Kagan, Yale Professor of History, Classics, and Western Civilization, determined that an interstate competition for power, either for a state's own selfish gain or for security, creates the environment for war to develop.<sup>295</sup> In his detailed case studies of the Peloponnesian War, the First World War, the Second Punic War, and the Second World War, Professor Kagan concludes that war was caused during this competition for power by a failure of states to take appropriate actions to preserve the peace, *i.e.*, *war is caused by a failure in deterrence*.<sup>296</sup> Accordingly, he postulates that "[p]eace does not keep itself,"<sup>297</sup> and concludes that peace is best maintained when those states with the preponderant power have the desire to preserve the peace.<sup>298</sup> The Peloponnesian War began, for example, when the Athenians were unable to match their policies and threats with a commensurate military ability to respond.<sup>299</sup> Similarly, it was the commitment to appeasement in the face of Germany's aggression and the failure of the Western allies to demonstrate effective military deterrence and their resolve for collective security that led to the Second World War.<sup>300</sup>

Professor Rudy J. Rummel, Professor of Political Science Emeritus at the University of Hawaii, has studied the causes of war for forty years.<sup>301</sup> In one of the most remarkable series of studies of this century, Professor Rummel has empirically proven "the most important fact of our time . . . that *democracy is a method of nonviolence*."<sup>302</sup> Professor Rummel supports this fact with three levels of analysis. The first-level explanation is the democratic peace theory of Immanuel Kant, which asserts that the public will within representative governments restrains decision-makers from international violence.<sup>303</sup> The simple reason for this is

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294. *Id.* at 820.

295. See KAGAN, *supra* note 13, at xiii, 6-7.

296. See, *e.g.*, *id.* at 74.

297. *Id.* at 73, 212, 567.

298. See *id.* at 570.

299. See *id.* at 74.

300. See *id.* at 413-17.

301. RUDY J. RUMMEL, *POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE*, ix (1997).

302. *Id.* at 23 (emphasis added).

303. See *id.* at 129-35. Immanuel Kant (1724-1804) was

[a] German philosopher, considered by many the most influential thinker of modern times. . . . Kant's ethical ideas are a logical outcome of his belief in the fundamental freedom of the individual as stated in his *CRITIQUE OF PRACTICAL REASON* (1788). This freedom he did not regard as the lawless freedom of anar-

that it is the people, not the government, who suffer from war, and they will choose not to go to war when they can.<sup>304</sup>

Professor Rummel's second-level of analysis explains that democracies are inherently nonviolent because of cross-pressures and democratic culture.<sup>305</sup> Cross-pressures are internal restraints such as internal checks and balances in the structure of the government that distribute decision-making authority, as well as social, economic, and political pressures on the decision-makers.<sup>306</sup> Democratic culture fosters nonviolence because it is a political culture of compromise, negotiation, concession, and tolerance that extends such tolerant behavior into the international community.<sup>307</sup> The third-level of Professor Rummel's analysis involves social fields and their antifields.<sup>308</sup> Social fields are societies where individuals are free to interact to pursue their own interests and run their own lives.<sup>309</sup> In contrast, antifields are societies that have been turned into organizations held together by coercion and force to support a totalitarian political regime.<sup>310</sup> In short, democracies are a method of nonviolence, and nondemocracies are a method of violence.<sup>311</sup>

Professors Kagan and Rummel have proven that these two principal theories on the causes of war—the absence of deterrence and the democratic peace—are powerful correlatives with the occurrence or non-occurrence of war. Professor Moore has conformed these principle theories into a profound theory of war avoidance. After decades of studying conflict management, use of force, and deterrence theory,<sup>312</sup> Professor Moore has concluded that *the cause of major international armed conflict is the synergy between a totalitarian regime and the absence of effective system-wide deterrence.*<sup>313</sup> Stated differently, a major international

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chy, but rather as the freedom of self-government, the freedom to obey conscientiously the laws of the universe as revealed by reason. He believed that the welfare of each individual should properly be regarded as an end in itself and that the world was progressing toward an ideal society. . . . In his treatise PERPETUAL PEACE (1795) Kant advocated the establishment of a world federation of republican states.

*Immanuel Kant*, MICROSOFT ENCARTA '95 (CD-ROM Multimedia Encyclopedia, 1994).

304. See RUMMEL, *supra* note 301, at 129.

305. *Id.* at 137-50.

306. *Id.* at 143-47.

307. *Id.* at 137-43.

308. *Id.* at 153.

309. *Id.* at 153-84.

310. *Id.* at 191-201.

311. *Id.* at 210.

312. See NATIONAL SECURITY LAW, *supra* note 3, at xlv (describing Professor Moore's professional credentials and areas of expertise).

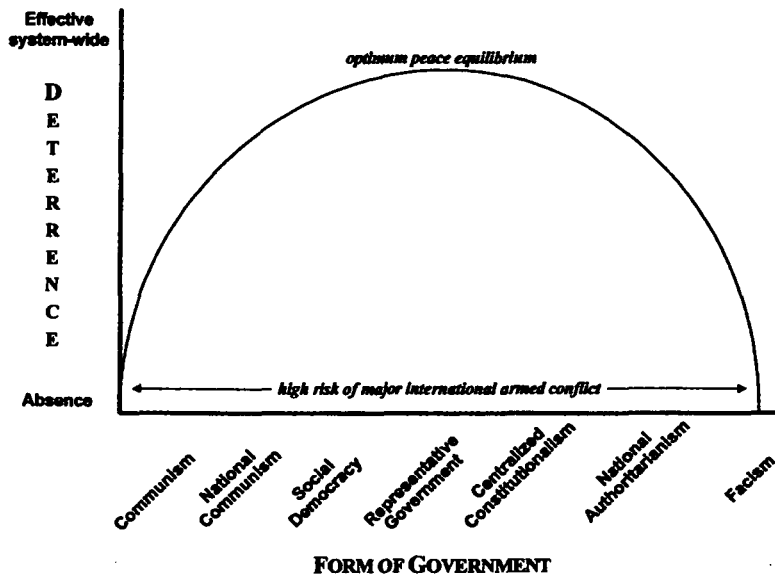
313. See Moore, *supra* note 285, at 840.

