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Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations

JAUME SAURA*

INTRODUCTION

The deployment and operation of peacekeeping missions has been rightly considered one of the most successful initiatives in the history of the United Nations (UN). Despite some failures and drawbacks, the "blue helmets," which were not originally envisaged in the Charter of the United Nations, have brought peace and stability to numerous cases of domestic or international armed conflict. In 1988, UN peacekeeping forces were awarded the Nobel Peace Prize for their contribution "to reducing tensions where an armistice has been negotiated but a peace treaty has yet to be established...the forces have, by their presence, made a decisive contribution towards the initiation of actual peace negotiations," and in the World Summit held at the UN headquarters in September 2005, the Heads of State and Government of all Nations recognized that "United Nations peacekeeping plays a vital role in helping parties to conflict end hostilities."

In the wake of the sixtieth anniversary of the UN’s establishment, though, it seems appropriate to review how the international organization has approached one of the most controversial aspects of peacekeeping: the duty of UN forces to abide by the rules of international humanitarian law. In effect, notwithstanding the overall

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1. The “constitutional bases” of peacekeeping operations can be found, though, in the different functions of the Security Council, the General Assembly and the Secretariat. DEREK BOWETT, UNITED NATIONS FORCES 274-301 (1964). Likewise, as noted by Professor Greenwood, their legal basis is “rooted in the consent of the states on whose territory each force [operates] and not in the provisions of Chapter VII of the Charter.” Christopher Greenwood, International Humanitarian Law and United Nations Military Operations, 1 Y.B. INT’L HUMANITARIAN L. 3, 10 (1998).
success of peacekeeping operations, the shocking news that a few of the otherwise professional and law-abiding troops had committed grave violations of the laws of war moved scholars and the UN to consider the applicability of the Geneva Conventions and other relevant treaties to these types of operations. Following the 1999 adoption of an internal “Bulletin,” *Observance by UN Forces of International Humanitarian Law,* issued by the Secretary-General, the matter seemed to some to have been settled for good, however some legal questions still remain.

The purpose of this Article is to ascertain the scope and degree of the duty of UN peacekeeping forces to observe international humanitarian norms in light of the Bulletin, on the one hand, while also considering provisions of international humanitarian law not fully addressed in the Bulletin. In order to do so, this Article begins with an overview of the main features of the international peacekeeping operations, particularly in the last few years (Part I), and of international humanitarian law (Part II), before turning to the specific norms that are or should be applicable to blue helmet operations and the responsibility that the UN and/or other actors should eventually bear for their infringement (Parts III and IV). In particular, Part IV looks beyond the actual content of the Bulletin and examines the extent to which the norms of international humanitarian law apply to peacekeeping operations. This leads to the examination of some substantive areas of the laws of war that are not mentioned, or are only partially mentioned, in the Bulletin, including whether the duty to “ensure respect” applies to such operations, or if it matters that the original conflict in which the blue helmets intervened was international or non-international in nature. This Article then examines the relationship between the 1994 Safety Convention and the rules of international humanitarian law to ascertain whether or not both regimes are compatible with the duties of peacekeeping operations. And finally, having determined that the UN is bound, generally speaking, by the Geneva Conventions and other relevant international humanitarian rules, this Article discusses the degree of responsibility the UN, and/or member States, must bear if a breach is committed.

This Article concludes that whenever international humanitarian law is otherwise applicable, and whenever international organizations actually have the capacity to implement it, UN peacekeepers must observe this body of law.

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I. UNITED NATIONS PEACEKEEPING OPERATIONS

A. GENERAL OVERVIEW

When this Article went to press, the UN had sixteen designated peacekeeping operations on the ground throughout the world.\(^5\) Since 1948, the UN has authorized sixty peacekeeping operations, two of the very first ones still being in place.\(^6\) The current operations move some 92,311 personnel, most of whom are military and police (76,726), and possess an annual budget of approximately $5 billion.\(^7\)

The purposes of these missions have varied significantly along the years.\(^8\) Originally, international peacekeeping operations were intended to be mere "interposition" forces between warring parties that had managed to broker a truce.\(^9\) Their mission was intended to "cool down" the conflict, impede subsequent fighting, and allow the parties to reach a final peace agreement on their own.\(^10\) Some monitoring of the truce would also be implied in the mandate of the mission. More recently, UN peacekeeping operations have been entrusted with wider observation mandates (elections and transition to democracy; peace processes, rather than just truces, etc.), as well as humanitarian crisis management, return to normal conditions in a "failed" State, or even conflict prevention, among others.\(^11\) The most ambitious operations have involved the actual administration of an entire territory for a framed period of time,\(^12\) with the UN acting as a "government" in the sense this term is used when

\(^5\) UN Department of Public Information, Peace and Security. U.N. Peacekeeping Operations
Background Note, U.N. Doc. No. DPI/1654/Rev.65 (Oct. 31, 2006), available at http://www.un.org/Depts/dpko/dpko/bnoteoioioi.pdf [hereinafter Background Note]. Seven of them are in Africa (in Western Sahara, Burundi, Congo, Sudan, Liberia, Ethiopia-Eritrea, and Ivory Coast), one in America (Haiti), five in Asia (India/Pakistan, East Timor, and three in the Middle East) and three in Europe (Cyprus, Georgia, and Kosovo). Id. Except where otherwise indicated, facts in this Article are current as of September 30, 2006.


\(^7\) See Background Note, supra note 5.


\(^9\) Katayanagi, supra note 9, at 42–54.

\(^10\) Id.

\(^11\) See description of the different "generations" of UN peacekeeping operations in Katayanagi, supra note 8, at 42–54.

referring to the elements of sovereign States. Such was the case in Cambodia (1991–93), East Timor (1999–2002), and Kosovo (since 1999).

In spite of the evolving nature of UN peacekeeping functions, several elements are common to all these operations. First, they are not “peace enforcement” operations, i.e., international sanctions that imply “action by air, sea or land forces as may be necessary to maintain or restore international peace or security” under the terms of article 42 of the UN Charter. Thus operations “authorized” by the Security Council in Korea (1950) or Iraq (1990) would neither fall in the peacekeeping category, nor pose the problems relating to the application of international humanitarian law that are outlined below. For this reason, a second element common to all peacekeeping operations is the agreement of the State or States concerning troop deployment. In fact, not only sovereign States but warring “factions,” i.e., non-state militias, within a State should agree to the deployment and mandate of force. The form of this consent is not important and can be expressed either before or after the formal formation of the operation. However, it is indisputable that when consent to peacekeeping troops was not given or was somehow forced on the parties (as with the warring Somalia factions or the Bosnian Serbs in the early 1990s), the peacekeeping operations ended in a dramatic failure, both for the civilian population who trusted these forces and for some of the troops themselves. Third, peacekeeping troops are not supposed to resort to the use of armed force to carry out their mandate. Traditionally, peacekeeping forces are only allowed to

19. Bothé, supra note 12, at 681 (“The agreement may take the form of an agreement between the parties to a conflict, the acceptance of a resolution by those parties individually expressed by each of them or an agreement between the UN and the State on whose territory the unit is to function.”).
20. In Bosnia, the “safe area” of Srebrenica was taken by Serb paramilitaries in August 1995—and some 8000 civilians massacred—just by asking the impotent blue helmets to leave. Carina Faur et al., El Derecho Internacional Humanitario y su Aplicación: El Conflicto en la Antigua Yugoslavia 1991–1995, at 265–71 (2001). A few months earlier, peacekeeping troops had been captured, handcuffed to strategic bridges, and used as human shields in order to avoid the North Atlantic Treaty Organization’s (NATO) air strikes against Serbian positions. Id.
21. Greenwood, supra note 1, at 11; Tittemore, supra note 17, at 77.
use force in self-defense, but this term has been interpreted differently, depending on the operation. In a narrow sense, it means that blue helmets may only use force when actually attacked; in a wider sense, the blue helmets can also resort to force when they are prevented from carrying out their mission. In this respect, it is worth noting that the more recent peacekeeping operations have been established by the Security Council under the Chapter VII powers of the UN Charter, i.e., in situations that constitute “threats to the peace.” This allows the mission to use “action . . . as may be necessary” to carry out its mandate. Agreement of the relevant parties continues to be required, but the degree of force that can be employed by the peacekeepers and the range of situations in which they may need to resort to it are generally broader. In the Congo, for instance, forces for the United Nations Mission in the Democratic Republic of Congo (MONUC) are supporting the armed forces of the government to restore the authority of the Congolese State in areas of the country that are controlled by rebel forces. In such cases, it is hard to see how all the parties may have actually consented to the deployment of peacekeeping troops. For this reason, the question of whether the laws and customs of war are even applicable to these operations is of paramount importance.

Admittedly, the distinction between enforcement and peacekeeping operations becomes blurred when Chapter VII and the authorization of necessary means are used in both types of actions, and when enforcement takes place in post-conflict situations, such as Kosovo (Kosovo Force (KFOR), coexisting with a true peacekeeping operation) or Afghanistan (International Security Assistance Force (ISAF),

22. Greenwood, supra note 1, at 11; Tittemore, supra note 17, at 77.


24. U.N. Charter art. 42. Out of the six operations currently based on Chapter VII, only the United Nations Mission in Liberia (UNMIL) is not expressly authorized to use all necessary means to carry out its mandate. Although the original mandate of the United Nations Interim Force in Lebanon (UNIFIL) did not include such authorization, Security Council Resolution 1701 of Aug. 11, 2006 dramatically expanded the operation (from 2000 to 15,000) and amended its mandate to include authorization “to take all necessary action.” S.C. Res. 1701, ¶ 12, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

coexisting with a larger North Atlantic Treaty Organization (NATO) operation, to which the Afghan government "consented"). This Article will focus only on those peacekeeping operations that are considered as such by the UN, and are thus coordinated by the Department of Peacekeeping Operations and fall under its actual command and control.

B. STATUS AND LEGAL NATURE OF PEACEKEEPING FORCES

Within the institutional structure of the UN, peacekeeping operations are "subsidiary organs" established by a principal organ, usually the Security Council, in accordance with article 7.2 of the UN Charter. In fact, as Bothé points out, they are hybrid organs since they also form part of the Secretariat (Department of Peacekeeping Operations). In any case, they act on behalf of the UN and their members are considered to be "international agents," i.e., persons who have been "charged by an organ of the Organization with carrying out, or helping carrying out, one of its functions - in short, any person through whom it acts." They are thus protected by article 105 of the UN Charter and by the 1946 Convention on the Privileges and Immunities of the United Nations.

The legal status of peacekeeping forces as subsidiary organs of the UN does not preclude the UN's need to reach agreements in order to establish the forces. The UN should first reach agreements with troop-contributing States, since neither the missions nor their personnel are standing organs or servants of the UN. The UN should then reach agreement with the host State, since the very nature of the peacekeeping operation calls for a specific arrangement relating to the privileges and immunities of the troops on the ground. Following a significant surge of demand for peacekeeping troops in the late 1980s, the General Assembly did establish some of the first peacekeeping operations under the "Uniting for Peace" Resolution. G.A. Res. 377 (V), U.N. Doc. A/RES/377(V) (Nov. 3, 1950). It is well-accepted now, though, that this function belongs to the Security Council according to its "primary responsibility for the maintenance of international peace and security." U.N. Charter art. 24.


27. The U.N. Charter states that "[s]uch subsidiary organs as may be found necessary may be established in accordance with the present Charter." U.N. Charter art. 7.2.


32. In the first thirty-nine years of UN peacekeeping operations, between 1948 and 1987, the UN
Assembly adopted two “model” agreements, drafted by the Secretary-General, that set forth the status of the peacekeeping forces both in the host State and the relationship between the contributing State(s) and the UN. They are the “Model Status-of-Forces Agreement for Peacekeeping Operations” (SOFA) and the “Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peacekeeping operations” (“Model Contributing Agreement”). Both model agreements are inspired by past UN practices and are intended to apply upon concretion and specific signature on a case-by-case basis. Recent practice shows that SOFAs may apply provisionally, pending the actual conclusion of a treaty between the UN and the host country.

The model agreement confirms that peacekeeping operations are subsidiary organs of the UN. The operations are therefore entitled to the privileges and immunities established in the Convention on Privileges and Immunities of the United Nations and in the SOFA. The SOFA devotes a great deal of attention to the facilities, privileges, and immunities owed by the host State to the operation and its personnel. In particular, the SOFA states that “[a]ll members of the UN peacekeeping operation . . . shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.” If military members of the operation are suspected of having committed a criminal offense, including war crimes, they “shall be
subject to the exclusive jurisdiction of their respective participating States."\footnote{40} Such States must be prepared to exercise jurisdiction "with respect to crimes or offences which may be committed by members of their national contingents serving with the peacekeeping operation."\footnote{41}

The characterization of peacekeeping forces and troops as UN agents is, admittedly, somewhat biased by their military nature. Although civilians and police forces are also part of peacekeeping operations, the core of these units is the military.\footnote{42} The Model Contributing Agreement acknowledges the dual nature of the troops, and it provides that the personnel "shall remain in their national service but shall be under the command of the United Nations, vested in the Secretary-General, under the authority of the Security Council."\footnote{43} This provides several layers of authority in peacekeeping operations.\footnote{44} The Security Council establishes the functions and mandate of the mission. The Secretary-General has "full authority over the deployment, organization, conduct and direction" of the operation.\footnote{45} This authorizes the Secretary-General to issue "the regulations of the force"\footnote{46} or "rules of engagement."\footnote{47} On the field, the Secretary-General delegates to a Head of Mission who has "general responsibility for the good order and discipline of the [operation]."\footnote{48} Thus far, only the UN, through its different organs and agents, bears responsibility for the actions or omissions of the mission.

