

# PROTECTION OF PEACEKEEPERS: THE LEGAL REGIME

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## I. INTRODUCTION

It is a sad fact of life that attacks on peacekeepers have been a feature of U.N. peacekeeping operations from the outset.<sup>1</sup> Concern about such attacks has escalated in recent years following the particularly heavy casualties suffered by peacekeepers in Somalia, the former Yugoslavia and Rwanda. This concern has led to an examination of ways in which the protection given to peacekeepers can be enhanced by a strengthening of the legal regime regarding their protection.<sup>2</sup> It was in this context that the United Nations General Assembly, in December 1994, adopted the Convention on the Safety of United Nations and Associated Personnel (Safety Convention).<sup>3</sup> Scholars have argued that more still needs to be done, especially as regards operations

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1. The attention given to recent loss of life in Somalia and former Yugoslavia has distracted attention away from the casualties suffered in earlier United Nations operations. For example, amongst the operations established by the United Nations in its early years, the United Nations Truce Supervision Organization (UNTSO), which had a maximum strength of 572 at any one time, lost 24 personnel through hostile action and accidents. *See* UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING* 419 (2d ed. 1992), U.N. Doc. DPI/1065, U.N. Sales No. E.85.I.16. The United Nations Emergency Force (UNEF I) in the Middle East suffered 64 fatalities. *See id.* at 421. The United Nations Operation in the Congo (ONUC) lost 195 personnel through hostile action and accidents. *See id.* at 435. More recently, the United Nations Interim Force in the Lebanon (UNIFIL) had lost 130 of its personnel by 1992. *See id.* at 427.

2. *See* S.C. Res. 868, U.N. SCOR, 48th Sess., 3283d mtg., U.N. Doc. S/RES/868 (1993); *Security of United Nations Operations: Report of the Secretary General*, U.N. GAOR, 48th Sess., Item 87 of the Provisional Agenda, U.N. Doc. A/48/349-S/26358 (1993).

3. Convention on the Safety of United Nations and Associated Personnel, 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) [hereinafter *Safety Convention*].

authorized by the United Nations but not under U.N. control.<sup>4</sup>

The purpose of this Article is to examine the current legal regime for the protection of peacekeepers. The traditional "law of armed conflict" is reviewed and found inadequate to protect peacekeepers in circumstances where the U.N. force is not a party to the conflict. Similarly, the new Safety Convention has not greatly improved the situation because of its limited applicability. Moreover, the Convention could have a negative impact on the law of armed conflict by indirectly raising the threshold at which the 1949 Geneva Conventions become applicable to a U.N. operation.

These issues have been addressed by Professor Walter Gary Sharp, Sr., in his article *Protecting the Avatars of International Peace and Security*.<sup>5</sup> Professor Sharp concludes that the law of armed conflict should not apply equally to the United Nations and that the Safety Convention should be extended to apply to operations authorized by the United Nations even if not under U.N. control. This Article takes issue with Professor Sharp's conclusion on three grounds. First, the international community continues to stand by the idea that the law of armed conflict should apply equally to all parties. Secondly, it is not the soldier who should be held accountable for an attack against U.N. forces, but the government that orders that attack, and this can already be accomplished through order of general international law. Finally, if the principle of equal application is undermined, all respect for the 1949 Geneva Conventions<sup>6</sup> may be destroyed.

## II. THE LAW OF ARMED CONFLICT

Although doubts were initially expressed about the applicability of the law of armed conflict to U.N. operations, even where the U.N. force in question was established expressly in order to conduct hostilities on a large scale, the prevailing view today is clearly that the law of

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4. See, e.g., *infra* note 5.

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

6. 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 I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention II]; 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 III]; 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 IV].

armed conflict applies to such situations.<sup>7</sup> Thus, the widely respected Institute of International Law declared in 1971 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.

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

- (a) the rules pertaining to the conduct of hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives;
- (b) the rules contained in the Geneva Conventions of August 12, 1949;
- (c) the rules which aim at protecting civilian persons and property.<sup>8</sup>

The Institute subsequently concluded that the entirety of the law of armed conflict, including those rules which were not specifically humanitarian in character, were applicable to hostilities conducted by U.N. forces.<sup>9</sup> The Institute's view is supported by most authoritative academic commentators on the subject<sup>10</sup> and reflects the practice of the United Nations during the Korean conflict. After initial hesitation, the Unified Command in Korea accepted that it would apply the rules of the law of armed conflict, including those contained in the 1949 Ge-

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7. See American Society of International Law, *Report of the Committee on the Study of the Legal Problems of the United Nations: Should the Laws of War Apply to United Nations Enforcement Action?*, 46 PROC. AM. SOC. INT'L L. 216, 220 (1952). For a review of the literature, see D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 484-516 (1964).

8. 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*, 54-II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 465-66 (1971), reprinted in WALTER GARY SHARP, SR., UNITED NATIONS PEACE OPERATIONS 138 (1995) [hereinafter Institute of International Law].

9. 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*, 56-II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 540 (1975), reprinted in SHARP, *supra* note 8, at 141.

10. See, e.g., BOWETT, *supra* note 7, at 503; Dietrich Schindler, *United Nations Forces and International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 521 (Christophe Swinarski ed., 1984).

neva Conventions,<sup>11</sup> notwithstanding that those Conventions had not then entered into force for any of the major states contributing forces to the United Nations Command in Korea.<sup>12</sup> Likewise in the Kuwait conflict of 1990-91, where military action was authorized by the Security Council but conducted entirely under national control, it was never doubted that the coalition forces were subject to the law of armed conflict, and the coalition states on numerous occasions declared that they had scrupulously complied with those laws.<sup>13</sup>

The law of armed conflict encompasses the customary law of armed conflict, the 1949 Geneva Conventions (to which all the states likely to contribute contingents to a U.N. operation are parties), and, in some cases, the Protocol Additional to the Geneva Convention of 1977 (Protocol I).<sup>14</sup> The law of armed conflict regulates most aspects of the conduct of hostilities, limiting the type of weapons which may be used,<sup>15</sup> the targets against which force may lawfully be directed,<sup>16</sup> and the treatment of wounded and civilians in the power of an enemy.<sup>17</sup> Likewise it prohibits the use of methods and means of warfare likely to cause unnecessary suffering and requires that captured members of enemy armed forces be treated humanely and in accordance with the strict provisions of the 1949 Geneva Convention III on the Treatment of Prisoners of War.<sup>18</sup>

The law of armed conflict also provides a measure of protection to U.N. personnel, with two significant limitations. First, the laws of armed conflict make no special provision for U.N. forces. Where a U.N. force is engaged in hostilities as a belligerent, it is treated in exactly the same way as the armed forces of a state.<sup>19</sup> Since the United

11. 1949 Geneva Conventions, *supra* note 6.

