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Note

*283 THE U.N. AND THE LAWS OF WAR: HOW CAN THE WORLD'S PEACEKEEPERS BE HELD ACCOUNTABLE? [FNa]

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I. Introduction

During a symposium held on April 8, 1993 at Syracuse University, on "Rape as Genocide in Bosnia-Herzegovina," Natalie Nanedic, a Croatian-American research scholar who had been working with Professor Catharine MacKinnon on genocide atrocities committed against women, repeated accounts of atrocities that had recently occurred in Bosnia-Herzegovina. [FN1] Amidst her horror stories of brutal and systematically organized rapes, torture, and killing, she stated that several women claimed they had been raped by U.N. soldiers as a condition for escape from Serbian-run rape/death camps. [FN2]

One week after 23 U.N. (Pakistani) soldiers were killed by Somali fighters, U.N. troops opened fire on protestors in Mogadishu, injuring several civilians and leaving six dead. [FN3] Although the U.N. commander claimed it was a valid act of self defense, no guns were found among the crowd, and some witnesses claim that the shots fired on the U.N. soldiers came from the roof of a nearby building. [FN4]

Suppose the allegations that U.N. soldiers raped Bosnian women, or that the U.N. troops had no valid reason to open fire on civilians in Somalia, are true. Who is responsible for such actions? As the role of the United Nations Peacekeeping Forces changes from "peacekeeping" to "peacemaking," the answer to this question may become paramount to the proper functioning of the envisioned "new world order" where global police actions replace the traditional wars of "self defense". [FN5] While global police action, envisioned under Article 42 of the U.N. Charter, has yet to be authorized by the Security Council, the deteriorating situation in the former Yugoslavia and Somalia has prompted many *284 to believe that the time has come for the Security Council to authorize such an action. [FN6]

This note is an inquiry into whether, given the possibility that U.N. forces will increasingly be called upon to enforce peace, as permitted under Chapter VII Article 42 of the U.N. Charter, the laws of war which are binding upon the states who are members of the United Nations, are binding as well upon the organization itself. In part I, this note will discuss the changing role of the United Nations Peacekeeping Forces which has given rise to this inquiry. In part II this note will discuss the laws of war. In part III this

note will discuss the applicability of the laws of war to the United Nations, and will finally, in Part IV, propose a method to ensure that the laws of war are binding upon the U.N.

II. The Changing Role of the United Nations Peacekeeping Forces

The declared purpose of the United Nations is "to maintain international peace and security," [FN7] a goal which proved impossible during the Cold War. [FN8] Since the creation of the United Nations in 1945, there have been over 100 major conflicts which have left over 20 million dead. [FN9] During the Cold War the United Nations was rendered powerless to deal with many of these crises because of vetoes - 279 of them - cast in the Security Council. [FN10] However, since the end of the Cold War there have been no such vetoes, and the security arm of the United Nations, once disabled by circumstances beyond its control, has emerged as a central instrument for the prevention and resolution of conflicts and for the preservation of peace. [FN11]

A. The United Nations as Peacekeepers

Article 24 of the United Nations Charter confers primary responsibility for the maintenance of international peace and security on the Security Council, which consists of fifteen Members of the U.N. [FN12] The powers of the Security Council in dealing with disputes and situations *285 that may disrupt international peace and security, conferred under Article 24, are specifically given to the Council under Chapters VI and VII of the Charter. Chapter VI deals with the peaceful settlement of disputes, and Chapter VII deals with the maintenance or restoration of international peace and security once peace has been threatened or breached. [FN13]

In recognition of the fact that peace could not be maintained without co-operation of the major powers (China, France, Russia, the United Kingdom and the U.S.), the drafters established the rule of the "Great Power Unanimity". [FN14] Under Chapter V Article 27, the five permanent members of the Security Council must concur when the Council makes decisions on substantive matters. Because successful peacekeeping requires support from the five permanent members of the Security Council, the changing role of the United Nations peacekeeping forces is a function of the recent change in the international relations between the United States and the former Soviet Union. [FN15]

It was the ideological barrier between the "East" and "West", which for decades gave rise to distrust and hostility, which has prevented the United Nations from doing the job for which it was created -- global collective security. [FN16] The inability of the Security Council to achieve "Great Power Unanimity" on operations authorized under Chapter VII of the Charter (to maintain or restore international peace and security once peace has been threatened or breached), forced the U.N. to carve out a much narrower security role by acting as a watchdog over international disputes, a peacemaker [FN17] and peacekeeper [FN18] after the event of conflict, and a facilitator of disarmament and peaceful dispute resolution under Chapter VI of the Charter. [FN19] Although the Security Council can authorize enforcement measures under Chapter VII of the U.N. *286 Charter, ranging from economic sanctions (under Article 41), to collective military action (under Article 42), the only instances of collective action under Chapter VII during the cold war were the sanctions imposed against Rhodesia and South Africa. [FN20]

As a "neutral" organization [FN21], the U.N. was able to bring smaller conflicts to an end and prevent them from leading to potentially catastrophic clashes between the U.S. and the former Soviet Union. [FN22] Both countries' principle interest in most Third World countries was to keep the influence of the other to a minimum, and the U.N. offered a nominally impartial alternative that could meet this objective. [FN23] Given the bipolar political climate, the U.N. developed more realistic objectives: the mediation of isolated and idiosyncratic conflicts, the monitoring of cease-fire arrangements, and the separation of hostile armed forces. [FN24] To accomplish such objectives, two types of "peacekeeping" missions developed: unarmed military observer missions (first employed in the Balkans in 1947) and armed peacekeeping missions (first employed in Sinai in 1956). [FN25]

Between 1947 and 1985, a span of 38 years, the United Nations undertook thirteen "peacekeeping" missions of varying scope, duration, *287 and degree of success. [FN26] Between 1985 and 1992, a span of only seven years, the United Nations has undertaken an equal number of missions with increasingly ambitious mandates. [FN27] For example, in 1989 the U.N. undertook its first peace-building operation, both overseeing the withdrawal of hostile armed forces from Namibia and monitoring its first free election. [FN28] In several of its most recent operations, including Cambodia, Somalia, El Salvador, and the Former Yugoslavia, the U.N. was not called on to observe a peace already made, but to conduct an enormous range of activities including preventative diplomacy, peacemaking, peacekeeping, and peace-building. [FN29] Clearly, the United Nations enjoys greater popularity than ever before. General appreciation for the U.N. soldiers' function as peacekeepers has been expressed through the Peace Nobel Prize awarded in 1989. [FN30] However, the effectiveness of non-violent military action has been drawn into question. [FN31]

Eight of the nine missions undertaken since the Namibia operation have facilitated resolution of "domestic" conflicts and the establishment of democratic regimes, two of the latest examples of which are operations in Yugoslavia and Somalia. The resolution of such internal conflicts involves the apportionment of power among recently hostile *288 parties with long histories of bloodshed and violence. In such situations the U.N.'s effectiveness is greatly hampered by deteriorating field situations and the risk of being seen as a hostile force by the losing side, thus creating a perception of bias. [FN32] Operations in both Somalia and Yugoslavia, where the consent of the parties cannot be assumed, represent a new generation of conflicts requiring both the capability and desire to project force. This has led many to conclude that the time has come for the United Nations to transform "peace-keeping" to "peacemaking" -- to "enforce" rather than "keep" the peace. [FN33] Although the signatories of the U.N. Charter hoped that the Security Council would encourage the "pacific settlement of disputes" under Chapter VI, if such efforts failed, the Security Council was expected to rely on its authority under Chapter VII of the United Nations Charter.

B. The United Nations as Peace Enforcers

Secretary-General Boutros-Ghali has recognized that the U.N. needs to take a more assertive role to impose peace on those who violate it. [FN34] He says that, "clearly, it is in our power to bring about a renaissance - to create a new United Nations for a new international era." [FN35] To accomplish this goal, Boutros-Ghali proposed a U.N. army

that would consist of special units set aside by various regular armies for use when needed. [FN36] These forces, able to be summoned quickly into action, would be more heavily armed than regular peacekeepers, and would be assigned tasks that proved too difficult for peacekeepers. [FN37] Such a force, however, would not be possible without support from the members of the U.N.

