

# War in (Another) New Context: Postmodernism

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## International Humanitarian Law and Peace Support Operations: Bridging the Gap

by  
Ray Murphy

### INTRODUCTION

Here is hand to hand struggle in all its horror and frightfulness: Austrians and Allies trampling each other under foot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet. No quarter is given; it is sheer butchery, a struggle between maddened beasts with blood and fury. Even the wounded fight to the last gasp. When they have no weapons left, they seize their enemies by the throat and they tear them with their teeth. (Henry Dunant, *A Memory of Solferino*).

The quote may seem at first to be somewhat out of place in an article dealing with peacekeeping and other military action undertaken by or on behalf of the UN. Since the end of the Cold War, the UN's willingness to pursue its role in the maintenance of international peace and security by the adoption of military solutions has increased significantly. Recent UN operations have had more in common with the operation conducted in Korea, or the enforcement measures carried out in the Congo during the 1960s, than with the more traditional peacekeeping forces prevalent during the 1970s and 1980s.<sup>1</sup> When one looks at the actual combat engaged in by the United States Rangers in Mogadishu during their attempt to capture one of the leading warlords, General Aidid; or the coalition forces during the Gulf War of 1991, then Dunant's scenario may not be so far from the reality for the soldiers involved at first hand.

This article sets out to examine the applicability and relevance of international humanitarian law (humanitarian law) to all types of military action undertaken by or on behalf of the UN.<sup>2</sup> The article focuses primarily on the UN enforcement operation in Somalia, and, by way of contrast, the more traditional peacekeeping operation in Lebanon (UNIFIL). Owing to the controversy surrounding action by UNOSOM forces in Somalia, the question of respect for the principles of humanitarian law by UN forces has been the subject of controversy and debate.<sup>3</sup> Although the reasons for this turn of events are a source of regret,

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the actual result in heightened awareness is welcome. The less controversial traditional peacekeeping missions can also involve important issues of humanitarian law, especially when the situation that UNIFIL found itself in after the Israeli invasion of 1982 is considered. One of the major stumbling blocks for peacekeeping troops is that the relevant principles are enshrined in international instruments governing the conduct of combatants engaged in armed conflict of an international or non-international character. To use a military metaphor, the target of these rules is the combatant or participator, not the peacekeeper or observer.

Although originally there was some doubt about the applicability of humanitarian law to UN forces, it is now generally accepted that UN forces are bound by humanitarian law, whether performing duties of a peacekeeping or enforcement nature.<sup>4</sup> The UN has declared its commitment to the application of humanitarian law to peacekeeping operations, but it has consistently taken the position that UN forces act on behalf of the international community, and therefore they cannot be considered a “party” to the conflict, nor a “Power” within the meaning of the Geneva Conventions.<sup>5</sup> To accept that peacekeepers were parties to a conflict would at the very least mean a loss of impartiality. The mere presence of UN peacekeeping soldiers in an area of conflict or a theatre of war, while performing a humanitarian or diplomatic mission, does not necessarily mean that humanitarian law binds these troops.<sup>6</sup> The UN, as an international organization, is not in a position to become a party to the Geneva Conventions or Additional Protocols. This would entail binding the Organization to detailed provisions that are aimed at states, and do not fit the role and function of an international organization. Notwithstanding its international legal personality, the UN is not itself a state and thus, it does not possess the juridical or administrative powers to discharge many of the obligations laid down in the Conventions.<sup>7</sup> It also lacks the legal and other structures for dealing with violations of humanitarian law. Nor does it possess the competence to recognize that an armed conflict invoking the application of the Geneva Conventions exists.<sup>8</sup> However, this does not mean that the conduct of hostilities by UN forces will be free from humanitarian constraint or that humanitarian law considerations do not apply.<sup>9</sup>

In addition to the above, another serious obstacle confronting those charged with ensuring compliance with humanitarian law norms is to make the rules establishing such norms accessible and relevant to those most responsible for their implementation, i.e., the soldiers on the ground. The language of the international instruments in question is often obtuse and unintelligible.<sup>10</sup> The principles enshrined in these instruments, when combined with a “dumb down” approach for classroom instruction, are often presented in a half-hearted and “touchy feely” way that makes the instructors and principles involved appear out of touch with reality.

In considering the applicability of humanitarian law to UN operations, a number of questions arise for consideration. First, what international law applies

to the conflict or situation in the country where the UN force is deployed? Second, what international law regulates the conduct of the UN force itself and how is this determined? And third, what can or should the UN force do when it becomes aware that parties in the country where it is deployed are violating applicable international law? (The answer to this question will be dependent in part on the mandate of the force.) The question may also be posed as to whether there is any useful purpose served in applying humanitarian law to peacekeeping and similar forces whose mission is to restore or maintain a peaceful environment in a crisis area? And if these principles of law have a role, how can this be evaluated and improved to make it an accepted part of the conduct of all those involved, even if not actually participating in, armed conflict that may be either international and non-international in character. The answer to these questions is of direct relevance to Canadian and other troops as it will determine the standards that they will be required to uphold in order to comply with the relevant international obligations.<sup>11</sup> There is also the issue of the appropriate use of force and rules of engagement, and in what circumstances could the use of force constitute a grave or other breach of the Geneva Conventions and/or Additional Protocols. These are real issues confronting today's peacekeepers, but especially those participating in the so-called "robust" peacekeeping operations similar to that of UNOSOM II in Somalia. A failure to comply with applicable humanitarian law could result in those involved in peace support operations being tried by an appropriate national court, a foreign national court or an international tribunal/court on criminal charges or for war crimes, irrespective of the categorization of the conflict as internal or international in character.<sup>12</sup>

## **HUMANITARIAN LAW AND ARMED CONFLICTS**

In recent years various Security Council resolutions have called upon "all the parties to the conflict" to respect humanitarian law.<sup>13</sup> The UN Secretary-General has also issued a Bulletin to the effect that the fundamental principles and rules of humanitarian law are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants.<sup>14</sup> However, in situations where that law does not apply, the international accountability of such groups for human rights abuses remains unclear (though such acts would be criminalized under domestic criminal law). However, since the coming into force of the Rome Statute of the International Criminal Court (ICC), in certain circumstances peacekeepers will be subject to the jurisdiction of the Court.<sup>15</sup>

Unfortunately, there is now ample evidence that UN forces in Somalia did perpetrate or engage in conduct and practices that were contrary to humanitarian law.<sup>16</sup> Human rights are a key issue in guaranteeing consistent and effective peacekeeping.<sup>17</sup> Nothing can be more contradictory than a UN force transgressing international humanitarian law standards that have been gradually and painstakingly agreed upon during the last 60 years.

The status of a UN or similar force depends on the underlying authority upon which the force is present in the receiving state and on the nature and mission of the force.<sup>18</sup> Under existing law, a UN peacekeeping operation is considered a subsidiary organ of the UN, established pursuant to a resolution of the Security Council or General Assembly. As such, it enjoys the status, privileges, and immunities of the Organization provided for in Article 105 of the UN Charter, and the UN Convention on the Privileges and Immunities of the UN of 13 February 1946.<sup>19</sup> The legal framework for UN forces is usually made up of the following:

- The resolution of the Security Council or the General Assembly;
- The Status of Force Agreement between the UN and the host state;
- The agreement by exchange of letters between each of the participating states and the UN; and
- The regulations for the force issued by the Secretary-General.

However, as UN forces are more often than not deployed in situations of conflict, determining what situations constitute “conflict” under international law, and the laws governing UN and other forces present or participating as combatants in such situations is a vital issue. Humanitarian law will also provide a certain level of protection to UN forces, depending on the degree of involvement and the nature of the conflict.<sup>20</sup>

None of the existing Geneva Conventions or Additional Protocols address the specific issues of UN forces, or forces acting on the authority of the UN, in situations of armed conflict. It could be said that this situation leaves military forces acting under the control of the UN in somewhat of a limbo. However, the *Institut de droit internationale* has confirmed that the rules of the “law of armed conflict” apply as of right and they must be complied with in every circumstance by UN forces engaged in hostilities.<sup>21</sup> If the UN is considered the sum of its parts, then it comprises states. In this way a conflict involving the UN must also engage individual states acting for or on its behalf. The UN is clear that it is capable of being internationally responsible for an internationally wrongful act.<sup>22</sup> While the obligation to comply with the Conventions could be viewed as falling simply on the states concerned, it does not seem correct to allow the Organization under whose control and upon whose authority and behalf the states are acting, to evade responsibility.<sup>23</sup> There should be no doubt that an organization is responsible for the delictual acts committed by that organization, but not all acts or conduct can be attributable to the organization. Unlike a state, it must be kept in mind that an international organization’s capacity to act is functional, not sovereign.<sup>24</sup>

## **International and Non-International Armed Conflicts**

Although it may be argued that the distinction between international and non-international armed conflict has lost much of its significance,<sup>25</sup> it is submitted that this is an overly optimistic assessment and determining whether a conflict can be characterized as internal or international can still be critically important.<sup>26</sup> This arises from the fact that the rules applicable during internal conflicts remain rudimentary and skeletal compared to those that apply to international conflicts.<sup>27</sup> The International Court of Justice decision in the *Nicaragua case* illustrates how far the evaluation of conflict status has shifted from dependence on the classification by the sovereign state alone toward neutral external measurement by international bodies.<sup>28</sup> Distinguishing between international and non-international armed conflict in contemporary situations remains difficult,<sup>29</sup> and this is evidenced by the contradictory decisions of the different chambers of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on the nature of the conflict in the former Yugoslavia.<sup>30</sup>

In all of these developments the impact of humanitarian law on UN forces does not seem to have been given serious consideration.<sup>31</sup> While the intensity and classification of the conflict are fundamental determiners of the application of humanitarian law where UN forces are deployed, they can also be an important determiner of UN military involvement in intra-state conflicts in the first place. UN forces can find themselves deployed in complex political situations where the international legal framework within which they must operate is anything but clear. Despite claims to the contrary, this is all the more so when it is considered that humanitarian law does not apply to most kinds of UN military activities.<sup>32</sup> Recent UN operations have involved authorized and mandated operations mounted in situations of conflict where clashes involving local actors or parties and UN soldiers were inevitable. These have left casualties on both sides, and they have involved both combatant and non-combatant alike. Often the parties to such conflicts have undergone a sustained period of bitter and bloody conflict. Many combatants are not soldiers of regular armies but militias or groups of armed civilians with little discipline and an ill-defined command structure.<sup>33</sup> Fighters of this nature do not always fit easily into the matrix of humanitarian law combatant status. There is also the vexed question of responsibility for the actions or omissions of UN soldiers in the field, and what to do when confronted with human rights abuses on a large scale. In this way, the matter of the applicability of humanitarian law to UN forces is of much more than academic interest. It is directly relevant to states contributing contingents, and to the UN itself, even if it is not formally a party to the relevant international treaties.

## **The UN and the Maintenance of International Peace and Security**

The maintenance of international peace and security is one of the primary purposes of the UN. Chapter VI and VII are significant in this regard, and

Chapter VII permits the Security Council to decide on coercive measures or undertake enforcement action against a state or states in response to breaches of the peace or acts of aggression. The importance attached to the Security Council's power to order military measures did not stem from expectations that it would often be necessary to do so.<sup>34</sup> Nevertheless, although the military agreements envisioned under Article 43 of the Charter did not materialize, the UN has had a significant involvement in military operations of one kind or another since the first major UN authorized operation during the Korean conflict in 1950.

It is important at the outset to make a distinction between peacekeeping and enforcement action. However, this distinction can be somewhat blurred in certain instances. This is complicated by the grey area that exists between peacekeeping and so called "peace enforcement." With the end of the Cold War this distinction has become further blurred. Prior to 1990, the UN had authorized two enforcement missions, that against North Korea in 1950 and the Congo in 1960 (ONUC).<sup>35</sup> It has since approved a number of major operations with similar characteristics, in Kuwait, Somalia, the former Yugoslavia, Kosovo, East Timor, Albania,<sup>36</sup> the Central African Republic and Sierra Leone. However, some of these are UN mandated forces, while others are merely authorized "coalitions of the willing."<sup>37</sup>

In addition, since 1985 there has been a significant increase in the number of peacekeeping missions established, with a corresponding increase in the complexity of the mandates. These are often referred to as "second generation" peacekeeping operations.<sup>38</sup> The resolution of internal or domestic conflict has been a dominant feature of recent operations that involved the establishment of democratic governments culminating in the nation building attempted for a time in Somalia. Any interventions by UN forces may, intentionally or otherwise, alter the delicate balance of power between the warring parties. The UN may then be perceived as not impartial or even hostile.<sup>39</sup> Maintaining impartiality can present peacekeepers with a dilemma, especially when they confront situations in which civilians are victimized, or when UN forces are themselves the subject of attack.<sup>40</sup> The question of consent to a UN presence is particularly problematic in those situations, and the blue berets involved must be prepared to resort to force rather than be bystanders to large-scale human rights abuses or even genocide. In this way, the continuum from peacekeeping to peacemaking and enforcement can be difficult to track, but when all else fails and the political will exists, the Security Council may resort to the use of force under Chapter VII of the UN Charter.

UN forces can take on many different forms, but the status and nature of a force is important to evaluating the relevance and applicability of humanitarian law principles. The difference between peacekeeping and enforcement action operations is fundamental, but second generation operations, which while not constituting enforcement action as originally envisaged under the Charter, pos-

sess certain of the characteristics of both types of operations. There is also the problem of distinguishing between UN mandated operations and those merely authorized to be carried out by coalitions of the willing. These issues are important in determining the extent, if any, of the application of humanitarian law to UN forces. However, the fundamental question regarding the application of humanitarian law remains the existence of an armed conflict. Ultimately, it is the fact of participation in hostilities, not the existence of authority to do so that is significant.<sup>41</sup>

### **Peace Enforcement Operations**

In more recent years, when the UN has decided to react to international crises but the resources are not available, the Security Council has authorized groups of states to organize “peace enforcement” operations with specific goals in mind. The operations in question, while not constituting enforcement action as originally envisaged under the Charter, owed much to the half-way house suggested by Boutros-Boutros Ghali in his original *Agenda for Peace* document.<sup>42</sup> In all cases, the relevant resolutions of the Security Council made specific reference to Chapter VII of the Charter. Furthermore, the military action concerned was conducted by states outside their own national borders and in the territory of a foreign country, while being authorized by the UN. In this way it could not be said to constitute aggression or the illegal use of force contrary to international law. The military operations were similar to conventional operations involving coalition forces under a complex but essentially unified operational command structure and intended to be governed by the Geneva Conventions and Additional Protocols, and the international law of armed conflict as a whole.<sup>43</sup>

In addition, as discussed above, it is an accepted principle of humanitarian law that it applies in equal measure to all parties involved, irrespective of any other consideration, including the issue of the legality and objective of the resort to the use of force. There would seem to be broad agreement that humanitarian law norms do apply to UN military operations.<sup>44</sup> This view is supported by the terms of the relevant Conventions. There is no doctrine of ends and means in the application of humanitarian principles, and the terms of the Geneva Conventions require that “the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances.”<sup>45</sup> Not every armed confrontation triggers the application of humanitarian law, but states involved are obliged to ensure its strict implementation once the threshold of “armed conflict” has been reached.

### **HUMANITARIAN LAW AND UN OPERATIONS**

D.W. Bowett addressed the issue of the application of the law of armed conflict to operations by UN forces by examining two preliminary questions: first, what different types of functions a UN force may assume; and, secondly,



the question of the different types of command structure that may be adopted for a UN Force.<sup>46</sup> An analysis of the different types of functions that may be entrusted to UN Forces suggests that the application of the laws of armed conflict may be relevant to certain types of functions, but not to others. The most fundamental difference to identify in the first instance is that between enforcement action under Chapter VII of the Charter and traditional peacekeeping, though as previously stated, in recent years the distinction is less clear. It is still worthwhile making this initial distinction and dealing in the first instance with enforcement action. Bowett's two questions are also inextricably linked, as the command structure will largely depend on the function of the force.<sup>47</sup> A further complication arises by virtue of the kind of operations conducted under Chapter VII and intended to be enforcement action in nature, despite the failure to conclude the requisite agreements with the UN under Article 43 of the Charter.<sup>48</sup> The issue of who commands the force, the UN or the states concerned, is especially relevant in operations involving "coalitions of the willing."<sup>49</sup>

More significantly, from the point of view of the applicability of humanitarian law, nowhere in Chapter VII, and Article 42 in particular, is "war" mentioned. It refers to "such action by, sea, air or land forces as may be necessary . . . [and] may include demonstrations, blockade, and other operations by air, sea or land forces of members of the UN." The obvious implication of this is that military action taken by the UN is not to be regarded as "war," and this was the commonly accepted view of the UN action in Korea.<sup>50</sup> Given the intensity of the hostilities during the conflict, this point may seem somewhat esoteric and academic to the ordinary person on the street, or to the soldier acting under UN "command."<sup>51</sup> The tendency to view conflicts of this nature as other than war may also confuse the issues somewhat and have its origins in the old just war theory. The problem with this is that it may justify the use of violence on a massive scale, and indirectly undermine humanitarian law principles by failing to view those against whom the military action is being taken as equally deserving of their protection.