armed conflict will only occur in the presence of both factors, and will not occur in the absence of either.<sup>314</sup>

System-wide deterrence, as previously defined, refers to the totality of positive and negative incentives that discourage the aggressive use of force. The role of the totalitarian regime in this synergy centers on its government structure, because the core mechanism responsible for the democratic peace is the internal structure of governments.<sup>315</sup> In a previous study of conflict management, Professor Moore described a political spectrum of government structures in the form of a horseshoe that ranges from the totalitarian left of communism through democracies to the totalitarian right of fascism.<sup>316</sup> Figure 4 is a notional depiction of the risk of war curve when this political spectrum of government is graphed against the continuum of deterrence.

#### THE MOORE PARADIGM OF WAR AVOIDANCE

(Figure 4: © 1997 Walter Gary Sharp, Sr.)



This figure depicts that the optimum peace equilibrium exists in the presence of effective system-wide deterrence and representative forms of government. Accordingly, the equilibrium is disturbed as the effectiveness of system-wide deterrence decreases along its continuum to an ab-

314. *Id.*

315. *Id.* at 833-34.

316. See NATIONAL SECURITY LAW, *supra* note 3, at 78-79.

sence of deterrence, or as the form of government shifts along the political spectrum away from representative forms of government to that of a totalitarian regime.

C. *Government Structures and Externalization: A Failure of Deterrence*

Within Professor Moore's war avoidance paradigm, the core mechanism responsible for the democratic peace is the internal structure of governments.<sup>317</sup> Four powerful correlatives that are related to these government structures are human rights, economic development, famine avoidance, and environmental protection.<sup>318</sup> Democratic governments defend human rights, foster economic freedom, prevent famines, and protect the environment.<sup>319</sup> In sharp contrast, totalitarian regimes slaughter their own people, stymie economic growth, fail to prevent famines, and destroy the environment.<sup>320</sup>

A study of these correlatives suggests a common causal element within government structures that explains the operation of both components of the war avoidance paradigm.<sup>321</sup> Professor Moore's "theory of government failure," based upon economic public choice theory, "posits that government decision makers will generally act rationally, like actors elsewhere, and that the government setting, as with markets, provides a series of mechanisms by which these elites and special interest groups may be able to externalize costs on others."<sup>322</sup> The ability of government decision-makers to externalize costs explains inefficiencies and government failure in democracies, and explains massive government failure of human rights, economic development, famine, and environmental protection within totalitarian regimes.<sup>323</sup>

The ability to externalize costs also defines deterrence failure.<sup>324</sup> A totalitarian regime elite such as Saddam Hussein, for example, may personally benefit from aggressive war if he successfully takes over the oil fields of Kuwait; however, the risks of the armed aggression are externalized to the members of his armed forces.<sup>325</sup> Accordingly, Professor Moore concludes that "deterrence must be focused on the regime elites who are the source of the externalization rather than on the country or

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317. See Moore, *supra* note 285, at 833-34.

318. *Id.* at 826-33.

319. *Id.*

320. *Id.*

321. *Id.* at 833-34.

322. *Id.* at 834.

323. *Id.*

324. *Id.* at 836.

325. *Id.* at 834-35.

the peoples of that country as a whole."<sup>326</sup> Enhanced deterrence on regime elites entails new and more effective international legal mechanisms concerning civil and criminal responsibility.<sup>327</sup>

#### V. REVOKING AN AGGRESSOR'S LICENSE TO KILL

The evolution of the doctrine of equal application illustrates the origin of its corollary that the combatants of an aggressor state who kill in furtherance of an unlawful use of force have complete immunity so long as they kill enemy combatants in accordance with the *jus in bello*. In the context of *interstate* conflicts, the reasoning for the doctrine of equal application remains valid. The evolution of the doctrine of equal application, however, also demonstrates that international law evolves from custom and state practice that are driven by social, moral, and political factors more than by juristic principles. For example, notwithstanding the historically low threshold of Common Article 2, the international community's desire to protect those who serve it has already established military forces serving the United Nations as an entity legally different than military forces acting under state authority.

For millennia, the application of the *jus ad bellum* determined the application of the *jus in bello*. With the rise of the nation state and absolute sovereignty, the 1625 seminal treatise *DE JURE BELLI AC PACIS LIBRI TRES* written by Hugo Grotius caused a change in the interdependence of the *jus ad bellum* and *jus in bello*, thus establishing the doctrine of equal application. In the introduction to his 1956 treatise on war, however, one scholar echoed the warning of the High Court of England that "there is always a temptation to turn to the words of great international jurists, such as Grotius and Hall and others, who wrote some time ago, when modern conditions did not prevail."<sup>328</sup> A number of international law principles codified by Grotius are now soundly rejected as morally repulsive and unlawful. For example, Grotius believed that the *jus in bello* of his time condoned the slaughter of women and children, the right to kill belligerents who have surrendered unconditionally, the rape of women, and the destruction and pillage of entire cities, even those cities that have surrendered.<sup>329</sup>

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326. *Id.* at 837-38.

327. *Id.* at 854.