12. See BOWETT, *supra* note 7, at 500; see also 2 SIDNEY D. BAILEY, *HOW WARS END: THE UNITED NATIONS AND TERMINATION OF ARMED CONFLICTS*, 1946-64, at 444 (1982).

13. See Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MOD. L. REV. 153, 171-75 (1992).

14. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (1979), 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

15. See, e.g., 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, 1342 U.N.T.S. 137, 171, reprinted in 19 I.L.M. 1523, 1533 (1980) [hereinafter Conventional Weapons Convention].

16. See, e.g., Hague Convention IV Respecting the Laws of and Customs of War on Land, Annex (Regulations), art. 23, Oct. 18, 1907, 36 Stat. 2295, 2301, 1 Bevans 643, 648.

17. See, e.g., 1949 Geneva Convention IV, *supra* note 6, 6 U.S.T. 3516, 75 U.N.T.S. 287.

18. 1949 Geneva Convention III, *supra* note 6, 6 U.S.T. 3316, 75 U.N.T.S. 135.

19. See Institute of International Law, *supra* note 8.

Nations has no permanent disciplinary system or criminal law of its own, in practice many requirements of the law of armed conflict can be met only by action on the part of the contributor States, rather than the United Nations itself. Secondly, the law of armed conflict is based on the principle that its provisions apply equally to all parties to an armed conflict without distinction between the aggressor and the victim of aggression<sup>20</sup> or, in the case considered here, between the forces of the United Nations and the forces of an aggressor state. Moreover, although the law of armed conflict does not expressly confer a right to take life in any circumstances, it operates on the assumption that killing opposing soldiers is not unlawful under international law, provided that the killing takes place within the constraints laid down by the various treaties and rules of customary international law.<sup>21</sup> Thus, killing a prisoner of war or killing enemy soldiers with chemical weapons is a war crime, but killing enemy soldiers in open combat with weapons not prohibited by the law of armed conflict is not in itself an illegal act.<sup>22</sup>

The law of armed conflict can also apply to peacekeeping operations if the U.N. forces become involved in fighting to such an extent that the forces become parties to the conflict. In such a situation, peacekeepers are subject to the law of armed conflict: they are subject to the same degree of legal protection as any other lawful combatants.<sup>23</sup> Thus, if captured they are entitled to be treated as prisoners of war and their murder or ill treatment would be a grave breach of the 1949 Geneva Convention III, whereupon all states would have the right, and in certain circumstances the duty, to prosecute.<sup>24</sup> Civilian personnel attached to a U.N. force would benefit from the protection of the 1949 Geneva Convention IV.<sup>25</sup>

A more difficult case arises where U.N. peacekeepers are caught up in an armed conflict between states and subjected to attacks by members of one or more belligerent forces but the U.N. force does not itself become party to an armed conflict. This case is different because the law of armed conflict makes almost no express provision for it, ex-

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20. See Christopher Greenwood, *The Relationship Between Ius ad Bellum and Ius in Bello*, 9 REV. INT'L STUD. 221 (1983); Hersch Lauterpacht, *The Limits of Operation of the Laws of War*, 30 BRIT. Y.B. INT'L L. 206, 212 (1953).

21. See sources cited *supra* note 19.

22. See *id.* Professor Sharp takes issue with the application of this principle to United Nations operations. See Sharp, *supra* note 5, at 165-74.

23. See BOWETT, *supra* note 7, at 499-503.

24. 1949 Geneva Convention III, arts. 129-30, *supra* note 6, 6 U.S.T. at 3418, 75 U.N.T.S at 236.

25. 1949 Geneva Convention IV, *supra* note 6, 6 U.S.T. 3516, 75 U.N.T.S. 287.

cept for indirect protection under Article 37(1)(d) of Protocol I, which prohibits "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other states not parties to the conflict."<sup>26</sup> This provision clearly envisages that the United Nations and, by extension, U.N. personnel, have some kind of "protected status," but the nature of that status and the rights and obligations which flow from it are not set out in the Protocol.

Nevertheless, it is possible to infer certain protections for non-party U.N. peacekeepers from other provisions of Protocol I. Thus, the parties to the conflict have a duty to respect and protect U.N. personnel engaged in relief operations.<sup>27</sup> More generally, because U.N. peacekeeping units, the civilian personnel attached to them, their buildings, vehicles, and equipment would not constitute military objectives under Articles 48 and 50-52 of Protocol I, attacks upon them by a party to an international armed conflict are unlawful.<sup>28</sup> If taken prisoner, peacekeepers would, at the very least, be entitled to the fundamental guarantees laid down in Article 75 of the Protocol,<sup>29</sup> and, since these provisions of Protocol I are generally regarded as declaratory of customary international law, it does not matter whether or not the belligerents are parties to Protocol I.<sup>30</sup> In addition, the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons gives members of U.N. peacekeeping and observation forces a degree of protection from land mines.<sup>31</sup>

26. Protocol I, *supra* note 14, art. 37(1)(d), 1125 U.N.T.S. at 21, 16 I.L.M. at 1409. It is clear from the *travaux préparatoires* of the Protocol that this provision was not intended to apply to situations in which U.N. forces were engaged as combatants on one side of an armed conflict, but only to genuine cases of peacekeeping. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949, at 1509 (Yves Sandoz et al. eds., 1987).