One final layer of command for each national contingent remains: the Model Contributing Agreement calls for a national commander who is responsible "for disciplinary action with respect to military personnel made available by [the participating State]."\footnote{49} In theory, troops "shall not
seek or accept instructions in respect of the performance of their duties from any authority external to the United Nations, nor shall the Government of [the participating State] give such instructions to them.\footnote{50} This, however, has not always been the case, and lack of discipline\footnote{51} or "tensions between UN direction and, sometimes contrary, national understanding and expectations"\footnote{52} are likely to occur.

II. INTERNATIONAL HUMANITARIAN LAW: BASIC FEATURES

International humanitarian law encompasses the norms of international law that govern the conduct of belligerent parties during armed conflicts. These norms include restrictions on the right of the parties to use means and methods of combat during actual hostilities, as well as the treatment of non-combatants, i.e., those who no longer can fight (wounded, sick, shipwrecked, and prisoners of war) and those who have never fought (civilians).\footnote{53} They also deal with the status of certain qualified people (e.g., journalists, members of the Red Cross) and with the protection of certain goods (e.g., historic and religious sites).\footnote{54} Some have argued that international humanitarian law is nothing but the application of international human rights law during a time of war; and though there is no doubt about the relationship between both areas of international law,\footnote{55} it is important to stress their structural differences. Humanitarian law appears much earlier in the history of international relations (mid-nineteenth century), has a different legal and philosophical basis (the balance between military necessity and humanity),\footnote{56} and is much wider in scope (it deals not only with how States treat individuals, but also with how hostilities should be conducted, the prohibition or limitation of certain weapons, the protection of sites and "dangerous forces," etc.). At the same time, the application of international humanitarian law is much narrower: it only applies within

\footnote{50. Id. ¶ 9.}
\footnote{51. See Richard Simmonds, Legal Problems Arising from the United Nations Military Operations in the Congo 165 (1968). Professor Simmonds stresses the problem of the attitude of contributing States in relation to the strategic and political direction of the Force in the Congo operation: "Particularly disturbing was the order given by the Government of Morocco in January 1961 to its brigade ‘to cease to perform its function’ while remaining in the Congo." \textit{Id.} Later on, and in another front, it was reported that "the Commanding officer of the [United Arab Republic] battalion in the Congo had declined to comply with a UN Commander’s order to shift his men from the Equator Province to Kasai." \textit{Id.} \textit{Id.} ¶ 9.}
\footnote{53. See id. at 43 (discussing the topics of the four Geneva Conventions).}
\footnote{54. See id. at 109.}
\footnote{56. Doswald-Beck & Vité, supra note 55, at 95.}
the framework of an armed conflict, whereas human rights law applies in times of peace and, with the exception of a few rights that have been expressly suspended, human rights law also applies in times of war. Although it is beyond the scope of this Article, it is important to note that whether or not international humanitarian law applies to peacekeeping operations, such operations have a continuing duty to respect the general international law of human rights.

The first international instruments on the laws of war date back to the second half of the nineteenth century, and they currently comprise more than a hundred different legal texts. Among them, the basic treaties dealing with jus in bello can be currently narrowed to the Fourth Hague Convention (1907), the Four Geneva Conventions (1949) with their two additional Protocols (1977), as well as the UNESCO

57. The International Court of Justice has stated that “the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) [hereinafter Use of Nuclear Weapons]. The ICJ has confirmed this approach in its Advisory Opinion of July 9, 2004 entitled the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9) [hereinafter Construction of a Wall].


Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954). The tangled relationship among the different sources of international humanitarian law, which together form a single system of norms, was appropriately emphasized by the International Court of Justice in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons:

A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The “laws and customs of war”—as they were traditionally called—were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907).... This “Hague Law” and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the “Geneva Law” (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

It is beyond the scope of this Article to try to summarize international norms relating to humanitarian law. Some basic elements and features of this set of rules, however, are well worth emphasizing, in particular the evolutionary character of humanitarian law, its customary nature in general international law, the distinction between norms applying to international and non-international armed conflicts, and the scope of duty to “respect and ensure respect” in Common Article I to the Geneva Conventions.

1. International law, like any domestic legal system, is a social product: it “carries the structures and systems of society through time”; it “inserts the common interests of society into the behavior of society-members”; and it “establishes possible futures for society, in accordance with society’s theories, values and purposes.” In fact, if law
predominantly follows rather than shapes societies, this is particularly true with respect to international humanitarian law. During the last 150 years, countries have shown a clear ability to outgrow pre-existing rules of international humanitarian law. As Meron puts it, "[c]alamitous events and atrocities have repeatedly driven the development of international humanitarian law. The more offensive or painful the suffering, the greater the pressure for accommodating humanitarian restraints." 67 Throughout the years, new weapons (chemical warfare in World War I, nuclear weapons in World War II), new means of warfare (guerrilla), new actors in warfare (national liberation movements), and new atrocities committed on civilians or prisoners of war have forced States to constantly update the principles and norms of humanitarian law. 68 Thus, the established rules may be insufficient to govern new armed conflicts. This is what makes the inclusion of the "Martens Clause" in the Hague Convention so important. The Martens Clause has also been incorporated into other humanitarian treaties, the latest being the Additional Protocol I of 1977. The Martens Clause provides:

[I]n cases not included in the Regulations adopted by them [the High Contracting Parties] the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. 69

The Martens Clause provides a counterweight to a literal interpretation of law 70 and reminds us that whatever is not expressly prohibited in the corpus of humanitarian law is not necessarily thereby permitted. 71 This allows UN peacekeeping operations to fit within the normative scope of humanitarian law even though such operations were not originally contemplated by the instruments of international humanitarian law.

2. The Martens Clause is also proof that most of international humanitarian law has become customary international law 72 binding on

67. Meron, supra note 55, at 243.
68. Victoria Abellán, El Derecho Humanitario Bélico: Evolución Histórica, in LA REGULACIÓN JURÍDICA INTERNACIONAL DE LOS CONFLICTOS ARMADOS 73 (1992) (noting that "cualquier avance en las normas humanitarias en los conflictos armados ha tenido el alto coste de una práctica anterior cada vez más cruel e inhumana.").
69. War on Land and its Annex, supra note 60, art. 1.
70. DETTER, supra note 65, at 376. According to the ICJ, the Martens Clause "has proved to be an effective means of addressing the rapid evolution of military technology." Use of Nuclear Weapons, supra note 57, at 257.
71. ROSARIO DOMÍNGUEZ MATÉS, LA PROTECCIÓN DEL MEDIO AMBIENTE EN EL DERECHO INTERNACIONAL HUMANITARIO 297 (2005).
72. DETTER, supra note 65, at 376. Pons underlines the link between natural law and positive law operated by the Martens Clause. Xavier Pons Rafols, Revisitando a Martens: Las normas básicas de humanidad en la Comisión de Derechos Humanos, in 2 SOBERANÍA DEL ESTADO Y DERECHO
all States and other subjects of international society. After the second World War, the Nuremberg Tribunal acknowledged the customary nature of the rules embodied in the Hague Convention.\textsuperscript{73} One hundred and ninety-four States have ratified the four Geneva Conventions,\textsuperscript{74} making them universal almost without the need to resort to customary law considerations. The only gray area could be the two 1977 Additional Protocols to the Geneva Conventions. Though participation in both instruments is impressive (166 and 162 parties respectively),\textsuperscript{75} participation is not actually universal, and among those who have not ratified either, or both, instruments are countries as significant as the United States. Nonetheless, the disagreement on the part of States that have not ratified the Protocols rests mostly on very specific issues, such as the inclusion of colonial wars as international armed conflicts in Protocol I, rather than non-international ones (Protocol II).\textsuperscript{76} There is little doubt that provisions of the Protocols that simply restate or update norms from the Geneva and Hague Conventions are generally applicable as customary international law.\textsuperscript{77} In addition, the fact that the Rome Statute for the International Criminal Court includes a number of crimes considered to be grave breaches exclusively by the Protocols as war crimes is evidence of the customary character of such norms.\textsuperscript{78}

3. International humanitarian law traditionally dealt only with international armed conflicts, that is, conflicts between two or more sovereign States. Domestic conflicts or civil wars were considered “internal affairs” in which third parties, or the rules of international law,
This perspective started to change with Common Article 3 of the Geneva Conventions, which established minimum rules for parties in an armed conflict that is not international in nature. Additional Protocol II to the Geneva Conventions builds upon Common Article 3 by establishing greater protection for victims of non-international armed conflicts. Nonetheless, the truth is that the rationale behind many of the rules dealing with international armed conflicts (i.e., that these are conflicts between “States” and not individuals) does not apply to civil wars. This results in striking differences of treatment in otherwise similar situations. Thus, for instance, an “enemy combatant” in an international armed conflict is not a criminal per se, even if that person has killed soldiers during the war; when he is captured, the only point of his “prisoner of war” status is simply to keep him away from the conflict and from helping his own country; prisoner of war status is not meant to “punish” him. In contrast, the rebel in a civil war is a criminal, a “traitor” who is subject to criminal prosecution according to domestic law. The notion of “prisoner of war” does not exist in non-international armed conflicts. Generally speaking, only the very basic humanitarian norms apply as a minimum set of rules of conduct for the parties in non-international conflicts, such as the notion that certain rights must be respected “in all circumstances” and that certain practices are never tolerable (as envisaged by the Martens Clause). The link between the international law of human rights and international humanitarian law appears clearer than ever in non-international armed conflicts for they both attempt to spell out the actual threshold that States should never cross with regard to their own population, despite political unrest, domestic conflict, or open civil war.

79. Green, supra note 65, at 54, 317.
80. “Persons taking no active part in the hostilities … shall in all circumstances be treated humanely” without discrimination. First Geneva Convention, supra note 61, art. 3. To this end, “the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons”: violence to the person, murder, torture, taking of hostages, outrages upon personal dignity, and the passing of sentences without due process. Id.
81. See Detter, supra note 65, at 3–5 (concluding nonetheless that war is “essentially a relationship by armed force between individuals”); see also Green, supra note 65, at 327 (acknowledging that “in non-international armed conflicts it is perhaps more necessary to make provision for the protection of those who fall into the hands of their opponents than is the case in an international conflict when ideologies and emotions are not normally so important”).
82. See, e.g., Francis Lieber, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 56 (Apr. 24, 1863), reprinted in The Laws of Armed Conflicts to (Dietrich Schindler & Jiri Tomas eds., 3d. ed. 1988) (“A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace … .”); see also Detter, supra note 64, at 327 (“The essence of the treatment of prisoners of war is that it must not constitute a sanction but a set of precautionary measures.”).
83. The same applies, mutatis mutandis, to the regular soldier, if we adopt the rebels’ point of view.
84. See Doswald-Beck & Vité, supra note 55, at 112.
4. Common Article I of the Geneva Conventions provides that it is a duty of all States to “respect” and to “ensure respect” of the norms of international humanitarian law “in all circumstances.” As with any other binding norms of international law (be it treaty-based or customary), States have the duty to “respect” them. The fact that they have to do so “in all circumstances” has been widely understood as derogating the old si omnes clause that would make the laws of war applicable only “if all” warring parties were also parties to the relevant convention. International humanitarian law, like international human rights law, is not based on reciprocity. On the contrary, a State continues to be bound by the core norms even if its rival is in breach. The concept of “counter-measure” does not apply. But then what does the duty to “ensure respect” mean? Since norms of international humanitarian law have an erga omnes nature, there is wide consensus on the idea that States have the duty to “ensure” that other States also comply with such norms. In other words, all States have a general duty to enforce these norms by, for example, adopting international sanctions or other appropriate measures, when another State violates these norms. In fact, a closer look at the travaux preparatoires of Common Article I shows that the purpose of the drafters in 1949 was not so advanced for its time. The “ensure respect” clause was meant to emphasize the duty of all States to enforce humanitarian norms at the domestic level, and apply them to all relevant actors within the State structure. This interpretation has evolved along with current developments in contemporary international law. According to the Draft Articles on State Responsibility, States have the duty to cooperate to bring an end to serious violations of peremptory norms of international law. This includes their right to adopt measures of enforcement against a blatant violation of jus cogens committed by any third party; but there seems to be no duty to do so, except when mandated by the competent international organ (e.g., the Security Council). Nonetheless, in the context of the Geneva Conventions, the

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86. They are owed to the international community as a whole, not to a particular State or group of States.

87. See Knoops, supra note 47, at 81.

88. Cf. id. at 81–82 (arguing that, in the case of the UN, “a United Nations force has a duty to take action against violations of international humanitarian law by others, regardless of whether it is itself a party to an armed conflict”).