At the Security Council summit meeting held on Jan. 31, 1992, the permanent members of the Security Council reaffirmed their commitment to the collective security system of the Charter to deal with threats to peace and to reverse acts of aggression. [FN38] Boris Yeltsin, president of Russia, stated that Russia "will make use of the effective role of the United Nations and Security Council" and that Russia is "prepared to *289 become practically involved in United Nations peacekeeping operations and contribute to their logistical support." [FN39] John Majors, Prime Minister of Great Britain, stated: "[l]et us exploit the unrealized potential of the U.N. Charter." [FN40] Francois Mitterrand, President of France, stated that "a country such as France is ready to make available to the United Nations Secretary General a contingent of 1,000 men for peacekeeping operations, at any time and on 48 hours notice, "which number could be doubled within a week." [FN41] George Bush, then President of the United States, stated that now is the time to "accept the responsibilities necessary for a vigorous and effective United Nations. [FN42]

The political climate is ripe for the United Nations system to successfully and effectively provide global collective security. [FN43] Now that relations have improved between the East and West the United Nations will indeed be able to broaden its role, and perhaps operate to its full capacity -- to call into being the "new world order," [FN44] characterized by a Security Council able to respond swiftly and effectively to aggression, as was intended in 1945. [FN45] Although various meanings have been given to the phrase "new world order," [FN46] it is used herein to describe a system of collective police actions by the members of the international community -- a system which was envisioned by the drafters of the United *290 Nations Charter, and which, with the ability for concurrence of the permanent members of the Security Council, may soon become reality.

1. The Use of Force Under the United Nations Charter

The United Nations system was carefully crafted to make war illegal and unnecessary. [FN47] Article 2(4) of the U.N. Charter states that members are required to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state." If, however, force is used despite this prohibition, the Charter envisages two kinds of military remedies: wars of self-defense and police actions. Article 51 authorizes members to use military force in exercise of the "inherent right of individual or collective self-defense if an armed attack occurs" in violation of Article 2(4). If states use armed force under the rubric of Article 51, their individual activities are incorporated into the global police response once it is activated. [FN48] Thus, the old way is licensed only until the new way begins to work: "until," in the words of Article 51, "the Security Council has taken the necessary measures to maintain international peace and security." [FN49] This provision, therefore, simply recognizes that the old war system (wars of self defense) may still be needed until the new system of global policing can secure peace for all. [FN50]

The "new world order," which envisions collective police actions by the members of the international community, presents an alternative to the traditional wars of self-defense. As discussed above, the Security Council can authorize enforcement measures under Chapter VII of the U.N. Charter, ranging from economic sanctions (under Article 41), to collective military action (under Article 42). Article 39 states that "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." [FN51] Although collective action would usually take the form of global action, authorized under Article 42, it could also be implemented by regional organizations, authorized under Article 53. [FN52] Thus, under the new world order, the U.N. will "police" wars by getting involved at the outset of *291 hostile conflicts and enforcing peace through the measures authorized under Chapter VII. [FN53]

As mentioned above, the U.N. has imposed Article 41 sanctions on Rhodesia and South Africa and more recently, it has imposed economic sanctions on Iraq, Yugoslavia, and Haiti as well as arms embargoes on Liberia, Somalia and Libya. Although, as with Rhodesia, the Security Council also authorized member states to use force to enforce the sanctions with Iraq, Yugoslavia and Haiti, the Council has yet to authorize global action under Article 42, which states "[s] hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security." [FN54] To effectuate such a decision, Article 43 [FN55] grants the Security Council the power to require armed forces, assistance, and facilities from member states.

Although global action under Article 42 has yet to be authorized, the authorization by the Security Council to enforce the sanctions with Iraq, Yugoslavia and Haiti demonstrates the Council's increased willingness to use force, and its increased willingness to treat a domestic political crises as a threat to international peace and security. [FN56]

*292 There is a current debate as to whether the Persian Gulf War demonstrates enforcement action or collective self defense. As in the Korean conflict, the Security Council established a broad objective and authorized member states wide latitude in achieving it. Security Council Resolution 678 authorized member states to use "all necessary means to uphold and implement [[[the Iraqi withdrawal from Kuwait] and . . . to restore international peace and security in the area." [FN57] Resolution 678 did not however, provide for political control by the Security Council [FN58]; requesting only that "the States concerned . . . keep the Security Council regularly informed on the progress of actions undertaken." [FN59] While a mandate restricted to the liberation of Kuwait could have come under Article 51 as a measure of "collective self-defense," some argue that the actual mandate, authorizing the "restoration of peace and security in the area," was broader in scope than what a "collective self-defense" operation could legally achieve. [FN60]

2. The Command and Control of United Nations Forces

Regardless of whether one considers the Persian Gulf War, or even the Korean conflict as examples of police action under Article 42, it is important to note that in both, the United Nations subcontracted its enforcement responsibilities to its individual members; in

particular, to the United States. In the Korean conflict, the sixteen nations which fought under the United Nations flag were under the command and control of the United States. [FN61] Although in the Persian Gulf War command relationships were more complex than those in Korea, the Security Council again, subcontracted its enforcement responsibilities. While the United States was the leader of the campaign to drive Iraqi forces from Kuwait, its dependence on Saudi Arabia and its regional neighbors for basing and political support led to a dual command structure. [FN62] While U.S. *293 forces were led by George Bush, Islamic forces participated under Saudi operational command. [FN63]

The question of who makes the political, strategic, and operational decisions that together comprise the right to command and control United Nations forces is central to determining who is responsible for actions taken by U.N. soldiers, whether they be peace-keepers or peace-enforcers. There are fundamental concerns in both United Nations headquarters and in Washington over who has this authority. [FN64] In 1945, the signatories to the United Nations Charter created a model for the command and control of United Nations forces. However, this model was replaced during the Cold War by systems of command and control which evolved to meet the needs of two distinct United Nations missions: large-scale enforcement and peacekeeping. [FN65]

Who has control over United Nations forces is paramount to a discussion of whether the United Nations can be held responsible for the actions of its soldiers. This note is an inquiry into whether the United Nations can be held accountable for the violation of the laws of war during a Chapter VII enforcement action. [FN66] Therefore, it is important to understand who has controlled United Nations forces in enforcement type actions of the past, and to speculate as to who will control such forces in the future. The Korean conflict and the Persian Gulf war provide the only two examples of enforcement type actions. As we have seen, in both examples the Security Council authorized its members to use force against an aggressor, rather than deciding to use force.

The model for the control and command of United Nations forces, envisioned by the drafters, consists of a network of national military contingents, which together comprise the United Nations armed forces [FN67], *294 which once deployed, would be under the political and strategic control of the Security Council. [FN68] Given the Security Council's recent reaffirmation of their commitment to the collective security system of the Charter to deal with threats to peace and to reverse acts of aggression, [FN69] the Security Council may finally exercise the international community's authority over international armed forces. Assuming this reality, the remainder of this note discusses whether the laws of war which are binding upon the states who are members of the United Nations, are binding as well upon the organization itself.