Writing in 1964, Bowett stated that "there [was] no known case in which the UN Command ever claimed exemption from any of the accepted rules of the laws of war, customary or conventional."<sup>52</sup> In fact, there appears to be no record of the UN ever claiming that humanitarian law does not apply to operations authorized by or undertaken on behalf of the Organization. But the policy of the UN with regard to the applicability of humanitarian law to forces under its command or operational control is still ambivalent.<sup>53</sup> The end of the Cold War has not brought the realization of the early optimism associated with that event, and the ambitions for the UN and the Security Council reflected in the Secretary-General's *Agenda for Peace*,<sup>54</sup> did not materialize. A more sobering and reflective sequel to this was published a short time later in which the Secretary-General acknowledged certain limitations. In particular, the limited ability of the Security Council and office of the Secretary-General to deploy, direct, command,

and control enforcement action operations in response to threats to the peace, breaches of the peace, or acts of aggression. The consequences of this are well-known, but worth restating. International and internal armed conflicts have continued to flare around the globe, and one of the ironies of the end of the Cold War is that local or internal conflicts have increased.<sup>55</sup> With the UN's inability to respond effectively to these crises, the Security Council has left the establishment and management of international forces to individual member states, in particular the United States. These operations are outside the formal framework of the Organization, and come under the umbrella of traditional and reciprocal inter power relations to which humanitarian law naturally applies.<sup>56</sup> In some of these cases, for example, the UN has divested itself explicitly of its competence in leading enforcement actions and has instead "authorized" member states to undertake enforcement measures by use of force. The two best known instances are the Korean and Gulf conflicts of 1950 and 1991 respectively. Some have described the action by the Security Council as a form of abdication of responsibility, with little or no command and control by the UN, and no strategic direction either.<sup>57</sup> Not surprisingly, the matter of enforcing humanitarian law was left to the contributing states. Given the universal nature of the principles, this should not prove problematic, but a lot will depend on the country concerned and the level of importance attached to dissemination and training among the armed forces. Such an arrangement cannot be regarded as satisfactory, and it raises the issue of UN responsibility for violations of international law in such instances.

The UN is, however, a separate legal person from and additional to its member states, and it is not simply an aggregation of those states.<sup>58</sup> Once the existence of international personality and rights is conceded, it is not difficult to infer that this will also entail obligations. In the *WHO Agreement Case* the International Court of Justice specifically referred to the existence of obligations at customary international law for international organizations.<sup>59</sup> There are situations where the UN would be responsible under customary international law for acts of persons or armed forces acting under its control.<sup>60</sup> In fact, there have been claims by states against the UN arising from violations of international law during the ONUC (Congo) operation that were later settled by negotiation.<sup>61</sup>

The UN has generally accepted responsibility for illegal acts that may have been committed by armed forces (belonging to member states) acting under its control.<sup>62</sup> Imputability to the UN is possible when national contingents become organs of the UN by being placed under its authority and control. This does not happen when a country or countries retain control of a military force, as in the Gulf War, even if acting in the execution of a UN decision. Where national contingents come together to form "coalitions of the willing" in such cases, but do not become organs of the UN, or fall under its command and control, then the UN cannot be held responsible for their acts.<sup>63</sup> In such cases, the acts of military forces remain the responsibility of the states concerned. However, definitive statements remain problematic due to the linkage with the complex issues sur-

rounding the command and control of UN forces, and a lot will depend on the facts of a case.<sup>64</sup> In the meantime, the control test retains its central role in determining liability, and in some cases may even allow for concurrent responsibility because of a limbo status involving an ill-defined form of dual control.<sup>65</sup>

### **The United Nations Position**

In 1994, as Serb troops advanced on the UN declared “safe area” of Bihac, the municipal hospital stood in the middle of their line of advance.<sup>66</sup> The Canadian Commander of the UN forces was reluctant to intervene. The UN forces civil affairs officer, an American, urged that the hospital should be protected owing to its special status under the Geneva Conventions and that UNPROFOR had a duty to protect it. He drafted a memorandum to this effect to his superior in Sarajevo who then instructed Bangladeshi troops to take up positions with their armoured personnel carriers around the hospital. The Serbs refrained from attacking the hospital, and bypassed Bihac in the process.

Two weeks later, the UN Office of Legal Affairs issued a statement to set the record straight and ensure that the “Bihac incident” did not set any precedents. UN forces are bound only by their Security Council mandate, and they are not legally obliged to uphold the Geneva Conventions. From a strictly legal point of view, obligations arising under humanitarian law are binding on states. Article 103 of the UN Charter may also be relied upon to support the argument that the obligations arising under the UN Charter on member states (including those arising from Security Council resolutions), take precedence over other international treaties, including the Geneva Conventions and Additional Protocols.<sup>67</sup> The role of the UN is to carry out the will of the international community as expressed by the Security Council.<sup>68</sup> When states assign troops to peacekeeping duties, they are under the command or operational control of the Security Council. This may be the theory, but even a superficial knowledge of UN peacekeeping indicates that the reality is much more complex. Few states ever relinquish full operational control to the UN.<sup>69</sup>

The “Bihac incident” illustrates the UN’s ambivalent attitude to humanitarian law. Not surprisingly, it has been a source of tension between the ICRC and the UN. The UN has declared its commitment to the application of humanitarian law to peacekeeping operations, but it has consistently taken the position that UN forces act on behalf of the international community, and therefore they cannot be considered a “party” to the conflict, nor a “Power” within the meaning of the Geneva Conventions. The mere presence of UN peacekeeping soldiers in an area of conflict or a theatre of war, while performing a humanitarian or diplomatic mission, does not necessarily mean that humanitarian law binds these troops.<sup>70</sup>

In addition, the UN is not in a position to become a party to the

Conventions or Additional Protocols as this would entail binding the Organization to detailed provisions that are aimed at states, and do not fit the role and function of an international organization.<sup>71</sup> Notwithstanding its international legal personality, the UN is not itself a state and thus, it does not possess the juridical or administrative powers to discharge many of the obligations laid down in the Conventions.<sup>72</sup> However, this does not mean that the conduct of hostilities by UN forces will be free from humanitarian constraint or that humanitarian law considerations do not apply.<sup>73</sup> While a relevant factor in determining how UN forces will implement humanitarian law, it is not a reason for concluding that it cannot be applicable to them.<sup>74</sup>

The ICRC has been instrumental in obtaining agreement from the UN that international forces acting under UN authority would do so in accordance with the “principles and spirit” of relevant law.<sup>75</sup> But once a provision to this effect was incorporated in the Regulations of the Force and in the agreements with troop contributing states, it did not entail the direct responsibility of the UN to ensure respect for humanitarian law by members of its forces. In this regard the relatively recent UN Model Agreement with troop contributing states and the Model Status of Force Agreements between the UN and host states now include an express provision to this effect.<sup>76</sup> Under that provision, the UN undertakes that the operations of the force in question will be conducted with full respect for the principles and spirit of the general international conventions applicable to the conduct of military personnel.

While these developments are welcome, they fail to address the fundamental questions, and more importantly, it seems to suggest that the UN does not have a duty to monitor the behaviour of third parties. The “Bihac incident” already referred to confirms this policy.<sup>77</sup> This is crucial, as the military culture requires that such duties be spelt out in clear terms. There is, however, a lack of consistency in this regard, as UNIFIL did monitor the behaviour of Israeli forces in Lebanon after the 1982 invasion.<sup>78</sup>

The Secretary-General’s Bulletin on the observance by UN forces of humanitarian law does go some way toward addressing these problems.<sup>79</sup> It adds significant weight to the ICRC position and it is important in terms of legal certainty by giving obligations substance. Bulletins of this nature are intended to be legally binding on UN personnel, in this case UN forces.<sup>80</sup> Section 1 of the Bulletin states that:

The fundamental principles and rules of international humanitarian law set out in the present Bulletin are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peace-keeping operations when the use of force is permitted in self-

defence.

The categorization of UN troops as combatants in certain instances may seem unusual, especially to troop contributing states. However, this Bulletin must be judged in the context of the 1994 Convention on the Safety of UN and Associated Personnel, and there is a problematic overlap in the respective regimes covered.<sup>81</sup> Both are incompatible because they are based on fundamentally different principles. The objective of the Convention was to protect UN personnel and ensure immunity from attack for other than those engaged in enforcement operations under Chapter VII involving combat against organized armed forces; while the remit of humanitarian law is much broader and respects the combatants' privilege to attack enemy forces once the general rules of international law are followed, and is based on the cardinal principle that combat forces are treated equally.<sup>82</sup>

The Bulletin appears to say that when UN forces, for whatever reason, are required to resort to the use of force in armed conflict situations, then humanitarian law will apply. What degree, intensity, and duration of force are required is unclear, but some threshold must exist and be crossed before triggering the application of humanitarian law. Commanders and soldiers will still find themselves in a kind of legal no man's land trying to determine in the first instance if the situation can be classified as one of armed conflict, and then whether or not the use of force was sufficient to change their status from that of peacekeeper or peace enforcer, to that of combatant. No pocket book of humanitarian law of the kind usually supplied to military personnel will supply easy answers to these questions.<sup>83</sup> At least paragraph 9 (4) should provide an answer to those that would see the UN stand by in situations that arose in Bihac. Under these provisions, the UN shall in all circumstances respect and protect medical personnel and wounded.<sup>84</sup> This places a clear onus on peacekeepers to intervene and actively accept responsibility for the protection of these categories of persons.

The Bulletin also commits the UN to ensuring that members of military personnel are fully acquainted with the rules of humanitarian law. It accepts co-responsibility with the contributing states for this whether or not there is a Status of Force Agreement. What liability the UN may be subject to for breach of this duty is unclear. Most important, however, is Section 4 which says in effect that it is the responsibility of the national courts to prosecute military personnel for violations of humanitarian law. This means that the UN will not be required to establish a special tribunal to consider violations of humanitarian law by UN troops, and the *status quo ante* remains.<sup>85</sup>

What practical effect this Bulletin will have with the UN forces on the ground and the policy of contributing states remains to be seen. Does it impose a wider duty on UN forces to intervene to prevent violations of humanitarian law by third parties in the absence of a specific provision to this effect in the mandate? Common Article 1 of the Conventions provides that "the High Contracting

Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>86</sup> It can be argued that this, and a similar provision in Protocol I, places a duty on UN forces to take action to prevent such violations.<sup>87</sup> Although this may not have been the original intention of the negotiators of the Conventions<sup>88</sup> and Protocol, is such an interpretation supported by the agreement to respect and observe the “spirit and principles” of humanitarian law and the recent Secretary General’s Bulletin? It would seem that the UN remains reluctant to acknowledge a duty to intervene in such circumstances,<sup>89</sup> and that the Bulletin acknowledges such a duty in very limited circumstances. Recent Security Council resolutions have acknowledged the potential need for UN forces to protect civilians, but this does not amount to acknowledging a legal obligation to do so without more.<sup>90</sup> In this way, as the law currently stands, a UN force is not under a general legal duty to intervene on behalf of victims of violations of applicable law in its area of operations, unless the mandate of the force provides otherwise.

The real problem for the UN is that acknowledging a duty to intervene then creates an onus to give the force(s) the means and capacity to do so without exposure to unnecessary risk.<sup>91</sup> If a force cannot intervene directly without exposing troops to significant danger, then the duty of a commander must first be to the safety of his/her personnel. Most lightly armed peacekeepers will not be in a position to prevent large-scale abuses by a party to the conflict, and this was the predicament of the Dutch contingent at Srebrenica.<sup>92</sup> But this will not relieve them of responsibility to take some action, as protests on the ground and later through higher channels can have effect. This is the kernel of the dilemma, and will commanders hide behind the cloak of preserving force security to excuse a failure to protect? It can also be argued that intervention in such circumstances will compromise the impartiality of the force, but if the policy adopted by the UN is applied in a consistent and impartial manner, this argument may be rebutted. Acknowledging that such a duty exists by expressly providing so in the mandate of the force may make the mission more difficult, but it cannot be right to allow a UN force to stand idly by in circumstances where breaches of humanitarian law are taking place in their area of operations.<sup>93</sup>

### **The ICRC Position**

The question of the applicability of humanitarian law to UN forces was raised for the first time during the Korean conflict. This highlighted a fundamental problem for the UN in regard to ensuring compliance with the principles involved. Having been requested to apply *de facto* the humanitarian law principles protecting war victims and especially Common Article 3 of the Geneva Conventions, the UN commander replied that his instructions were to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly Common Article 3, and by the detailed provisions of the Prisoners of War

Convention.<sup>94</sup> The importance of the latter convention may have arisen from the need to ensure that all prisoners were treated equally, whereas in the case of Common Article 3, the principles concerned represent a compulsory minimum to be applied irrespective of the nature of the conflict or the issue of reciprocity.<sup>95</sup> However, as the UN Commander, he claimed that he did not have the authority to accept, or the means to ensure the accomplishment of responsibilities incumbent upon sovereign nations under the detailed provisions of the other Geneva Conventions. Since then the ICRC has drawn the attention of the Secretary-General to the application of humanitarian law to the forces at his disposal, and to the desirability that these forces be provided by their contributing governments with adequate instruction in this area.<sup>96</sup>

The essence of the ICRC position is that humanitarian law principles, recognized as part of customary international law, are binding upon all states and upon all armed forces present in situations of conflict.<sup>97</sup> If these rules are binding on all states, then they must be binding on an international organization that resorts to the use of force on their behalf. This is especially so when this Organization is an independent subject of international law and it was established by those states bound by the principles in the first place. In this context, the status of the parties or the legality of the use of force is not an issue that will determine the applicability of humanitarian law. Recognizing that the UN is not a party to the Conventions, and given the nature of the Organization, it is accepted that the applicability of humanitarian law principles to the Organization would have to be *mutatis-mutandis*.<sup>98</sup>

When member states are authorized by the Security Council to intervene in an internal conflict such as Somalia, the basic character of the conflict remains internal.<sup>99</sup> However, the forces of the participating member states are carrying out an international mission on the basis of the UN resolution. In the relations between the “UN forces” and the parties to the conflict, the rules applicable to international armed conflict must be applied. It is acknowledged that the application of the rules of humanitarian law in their entirety is problematic as this was intended for conflict between states.<sup>100</sup> Nevertheless, it would be a denial of the clear international dimension of such missions if humanitarian law were to be restricted to Common Article 3 or Protocol II to the Geneva Conventions.

It is apparent that the adoption of military measures under Chapter VI or VII of the Charter is likely to call for the application of humanitarian law under various profiles. Action against the illegal use of force in the past has involved the use of force by the UN or states acting on its behalf. In regard to peace-keeping operations, it is commonly accepted that deployment in situations endangering peace or constituting a threat to international peace and security may also call for preventive measures involving the use of force. If and when conflict does break out and humanitarian law is applicable, it makes little sense to argue that UN forces on the ground in such a situation are not bound by these

same principles. Adherence to these principles will also assist in facilitating a restoration of the peace, a matter that is ultimately the goal of all UN forces.