90. See Responsibility of States for Internationally Wrongful Acts, supra note 85, art. 41.1 (affirming that “States shall cooperate to bring an end through lawful means any serious breach” of peremptory norms of international law (emphasis added)). This duty to cooperate includes the right to adopt “lawful measures” against the State in breach. Id. art. 54. The Draft Articles reflect norms of customary international law and are thus binding on all states irrespective of the draft nature of the
International Court of Justice has recently accepted the interpretation of Common Article 1 as establishing a duty on all parties to force compliance, by lawful means, on a non-complying party.\textsuperscript{91}

International humanitarian law, and the humanization that it brings to modern warfare, is now a core element of contemporary international law. It remains to be seen whether and to what extent international humanitarian law is mandatory for troops in the type of mission described in Part I above; under what circumstances; with which limitations, restrictions, or adaptations, if any; and, finally, whose responsibility it is to comply with these humanitarian norms. After years of denial and doubt, the Secretary-General seems to have settled the question by adopting a three-page internal Bulletin on the observance by United Nations forces of international humanitarian law. The next Part examines its scope and contents.

III. OBSERVANCE BY UNITED NATIONS FORCES OF INTERNATIONAL HUMANITARIAN LAW: THE SECRETARY-GENERAL'S BULLETIN

There is little doubt today that international humanitarian law is fully applicable to State-led “peace enforcement” operations authorized by the Security Council. In spite of initial arguments to the contrary when the UN was first formed,\textsuperscript{92} these national troops are “belligerents” in every sense of the term, and the “fairness” of their purpose, or the fact that they have the blessings of the Security Council, is irrelevant to their duties to uphold the laws of war, just as it is irrelevant in other contexts that a belligerent State is considered to be an “aggressor” or to be acting in “self-defense.” Humanitarian norms must be respected by everyone

\textsuperscript{91}As noted in Construction of a Wall:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Construction of a Wall, supra note 57, at 61 (emphasis added). The implications of this obligation on peacekeeping operations will be examined infra, in Part IV.A.

\textsuperscript{92}Still in more recent times, some authors have claimed that international humanitarian law should never be applicable to U.N. operations, whatever their nature. See, e.g., Walter Sharp, Protecting the Avatars of International Peace and Security, 7 DUKE J. COMP. & INT'L L. 93, 163 (1996) (arguing that U.N. forces should be accorded special protected status, making it unlawful to target them, even when they are using force to accomplish their mission).
"in all circumstances." 93

The main theoretical problem with compelling peacekeeping operations to abide by international humanitarian norms is that it is difficult to consider the blue helmets as "belligerents" in the traditional sense of the word. As noted above, the blue helmets operate with the consent of the parties: no use of force has been needed to deploy the troops on the ground and their mandate does not necessarily imply the use of armed force. 94 In fact, UN forces and other UN personnel have often been the victims of hostile action by warring actors rather than the perpetrators of violence against those factions. 95 This led to the 1994 adoption of the Convention on the Safety of United Nations and Associated Personnel, 96 which expanded and updated the privileges and immunities of UN "agents" established in older treaties. 97

For decades, the United Nations was "disinclined to recognize the applicability of international humanitarian law to UN forces or to abide formally by its provisions." 98 In 1978, the UN formally acknowledged, in an exchange of letters and documents with the International Committee of the Red Cross, its duty to comply with "the principles and spirit" of international humanitarian law. 99 This commitment was upgraded to an actual agreement between the UN and a contributing State in 1993, 100 following the Model Contributing Agreement adopted by the General Assembly two years earlier. 101 Peacekeepers have nevertheless faced

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93. See Bowett, supra note 1, at 495 ("A survey of the judicial decisions of international and municipal tribunals ... tends to contradict the idea that an illegal aggressor cannot benefit, nor its opponent be bound, by the law of war during hostilities.").

94. See discussion supra Part I.


99. Palwankar, supra note 18, at 233 (citing an "interoffice memorandum" addressed on May 24, 1978 to all commanders of UN forces then operative, as well as the reply letter of October 23, 1978 by the UN Secretary-General to the President of the ICRC, among others).

100. See Shagra, supra note 98, at 406-07.

101. Model Contributing Agreement, supra note 34. 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
sustained armed action on a number of occasions, starting with the Congo operation in the early 1960s. During the 1990s, the world was shocked to hear of cases of inhumane treatment by peacekeeping troops (i.e., Canadian and Italian troops in Somalia), including sexual exploitation, torture, and the murder of civilians. The UN’s previous position was considered unsatisfactory, given its ambiguous and limited scope, as the UN was considered “capable of carrying out many, if not all, customary obligations” of international humanitarian law, and the declaration could not “provide guidance to troops, protected persons, or monitoring entities.” These examples of misconduct and the increasing pressure of scholars, activists, and the International Committee of the Red Cross (ICRC) led to the Secretary-General’s 1999 issuance of an internal three-page Bulletin accepting the binding character of core humanitarian norms on UN operations, for both those with enforcement mandates as well as those with “peacekeeping” mandates “when the use of force is permitted in self-defense.” Unfortunately, the Bulletin has not stopped allegations of misconduct and lack of accountability for peacekeepers, and the Secretary-General has been forced to adopt new measures that fall beyond the scope of this Article.

Cultural Property in the event of armed conflict. [The participating State] shall therefore ensure that the members of its national contingent serving with [the UN peacekeeping operation] be fully acquainted with the principles and spirit of the Conventions.

Id. ¶ 28 (emphasis added). It is worth noting that such commitment appears only in the model agreement between the UN and the contributing State, but not in the SOFA, between the UN and the host State, in which it would be at least as relevant as in the former.

102. See Bowett, supra note 1, at 166, 173.


105. See, e.g., Bowett, supra note 1, at 510–11 (“A simpler solution ... would be for the General Assembly to resolve that the Conventions were applicable to United Nations Forces.”); see also Palwankar, supra note 18, at 229–32 (providing the position of the ICRC).

106. The Bulletin, supra note 4, ¶ 1.1. For a review of the Bulletin, see, for example, Benvenuti, supra note 47, at 355; Luigi Condorelli, Le azioni dell’ONU e l’applicazione del diritto internazionale umanitario: il ‘bollettino’ del Segretario generale del 6 agosto 1999, 82 RIVISTA DE DIRITTO INTERNAZIONALE 1049 (1999); Shagra, supra note 98, at 406–09.


The Bulletin has been characterized as an “instrument whose form is unusual and modest, but whose substance is very important.”\textsuperscript{109} The Bulletin is intended to be binding on UN personnel, both because of its characterization as “internal law” within the UN’s own legal system,\textsuperscript{110} and its implementation of binding norms\textsuperscript{111} stemming “from the United Nations’ own obligations under customary international law.”\textsuperscript{112} With its adoption, the UN and the Secretary-General are implementing their own duty as “commanders” of the operation in accordance with article 87 of Protocol I to the Geneva Conventions.\textsuperscript{113}

As discussed above, the applicability of the Bulletin to peacekeeping operations is, apparently, very narrow in scope. It applies “when in situations of armed conflict [the peacekeeping forces] are actively engaged therein as combatants, to the extent and for the duration of their engagement.”\textsuperscript{114} It seems that the Bulletin is only applicable to actual combat and that only “Hague” law on the conduct of hostilities and the use of means and methods of combat would be mandatory. But such a narrow approach is contradicted not only by some of the substantive rules in the Bulletin itself, but by the commitment that the UN assumes in section 3 of the Bulletin “to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel.”\textsuperscript{115} If we

\begin{footnotes}
\item[109] Benvenuti, \textit{supra} note 47, at 356 (“Instrument inhabituel et modeste dans sa forme, mais très important dans la substance.”).
\item[110] See Murphy, \textit{supra} note 30, at 176.
\item[111] See Benvenuti, \textit{supra} note 47, at 356, 358 (stressing its “administrative-regulatory” nature).
\item[112] \textit{Knoops}, \textit{supra} note 47, at 95. For Shagra, the Bulletin is binding on members of UN forces in the same way as are all other instructions issued by the Secretary-General in his capacity as commander-in-chief of UN operations; but “the source of the legal obligation, however, lies in the international humanitarian law provisions incorporated in the respective national laws . . . or in the customary international law provisions that are independently binding on them.” Shagra, \textit{supra} note 98, at 409.
\item[113] See Benvenuti, \textit{supra} note 47, at 359. Article 87 reads as follows:
\begin{quote}
The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol. 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol. 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.
\end{quote}
\item[114] \textit{Protocol I}, \textit{supra} note 62, art. 87.
\item[115] \textit{Id.} § 3. Note that the reference to the “principles and spirit” of humanitarian norms has been substituted by the more accurate “principles and rules.” Section 3 refers to the status-of-forces agreements, but “the obligation to respect the said principles and rules is applicable to United Nations
\end{footnotes}
were to understand the term "operations" only in a strict military sense, the Bulletin would be very limited in scope. Instead, we should read "operations" in its wider and more usual sense to encompass any activity carried out under the mission. Its ambiguous scope is arguably the most negative and troubling aspect of the Bulletin.

Sections 5 through 9 of the Bulletin synthesize substantive norms of international humanitarian law that must be observed by peacekeeping (and enforcement) operations. Although it is a "short, succinct and simplified document," these sections contain instructions that "reflect the quintessential and most fundamental principles of the laws and customs of war," namely: The protection of civilian populations, including the principle of distinction between civilians and combatants, and between civilian objects and military objectives.

The means and methods of combat, include general principles such as that "the right to choose methods and means of combat is not unlimited" or that weapons or methods causing "superfluous injury or unnecessary suffering" are prohibited. Weapons prohibited by different treaties, even if not universally ratified, are banned for UN troops. Section 6 of the Bulletin also prohibits any declaration that "quarter" will not be given, i.e., it prohibits telling the surrendered or conquered enemy that clemency will not be given. Among other things, Section 6 also forbids attacks on cultural property and attacks on objects indispensable to the survival of the civilian population.

The treatment of civilians and non-combatants is based on the

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116. Equivalent expressions might be "carry out its mandate" or "discharge its functions."

117. Shagra, supra note 98, at 408; see also Benvenuti, supra note 47, at 362 (considering it a "synthèse efficace").

118. The Bulletin, supra note 4, § 5.1. It includes the prohibition of indiscriminate attacks and reprisals against civilians or civilian objects. Id. §§ 5.5, 5.6. The Bulletin extends beyond its envisaged scope of application when determining that "military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives," a rule that is clearly addressed to parties different from UN agents, upon which the Secretary-General has no direct authority. Id. §§ 5.4

119. The Bulletin, supra note 4, §§ 6.1, 6.3.

120. See Benvenuti, supra note 47, at 366 (stating that in this matter "le Secrétaire Générale pose des limites qui vont même au delà du contenu des conventions en vigueur." [the Secretary-General imposes limits that go beyond the contents of conventions in force].)

121. Shagra, supra note 98, at 408, praises the Secretary-General for not constraining himself by the customary law dimension of international humanitarian law when including in this Section provisions such as the prohibition on using methods of warfare intended to cause widespread, long-term, and severe damage to the natural environment, rendering useless objects indispensable to the survival of the civilian population, and causing the release of dangerous forces with consequent severe among the civilian population. She argues that these provisions were considered innovative at the time of their adoption (1977) and must still be considered "conventional international law" only. See id. Instead, the fact that they are contained in other legal instruments (EN-MOD Convention, Statute of the ICC. . .) makes me believe that these are already binding obligations under general international law. See also Domínguez, supra note 71, at 464, 487.
principle of humanity. Violence against their persons, collective punishments, reprisals, the taking of hostages, any form of sexual assault, as well as other actions, are prohibited. Moreover, paragraphs three and four of section 7 provide special measures of protection for women and children.

Detained persons, without prejudice of their legal status, shall be treated in accordance “with the relevant provisions” of the Third Geneva Convention, “as may be applicable to them mutatis mutandis.” Thus, they are to be treated as prisoners of war, but only concerning certain “relevant provisions” and even those, “mutatis mutandis.” Section 8 mentions some of the rights that detainees shall enjoy “in particular,” including notification to the ICRC, which shall have the right to visit them; safe and healthy premises; a prohibition on torture and ill-treatment; and special measures for women and children.

The Bulletin provides for the protection of the wounded and sick, who are to be treated humanely and receive medical care without adverse distinction, as well as for medical and relief personnel, who shall be respected and protected by the UN.