III. The Laws of War

A. Introduction

The rules of Public International Law regulating the conduct of those armed conflicts defined as "international" are often referred to as the jus in bello, and are distinguished from the jus ad bellum, which regulates and restricts the rights of international legal entities (particularly States) to use armed force against one another. [FN70] Evidence of rules governing methods of warfare dates as far back as 1400 BC. [FN71] Only within

the last 150 years, however, have the laws of war have emerged from their unwritten rules of conduct, and taken shape in treaties [FN72], military*295 manuals and the decisions of military courts [FN73] established for their enforcement. [FN74]

B. The Hague and Geneva Conventions

The Hague and Geneva Conventions are a series of treaties which state the laws of war as general principles of conduct. [FN75] These general principles of international law have subsequently been adopted by the military law of many countries, and are often set forth in general orders, manuals of instruction, or other official documents. [FN76] Treaties such as the Hague and Geneva conventions, and military directives such as the Army field manual are not, therefore, the sources of the laws of war, but rather the codification of customary international law. [FN77] Thus, although nonsignatory nations are not bound by the precise wording and detailed prescriptions of the Hague and Geneva Conventions, they are regarded as bound by the customary laws of war from which the treaties are derived. [FN78]

*296 The Hague and Geneva Conventions embody the laws of war, referred to as the jus in bello. The Hague Conventions are a series of treaties concluded at the Hague in 1907, which primarily regulate the behavior of belligerents in war and neutrality, whereas the Geneva Conventions are a series of treaties concluded in Geneva between 1864 and 1949, which concern the protection of the victims of armed conflict. [FN79] In 1977 two Protocols to the 1949 Geneva Conventions, which further developed the protection of victims in international armed conflicts and expanded protection to victims of non-international armed conflict, were opened for signature, but were not as universally accepted. [FN80]

Together, the Hague and Geneva Conventions embody the rules which govern the (1) laws on the use and types of weapons; (2) laws on warfare, including rules on permissible tactics and strategies and on illegitimate targets; and (3) humanitarian rules. [FN81] These rules attempt to limit, in the name of humanity, the conduct which is directly related to war hostilities in progress between organized belligerent forces to that which is actually necessary for military purposes. [FN82] And, although the traditional laws of war were understood in pre-modernized international law to apply essentially between States, under the modern international law, embodied in the Hague and Geneva Conventions, the jus in bello, similar to other parts of the law, applies in certain circumstances to other recognized entities as well. For example, the effective realities made it *297 necessary to subject conflicts within States to the jus in bello on the basis of subjective recognition of rebel forces as belligerents. [FN83]

If one were to suppose that the U.N. soldiers who opened fire on civilians in Somalia did so for no valid reason, or that allegations that U.N. soldiers raped Bosnian woman are true, violations of the above mentioned laws of war have occurred. Under the Geneva Convention Relative to the Protection of Civilian Persons in the Time of War (Geneva Convention IV), the murder, torture or other cruel, inhuman, or degrading treatment of civilians is prohibited. [FN84] The question remains, however, as to whether the United Nations can be held responsible. As we have seen, the laws of war apply to States and to belligerent forces. Under the Nuremberg principles, they also apply to individuals.

C. The Nuremberg Principles

Two international tribunals were established following World War II, at Nuremberg and Tokyo to try major war criminals. The Nuremberg trials, held in 1945 - 46, in which former Nazi leaders were indicted and tried as war criminals by the International Military Tribunal (IMT), established the principle that individuals, not merely states, can be found guilty of war crimes. [FN85] The decision of the Allies in World War II to try individual Nazis before the IMT for violations of international law was the turning point in modern history concerning the relationship between individuals and international law. [FN86] "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." [FN87]

The crimes falling within the jurisdiction of the Tribunal for which individuals were held responsible were: (a) Crimes Against Peace (the planning of or participation in aggressive war), (b) War Crimes (violations of the laws or customs of war), and (c) Crimes Against Humanity, which included inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any other crime *298 within the jurisdiction of the Tribunal, whether or not such acts were in violation of the domestic law of the country where perpetrated. [FN88]

It is important to note that the principles by which the above tribunals guided themselves were recognized in 1946 by the General Assembly of the United Nations as principles of substantive and procedural international criminal law. [FN89] The Nuremberg Tribunal was not meant merely to establish plainly and forcefully that the rules of public international law should and do apply to individuals; it was also intended to demonstrate that the protection of human rights was too important a matter to be left entirely to states, a proposition already enunciated in the Preamble and Article 55 of the Charter of the United Nations:

We the Peoples of the United Nations [are] determined . . . to reaffirm faith in fundamental human rights . . . . [FN90]

[T]he United Nations shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. [FN91]

Efforts to prosecute individuals responsible for the commission of war crimes has not ended with the Nuremberg and Tokyo tribunals. In 1992, the United Nations Security Council called for the establishment of an ad hoc international war-crimes tribunal to prosecute those accused of atrocities in the former Yugoslavia. [FN92] It was established as an enforcement measure under the binding authority of Chapter VII, rather than through a treaty which would have created an international criminal court whose jurisdiction would be subject to the consent of the states concerned. [FN93]

The establishment of the tribunal has also invoked a response from the Security Council to move forward on the establishment of a permanent*299 international criminal court. [FN94] According to Adama Dieng, Secretary General of the International Court of Justice, "[e]stablishing an International Penal Court is one example of cooperation based on reciprocity, mutual understanding, and reliance." [FN95] However, is the Security Council ready to apply the same standards that it wishes to impose on belligerent forces to its own troops?

We have seen that the laws of war, embodied in the Hague and Geneva Convention apply to States, to belligerent forces, and to individuals. Do they apply to the United Nations?

IV. The Applicability of the Laws of War to the United Nations?

A. The International Legal Personality of the United Nations

For the United Nations to be held responsible for a violation of the laws of war, it must possess sufficient international legal personality. Legal personality is possessed by those entities with the status of being capable of bearing legal rights and duties in a given legal system. [FN96] States are the traditional subjects of international law based on the principle of "territorial sovereignty." [FN97] In the twentieth century, international organizations have been widely received as having international legal personality. [FN98] *300 Clyde Eagleton in his Hague Academy lectures on international responsibility stated that "[t]he responsibility of a State in international law rests largely upon a territorial basis, but behind this territorial basis lies the broader concept of control." [FN99] Since the control that a state exercises within its territory is exclusive, i.e. no other state is allowed to protect its interests therein, the territorial State must be held responsible for the protection of those interests." [FN100] Therefore, whenever such control is exercised, in or out of the territorial area, responsibility is measured by the actual degree of control. [FN101] Legal capacity, accordingly, varies with every state and with every legal person according to the degree of control. [FN102] A state, or other international legal person, may be held responsible only to the extent that it has rights and duties which it is free to exercise; and some have more than others. [FN103]
Just as a state has the right under international law to assert an international claim for damages when another state fails to live up to certain minimum standards for safety of its nationals, vis-a-vis forces representing the United Nations, the Organization assumes responsibility only to the extent that such forces become an organ of the U.N. and therefore subject to its exclusive operational control. [FN104]
Thus, when in 1948 a Swedish national acting as a United Nations mediator in the Middle East was killed while performing his U.N. duties in Palestine, the International Court of Justice, in its Advisory Opinion on Reparation for Injuries suffered in the Service of The United Nations, held that if in the performance of his duties, an agent of the UN suffers injury in circumstances involving the responsibility of a state, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto Government with a view to obtaining the reparation due in respect of damage caused to the victim or to his successors in title. [FN105] This case therefore established that the United Nations has the capacity to bring a claim with a view of obtaining reparations due in respect of the damage caused to the United Nations, and to the victim or to persons entitled through him, regardless of whether the respondent state is a member of the U.N.
*301 In reaching this decision the court concluded that the United Nations is an international person, a subject of international law capable of possessing international rights and duties with the capacity to maintain its right by bringing international claims. [FN106] The court stated that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality . . . together with

capacity to bring international claims." [FN107]
Thus, it has been established that the United Nations has sufficient international legal personality to bring a claim against one of its Members which has caused injury to it by breach of the state's international obligation towards it. Rights are not conferred without corresponding duties. Thus, under the theory of reciprocity, along with the right to bring an international claim, the U.N. also has the responsibility to be held responsible under international law for the actions of its agents. [FN108]
One must keep in mind, however, that where a state possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity, such as the United Nations, must depend upon its purposes and functions as specified or implied in its Charter and as developed in practice. [FN109] The International Court of Justice ("I.C.J.") has determined that the United Nations could not carry out the intentions of its founders without the right to bring an international claim. [FN110] Thus, when considering whether the U.N. has sufficient international personality to be held responsible for the laws of war, one must consider whether the functions of the United Nations are such that they could not be effectively discharged without such a corresponding obligation.
The applicability of the laws of war to the United Nations does not, however, depend solely on the capacity of the U.N. to be held responsible under international law. The U.N., in addition to being a subject of international law, must be a direct and intended addressee of the rights and duties designated in the laws of war. [FN111] The following section therefore *302 discusses to what extent the United Nations peacekeeping forces should be bound by the laws of war.