### **The 1994 Convention on the Safety of UN and Associated Personnel**

In an effort to address some of the issues surrounding the protection of, and regulations governing UN forces, the 1994 Convention on the Safety of UN and Associated Personnel (the Convention) was adopted. The declared purpose of the Convention is to protect UN and associated personnel from becoming the object of attack by purporting to criminalize attacks by other armed forces on peacekeeping troops. The new Convention clarifies the protective duties of the receiving or host state, and this is a welcome initiative, but in the context of UN enforcement measures and humanitarian law, the Convention raises some interesting issues.<sup>101</sup>

Taking into account the Preamble, it is evident that the Convention was drafted owing to the concerns of contracting states and contributors to UN peacekeeping operations over the scale and frequency of attacks on peacekeeping forces. It provides that UN personnel, including those involved in maintaining peace and security, or providing emergency humanitarian assistance, are protected from attack.<sup>102</sup> The negotiators realized that it was necessary to have a clear separation between the situation where the Convention would apply and that where humanitarian law is applicable, so that UN and associated personnel and those who attack them would be covered by one regime or the other, but not both.<sup>103</sup> An important reason for this was not to undermine the Geneva Conventions, which rely in part for their effectiveness on all forces being treated equally. If it became a crime to engage in combat with UN forces acting as combatants, this could have a dramatic impact on other parties' willingness to adhere to accepted principles of humanitarian law.

Article 1 of the Convention is central to its applicability and scope. The text provides for a two-fold definition. The operation must be established by the competent organ of the UN in accordance with the Charter and under UN authority and control. In addition, one of two further conditions must be met: first, the operations must be for the purpose of maintaining or restoring international peace and security; or second, where the Security Council or General Assembly has decided for the purposes of the Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation. This means that operations authorized, as opposed to mandated by the Security Council, but carried out under the command and control of one or more states are outside the scope of the Convention. The Convention also provides further evidence to substantiate the view already advanced that enforcement measures by the UN are subject to humanitarian law. In particular, Article 2, paragraph 2 of this Convention is entirely consistent with the aforementioned view and in defining



the scope and application, establishes that it:

shall not apply to a UN operation *authorised by the Security Council as an enforcement action under Chapter VII* of the Charter of the UN in which any of the personnel are *engaged as combatants against organised armed forces* and to which the law of international armed conflict applies.<sup>104</sup> [italics added]

Having reached agreement on the principles involved, states, with the advice of the ICRC, had to adopt criteria to determine which operations would be covered by the Conventions and those that would not. Chapter VII operations are thus excluded from the scope of the Convention upon the fulfilment of this cumulative list of conditions.<sup>105</sup> Even if only part of the operation fulfils these conditions, then all of the UN elements participating in that operation will be excluded from its protection.

Initially the ICRC and some states had concerns regarding the reference to international armed conflict, but the wording of Article 2 (2) proved acceptable in the end because it was generally agreed that it was impossible for the UN to be involved in internal armed conflict. Once UN or associated personnel intervened or became engaged in a conflict with a local force (as opposed to acting merely in self-defence), the conflict became by definition “international” in character.<sup>106</sup> Identifying if any of the personnel are engaged as combatants against organized armed forces and whether the operation is one to which humanitarian law applies is problematic. The formulation was designed to be consistent with Common Article 2 of the Geneva Conventions, and thus the point of analysis is whether the operation involves combat during an international armed conflict, which would trigger the application of Article 2 while excluding the application of the UN Convention.<sup>107</sup> This provision will prove difficult to interpret in practice, and the fact that there is no agreement on which provisions of humanitarian law apply to UN personnel and in what circumstances, will only add to the confusion. It can also be predicted that the UN and troop contributing states will be reluctant to recognize that the Convention has ceased to apply, and this may inflate the level of conflict required before acknowledging “armed conflict” is taking place.<sup>108</sup>

Another interpretation is that humanitarian law would continue to apply to UN personnel when, in the conduct of a Chapter VII mandated operation, they are actively engaged in a combat mission, regardless of whether the armed conflict is international or internal in character. Humanitarian law would also be applicable in peacekeeping operations, which however peaceful and consensual they may be in theory, can in practice give rise to situations where UN personnel can resort to the use of force in self-defence or to resist attempts to prevent them carrying out their mandate.<sup>109</sup> However, in most traditional peacekeeping operations, situations where force is used in self-defence are short and could not be described as involving sustained periods of fighting. Incidents of this nature do

not by themselves remove the protection offered by the Convention because the UN troops involved are not necessarily engaged as combatants.<sup>110</sup>

Under the Convention traditional peacekeeping forces enjoy a protected status similar to that of non-combatants. However, it does not purport to protect armed forces acting as combatants on behalf of the UN. Article 2, paragraph 2 applies to troops acting under Chapter VII, in particular Article 43 of the Charter, in furtherance of UN collective security provisions. It is submitted that what is also being referred to in this provision is enforcement operations conducted by third states as occurred in the first Gulf conflict. These operations are authorized by the Security Council under the umbrella of Chapter VII, and they arise as a direct result of the failure of member states to conclude the necessary agreements for military forces under Article 43 of the Charter. The element of consent, which has hitherto been an important factor in distinguishing peacekeeping from enforcement operations, is absent. But the criterion of consent should be applied with some caution. Even in the case of UNIFIL, when deployed in 1978 with the consent of the Lebanese government, the authority of the government barely extended beyond west Beirut. Likewise, in the more recent case of Albania, the government there consented to the deployment of a “coalition of the willing” under a Chapter VII enforcement mandate.<sup>111</sup> However, peace support operations, whether of the traditional peacekeeping or peace enforcement kind, can be distinguished from enforcement action as envisaged under collective security provisions of the UN Charter. When a situation is deemed to pose a threat to the peace, breach of the peace, or act of aggression, the legal groundwork is then laid for military and other action to compel a recalcitrant state to succumb to the will of the international community. This may ultimately lead to combat by UN authorized forces against the armed forces of a non-complying party or parties. In this way, Article 1, paragraph 2 of the Convention provides additional evidence of the applicability of humanitarian law to UN enforcement operations of this nature.

The Convention effectively repeals the combatant’s privilege: soldiers in the field who attack UN military personnel pursuant to the orders of their commanders are deemed to be committing a crime for which individual criminal responsibility is established.<sup>112</sup> It has been argued that in effect the Convention purports to change humanitarian law by criminalizing attacks on UN forces and modifying the combatant’s privilege as it applies to such attacks, without a concomitant recognition that the UN is governed in such situations by specific norms of the same body of law.<sup>113</sup> This conclusion is flawed. Under humanitarian law, where only non-combatants are protected from attack, UN personnel acting as combatants, are both bound to apply these rules and to invoke their protection when appropriate. In this way the Convention and humanitarian law are mutually exclusive, the former regime applying to non-conflict situations, and the latter applying to any situation of sufficient degree of conflict.<sup>114</sup>

The exact scope and nature of UN operations covered by the Convention is a matter on which there is a divergence of opinion. Originally the Convention was to be limited to operations “established pursuant to a mandate approved by a resolution of the Security Council.”<sup>115</sup> A broader material scope of application of the Convention was eventually agreed.<sup>116</sup> The view that the Convention applies to most kinds of UN operations falling short of enforcement action itself is the dominant opinion, although the protection provided for thereunder might not extend to all stages and components of the military operation.<sup>117</sup> The confusion arises primarily from the different perspectives among countries as to the purpose of the Convention in the first place. Many were critical of the scope and expansion of the Security Council’s activities in recent years, but were powerless to prevent it. They saw the approval of a Convention covering traditional peacekeepers as a means to curtail these activities. But arguing that it should apply to traditional peacekeeping operations only missed the point somewhat. It was precisely because of the Somalia type operations that pressure was brought to bear to deal with the legal deficiencies that existed in the international regime.<sup>118</sup>

The end result is still unsatisfactory in that the difficulty of distinguishing between peacekeeping and enforcement operations, while making provision for hybrid operations involving both, has not been properly taken into account. This crucial issue, like the question relating to the applicability of humanitarian law to UN operations, has been left unresolved by the Convention. It now seems generally accepted that the Convention applies to peace enforcement operations such as that established in Somalia. The problem is when and who determines that a confrontation between UN troops and others reaches the threshold that the participants may be regarded as combatants under Article 2 (2) of the Convention. Did Aidid’s forces in Somalia constitute “organized forces” for the purposes of the Convention? These are not straightforward questions. Why is the Convention so replete with references to the characteristics of traditional peacekeeping duties, i.e. impartiality, host state consent, and non-use of force except in self-defence?<sup>119</sup> The answer can only be that the Convention is a poorly drafted and ill thought out document that was heavily influenced by political factors. As a compromise document, contributing states may take some solace from the fact the troops serving with missions in Kosovo and Bosnia-Herzegovina are protected by the terms of the Convention. But how this will work in practice is anyone’s guess, and it presents a potential nightmare for a prosecutor seeking to invoke the terms of the Convention.

There is also the issue of European and Western neo-colonialism acting under the cloak of UN activity.<sup>120</sup> How will the Convention operate in a situation like Somalia when a major contributor to the UN force decides to target a clan or militia leader, and sometimes operates outside the UN command structure? The problem with accepting that peace enforcement operations come within its remit is that it seeks to criminalize action by military forces against UN mandated or

authorized peace enforcement operations. What happens when these operations are outside the formal framework of the organization, and come under the umbrella of traditional and reciprocal inter power relations to which humanitarian law of armed conflict naturally applies? During wartime combat operations, or hostile acts engaged in during an armed conflict, combatants do not commit crimes by killing or wounding the “enemy” if this is carried out in a manner that does not conflict with the rules of humanitarian law.<sup>121</sup> It cannot be correct that military action at the behest of political or others leaders, which is otherwise in accordance with humanitarian law, could render the combatants concerned liable to prosecution under the Convention. Such a scenario would place these forces in an invidious position, which it is submitted, is neither the intention nor the effect of the Convention.

Doubts have been expressed about the Convention’s usefulness and the question was raised whether it did not rather belong to *ius ad bellum* – as it contains the prohibition to wage war against the UN – than to *ius in bello*.<sup>122</sup> The Convention does address what was a significant gap in international law. While humanitarian law governs the conduct of combatants, no international instrument prohibited or provided legal remedies for attacks upon traditional peacekeeping forces acting in that role.<sup>123</sup> This is no longer the case, and the new regime is welcome. However, the Convention does not have a significant impact on the humanitarian law implications of UN operations and its adoption marked a lost opportunity to clarify rather than obfuscate the question further. Nor is it clear from the Convention whether humanitarian law may be applicable when the Convention itself applies. It also avoids the thorny issue of the consequences encountered if the procedure and/or the adoption of UN resolutions authorizing or mandating certain kinds of peace enforcement operations are themselves in accordance the UN Charter and international law. It bears all the scars of the behind-the-scenes battles regarding the separate, but linked issue of the expanded powers of the Security Council.

## **HUMANITARIAN LAW AND UN FORCES IN LEBANON AND SOMALIA**

### **The Predicament of UNIFIL**

UNIFIL in Lebanon is a traditional peacekeeping force based on consent of the parties and the non-use of force except in self-defence. Though part of the conflict in Lebanon may be classified as internal, the presence of, *inter alia*, Israeli and Syrian forces meant it could also be classified as international in character. The most obvious characteristic of peacekeeping forces that directly raises the question of applicability of humanitarian law is that the members are armed and permitted to use force, albeit in self-defence or to resist attempts to prevent the implementation of the mandate.<sup>124</sup>

At the time UNIFIL was being established, the President of the ICRC wrote to the Secretary-General and drew attention to the necessity of compliance with the Geneva Conventions by forces placed at the disposal of the UN.<sup>125</sup> Later, the Secretary-General wrote to the permanent representatives of troop contributing states, pointing out that in situations where members of UNIFIL have to use weapons in self-defence, the principles and spirit of humanitarian law “as contained, *inter alia*, in the Geneva Conventions . . . [and] the Protocols of 8 June 1977 . . . shall apply.” Troop contributing states were obliged to ensure that their troops fully understood the principles of humanitarian law. For its part, the UN undertook, “through the chain of command, the task of supervising the effective compliance with the principles of humanitarian law by the contingents of its peacekeeping forces.”<sup>126</sup> But no system for monitoring humanitarian law training and ensuring compliance with relevant principles was ever put in place. Similarly, such training seemed to be conducted on an *ad hoc* basis, and did not always achieve the desired level of knowledge.<sup>127</sup>

The Israeli invasion and subsequent occupation of most of south Lebanon presented UNIFIL with a number of serious difficulties. It was never envisaged that the peacekeeping force would find itself alongside non-Lebanese forces that were occupying the area UNIFIL was responsible for and supposed to control. In the circumstances, UNIFIL was unable to enforce its standing operating procedures or make any serious attempt to carry out its mandate. Not surprisingly, UN officials used every means at their disposal to justify the continued presence of UNIFIL in such an adverse situation.

The legality of Israeli actions and policy in Lebanon under international law received little public attention up until the *Report of the International Commission* which looked into reported violations of international law by Israel during its invasion of Lebanon.<sup>128</sup> The 1982 invasion and the subsequent policy pursued led to many complaints of grave and fundamental breaches of the international legal order. In the absence of an official UN investigating authority, it was considered essential to establish an independent international tribunal or commission to investigate these complaints and related issues.<sup>129</sup> The Commission dealt comprehensively with a wide range of matters arising from Israeli policy throughout Lebanon, and concluded that Israel had violated a number of international legal principles and conventions governing the laws of war.<sup>130</sup>

The question of the Israeli treatment of Lebanese civilians in the aftermath of their invasion and occupation in 1982 was first brought before the Security Council in 1984.<sup>131</sup> After the Lebanese government introduced two draft resolutions to the Security Council calling on Israel to comply with the provisions of the Fourth Geneva Convention and the regulations annexed to the Hague Convention of 1907, UNIFIL was inadvertently presented with an opportunity to play a role in ensuring Israeli observance of these Conventions.<sup>132</sup> While the Security Council prevaricated over what to do about the peacekeeping force, the

role of safeguarding the rights of a civilian population under occupation provided a reasonable solution to the problem in the short term. This policy was a reaction to events rather than a carefully planned response.

Since the invasion had undermined the whole *raison d'être* of the force, adopting such a role provided UNIFIL with an interim solution to Israel's total disregard of its authority. However, UNIFIL could do little to influence the major events taking place elsewhere in the country and unless it was prepared to intervene within its own area it risked being held responsible for Israeli actions there.<sup>133</sup> Faced with an impossible situation, UNIFIL did perform a worthwhile function by highlighting breaches of humanitarian law. More importantly, it ensured compliance with fundamental principles when it appeared that they would be disregarded. This aspect of UNIFIL's presence at the time should not be underestimated. Even those Lebanese who were often critical of its failure to carry out the mandate agreed that the force played an important role during the period, but this presented particular difficulties for UNIFIL that deserve closer analysis.<sup>134</sup>

When Israeli forces adopted what became known as an "iron fist" policy in and close to the UNIFIL area during 1984 to deter further attacks, they put UNIFIL in an impossible position.<sup>135</sup> In the changed situation, there was an urgent need to define the policy UNIFIL should adopt and in response the Secretary-General issued the following statement,

. . . a new situation has developed in southern Lebanon . . . UNIFIL is now stationed in an area where active resistance against IDF is in progress, and in which the latter is engaged in active countermeasures. UNIFIL, for obvious reason, has no right to impede Lebanese acts of resistance against the Occupying force, nor does it have the mandate or the means to prevent counter measures . . . It seems to me that the only course for UNIFIL is to maintain its presence and to continue within its limited means to carry out its existing functions in the area . . .<sup>136</sup>

This highlighted the dilemma facing UNIFIL as it had neither the means nor the authority to prevent resistance attacks against Israeli Forces and the subsequent counter measures by Israel. Questions, such as how UNIFIL was to distinguish between Palestinian guerrillas and local resistance groups attempting to infiltrate by night through UNIFIL lines, were not clarified. UNIFIL was told to carry out its existing functions. Unfortunately, the Secretary-General did not elaborate upon this. In attempting to monitor the Israeli raids on villages, UNIFIL sometimes appeared to be in collusion with them. The sight of UNIFIL soldiers standing by Israeli soldiers led some to complain that UNIFIL was helping to carry out the raids.<sup>137</sup> The policy also meant UNIFIL avoided the potentially difficult issue of which, if any, resistance groups were entitled to recognition.