The Bulletin took effect on August 12, 1999, on the fiftieth anniversary of the adoption of the Geneva Conventions. The Secretary-General’s acknowledgment of the applicability of international humanitarian law to peacekeeping operations, though welcome, does not settle the controversy. The implication in the Bulletin is that these norms will only be mandatory to UN peacekeepers during actual hostilities between peacekeeping forces and a State or an armed faction. In fact, the Bulletin only mentions “self-defense,” although it should be self-evident that international humanitarian law would also be applicable when the blue helmets receive a wider mandate and are allowed to use force to secure their mission, or when they (unlawfully) use armed force despite having no mandate to do so. The Bulletin’s limited approach raises two important flaws. First, it contradicts some of the substantive rules embodied in the Bulletin itself, particularly section 8 and parts of sections 7 and 9. Second, and foremost, it seems to ignore the fact that most international humanitarian norms do not deal with the actual

123. Id. §§ 7.3, 7.4.
124. Id. § 8.
125. Id. § 9 (referring in paragraphs 1 and 2 to the protection of the wounded and sick, and in paragraphs 3 through 9 to the respect for medical and relief personnel).
126. Id. § 10.
127. As is the case in the five Peacekeeping Operations established by the Security Council in the last two years and in the renewed Lebanese mission. See discussion supra note 23 and accompanying text.
128. The treatment of civilians, of prisoners of war, and of the wounded and sick clearly extends beyond the “active” engagement as combatant.
conduct of hostilities, but with the treatment of non-combatants.\textsuperscript{129} Thus, these norms are applicable "in a situation" of armed conflict and not only when an actual exchange of fire occurs.

IV. **Scope and Implications of the Duty to Observe International Humanitarian Law by Peacekeeping Operations**

The UN is an international organization, not a sovereign State. Because only States can sign the Geneva Conventions and Protocols, the UN is not a party to any humanitarian legal instrument.\textsuperscript{130} However, since most norms of international humanitarian law have achieved the status of customary international law, it is almost unarguable that they should be considered as binding upon all subjects of international society, which would include sovereign States as well as the United Nations.\textsuperscript{131}

Thus, consideration must be given to the issues of (1) whether peacekeeping operations may find themselves in a situation in which the laws of war are applicable, and (2) whether the intrinsic features of such UN operations, as well as those of the Organization itself, make them subject to the jurisdiction of international humanitarian law. The adoption of the Secretary-General's Bulletin answers these two questions in the positive, since it acknowledges both that peacekeepers may find themselves in a situation in which they need to respect certain rules of humanitarian law, and it assumes that the peacekeepers and the United Nations are both capable of doing so. The Bulletin, however, leaves a number of issues open, particularly whether it is a "complete" document and, if not, whether peacekeeping operations need observe all norms of international humanitarian law.

\textsuperscript{129} See, e.g., Geneva Conventions, \supra note 61 (each addressing the subject of non-combatants).

\textsuperscript{130} The United Nations has the capacity to sign treaties, but it cannot sign the Geneva Conventions or the Protocols because they are only open to sovereign "Powers." Tittemore, \textit{supra} note 17, at 95–96. As early as the 1960s, some scholars argued extensively that the Geneva Conventions were not open to international organizations since they were not "Powers" in the sense generally attributed to this term ("Nation" or "State") in international law. \textit{See} Bowett, \textit{supra} note 1, at 507–08; Simmonds, \textit{supra} note 49, at 179–80; \textit{see also} Tittemore, \textit{supra} note 17, at 96.

\textsuperscript{131} Most scholars mentioned in this Article argue that customary law on the matter is applicable, mutatis mutandis, to the UN. \textit{See}, e.g., Bowett, \textit{supra} note 1; Simmonds, \textit{supra} note 51; \textit{see also} Bothé, \textit{supra} note 12, at 695 ("[T]he UN is bound by general international law, the laws of war being no exception."). The International Law Commission is currently examining the topic of the responsibility of international organizations for breach of their international law obligations. Gen. Assembly, Int'l L. Comm'n, \textit{Second Report on the Responsibility of International Organizations}, A/CN.4/541 (Apr. 2, 2004) (\textit{prepared by} Giorgio Gaja) [hereinafter \textit{Second Report}]. In the research of the Special Rapporteur, Giorgio Gaja, international humanitarian law is expressly mentioned as a source of obligations for the UN. \textit{See id. ¶ 4}. 
A. THE DUTY TO RESPECT AND TO ENSURE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN ALL CIRCUMSTANCES

The commitment to respect and ensure respect for the Geneva Conventions is meant to emphasize that these treaties are not "an engagement concluded on a basis of reciprocity," but rather "a series of unilateral engagements solemnly contracted before the world." In order for the Geneva Conventions to apply, there must be a "declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The Conventions shall also apply "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." The Conventions thus apply whenever a situation of "armed conflict" exists between two or more sovereign States, irrespective of a declaration of a state of war, or how long the conflict lasts, or how much slaughter takes place. An armed conflict exists as a matter of fact, not of law, and even without actual hostilities the Conventions may be applicable. Article 2 of the Geneva Conventions "refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances." An occupation after a capitulation or armistice also implicates the Conventions for "an armistice suspends hostilities and a capitulation ends them, but neither ends the state of war."

Review of past and present practice of UN peacekeeping operations shows that forces are mostly deployed in territories that fit the factual situation required to trigger the Geneva and other humanitarian conventions. Both in traditional "interposition" missions and in more

133. First Geneva Convention, supra note 61, art. 2.
134. Geneva Conventions, supra note 61, Common art. 2.
135. COMMENTARY I, supra note 132, at 28.
136. Glick, supra note 104, at 75.
138. Id. at 22.
139. The fact that there are not actual hostilities in Cyprus or in the Middle East does not imply that a situation of "war" has ceased to exist between the parties in those conflicts. Meanwhile, the situation between Ethiopia and Eritrea remains "tense and potentially volatile" according to the UN spokesman for UNMEE. Military Situation in Area Separating Ethiopia from Eritrea ‘Potentially Volatile’ – UN, UN NEWS Serv., Dec. 29, 2005, available at http://www.un.org/apps/news/storyAR.asp?NewsID=17057&Cr=Ethiopia&CrI=Eritrea#. This is particularly true after Eritrea expelled, and the Security Council agreed to withdraw, about 160 Western peacekeepers from its border with Ethiopia. Warren Hoge, U.N.’s Western Peacekeepers To Be Withdrawn, N.Y. TIMES, Dec.
recent and complex ones,\textsuperscript{140} blue helmets are usually deployed in places where a "non-peaceful" situation actually exists. The fact that the Security Council, more often than not, is using Chapter VII as legal basis for the establishment of the operations may be considered as non-conclusive evidence in that respect.\textsuperscript{141} As is well known, under the UN Charter the Security Council is in charge of "international peace and security," and the Council may use different sources of authority to secure it.\textsuperscript{142} The fact that the Security Council opts for Chapter VII proves that at least a "threat to the peace" exists.\textsuperscript{143} It is true that in the sort of operations we are considering, peacekeepers are not "parties" to the conflict under the Geneva Conventions.\textsuperscript{144} But if we accept that armed troops, numbering several thousands\textsuperscript{145} and under responsible military command,\textsuperscript{146} are deployed in a territory where international humanitarian law is already applicable, and that the troops have a mandate that in certain circumstances may compel them to use armed force, then it is difficult to understand why the troops should not be bound de jure by such body of law from the very beginning of their mission, even before a single shot is fired.\textsuperscript{147} The fact that the Bulletin is only applicable to peacekeepers while they engage in hostilities means that its scope is excessively narrow. This minimalist approach, however, is consistent with the views of many scholars who claim that "although an

\textsuperscript{140} Clashes between Kosovo Albanians and Serbs have been frequent since 1999, particularly around the divided city of Mitrovica. Nebojsa Malic, \textit{Kosovo Burning}, Balkan Express, Mar. 20, 2004, http://www.antiwar.com/malic/?articleid=2164.

\textsuperscript{141} As mentioned supra note 24, six out of the seven operations launched since 2000 have a reference to Chapter VII, the only exception being UNMEE. I accept that this is non-conclusive evidence because the Security Council has in the past made a very flexible use of the expression "threat to the peace" in Article 39 of the Charter, including situations that are far from amounting to armed conflicts. U.N. Charter art. 39.

\textsuperscript{142} U.N. Charter chs. VI-VII.

\textsuperscript{143} Chapter VII is activated when the Security Council "determines" the existence of a "threat to the peace, a breach of the peace or an act of aggression." U.N. Charter art. 39.

\textsuperscript{144} See Glick, supra note 104, at 73 (criticizing the UN contention (articulated prior to the issuance of the Bulletin) that it can never be "party to a conflict," and its soldiers may not be considered to be "combatants").

\textsuperscript{145} The more recently established missions range between 2064 (UNMEE) and 14,434 (United Nations Mission in Liberia) troops. Background Note, supra note 5. Currently, the largest operation, the United Nations Mission in the Democratic Republic of Congo (MONUC), deploys 22,167 military personnel. Id.

\textsuperscript{146} Glick, supra note 104, at 74 ("The term 'party to an armed conflict' is deemed to encompass any de facto authority exercising command and control over military forces.").

\textsuperscript{147} Tittemore, supra note 17, at 107-08 (arguing that UN forces are subject to the principles of international humanitarian law only "to the extent that those forces are actively involved in hostilities"). Tittemore seems to accept, though, that in any circumstance the UN "must recognize a core of fundamental, nonderogable duties and protections comparable to those in Common Article 3, its corresponding elaborating provisions in Protocol II, and the grave breach provisions of the Geneva Conventions and Protocol I." Id.
armed conflict between other parties may take place at the same time, [peacekeepers] enjoy the status of civilians. However, such a view fails to fully take into account the factual characteristics of foreign troop deployment in conflict areas, even when the troops are neutral and enjoy the agreement of the parties. As discussed below, the problem is not to acknowledge their status as civilians insofar as we consider them from a passive perspective, as persons worthy of protection, i.e., potential victims of an attack by the parties. The issue only appears when they engage in some sort of action—not necessarily the use of force—that may implicate the rules of humanitarian law. At that point, the peacekeepers’ special, protected status should not lessen their obligation to comply with those rules. They may be considered “civilians” worthy of special protection, but at the same time, they are not mere passersby. They belong to a public organization with a mandate involving actions in the thin line between war and peace. This fact simply cannot be disregarded.

Even given the de jure duty of peacekeeping forces to observe international humanitarian law, it must be acknowledged that the very nature of the UN makes it impossible, or unlikely, for it to be bound by certain humanitarian obligations, particularly those concerning domestic action against breaches of the law committed by individuals. Thus, the “lack of a criminal or court system in the United Nations means that even where an operation is conducted entirely under United Nations command and control, certain obligations derived from IHL [International Humanitarian Law] must be under the responsibility of the contributing states and not of the United Nations.” The Bulletin acknowledges this fact when stating that in case of violations of international humanitarian law, “members of the military personnel of a United Nations force are subject to prosecution in their national courts.” The UN cannot fulfill, or breach, other provisions, but this only confirms the fact that whenever and wherever international

148. Bothé, supra note 12, at 695. Section 1 of the Bulletin also considers peacekeepers as “non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.” The Bulletin, supra note 4, § 1.2.

149. See discussion infra Part IV.B on the 1994 Safety Convention and its implications for the present discussion.

150. The Geneva Conventions require parties “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.” First Geneva Convention, supra note 61, art. 49; Second Geneva Convention, supra note 61, art. 50; Third Geneva Convention, supra note 61, art. 129; Fourth Geneva Convention, supra note 61, art. 146. Obviously, the UN cannot enact such legislation. The UN is not a state and it does not possess a judiciary or a legislative power, much less a prison system of its own.

151. Greenwood, supra note 1, at 27; see also Tittemore, supra note 17, at 111 (adding that “at the same time, [the UN] must also exercise some supervisory jurisdiction over such prosecutions in order to maintain its own independence from the influence of individual member states”).

152. The Bulletin, supra note 4, § 4; see also Model Contributing Agreement, supra note 34; SOFA, supra note 33.
humanitarian law is applicable, it is also binding on UN peacekeeping forces.\textsuperscript{153} The following section expands briefly on this notion to try to determine which humanitarian norms could be applicable to UN operations beyond those listed in the Bulletin. The following examples are a mere sampling from the vast body of norms of international humanitarian law that the Bulletin fails to explicitly address.