328. *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S. Co. Ltd.* (1938), England, High Court (King's Bench Division), *quoted in* KOTZSCH, *supra* note 2, at 18.

329. *See* 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY*, *supra* note 19, at 34, 36, 41-42.

Merely five decades ago, the Charter outlawed aggressive war, thereby converting overnight the *jus ad bellum*, a body of law that condoned warfare for almost four millennia, to the *jus contra bellum*. The United Nations has woven the international community into an interdependent system of collective security that obligates the Security Council to take measures which it decides are necessary to uphold the rule of law embodied in the *jus contra bellum*. Revoking an aggressor's right to kill military forces serving the United Nations is embedded within this new role of the United Nations and the Security Council, and is embraced within universally accepted principles of the rule of law, war avoidance, and deterrence.

#### A. *A Concept Matures: International Law Enforcement*

The concept of war and the doctrine of equal application evolved from the practice of sovereign states based upon the fundamental premise of the legality of war. War and the aggressive use of force are now universally accepted as unlawful.<sup>330</sup> The contemporary *jus ad bellum*, also appropriately referred to as the *jus contra bellum*, is now based upon the premise of international penal law.<sup>331</sup> The international community has entrusted the Security Council with the responsibility, indeed the obligation, to enforce this norm of international law.<sup>332</sup>

To discharge its obligation under the Charter, the Security Council may authorize military forces to use all necessary means to respond to the unlawful, aggressive use of force.<sup>333</sup> These peace-enforcers are the international community's police force that have been specifically authorized, on a case-by-case basis, to enforce the international norm outlawing the aggressive use of force. Since war essentially began as nothing more than armed robbery by plundering hordes that evolved into institutionalized violence between states,<sup>334</sup> the concept of military forces serving as international law enforcement is not only authorized now by the Charter but is historically apropos. During this evolution and institutionalization of war, intrastate plundering was criminalized and made punishable by domestic law. Since the Charter has now outlawed interstate plundering, and it is now time to make punishable all acts associated with such interstate plundering.

Drawing upon an analogy with domestic law, the concept of interna-

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330. See discussion *supra* Parts II.A, III.A.

331. See KOTZSCH, *supra* note 2, at 83-85.

332. See U.N. CHARTER art. 39.

333. See discussion *supra* Part II.D.

334. See KOTZSCH, *supra* note 2, at 25. See also discussion *supra* Part II.

tional law enforcement began with the League of Nations.<sup>335</sup> The argument for this concept was increasingly asserted and considerably strengthened by the Charter's centralization of executive functions in the Security Council, and the belief grew that United Nations enforcement actions were more in the nature of a police action.<sup>336</sup> Critics argued, however, that this approach implied that the United Nations was a stronger governmental system than originally planned, and that military enforcement actions were of the traditional nature of war and should be treated as such.<sup>337</sup> While acknowledging a legal difference in a war between states and the use of force by the United Nations to restrain aggression, the critics also maintained that to equate such enforcement action to international law enforcement was to accept the rule that these United Nations military forces would not be bound by the *jus in bello*.<sup>338</sup> Given the humanitarian nature of the *jus in bello* and the desire to have a set of minimum standards apply during all hostilities, the initiative to treat a peace-enforcement action by the United Nations as international law enforcement lost momentum.<sup>339</sup> These concerns are addressed, however, by the revocation of the aggressor's license to kill proposed by this Article because the *jus in bello* remain applicable to both the aggressor and all United Nations forces. The revocation only entails creating a protected status for military forces serving the United Nations.

#### B. *A New Modality of Deterrence: Prosecuting the Individual Combatant*

Just as the Security Council must rely upon the military forces of Member States to enforce the rule of law, totalitarian regime elites must rely upon their military forces to carry out their unlawful acts of aggression. Without military forces that obey a regime elite's order to go to war, armed aggression simply cannot occur. Although the first-level of system-wide deterrence should be focused on the regime elites who are able to externalize the cost of aggression onto others,<sup>340</sup> the failure to focus on the military forces of a totalitarian regime is a missed opportunity to strengthen system-wide deterrence.

Existing international law simply criminalizes the acts of a totalitarian regime's senior leadership, and not the acts of individual combatants,

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335. See KOTZSCH, *supra* note 2, at 288.

336. *Id.* at 289.

337. *Id.*

338. *Id.* at 292-93.

339. *Id.* at 293-94.

340. See Moore, *supra* note 285, at 837-38.



for a crime against peace. This existing rule allows a totalitarian regime elite to externalize his or her costs on those who incur no legal responsibility for their acts that further a criminal act of aggression; consequently, this is a major failure of military and legal deterrence. Effective system-wide deterrence demands that a negative incentive be applied to all who have the ability to influence the commission of the unlawful act.

Studies of war criminals from the Second World War and Vietnam reveal that most war criminals were normal people operating in an organizational mode who failed to "assess the orders they receive[d] from on high."<sup>341</sup> Those studies that focused on the individual soldier recommended that more training on the laws of war and on how to cope with the problem of obedience to illegal orders would help prevent war crimes in the future.<sup>342</sup> Other studies that focused on the military-industrial-political complex suggested that "[a]t the very least we need a new perspective on the rights and duties of sovereign nation states . . . [and that what we need concerning the obligation of soldiers to obey superior orders] is some way to evaluate the orders on the part of those at the top who initiate them."<sup>343</sup> All of these studies sought a clear, objective method for evaluating the lawfulness of an order. Under existing international law, when combatants of an aggressor state assess the lawfulness of an order to attack a military force serving the United Nations, they must first determine whether the United Nations force is a non-belligerent or belligerent force, and if the force is a non-belligerent, whether the scope, duration, and intensity of its use of force makes it a belligerent military force. This analysis is *not* a model of clarity. In contrast, an international norm that prohibits the use of force against any military force serving the United Nations properly identified by the use of distinctive uniforms, insignia, and equipment markings is an unequivocal method to determine the lawfulness of an order to use armed force.