The situation deteriorated as the Israeli Defence Forces redeployed and in

certain instances clashes occurred between the Israeli forces and UNIFIL troops. The French battalion in particular adopted a more forceful stance than many of the other UNIFIL contingents.<sup>138</sup> Irish UNIFIL troops also clashed with the Israelis, especially during raids on the Shi'ite village of Yatar.<sup>139</sup> For the most part there was not much else that UNIFIL could do. Its policy of monitoring and reporting did little to instil confidence in UNIFIL among the population, who accused it of being "both the observer and protector of the [Israeli] invasion army."<sup>140</sup> UNIFIL policy appeared to be accomplishing little and it led to allegations of collusion with the Israelis.<sup>141</sup> This was despite the fact that many UNIFIL personnel sent to monitor Israeli operations often placed themselves in personal danger in attempting to mitigate the excessive behaviour of the Israelis and their allies. UNIFIL was being placed in a "no-win" situation. It was not surprising that soon after the "iron fist" policy began, a serious threat was made against UNIFIL by one of the resistance groups.<sup>142</sup> In such circumstances, it was difficult to determine whether UNIFIL was accomplishing sufficient to justify remaining in south Lebanon. Its role and function was very unclear, while its overall predicament was unsatisfactory. In fact, during 1985 and 1986 the reports to the Security Council were very pessimistic and there seemed little hope of improving the situation. Despite this, the Secretary-General continued to recommend extensions of the mandate.

The anomalous position of UNIFIL was evident during a serious incident in February 1986 when Israeli and "South Lebanon Army" personnel were ambushed near the village of Kunin in the "security zone."<sup>143</sup> Two Israeli soldiers were abducted which led a large Israeli force to carry out a series of cordon and search operations during which UNIFIL monitored the situation as closely as possible and tried to prevent acts of violence against the local population.<sup>144</sup> In so doing they put themselves at risk, especially in dealing with the "South Lebanon Army." The Secretary-General's report of the incident states that UNIFIL personnel, "observed some cases of what appeared to be unacceptable treatment of prisoners by IDF/SLA personnel. The UNIFIL reports of the incidents were transmitted immediately to the Israeli authorities and their comments invited."<sup>145</sup> The operation led to a number of complaints by local civilians regarding the treatment they received.<sup>146</sup> The most serious of these was that the Israeli forces attempted to expel all the locals from the village of Kunin in retaliation,<sup>147</sup> and that Israeli actions violated a number of provisions of the Fourth Geneva Convention.<sup>148</sup>

While Israeli anger at what took place is understandable, it did not justify the response.<sup>149</sup> The attempt to expel all the Shi'ite residents of Kunin could not be justified on military or security grounds.<sup>150</sup> The large numbers of civilians detained indicated the follow up operation was a retaliation that was intended to coerce information from those detained.<sup>151</sup> The ambush afforded the opportunity to implement the proposed "sanitized zone" policy in Kunin. There was a sim-

ilar threat to other villages in the UN area but UNIFIL's interventions prevented this going ahead. For this reason, the peacekeeping force can take at least some credit for protecting the civilian population in the area.<sup>152</sup>

The Israelis faced a dilemma in south Lebanon. Their tactics alienated the population and met international condemnation. However, they were still apparently unable to defeat the resistance groups and Israelis themselves began to question whether the tactics adopted were compatible with the so-called "purity of arms" doctrine.<sup>153</sup> In fact, the policy was so evidently self-defeating that it was difficult to discern any coherent long-term goal. Many of the Shi'ite villages that suffered most during this period were strongly opposed to the Palestinian presence prior to the invasion. Now their hatred switched to the Israelis. Attempts to have the "South Lebanon Army" adopt a more prominent role only made matters worse. Figures compiled by the UN in 1985 indicated that the "iron fist" policy failed.<sup>154</sup> The daily attacks on Israeli soldiers increased considerably. In one well-publicized suicide attack by a Shi'ite resistance fighter in March, 12 Israeli soldiers were killed.<sup>155</sup> It was the eighth attack of its kind. The Israeli response was predictable. They launched a major operation against a number of villages that left at least 32 dead.<sup>156</sup> Throughout 1985, they carried out numerous cordon and search operations. The *de facto* forces also frequently shelled villages, particularly in the Irish area.<sup>157</sup> During this period, the Israelis continued their efforts to impose the "South Lebanon Army" on the people of the south while dangerous confrontations ensued when UNIFIL tried to curtail the activities of this militia.<sup>158</sup>

## Summary

The consequences of Israeli policy for UNIFIL were very grave. The UN response was a reaction to events rather than a carefully planned policy. Greater focus on Israeli violations of the Fourth Geneva Convention marked a change in emphasis, for until then little attention was paid to Israeli transgressions of international law in Lebanon. The degree of control exercised by Israel before and after the 1985 redeployment was sufficient to justify the UN decision to treat the Israeli forces as an Occupying Power under international law and this in turn determined the nature of UNIFIL's response. But there is no escaping the fact that UNIFIL policy regarding the Occupying Power and the indigenous resistance movements was inconsistent with its original mandate and terms of reference.<sup>159</sup> In granting the Israelis the rights and privileges of an Occupying Power, while at the same time deliberately avoiding impeding acts of resistance, the peacekeeping force made no progress whatsoever in confirming the Israeli withdrawal or bringing about a cessation of hostilities. Nonetheless, the performance of humanitarian tasks as an interim measure was a worthwhile attempt to ease the plight of the local population and maintain goodwill toward UNIFIL. It also undermined those within Lebanon that sought to discredit the Force as a "tool of



American imperialism.”<sup>160</sup> However, it did not justify a 6,000 strong peacekeeping force remaining in what was effectively occupied territory, when it was unable to perform any of its original tasks laid down by the Security Council. Whether UNIFIL would have achieved as much or even more by withdrawing at the time will never be known.<sup>161</sup> In the long term, another peacekeeping force could have been deployed under a more realistic mandate in circumstances more conducive to the conduct of peacekeeping.

During this period UNIFIL grew close to and reliant upon the Shi’ite Resistance movement AMAL. The movement had considerable influence and support in the area and was pro-UNIFIL.<sup>162</sup> The alternative was Hizbollah, which did not support the force’s presence in Lebanon. Nonetheless, the level of cooperation between UNIFIL and AMAL risked comprising the force’s impartiality. This was one of the most serious threats to UNIFIL’s delicately balanced impartiality and general acceptability in the area.

The presence of UNIFIL rendered the Israeli occupation of south Lebanon unique and less harsh than otherwise would have been the case.<sup>163</sup> UNIFIL gave the local population support and protection by intervening to prevent, by non-violent means, the demolition of public and private property and the ill-treatment of civilians.<sup>164</sup> A major achievement during the period was the ability to hinder the Israeli consolidation of its occupation of Lebanon. Some commentators were critical of the policy of treating the Israeli forces as an Occupying Power, owing to the presence of UNIFIL as the legitimate military power in its area of operation.<sup>165</sup> However, it was not an instrument of the Lebanese government or a replacement for the Lebanese Army. It is true that there was a lack of consistency among the different UNIFIL battalions in their policy toward the Israeli forces and the “South Lebanon Army.”<sup>166</sup> The peacekeeping force had no option but to accept the reality of its predicament: “without the mandate or firepower to do more, UNIFIL found itself in the unenviable position of watching the rockets and shells fire back and forth overhead, while on occasion falling victim to direct hits itself.”<sup>167</sup> The real shame is that the Security Council did nothing to change this, and that UN forces were sidelined, essentially fulfilling a role as witnesses and protestors to violations of humanitarian law. The recent *Brahimi Report* stated that “UN peacekeepers – troops or police – who witness violence against civilians should be presumed to be authorized to stop it, within their means.”<sup>168</sup> But this requires a mandate for civilian protection, and the resources to carry out this role. Experience to date, in Lebanon and elsewhere, does not augur well for such developments in the near future.

## **Somalia**

The Somalia experience on the other hand, shows the limitations and difficulties of attempts at too rigid an adherence to categories of UN military operations. In the first place, the Security Council deployed a traditional peacekeep-

ing force in an internal conflict situation, and then found that the circumstances were beyond the traditional approaches. Later, the Security Council authorized member states, under the leadership of the United States, to intervene in the internal affairs of Somalia. But the forces of the participating member states were acting under the mandate of the Security Council and carrying out a mission on behalf of the international community.

In order to understand and apply the rules, the participant must first know what the rules are, but in the theatre of military operations, the rules depend on the level of conflict, as this “dictates the nature of the law applicable . . . either the internal law of the state or international humanitarian law.”<sup>169</sup> But the situation in Somalia was unclear in many ways, and, despite the level of hostilities, the reported body count, and the armed confrontations and shooting, it remained uncertain which if any of the laws of war applied.<sup>170</sup> This led at least one commentator to claim that applying the Geneva Conventions and Additional Protocols to the conflict in Somalia merely demonstrates the inadequacies in the current international legal regime to meet the complexities presented by peacekeeping operations.<sup>171</sup>

In the complex humanitarian emergency that was Somalia, UN forces intervened with an ill-defined mission that contained conflicting and unrealistic objectives.<sup>172</sup> It is not surprising then that there is confusion regarding applicable legal norms, especially when those norms themselves may also be ill-defined.<sup>173</sup> Somalia shifted from a traditional peacekeeping mission to one of the most robust peace enforcement missions of recent times. There seemed to be little attention paid to the political and legal consequences of this escalation, and it provided a stark example of UN military forces operating in the twilight zone between peace and armed conflict or war. In the intervening no man’s land, “[a] clear demarcation between a state of war and a state of peace no longer exists, if it ever did.”<sup>174</sup> Determining what, if any, international law applies in these circumstances is a difficult task. Nevertheless, in the relations between UNITAF forces and the parties to the conflict, it is submitted that the rules of humanitarian were applicable.<sup>175</sup> To accept anything less would be to adopt a minimalist view that denied the clear international character of the mission.

The problem of determining the applicable international law to peace support operations was not unique to UNIFIL or UNOSOM II, and the issue also arose for consideration in the court martial of a United States army officer, Captain Lawrence P. Rockwood, as a result of action taken while on duty with the United States-led Multinational Force in Haiti.<sup>176</sup> Captain Rockwood was convicted of felony charges arising from his unauthorized human rights inspection of Haiti’s National Penitentiary in September 1994.<sup>177</sup> In this case the military trial judge ultimately refused to instruct the court-martial on the applicability of international law, telling the members of the court that they should bear in mind that the expert witnesses could not agree on the parameters of internation-

al law applicable to the case.<sup>178</sup> The outcome of this case supports the notion that peacekeepers have a limited remit, i.e., it emphasizes the preservation of peace to the detriment of a potential role in the protection of the local population. However, peacekeeping also involves positive duties on behalf of the military personnel involved. This is where humanitarian law has a role to play. But in order to be useful in a military culture, the responsibilities of the military must be spelt out in clear and concise terms, preferably in the mandate. In this regard, the adoption of the role of Protecting Power by traditional peacekeepers is one option that could be examined.<sup>179</sup> However, it is not appropriate for peace enforcement operations, as the requisite neutrality would not exist in the case of peace enforcement forces.

The matter of the applicability of humanitarian law to Canadian forces in Somalia was considered by a military court in *R. v. Brocklebank*.<sup>180</sup> This case arose from incidents that occurred in the course of the Canadian participation in the UNITAF mission during March 1993.<sup>181</sup> These events ultimately led to a military board of inquiry, several courts martial and appeals, and most importantly, to the establishment of a civilian *Commission of Enquiry into the Deployment of Canadian Forces to Somalia* (“the Commission”). Although the Commission discussed the issue and specifically the applicability of the Geneva Conventions and Protocols, it did not reach any firm conclusion in this regard. This is unfortunate, but it is also preferable to making decisions on matters that it may not have felt competent or able to decide in the circumstances.

The decision in *Brocklebank* concerned, *inter alia*, the applicability to the case of the Geneva Conventions, which imposed on members of the Canadian Forces *at all times* a duty to safeguard civilians in Canadian Forces custody, whether or not these civilians are in that member’s custody.<sup>182</sup> The Court took the view that as there was no declared war or armed conflict in Somalia, and as the Canadian Forces deployed as part of the UNITAF mission were performing peacekeeping duties, they were not engaged in an armed conflict. In the circumstances, the Court held that Private Brocklebank had no legal obligation to ensure the safety of the prisoner because neither the Geneva Conventions nor Additional Protocol II applied to Canadian Forces in Somalia. Furthermore, neither the Conventions nor Protocols applied to a peacekeeping operation.

This analysis seems to have been flawed in a number of respects. In the first place the judgement mentioned in several places that the mission of the Canadian Forces at the time was a “peacekeeping mission.” This was not the case, as the UNITAF mission had been authorized by the Security Council under Chapter VII in circumstances that indicated the peacekeeping mission of UNOSOM I was being replaced by a peace enforcement authorized operation comprising a coalition of nations. It is also worth noting that Security Council Resolution 794 (1992) establishing UNITAF also condemned vigorously all violations of humanitarian law committed in Somalia.<sup>183</sup> This was a clear recogni-

tion by the Security Council that the conflict in Somalia was of sufficient degree and intensity to trigger the application of humanitarian law. Despite this, Decary, Judge Advocate for the majority, found that there was no evidence there was an armed conflict. The Court does not appear to have heard any evidence of the level of killings among the armed factions, and the casualties among other contingents of UNITAF. Cognisance does not appear to have been taken of the reports of the Secretary-General to the Security Council on the situation in Somalia up to and during this period. The judgement also seems to have put too much emphasis on the need for a certificate from the Secretary of State for External Affairs stating that at a certain time a state of war or international or non-international armed conflict existed.<sup>184</sup> Not surprisingly, the *Brocklebank* decision has been questioned, most notably in the Simpson Study, which made a strong case that the decision of the Court appears, a least partly, to have been based on the wrong provisions of the Fourth Geneva Convention and Protocols.<sup>185</sup>

The difficulty surrounding this issue was evident in the inconclusive findings of the Commission and the diverse views of other commentators.<sup>186</sup> It is worth noting that a Belgian Military Court, acting as the Court of Appeals, also came to the view that the four Geneva Conventions of 1949 and two Additional Protocols of 1977 were not applicable to the armed conflict in Somalia.<sup>187</sup> In addition, members of UNOSOM II could not be considered “combatants” since their primary task was not to fight any of the factions, nor could they be said to be an “occupying force.” An Italian Commission of Inquiry into events in Somalia also had difficulty grappling with this issue, and it failed to make any legal evaluation of the facts, especially from the perspective of humanitarian law.<sup>188</sup>

Another view proffered is that the situation in Somalia was not an international or non-international armed conflict within the established treaties.<sup>189</sup> However, some of the relevant international instruments contained a substitute principle, the Martens Clause, which holds that in cases not explicitly covered by treaty law, civilian persons and combatants remain under the protection and authority of the principles of international law.<sup>190</sup> Arguments have also been put forward as to why the provisions of the Hague Rules, the Fourth Geneva Convention, and customary rules concerning an “occupying power,” could have applied in Somalia.<sup>191</sup> The policy of the United States is also illuminating, in that while applying the provisions of Common Article 3, it made it clear that it did not consider the Fourth Geneva Convention applied during the UNITAF deployment.<sup>192</sup> Despite the outcome of the *Brocklebank* decision,<sup>193</sup> and whatever the category or qualification given to the situation in Somalia, it is difficult not to conclude that Private Brocklebank failed a duty incumbent upon any soldier in the circumstances. There can be no grey areas when confronted with such blatant human rights abuses. Cognisance should have been taken of the Martens Clause as it imposes at all times the minimal, but overriding obligation to act in

accordance with the laws of humanity and the dictates of public conscience.<sup>194</sup> No relativity such as that suggested by the majority decision of the Court should be allowed in this regard.