\textbf{1. Prisoners of War}

In 1993 “UN Forces [in Somalia] detained hundreds of Somalis then denied ICRC access to prisoners of war and persisted until ICRC suspended all operations in protest.”\textsuperscript{154} The treatment of persons detained in the course of peacekeeping operations has long been one of the most controversial areas in discussions of the applicability of international humanitarian law to peacekeeping. This is so because the application of the Third Geneva Convention would seem to involve “a degree of recognition of the status of the party which [the detainee] served and his right to participate in combat.”\textsuperscript{155} It is probably for this reason that the Bulletin only provides that “detained persons” shall be treated in accordance “with the relevant provisions” of the Third Geneva Convention, “as may be applicable to them mutatis mutandis.”\textsuperscript{156} The Bulletin is cautious not to call these people “prisoners of war,” though it acknowledges that they may very well be so.\textsuperscript{157} The applicability of the Third Geneva Convention to these detainees, even “with the necessary changes,” seems sufficient until we examine the specific examples set forth by the Secretary-General.\textsuperscript{158} The list of examples is too short and seems to have the main purpose of responding to ICRC concerns about the discharge of its mandate, while, at the same time, remaining applicable to both civilian and military detainees.\textsuperscript{159} Concerning the latter, though, some very important norms from the Third Geneva Convention are missing. The Bulletin contains no reference to the prohibition of discrimination on grounds of race, nationality, religious

\begin{footnotes}
\textsuperscript{153} As Pictet puts it, “as a matter of fact, there is an implicit clause in any law to the effect that no one is obliged to do what is impossible.” Jean Pictet, Developments and Principles of International Humanitarian Law 88 (1985). He refers to “a genuine material impossibility.” Id.
\textsuperscript{155} Greenwood, supra note 1, at 29.
\textsuperscript{156} See discussion supra Part III.
\textsuperscript{157} It refers to detained persons “[w]ithout prejudice to their legal status.” The Bulletin, supra note 4, § 8.
\textsuperscript{158} See discussion supra Part III (describing notification to the ICRC, which shall have the right to visit the detainees; safe and healthy premises; prohibition of torture and ill-treatment; and special measures for women and children).
\textsuperscript{159} These particular obligations of the “Detaining Power” are found both in the Third (POW) and Fourth (Civilians) Geneva Conventions. See Third Geneva Convention, supra note 61; Fourth Geneva Convention, supra note 61.
\end{footnotes}
belief, political opinion, language, social status, or to the duty to release prisoners who are seriously wounded or sick. Nor does the Bulletin set forth the right of prisoners to disclose only their name, rank, date of birth, and serial number in interrogations or the duty to inform the detainees about the camp or center regulations and the limitations to the ability to impose disciplinary measures for violations of such regulations. Clearly, the Bulletin is neither denying nor asserting the UN’s duty to comply with these and other provisions of the Third Geneva Convention. However, given the discussion at the beginning of this Part, whenever the detainee is a lawful—and it is up to the competent authorities of the mission to make this decision—the Bulletin’s reference to “the relevant provisions” of the Third Geneva Convention, “as may be applicable to them mutatis mutandis” should be understood in the widest possible sense, as encompassing all norms with which the UN has the actual capacity to comply.

2. Occupation of Territories

In 1991, following the Paris Peace Accords that ended two decades of internal struggle and foreign intervention, the Security Council established the United Nations Transitional Authority in Cambodia (UNTAC) with two components: “The military will be in charge of the cease-fire, the withdrawal of foreign troops, and the demobilization of the various combatants. The civil authorities, on the other hand, will be responsible for Cambodian administrative structures, human rights, and the refugee question.”

What distinguishes the Peace Plan from other UN operations was that it provided that “United Nations itself (and

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160. However, positive discrimination on grounds of gender, rank, or age is admissible under the Convention. Fourth Geneva Convention, supra note 61, art. 16.
161. Third Geneva Convention, supra note 61, arts. 109, 110.
162. Id. art. 17. The implication is that the UN has the right to interrogate prisoners of war (detainees), obviously without coercion or outrages upon their dignity.
163. Id. arts. 89-98.
164. The UN must apply Article 4 of the Third Geneva Convention to make such a determination. See id. art. 4. In spite of the concerns raised by Greenwood, supra note 1, at 35, there is no reason why the commanding officers should not make this sort of decision, as they would in a State-led operation. The only limitation would be whenever there are “doubts” about the status of the person and a “competent tribunal” must decide. Third Geneva Convention, supra note 61, art. 5. This is one of the situations in which the UN cannot, because of its very nature, implement the rule on its own and must rely on contributing States.
165. The Bulletin, supra note 4, § 8. This includes the right of prisoners to keep their personal effects, the recognition of their rank, and the limitations to their use as labor, among many others. Third Geneva Convention, supra note 61, arts. 43-45, 49-57. But not, for instance, the provisions concerning “judicial proceedings,” inasmuch as they refer to criminal prosecution for acts that are forbidden “by the law of the Detaining Power” or by international law. Id. art. 99.
166. Sellarés, supra note 12, at 129 (“El militar estará encargado del alto el fuego, de la retirada de las tropas extranjeras y de la desmovilización de los bandos combatientes. El componente civil, por su parte, tendrán como cometido la supervisión de las estructuras administrativas camboyanas, los derechos humanos y la cuestión de los refugiados.”).
not... the warring parties, who could not agree on interim power-sharing arrangements) [would] assure responsibility for the internal administration of Cambodia during its transition to elected government. The transition lasted for two years, during which the United Nations was de jure and de facto the supreme authority of the country. In 1999, the Cambodian experience was used to establish temporary international administrations in the territories of Kosovo and East Timor.

When the United Nations carries out complex and multidimensional peacekeeping operations, such as those in Cambodia, East Timor, or Kosovo, where the UN in fact replaces national authorities of the State or territory, there seems to be room for considering whether the laws of military occupation should apply. Occupation exists de facto when a foreign power holds actual control and is the only authority in the territory. As noted above, this control does not need to derive from an armed conflict. What is relevant is the actual submission of a territory and its population to the authority of a foreign army as long as this presence is not approved by the authorities under whose sovereignty the territory is placed. This caveat is the most important element in determining the applicability of the law of military occupation to the sort of peacekeeping operations mentioned above. Since peacekeeping operations are deployed after the adoption of an agreement between the UN and the host State, or when the host State otherwise consents to this deployment, the de jure applicability of the law of military occupation...
seems to be excluded. The problem is that, in practice, the consent of a host State in a situation that requires such deep and extensive UN presence may be null and void, tainted, or simply nonexistent. For example, in East Timor, the establishment of UNTAET in October 1999 followed the ousting of Indonesian forces and paramilitaries by a Chapter VII enforcement operation (INTERFET). There was no “power” in the territory, and even if Indonesia had agreed on the deployment of INTERFET, its consent was completely irrelevant from a legal point of view: first, a Chapter VII operation does not need the agreement of the State against which it is addressed; second, Indonesia had never been recognized as sovereign over the territory.

In these circumstances, an “occupation” should be deemed to exist if all other requirements are met. And even if the case for a de jure application of international humanitarian law might be hard to construct, there would be grounds to claim its de facto application, at

176. Yugoslavia (Serbia and Montenegro) “consented” to the deployment of UNMIK (and KFOR) in Kosovo on June 3, 1999, six days before surrendering to the NATO commander and while still under air attacks. Vité, supra note 172, at 23.

177. The peace process that led to the Paris Conference and Accords in 1991 was led by Australia and imposed by the five permanent members of the Security Council once they had reached an agreement among themselves. As Sellares explains:

Aunque nominalmente sea Camboya soberanamente quien resuelve el conflicto, en realidad la solución ha sido dictada por los 5 miembros permanentes... Es una solución impuesta, sin alteraciones o cambios sustanciales.

Este dirigismo de los permanentes es tan evidente que reiteran hasta tres veces el llamamiento a que las partes camboyanas creen el Consejo Nacional Supremo, y cuando éste exista “deberá reanudarse la Conferencia de París”, para la que fija una “tarea” o “deber”: “un plan detallado para la puesta en práctica de conformidad con ese marco”, el marco acordado por Francia, Gran Bretaña, China, Estados Unidos y la Unión Soviética.

SELLARÈS, supra note 12, at 111-12 (“Although in theory Cambodia was to solve the conflict as a sovereign power, the solution, in fact, was dictated by the five permanent members [of the Security Council]. It was an imposed solution, [to be implemented] without substantive changes. The power of the permanent members was so evident that they reiterated at least three times their call to the Cambodian parties to establish the Supreme National Council and to reinstate the Paris talks, where the parties were to dutifully put into place the framework decided by France, Great Britain, China, the United States, and the Soviet Union.”).


179. See SÁURA, supra note 13, at 46; Vité, supra note 172, at 28.

180. In Kosovo, the military and civil authorities running the territory are split between KFOR, a Chapter VII operation led by NATO, and UNMIK, a peacekeeping operation without any troops. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); United Nations, UNMIK at a Glance, http://www.unmikonline.org/intro.htm (last visited Jan. 4, 2007). Thus, even if the situation on the ground can be considered equivalent to military occupation in this case, the duty to observe the Fourth Geneva Convention and other relevant norms belongs to the States acting under KFOR and not to the UN.

least in those areas where this body of law broadly coincides with international human rights law. As Meron explains, "to the extent that the Fourth Geneva Convention cannot adequately resolve the problems of modern occupation ... the applicable human rights protection should be invoked to fill the void."183

Setting aside the core human-rights aspects of international humanitarian law, most authors tend to think that "when a United Nations force is involved in administering territory but has not been a party to an international armed conflict," the law of belligerent occupation is inapplicable.184 Instead, they argue "the Charter itself imposes obligations that may stop Member States whose territory the Force is occupying from claiming the treatment of the laws of war"185 and that the Security Council "may override customary international law in the same manner as treaty law,"186 including international humanitarian law.187 Such bold assertions cannot be accepted. It is true that the International Court of Justice has held that UN Members "are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter" and that, in doing so "in accordance with Article 103 of the Charter, the obligations of the parties in that respect prevail over their obligations under any other international agreement."188 But it must be noted that the dispute in that case referred to the 1971 Montreal Convention, which established obligations that are purely treaty-based and are not based on customary international law, and much less peremptory. This is a very different situation from the

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Footnotes:

182. Meron, supra note 55, at 266; see also Luigi Condorelli, Le statut des forces de l’ONU et le droit international humanitaire, 78 RIVISTA DI DIRITTO INTERNAZIONALE 4 (1995). The same arguments that we have used for international humanitarian law, i.e., that it is customary and generally applicable, including for international organizations in the appropriate circumstances, apply to the international protection of human rights. And since this body of law does not cease to apply in times of war (except when derogation is allowed and exercised), the elements of the law of occupation, and particularly the treatment of civilians, that are common to general customary law of human rights are mandatory for peacekeeping operations.

183. Greenwood, supra note 1, at 30; see also Bowett, supra note 1, at 490 (stating that when the jurisdiction of a peacekeeping force is grounded on Status of Forces agreement between the Organization and the host State, it does not operate as a belligerent occupier).

184. Bowett, supra note 1, at 491.

185. Tittemore, supra note 17, at 101.

186. Greenwood, supra note 1, at 28 (stating that in case of occupation by the UN (or by States with the authorization of the UN), "the law of belligerent occupation would apply but only unless and until the Security Council used its Chapter VII powers to impose a different regime as part of the measures which it considered necessary for the restoration of peace and security").

Geneva Conventions and Protocols, inasmuch as most of their rules are customary in nature and in many respects may be considered jus cogens. Moreover, with respect to the Montreal Convention, the ICJ later held that it could not declare Libya’s request inadmissible without looking into the merits of the case, only because of the existence of two Security Council resolutions, thus questioning whether Security Council resolutions can actually or would necessarily override treaty obligations. Condorelli is therefore correct when he states that the Security Council does not have the authority to rule against international humanitarian law.

We now turn to the applicability of the law of occupation to UN missions, for this will, in fact, determine the exact extent of UN rights and duties in the occupied territory, beyond the particular mandate of the Security Council and the terms of the Secretary-General’s Bulletin. In this respect, a number of provisions in the relevant Hague and Geneva Conventions are clearly inapplicable to an operation led by a non-State entity. For example, the UN cannot “transfer . . . its own civilian population” in order to change the demographic composition of the occupied territory. Moreover, while the UN should not “compel” protected persons to serve in its armed or “auxiliary forces,” there is no good reason why it should not publicize the possibility of a voluntary engagement. On the other hand, most other norms seem to be perfectly applicable to the UN: foreigners in the occupied territory must be

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188. See discussion supra Part II.

189. The ICJ stated:

However, by requesting such a decision, the United Kingdom is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The ICJ was thus not ready to determine, without further consideration, that Security Council resolutions would completely supersede pre-existing treaty law and that this was necessarily a legal consequence of such resolutions. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1998 I.C.J. 9, 29 (Feb. 27).

190. Condorelli, supra note 182, at 898. In my view, the binding nature of these resolutions does not necessarily imply that they supersede or eliminate in toto the whole of International Law. First, the Security Council cannot impose duties that are contrary to peremptory norms of general international law; and, second, as long as they are not incompatible with the Council’s determination, other rules of international law remain binding. Thus, the Security Council does not need to recall for each operation the duty of peacekeepers to respect, for instance, the sovereignty and territorial integrity of the State or States where they are acting. It is a given. The same happens with international humanitarian law.

191. Fourth Geneva Convention, supra note 61, art. 49. The UN does not have the capacity to breach the prohibition for it does not possess “population” of its own.

192. Id. art. 51(1) (“The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.” (emphasis added)).
allowed to leave it;\textsuperscript{193} individual or mass forcible transfers are forbidden;\textsuperscript{194} the Occupying Power must restrain from measures aiming at creating unemployment;\textsuperscript{195} it must also abstain from any destruction of real or personal property belonging to individuals or the State;\textsuperscript{196} it may not alter the status of public officials or judges in the occupied territories;\textsuperscript{197} it must permit ministers of religion to give spiritual assistance to the members of their religious communities;\textsuperscript{198} and so forth.