27. See Protocol I, *supra* note 14, arts. 69-71, 1125 U.N.T.S. at 35, 16 I.L.M. at 1422.

28. See *id.*, art. 48, 50-52, 1125 U.N.T.S. at 25, 16 I.L.M. at 1412-13.

29. *Id.* art. 75, 1125 U.N.T.S. at 37, 16 I.L.M. at 1423.

30. See Christopher Greenwood, *Customary Law Status of the 1977 Additional Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 93, 112-13 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

31. Article 8 provides as follows:

Protection of United Nations forces and missions from the effects of minefields, mines and booby-traps

1. When the United Nations force or mission performs functions of peacekeeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in 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

Similarly, where a U.N. peacekeeping force is embroiled in fighting which constitutes an internal, rather than an international, armed conflict, a limited degree of protection is implicit in the rules of international law applicable to civil wars. Thus, members of a U.N. force embroiled in an internal armed conflict would be "persons taking no active part in the hostilities" for the purposes of Article 3(1) common to the four 1949 Geneva Conventions.<sup>32</sup> As a result of that provision, the parties to the conflict must treat peacekeepers humanely and are forbidden to commit acts of violence against them or take them hostage.<sup>33</sup> The massacre of members of the United Nations Assistance Mission for Rwanda (UNAMIR) in April 1994 during the Rwandan civil war was thus a clear example of a violation of common Article 3.<sup>34</sup> If the state in which the conflict is taking place is a party to Additional Protocol II to the Geneva Conventions of 1949 (Protocol II), both government and rebel forces have more detailed obligations.<sup>35</sup> Many of these obligations, such as the fundamental guarantees set forth in Article 4 of Protocol II,<sup>36</sup> and the provision on persons whose liberty has been re-

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information in the party's possession concerning the location of minefields, mines and booby-traps in that area.

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

Conventional Weapons Convention, *supra* note 15, art. 8, 1342 U.N.T.S. at 171, 19 I.L.M. at 1533.

32. 1949 Geneva Convention I, *supra* note 6, art. 3(1), 6 U.S.T. at 3116, 75 U.N.T.S. at 32; 1949 Geneva Convention II, *supra* note 6, art. 3(1), 6 U.S.T. at 3220, 75 U.N.T.S. at 86; 1949 Geneva Convention III, *supra* note 6, art. 3(1), 6 U.S.T. at 3318, 75 U.N.T.S. at 136; 1949 Geneva Convention IV, *supra* note 6, art. 3(1), 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

33. *See id.*

34. The Security Council, in condemning the attacks on U.N. personnel in Rwanda, treated those attacks as a violation of international humanitarian law, which, in this context, was clearly a reference to common Article 3. *See* S.C. Res. 912, U.N. SCOR, 49th Sess., 3368th mtg., para. 5, U.N. Doc. S/RES/912 (1994).

35. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

36. Article 4 states in relevant part:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honor and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any

stricted set forth in Article 5 of Protocol II,<sup>37</sup> would also confer protection upon members of a U.N. force caught up in the fighting. Even if the state in question is not a party to Protocol II, it is arguable that the guarantees in Articles 4 and 5 of that treaty are declarations of customary law and thus of general application.<sup>38</sup>

While these provisions give a measure of protection to U.N. peacekeepers in circumstances where the U.N. force cannot be regarded as a party to a conflict and thus is not subject to the law of armed conflict in its entirety, they cannot be regarded as constituting a satisfactory legal regime. In many cases, the status of the peacekeepers

form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

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

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

*Id.* art. 4, 1125 U.N.T.S. at 612, 16 I.L.M. at 1444.

37. Protocol II, art. 5 states in relevant part:

1. In addition, to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether or not they are interned or detained:

...

(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;

...

(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

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2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

(a) expect when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;

(b) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;

(c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;

(d) they shall have the benefit of medical examinations;

(e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. . . . *Id.* art. 5, 1125 U.N.T.S. at 612-13, 16 I.L.M. at 1444-45.

38. See Greenwood, *supra* note 30, at 112-13.



may be ambiguous. In Somalia, for example, the members of the United Nations Operation in Somalia (UNOSOM), the Unified Task Force (UNITAF), and the national forces associated with them could no longer be characterized as "persons taking no active part in the hostilities" pursuant to 1949 Geneva Conventions common Article 3 once they began initiating operations against one of the factions in the Somali conflict in an attempt to arrest its leader and became involved in heavy fighting.<sup>39</sup> Even where the status of the U.N. personnel is unequivocally that of peacekeepers not involved in the hostilities, the rules outlined in the previous two paragraphs are insufficiently detailed and precise to provide adequate protection, even in an environment in which the parties to the conflict are disposed to observe the law. In particular, members of such a force who are taken prisoner by one of the parties to the conflict would not normally have the status of protected persons under either 1949 Geneva Convention III or IV.<sup>40</sup> In these circumstances, therefore, U.N. personnel taken prisoner by one of the parties to an armed conflict would not benefit from the detailed regime of protection in 1949 Geneva Conventions III and IV, and of-

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

40. See 1949 Geneva Convention III, *supra* note 6, art. 4, 6 U.T.S. at 3320, 75 U.N.T.S. at 138; 1949 Geneva Convention IV, *supra* note 6, art. 4, 6 U.T.S. at 3520, 75 U.N.T.S. at 290. Professor Sharp argues that members of the armed forces of states not a party to a conflict operating in areas of armed conflict are protected persons under 1949 Geneva Convention IV. See Sharp, *supra* note 5, at 122-23. He bases this conclusion on passages in the International Committee of the Red Cross Commentary on the Fourth Geneva Convention describing the Conventions as embodying a comprehensive regime. See COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY ON THE FOURTH GENEVA CONVENTION]. However, Article 4 of 1949 Geneva Convention IV, which specifies who are protected persons under that Convention, provides that "nationals of a neutral State who find themselves in the territory of a belligerent state . . . shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." 1949 Geneva Convention IV, *supra* note 6, art. 4, 6 U.T.S. at 3520, 75 U.N.T.S. at 290. This provision will normally, though not invariably, serve to exclude members of a United Nations force from the status of protected person under 1949 Geneva Convention IV, since United Nations personnel will usually be drawn from countries which have normal diplomatic representation with the state parties to the armed conflict. Thus, for example, members of UNIFIL caught up in the armed conflict between Israel, Lebanon and Syria in Lebanese territory in 1982 were in most cases nationals of states which had normal diplomatic relations with all three of the countries involved. See ROBERT C.R. SEIKMANN, NATIONAL CONTINGENTS IN UNITED NATIONS PEACE-KEEPING FORCES 41-42, 76 (1991). Notwithstanding the passages in the ICRC Commentary on the Fourth Geneva Convention, therefore, these personnel would not have been protected persons under 1949 Geneva Convention IV if they had fallen into the hands of one of the belligerent parties.