### **Summary – Practical Difficulties Applying the Conventions in Somalia**

In spite of the most significant codification of humanitarian law, i.e. the Geneva Conventions and Additional Protocol I and II, there still remain considerable practical difficulties when these are applied to a situation like Somalia.<sup>195</sup> In the circumstances it is difficult to make a definitive pronouncement on whether the situation in Somalia constituted an armed conflict. The most important determinant of the applicability of humanitarian law is the level of hostilities, and Somalia was no exception to this general rule. Common Article 2 states that the Conventions “[s]hall apply to all cases of declared war or any other armed conflict, which may arise between two or more of the High Contracting Parties, even if a state of war is not recognised by one of them.” One of the major difficulties with this provision is the ill-defined nature of what constitutes *any other armed conflict* itself. It fails to address in clear legal terms at what stage the level of violence is sufficient to constitute armed conflict.<sup>196</sup> In this way it may be described as humanitarian, but hardly definitive.<sup>197</sup> Its deliberately expansive nature is to ensure that the humanitarian protections afforded by the Conventions are applicable in cases short of declared war. In one sense this may be described as strength, in that it may be invoked in circumstances that could not have been envisaged at the time of drafting. However, this lack of precision can also be a major weakness in that the discretion bestowed on states may also be abused by them.<sup>198</sup> The need for recognition by one of the relevant states is also a problem in that it does not envisage a situation where none of the parties acknowledge that a state of war exists.<sup>199</sup> Not surprisingly, there is considerable support for the view that “armed conflict” should be given a broad interpretation and that the existence of international armed conflict should not be regarded as contingent upon hostilities reaching a particular level of intensity.<sup>200</sup>

The requirement of state recognition is especially problematical for UN military operations, as the UN is neither a party to the Conventions nor a state. It does not have the competence to recognize that an armed conflict invoking the application of the Geneva Conventions exists.<sup>201</sup> The UN also lacks the legal and other structures for dealing with violations of humanitarian law. The Additional Protocols of 1977 were intended to address some of the more apparent deficiencies in the current system, but these too did not take into account the deployment of UN forces and multinational forces authorized by the Security Council.<sup>202</sup> Protocol I would seem to have no application to Somalia as the clan fighting and conflict in general did not qualify as a struggle of self-determination, or a struggle against a racist regime. An interesting aspect to the applicability of Protocol I, and some other relevant treaties, is that not all states have ratified it and this

could give rise to the situation where different contingents in a unified force are governed by different principles of law.<sup>203</sup>

Protocol II applies only when the conflict is between the armed forces of a High Contracting Party and dissident groups within the same territory, and the ICRC definition applies to struggles against a lawful government.<sup>204</sup> The problem here is that it is not possible to determine which if any faction in Somalia could be deemed the "lawful government." A strong case can be made that the warlord General Aidid fulfilled a number of important requirements to be regarded as a dissident organized force in control of a defined area, but the issue is so legitimately debatable that definitive conclusions are problematic. The level of fighting could also be seen as having exceeded that regarded in other cases as sufficient to amount to armed conflict, and it meets the criteria suggested by Pictet and the Appeals Chamber in *Tadic*.<sup>205</sup> The experiences of Bosnia-Herzegovina and Somalia indicate that NATO and the UN adopt a certain *à la carte* policy when it comes to determining the existence of "armed conflict" and whether they are parties thereto. It would also seem that the threshold for triggering armed conflict is higher in the case of military operations authorized or mandated by the UN.<sup>206</sup>

The United States had the opportunity and authority to recognize that an armed conflict took place in Somalia, but it pointedly declined to do so. The Clinton administration refused to declare it a war zone, arguing even after 30 United States soldiers had been killed and nearly 200 wounded, and many hundreds more Somali casualties, that there had yet to be an event "that makes it clear to everyone that this is combat, not peacekeeping."<sup>207</sup> What difference does this make in practice if the United States agrees to act in a humane and civilized manner in any event? When cognizance is taken of one of the most recent accounts of American action against Aidid, it is further confirmation of excessive use of force and violations of fundamental principles of humanitarian law in what were admittedly extreme conditions.<sup>208</sup> This is where training and unequivocal rules apply. However, the lack of "a method for authoritatively and effectively determining that a situation justifies the application of the laws of war is a major weakness of the contemporary laws."<sup>209</sup> Basing a finding of the existence of war or armed conflict in a material sense, *inter alia*, on the duration of the conflict merely serves to facilitate the exclusion of short-term hostilities such as occurred in Somalia and elsewhere. Surely it would be preferable if measures were taken to ensure that humanitarian law applied to conflict situations, especially those involving UN military forces, as a matter of law, rather than upon the finding of the existence of material war or armed conflict.

## CONCLUSION

It is undisputed that the UN has international legal personality and that it is a subject of international law.<sup>210</sup> But it does not automatically follow that all the rules of international law, in particular those relating to humanitarian law, apply to the UN. The arguments that the UN cannot be bound by such rules owing to their specific nature and structure, and that the Organization does not possess the necessary internal structure, are not compelling. In fact, the structures and resources of the UN are superior to many smaller states. When the UN was established, it became part of the existing international legal order. It was created by the common accord of states within the system. It is not within the powers of those states to create a functional international institution that is outside the framework of the pre-existing international legal order. There are of course practical difficulties for the UN in ensuring troops under its command or operational control do not infringe any of the applicable rules of international law. Not least being the fact that no troops have ever served under the full command and control of the UN, and it is unlikely that they will do so in the foreseeable future.<sup>211</sup>

While the principles and basic rules of humanitarian law may be considered to represent fundamental values that have received almost universal acceptance, peacetime efforts to implement them at the national level are nonetheless insufficient.<sup>212</sup> In fact, it is often a marginal item in military training programs.<sup>213</sup> Consequently, these rules of law are not as well-known or understood as they should be by those who must apply them, especially members of the armed forces. However, the conduct of Canadian and other contingents part of UNOSOM II highlighted the need for training in this area.<sup>214</sup>

After the capture of a United States helicopter pilot shot down over Mogadishu, it was said that the United States recognized too late that there was no international law to protect him.<sup>215</sup> A gap was deemed to exist in international law as no international armed conflict was taking place and the Geneva Convention protecting prisoners did not apply. But to rely upon humanitarian principles in a conflict, both parties must be prepared to demonstrate willingness to respect those principles. Reciprocity, while not a legal requirement, is a practical necessity. A primary consideration in developing principles of humanitarian law was the self-interest of the most protected class of person under the original rules, the combatant. States, and in particular the United States, sought to fill a perceived gap in international law by way of the Convention to Protect UN personnel. This Convention is far from perfect, and may not alter the risk to which UN personnel will be exposed. Categorizing those who oppose or threaten UN personnel as criminals or outlaws carries certain dangers, and if not implemented with caution and skill, it could be associated with a new kind of colonial mentality.<sup>216</sup>

With regard to the initial question posed as to the relevant applicable law

to situations where UN forces are deployed, this will depend largely on the nature and extent of the conflict. Nevertheless, there appears to be little doubt but that the provisions of humanitarian law that have customary status do apply to UN forces. Such provisions bind all states, and may reasonably be suggested to apply to the UN itself.<sup>217</sup> The most difficult question arises in respect of those rules that have not yet attained customary status. There seems little sense in a system where combatants engaged in conflict are subject to humanitarian law when they are acting as members of national armed forces, whereas members of armed forces in the same armed conflict acting as peacekeepers are exempted from the obligations to respect the rights of protected persons. This is all the more absurd when these UN soldiers represent the Organization charged with upholding and promoting the fundamental human right that humanitarian law seeks to protect.<sup>218</sup> The application of humanitarian law to UN forces will not compromise the mission to promote peace. Moreover, as the declared aim of such operations is the restoration of international peace and security, it is surely not the case that it can be based on action in violation of existing principles of law.

What can or should a UN force do when it becomes aware that parties in the country where it is deployed are violating applicable international law? Unless the mandate of a force states otherwise, as the law stands at present, there is no legal duty to protect victims of such violations. However, international military and civilian field personnel cannot be silent witnesses to gross violations of humanitarian law.<sup>219</sup> And nor do they wish to be. The legal obligations of peacekeeping and other UN military forces should reflect the notion that they will affirmatively seek to prevent abuses. The *Brahimi Report* suggests a more assertive and interventionist approach in such cases. If a force cannot intervene directly without exposing troops to significant danger, then the duty of a commander must first be to the safety of his/her personnel. Most lightly armed peacekeepers will not be in a position to prevent large-scale abuses by a party to the conflict. The *Brahimi* recommendations are a welcome initiative, but it presupposes that UN personnel will be given the means and capacity to act in this way when appropriate, a presumption that past experience shows may not be taken for granted. This is the kernel of the dilemma, and some commanders may hide behind the cloak of preserving force security to excuse a failure to act.

Enforcement of humanitarian law is especially problematic in respect of UN forces. Relying on the contributing states to use their disciplinary regimes to enforce municipal law is one solution, but this requires the cooperation of those states concerned and the existence of an appropriate legal structure to deal with such offences. The *Brocklebank*, *Rockwood* and similar trials make it clear that there is significant confusion regarding the applicability of international law to the different kinds of UN military operations. The use of the courts martial or its equivalent within contributing states still remains the most likely system for dealing with disciplinary matters arising. While the independence of municipal



legal regimes and disciplinary procedures must be respected, the current confusion is militating against a uniform and agreed formula for determining the applicability of international law to such operations.

The establishment of the ICC is the most significant recent development in this regard. Once a state has ratified the Statute, then all nationals of that state will be subject to its provisions.<sup>220</sup> Concern about implementing humanitarian law was one of the driving forces behind proposals for its establishment.<sup>221</sup> The United States was most concerned about the impact this might have on participation in multinational and peacekeeping operations.<sup>222</sup> However, the Court to be established is not a serious alternative for the present system of criminal jurisdiction over peacekeepers. The Preamble to the Statute states that the Court shall be complementary to national criminal jurisdictions.<sup>223</sup> In stark contrast to the Statutes for the ICTY and International Tribunal for Rwanda (ICTR), this acknowledges the primacy of national authorities unless they are unable or unwilling to adequately investigate and prosecute alleged offences. Once a state has ratified the Statute, then all nationals of that state will be subject to its provisions. But fundamental problems remain, as states that refuse to ratify will not be subject to the jurisdiction of the ICC unless an offence is committed by a national of that State on the territory of another state party to the Statute. This was one of the main concerns of the United States, and as a result it has concluded bilateral agreements with a number of states to ensure that its military personnel serving in the territory of States Parties would not be surrendered to the Court.<sup>224</sup> Furthermore when the United States threatened to veto the renewal of crucial mandates for UN peace operations in 2002, the Security Council adopted Resolution 1422 (2002) which effectively exempts officials and personnel that are part of UN authorized or established operations and from a State not a party to the ICC Statute, from the jurisdiction of the ICC for twelve months.<sup>225</sup> In addition, Article 8, which deals with war crimes, is also linked to the notion of armed conflict (international and internal), and is dependent on a minimum threshold of conflict being reached before the relevant provisions can apply.<sup>226</sup> The Statute emphasizes the prosecution of war crimes on a large scale, whereas the crimes committed by peacekeepers have been isolated and not part of a plan or policy sanctioned by higher authorities. Despite this, the possibility of a prosecution for a single act constituting a war crime still exists, and contrasts with the threshold level of gravity for a crime against humanity under the Statute.<sup>227</sup>

In order to ensure humanitarian law is applied and enforced in the course of all relevant UN activities, it must first be clarified. This is not as simple a task as it may first appear. In the case of IFOR and SFOR, and the current KFOR, Protocol 1 Additional to the Geneva Conventions was applicable to the Canadian and German contingents, but not to the American and French. This problem is mitigated somewhat by the fact that many of the relevant norms are part of customary international law which binds all states. Making it mandatory for all UN personnel to be educated and trained in this area is essential. Such instruction is

a legal obligation on states party to the Geneva Conventions and Additional Protocols.<sup>228</sup> In addition, the UN and the ICRC should agree on the rules applicable to military operations conducted on behalf of or by the UN. There is an urgent need for codification of the law as “ambiguity is always a fault in legal norms and in international humanitarian law it is potentially a source of disaster.”<sup>229</sup> Several commentators have called for the formation of an independent body to police the application of humanitarian law and to recommend revisions where necessary.<sup>230</sup> One means of clarifying the issues raised would be for both organizations to identify precisely which rules have achieved the status of customary law. Despite the universality of the Geneva Conventions, not all the details of their provisions have simply become declaratory of customary law.<sup>231</sup> The situation is even more uncertain in regard to Protocol I; moreover, not all customary rules may be applicable to operations carried out by UN forces.

It is an unavoidable flaw that in relation to the purposes and functions of the UN, humanitarian law only plays a secondary role. Furthermore, states perceive criminal jurisdiction over their nationals as part of their jealously guarded sovereignty, and considerable national sensitivities are associated with participation in UN military operations.<sup>232</sup> The creation of a special tribunal or court to deal with such matters is one potential solution, but the fact that few if any countries actually place their forces under the full command of the UN could be problematic. The matter would be complicated in respect of those countries with dualist legal regimes that do not automatically incorporate international law provisions into their domestic legal systems. Certainly since the Secretary-General’s Bulletin regarding the field of application of humanitarian law to UN forces and the number of references to it in Security Council resolutions as a “body of law” to be applied “in all circumstances,” it may be argued that humanitarian law is part of *ius cogens*.<sup>233</sup>

In most instances the task of applying theoretical principles of international law to specific cases becomes the responsibility of armed forces on the ground. There are a number of measures that contributing states could take to improve the current situation. Up until recently, United States policy was linked to the notion of armed conflict. In accordance with international law, United States military were obliged to comply with humanitarian law in conducting military operations in times of armed conflict.<sup>234</sup> However, military regulations are silent on when an engagement reaches the level of armed conflict, or what demarcates the point at which the laws of armed conflict apply. These distinctions are crucial to peacekeeping operations, and neither the recent Secretary-General’s Bulletin nor the Convention on the Protection of UN Personnel shed much light on this area. In 1996, the US Chairman of the Joint Chiefs of Staff issued an instruction that extended the application of “the law of war principles during all operations that are characterized as Military Operations Other Than War.”<sup>235</sup> This effectively covers every conceivable military operation. Most significantly, there is no triggering event wedded to the notion of armed conflict, which is

a prerequisite for the application of these principles under international law. This is a welcome initiative, but from a legal perspective, it too has deficiencies in that the instruction refers to principles of war, but gives no indication of what these might be. The practical problems that can arise in applying these principles became evident when the United States refused to grant prisoner of war status to captured Taliban and *Al Qaeda* fighters detained as a result of the “war on terrorism” in Afghanistan.<sup>236</sup>

Humanitarian law represents fundamental principles of humanity imposed on all of us, including the Security Council and agents of the UN. It must be respected in all circumstances, regardless of the existence or nature of the armed conflict. A solution would be for an acknowledgement and declaration that humanitarian law binds UN personnel, and that UN military and other personnel will be educated, trained, and monitored in this regard. Ensuring the universality of the treaties on humanitarian law, including the Statute of the ICC, would serve as an additional guarantee of compliance. After 100 years of law making, the primary objective must not be a new law, but ensuring compliance with and effective implementation of the laws already in existence.<sup>237</sup>

### Endnotes

1. The author would like to thank the journal referee for constructive comments on an earlier draft. For an overview of peacekeeping see M. Bothe, “Peacekeeping” in B. Simma, ed., *The Charter of the United Nations* 1, 2nd. ed. (Oxford: Oxford University Press, 2002), pp. 648-700.
2. Humanitarian law denotes the whole body of law applicable during armed conflict, often referred to as the law of armed conflict (*jus in bello*). See C. Greenwood, “Historical Development and Legal Basis,” in D. Fleck, ed., *Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), pp. 8-12.
3. See, for example, *Symposium on Humanitarian Action and Peacekeeping Operations Report* (Geneva: ICRC, 1994); Martin Meijer, Notes on the Conference on “The UN and International Humanitarian Law,” Geneva, 19-20 October 1995, *International Peacekeeping* 2, no. 6 (1995), pp. 136-38 at 137; and Report on the International Workshop: “Towards a Future for Peacekeeping: Perspectives of a New Italian/German Co-operation,” Pisa, 17-18 November 1995, *International Peacekeeping* 2, no. 6 (1995), p. 138.
4. C. Greenwood, “Scope of Application of Humanitarian Law,” in Fleck, *Handbook*, pp. 39-49 at 46. This is not just a practical necessity, but may arise from obligations of states “to respect and ensure respect” for the Geneva Conventions and Protocols “in all circumstances.” See also B. Tittmore, “Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations,” *Stanford Journal of International Law* 33 (1997), pp. 61-117, at 107.
5. See below under “ICRC Position.”
6. This position has not altered with the Secretary-General’s Bulletin on Observance by UN forces of International Humanitarian Law, ST/SGB/1993/3 of 6 August 1999. See Section 1(1) discussed below.
7. *Reparations Case*, ICJ Reports 1949, p. 174. From a formal point of view, the UN cannot become a party to the Conventions because their final clauses do not provide for participation of international organizations, such as the UN; D. Shruga and R. Zacklin, “The Applicability