B. The Belligerent Status of the United Nations

The laws of war, as discussed above, are codified in international treaties known as the Hague and Geneva Conventions. The parties (signatory states) to the conventions are bound to the precise wording of these treaties, and the nonsignatory states are bound by the customary international law from which the treaties are derived. [FN112] In addition, we have seen that under the Nuremberg principles, individuals may also be held responsible for the violation of such laws, regardless of whether they acted as agents of a signatory state. The problem regarding the applicability of the laws of war to the United Nations arises from the fact that the peacekeeping forces are agents, not of a belligerent party/state in the traditional sense, but of an international organization whose role is to maintain and enforce peace. This distinguishing factor has given rise to much debate over the extent to which the U.N. is bound by the laws of war.
In a report entitled "Should the Laws of War Apply to United Nations Enforcement Action?" presented to the American Society of International Law in 1952 by the Committee on the Study of the Legal Problems of the United Nations, its Chairman (Clyde Eagleton), stated that:
The assertion that United Nations enforcement action is war arouses strong opposition. . .war is conflict between states, between units of equal legal status; whereas the United Nations, acting on behalf of the organized community of nations against an offender, has a superior legal and moral position as compared with the other party to the conflict. A war is fought by a state for its own national interest; United Nations enforcement action is on behalf of order and peace among nations . . . War as between states of equal legal

status has in the past been regarded as honorable; the use of force against the United Nations is now to be regarded as an offense against all Members. It is maintained by some that acceptance of the Charter by Member States meant acceptance by them of the superior legal position of the United Nations as regards the use of force and that, consequently, the United Nations may *303 apply such rules as it wishes. It might, for example, forbid use of atomic bombs by a state while reserving the right to use them itself. Presumably, its rules would be of high humanitarian character and it would respect them carefully. [FN113] The committee concluded in its report that due to the different nature of the use of force by the United Nations to restrain aggression from war-making by a state, the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes. [FN114]

This conclusion has found little support and has subsequently been severely criticized. This writer shares the opinion of those who argue that the law governing the conduct of warfare arises from a fundamental humanitarian need and was not simply framed as a set of rules to permit the playing of a game of 'war' between two states. [FN115] As stated by Major R.R. Baxter, we cannot afford to cast aside the wisdom of the past in looking to the law of the future: "No more can we allow abstract considerations about the changing nature of hostilities to blind us to the fact that the use of force, whether called war or enforcement action, causes suffering to human beings, and that it is human suffering which the law of war attempts to mitigate." [FN116]

In recognition of the fact that the law of war has a legitimate role to play whenever hostilities exist, its application in the past has not been confined to declared war between states. [FN117] Under common Article 2 of the Geneva Conventions of 1949, the laws of war are made applicable not only to all cases of declared war between the parties, but to all other armed conflicts as well. [FN118] Similarly, its application in the present should not be confined to "belligerents" in the strictest sense, but to any organized party involved in a hostile conflict. As Baxter points out, especially after the Geneva Conventions of 1949 came into force as to the United States, thus becoming the supreme 'law of the Land', the argument that the United States, acting under the auspices of the United Nations, is not *304 participating in an 'armed conflict' "would require the most ingenious casuistry". [FN119]

In support of such an argument, Baxter maintained that we must look behind arbitrary labels and seek the guiding principle of the law governing armed conflict. [FN120] For example, how can the view that the law of war is not applicable to a United Nations action be reconciled with the humanitarian inspiration of the laws of war? It would seem to this writer, that if the United Nations finds its distinction in its status as a superior legal and moral entity, it should be held to an even higher standard than those embodied in the current laws of war.

The argument that the same laws of war should not be applied to all belligerents stems from the postulate that laws of war should discriminate between the legal and illegal belligerent. [FN121] The proposition that the superior status of the U.N. exempts it from being bound by the laws of war rests on the fact that when the U.N. acts, it is acting under the consensus of the international community.

As discussed above, the historical lack of consensus among the permanent members of the Security Council has limited the role of the United Nations Peacekeeping Forces. However, the new allegiance among East and West has created an increased opportunity

for international consensus on methods for keeping the peace. It has also prompted the heads of state or governments of the permanent members of the Security Council to pledge increased support to the United Nations towards the end of creating a more effective United Nations. [FN122]

If one were to conclude that the laws of war do not apply to the United Nations because of its unique character, it would mean that as the Superpowers transfer their sovereign power over their troops to the United Nations, in an effort to rely on the U.N. as a means to their end, they would simultaneously be exempting those troops from adherence to the laws of war. However, simply because those troops are acting on behalf of the international community (as opposed to a state) and supposedly have the broader aim of enforcing or maintaining peace, rather than destroying an enemy to gain political or territorial control, does not mean that the unregulated conduct of those troops presents any less of a danger to humanity.

*305 When he argued that the United Nations could apply such rules as it wished, Eagleton stated that "[p]resumably [the U.N.'s] rules would be of a high humanitarian character and it would respect them carefully." [FN123] But, as Baxter later pointed out, "it must be that the United Nations will be guided by some new standard of humanity, yet unknown to us, when it starts the selective process of deciding what principles will guide its conduct." [FN124]

An alternative approach to granting immunity to U.N. forces based on the supposition that their actions do not correspond to the classical legal definition of war is to investigate when action taken by U.N. forces amounts to war in a "material" rather than "formal" sense. [FN125] Such an approach realizes that the laws of war regulating the actual hostilities and combat, the jus in bello, are applicable to prolonged armed conflicts of an international character, irrespective of compliance with the formal requisites, or of the incapacities of the participants to be belligerents in "strict law". [FN126] Thus, the laws of war would apply to the United Nations forces when evidence that war existed in the material sense regardless of the noble intentions of the forces. [FN127]

The acceptance of the view that the belligerent status of the U.N. should objectively be determined based on the particular action taken by its forces requires an analysis of the mandate of the United Nations forces which dictates the extent to which any United Nations force can engage in a belligerent activity. [FN128] This writer shares Simmonds' opinion that the laws of war should apply as a matter of law to collective enforcement actions authorized under Chapter VII, Article 42 based on the fact that a breach of the peace under Article 39 can be logically equated with a state of war in the material sense. [FN129]

However, unlike Simmonds, in regards to peacekeeping operations authorized under Chapter VI, where the use of forces may be conditionally authorized to engage in armed conflict, depending on the degree of force with which they are met, I am of the opinion that measures should be taken to ensure that the laws of war apply as a matter of law rather than upon a finding of the existence of material war. [FN130] Still today, the *306 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. [FN131] However, in my opinion, basing a finding of the existence of war in a material sense on the prolonged nature of a conflict, would exclude instances where hostilities may be short-lived or where, as in Somalia and the former Yugoslavia, although the U.N.

forces have a limited mandate, they may nevertheless cause undue suffering to civilians in violation of the laws of war.

V. Proposed Methods for Holding United Nations Forces Accountable

Given the importance of the assurance that any party involved in hostile conflict adheres to the humanitarian rules set forth in the Hague and Geneva Conventions, regardless of the nature of their involvement, or their particular status in international law, I believe that the United Nations needs to take affirmative action to bind itself to both sets of Conventions. Although there is a strong argument that there is no need to take such an action since the United Nations is bound by the customary rules embodied in the Conventions, affirmative action to bind itself to the agreements will guarantee that the United Nations is willing to hold its troops to the same standards it wishes to hold its members. Therefore, I feel that the United Nations should take advantage of its treaty making power to become a signatory party to the treaties.

In order for the U.N. to become a party to the treaty however, one must first consider whether the U.N. has the capacity to become a party to the Conventions; second, whether the Conventions permit accession by the U.N.; and third, whether, if it became a party, the U.N. could carry out the obligations of the Conventions.

A. The U.N.'s Capacity to Become a Party to the Conventions

This note has previously discussed that the United Nations has sufficient international personality to either bring or defend a claim for the breach of an international obligation. Another important aspect of international personality is treaty-making capacity. Although all entities having treaty-making capacity necessarily have international personality, all international persons do not necessarily have treaty-making capacity. [FN132] The United Nations, however, has such capacity.