fenses committed against them would not constitute grave breaches of those Conventions, since only offenses committed against protected persons fall within the definition of a grave breach in Articles 129-30 of 1949 Geneva Convention III and Articles 146-47 of 1949 Geneva Convention IV.<sup>41</sup>

### III. THE 1994 CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL

Concern over the attacks on U.N. personnel in Somalia, the former Yugoslavia, and Rwanda led to the adoption in 1994 of the Convention on the Safety of United Nations and Associated Personnel (Safety Convention).<sup>42</sup> Because this Convention has been analyzed in detail elsewhere,<sup>43</sup> this Article will focus only upon the extent of the application of the convention, particularly important because its provisions mark a radical departure from the approach of the law of armed conflict.<sup>44</sup>

Unlike the law of armed conflict, the Safety Convention was specifically tailored to meet the needs of the United Nations and aims to outlaw all attacks upon U.N. forces.<sup>45</sup> Where the Safety Convention applies, Article 7 prohibits any attack upon United Nations and associated personnel, their equipment and premises, as well as any action that prevents them from discharging their mandate. All states which are parties to the Safety Convention are required to take appropriate measures to ensure the safety and security of United Nations and asso-

41. On the relationship between the grave breaches provisions and the definition of protected persons under the 1949 Geneva Conventions III and IV, see the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Dusko Tadic*, 35 I.L.M. 32 (1996). See also Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT'L L. 265 (1996).

42. Safety Convention, *supra* note 3, at 2-3 (the Security Council was "[d]eeply concerned over the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel . . . [and] [c]onvinced that there is an urgent need to adopt appropriate and effective measures for the prevention of attacks committed against United Nations and associated personnel and for the punishment of those who have committed such attacks").

43. See Sharp, *supra* note 5, at 145-56. See also Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621 (1995); M. Christiana Bourloyannis-Vrailas, *The Convention on the Safety of United Nations and Associated Personnel*, 44 INT'L & COMP. L.Q. 560 (1995).

44. See Safety Convention, *supra* note 3, art. 2(1), 34 I.L.M. at 486 ("This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action . . . in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.").

45. See *id.*

ciated personnel, especially when deployed on their territory.<sup>46</sup> Article 8 imposes a duty to release or return United Nations and associated personnel who have been captured or detained. Furthermore, Article 9 requires all states which are parties to make the intentional commission of various attacks and hostile acts against United Nations or associated personnel crimes under their national law, in addition to their general duty to either extradite or try those accused of such offenses.<sup>47</sup>

In determining the scope of its application, three provisions of the Safety Convention are especially important. First, the Safety Convention applies only with respect to a "United Nations operation."<sup>48</sup> This term is defined in a restrictive way by Article 1(c) which provides that

"United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:

- (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or
- (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.<sup>49</sup>

The Safety Convention thus applies only to those forces which operate under the authority and *control* of the United Nations; operations authorized by the United Nations but controlled by individual member states or groups of member states, or by regional organizations, are excluded. Had the Safety Convention been in force at the time, the coalition operation in Kuwait and the French operation in Rwanda,<sup>50</sup> both of which were authorized by the United Nations Security Council but operated under the control of national authorities, would have fallen outside its scope. The same is true of the operation conducted in Libe-

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46. *Id.* art. 7(2), 34 I.L.M. at 488.

47. *See id.* art. 10, 34 I.L.M. at 488-89 (using terms which are modelled upon anti-terrorism conventions such as The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177).

48. *Id.* art. 2(1), 34 I.L.M. at 486.

49. *Id.* art. 1(c), 34 I.L.M. at 486.

50. *See* S.C. Res. 929, U.N. SCOR, 49th Sess., 3392d mtg., U.N. Doc. S/RES/929 (1994) (authorizing the French operation in Rwanda which was conducted under national command and was entirely separate from the U.N. operation); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990) (authorizing the coalition operation in Kuwait).

ria by the regional organization ECOWAS.<sup>51</sup>

A more complicated limitation is that the Safety Convention applies only to certain types of United Nations operations. Article 1(c) divides United Nations operations into two categories: those to which the Convention will apply automatically and those to which it will apply only if the Security Council or the General Assembly has made a declaration of exceptional risk. The limitation of the "automatic category" to operations which are for the purpose of maintaining or restoring international peace and security, suggests at first sight that this category is limited to operations established by the Security Council and operating under Chapter VII of the Charter, since the language used in Article 1(c)(i) echoes the language of Article 39 of the Charter. However, to interpret Article 1(c)(i) in this way would mean that most traditional peacekeeping operations, which are not established under Chapter VII but which rely upon the consent of the host state, such as the United Nations Emergency Force in the Middle East, UNIFIL in Lebanon or the United Nations Force in Cyprus (UNFICYP), would not be covered by the Safety Convention unless there had been a declaration of exceptional risk to personnel. It is difficult to see why the Convention should be limited in such a way and Bloom suggests that all peacekeeping operations would fall within the automatic category,<sup>52</sup> presumably because all peacekeeping operations are concerned with international peace and security. That would mean the second category was designed to cover such operations as humanitarian missions and election monitoring missions where there was an exceptional risk to the safety of U.N. personnel.<sup>53</sup> The difficulty with this interpretation is that unless an operation has been established under Chapter VII of the Charter, it is not immediately obvious from the resolutions which establish it that its purpose is to restore international peace and security. This is likely to prove a fertile area for argument in the future.