- of International Humanitarian Law to United Nations Peacekeeping Operations: Conceptual, Legal and Practical Issues,” in *Symposium*, pp. 39-48 at 43. In addition, “The UN, as such, had no judiciary (sic) system, no legal basis on which it could try individuals.” B. Miyet, Under-Secretary General for Peacekeeping Operations, quoted in the XXXIV *UN Chronicle* 3, (1997), p. 39. As a result, UN soldiers involved in child prostitution while part of the UN operation in Mozambique were repatriated.
8. Susan Turley, “Keeping the Peace,” *Texas Law Review* 73 (1994), p. 158.
  9. It is widely accepted that the “laws of war remain directly relevant to such forces.” A. Roberts and R. Guelff, eds., *Documents on the Laws of War*, 3rd. ed. (Oxford: Oxford University Press, 2000), p. 721.
  10. See G. Best, *War and Law since 1945* (Oxford: Oxford University Press, 1994), p. 10. An example of a more accessible read is the ICRC text, “*Fighting it Right*,” *Model Manual of the Law of Armed Conflict for Armed Forces* (Geneva: ICRC, 1999).
  11. See J. Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93*, a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Minister of Public Works and Government Services Canada (1997), p. 23, (hereafter “Simpson Study”).
  12. See Institute of International Law, “The application of international humanitarian law and fundamental human rights, in armed conflicts in which non-state entities are parties,” Fourteenth Commission, Berlin Session 1999 (25 August 1999), p. 3.
  13. For example, see UN Security Council Resolution 814, 26 March 1993, para. 13 (Somalia), and UN Security Council Resolution 788, 19 November 1992, para. 5 (Liberia).
  14. Secretary-General’s Bulletin on Observance by UN forces of international humanitarian law, ST/SGB/1993/3 of 6 August 1999, see *infra*.
  15. For a discussion of the ICC and related issues, see below; and also D. Robinson and H. von Hebel, “War Crimes in Internal Conflicts: Article 8 of the ICC Statute,” in *Yearbook of International Humanitarian Law* 2 (Dordrecht: Kluwer, 1999), pp. 193-209.
  16. See *Dishonoured Legacy, Report of the Commission of Enquiry into the Deployment of Canadian Forces to Somalia*, Canadian Government Publishing (Ottawa, 1997), also available at <http://www.dnd.ca.somaliae.htm> (english version); *Africa Rights Report*, “Somalia - Human Rights Abuses by the UN Forces,” London (July 1993); and Mark Huband, *Guardian*, 31 December 1993, p. 6. The Africa Rights report documents a number of grave breaches of the Geneva Conventions by a number of contingents in Somalia. Most disturbing is the conclusion that these were “not cases of undisciplined actions by individual soldiers, but stem from the highest echelons of the command structure,” p. i. Italy and Belgium also established inquiries into the conduct of their respective armed forces in Somalia. See *Amnesty International*, “AI Concerns in Europe: January-June 1997,” AI Index EUR 01/06/97 (1997), p. 1; and “Italy: A Briefing for the UN Committee Against Torture,” AI Index EUR 30/02/99 (May 1995), p. 10.
  17. D. Garcia-Sayan, “Human Rights and Peace-Keeping Operations,” *University of Richmond Law Review* 29 (1995), pp. 41-65 at 45. This article deals primarily with the UN mission to El Salvador (ONUSAL). See also D. Forsythe, “Human Rights and International Security: United Nations Field Operations Redux,” in P.R. Baehr, et al. eds., *The Role of the Nation State in the 21st Century: Human Rights, International Organisations and Foreign Policy* (Dordrecht: Kluwer, 1998), pp. 265-76.
  18. See W. G. Sharp, “Protecting the Avatars of International Peace and Security,” *Duke Journal of Comparative and International Law* 7 (1996), pp. 92-183 at 112-43.
  19. In addition, the Secretary-General endeavors to conclude Status of Force Agreements (SOFA) with the host state governments. This is not always possible; for example, none was concluded in Somalia, and it took nearly 20 years to conclude a SOFA in respect of UNIFIL. See generally D. Fleck and M. Saalfeld, “Combining Efforts to Improve the Legal Status of UN Peacekeeping Forces and Their Effective Protection,” *International Peacekeeping* 1, no. 3 (1994), pp. 82-84.

20. This is outlined by C. Greenwood, "International Humanitarian Law and United Nations Military Operations," *Yearbook of International Humanitarian Law* 1 (Dordrecht: Kluwer, 1998), pp. 3-34 at 30-31; also see Roberts and Guelff, eds., *Documents*, p. 623. Article 8, para. 2 (d), iii, of the Statute of the International Criminal Court (ICC) also prohibits attacks on peacekeepers "so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict." See O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verl.-Ges., 1999), pp. 277-78; and ICRC reference document to the Preparatory Commission to assist in its work on elements of crimes for the ICC, *Droit international humanitaire, 1.3 Cour penale internationale, 1.3.3.4 General points common to the offences under Article 8 (2) (e) of the ICC Statute* (1999).
21. *Annuaire de l'Institut*, 54 vol. II, (1971), p. 466, and 56 vol. II, (1975), p. 541. See also Institute of International Law, "The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties," Fourteenth Commission, Berlin Session 1999 (25 August 1999), p. 4; and D. Schindler and J. Toman, eds., *The Laws of Armed Conflicts* (Dordrecht: Martinus Nijhoff, 1988), pp. 903 and 907.
22. See R. Dupuy, ed., *A Handbook on International Organizations*, 2nd ed. (Dordrecht: Martinus Nijhoff, 1998), p. 887; and *Secretary-General's Report on Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations (A/51/389)*, reproduced in *International Legal Materials* 37 (1998), p. 702, para. 4.
23. See generally C. F. Amerasinghe, *Principles of the Institutional Law of International Organization* (Cambridge: Cambridge University Press, 1996), pp. 223-48.
24. Dupuy, *International Organizations*, p. 888.
25. See D. Schindler, "Significance of the Geneva Conventions for the contemporary world," *International Review of the Red Cross* 836 (1999), pp. 715-29.
26. See T. Meron, "War Crimes in Yugoslavia and the Development of International Law," *American Journal of International Law* 88 (1994), pp. 78-83, at 80; and C. Byron, "Armed Conflicts: International or Non-International?" *Journal of Conflict and Security Law* 6, no. 1 (2001), pp. 63-90.
27. Greenwood, "International Humanitarian Law," p. 9; and D. Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols," *Recueil des Cours* 163 (1979), pp. 116-63. And see Institute of International Law, "The application of international humanitarian law and fundamental human rights, in armed conflicts in which non-state entities are parties," Fourteenth Commission, Berlin Session 1999 (25 August 1999), pp. 3-5.
28. Military and Paramilitary activities, *Nicaragua v. USA*, ICJ Reports 1986, p. 122 esp. paras. 219 and 220. The ICJ contrasted the conflict between the Contras and the Sandinista government with that between the US and Nicaragua. The first, as internal, was governed by Common Article 3 only; the second, as international, fell under the rules governing international armed conflicts. The Court also affirmed that the fundamental general principles of humanitarian law (Common Article 3, in the opinion of the Court), belong to the body of general international law; in other words, that they apply in all circumstances for the better protection of the victims, regardless of the legal classification of armed conflicts. See R. Abi-Saab, "Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern," *Essays in Honour of F. Kalshoven* (Dordrecht: Martinus Nijhoff, 1991), pp. 209-23.
29. See generally M. Sassoli and A. Bouvier, "The Law of Non-International Armed Conflict," *How Does Law Protect in War* (Geneva: ICRC, 1999), pp. 201-17; and ICRC reference document to assist Preparatory Commission to assist in its work on elements of crimes for the ICC, *Droit international humanitaire, 1.3 Cour penale internationale, 1.3.3.3 General points common to the offences under Article 8 (2) (c) of the ICC Statute* (1999).
30. See T. Meron, "The Humanization of Humanitarian Law," *American Journal of International Law* 94 (2000), pp. 239-78, esp. p. 261.

31. But it is noteworthy that in the *Tadic* case (*Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case no. IT-94-1-AR72, 2 October 1995), the Appeals Chamber referred to the ICJ decision in the *Nicaragua v. US* case (merits) that Article 1 of the four Geneva Conventions “lays down an obligation that is incumbent, not only on states, but also on other international entities including the UN” (para. 93).
32. P. Rowe, “Maintaining Discipline in UN Peace Support Operations: The Legal Quagmire for Military Contingents,” *Journal of Conflict and Security Law* 5, no. 1 (2000), pp. 45-62, esp. pp. 50-58.
33. *The Blue Helmets - A Review of United Nations Peacekeeping*, 3rd ed. (New York: United Nations, 1996), p. 4.
34. Goodrich, Hambro and Simons, *Charter of the United Nations*, 3rd ed. (New York: Columbia University Press, 1969), p. 291.
35. ONUC amounted to at least *de facto* enforcement action; see N. D. White, “The UN Charter and Peacekeeping Forces: Constitutional Issues,” in M. Pugh, ed., *The UN, Peace and Force* (London: Frank Cass, 1996), pp. 43-63 at 53. See also *Certain Expenses of the UN - Article 17(2)*, Advisory Opinion, 20 July 1962, ICJ Reports 1962, p. 177, where the ICJ said the “the operation did not involve ‘preventative or enforcement measures’ against any state under Chapter VII.”
36. Though Albania had elements of traditional peacekeeping and peace enforcement combined in one mandate. See D. Kritsiotis, “Security Council Resolution 1101 (1997) and the Multi-national Protection Force of Operation Alba in Albania,” *Leiden Journal of International Law* 12 (1999), pp. 511-47.
37. It is best to view the action by NATO forces in Kosovo during 1999 as *sui generis*. See B. Simma, “NATO, the UN and the Use of Force: Legal Aspects,” *European Journal of International Law* 10 (1999), pp. 1-22; K. Ambos, “NATO, the UN and the Use of Force: Legal Aspects. A comment on Simma and Cassese,” *Humanitäres Völkerrecht, Deutsches Rotes Kreuz* 2 (1999), pp. 114-15; A. Cassese, “Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” *European Journal of International Law* 10 (1999), pp. 23-30; and C. Guicherd, “International Law and the War in Kosovo,” *Survival* 41, no. 2 (Summer 1999), pp. 19-34. See also “The Kosovo crisis and international humanitarian law,” *International Review of the Red Cross* 837 (2000), in which the whole edition is devoted to contributions on the topic.
38. *The Blue Helmets*, p. 5.
39. J. Peck, “The U.N. and the Laws of War: How Can the World’s Peacekeepers be Held Accountable,” *Syracuse Journal of International Law* 21 (1995), pp. 283-310, at 288.
40. *The Blue Helmets*, p. 5.
41. Greenwood, “International Humanitarian Law,” p. 11.
42. UN document: A/47/277 - S/24111 (June 1992).
43. Interviews, UN official and senior military officer seconded to UN DPKO, New York, 1998.
44. H. McCoubrey, “International Law and National Contingents in UN Forces,” *International Relations* 12, p. 46; Greenwood, “International Humanitarian Law,” p. 18; and M. Bothe, “Peacekeeping,” in Simma, ed., *Charter*, p. 695. See also two resolutions adopted by the Institut de Droit International: Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which UN Forces may be engaged, adopted in Zagreb in 1971, *Annuaire de l’institut de droit international* 54, no. II (1971), p. 465; and Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which UN Forces may be Engaged, adopted in Wiesbaden in 1975, *Annuaire de l’institut de droit international* 56 (1975), p. 540.
45. Article 1, First Geneva Convention of 1949, and the Preamble to the Additional Protocol I of 1977.

46. D.W. Bowett, *United Nations Forces* (London: Stevens, 1964), pp. 484-85.
47. *Ibid.*, pp. 487-88.
48. Goodrich, Hambro, and Simons, *United Nations*, pp. 317-26; and Simma, ed., *Charter*, pp. 760-63.
49. See Dupuy, *International Organizations*, p. 891.
50. Bowett, *Forces*, p. 53.
51. See R. Murphy, "The Legal Framework of UN Peacekeeping Forces and the Issue of Command and Control," *Journal of Armed Conflict Law* 4, no. 1 (1999), pp. 41-73.
52. Bowett, *Forces*, p. 56.
53. See below.
54. United Nations document: A/47/277 - S/24111 (June 1992).
55. See D. Smith, *The State of War and Peace Atlas*, International Peace Research Institute, Oslo (London: Penguin, 1997).
56. P. Benvenuti, "The Implementation of International Humanitarian Law in the Framework of Peacekeeping Operations," *Law in Humanitarian Crises* 1 (European Commission, 1995), pp. 83-120 at 88.
57. See N. White, *Keeping the Peace*, 2nd ed. (Manchester: Manchester University Press, 1997), pp. 115-28 esp., pp. 117-18.
58. Amerasinghe, *Principles*, pp. 92-93 and 229. See also Tittmore, "Belligerents," esp. pp. 92-95.
59. ICJ Reports 1980, p. 67 at 90.
60. Amerasinghe, *Principles*, pp. 240-41.
61. See UN Documents A/CN.4/195 and Add. 1 dated 7 April 1967. The principal claimant was the Belgian government. Despite the nature of the authorization to use force in the ONUC operation, the ICJ found that it "did not involve 'preventive or enforcement' measures against any State under Chapter VII . . ." *Advisory Opinion on Certain Expenses of the United Nations*, ICJ Reports 1962, p. 177. See Bowett, *Forces*, pp. 175-80.
62. Amerasinghe, *Principles*, p. 242; and Dupuy, *International Organizations*, p. 891. The UN has acknowledged liability for activities carried out by both UNEF and ONUC.
63. *Ibid.*, p. 243; and F. Seyersted, "United Nations Forces: Some Legal Problems," *British Yearbook of International Law* 37 (1961), pp. 362 and 421.
64. Murphy, "Legal Framework," pp. 41-73.
65. See *Nissan v. Attorney General* [1968] 1 Queens Bench 286, and [1969]1 All England Reports 629; and I. Brownlie, "Decisions of British Courts during 1968 Involving Questions of International Law," *British Yearbook of International Law* 42 (1968-69), p. 217.
66. R. Gutman, "The UN and the Geneva Conventions" in R. Gutman and D. Reif, eds., *Crimes of War* (New York: Norton, 1999), pp. 361-64.
67. Simma, *Charter*, pp. 1292-302; and Goodrich, Hambro and Simons, *United Nations*, pp. 614-17. See also Tittmore, "Belligerents," esp. pp. 101-08.
68. Statement to this effect attributed to Stephen Katz, OLA official, in Gutman, "Geneva Conventions," pp. 361-64 at 361.
69. See Murphy, "Legal Framework," pp. 41-73.
70. This position has not altered with the Secretary-General's Bulletin on Observance by UN forces of international humanitarian law, ST/SGB/1993/3 of 6 August 1999. See Section 1(1) discussed.
71. On the question of treaty making powers, see Amerasinghe, *Principles*, pp. 102-03.

72. Reparations Case, ICJ Reports 1949, p. 174; and Shraga and Zacklin, *Symposium*, p. 43.
73. Roberts and Guelff, eds., *Documents*, p. 721.
74. Greenwood, "International Humanitarian Law," p. 15.
75. U. Palwankar, "Applicability of International Humanitarian Law to UN Peacekeeping Forces," *International Review of the Red Cross* 80 (1993), pp. 227-40 at 229-33. A provision to this effect was incorporated into the UNEF, ONUC and UNFICYP Force Regulations. As no regulations were adopted in respect of UNIFIL, no such provision exists for that force.
76. Shraga and Zacklin, *Symposium*, p. 44. The Model Agreement with troop contributors contains the following provision:

[The UN peacekeeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving . . . be fully acquainted with the principles and spirit of the conventions.
77. Gutman, "Geneva Conventions," pp. 361-64. There were also claims that UN forces in Bosnia-Herzegovina ignored evidence of human rights abuses elsewhere.
78. Interview, T. Goksel, UNIFIL spokesman, Naqoura, Lebanon, 1998; and personal experience of author.
79. Secretary-General's Bulletin on Observance by UN forces of international humanitarian law, ST/SGB/1993/3 of 6 August 1999. See M. Zwanenburg, "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations," *International Peacekeeping* 5, nos. 4-5 (1999), pp. 133-39; and Rowe, "Maintaining Discipline," p. 52.
80. Personal interview, Official, UN Legal Division, New York, December 2000. Bulletins were described as part of the UN "internal law, binding within the Organisation's own legal system."
81. *Ibid.*, at pp. 136 and 138, and below.
82. See Roberts and Guelff, eds., *Documents*, pp. 623-26. On combatants generally, see K. Ipsen, "Combatants and Non-Combatants," in Fleck, ed., *Handbook*, pp. 65-104.
83. The Bulletin also commits the UN to ensuring that members of military personnel are fully acquainted with the rules of humanitarian law. It accepts co-responsibility with the contributing states for this whether or not there is a Status of Force Agreement. Most important, however, is Section 4, which states that it is the responsibility of the national courts to prosecute military personnel for violations of humanitarian law.
84. Paragraph 9.4 states: The UN shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel. Paragraph 9.5 states: The UN shall respect and protect transports of wounded and sick or medical equipment in the same way as mobile medical units.
85. It has been proposed by the Security Council (22 December 2000) that the Special Court for Sierra Leone have jurisdiction over crimes committed by peacekeepers or related personnel, where the state that had sent the relevant personnel was unwilling or genuinely unable to carry out an investigation or prosecution. See Amnesty International, *Sierra Leone - Renewed commitment needed to end impunity*, 24 September 2001, para. 3.6.
86. See Pictet, *Commentary - Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 16.
87. Greenwood, "International Humanitarian Law," pp. 9, 32-33.