*307 Although article 1 of the Vienna Convention on the Law of Treaties states that the Convention applies to treaties between States, [FN133] the International Law Commission, charged with recommending the proposed codification of the Convention, explained that the fact that the scope is so defined is not intended in any way to deny that other subjects of international law, such as international organizations, may conclude treaties. [FN134] This is reflected in article 3 of the Convention which states that "[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law . . . shall not affect the legal force of such agreements. [FN135]

Furthermore, after drafting the Vienna Convention, the International Law Commission drafted articles on treaties made by international organizations, agreeing in article 6 that: "The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization." [FN136] The commentary to the article states that reference to "relevant rules" is not limited to the explicit provisions of the organization, but might include the actual practice of the organization. [FN137] Thus, the United Nations, as an international organization, does have the capacity to conclude treaties. [FN138] This capacity has been recognized in the Vienna Convention on Law of Treaties Between States and International Organizations or Between International Organizations which, although it has not entered into force, recognized that such capacity is necessary

for international organizations to perform their functions and fulfil their purposes. [FN139]

Despite the fact that the United Nations has the capacity to conclude a treaty, whether the United Nations has the capacity to be a member of the particular treaties which make up the laws of war must still be determined.

*308 B. The U.N.'s Ability to Accede to the Conventions

The eligibility of the U.N. to formally accede to the Hague and Geneva Conventions rests on the consent of the current parties to the treaties. [FN140] For example, each of the Geneva Conventions expressly provides that accession is open only to "Powers". [FN141] Some writers have concluded that although the term "Power" or, "Puissance" is a term which is normally used in treaties synonymously with "States," it does not preclude other subjects of international law which may be parties to an armed conflict of an international and warlike character, and thus the U.N., too, is a Power. [FN142] There are others, however, who argue that international organizations are not "Powers" within the meaning and intendment of the Conventions, thus requiring the existing Parties to revise the accession clause or to tacitly accept a revision by formally accepting accession by the U.N. [FN143]

The intent of the drafters of the Conventions was to limit a belligerent's conduct, in the name of humanity, to that which is actually necessary for military purposes. [FN144] As a means to achieving their humanitarian ends, the drafters did not limit the application of the rules to "States". [FN145] For example, rebel forces are considered belligerents. [FN146] In this writers opinion, if the parties to the Conventions are willing to treat individuals, under the Nuremberg principles, as subjects of international law in order to reach their humanitarian goals, it can hardly be argued that an international organization, which represents a significant portion of the international community, should not also be regarded as an intended subject of those rules when it is involved in an armed conflict of an international and warlike character. Therefore, it is my opinion that the U.N. has the capacity to formally accede to the Conventions.

C. The U.N.'s Aability to Carry Out the Obligations of the Conventions

Although the U.N. may have the capacity to formally accede to the Conventions, its willingness to enforce the laws of war along its chain of *309 command is not enough. [FN147] It is a recognized principle of the customary laws of war that an entity must also have the ability to compel its Commander and its Force to act lawfully. [FN148] Assuming that the Security Council has full command authority over the forces [FN149], some maintain that the dichotomy between the Commander's responsibility for ordering the troops and the Participating State's responsibility for discipline raises serious questions concerning the requisite responsibility along the entire chain of command which the customary laws of war demand. [FN150]

This concern, however, has been raised under situations where the Regulations governing a United Nations operation has left the Contributing State's responsibility to enforce discipline on its nationals up to that State's discretion. [FN151] It has been suggested that a possible solution for the assurance that such enforcement is mandatory would be for the U.N. to designate as its agent for the purpose of fulfilling the requirements of the

Conventions, one or more of the Members which have contributed national contingents to the Force. [FN152] Another possibility, however, is simply to assure that no mandate or regulation ever leaves the Participating State's responsibility to discipline its nationals up to its own discretion.

VI. Conclusion

The situation in the former Yugoslavia and Somalia demonstrate the need, now that the United Nations has been given a breath of new life and may become the "tool" of the future for enforcing or maintaining peace, to consider whether the laws of war, which have traditionally regulated the conduct of States during armed conflict, apply to the United Nations Forces as well. This note concludes that these rules, embodied in the Hague and Geneva Conventions, should regulate the conduct of U.N. forces, and do so insofar as they embody customary international law.
However, because there are those who feel that the unique status of the United Nations Forces exempts it from the obligation to observe these rules, and because the laws of war should be binding, in their entirety, *310 on the United Nations, it is my opinion that the United Nations should become a party the Hague and Geneva Conventions. Becoming a party to the Conventions will ensure that the U.N. Forces will be held to no less of a standard than other parties to an armed conflict. Such a result is not only desirable, but logical. After all, the U.N. is the body created to "reaffirm faith in fundamental human rights." To hold the U.N. to a lesser standard would require the belief that the U.N. itself is not capable of protecting those rights.

[FOOTNOTES]

[FNa]. The author wishes to thank Professor Donna Arzt, of the Syracuse University College of Law, who was kind enough to review and comment upon earlier drafts of this note, and without whose guidance and assistance this note would not have been possible.

[FN1]. Symposium, Rape As Genocide in Bosnia-Herzegovina & Croatia: A Symposium on War Crimes, Rights and International Law, April 8, 1993 (held at Syracuse University)[hereinafter Symposium].

[FN2]. Id.

[FN3]. Mark Huband, The Pivotal Moments of the Year as Seen Through the Eyes of Guardian Writers, G uardian , Dec. 31, 1993, at 6.

[FN4]. Id.

[FN5]. Thomas M. Franck and Faiza Patel, Agora: The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: "The Old Order Changeth, " 85 A m . J. I nt'l L. 63 passim (1991).

[FN6]. See, e.g., W illiam M. D urch , T he E volution O f UN P eacekeeping 2 (1993).

[FN7]. U.N. C harter Preamble.

[FN8]. Durch , supra note 6, at 1.

[FN9]. An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, Report of the Secretary-General, GA 47th Sess, Agenda Item 10, para. 14, UN Doc. A/47/277-S/24111 (1992), reprinted in 31 I.L.M. 953, 958 (1992) [[[hereinafter Agenda For Peace].

[FN10]. Id.

[FN11]. Id. at para. 15.

[FN12]. U.N. C harter art. 23, para. 1; Five of the members are permanent: The People's Republic of China, France, Russia, the United Kingdom and the United States. The remaining ten members are elected for non-consecutive two year terms. Id.

[FN13]. See U.N. C harter arts. 39 -51 (these articles constitute Chapter VII which spells out the responsibilities of the Security Council for maintaining international order and other aspects of the U.N. collective security system)

[FN14]. A njali V. P atil , T he UN V eto I n W orld A ffairs 1946 -1990: A C omplete R ecord A nd C ase H istories O f T he S ecurity C ouncil's V eto 7 (1992).

[FN15]. Durch , supra note 6, at 23.

[FN16]. Id. at 1.

[FN17]. "Peacemaking" is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter. Agenda for Peace, supra note 9, at para. 20.

[FN18]. "Peacekeeping" is defined as the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. It expands the possibilities for the prevention of conflict and the making of peace. Agenda for Peace, supra note 9, at para. 20.

[FN19]. Id. See also Patil , supra note 14, at 7; James A.R. Nafziger, The Security of Human Rights: A Third Phase in the Global System, 20 C al . W. I nt'l L.J. 173, 176 (1990).

[FN20]. The call for an immediate cessation of hostilities and the withdrawal of the North Korean forces from South Korea (S.C. Res. 82 (June 25, 1950)), and the recommendation that members furnish assistance to the South Korean Government necessary to repel the armed attack and restore international peace and security in the area (S.C. Res. 83 (June

27, 1950)), could, by some, be considered an "enforcement action". However, in the Korean episode, the Security Council was able to function for two months because the Soviet Union was boycotting the Organization at the time. Even so, the security council resolution did not use the language "decision" which would have activated Article 25 of the U.N. Charter which states that members agree to accept and carry out the decisions of the Security Council. Therefore, technically, Korea does not qualify as a Chapter VII enforcement action. See Eugene V. Rostow, The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense?, 85 A m . J. I nt'l L. 506, 508 (1991).