These studies focused on the obligation of members of the armed forces to disobey unlawful orders. Under the *jus in bello*, the fact that a combatant has committed a crime pursuant to the order of a superior does *not* relieve him or her from individual criminal responsibility.<sup>344</sup> The fact that the law was violated pursuant to a superior order is not a defense to a crime unless the accused "did not know and could not reasonably have been expected to know that the act ordered was unlawful."<sup>345</sup>

341. DONALD A. WELLS, WAR CRIMES AND LAWS OF WAR 108-09 (1984).

342. *See id.* at 110.

343. *See id.* at 113.

344. *See* COMMANDER'S HANDBOOK, *supra* note 6, ¶ 6.2.5.5.1; THE LAW OF LAND WARFARE, *supra* note 65, ¶ 509.

345. THE LAW OF LAND WARFARE, *supra* note 65, ¶ 509.

Additionally, it may be a defense if the unlawful order is obeyed under duress.<sup>346</sup> In considering the issue of whether a superior order constitutes a defense, a court should take into consideration:

the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal.<sup>347</sup>

To impose the responsibility on members of the armed forces of all states to consider the lawfulness of the use of force under the *jus contra bellum* by their respective states is consistent with the existing *jus in bello* that imposes an obligation on all members of the armed forces not to follow unlawful orders. Indeed, the rule of law that it is unlawful to attack military forces serving under the authority of the United Nations under all circumstances is a much clearer objective obligation than that which currently exists under the *jus in bello*.

In his study of the Persian Gulf War, Professor Moore stated that "[a]bove all, we must not accept aggressive war an inevitable part of the human condition."<sup>348</sup> One conclusion in his discussion for strengthening a rule of law that will meaningfully sanction aggressive attack is that the international community must explore a "[t]ough-minded application of sanctions, such as reparations and war crimes trials, against aggression and grave breaches of the laws of war, in order to end 'costless aggression,' promote human rights, and particularly to add a personal level of deterrence to the actions of ruthless regime elites."<sup>349</sup> A tough-minded extension of his conclusion is to add a personal level of deterrence to the combatants of the aggressor state.

It may be argued that it is unfair to hold members of the armed forces of a totalitarian regime accountable for killing military forces serving the United Nations because the consequences of refusing to obey such an order may result in torture or death. Such an impassioned plea was made by General of the Army Wilhelm List in his final statement before the Nuremberg IMT on behalf of all defendants:

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346. See COMMANDER'S HANDBOOK, *supra* note 6, ¶ 6.2.5.5.1.

347. THE LAW OF LAND WARFARE, *supra* note 65, ¶ 509.

348. JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 344 (1992).

349. *Id.* at 341-44.

To arrive at a just appreciation it is furthermore imperative, to take due consideration of the inherent circumstance, under which we were compelled to serve. We were pledged by our oath and duty of obedience. We were living under the coercion of a dictatorship which grew ever more and more demonic and chaotic; a dictatorship where nevertheless strong tendencies and countertendencies were predominant, wherein, however the individual had but little freedom of action; a dictatorship unconceivable by any outsider, least so by a free citizen of a free democracy. These conditions, as a whole, cannot be grasped without an insight into the background of all that happened in these days. Against us stood more or less the same powers who have established today in the Balkans a regime of terror, and plan to do the same in Europe, powers who keep the world in tension, today opposed by the whole Western Hemisphere. May a kind fate spare the nation which now holds trial on us from having to fight a battle as we were forced to fight.<sup>350</sup>

Notwithstanding the eloquence of his speech, the IMT rejected the defense of superior orders pled by General List and sentenced him to life in prison.<sup>351</sup> Indeed, the record showed that General List had openly disagreed with many of the orders of his superiors, and had been allowed to retire because of a difference of opinion with Adolf Hitler on tactical matters.<sup>352</sup>

The argument that it would be unfair to require the armed forces of a totalitarian regime to disobey a superior order to kill military forces serving the United Nations does not withstand scrutiny for several reasons. First, members of the armed forces of a democracy do not have the immediate right to refuse to go to war. In the United States, for example, the refusal of a superior order to deploy overseas can be prosecuted under the Uniform Code of Military Justice.<sup>353</sup> Second, international law already requires the members of the armed forces of a totalitarian regime to disobey unlawful orders. To require them to disobey an unlawful order to kill military forces serving the United Nations puts them in no worse position than to refuse to kill prisoners of war or innocent women and children.

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350. *United States v. List*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 759, 1229 (1950).

351. *See id.* at 1230-1319.

352. *See id.* at 1273.

353. Uniform Code of Military Justice art. 18, 10 U.S.C. § 818 (1988).

Third, all situations may not be as oppressive or coercive as was so eloquently overstated by General List. One recent scholarly study, for example, reveals that the murderers of the Holocaust were ordinary German soldiers who were not intimidated by their commanders, but who brutalized and murdered Jews voluntarily and zealously despite having been told they could refuse to kill without fear of retribution.<sup>354</sup> Perhaps the existing immunity to kill enemy combatants fosters such a lack of respect for human life that other war crimes and atrocities are actually easier for combatants of an aggressor state to commit. Fourth, once deployed and on the battlefield, the armed forces of a totalitarian regime do not have to pull the trigger; they can surrender upon meeting the military forces serving the United Nations knowing that they will be well-treated and returned home at the end of the hostilities. Finally, it may be a defense if the unlawful order is obeyed under duress. The armed forces of a totalitarian regime will have their day in court before they are punished for any unlawful killing.