88. A. Roberts, "The Laws of War: Problems of Implementation" in *Law in Humanitarian Crises*, p. 13.
89. For a discussion of this issue, see R. Weiner and F. Ni Aolain, "Beyond the Laws of War: Peacekeeping in Search of a Legal Framework," *Columbia Human Rights Law Review* 27 (1996), p. 293 at 312-20.
90. In a follow up to the *Brahimi Report*, the Security Council adopted Resolution 1327, of 13 November 2000, which stated that the Council "Undertakes to ensure that the mandated tasks of peace operations are appropriate to the situation on the ground, including such factors as the prospects of success, the potential need to protect civilians, and the possibility that some parties may seek to undermine peace through violence" (Annex II). See also Security Council Resolution 1296, of 19 April 2000, paras. 13 and 14. These express a commitment, but not a legal obligation, to protect civilians.
91. The Report of the Panel on UN Peacekeeping Operations, UN, 23 August 2000 (*Brahimi Report*, available from <http://www.un.org>), recommended that UN peacekeepers - troops or police - be authorized to stop violence against civilians, within their means, in support of basic UN principles. At present this has no legal status, but it is a significant acknowledgement of the duty to intervene. See generally Reinhard Marx, "A Non-Governmental Human Rights Strategy for Peacekeeping," *Netherlands Quarterly of Human Rights* 14, no. 2 (June 1996), pp. 126-45.
92. In 2002 the Dutch government resigned after the release of the Netherlands official report into the event; see [www.srebrenica.nl](http://www.srebrenica.nl), and R. Siekmann, "The Legal Position of Dutchbat vis-a-vis Srebrenica," *Yearbook of International Humanitarian Law* 1, pp. 301-12.
93. See generally O. Ulich, "Peacekeeping and Human Rights: Is there a Duty to Protect," *International Human Rights Advocacy* (Spring 1996).
94. Shragra and Zacklin, *Symposium*, p. 39.
95. Common Article 3, referred to as the mini convention, is contained in all four Geneva Conventions. It applies to armed conflict "not of an international character." See Pictet, *Commentary*, pp. 25-44. The ICJ has deemed that "certain general and well recognised principles," including those contained in Common Article 3, reflect the "elementary considerations of humanity," the *Corfu Channel Case*, ICJ Reports 1949, p. 4 at 22.
96. Both the ICRC and the International Conference of the Red Cross and Red Crescent on many occasions expressed their opinion on the applicability of international humanitarian law to peacekeeping forces. See Palwankar, "Applicability," pp. 230-31.
97. Shragra and Zacklin, *Symposium*, p. 43.
98. Thus rules pertaining to prisoners of war of penal sanctions could not apply, whereas rules pertaining to methods and means of combat, categories of protected persons and respect for recognized sites would be fully applicable. Statement by the ICRC at the 47th Session of the General Assembly on 13 November 1992.
99. Pfanner, "Application of International Humanitarian Law and military operations undertaken under the United Nations Charter," in *Symposium*, pp. 49-59 at 55.
100. *Ibid.*
101. See Sharp, "Protecting the Avatars," pp. 93-183. Sharp is very critical of the Convention, and he suggest the adoption of a Geneva Protocol III instead. C. Greenwood replied to Sharp's article in "Protection of Peacekeepers: The Legal Regime," *Duke Journal of Comparative and International Law* 7 (1996), pp. 185-207.
102. E. Bloom, "Protecting Peacekeepers: The Convention on the Safety of UN and Associated Personnel," *American Journal of International Law* 89 (1995), pp. 621-31 at 623-24. In essence, it covers two types of personnel who carry out activities in support of the fulfilment of the mandate of a UN operation. In the first category are those directly engaged as part of a UN mandated operation whether in a military, police, or civilian capacity. The second category

covers “associated personnel,” i.e., persons assigned by the Secretary-General or an intergovernmental organization with the agreement of a competent organ of the UN. For example, NATO forces asked to assist UNPROFOR in Bosnia-Herzegovina, and US assistance under UNITAF in Somalia would fall within this element of the definition.

103. *Ibid.*, p. 625. However, Article 20(a) of the Convention, a “savings clause,” indicates that the special protective status given to non-combatant UN forces neither derogates from those provisions of humanitarian law that would protect such forces, nor removes the responsibility of non-combatant UN forces to respect the law.
104. This should be read in conjunction with Article 1 (definitions) of the Convention.
105. M. Christiane Bourloyannis-Vrailas, “The Convention on the Safety of UN and Associated Personnel,” *International Comparative Law Quarterly* 44 (July 1995), pp. 560-90 at 567.
106. See generally P. Kirsch, “The Convention on the Safety of UN and Associated Personnel,” *International Peacekeeping* 2, no. 5 (1995), pp. 102-06 at 105.
107. Bloom, “Protecting Peacekeepers,” p. 625.
108. See Greenwood, “Protection of Peacekeepers,” pp. 200-02.
109. Shraga and Zacklin, *Symposium*, pp. 46-47. See R. Murphy “UN Peacekeeping in Lebanon and the Use of Force,” *International Peacekeeping* 6, no. 2 (1999), pp. 38-63.
110. Bloom, “Protecting Peacekeepers,” p. 625.
111. See Kritsiotis, “Resolution,” pp. 511-47.
112. Article 9 of the Convention.
113. R. Glick, “Lip Service to the Laws of War: Humanitarian Law and UN Armed Forces,” *Michigan Journal of International Law* 17 (1995), pp. 53-107 at 81-96.
114. Shraga and Zacklin, *Symposium*, p. 46.
115. Document A/AC.242/L.2, proposal by New Zealand and Ukraine, Article 1, paragraph 2. Civilian UN personnel were also unhappy with the original proposals; interview, Ambassador P. Kirsch, former chairman of the negotiations on the Convention, Galway, August 2000.
116. For background, see A. Bouvier, “Convention on the Safety of UN and Associated Personnel,” *International Review of the Red Cross* 309 (1995), pp. 638-66 (available at [www.icrc.org](http://www.icrc.org)).
117. Shraga and Zacklin, *Symposium*, p. 46; S. Lepper, “War Crimes and the Protection of Peacekeeping Forces,” *Akron Law Review* 28 (Spring, 1995), pp. 411-15 at 415.
118. Interview, Ambassador Kirsch. There was also concern among some states to avoid condoning the possible future presence of NGOs on their territory, and the issue of consent to the presence of UN forces in the first instance.
119. Benvenuti, “Implementation,” p. 92
120. Some states have reviewed their positions and expressed reservations about the Security Council’s use of Chapter VII. See J. Ciechanski, “Enforcement Measures under Chapter VII of the UN Charter: UN Practice after the Cold War”; and D. Daniel and B. Hayes, “Securing Observance of UN Mandates Through the Employment of Military Force,” in Pugh, ed., *The UN, Peace and Force*, pp. 82-104 at 97, and pp. 105-25 at 106 respectively.
121. Under the Geneva Conventions Relative to the Treatment of Prisoners of War of August 12, 1949, 75 U.N.T.S. 135 (Third Convention) prisoners of war, that is, captured enemy combatants cannot be prosecuted or punished for having fought in accordance with humanitarian law.
122. See comments to this effect in M. Meijer, Notes, p. 137.
123. For the limited protection available under the Geneva Conventions and Additional Protocols, see fn. 140.

124. Document S/12611, 19 March 1978 provides, *inter alia*,  
The Force will be provided with weapons of a self-defensive character. It shall not use force except in self-defence. Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate . . . .”
125. Palwankar, “Applicability,” p. 230.
126. *Ibid.*, pp. 232-33.
127. See R. Murphy, “International Humanitarian Law Training for Peace Support Operations,” *International Review of the Red Cross* 82 (2000), pp. 953-68.
128. *Israel in Lebanon*, Report of the International commission to enquire into reported violations of International Law by Israel during its invasion of the Lebanon, (London: Ithaca Press, 1983). See also *Civilian Pawns - Laws of War Violations and the Use of Weapons on the Israeli-Lebanon Border* (New York: Human Rights Watch, 1996).
129. *Ibid.*, preface, pp. ix-x. The Commission was comprised of Mr. Sean MacBride (Chairman), Prof. Richard Falk, Kadar Asmal, Dr. Brian Bercusson, Prof. G. de la Pradelle, and Prof. Stefan Wild.
130. *Ibid.* at pp. 38, 65, 99, 103, 108, 121, 159-60, 187-97 and *passim*.
131. Document S/16713, 24 August 1984, letter from representative of Lebanon to Council President. The Four Geneva Conventions of 1949 were ratified by Lebanon and Israel in 1951. Neither were party to the Additional 1977 Protocols.
132. The Lebanese draft resolution called upon Israel as the Occupying Power, to respect strictly the rights of the civilian population in the area under its occupation and to comply strictly with the provisions of the Fourth Geneva Convention. The vote on the text (S/16732) was 14 in favor, to one against (the USA), there were no abstentions. The draft resolution was not adopted due to the negative vote of the United States. See also S.C.O.R. 2552 Mtg., 29 August 1984 to 2556 Mtg., 4 September 1984.
133. There were also grave risks for UNIFIL of being caught in a crossfire or being deliberately targeted by parties to the conflict. See D. Turns, “Some Reflections on the Conflict in Southern Lebanon: The ‘Qana Incident’ and International Humanitarian Law,” *Journal of Conflict and Security Law* 5 (2000), pp. 177-209.
134. Personal experience of writer from discussions with Lebanese during 1989. This was particularly true when the Israeli forces came under intense pressure after their decision to re-deploy in 1985.
135. It began in February 1984, and involved, *inter alia*, the deportation of Lebanese from their home villages, expulsions of local inhabitants, curfews, mass arrests, internment, transfer of suspects, and the increased destruction of homes belonging to suspected resistance fighters. The policy was reportedly sanctioned by the Israeli Defence Minister and was likened to that used in the Gaza Strip in the early 1970s to curtail Palestinian unrest. See R. Fisk, *The Times*, 15 February and 21 February 1985. For a more extensive account by the same author, see *Pity the Nation* (London: Andre Deutsch, 1990), pp. 243 to 281 and *passim*.
136. UN Document S/17093, 11 April 1985, para. 24.
137. The leader of AMAL, Nabbi Berri, accused UNFIIIL of helping the Israelis on occasions. *The Irish Times*, 23 January 1985. Other groups made similar accusations. *The Times*, 22 February 1985.
138. In one incident they became involved in a fist fight with the Israelis when trying to prevent the latter blowing up houses. They were also reported to have laid the French Tricolour at the entrance to another village and threatened to shoot the first Israeli to drive over it. The Israelis are reported to have retreated. R. Fisk, *The Times*, 28 February 1985.
139. In the first joint Israeli/“South Lebanon Army” operation, during which the latter forces played the leading role, an attempt to forcefully evict the Irish troops from their post there was successfully resisted. See R. Fisk, *The Irish Times*, 8 March 1985. The report was confirmed by

Comdt. B. McKevitt who was serving with 56 Infantry Battalion at the time. The Israelis used the South Lebanese Army to extend the "Security zone" and push the Irish back from certain posts in their way. The Irish refused to move from posts, such as "Charlies Mountain"(Al Yatun) despite Israeli demands that they do so. *The Irish Times* 21, 22 March 1985 and 1 April 1985, and *The Guardian*, 21 March 1985.

140. Personal interview, senior Irish officer who served with UNIFIL at the time, Dublin, June 1998.
141. R. Fisk, *The Times*, 22 February 1985.
142. *Ibid.*, the threat was made by the Shi'a Muslim Organization *Hizbollah*.
143. Document S/17965, 9 April 1986, para 21.
144. UNIFIL reported that six persons, including one Israeli soldier, were killed in the operation, 10 more wounded and about 150 others were taken prisoner by the Israeli "South Lebanon Army" forces. Eighty of the detained were released soon afterwards; however, the other 60 were held indefinitely.
145. Israel claimed that its forces had received clear instructions on how to behave toward the local civilian population before and during the operation, and that follow up investigations of all Israeli army units involved had found no deviation from these instructions.
146. Personal interview with senior Lebanese Red Cross official, 19 September 1989 and local civilians from villages affected September/October 1989. The Secretary-General's report states that following the incident an Israeli force of about three mechanized battalions accompanied by members of SLA and supported by tanks and helicopter troop carriers and gun ships carried out a series of cordon and search operations in the UNIFIL area from 17 to 22 February. S/17965 (fn.143), para 21.
147. *Ibid.*; and personal interview T. Goksel.
148. Article 33 provides that no protected person may be punished for an offence he or she has not personally committed. See Pictet, *Commentary*, pp. 224-29; Roberts and Guelff, eds., Documents, pp. 312-13; and G. Schwarzenberger, *International Law, Vol. II, The Law of Armed Conflict* (London: Stevens, 1968), pp. 223-24. Collective penalties, and likewise all measures of intimidation or of terrorism, are prohibited, including reprisals against such persons or their property. Article 31 forbids any physical or morale coercion against protected persons to obtain information. See Pictet, *Commentary*, pp. 219-20.
149. Those detained were blindfolded and had their hands tied behind their backs. Many of the suspects were beaten. Personal interviews with UNIFIL officers who witnessed such events at the time. For an account of Israeli Defence Forces actions in Lebanon, see D. Yermiya, *My War Diary - Israel in Lebanon* (London: Pluto Press, 1983). The pamphlet, *Operation Iron Fist- Israeli Policy in Lebanon* (London: published by the League of Arab States, May 1985), gives a somewhat biased chronology of events.
150. Article 49 of the Geneva Convention IV states in para 2 that "... the Occupying Power may undertake total or partial evacuation if the security of the population or imperative military reasons so demand..." Neither justification was applicable in this instance. See Oppenheim, p. 452; J. Stone, *Legal Controls of International Conflict* (Sydney: Maitland Publications, 1958), pp. 704-05; and Pictet, *Commentary*, pp. 277-83.
151. At the time of the ambush the Israeli forces and the "South Lebanon Army" were considering establishing a "sanitised zone" in the area immediately behind the so-called security zone. Personal interviews, senior Irish officer with UNIFIL at the time, Dublin 1986, and T. Goksel.
152. Israeli tactics led to widespread and unnecessary damage being caused to the property and personal belongings of villagers, contrary to Article 53 of the Fourth Geneva Convention, S/17965 (fn.144), paras. 13-15, and interviews with local inhabitants living in the areas searched at the time, July to October 1989. When the Israeli troops were assisted or followed by the *de facto* forces the damage caused to property was much worse and the operation frequently turned into one of terrorizing and ill treating villagers. The "South Lebanon Army" also