Secondly, the Safety Convention applies to a wide range of personnel involved in such an operation. According to Article 1(a) and (b), the Safety Convention applies not only to U.N. personnel but also to associated personnel, defined in Article 1(b) as:

51. See S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992); *Note by the President of the Security Council*, U.N. SCOR, U.N. Doc. S/23886 (1992); *Note by the President of the Security Council*, U.N. SCOR, U.N. Doc. S/22133 (1991).

52. Bloom, *supra* note 43, at 623.

53. *Accord Bourloyannis-Brailas*, *supra*, note 43, at 566-69.

(i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;

(ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;

(iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency

to carry out activities and support the fulfilment of a mandate of the United Nations operation . . . .<sup>54</sup>

The definition of associated personnel is wide enough, therefore, to include NATO air crews involved in support of the United Nations Protection Force (UNPROFOR) in Bosnia-Herzegovina, as they were persons assigned by a government with the agreement of the competent organ of the United Nations to carry out activities and support the fulfilment of UNPROFOR's mandate, notwithstanding that they operated under NATO command and control.<sup>55</sup> In contrast, the personnel of the Multi-National Implementation Force (IFOR), which took over responsibility from UNPROFOR in Bosnia-Herzegovina under the terms of the Dayton Peace Agreement, would not be covered, because IFOR does not operate under United Nations' control.<sup>56</sup>

Finally, Article 2(2) of the Convention imposes a most important limitation on the Convention's scope of application, by providing that

[t]his Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.<sup>57</sup>

This provision was designed to ensure that the legal regimes of the Safety Convention and the laws of armed conflict were mutually exclu-

54. Safety Convention, *supra* note 3, art. 1(b), 34 I.L.M. at 486.

55. See S.C. Res. 958, U.N. SCOR, 49th Sess., 3461st mtg., U.N. Doc. S/RES/958 (1994); S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

56. See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. at para. 14, U.N. Doc. S/RES/1031 (1995) (authorizing Member States, acting through NATO, or in cooperation with NATO, to establish the IFOR). The States concerned had already agreed to establish and deploy IFOR when they concluded the Dayton Peace Agreement. See General Framework Agreement for Peace in Bosnia and Herzegovina, U.N. S.C. Doc. S/1995/999, Annex (1995).

57. Safety Convention, *supra* note 3, art. 2(2), 34 I.L.M. at 487.

sive. As one of those involved in the drafting of the Convention explained, “[t]he negotiators realized that it was necessary to have a clear separation between the new legal regime under the instrument being drafted and the Geneva Conventions, so that U.N. and associated personnel and those who attack them would be covered under one regime or the other, but not both.”<sup>58</sup>

Although criticized by some commentators,<sup>59</sup> the basic principle underlying Article 2(2) is entirely understandable. Nevertheless, partly because of the way in which the provision is drafted, and partly due to problems of a wider nature, any attempt to draw a line between those U.N. operations to which the law of armed conflict applies and those which are subject to the new Safety Convention, is far from straightforward. The first problem is that Article 2(2) does not make the two legal regimes mutually exclusive. Article 2(2) excludes the application of the Safety Convention only in respect of “a United Nations operation authorized by the Security Council as *an enforcement action under Chapter VII of the Charter*.”<sup>60</sup> While most of the operations in which U.N. personnel become engaged as combatants against organized armed forces are likely to fall under Chapter VII of the Charter, that will not always be the case. Even a force established by the Security Council or the General Assembly without reference to Chapter VII of the Charter is entitled to use force in self-defense.<sup>61</sup> The United Nations has traditionally interpreted this right of self-defense very broadly, so as to justify not only the use of force to protect United Nations and associated personnel and property from attacks, but also to justify the use of force in response to armed resistance to the discharge of the force’s mandate.<sup>62</sup> A peacekeeping force which exercised this right of self-defense might well find itself engaged in protracted hostilities with organized armed forces, which would be subject to the law of armed conflict.<sup>63</sup> The Safety Convention would, however, also apply.<sup>64</sup>

58. Bloom, *supra* note 43, at 625.

59. See Sharp, *supra* note 5, at 158.

60. Safety Convention, *supra* note 3, art. 2(2), 34 I.L.M. at 487 (emphasis added).

61. See BOWETT, *supra* note 7, at 200-03. For a recent assertion of the principle, see *Report of the Secretary General on the Situation in Rwanda*, para. 15, U.N. S.C. Doc. S/1994/565 (1994).

62. See the discussion of self-defense in respect of U.N. operations in the Congo in the early 1960s in BOWETT, *supra* note 7, at 200-03.

63. See BOWETT, *supra* note 7, at 486, 503.

64. The applicability of the Safety Convention does not affect the operation of the laws of armed conflict. Article 20(a) of the Safety Convention provides that

Nothing in this Convention shall affect:

- (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in rela-

Moreover, Article 2(2) only removes an operation from the scope of the Safety Convention in a case where personnel are engaged as combatants in a situation to which the law of *international* armed conflict applies. Where the members of the U.N. force or associated personnel become embroiled in an *internal* armed conflict, it is arguable that their involvement is not subject to the law of international armed conflict because the entity against which they are using force is not itself a state. Such was the case in Somalia.<sup>65</sup> In many of the countries to which United Nations forces have been deployed in recent years, the dividing line between internal and international armed conflicts has been extremely difficult to determine. For example, it is arguable that in Haiti, any fighting between members of the U.N. force and the forces of the military junta which the United Nations sought to displace would have constituted hostilities between the U.N. force and the then government of Haiti, and would therefore have been an international armed conflict. In contrast, in Somalia, fighting between the supporters of General Aideed and the United Nations would not have been so characterized, because Aideed's faction was not even the *de facto* government of Somalia.<sup>66</sup> In the case of Bosnia-Herzegovina, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held that the hostilities had both internal and international aspects.<sup>67</sup> The difficulty in determining whether a particular conflict involving U.N. forces should be characterized as internal or international is not one for which the drafters of Article 2(2) can be blamed, but it is likely to make the application of that provision much more difficult.