[FN21]. Peacekeeping operations are not intended to enforce a given solution regarding a conflict decided upon by the United Nations, but to ease the strains of a conflict and facilitate a peaceful solution. Acceptance by the parties is an essential element of this method of settling conflicts. Michael Bothe, Peacekeeping and the Use of Force - Back to the Charter or Political Accident?, 1 I nt'l P eacekeeping 2, 3 (1994).

[FN22]. Durch , supra note 6, at 1.

[FN23]. Id. at 7. For example, the U.N.'s second armed peacekeeping force, The U.N. Operation in hte Congo ("ONUC"), was sent to the Congo in 1960 to help restore order and avoid a direct U.S.-Soviet confrontation. Id. at 8.

[FN24]. Id. at 1.

[FN25]. Id. UNSCOB, the U.N. Special Committee on the Balkans was employed in 1947 to investigate outside support for guerrillas in Greece. UNEF I, U.N. Emergency Force was dispatched to the Sinai peninsula following the Suez Crisis of 1956 to oversee the withdrawal of British, French, and Israeli forces from the Sinai, and to monitor a buffer zone between Egypt and Israel. Durch , supra note 6, at 7, 8.

[FN26]. The thirteen missions between 1947 and 1985 include, in chronological order: U.N. Special Committee on the Balkans ("UNSCOB") 1947-51; U.N. Truce Supervision Organization ("UNTSO") 1948 -; U.N. Military Observer Group in India and Pakistan ("UNMOGIP") 1949 -; UN Emergency Force ("UNEF I") 1956 - 67; U.N. Observation Group in Lebanon ("UNOGIL") 1958; U.N. Operation in the Congo ("ONUC") 1960 - 64; U.N. Temporary Executive Authority ("UNTEA") 1962- 63; U.N. Yemen Observation Mission ("UNYOM") 1962- 63; U.N. Force in Cyprus ("UNFICYP") 1964 -; U.N. India Pakistan Observer Mission ("UNIPOM") 1964 - 66; U.N. Emergency Force II ("UNEF II") 1974 -79; U.N. Disengagement Observer Force ("UNDOF") 1974 -; U.N. Interim Force in Lebanon ("UNIFIL") 1978 -. Id. at 8.

[FN27]. In chronological order these missions include: U.N. Good Offices Mission in Afghanistan and Pakistan ("UNGOMAP") 1988 - 89; U.N. Iran-Iraq Military Observer Group ("UNIMOG") 1988 - 91; U.N. Angola Verification Mission I ("UNAVEM I") 1988 - 91; U.N. Transition Assistance Group ("UNTAG") 1989 - 90; U.N. Observer Group in Central America ("ONUCA") 1989 - 91; U.N. Angola Verification Mission II

("UNSVEM II") 1991-; U.N. Iraq-Kuwait Observation Mission ("UNIKOM") 1991-; U.N. Mission for the Referendum in Western Sahara ("MINURSO") 1991-; U.N. Observer Mission in El Salvador ("ONUSAL") 1991-; U.N. Advance Mission in Cambodia ("UNAMIC") 1991-1992; U.N. Transitional Authority in Cambodia ("UNTAC") 1992-; U.N. Protection Force in Yugoslavia ("UNPROFOR") 1992-; U.N. Operation in Somalia ("UNOSOM") 1992-. Id. at 10.

[FN28]. "Peace-building" refers to post-conflict action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict. Agenda for Peace, supra note 9, at para. 20.

[FN29]. Preventive diplomacy seeks to resolve disputes before violence breaks out; peacemaking and peacekeeping are required to halt conflicts and preserve peace once it is attained. If successful, they strengthen the opportunity for post-conflict peace-building, which can prevent the recurrence of violence. Id. at para. 20.

[FN30]. See Bothe, supra note 21, at 2.

[FN31]. Id. at 3.

[FN32]. Durch , supra note 6, at 11.

[FN33]. Id. at 2.

[FN34]. Paul Lewis, Peacekeeper to Peacemaker: U.N. Confronting New Roles, N.Y. T imes , Jan. 25, 1993, at A1.

[FN35]. Brian Hall, Blue Helmets, Empty Guns, N.Y. T imes , Jan. 2, 1994, at 20.

[FN36]. Stanley Meisler, U.N. Peacekeepers Face a Crisis of High Expectations, L.A. T imes , Nov. 17, 1992, at A12.

[FN37]. Kelly A. Childers, Comments: United Nations Peacekeeping Forces in the Balkan Wars and the Changing Role of Peacekeeping Forces in the Post-Cold War World, 8 T emp . I nt'l & C omp . L.J. 117, 151 (1994).

[FN38]. See Summit at the U.N., N.Y. T imes , Feb. 1, 1992, at 5 [[[hereinafter Summit].

[FN39]. Id.

[FN40]. Id.

[FN41]. Id.

[FN42]. Id. Following his inauguration, President William Clinton took practical steps to make this promise a reality by authorizing the United States logistics forces to serve

under the command of the United Nations Operation in Somalia ("UNOSOM"). However, following criticism of operations in Somalia and media reports of dead United States servicemembers being dragged through the streets of Mogadishu, the President announced that United States troops will participate in United Nations operations only if they serve under a United States chain of command. See David Lauter & Paul Richter, Clinton to Insist on U.S. Control of GIs in U.N. Roles, L.A. T imes (Wash. ed.), Oct. 15, 1993, at 1.

[FN43]. Franck & Patel, supra note 5, at 65.

[FN44]. At the end of the Cold War, some observers, including United States President George Bush, began to speak of the emergence of a "new world order," suggesting that the international system was becoming a safer, more peaceful place. Anthony Clark Arend, The United Nations and the New World Order, 81 G eo . L.J. 491 passim (1993); see George H. Bush, Toward a New World Order, 1 U.S. D ep't ST. D ispatch 91 (1990)(outlining American expectations of the new international framework in an address before a joint session of Congress); see also Alan K. Henrikson, How Can the Vision of a "New World Order" be Realized, 16 Fletcher Foreign World Aff . 63, 74 -78 (1992)(discussing possible instruments of collective peacekeeping as a focus of a new world order); Ted Galen Carpenter, The New World Disorder, 84 F oreign P ol'y 24, 27-28 (1991)(criticizing the preeminent role of the United States in the design of a new world order).

[FN45]. Franck & Patel, supra note 5, at 63 - 66. For a review of the drafters' intent see S ecretary O f S tate , 79 th C ong ., 1 st S ess ., R eport T o T he P resident O n T he R esults O f T he S an F rancisco C onference 87 (Comm. Print 1945).

[FN46]. Anthony Clark Arend, Symposium: The United Nations and the New World Order, 81 G eo . L.J. 491, 492-3 (1993).

[FN47]. Franck & Patel, supra note 5, at 63.

[FN48]. Id.

[FN49]. Id.

[FN50]. Id.

[FN51]. U.N. C harter art. 39.

[FN52]. Franck & Patel, supra note 5, at 63.

[FN53]. Cf. Stanley Hoffman, Delusions of World Order, N.Y. R ev. of B ooks , Apr. 9, 1992, at 37 (noting the difficulty of establishing "world order" given the distinction between international and domestic legitimacy, and advocating a limited strategy for global peacekeeping centered on the United Nations).

[FN54]. U.N. C harter art. 42. Note that in the Korean episode, the Council's resolutions simply recommended that the members refrain from helping North Korea and urged them to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area". S.C. Res. 83 (June 27, 1950). See Y. D instein , W ar , A ggression A nd S elf -D efence 142- 43 (1988). The forces which finally prevailed in Korea were national forces carrying out a mission of collective self-defense under American direction, not a Security Council enforcement action.

[FN55]. U.N. C harter art. 43.