This struggle between the responsibilities of a ruler *vis-a-vis* the duties of the subject is centuries old.<sup>355</sup> One of Shakespeare's historical plays, *THE LIFE OF KING HENRY THE FIFTH* is a reflection of the political teachings of his time.<sup>356</sup> On the eve of the Battle of Agincourt, King Henry V circulated in disguise as a common soldier among his troops.<sup>357</sup>

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354. See DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 192-202, 405 (1996).

355. See, e.g., *HENRY V*, *supra* note 1, at xxiv-xxv.

356. *Id.* at xxv. William Shakespeare, born on April 23, 1564, is recognized as one of England's greatest poets and playwrights. "Throughout the Western world he is held to be the greatest dramatist ever. His plays communicate a profound knowledge of the well-springs of human behavior as revealed in his masterful characterizations of a wide gamut of humanity." He died on April 23, 1616. *William Shakespeare*, MICROSOFT ENCARTA '95 (CD-ROM Multimedia Encyclopedia, 1994).

357. See SHAKESPEARE, *supra* note 1, act 4, sc. 1, ll. 24-201, *reprinted in* *HENRY V*, *supra* note 1, at 127-41.

The Battle of Agincourt was a decisive English victory during the Hundred Years' War, fought in France on October 25, 1415, between an English army under King Henry V of England and a French one under Charles d'Albret, constable of France. Prior to the action, which took place in a narrow valley near the village of Agincourt . . . Henry, a claimant to the French throne, had invaded France and seized the port of Harfleur. At the time of the action, Henry's army, weakened by disease and hunger, was en route to Calais, from which Henry planned to embark for England. In the course of the march to Calais the English force, which numbered about 6000 men, for the most part lightly equipped archers, was intercepted by d'Albret, whose army of about 25,000 men consisted chiefly of armored cavalry and infantry contingents. . . . D'Albret, several dukes and counts, and about 500 other members of the French nobility were killed; other French casualties totaled about 5000. English losses

One soldier, Michael Williams, tells the King that soldiers do not know whether the King's cause is "just and his quarrel honourable."<sup>358</sup> A second soldier, John Bates, interrupts to add that soldiers "know enough, if we know we are the king's subjects. If his cause be wrong, our obedience to the king wipes the crime of it out of us."<sup>359</sup> Williams continues that if the King's cause is not just, then the King must answer for the sins of his soldiers because to disobey the King is against the soldier's duty.<sup>360</sup> The King disagreed, and responded that "[e]very subject's duty is the king's; but every subject's soul is his own."<sup>361</sup> Williams and Bates, still believing the King was a common soldier amongst them, then agreed with him.<sup>362</sup> The words of King Henry V are frequently interpreted for the proposition that "the subject has a higher authority than the king."<sup>363</sup>

Contemporary international law reflects the political teaching echoed by King Henry V. As previously discussed, under the *jus in bello*, members of the armed forces have an existing international obligation to disobey unlawful orders. Article 8 of the 1945 Charter of the International Military Tribunal at Nuremberg provides that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."<sup>364</sup> In 1946, the General Assembly of the United Nations unanimously affirmed the principles of international law recognized by the Charter of the IMT.<sup>365</sup> The International Law Commission was subsequently directed by the

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numbered fewer than 200 men. . . . Although Henry returned to England after Agincourt, his triumph paved the way for English domination of most of France until the middle of the 15th century.

*Battle of Agincourt*, MICROSOFT ENCARTA '95 (CD-ROM Multimedia Encyclopedia, 1994).

358. SHAKESPEARE, *supra* note 1, act 4, sc. 1, ll. 115-18, *reprinted in* HENRY V, *supra* note 1, at 135.

359. SHAKESPEARE, *supra* note 1, act 4, sc. 1, ll. 119-21, *reprinted in* HENRY V, *supra* note 1, at 135.

360. SHAKESPEARE, *supra* note 1, act 4, sc. 1, ll. 122-32, *reprinted in* HENRY V, *supra* note 1, at 135-37.

361. SHAKESPEARE, *supra* note 1, act 4, sc. 1, ll. 158-59, *reprinted in* HENRY V, *supra* note 1, at 137.

362. SHAKESPEARE, *supra* note 1, act 4, sc. 1, ll. 166-69, *reprinted in* HENRY V, *supra* note 1, at 138.

363. *See, e.g.*, TREVOR R. GRIFFITHS & TREVOR A. JOSCELYNE, LONGMAN GUIDE TO SHAKESPEARE QUOTATIONS 183 (1985).

364. Charter of the International Military Tribunal, *supra* note 4, art. 8, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 4, at 911, 914-15.

365. *See Affirmation of the Nuremberg Principles*, *supra* note 245, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 4, at 921.

General Assembly to codify the principles of international law recognized in the Charter of the IMT and in its judgments.<sup>366</sup> Principle IV of this 1950 codification amplified this principle to reflect that “[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, *provided a moral choice was in fact possible to him.*”<sup>367</sup> The International Law Commission explained in its commentary that the “true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.”<sup>368</sup> On the battlefield, the armed forces of a totalitarian regime engaged in the aggressive use of force have the moral choice of surrendering to the military forces serving the United Nations.