A more fundamental problem with Article 2(2) is that it makes the application of the laws of international armed conflict one of the conditions for the Safety Convention ceasing to apply. The threshold for the applicability of the law of international armed conflict thus be-

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tion to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such laws and standards . . . .

Safety Convention, *supra* note 3, art. 20(a), 34 I.L.M. at 491.

65. It has, however, been argued that once armed forces from outside a state become involved in fighting within that state, even where they are fighting against a non-state entity, their involvement necessarily internationalizes the conflict and brings into operation the entire body of the 1949 Geneva Conventions and other rules applicable to international armed conflict. This approach appears to have been taken, for example, by the International Committee of the Red Cross on a number of occasions and by the United Nations itself in the Congo conflict in the early 1960s. See BOWETT, *supra* note 7, at 509-10.

66. Republic of Somalia v. Woodhouse, Drake and Carey [1993] Q.B. 54 (the High Court in England concluded, in March 1992, that there was no government in Somalia), *reprinted in* 94 I.L.R. 608 (1993).

67. Prosecutor v. Dusko Tadic, 35 I.L.M. at 55 (1996).

comes the ceiling for the operation of the Safety Convention. The trend of the last fifty years has been to make the threshold for the application of the laws of international armed conflict as low as possible. Common Article 2(1) of the 1949 Geneva Conventions provides that the Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties, even if the state of war is not recognized by one of them."<sup>68</sup> This provision is widely regarded as determining not only when the 1949 Geneva Conventions apply, but also when the customary law of international armed conflict comes into operation.<sup>69</sup> The application of the laws of armed conflict is, therefore, no longer dependent on the existence of a state of war.<sup>70</sup> The term "armed conflict," which is not defined in the 1949 Geneva Conventions, has generally been given a very broad interpretation. Thus, the widely respected commentary on the 1949 Geneva Conventions published by the International Committee of the Red Cross states that

[a]ny difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.<sup>71</sup>

There is some support in state practice for this view. For example, when a United States Navy pilot, Lieutenant Goodman, was shot down and captured by Syrian forces in Lebanon in 1983, the United States treated the brief exchange in which this incident had occurred as an armed conflict between the United States and Syria and claimed prisoner of war status for the pilot.<sup>72</sup> A State Department press release

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68. 1949 Geneva Convention I, *supra* note 6, art. 2(1), 6 U.S.T. at 3316, 75 U.N.T.S. at 32; 1949 Geneva Convention II, *supra* note 6, art. 2(1), 6 U.S.T. at 3220, 75 U.N.T.S. at 86; 1949 Geneva Convention III, *supra* note 6, art. 2(1), 6 U.S.T. at 3318, 75 U.N.T.S. at 136; 1949 Geneva Convention IV, *supra* note 6, art. 2(1), 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

69. See, e.g., WAR OFFICE (UNITED KINGDOM), *THE LAW OF WAR ON LAND: BEING PART III OF THE MANUAL OF MILITARY LAW* ¶ 7 (1958); Christopher Greenwood, *Scope of Application of Humanitarian Law*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 39, 39-44 (Dieter Fleck ed., 1995).

70. See Christopher Greenwood, *The Concept of War in Modern International Law*, 36 *INT'L & COMP. L.Q.* 283 (1987).

71. ICRC COMMENTARY ON THE FOURTH GENEVA CONVENTION, *supra* note 40, at 20-21.

72. See 3 CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW: 1981-88, at 3456 (Marian Nash (Leich) ed., 1989) [hereinafter CUMULATIVE DIGEST].



stated that “[a]rmed’ 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 . . . .”<sup>73</sup> The more substantial, though still shortlived, U.S. operations in Grenada in 1983 and Panama in 1989 were also treated by the United States as armed conflicts to which the 1949 Geneva Conventions and other rules of the law of armed conflict applied.<sup>74</sup>

Hitherto there has never been any suggestion that the level of violence required to constitute an armed conflict between the U.N. force and the forces of a state is any different from that which constitutes an armed conflict between the forces of two opposing states. If one applies the definition in the International Red Cross Commentary<sup>75</sup> to U.N. operations, as soon as the members of a U.N. force become involved in hostilities with the forces of a state, an armed conflict between them comes into being and the law of international armed conflict becomes applicable. The duration and intensity of the hostilities would be irrelevant, except perhaps in the sense that low level, isolated incidents, such as an exchange of fire by sentries, would not constitute an armed conflict. That approach would mean, however, that the operations carried out by the United Nations and NATO in support of the United Nations in Bosnia-Herzegovina were certainly sufficient to constitute an armed conflict between the United Nations and the Bosnian Serbs.<sup>76</sup> It follows that the law of international armed conflict applied to those hostilities, unless the armed conflict was not of an international character because the Bosnian Serb entity was not a state. It would be difficult to reconcile this approach with many of the public statements made by states involved in both the NATO and UNPROFOR operations about the nature of the armed conflict in Bosnia-Herzegovina and the law to be applied by the International Criminal Tribunal for the Former Yugoslavia.<sup>77</sup> Even if it could be ar-

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73. *Id.* at 3457.

74. On Grenada, see W. HAYS PARKS, DEPARTMENT OF THE ARMY, MEMORANDUM FOR THE VICE CHIEF OF STAFF, STATUS OF ENEMY PERSONNEL CAPTURED DURING OPERATION URGENT FURY in 3 CUMULATIVE DIGEST: 1981-88, *supra* note 72, at 3452-56. On Panama, see *United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992).

75. See ICRC COMMENTARY ON THE FOURTH GENEVA CONVENTION, *supra* note 40, at 20-21.

76. Those operations included sustained NATO air strikes against targets in Bosnian Serb-held areas on several occasions, and also some heavy fighting by UNPROFOR ground troops.