Fears that these constraints may hamper the mission are unfounded because most of these obligations are far from absolute. They are worded in a manner that takes into account “military necessity.” In the case of peacekeeping operations, the reasonable contrary commands of the Security Council, due to functional necessity, need not be interpreted as incompatible with them. For instance, even if “the penal laws of the occupied territory shall remain in force” they “may be repealed or suspended . . . where they constitute a threat to its security or an obstacle to the application of the present Convention.”\textsuperscript{199} Thus, UN administrations that change domestic laws that are incompatible with the UN’s mandate would not necessarily be a breach of the Fourth Geneva Convention.\textsuperscript{200} Rather than seeing the duty of peacekeeping operations to observe the Fourth Geneva Convention as a “problem,” one could argue that the problem is that the Convention is insufficient, and that its provisions need to be supplemented by other relevant and applicable international norms, particularly those regarding human rights.\textsuperscript{201}

3. The Duty “To Ensure Respect”

During the Bosnian War, an oft-cited episode occurred in which officials of United Nations Protection Force (UNPROFOR) had to decide whether they had a “duty to intervene” to defend the inviolability of a hospital under attack by Serbian troops in the safe area of Bihać. They did so, although later that year the UN Office of Legal Affairs stated that such action did not amount to a precedent and that

\textsuperscript{193} Id. art. 48.
\textsuperscript{194} Id. art. 49.
\textsuperscript{195} Id. art. 52.
\textsuperscript{196} Id. art. 53.
\textsuperscript{197} Id. art. 54.
\textsuperscript{198} Id. art. 58.
\textsuperscript{199} Id. art. 64 (“The Occupying Power may . . . subject the population of the occupied territory to provisions which are essential to enable the Occupying Power . . . to maintain the orderly government of the territory, and to ensure the security of the Occupying Power . . . .”).
\textsuperscript{200} For instance, the seventy-five regulations adopted by UNTAET during the two and a half years of its administration of East Timor (1999–2002) were a minimum set of necessary rules to govern a lawless, devastated territory. See United Nations, UNTAET, News and Developments, http://www.un.org/peace/etimor/UnptaetN.htm (last visited Jan. 4, 2007).
peacekeepers were only bound by Security Council resolutions, not by the Geneva Conventions, as if both sources of legal obligations were mutually exclusive. It should come as no surprise, then, that the only reference to a duty to ensure respect of international humanitarian law found in the Secretary-General's Bulletin is the duty to protect in all circumstances medical and religious personnel, as well as transports, medical equipment, and units.

The remaining issue is whether UN peacekeeping operations also have a duty to intervene to "ensure respect" whenever they witness or learn of violations of international humanitarian obligations by the parties in the conflict. As discussed above, the meaning of the "ensure respect" clause in Common Article 1 to the four Geneva Conventions has expanded, and it is now widely understood—including by the ICJ—to encompass a duty to intervene. As the ICRC explains in its comments to the Geneva Conventions, "in the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect of the Convention." Likewise, even though the UN is not a "contracting Party" to the Convention, it still must comply with the customary duty to ensure respect for international humanitarian norms. Professor Greenwood, thus, is incorrect when he qualifies the alleged legal duty of the UN to take such action as "unsound" on the grounds that the terms of that provision would be "asked to bear a weight which they were never intended to carry and which has never been acknowledged in state practice." In fact, he rightly points out that the obligation faces "considerable practical difficulties," particularly because the blue

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202. Gutman, supra note 154, at 361; Murphy, supra note 30, at 176 (noting the inconsistency in the attitude of the UN, since his interviews show that UNIFIL did monitor the behavior of Israeli forces in Lebanon after the 1982 invasion).
203. As mentioned above supra note 182, it goes without saying that UN Operations have to fulfill the mandate entrusted to them by the Security Council under the resolution establishing them, but that does not mean that the rest of international law ceases to apply. Thus, the only relevant issue concerning the "duty to ensure respect" is to determine its legal implications in general, both for States and the UN, irrespective of the mandates provided by the Security Council.
204. The Bulletin, supra note 4, §§ 9.4-9.5.
205. See discussion supra Part II.
207. As the ICJ has pointed out in relation to Israel's violations of the Fourth Geneva Convention, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.
208. Greenwood, supra note 1, at 32-33.
helmets may "not [be] equipped for an operation of that kind." But such concern derives from a narrow understanding of the duty to intervene, as including only an armed or coercive intervention meant to stop an on-going violation of the Conventions. As Greenwood suggests, this would only be feasible when the peacekeepers are capable of undertaking such action with minimum guarantees of success. But just as we do not require all States to react in the same manner to a violation of international humanitarian law, the duty to ensure respect by UN peacekeeping operations must be understood within the framework of their strength and features. For instance, as Palwankar notes, one way to comply with the duty to ensure respect of the Conventions would simply be "to draw up reports on violations of [international humanitarian law] in the sectors where the [peacekeeping forces] are deployed." Likewise, Domínguez mentions that the duty to ensure respect implies that all states must take the measures they feel appropriate with respect to any other state that fails to observe those duties. Thus, "it may be argued that a United Nations force has a duty to take action against violations of international humanitarian law by others, regardless of whether it is itself a party to an armed conflict," as a general obligation under international law. Even if the measures adopted by the force are only diplomatic and non-coercive, this may seem to compromise the "impartiality" of the Operation or of the UN, "[b]ut if the policy adopted by the United Nations is applied in a consistent and impartial manner, this argument may be rebutted." In any case, this is a characteristic of peacekeeping that is worth renouncing for the sake of ensuring respect for international humanitarian norms.

209. Id. at 33.

210. Id. More often than not, peacekeepers carry only light weaponry, unfit for any sustained enforcement action. In this respect, paragraph 12 of Resolution 1701 (2006) authorizes UNIFIL troops to use all necessary action, among other things, "to protect United Nations personnel, facilities, installations and equipment, ensure the security and freedom of movement of United Nations personnel, humanitarian workers and . . . to protect civilians under imminent threat of physical violence." S.C. Res. 1701, supra note 24, ¶ 12. But this authorization is conditioned "as it deems within its capabilities." Id. In other words, no one should expect peacekeepers to do more than they can materially do.

211. Palwankar, supra note 18, at 236.

212. Domínguez, supra note 71, at 381: "Todos los Estados se encuentran con el deber de tomar las medidas que crean oportunas respecto de cualquier otro Estado que no respete ese deber."

213. Knops, supra note 45, at 81–82.

214. This was the second practical concern of Greenwood, supra note 1, at 33.

215. Murphy, supra note 30, at 179. He adds that "it cannot be right to allow a United Nations force to stand idly by in circumstances where breaches of humanitarian law are taking place in their area of operations." Id.

216. The agreement given by the parties as a pre-condition for the deployment of the operation should not be understood as a blank check given by the UN to any unlawful action in which the parties may engage afterwards.
4. Non-International Armed Conflicts

Most peacekeeping operations, especially since the first surge in international peacekeeping in the late 1980s, take place within the boundaries of a single State. Since 2000, only one out of seven new peacekeeping operations, the one dealing with the supervision of the cease-fire between Ethiopia and Eritrea, has a purely international character. The rest take place, or have taken place within the borders of the sovereign states of East Timor, Liberia, Ivory Coast, Haiti, Burundi, and Sudan. In these circumstances, the question arises whether only Common Article 3 and Additional Protocol II are applicable to UN troops or whether the presence of UN troops renders the conflict automatically international in nature. In a sense, the silence of the Secretary-General's Bulletin in this respect is reassuring: it means that the Bulletin's rules apply regardless of the international or non-international nature of the armed conflict in which the peacekeeping mission takes place. The Secretary-General is thus ordering its troops to comply with this set of norms. Nevertheless, because the Bulletin is not a complete document, we need to ascertain (1) whether by deploying peacekeeping troops in a non-international armed conflict, the UN's presence turns the conflict into an international one, thus making the whole body of international humanitarian law applicable to the parties and to the UN forces; or (2) whether UN forces must always comply with the norms of international armed conflicts regardless of the nature of the conflict.

Initially, even if it is only because of the "multinational nature of U.N. forces," it is difficult to see how hostilities in which the [UN] is involved can be regarded as 'not of an international character.' The practice of the UN, though, is not fully consistent with this view. In the Congo operation, "[t]he United Nations considered itself to be bound (and to benefit from) the entire body of the Geneva Conventions and not...
just common Article 3 ... in Somalia [it] did not regard [it]self as part[y] to an international armed conflict." Greenwood supports this change of attitude on the grounds that since the Somali factions "did not possess the military, political or judicial organization of a state ... [,] to have maintained that both sides were obliged to apply the Prisoners of War Convention would have had an air of unreality." Likewise, Tittemore is ready to accept that in a non-international setting, UN forces are bound "to the law governing international armed conflict vis-à-vis the organized armed forces of other States," but "in conflicts that would be considered domestic without U.N. involvement, the United Nations would be bound only by the law governing domestic armed conflicts, with respect to non-state actors involved." These approaches rely heavily on the need for "reciprocity" and "equality" between the parties in the conflict as an underlying essential principle of international humanitarian law. This implies the equalization of parties who are not, in fact, equal. Glick has rightly criticized such approach on the basis of the applicability of the jus ad bellum argument. If, as he contends, "the boundaries of the jus ad bellum manifest the jurisdictional boundaries between civil war and international conflict" and "when the United Nations intervenes in a civil war, it is the jus ad bellum that prescribes and delimits the right of the Organization to engage in armed conflict with rebel forces" then "U.N. conflicts with rebel forces are 'international' in character, despite the fact that the 'two subjects of international law' test might suggest otherwise." A similar argument is used by Professor Oeter to conclude that "with the intervention of third states the conflict becomes 'internationalized,' and in the relation between the intervening third states and the armed organizations participating in the civil war the entire complex of the laws of international armed conflict becomes applicable."
It may be unrealistic or unfeasible to ask non-State actors, or even governmental actors in their relationship with rebel forces, to comply with the Geneva Conventions, with or without UN involvement. In fact, since some of the conflicts where peacekeepers are being deployed take place in so-called “failed States,” only Common Article 3, rather than Protocol II, is applicable to the parties. Thus, the presence of international peace troops does not change the nature of the conflict for the parties in their mutual relations. But this is irrelevant as to their relationship with the UN. The parties, governmental or non-state, are bound to respect and protect UN troops, not because of the rules of international humanitarian law, but because of the 1994 Safety Convention. The UN is not treated as an “equal” party because it is not. Likewise, if we accept that international humanitarian law is applicable, then it only makes sense that the UN observe the norms that rule international armed conflicts, even if such rules are not binding between the parties in the conflict. The original non-international character of the conflict should not be an excuse for the UN to avoid compliance “in all circumstances” with those rules.

B. IMPLICATIONS OF THE 1994 CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL

Following a considerable escalation in the amount and intensity of attacks against peacekeeping personnel in the early 1990s, the General
Assembly adopted the Convention on the Safety of United Nations and Associated Personnel on December 9, 1994 ("Safety Convention"). The Safety Convention "was negotiated in three separate sessions at the [UN] in New York during 1994, a particularly fast pace for an instrument of some complexity and political sensitivity." The goal of the Safety Convention "is to protect United Nations and associated personnel from becoming the object of attack by purporting to criminalize [sic] attacks by other armed forces on peacekeeping troops." The Safety Convention states that the UN and its "associated personnel, their equipment and premises shall not be made the object of attack or any action that prevents them from discharging their mandate." The Safety Convention then compels states to establish as crimes under their national law a number of offenses that contravene this prohibition (murder, kidnapping, violent attacks, etc.). The Safety Convention also compels States to establish jurisdiction for those crimes in at least in two circumstances, and allows them to do so on three additional grounds. In order to ensure that alleged offenders are actually brought to justice, the Safety Convention operates as an extradition agreement among States that do not have such agreements already in place, or when the existing agreement does not contemplate the crimes mentioned in article 9. Because this may not be enough to guarantee prosecution in all cases, the Safety Convention also establishes a principle of universal jurisdiction: whenever a petition of extradition is addressed to the State that has jurisdiction over the offender, such State must either grant the petition or prosecute the offender. In this respect, the Safety

Antoine Bouvier, "Convention on the Safety of United Nations and Associated Personnel": Presentation and Analysis, 309 INT'L REV. RED CROSS 639, 640 (1994). He adds that by 1994, out of a total of 1074 dead in all past and ongoing missions by UN military contingents, 202 military personnel were killed in 1993 alone. Id.


239. Murphy, supra note 30, at 181.

240. Safety Convention, supra note 96, art. 7.1. State parties also have the duty to cooperate in the prevention of crimes against UN personnel. Id. art. 11.

241. Id. art. 9.

242. When the crime is committed in its territory or by a national of the State. Id. art. 10.1.

243. "[W]hen it is committed by a stateless person whose habitual residence is in that State; or with respect of a national of that State; or in an attempt to compel that State to do or to abstain from doing any act." Id. art. 10.2.