The international community has demonstrated its concern over the safety of those military personnel who serve as its peace-keepers in its new paradigm of collective self-defense and international law enforcement, even though they may be authorized to use armed force in self-defense and to accomplish their mission. The discussion in Part III objectively demonstrated an international recognition of an evolving *de facto* status of military forces serving the United Nations and the application of a different set of rules for those forces. While this approach affords maximum protection to military personnel serving the international community as consensual and coercive peacekeepers, it fails to take the final step of protecting peace-enforcers. Existing international law must be changed to protect all military personnel who serve in United Nations forces, non-belligerents and belligerents alike. Military personnel who serve as belligerent peace-enforcers risk their lives for those worthy principles the international community has enumerated in the Charter, and there is no rational argument to place a lesser value on the lives of those civilians who chose to serve the international community in uniform.

Six key principles underpin the rationale for the proposed rule of law that belligerent military forces serving the United Nations should be unlawful targets and that the combatants of a belligerent aggressor state should be prosecuted for killing them:

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366. See THE LAWS OF ARMED CONFLICTS, *supra* note 4, at 923.

367. *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, princ. IV, [1950] 2 Y.B. Int'l L. Comm'n 374 [hereinafter *1950 Nuremberg Principles*], reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 4, at 923, 924 (emphasis added).

368. *Comments of the ILC on the Seven Nuremberg Principles, 1950*, *supra* note 5, ¶ 105, reprinted in BAILEY, *supra* note 5, at 163, 165.

*First*, all personnel who serve the international community, military as well as civilians, deserve the maximum protection that the international community has to offer.

*Second*, a corollary principle to the first, no one, military or civilian, who serves the international community deserves to be a lawful target.

*Third*, military personnel who serve the international community do so under the legal authority of and at the political direction of the Security Council or the General Assembly.

*Fourth*, military personnel who serve the international community are expected to serve as its police force, and they have a duty to use armed force, when necessary, to accomplish their mission.

*Fifth*, these military personnel are international personnel who perform an international function by enforcing the laws of the international community. Accordingly, the use of force should be attributed to the United Nations and not individual states.

*Sixth*, without these avatars of international peace and security who implement the Security Council's coercive authority, the international community has no enforcement mechanism and international law.<sup>369</sup>

The revocation of an aggressor's license to kill military forces serving the United Nations draws a clear line and deters attacks against those military forces under all circumstances. In cases of unlawful aggression, this approach holds the offending state, its head of state, and the individual soldier who knowingly attacks the military personnel serving the United Nations all criminally responsible, while otherwise maintaining the integrity of the *jus in bello*.

### C. *Revoking the License: Defining a New Modality of Personal Deterrence*

Revoking an aggressor's license to kill military forces serving the United Nations can be accomplished by establishing *all* United Nations forces as a new category of protected persons that are unlawful targets under all circumstances. In the case of belligerent United Nations forces, such a new category of protected persons is a limited exception to the doctrine of equal application, and must be carefully defined to ensure that it can be fairly applied to the individual combatants who may be ordered to attack military forces serving the United Nations. This approach has support within the international community. In addition to the previ-

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369. Sharp, *supra* note 9, at 164.

ous challenges to the application of the doctrine of equal application to military forces serving the United Nations,<sup>370</sup> there is international precedent for creating such a category of belligerent forces that are protected from attack under certain circumstances. Similarly, there is international precedent for holding individual combatants of a totalitarian regime criminally accountable for complicity when they follow an unlawful order of their national leaders.

### 1. International Precedent

Protocol I creates a special category of protected belligerent personnel and installations that are not subject to attack provided they are used solely for defensive purposes and if such an attack may cause severe losses among the civilian population. Article 56 provides:

*Article 56 – Protection of works and installations containing dangerous forces*

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population. . . .

5. The Parties to the conflict shall endeavour [sic] to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. *Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.*<sup>371</sup>

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370. See discussion *supra* Part III.E.

371. Protocol I, *supra* note 114, art. 56, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 418-19 (emphasis added).



An attack on these defensive forces is a breach of Protocol I and is defined as a war crime.<sup>372</sup>

Over a hundred states attended each of the four sessions of the Conference that drafted Protocol I, which was signed by forty-six states on December 12, 1977, when it was first opened for signature.<sup>373</sup> Although states reserved the right to make declarations and reservations upon ratification, no state made a specific reservation to Article 56(5) at the time of signature on December 12, 1977.<sup>374</sup> Article 56 has been criticized, however, by at least one scholar, W. Hays Parks, who describes this protection provided belligerents and military equipment as radical, unprecedented, subject to exploitation, and ambiguous.<sup>375</sup> While this protected category has been criticized and is limited to a very narrow category of belligerent forces that are defending works or installations containing dangerous forces, it is a clear precedent for the willingness of a large percentage of the international community to carve out a limited exception to the doctrine of equal application and establish a category of protected persons who would otherwise be belligerents and lawful targets. The Convention on the Prevention and Punishment of the Crime of Genocide<sup>376</sup> holds individual combatants of a totalitarian regime criminally accountable for complicity when they follow an unlawful order from their national leaders to kill members of a protected group. Articles I through III of the 1948 Genocide Convention provide:

*Article I*

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

*Article II*

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;

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372. Protocol I, *supra* note 114, art. 85, para. 5, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 439.

373. DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 387, 459-62.

374. *Id.* at 462-68.

375. See W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 202, 213, 216-17 (1990). For a detailed discussion of Professor Parks' criticism of Article 56, see *id.* at 202-18.

376. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 277 [hereinafter 1948 Genocide Convention], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 158.