77. The Appeals Chamber of the Tribunal discussed this issue at length in *Prosecutor v. Dusko Tadic*, 35 I.L.M. 32 (1996). In that case it was argued that the Security Council had characterized the conflict in the former Yugoslavia as an international armed conflict in its entirety. While that argument was rejected by the Appeals Chamber, the Appeals Chamber did

gued that only the NATO airstrikes and not the ground operations by UNPROFOR itself reached the level of an armed conflict, that would not be sufficient to prevent Article 2(2) from removing the protection of the Safety Convention from UNPROFOR personnel, since Article 2(2) applies to the entirety of a United Nations operation if *any* of the personnel involved operate as combatants against organized armed forces in circumstances to which the law of international armed conflict applies.<sup>78</sup>

It is highly unlikely, however, that the drafters of the Safety Convention intended that the Safety Convention should not apply to attacks on U.N. personnel and associated personnel in a situation such as that in Bosnia-Herzegovina. On the contrary, it seems likely that the conflict in Bosnia-Herzegovina was precisely what the draftsman had in mind.<sup>79</sup> It is highly likely, therefore, that the desire to retain the applicability of the Safety Convention in situations such as Bosnia-Herzegovina will lead to a subtle raising of the threshold for the application of the law of international armed conflict, at least in cases in which the United Nations is involved. A degree of violence which, in the past, would certainly have been regarded as sufficient to constitute an international armed conflict will come to be regarded as something of a lesser nature if it involves U.N. forces. Such a development risks causing serious damage to the progress which has been made in widening the sphere of application of the 1949 Geneva Conventions and the other rules of the international law of armed conflict since the end of World War II.

#### IV. A RECONSIDERATION OF THE PLACE OF UNITED NATIONS FORCES IN THE LAW OF ARMED CONFLICT?

In his article *Protecting the Avatars of International Peace and Security*,<sup>80</sup> Professor Sharp argues for a fundamental reconsideration of the place of U.N. forces in the law of armed conflict and of the scope of application of the Safety Convention. Professor Sharp argues that the principle of equality of application, that is, the principle that the law of armed conflict applies equally to all the parties to an armed conflict irrespective of who is the aggressor, should not include the United Na-

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not exclude the possibility that at least some of the fighting which took place between Bosnian Serbs and the Bosnian government was subject to the law of international armed conflict. *Id.* at 57.

78. See Safety Convention, *supra* note 3, art. 2(2), 34 I.L.M. at 487.

79. Bloom expressly gives Bosnia as an example of a situation to which the Safety Convention would have applied had it entered into force in time. See Bloom, *supra* note 43, at 623.

80. Sharp, *supra* note 5.

tions.<sup>81</sup> To do so, he maintains, is to accept as lawful attacks upon members of U.N. forces, whom he sees as analogous to police officers in a domestic setting.<sup>82</sup> Since one would never accept that it was lawful to use lethal force against police officers and would reject any suggestion that the police officer and the criminal should be treated on an equal footing, why should one accept that the use of force against U.N. personnel is legitimate in international law? Professor Sharp argues that even when the United Nations takes enforcement action against a state and sends forces to engage in large-scale hostilities (as it did in Korea), any acts of violence against the members of that force should be regarded as criminal under international law.<sup>83</sup> He therefore proposes that the limitation in Article 2(2) of the Safety Convention be removed.<sup>84</sup> Indeed, he argues that the Safety Convention should be extended to operations *authorized* by the United Nations even if they are not under United Nations *control*.<sup>85</sup> Had Professor Sharp's views represented the law at the time of the Kuwait conflict, the result would have been that members of the Iraqi armed forces who committed acts of violence against coalition military personnel would have been guilty of a crime against international law, even if they had acted within the scope of the 1949 Geneva Conventions and the other laws of armed conflict.

It is important to understand that Professor Sharp is not arguing that his views represent the current state of international law. Moreover, he does not argue that the law of armed conflict is inapplicable to U.N. forces engaged in hostilities. Under his proposal, such forces would still be required to conduct their own operations in accordance with the law of armed conflict, but the equality of application, one of the essential features of the law of armed conflict, would be lost: it would be lawful for coalition military personnel to kill an Iraqi soldier, but unlawful for an Iraqi soldier to kill coalition military personnel.

There is considerable logical force to Professor Sharp's argument. The principle that the laws of armed conflict apply equally to both parties to an armed conflict, irrespective of who is the aggressor, is difficult to reconcile with the general legal principle *ex injuria non oritur jus*.<sup>86</sup>

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81. *See id.* at 165.

82. *See id.* at 96.

83. *See id.* at 163-67.

84. *See id.* at 158.

85. *See id.* at 157-58.

86. "An unlawful act cannot give rise to a legal right on the part of the actor" (author's translation).

While the difficulty of determining in many cases which state is the aggressor and which the victim of aggression might justify the principle of equal application in conflicts between states, the principle underlying Professor Sharp's proposal must surely be that the United Nations, representing the international community as a whole, stands on a different footing, so that any use of force against its representatives should be illegal.

Despite its apparent logic, Professor Sharp's theory is a dangerous one which is open to criticism on several grounds. First, the principle of equal application has been reaffirmed by the international community on numerous occasions since resort to aggressive war was outlawed. For example, in several of the war crimes trials which took place after World War II, it was argued by the prosecution that since the Axis powers were guilty of aggression in initiating war against their neighbors, they could not then take advantage of the provisions of the *jus in bello* and derive rights therefrom.<sup>87</sup> That argument was decisively rejected in all of the principal war crimes trials in which it was advanced.<sup>88</sup> Again, during and immediately after the Vietnam War, it was argued by North Vietnam that an aggressor was not entitled to benefit from the laws of armed conflict, yet at the 1974-77 Diplomatic Conference on Humanitarian Law, that view attracted no support at all: Protocol I reaffirmed, in its Preamble, the principle that "the provisions of the Geneva Conventions . . . 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 or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict."<sup>89</sup>

Secondly, Professor Sharp's analogy between the United Nations and the police in a domestic society is not as exact as one might wish. International society does not replicate the features of a national community and the United Nations does not at this stage command the degree of support and respect for its authority which is accorded to the organs of government within most national societies. In these circumstances, to treat members of a state's armed forces who take up arms under the orders of their government to resist forces controlled or authorized by the United Nations as criminals is unjust and unaccept-

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87. See, e.g., *United States v. List*, 15 ANN. DIG. & REP. PUB. INT'L L. CASES 632 (1948); *In re Krupp*, 15 ANN. DIG. & REP. PUB. INT'L L. CASES 620 (1948); *United States v. Von Leeb*, 15 ANN. DIG. & REP. PUB. INT'L L. CASES 376 (1948).