[FN56]. Article 2 (7) of the U.N. Charter subject the main political organs of the United Nations to the principle of nonintervention. Article 2 (7) provides that "[n]othing contained in the Present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Member to submit such matters to settlement under the present Charter." U.N. C harter art. 2, para. 7. It continues, however, by stating that "this principle shall not prejudice the application of enforcement measures under Chapter VII." Id. Invoking this exception presupposes that the Security Council has made the decision to intervene according to Article 39. This decision, in turn, implies that the Council has come to the conclusion that the matter on which it desires to act does not constitute a matter "essentially within the domestic jurisdiction" of the state concerned. Jost Delbruck, Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations, 67 I nd . L.J. 887, 892-93 (1992). For a thorough discussion on the violation of the principle of nonintervention, see id.

[FN57]. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990). Note that during the Korean conflict, Security Council resolution 83 recommended that member states take action "necessary to repel the armed attack and to restore international peace and security in the area." S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg. at para. 1, U.N. Doc. S/INF/5/Rev.1 (1950).

[FN58]. None of the resolutions during the Korean conflict provided for Security Council control either.

[FN59]. S.C. Res. 678, supra note 57, at 2. See James W. Houck, The Command and Control of United Nations Forces in the Era of "Peace Enforcement", 4 D uke J. Comp. & Int'l L. 1, LEXIS at *17 n.65 (1993).

[FN60]. See Delbruck, supra note 56, at n.4.

[FN61]. See Houck, supra note 59, at *15. This may have been due, in part, to the immobilization of the Security Council once the Soviet Union, which had been boycotting Security Council proceedings, returned. Id. at *14.

[FN62]. Id. at *19.

[FN63]. Id. at *19. Participating British and French units remained under the political control of their respective national command authorities, but their units operated under the tactical control of both the Americans and Saudis. Id.

[FN64]. Houck, supra note 59, at *5. Although further United States participation in the United Nations operations seems likely, if the United States reserves the right to go its own way during United Nations missions, what will prevent other nations from doing the same? Who will define the political objectives for these missions? Id.

[FN65]. Id. at *5.

[FN66]. The question of whether the laws of war apply during the peacekeeping operations which have been transforming into peacemaking operations where the use of force has been necessary (Somalia, Yugoslavia) is outside the scope of this note. For a thorough discussion on the applicability of the laws of war during the twilight zone between peace and war illustrated by what began as humanitarian intervention in Somalia, and ended in forceful conflict, see Susan L. Turley, Keeping the Peace: Do the Laws of War Apply?, 73 T ex . L. R ev . 139 passim (1994).

[FN67]. U.N. C harter art. 43. Although the United States, Great Britain, and the Soviet Union considered creating a standing United Nations army, they ultimately decided against such a plan. Houck, supra note 59, at *9. Instead, the signatories settled on a plan authorizing the Security Council to enter into "special agreements" with member states that would guarantee the availability of "armed forces, facilities, and assistance." Id. These Article 43 forces would be composed of national contingents and would be available to the Security Council at all times. U.N. C harter art. 43, para. 1. The special agreements would specify the "numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided." Id. at para. 2.

[FN68]. Houck, supra note 59, at *8. For an explanation of the chain of command, see id. at *7-12.

[FN69]. Summit, supra note 38, at 5.

[FN70]. R.H.F. Austin, The Law of International Armed Conflict, in I nternational L aw : A chievements A nd P rospects 765 (M. Bedjaoui ed., 1991).

[FN71]. A Swedish Working Group Study, Conventional Weapons, Their Deployment and Effects from Humanitarian Aspects, Recommendations for the Modernization of International Law 11 (Stockholm, 1973), cited in D e L upis , T he L aw O f W ar 121 (1987)(referring to agreements concluded in Egypt concerning the treatment of prisoners of war). See also I. B rownlie , I nternational L aw A nd T he U se O f F orce B y S tates 3 - 4 (1963). Brownlie states that the idea that wars should be subject to legal rules dates

back at least to the ancient civilizations of India, China, Israel, Greece and Rome. Id.

[FN72]. E.g., the first multilateral agreement was the 1856 Paris Declaration Respecting Maritime War. See Turley, supra note 66, at n.41(citing Paris Declaration Respecting Maritime Law, Apr. 16, 1856, 46 B.F.S.P. 26 (abolishing privateering and placing restrictions on property seizure and blockades)). The Lieber Code of 1863, which regulated the conduct of Union troops during the United States Civil War, was the first comprehensive code regulating armed conflict in modern times. Id. at 147 (citing U.S. War Dep't, Adjutant General's Office, Gen. Orders No. 100 (Apr. 24, 1863), reprinted in Richard S. Hartigan, Lieber's Code and the Law of War 45 (1983)). Other key international treaties, now numbering about thirty, have been developed over the last century at two primary cites: The Hague and Geneva. Id.

[FN73]. E.g., Judgment of the International Military Tribunal at Nuremberg (Oct. 1, 1946), in 1 International Military Tribunal, Trial of the Major War Criminals Before the International Military Tribunal 221 (English ed. 1947) [[[hereinafter Judgement of the International Military Tribunal at Nuremberg].

[FN74]. T elford T aylor , Nuremberg and Vietnam: An American Tragedy 28 (1970).

[FN75]. Id. at 23 (neither however, specifies means of enforcement nor the penalties for violations).

[FN76]. Id.

[FN77]. Id. In his commentary on the statute of the ad-hoc war crimes tribunal established pursuant to Chapter VII of the U.N. Charter to contribute to the restoration of peace in the former Yugoslavia, the U.N. Secretary-General stated that "part of conventional international humanitarian law which has beyond doubt become part of international customary law" is the law of armed conflict embodied in: the Geneva Conventions for the Protection of War Victims of August 12, 1949; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Customs of War on Land and the annexed Regulations of Oct. 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 35, U.N. Doc. S/25704 (May 3, 1993), reprinted in 32 I.L.M. 1159, 1170 (1993). The Geneva Conventions constitute "the core of the customary law applicable in international armed conflicts." Id. para. 37, 32 I.L.M. at 1170.

[FN78]. This was clearly recognized in the preamble to the Fourth Hague Convention of 1907, which states that questions not covered by the Convention should be resolved by "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience." Taylor , supra note 74, at 23 (citing Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36

Stat. 2277, 2280, 1 Bevans 631, 633). Similar language is found in Article 158 of the Geneva Convention of 1949, "For the Protection of Civilian Persons in Time of War," where it is provided that a signatory nation may denounce the treaty, but will nevertheless remain bound to abide by the "principles of the law of nations," which are then described in the same words used in the Hague Convention. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, infra note 79, at art. 158. The International Military Tribunal overseeing the Nuremberg trials echoed a similar viewpoint: "The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice ... This law is not static, but by continual adaptation follows the needs of a changing world." Judgement of the International Military Tribunal at Nuremberg.

[FN79]. See Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [[[hereinafter Geneva Convention IV].

[FN80]. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. As of December 31, 1987, 10 years after its signing, Protocol I had 71 parties as against 165 parties to the 1949 Geneva Conventions. See Howard S. Levie, Book Review: The Law of War, 83 A m. J. Int'l L. 194, 198 (1989)(reviewing I ngrid D etter D eLupis , T he L aw O f W ar (1987)).

[FN81]. D e L upis , supra note 71, at 129.

[FN82]. Taylor, supra note 74, at 30, 34.

[FN83]. See Austin, supra note 70, at 765.

[FN84]. Geneva Convention IV, supra note 79, at art. 3.

[FN85]. Judgment of the International Military Tribunal at Nuremberg, supra note 78. See Taylor, supra note 74, at 78 - 94.

[FN86]. M ark W. J anis , A n I ntroduction T o I nternational L aw 246 (1993).

[FN87]. The Judgment of the International Military Tribunal at Nuremberg, supra note 78. The U.S. tribunals prosecuted 185 defendants who had held important positions in the German High Command, government ministries, private industry, the Gestapo, the S.S. and other organizations. Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Y ale L.J. 2537, 2577 n.223 (1991).

[FN88]. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, 59 Stat. 1544, 1547-1548, cited in J anis , supra note 86, at 246.

[FN89]. The resolution of the 51st plenary session of the General Assembly of the United Nations of Dec. 11, 1946, cited in 2 A T reatise O n I nternational C riminal L aw 43 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

[FN90]. U.N. C harter Preamble.