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

### *Article III*

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.<sup>377</sup>

Article IV explicitly makes all persons committing the acts listed in Article III criminally accountable, "whether they are constitutionally responsible rulers, public officials or private individuals."<sup>378</sup>

The 1948 Genocide Convention makes no exceptions for persons who act under coercion or duress.<sup>379</sup> During the course of an international armed conflict, therefore, should individual combatants follow an unlawful order from their national leadership or their superior commanders to kill members of a group protected by Article II, they would be criminally liable for the act of genocide. These combatants are required by law to disobey such an unlawful order, regardless of the oppressive nature of their government and whether they are conscripts or volunteers. Similarly, an international norm that prohibits the attack of military forces serving the United Nations under all circumstances would require these individual combatants to disobey an unlawful order to do so. Thus, if combatants were ordered into armed conflict by their national leadership and are opposed by military forces identified as serving under the authority of the United Nations, they would have an obligation to lay down their weapons and surrender. Such a new rule that protects military forces serving

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377. 1948 Genocide Convention, *supra* note 376, arts. I-III, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 158.

378. 1948 Genocide Convention, *supra* note 376, art. IV, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 158.

379. *See* 1948 Genocide Convention, *supra* note 376, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 30, at 158.

the United Nations would place these combatants in no different legal, moral, or practical dilemma than they are presently in under the 1948 Genocide Convention.

## 2. Defining a New Category of Protected Persons

Notwithstanding previous initiatives and precedent, a new convention is required to make such a fundamental shift in the application of international law.<sup>380</sup> The parameters of the new protected category for United Nations peace-enforcers defined in this part of the Article judiciously balances three, potentially competing interests. First, the new paradigm must afford the maximum protection available under international law for the military forces acting on behalf of the international community. Second, the new paradigm must be established in such a way that it can be fairly applied to the individual combatants that may be ordered by their national leadership to attack military forces serving the United Nations. Finally, the new paradigm must not adversely impact the protections accorded noncombatants by international humanitarian law.

The conceptual approach of this new modality of personal deterrence is that military forces serving the United Nations are international policemen; they protect and serve the international community by maintaining international peace and security regardless of whether they serve as peace-keepers or peace-enforcers. Thus, this new modality is limited to protecting only military forces serving under the authority or direction of the United Nations. This proposal does not change the application of the *jus in bello* to international armed conflicts between states not acting under the authority of the United Nations.

The most important characteristic of this modality is that it does not change the application of the existing *jus in bello* to United Nations forces or to the combatants of an aggressor state with one exception. It simply creates a new category of protected persons under international law—all military forces who serve the international community under the authority of the United Nations would be unlawful targets under all circumstances. In practice, this paradigm allows combatants of an aggressor state to be ordered into armed conflict by their national leadership without questioning the lawfulness of the order. If their national leadership has engaged in a crime against peace through the unlawful use of force,

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380. See *supra* note 9 for a brief discussion of and reference to a "Draft Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Civilians and Military Forces operating under the authority of the United Nations (Protocol III)" that would advance and codify a protected status for military forces serving the United Nations.

then the individual combatants are *not* charged with a crime against peace. When and if the combatants of an aggressor state find themselves opposed by military forces identified as serving under the authority of the United Nations, however, they would have an obligation to lay down their weapons and surrender. Similarly, their commanders would have an obligation to surrender their units to United Nations forces. These individual combatants and their commanders would not have committed a crime until such time as they have fired upon or otherwise knowingly attacked military forces they have identified as serving under the authority of the United Nations.

To ensure fairness, military forces serving the United Nations would not be free to declare an aggressor's military forces hostile and fire upon them at will without any precondition. The United Nations would have a corresponding responsibility to provide notice that combatants have an obligation to surrender to United Nations forces and that it is an international crime to attack United Nations forces. This notice should also explain that combatants who surrender will be humanely treated and repatriated without delay after the cessation of active hostilities, and that combatants who attack United Nations forces are subject to prosecution for war crimes. To implement this responsibility, the United Nations should first encourage its Member States to adopt a convention that creates a new protected status for its military peace-keepers and peace-enforcers. The United Nations should also actively develop programs that disseminate this new international norm and require certifications from states that they have disseminated this rule to its armed forces and civilian population. The goal is to establish this protected status of United Nations forces as a peremptory norm of customary international law through wide-spread dissemination and consistent state practice.

During actual hostilities, the United Nations should also provide notice of this international norm to the extent possible under the circumstances. This responsibility to provide notice during hostilities does not require some kind of "bullhorn" announcement by United Nations forces before each and every engagement, but can be met in a number of ways without unnecessarily endangering United Nations forces. For example, notice could be provided through existing military doctrine such as psychological operations.<sup>381</sup> These operations were extremely effective during

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381. *Psychological operations* are "[p]lanned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals. The purpose of psychological operations is to induce or reinforce foreign attitudes and behavior favorable to the originator's objectives." JOINT PUB 3-0, DOCTRINE FOR JOINT OPERATIONS, GL-11 (1995).

the Persian Gulf War in encouraging the mass surrender of Iraqi troops.<sup>382</sup> The United States Department of Defense reported on its psychological operations (PSYOP) during the Persian Gulf War as follows:

PSYOP leaflets and radio broadcasts undermined unit morale, provided instructions on how to surrender, instilled confidence that prisoners would be treated humanely, and provided advanced warning of impending air attacks, thus encouraging desertion. PSYOP objectives were:

- Gain acceptance and support for US operations;
- Encourage Iraqi disaffection, alienation, defection and loss of confidence;
- Create doubt in Iraqi leadership;
- Encourage non-cooperation and resistance;
- Strengthen confidence and determination of friendly states to resist aggression; and,
- Improve deterrent value of US forces. . . .

Leaflet, radio and loudspeaker operations were combined and this combination was key to the success of PSYOP. Leaflets were the most commonly used method of conveying PSYOP messages. Twenty-nine million leaflets consisting of 33 different messages were disseminated in the Kuwait theater of operations. . . .