88. See cases cited *supra* note 87.

89. See Protocol I, *supra* note 14, 1125 U.N.T.S. at 7, 16 I.L.M. at 1396.

able unless they commit acts which would be violations of the 1949 Geneva Conventions or other rules of international law. That is not to say, however, that the state which employs force against the United Nations should not be penalized for doing so. Such action is a violation of a state's duties under the U.N. Charter and general international law, and there is no reason why the state should not be subject to some kind of penalty for its wrongful act, just as Iraq was penalized for its illegal acts in invading Kuwait and causing the conflict which ensued with the coalition forces.<sup>90</sup> Similarly, it would not be unreasonable to impose criminal responsibility upon the individual members of the state's leadership who were responsible for taking these decisions, much as the Nuremberg Tribunal held the highest ranking members of the German leadership responsible for crimes against the peace after World War II.<sup>91</sup> Both the Nuremberg Tribunal and later war crimes trials, however, rejected the argument that a similar liability for crimes against the peace should extend down the chain of command.<sup>92</sup>

Finally, from a pragmatic standpoint, the principle of causal application should be maintained as a powerful inducement to compliance with the law, because everyone whose action is constrained by the law also receives the benefit of that law's protection. To depart from that principle would be likely to undermine respect for the law. As Sir Hersch Lauterpacht, who was initially skeptical about the application of the principle of equality in the United Nations Charter era, put it more than forty years ago, "[i]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them."<sup>93</sup> Professor Sharp's proposal does not go as far as the one that Lauterpacht was rejecting, since Pro-

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90. See S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991) (imposing a variety of penalties on Iraq, ranging from a finding of responsibility for the damage caused by military operations conducted by both sides during the conflict, to a requirement that Iraq dismantle part of its military capabilities).

91. See JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN WAR CRIMINALS, CMD. 6964, (His Majesty's Stationery Office, 1946) [hereinafter JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL].

92. Thus, in *United States v. Von Leeb*, *supra* note 87, a United States military tribunal rejected the argument that members of the German High Command were guilty of crimes against the peace, since their actions were confined to implementing decisions taken by Hitler's inner circle. The International Military Tribunal acquitted Speer, the German armaments minister of crimes against the peace for the same reason. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 91, at 130-31.

93. Lauterpacht, *supra* note 20, at 212. For Lauterpacht's earlier views, see 2 OPPENHEIM'S INTERNATIONAL LAW 217-22 (7th ed. 1952).

fessor Sharp would still hold U.N. forces bound by the laws of armed conflict and would only seek to add a principle that those who commit acts of violence against them are guilty of a crime.<sup>94</sup> But the effect of Professor Sharp's proposal would nonetheless be to destroy the principle of equal application. If any attack on U.N. personnel by any means whatsoever is a crime for which an ordinary soldier can be prosecuted in any country in the world, then it is difficult to see what inducement there is for such persons to comply with the requirements of the 1949 Geneva Conventions, the law on weaponry, or any of the other principles of the law of armed conflict.

In short, there is a grave danger that Professor Sharp's proposal to criminalize all attacks on U.N. personnel or forces authorized by the United Nations, even where those forces are engaged in fighting a war on the scale of that against Iraq, would be widely perceived as unjust and encourage an approach that one might as well be hanged for a sheep as a lamb. If that were the case, it is difficult to see how this proposal would enhance the protection of peacemakers. That this risk is real is shown by the readiness with which those who had responsibility for protecting personnel fighting on behalf of the United Nations in Korea and Kuwait accepted that they were subject to the same principles of international law as their adversaries, in part because they were concerned to ensure that their own personnel received the treatment required by the law of armed conflict.<sup>95</sup>

## V. CONCLUSION

The development of a satisfactory legal regime which offers adequate protection to those who risk their lives to keep the peace on behalf of the international community is a matter of the utmost importance. At present, the legal regime is confused and in many respects unsatisfactory. However, three elements can be discerned.

First, the status of U.N. forces under the 1949 Geneva Conventions and the law of armed conflict is in many respects unclear, except where those forces are engaged as combatants on one side in a conflict such as that in Korea or Kuwait. In that case, the present state of international law (as Professor Sharp agrees) is that U.N. forces are subject to the laws of armed conflict in the same way and to the same extent as any other armed forces. In particular, the law applies equally to the U.N. forces and the forces against which they are engaged.

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94. Sharp, *supra* note 5, at 163-67.

95. See BOWETT, *supra* note 7, at 53-57; see also BAILEY, *supra* note 12, at 444.

Secondly, where U.N. forces are not engaged as combatants on one side in an armed conflict, it is nevertheless possible to deduce some elements of protection from the provisions of the 1949 Geneva Conventions, other international agreements and the customary international law applicable to armed conflicts. In most cases, however, that protection is not tailored to the specific situation of U.N. forces but relies upon an application to them of broader general principles. The result is unsatisfactory, since the legal regime concerned is insufficiently detailed and in some respects does not adapt well to the needs of U.N. peacekeepers or the circumstances in which they operate.

Thirdly, the new Safety Convention adds an important level of protection for U.N. forces and associated personnel who become caught up in an internal or international armed conflict and are made the target of acts of violence. However, the application of the Safety Convention is likely to prove extremely difficult in those cases in which U.N. forces or associated personnel become involved in fighting, but where it is not clear that they have become engaged as combatants in an international armed conflict. The application of the limitation in Article 2(2) of the Safety Convention will require great care if the result is not to be significantly to weaken both the protection of the Safety Convention and the protection offered by the law of armed conflict.

While Professor Sharp and I agree that there are serious deficiencies in the existing legal regime, I do not believe that the answer lies in making a radical departure from the principle that the laws of armed conflict apply equally to both parties in an armed conflict. 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.