244. Id. art. 15.

245. The aut dedere aut judicare clause in Article 14 of the Safety Convention is completed by Article 10.4, according to which "[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is
Convention follows the same rationale and structure as the different conventions against terrorism adopted under the aegis of the UN and specialized agencies in the last thirty years. A few years after the adoption of the Safety Convention, the Statute of the International Criminal Court has acknowledged that the following are war crimes:

Intentionally directing attacks against personnel, installations, material, units of vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

As the last sentence of this provision suggests, the protective regime described above is not applicable to any action attributable to the UN. The Safety Convention defines UN personnel as "[p]ersons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation," an operation which, in turn, is defined as "established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control" in order, inter alia, to maintain or restore "international peace and security." This structure and purpose of the mission indicates that the Safety Convention aims at the protection of present in its territory and it does not extradite such person pursuant to article 15." Id. art. 10.4. Thus, if a State is not ready to extradite an alleged offender but has no link with the crime in the terms of paragraphs 1 and 2 of Article 10, it will need to base its competence on the principle of universal jurisdiction.

In these treaties, parties must cooperate in the criminal and jurisdictional field to facilitate the punishment of those guilty of the crimes specifically mentioned in each treaty. In particular, they must incorporate that concrete conduct and appropriate foreseeable punishment into their criminal code. Then, parties must either prosecute or extradite the person that happens to be under their jurisdiction who is suspected of having committed this act in the territory of another party.


Safety Convention, supra note 96, art. 1(a)(i) (emphasis added).
blue helmets. In order to make things even clearer, article 2(2) formalizes a specific exclusion from the scope of application of the Treaty in the following terms:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflicts applies.

This clause, and particularly the reference to international humanitarian law, has raised the issue of the eventual contradiction between the establishment of a privileged regime for UN troops (and other personnel), on the one hand, and their duty to comply with international humanitarian law, on the other. Some scholars have gone so far as to state that the legal regime of the Safety Convention and the laws of war are "mutually exclusive," in the sense that "[t]he threshold for the application of the law of international armed conflict thus becomes the ceiling for the application of the Convention" or that the Safety Convention regime applies "to non-conflict situations," whereas international humanitarian law applies "to any situation of sufficient degree of conflict." This may be so, but only if we read the Safety Convention from the point of view of the parties to the conflict and their duties towards peacekeepers, not from the perspective of the duties of the UN and the mission towards the parties and others in the conflict.

There is no doubt whatsoever about the need for a protective regime for UN personnel engaged in peacekeeping operations. More than a decade after the adoption of the Safety Convention, the Secretary-General noted in his report of August 12, 2005 that in the previous year, "United Nations personnel deployed globally in a broad range of field operations continued to be subjected to threats such as hostage-taking, physical assault, robbery, theft, harassment, and detention." The Safety Convention may not be a perfect instrument, but it does add clarification and protection to the pre-existing regime, and it establishes a comprehensive network of competent jurisdictions. What the Safety

250. See Letter of Submittal on the Safety Convention to the United States Senate, Nov. 8, 2000, S. TREATY DOC. No. 107-1, at VII (2001) [hereinafter Letter of Submittal] ("These individuals are commonly known as 'blue-hats.'"). It goes on to say that the Convention also covers forces and certain other personnel associated with a UN operation in support of the fulfillment of the mandate of the UN. Id. at VIII.

251. Safety Convention, supra note 96, art. 2(2).

252. Christopher Greenwood, Protection of Peacekeepers: The Legal Regime, 7 DUKE J. COMP. & INT'L L. 185, 197–98; see also Greenwood, supra note 1, at 25.

253. Murphy, supra note 30, at 186.


255. Thus, I believe that certain criticisms are greatly exaggerated. See, e.g., Murphy, supra note
Convention does not do is alter the duties of peacekeepers in international law and, in this respect, any interpretation of it as being inherently incompatible with international humanitarian law arises from a misreading of article 2(2), which addresses the conduct of the parties in the conflict, not that of UN troops.

The sole purpose of article 2(2) is to clarify that the Safety Convention does not operate in enforcement operations and does not protect the personnel engaged in such operations. Article 2(2) explains to the parties fighting against UN-authorized troops that they must still comply with the Hague and Geneva Conventions and the Additional Protocols. This duty applies irrespective of the conduct of UN troops in either enforcement or peacekeeping operations. In the latter case, there are no reasonable grounds for thinking that the Safety Convention should not be applicable. Therefore, respect for UN personnel must be mandatory on all parties in the conflict. Furthermore, UN peacekeeping troops are obliged to comply with the norms of international humanitarian law, including those relating to prisoners of war and civilians that do not entail an actual conduct of hostilities.

Two further provisions of the Safety Convention clarify this point. First, article 6 provides that, without prejudice of their privileges and immunities, UN personnel shall “[r]espect the laws and regulations of the host State.” Such laws and regulations must be understood to include the main international humanitarian treaties and regulations, which are nowadays universally accepted. Second, and foremost, the savings clause in article 20(a) states that nothing in the Safety Convention shall affect “[t]he applicability of international humanitarian law and universally recognized standards of human rights . . . in relation to the protection of United Nations operations . . . and personnel or the responsibility of such personnel to respect such law and standards.” It is worth noting that these are the only two articles that mention the duties of UN personnel, and they clearly “[leave] room for conjecture whether humanitarian law may be applicable when the Convention itself applies.”

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256. In Chapter VII operations, even if authorized by the Security Council, the troops remain fully and only under the command and control of participating States.
257. See Bloom, supra note 238, at 625 (acknowledging an overlap between the Safety Convention and international humanitarian law—attacks against peace-keepers are criminalized under the Convention; if such attacks lead to a certain level of combat that makes international humanitarian law applicable, then attacks will be at the same time criminal and subject to the rules applicable to combatants in international armed conflicts).
258. Safety Convention, supra note 96, art. 6.
259. Id. art. 20(a) (emphasis added).
260. Bouvier, supra note 236, at 663. He considers not only the text of the Convention, but also the negotiations leading to it to reach this conclusion, including the finding that even if the material scope of application of the Convention is distinct from that of international humanitarian law, they both
Department puts it, "[t]his clause recognizes that the Convention is not intended to alter the existing application of humanitarian and human rights law."

This conclusion should not come as a surprise. Prior to the adoption of the Safety Convention, "the Command and personnel of the Force were entitled to the privileges and immunities granted by Article 105 of the Charter, as supplemented by the Convention on the Privileges and Immunities of the United Nations." The UN did not consider such action to be incompatible with the duty to respect the "principles and spirit of the general international Conventions applicable to the conduct of military personnel." True, the sacrosanct principle of equality between the warring parties is altered. But this is simply because the "parties" are not equal given that UN peacekeeping forces are not "warring parties" in the first place. They are deployed on a consensual mission and will only use force in self-defense or to carry out their mission. They are worthy of special treatment even if they engage in the use of armed force. But if they do use force, or, if they find themselves in actual armed conflict, their special status does not absolve them of a duty to comply with the Geneva Conventions and the Additional Protocols. At the same time, and again from the perspective of the other parties in the conflict, the savings clause "felicitously supplements the exclusion in Article 2(2) of the Convention by guaranteeing that whenever the Convention proves insufficient to ensure the protection of United Nations and associated personnel, international humanitarian law should take effect."

C. INTERNATIONAL RESPONSIBILITY FOR VIOLATION OF HUMANITARIAN LAW BY PEACEKEEPING OPERATIONS

We now turn to the question of the degree of responsibility that the UN assumes, as an international legal person, when a peacekeeping operation infringes the rules of international humanitarian law. As explained earlier, peacekeeping contingents are provided on an ad hoc basis by contributing States, but are put under the command and control of the UN. In effect, unlike Chapter VII operations, which are...
authorized by the Security Council but launched and fully controlled by sovereign States individually or within a coalition, peacekeeping operations are subsidiary organs of the UN, established by and under the political authority of a principal organ and put under the command and control of the Secretary-General. The acts of the blue helmets are attributable to the UN, and the organization should thus bear responsibility for such acts if they violate its international obligations under humanitarian law. This, however, does not resolve the question of whether there may be other forms of responsibility, alternative or complementary, to the UN’s, in particular from troop-contributing States. This Part will address these issues.

1. United Nations’ Responsibility

As an international legal person, the UN will bear international responsibility if an act that is attributable to it infringes an international obligation by which it is bound. We have already seen which international humanitarian obligations bind UN peacekeeping forces. Such responsibility includes that of the UN’s principal and subsidiary organs, as well as acts or omissions of its “agents,” including officials and “other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.” Whether considered to be subsidiary organs or mere agents, peacekeeping forces act on behalf of the UN and their acts are attributable to the UN. This applies not only to acts in the field, but also to the planning of operations. In Resolution 1353, following a debate on “[s]trengthening cooperation with troop-contributing countries,” the Security Council addressed the need to hold consultation meetings with troop-contributing States on “operational issues,” such as mission planning, authorization to use force, the chain of command, force structure, unity and cohesion of the force, etc. The fact that only consultation with troop-contributing States is envisaged shows that the actual decision-making power on all these issues belongs exclusively to UN organs.

The Secretary-General’s Bulletin adheres fully to this principle. Under section 3, “the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules terms used by the International Law Commission’s Special Rapporteur. Second Report, supra note 131, at 14.

268. See discussion supra Part I.


271. KNOOPS, supra note 45, at 329 (stressing that “[i]t is evident that the promulgation of Rules of Engagement is to be considered as an act ‘under state characterization and in the name of the state’ or pursuant to acts of an international organization (United Nations) or intergovernmental organization (NATO’)).

of the general conventions applicable to the conduct of military personnel. The UN also undertakes to ensure that members of the force’s military personnel are “fully acquainted” with those principles and norms. The language of both commitments reflects a duty to achieve a particular outcome, rather than just an obligation to attempt certain conduct or behavior. It is the UN’s undertaking that the force shall actually be fully acquainted with and fully respect international humanitarian law, at least within the scope of the Bulletin. Consistent with these principles, the Legal Counsel of the UN has stated that:

As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.

The UN will not avoid responsibility even if the conduct of its agents on the ground has interfered ultra vires with the formal commands or policies of the mission, leading to the undesired breach of humanitarian law. In this respect, the Special Rapporteur has proposed a provision on “excess of authority or contravention of instructions” which would be worded as follows: “The conduct of an organ, an official or another person entrusted with part of the organization’s functions shall be considered an act of the organization under international law if the organ, official or person acts in that capacity, even though the conduct exceeds authority or contravenes instructions.”

The UN’s assumption of full responsibility leads us to the dual issue of how the UN should proceed to make reparations for its wrongful acts and whether this assumption waives other forms of responsibility of troop-contributing States. As for the forms of reparations, the Draft Articles on State Responsibility provides a pattern that can be applied, mutatis mutandis, to international organizations. Restitution, when possible, should be the first option, and though very often restitution will

274. Second Report, supra note 131, at 18 (citing Letter from Hans Corell, UN Legal Counsel, to Václav Míkulka, Director of the Codification Division (Feb. 3, 2004)).
275. Second Report, supra note 131, at 25 (“While the ‘off-duty’ conduct of a member of a national contingent [of peacekeeping forces] would not be attributed to the organization, the ‘on-duty’ conduct may be so attributed, although one would have to consider how any ultra vires conduct relates to the functions entrusted to the person concerned.”).
276. Id. at 27 (emphasis added). A similar provision, but concerning State organs, is found in the current project on State responsibility. See Responsibility of States for Internationally Wrongful Acts, supra note 85.
be impractical, the UN will normally resort to compensation in its stead. The fact that SOFAs accord immunity to UN forces from domestic prosecution should not be construed in any way as an obstacle to obtaining financial compensation. What is at issue here is not a domestic claim, but an international dispute between international subjects to which the UN is not at all immune.

Likewise, the duty to make reparations in the form of compensation is not diminished by the General Assembly's 1998 adoption of a resolution intended to limit the UN's liability for damages incurred during peacekeeping operations. This resolution is aimed at supplementing paragraph 51 of the SOFA establishing the creation of a standing claims commission to solve any dispute of a "private law" character relating to a peacekeeping operation or any of its members that national courts cannot address because of the jurisdictional immunities acknowledged in the SOFA itself. The resolution is only recommendatory to member States but is legally binding on the UN to host States under subsequent SOFAs. It establishes two statutes of limitations: six months after the wrongdoing occurred and one year after the termination of the operation. It includes a damages limitation of $50,000. It is arguable whether such limitations, and in particular financial ones, should apply at all to violations by UN troops of international humanitarian law. First, the resolution acknowledges that the limitations do not apply to claims "resulting from gross negligence or willful misconduct of the personnel provided by troop-contributing States for peacekeeping operations." While not referring explicitly to violations of international law, the exclusion of willful misconduct could be understood as encompassing these sorts of claims. Second, both

278. Id. art. 35. Re-establishing the situation that existed before the wrongful act was committed may be, as article 35 acknowledges, "materially impossible," particularly when a violation of international humanitarian law is at stake. Id.
279. Id. art. 36 (noting "insofar as such damage is not made good by restitution," the State International Organization responsible is under an obligation to compensate for the damage caused thereby, and compensation shall cover any financially assessable damage including loss of profits).
280. In this respect I strongly disagree with Jennifer Murray, supra note 107, at 518-19, who suggests that the UN cannot be held accountable for its internationally wrongful acts because of its immunity to domestic prosecution.
282. SOFA, supra note 33. Shagra, supra note 98, at 409 explains that those commissions have never been created. Instead, UN-based claims review boards were established, "in almost every peacekeeping operation to settle third-party claims for personal injury, property loss, or damage attributable to activities of members of the force in the performance of their official duties." Shagra, supra note 98, at 409.
283. Shagra, supra note 98, at 411.
284. Third Party Liability, supra note 281, ¶ 8.
285. Id. ¶ 9.
286. Id. ¶ 7.
paragraph 51 of the SOFA and resolution 52/247 refer to "private" claims, and though it goes without saying that violations of international humanitarian law may imply some harm to citizens and private entities, the duty of the UN to make reparations in this case derives from a different source: the international relationship between the UN and the host State and the fundamental principle of international law that "any breach of an engagement involves an obligation to make reparation." Nothing prevents the host State from agreeing on a limitation of its right to claim compensation, but this renunciation cannot be presumed, and the General Assembly's resolution cannot be understood to have this effect.