'Voice of the Gulf' was the Coalition's radio network that began broadcasting on 19 January from ground based and airborne transmitters, 18 hours per day for 40 days. The radio script was prepared daily and provided news, countered Iraqi propaganda and disinformation, and encouraged Iraqi defection and surrender.

Loudspeaker teams were used effectively throughout the theater. Each tactical maneuver brigade had loudspeaker PSYOP teams attached. . . . Loudspeaker teams accompanied units into Iraq and Kuwait, broadcasting tapes of prepared surrender messages. . . . Iraqi soldiers were encouraged to surrender, were warned of impending bombing attacks, and told they would be treated humanely and fairly.<sup>383</sup>

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382. See CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, *supra* note 70, app. J at 20-23.

383. *Id.* app. J at 20-22.

One Iraqi division commander stated that next to the Coalition's bombing operations, these psychological operations were the greatest threat to the morale of his troops.<sup>384</sup> His view was validated through interviews with Iraqi prisoners of war.<sup>385</sup>

To ensure fairness, an element of *mens rea* is an integral component of this new paradigm. While all combatants of an aggressor state would have an obligation to surrender, they would only be held criminally accountable for a knowing attack on military forces serving the United Nations. Accordingly, all military forces serving under the authority of the United Nations should be properly identified as such through the use of distinctive uniforms, insignia, and equipment markings. Cooks, logistics personnel, and combatants who have not taken active part in combat, for example, would have an obligation to surrender when they found out the opposition force consisted of military forces serving the United Nations, but they would not be criminally accountable for their failure to do so. Not until they knowingly participate in an attack on military forces serving the United Nations, with either direct fire or over the horizon weapon systems, would they be criminally accountable under this new paradigm. As in any other war crimes trial, there will be difficulty in proving who knowingly committed what act. Similarly, there may be difficulty in prosecuting large numbers of combatants who attacked United Nations forces. These difficulties, however, should not deter the international community from establishing proscriptive norms and taking what action it can to enforce them. An actual trial is the final safeguard in this new paradigm that would ensure fairness and would also ensure that a combatant is only prosecuted for a knowing attack on United Nations forces.

### 3. Summary

This proposition of revoking an aggressor's license to kill military forces serving the United Nations is very circumspect and limited in nature. It imposes obligations on combatants of an aggressor state to surrender and refrain from attacking United Nations forces, and imposes corresponding responsibilities on the United Nations to facilitate their surrender and to treat them humanely. Such a limited exception to the doctrine of equal application would allow the *jus in bello* to remain intact, afford maximum legal protection to United Nations forces, treat combatants of an aggressor state fairly, and retain the protections accorded noncombatants by international humanitarian law.

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384. *Id.* app. J at 20.

385. *Id.* app. J at 21.

Consider how military and legal deterrence may have been strengthened during the Persian Gulf War had this protected status for military forces serving the United Nations been in place. In addition to focusing on deterrent options against the Iraqi leadership, system-wide deterrence could have been strengthened by also providing positive and negative incentives to the Iraqi combatants. The psychological operations efforts of the Coalition forces could have included notice that Iraqi combatants have an obligation to surrender to United Nations forces, that those who surrender will be humanely treated and repatriated without delay after the cessation of active hostilities, that it is an international crime to attack United Nations forces, and that combatants who attack United Nations forces are subject to prosecution for war crimes. Such a notice could have given the Iraqi combatants an additional, personal incentive to surrender and an additional, personal disincentive to continue fighting. There is no evidence to suggest that the addition of these incentives would have made surrender less likely. To the contrary, the effectiveness of the psychological operations suggests that the Iraqi combatants would have been more likely to surrender. The lesson of the Persian Gulf War is that system-wide deterrence can be strengthened by revoking an aggressor's license to kill military forces serving the United Nations.

## VI. CONCLUSIONS AND FINAL REFLECTIONS

During the twentieth century, the international community has increasingly relied upon the rule of law to rid humanity of the bloodshed and brutality of war that has plagued the past four millennia. Most notably, the Charter of the United Nations has clearly outlawed the aggressive use of force, while maintaining a state's inherent right of individual and collective self-defense. Through the Charter's paradigm of collective self-defense, the international community has conferred upon the Security Council the primary responsibility for the maintenance of international peace and security, and the obligation to either make recommendations or take coercive measures to maintain or restore international peace and security. These coercive measures were specifically intended by the drafters of the Charter to include the authority of the Security Council to use armed force against an aggressor state.

To enforce this rule of law, the Security Council must rely upon the military forces of the Member States of the United Nations. While the international community universally accepts that non-belligerent peace-keepers are protected persons and unlawful targets, these peace-keepers are normally deployed in areas of ongoing hostilities and are authorized to use force in self-defense and mission accomplishment. Tragically, this authorized use of force on behalf of the international community—under a

rote application of existing international law—creates the paradoxical situation where these peace-keepers may become belligerents and lawful targets. Even more untenable is the situation when military forces are expected, and required by their respective states, to serve as international policemen to fight aggression, but are allowed to be lawfully targeted by the combatants of an aggressor state.

This contemporary application of international law is unacceptable because it is anathema to fundamental principles of criminal law and deterrence, and is antithetical to the international community's demonstrated desire to protect military forces serving the United Nations. It is time for the international community to openly embrace the concept that military forces who serve under the authority of the United Nations are international policemen and unlawful targets under all circumstances, regardless of whether they serve as consensual peace-keepers or belligerent peace-enforcers. These men and women protect the international community from threats to international peace and security, and they deserve the maximum protection that can be established under international law.