- engaged in looting and harassment of UNIFIL troops. The Israeli troops made no attempt to restrain them from the excesses despite their responsibility under Article 29 and Section III of the Geneva Convention IV respectively.
153. The doctrine is known as *Tohar Haneshek* and penetrates all aspects of Israeli Defence Forces life. See R.A. Gabriel, *Operation Peace for Galilee* (Toronto: Collins, 1985), pp. 171-76.
  154. *The Times*, 21 March 1985.
  155. *The Irish Times*, 11 March 1985.
  156. *The Irish Times*, 12 March 1985.
  157. Personal interview, Capt. G. Humphreys (Ret'd), former UNIFIL HQ Information Officer at the time, Dublin, 1999.
  158. Document S/17684, 16 December 1985, paras. 2-7. The Norwegian battalion had particular difficulty with these groups when restrictions were imposed on the movement of UNIFIL personnel.
  159. According to Resolution 425 (1978), UNIFIL was supposed to confirm the Israeli withdrawal, bring about a cessation of hostilities, and restore international peace and security. See *UN Document S/12611* (fn. 124).
  160. The accusation was made by *Hizbollah* leaders.
  161. The government of the Netherlands obviously thought so when they unilaterally withdrew their contingent. *The Irish Times*, 9 October 1985.
  162. Personal interviews, Comdt. M. Hanrahan and Capt. J. Walsh, Military Information Officers with UNIFIL, Lebanon, August 1989.
  163. M. Heiberg, "Observations on UN Peacekeeping in Lebanon," *Norwegian Institute of International Affairs*, NUPI NOTAT No. 305, (September 1984), p. 30.
  164. Personal interview, Capt. G. Humphreys.
  165. Heiberg, "Observations, p. 33; and M. Heiberg and J.J. Holst, "Keeping the Peace in Lebanon: Assessing International and Multinational Peacekeeping," *Norwegian Institute of International Affairs*, NUPI NOTAT No. 357, (June 1986), pp. 13-14. See also M. Heiberg and J.J. Holst, "Peacekeeping in Lebanon - Comparing UNIFIL and the MNF," *Norwegian Institute of International Affairs* (1986), p. 406. It was submitted that since UNIFIL continued to operate as a legitimate military authority, inside the area of operation, the IDF did not exert exclusive control and therefore should not have been regarded as an Occupying Power. See also by the same authors "Keeping the Peace in Lebanon: Assessing International and Multinational Peacekeeping."
  166. *Ibid.* This led to claims that some UNIFIL battalions were passive and others more aggressive in their interpretation of UNIFIL Standing Operating Procedures.
  167. Human Rights Watch, *Civilian Pawns*, p. 35.
  168. *Brahimi Report*, Executive Summary, p. 3 of 6.
  169. R. Kiwanuka, "Humanitarian Norms and Internal Strife: Problems and Prospects," in F. Kalhoven and Y. Sandoz, eds., *Implementation of International Humanitarian Law* (Dordrecht and London: Nijhoff, 1989), pp. 229-34.
  170. Turley, "Keeping the Peace," p. 140.
  171. *Ibid.*, p. 156.
  172. See generally W. Durch, "Introduction to Anarchy: Humanitarian Intervention and 'State Building' in Somalia," in W. Durch, ed., *UN Peacekeeping, American Politics and the Uncivil Wars of the 1990's* (London: Macmillan, 1997), pp. 311-66; J. Mayall, ed., *The new interventionism 1991-1994: United Nations experience in Cambodia, former Yugoslavia, and Somalia* (Cambridge: Cambridge University Press, 1996), pp. 9-14; R. Thakur, "From Peacekeeping to Peace Enforcement: the UN Operation in Somalia," *The Journal of Modern African Studies* 39,

- no. 3 (1994), pp. 387-410; M. Sahnoun, *Somalia - The Missed Opportunities* (Washington, DC: United States Institute of Peace, 1994), esp. pp. 23-42; W. Clarke and J. Herbst, eds., *Learning From Somalia* (Boulder, CO: Westview, 1997), esp. W. Clarke, "Failed Visions and Uncertain Mandates," pp. 3-19; *The United Nations and Somalia 1992-1996* (New York: United Nations Blue Book Series, Vol. VIII, 1996), p. 4; Mohamed Diriye Abdullahi, *Fiasco in Somalia: US-UN intervention*, Africa Institute of South Africa, Occasional Paper No. 61 (1995), esp. pp. 10-30. Boutros-Boutros Ghali, *Unvanquished: A US-UN Saga* (New York: Random House, 1999), esp. pp. 105, 107 and 119-12.
173. Turley, "Keeping the Peace," p. 153.
174. P. Zengel, "Assassination and the Law of Armed Conflict," *Mercer Law Review* 43 (1992), p. 615 at 644.
175. Pfanner, *Symposium*, pp. 49-59 at 55.
176. *United States v Captain L. P. Rockwood II*, (1998) 48 MJ 501.
177. The case is discussed in detail in Weiner and Ni Aolain, "Beyond the Laws of War," pp. 293-354.
178. *Ibid.*, p. 305.
179. *Ibid.*, pp. 331-33 and *passim*. A Protecting Power was anticipated in the Geneva Conventions as a state that is a neutral party to a conflict, instructed by the belligerent parties to protect the interests of warring states nationals, "protected persons" and those detained in an armed conflict. See Article 8 common to Geneva Convention I, II and III.
180. Court Martial Appeal Court of Canada, (1996) 134 DLR (4th) 377. Pte. Brocklebank was arrested for aiding and abetting the torture of Shidane Arone, a Somali teenager who entered the Canadian Forces compound and was tortured and beaten to death while in custody. See K. Boustany, "Brocklebank: A Questionable Decision of the Court Martial Appeal Court of Canada," *Yearbook of International Humanitarian Law* 1, pp. 371-74; and J. Holland, "Canadian Courts Martial resulting from participation in the UNITAF Mission in Somalia," *International Peacekeeping* 1, no. 4 (1994), pp. 131-32.
181. For background on UNITAF and Somalia, see *Commission of Enquiry*, vol. 1, pp. 351-63. See also R.M. Young and M. Molina, "IHL and Peace Operations: Sharing Canada's lessons learned from Somalia," *Yearbook of International Humanitarian Law* 1, pp. 362-70 at 370.
182. See *United States v. Captain L.P. Rockwood II*.
183. Adopted 3 December 1992.
184. Pursuant to Section 9 of the *Geneva Conventions Act* of 1956. See "Simpson Study," pp. 26-28.
185. "Simpson Study," pp. 30-33. The CMAC may have failed to properly consider the relevance of Article 4 and 27 of the Fourth Geneva Convention. The Canadian Forces may arguably have been a party to the conflict or occupying part of Somalia within the meaning of the Fourth Convention. If so, this would create a group of "protected persons" that the court failed to recognize. The decision was also questioned by Boustany, "Brocklebank," at p. 371; and Young and Molina, "IHL and Peace Operations," pp. 365-67.
186. Although the Commission avoided reaching a firm conclusion a number of senior members of the Canadian Forces testified at the Commission's hearings that they thought the law of armed conflict applied in Somalia, "Simpson Study," p. 27; and *Commission of Enquiry*.
187. Judgment of the Belgian Military Court regarding violations of IHL committed in Somalia and Rwanda, Nr. 54 A.R. 1997, 20 November 1997. Published in *Journal des tribunaux* 24 (April/Avril 1998), pp. 286-89 (French language); and Comment by M. Cogen, *Yearbook of International Humanitarian Law* 1, pp. 415-16.
188. See N. Lupi, "Report by the Enquiry Commission on the Behaviour of Italian Peacekeeping Troops in Somalia," *Yearbook of International Humanitarian Law* 1, pp. 375-79.

189. D. Hurley, "An Application of the Laws of Armed Conflict," in Smith, ed., *The Force of Law: International Law and the Land Commander* (Canberra: Australian Defence Studies Centre/Australian Defence Forces Academy, 1994), pp. 179-87 at 182. Col. Hurley commanded the 1 Royal Australian Regiment in Somalia.
190. T. Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience," *American Journal of International Law* 94 (2000), pp. 78-89; A. Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?," *European Journal of International Law* 11 (2000), pp. 187-286; and R. Abi-Saab, "Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern," in A. Delissen and G. Tanja, eds., *Humanitarian Law of Armed Conflict* (Dordrecht: Martinus Nijhoff, 1991), p. 222.
191. M. J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations* (The Hague: Kluwer, 1999), esp. pp. 111-82; and by the same author, "Legal Regimes and Law Enforcement on Peace Operations," in Smith, ed., *Force of Law*, pp. 189-204 at 193.
192. *Ibid.* The US forces were ordered to apply the humanitarian provisions of Common Article 3.
193. *United States v. Captain L. P. Rockwood II.*
194. This clause had previously been recognized as proof that under international law war did not totally negate the protection accorded the civilian population. *Finta case*, Canada High Court of Justice, 10 July 1989, ILR 82, p. 435. Furthermore, in *Nicaragua v. USA*, ICJ Reports 1949, p. 22, the ICJ referred to the terms of the Martens clause as corresponding to what it had earlier identified under "elementary considerations of humanity, even more exacting in peace than in war."
195. See Rowe, "Maintaining Discipline," where he lists a number of disadvantages to arguing that soldiers are not well served by political leaders who argue that the humanitarian law applies to peacekeeping forces.
196. Although "War Crimes" are defined in Article 8 of the Statute of the ICC, these too are linked to the existence of an armed conflict situation. See O. Triffterer, *Rome Statute*, pp. 173-288.
197. R. Miller, *The Law of War* (Lexington MA: Lexington Books, 1975), p. 275. This is also the position of the ICRC.
198. C. Nier, Comment, "The Yugoslavian Civil War, an Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World," *Dickley Journal of International Law* 10 (1992), pp. 303 at 317.
199. The drafters of the Hague Convention on the Protection of Cultural Property amended the phrase to read ". . . even if a state of war is not recognised by one or more of them." F. Kalshoven, *Constraints on the Waging of War* (Geneva: ICRC, 1987), p. 27.
200. Greenwood, "International Humanitarian Law," p. 23.
201. Turley, "Keeping the Peace," p. 158.
202. Protocol I refers to struggles "in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1946* (Geneva: ICRC, 1987), p. 33.
203. This situation arose in respect of the NATO forces engaged in the Kosovo conflict during 1999.
204. Turley, "Keeping the Peace," p. 160.
205. See fn. 61; and Pictet, *Commentary*, pp. 17-44.
206. Greenwood, "International Humanitarian Law," p. 24.
207. Cited in Turley, "Keeping the Peace," p.136.
208. See <http://www.nightstalkers.com/tfranger/blackhawkdown/Default.html>, and M. Bowden, *Black Hawk Down* (New York: Penguin, 1999/2000). This account of the US led attack and subsequent military action to extricate themselves is a realistic outline of the dilemmas facing soldiers in such circumstances.

209. Peck, "Laws of War," p. 306.
210. *Reparations Case*, ICJ Reports 1949, p.174. See also Michael Bothe, "Peacekeeping and International Humanitarian Law: Friends or Foes?", *International Peacekeeping* 3 (1996), pp. 91-95 at 94.
211. See Murphy, "Legal Framework," pp. 41-73, and McCoubrey, "International Law," pp. 41- 44.
212. L. Geiger, "Armed forces and respect for international humanitarian law: Major issues," *Symposium*, pp. 60-64 at 60.
213. See generally D. Lloyd Roberts, "Training the armed forces to respect international humanitarian law - The perspective of the ICRC Delegate to the Armed and Security Forces of South Asia," *International Review of the Red Cross* 319 (1997), pp. 433-46; F. de Mulinen, *The Law of War and the Armed Forces*, Series Ius in Bello, no. 1 (Geneva: Henry Dunant Institute, 1992); and Y. Sandoz, "Respect for the Law of Armed Conflict: the ICRC's Observations and Experiences," *International Seminar on International Humanitarian Law in a New Strategic Environment: Training of Armed Forces*, Stockholm, 17-18 June 1996.
214. Though this need was recognized much earlier by some, see L. C. Green, "Humanitarian Law and the Man in the Field," *Military Law and Law of War Review* XIV (1976), pp. 96-115.
215. S. Lepper, "War Crimes and the Protection of Peacekeeping Forces," *Akron Law Review* 28 (1995), pp. 411-15 at 415.
216. A. Roberts, *Humanitarian Action in War*, Adelphi Paper 305 (Oxford, 1996), p. 70.
217. McCoubrey, "International Law," p. 46.
218. See Article 1, UN Charter.
219. See comments to this effect in R. Siekmann, "Notes on the Singapore Conference on Humanitarian Action and Peacekeeping Operations," *International Peacekeeping* 4 (1997), pp. 19-21 at 21. More recently, there were reports that UN troops deliberately avoided confronting militias in East Timor, and that French troops as part of KFOR failed to protect ethnic Albanians in Kosovo. See *The Irish Times*, 30 August 2000 p. 1, and 10 February 2000, p. 14.
220. See generally Triffterer, ed., *Rome Statute*, pp. 180-288; M.C. Bassiouni, *The Statute of the International Criminal Court - A Documentary History* (New York: Transnational, 1998); R. Lee, ed., *The International Criminal Court - The Making of the Rome Statute* (Dordrecht: Kluwer, 1999), pp. 79-126; L. Caflisch, "Toward the Establishment of a Permanent International Criminal Jurisdiction," *International Peacekeeping* 4, no. 5 (1998), pp. 110-15; Cassese, Gaeta and Jones, eds., *The Rome Statute of the International Criminal Court* (Oxford:Oxford University Press, 2002); and online at <http://www.igc.org/icc/>.
221. Roberts, *Humanitarian Action*, p. 50.
222. M. Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?" *European Journal of International Law* 10 (1999), pp. 124-43 at 126.
223. ICC Statute, Preamble, para. 10 and Articles 1, 12-15, 17-19. Triffterer, *Rome Statute*, pp. 15, 59-61 and *passim*.
224. The legal status of such agreements remains to be determined, but *prima facie* they are permissible under Article 98 of the ICC Statute. At the time of writing the US had signed 13 such agreements. Amnesty International Press Release, 11 October 2002.
225. UN Security Council Resolution 1422 of 12 July 2002. The resolution goes on to provide that it is the intention to renew this on an annual basis for as long as may be necessary in the future. This was possible by invoking Article 16 of the ICC Statute.
226. Triffterer, *Rome Statute*, pp. 180-288 esp. pp. 264-78; and Lee, ed., *International Criminal Court*, pp. 103-26. Lee notes that the Statute contains a substantially lower threshold for internal armed conflict than that laid down in Protocol II ( p.125).



227. M. Arsanjani, "The Rome Statute of an International Criminal Court," *American Journal of International Law* 93 (1999), p. 33. Article 7(1) of the Statute provides that particular acts must have been committed as part of a "widespread or systematic attack directed against any civilian population." Triffterer, *Rome Statute*, pp. 126-27.
228. McCoubrey, "International Law," p. 43.
229. H. McCoubrey, *International Humanitarian Law* (Great Britain: Dartmouth Publishing Company, 1990), p. 18. Although McCoubrey was addressing the confusion surrounding internal and international armed conflicts, the basic logic applies to all issues concerning humanitarian law.
230. H. Levie, *When Battle Rages: How Can Law Protect?*, Working Papers and Proceedings of the Fourteenth Hammarskjöld Forum 6 (John Carey, ed., 1971); and Miller, *Law of War*, p. 275. Tittmore recommended the adoption of a further Protocol to the Geneva Conventions permitting the UN to ratify the agreements, or the adoption of a report by the Security Council. Tittmore, "Belligerents," p. 114.
231. Pfanner, *Symposium*, p. 49.
232. H. McCoubrey, "International Humanitarian Law and United Nations Military Action in the "New World Order," *International Law and Armed Conflict: Commentary 1* (Nottingham: Nottingham University Press, 1994), p. 36 at 45.
233. See comments to this effect in M. Meijer, Notes, pp. 136-38 at 137. The Secretary-General issued his Bulletin on 6 August 1999, ST/SGB/1999/3.
234. Turley, "Keeping the Peace," p. 148.
235. "USA: International and Operational Law Note: When Does the Law of War Apply: Analysis of Department of Defence Policy on Application of the Laws of War," reprinted from *The Army Lawyer*, Department of the Army, June 1998 in *Yearbook of International Humanitarian Law* 1, pp. 617-19.
236. See Human Rights Watch, "Background Paper on Geneva Conventions and Persons Held by U.S. Forces," 29 January 2002; and reported statements by US Secretary of Defense, Donald Rumsfeld, *New York Times*, 23 January 2002; see also Rowan Scarborough, *The Washington Times*, 26 January 2002; and *USA Today*, 31 January 2002.
237. C. Greenwood, *International Humanitarian Law and the Laws of War, Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899* (May 1999), 3 (para. 1.6), quoting Sir Franklin Berman.