[FN91]. U.N. C harter art. 55(c).

[FN92]. For a statute of the tribunal, see Report of Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704 and Annex (May 3, 1993), reprinted in 32 I.L.M. 1159, 1192 (1993).

[FN93]. See Theodore Meron, War Crimes in Yugoslavia and the Development of International Law, 88 Am. J. Int'l L. 78, 79 (1994). Note, however, that no attempt has been made to prosecute those responsible for egregious violations of humanitarian law and human rights in Uganda, Iraq, Cambodia and occupied Kuwait. Id. at n.2. The credibility of the international system of justice requires prosecutions for atrocities everywhere, not only those committed in the former Yugoslavia. Id.

[FN94]. In 1981, the United Nations asked the International Law Commission ("ILC") to elaborate the draft Code of Crimes against the Peace and Security of Mankind, known as the "draft code." Attempts to establish a world penal court are not new, Human Rights Tribune , June 1993, at 24. In 1991, the General Assembly asked the ILC for a report on the feasibility of establishing a permanent international criminal court within the context of the draft Code. Id. An ILC working group concluded that the idea was feasible and set out specific recommendations. Id. For a draft of the statute for an international criminal court, see Report of the Working Group, U.N. International Law Commission, 46th Sess., U.N. D oc . A/CN.4/L.491 (1994).

[FN95]. Pauline Comeau, A permanent penal court is central to ICJ agenda, Human Rights Tribune , June 1993, at 25.

[FN96]. Bin Cheng, Introduction to Subjects of International Law, in I nternational L aw : A chievements & P rospects 23 (M. Bedjaoui ed., 1991).

[FN97]. Id. at 26.

[FN98]. International organizations have concluded in practice agreements with both member and non-member States, and with other international organizations. E.g., Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, signed at Bern on June 11, 1946 and at New York on July 1, 1946, 1 U.N.T.S. 163. Without such treaty making capacity, an international organization could not spell out in an international agreement its legal position within a host State. Peter H.F. Bekker, The Legal Position of Intergovernmental Organizations 66 n.291 (1994). See also Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, Mar. 21, 1986, U.N. D oc . A/CONF.129/15 (1986), reprinted in 25 I.L.M. 543 (1986).

[FN99]. Clyde Eagleton, International Organization and the Law of Responsibility, 76 H ague Recueil 386 (1950), cited in R. S immonds , L egal P roblems A rising F rom T he U nited Nations M ilitary O perations I n T he C ongo 229 (1968).

[FN100]. Id.

[FN101]. Id.

[FN102]. Id.

[FN103]. Id.

[FN104]. Simmonds , supra note 99, at 229.

[FN105]. Reparation For Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 185 (Apr. 11)[hereinafter Reparation Case].

[FN106]. Id. at 178, 179; F rederic L. K irgis , J r ., I nternational O rganizations I n T heir L egal S etting : D ocuments , C omments A nd Q uestions 9 (1977). This is not the same thing as saying that it is a State, or that its legal personality and rights and duties are the same as those of a state, nor is it saying that it is "a super-State." Id.

[FN107]. Reparation Case, supra note 105, at 185.

[FN108]. The theory of reciprocity is an underlying basis of the laws of war. Turley, supra note 66, at 142. How one party behaves can influence the behavior of another. Id.

[FN109]. Kirgis , supra note 106, at 10.

[FN110]. Id. at 9.

[FN111]. Cheng, supra note 96, at 29. The rights and duties must be directly possessed by, or binding upon, the subject concerned, to whom the law really intends them to be addressed. Cheng notes, however, that it is important to realize that legal rules, including

rules of international law, are often formulated in such an elliptical way that, almost like the use of transferred epithets, they transpose, not in law but merely for drafting purposes, the rights and duties from the subjects of the law to the objects concerned. Id.

[FN112]. Custom, secondary only to international agreements, is a binding source of international law. Vienna Convention on The Law of Treaties, May 23, 1969, art. 38, U.N. Doc. A/CONF. 39/27 [hereinafter Vienna Convention].

[FN113]. Eagleton et al., Should the Laws of War Apply to United Nations Enforcement Action, 1952 Am. Soc'y Int'l L. Proc. 216, 217-218, 220 (emphasis added).

[FN114]. Id. at 220.

[FN115]. Richard R. Baxter, The Role of Law in Modern War, 1953 Am. Soc'y Int'l L. Proc. 90, 95; See also Joseph L. Kunz, The Laws of War, 50 A m. J. Int'l L. 313, 317-321 (1956); F ritz G rob , T he R elativity O f W ar A nd P eace 217- 8 (1949).

[FN116]. Baxter, supra note 115, at 98.

[FN117]. Grob, supra note 115, at 217- 18.

[FN118]. See Geneva Conventions of 1949, supra note 79, common art. 2. The Geneva Conventions provide that their rules will apply "to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them" and "to all cases of partial or total occupation of the territory of the High Contracting Parties..even if the occupation meets with no resistance." Id.

[FN119]. Baxter, supra note 115, at 95 (casuistry involves the false application of legal or moral principles).

[FN120]. Id.

[FN121]. See Kunz, supra note 115, at 317-19.

[FN122]. Summit, supra note 38, at 5. At the Security Council summit meeting held on Jan. 31, 1992, the permanent members of the Council reaffirmed their commitment to the collective security system of the Charter to deal with threats to peace and to reverse acts of aggression. Id.

[FN123]. Eagleton, supra note 113, at 218.

[FN124]. Baxter, supra note 115, at 95.

[FN125]. Simmonds , supra note 99, at 173; B owett , U nited N ations F orces 497- 499 (1964).

[FN126]. Simmonds , supra note 99, at 173; 2 G uggenheim , T raite D e D roit I nternational P ublic 314 (1954); Quincy Wright, The Outlawry of War and the Law of War, A m. J. Int'l L. 365 (1953).

[FN127]. Simmonds , supra note 99, at 173.

[FN128]. Id. at 174.

[FN129]. Id. at 174 -75.

[FN130]. Id. at 174.

[FN131]. For a discussion of the difficulty in determining when the laws of war apply see Turley, supra note 66, at 156 -57.

[FN132]. Kirgis , supra note 106, at 16.

[FN133]. Vienna Convention, supra note 112, art. 1.

[FN134]. 2 Y.B. Int'l L. Comm'n 188 - 9 (1966), cited in Kirgis , supra note 106, at 16.

[FN135]. Vienna Convention, supra note 112, art. 3.

[FN136]. Report of the International Law Commission on the Work of Its 26th Sess., 29 GAOR, 26th Sess., Supp. No. 10 at 137, U.N. Doc. A/9610/Rev. 1 (1975).

[FN137]. Id. at 135, 138.

[FN138]. E.g., Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, supra note 98; Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 147, set out in 22 U.C.C. s 287 (1989).

[FN139]. See Preamble, Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, supra note 98.

[FN140]. See Simmonds , supra note 99, at 182.

[FN141]. Geneva Convention I, supra note 79, s 60; Geneva Convention II, supra note 79, s 59; Geneva Convention III, supra note 79, s 139; Geneva Convention IV, supra note 79, s 155.

[FN142]. Finn Seyersted, Objective International Personality of Intergovernmental Organizations. Do their Capacities really depend upon their Constitutions? 15 -21 (1963),

cited in Simmonds , supra note 99 at 182.

[FN143]. Simmonds , supra note 99, at 183.

[FN144]. Taylor , supra note 74, at 34.

[FN145]. See Austin, supra note 70, at 765.

[FN146]. Id. at 765.

[FN147]. Simmonds , supra note 99, at 193.

[FN148]. Id. Article 3 of the 1907 Hague Convention (No. IV) envisages that the U.N. should be "responsible for all acts committed by persons forming part of its armed forces." Each Convention requires that a party to it enact legislation "necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches ...." Geneva Wounded-land, art. 49; Geneva POW. art. 129; Geneva Civilian, art. 146.

[FN149]. See supra part II(B)(2).

[FN150]. See Simmonds , supra note 99, at 195.

[FN151]. Id.

[FN152]. Id. at 196.
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