It is for this reason that the SOFA provides for the establishment, unless otherwise agreed by the parties, of a tribunal of three arbitrators to which "any other dispute between the United Nations peace-keeping operation and the Government" shall be submitted. If the claims commission is foreseen for private claims, an international arbitration seems a much more adequate means for the settlement of disputes between public entities.

Together with restitution and compensation, a third means of making reparations is satisfaction, which "may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality." Nothing seems to impede the United Nations from carrying out any of the first three forms of satisfaction. As for "other appropriate modalities," the 1996 version of the Draft Articles on State Responsibility used to provide for the punishment, according to the criminal or administrative law of the responsible State, of the civil servants who had actually committed the wrongful act. This is consistent with Professor Simmonds's interpretation of article 3 of the 1907 Hague Convention:

In the conception of the traditional law of war, this Article refers to a responsibility to make reparations for any infractions of the law, but it is broad enough to include enforcement by trial and punishment of members of the force who have committed acts or omissions violative of the laws of war.

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288. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 26 (July 6); see also David Bondia García, Régimen Jurídico de los Actos Unilaterales de los Estados 105–10 (J. M. Bosch ed., 2004).
289. SOFA, supra note 33, ¶ 53.
290. See Manuel Pérez González, Les organisations internationales et le droit de la responsabilité, 92 Revue Générale de Droit International Public 63, 95–98 (1988) (discussing the different forms and procedures for making effective the responsibility of international organizations).
293. Simmonds, supra note 51, at 194.
The problem is that there is general agreement, which the Secretary-General’s Bulletin has acknowledged, that “[i]n case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.” This form of satisfaction is thus precluded for the UN, which cannot directly punish in any form this particular category of agents. Since only sovereign States may proceed with this sort of action we must consider now the responsibility of other subjects involved in the violation of an international humanitarian law obligation.

2. Individual and State Responsibility

Since its inception, the law of international criminal responsibility deriving from Nuremberg and Tokyo (and other cases) has been construed as fully autonomous from State responsibility, in the sense that the same act may simultaneously constitute an act of State in breach of an international obligation and an act of the individual or organ of such State constituting a crime against peace, a war crime, or a crime against humanity. There is no question that, in addition to implicating the international responsibility of the UN, an act of a peacekeeper may constitute a war crime for which he or she should be held personally accountable. As with any other form of war crimes, national jurisdictions should be the first to prosecute and convict the perpetrator. In fact, “international peacekeepers have already been subjected to criminal prosecution by national tribunals. Cases have occurred in which peacekeepers were tried by national courts for alleged war crimes committed during peacekeeping operations.” In addition, the Statute of the International Criminal Court allows prosecution of peacekeepers by

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295. This is true both for criminal procedures and disciplinary measures, but does not prevent the UN from establishing fact-finding mechanisms that may serve not just to gather information, but also to push governments to carry out more specific sanctions. For example, in December 2005 the UN mission in Haiti established a disciplinary commission of inquiry to investigate whether peacekeepers had used excessive force during incidents earlier that year in Haiti’s capital. Haiti: UN Sets up Panel To Probe Report that Peacekeepers Used Excessive Force, UN News Serv., Dec. 9, 2005, available at http://www.un.org/apps/news/story.asp?NewsID=16884&Cr=haiti&Cr1= (“The incidents involving the ‘blue helmets’ took place in the Sarthe/Cazeau area of Port-au-Prince on 31 October at and around the Larco drinks plant. Peacekeepers not only reacted in an excessive manner, but they then conducted inappropriate body searches of the population concerned, according to the early findings, which were based on interviews with presumed victims and others. MINUSTAH stressed that it was resolute in applying the zero-tolerance policy in proven cases of bad conduct by persons serving under the UN flag.”)
297. Glick, supra note 104, at 99 (“Individual responsibility exists for any member of a U.N. armed force who commits an act constituting a war crime.”).
298. KNOOPS, supra note 47, at 21. He adds that “[i]n the course of several international, as well as internal armed conflicts, in the past which led to court martial cases, examples emerge that realistically could occur within the context of peacekeeping or peace enforcement operations” to the “normative framework of (international) criminal law.” Id.
the ICC, a possibility which, in accordance with the principle of complementarity of the Court, does not preclude the traditional solution of leaving criminal jurisdiction to the troop-contributing States, but rather adds to it.

A different issue arises when we consider the responsibility of troop-contributing States. The International Law Commission’s Special Rapporteur on the responsibility of international organizations has acknowledged that, in general, “conduct does not necessarily have to be attributed exclusively to one subject only.” This seems to be particularly true in the case of peacekeeping operations. We have already discussed how the Model Contributing Agreement gives “full authority” over the “deployment, organization, conduct and direction” to the Secretary-General, who usually delegates it to a commander-in-chief who leads the operation on the ground. Each national contingent, however, remains under the authority of a national commander, and most countries never actually relinquish control over their troops.

Consequently, there are grounds to consider direct State responsibility for violations of international humanitarian law in the context of their participation in peacekeeping operations. In the first place, as discussed above, certain obligations under the Geneva Conventions and Additional Protocols must necessarily be carried out by the contributing States, such as the disciplinary or penal measures imposed upon those individuals who violate the Conventions. A State’s

300. Rome Statute, supra note 78, art. 17.
301. Zwanenburg, supra note 299, at 130, 132.
302. Second Report, supra note 131, ¶ 3; see Pérez González, supra note 290, at 85–92 (discussing the possibility of concurrent responsibility of States and International Organizations, and the different situations in which it may happen); see also Condorelli, supra note 182, at 895–97.
303. Model Contributing Agreement, supra note 34, ¶ 7 (emphasis added).
304. Id. ¶ 8.
305. Ray Murphy, Legal Framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces, 4 J. ARMED CONFLICT L. 41, 71 (1999), states that under Canadian law, at no stage in any international operation is national command of Canadian forces handed over to a foreign commander. A similar provision in Irish law leads Professor Murphy to argue that, by relinquishing such control, the Defense Minister of Ireland may have acted ultra vires. Id. He concludes that the legal obligation on members of the Irish or Canadian forces to obey UNIFIL or the United Nations Operation in Somalia (UNOSOM) standing operating procedures remains uncertain “as they have no status under Irish military law.” Id.
306. See Model Contributing Agreement, supra note 34, ¶ 25 (“[The participating State] agrees to exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel serving with [the United Nations peacekeeping operation]”; see also The Bulletin, supra note 4, ¶ 4 (“In case of violations of international humanitarian law members of the military personnel of a United Nations force are subject to prosecution in their national courts”). Besides what the law provides, “national sensitivities unavoidably associated with participation in UN military operations render it desirable that contributing states should have and be seen to have disciplinary authority over their own forces.” McCoubrey, supra note 52, at 45.
failure to prosecute in such a case would be its responsibility alone, not an act attributable to the United Nations. 307 Likewise, training troops in the intricacies of international humanitarian law is also a State duty. 308 A crash course by the UN prior to the deployment of the mission and/or in the country of operations may be mandatory according to section 3 of the Bulletin, 309 but will not do much good if soldiers are completely unaware of such a complex topic before they are placed under the authority of the United Nations. 310 Lastly, “the decisive question in relation to attribution of a given conduct appears to be who had effective control over the conduct in question.” 311 In other words, States will be held accountable for acts that violate international humanitarian law and that are attributable to the States and not to the UN. 312

What remains to be seen, then, is whether troop-contributing States should be held accountable even when the UN is also internationally responsible for the breach of humanitarian law in the context of a peacekeeping operation. Although the Secretary-General’s Bulletin remains silent on this issue, some authors have interpreted the assumption by the UN of responsibility over peacekeepers’ actions as an acceptance of “co-responsibility” with the contributing States. 313 According to Common Article 1 to the Geneva Conventions, “[i]t is difficult to posit any persuasive theories which would release a State’s military forces from the binding force of the laws of war, as a matter of law, simply because they are engaged in fulfilling a United Nations mandate.” 314 The duty to respect international humanitarian law “in all circumstances” means that, in spite of being under the authority of the United Nations, national contingents remain directly bound by “customary [international humanitarian law] (because that is binding

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307. This exclusive responsibility does not exempt the United Nations from an obligation to “exercise some supervisory jurisdiction over such prosecutions.” Tittemore, supra note 17, at 111.
308. First Geneva Convention, supra note 61, art. 47; Second Geneva Convention, supra note 61, art. 48; Third Geneva Convention, supra note 61, art. 127; Fourth Geneva Convention, supra note 61, art. 144.
309. See Palwankar, supra note 18, at 234.
310. For this reason, the Model Contributing Agreement, supra note 34, ¶ 28 states: “[T]he participating State] shall therefore ensure that the members of its national contingent serving with [the United Nations peace-keeping operation] be fully acquainted with the principles and spirit of these Conventions.”
313. Murphy, supra note 30, at 177 (referring to the UN’s duty to ensure that military personnel are fully acquainted with the rules of humanitarian law).
314. Bowett, supra note 1, at 503–04 (referring to peacekeeping operations).
upon both the states from which they come and the United Nations) and
the relevant IHL conventions (because they are binding upon the states concerned)."

Decision-making at the highest level, including the issuance of orders and commands, is probably the only level of
responsibility that would be attributable exclusively to the UN. Although it seems unlikely that the UN will issue an instruction that is per se inconsistent with its obligations under international humanitarian law, this possibility cannot be completely discarded. But even if it did, this would not waive the State’s primary obligation to comply with these rules on the ground, for “[t]he obligation to observe U.N. command and control never requires a state contingent to execute U.N. orders that violate IHL.” The State is, thus, always responsible for any breach of international humanitarian law that may be committed by its national troops under UN command and control, irrespective of the responsibility, or lack of it, if the act is not attributable to it, of the UN. Obviously, this implies that the duty to make reparations will be shared, not doubled, by the UN and the contributing State.

It is beyond the scope of this paper to determine the forms how this concurrent duty to make reparations can be made effective.

CONCLUSION

Since the late 1940s the establishment, deployment, and execution of peacekeeping operations under the command and control of the UN has produced an impressive record of success. Nonetheless, a number of worrying shadows have appeared, and among them are the increasing number of allegations and findings that the blue helmets have committed grave violations of the norms of international human rights and humanitarian law; as well as the reluctance of the UN itself, until fairly recently, to acknowledge its duty to ensure that its peacekeepers observe

315. Greenwood, supra note 1, at 18; see also Knoops, supra note 47, at 330–31 (“Party states . . . have a dual responsibility: that of applying the stipulated provisions themselves, as well as the dissemination . . . in all circumstances.”).

316. Knoops, supra note 47, at 329.

317. Bowett, supra note 1, at 504–05 (“[E]ven should the United Nations fail to declare its intentions with respect to those laws, the better legal opinion would probably hold that no analogy to pleas of superior orders would exculpate the national contingents from their duty to adhere to all the relevant rules.”).

318. Glick, supra note 104, at 99. He bases his assertion on the duty of troop contributing States, as non-parties to the conflict, “to ensure respect” for international humanitarian law. Id. at 98–99. He seems to contradict himself, though, when he insists that the United Nations “alone” is internationally responsible for violations committed by troops under its command and control, id. at 97, 99, and seems to deny the possibility of co-responsibility when stating that “[w]hen a troop contingent is acting in the capacity of a UN organ . . . it can not also be acting in the capacity of an organ or the contributing State,” id. at 101.


320. See Condorelli, supra note 182, at 895–97, 899.
international humanitarian law in the field.

International humanitarian law consists of more than a hundred treaties and other international instruments which, in their core elements, have become general customary law, binding upon all subjects of the international community, sovereign States, and international organizations alike. The evolutionary nature of this body of law, as expressed by the Martens Clause, implies the need to interpret its rules, including those that determine their own applicability, beyond the literal wording of the provisions in the main treaties. Those rules in fact must operate in situations that were not foreseen, because they simply did not exist, in 1907 or 1949, or were as yet undeveloped in 1977. Even though the letter of the Geneva and Hague Conventions and Protocols may not always perfectly fit peacekeeping operations, interpreters and practitioners need to look beyond the actual terms of the relevant treaties to ascertain their spirit. We must determine whether it is reasonable for these rules to bind neutral armies on the ground, i.e., peacekeeping troops provided by contributing States.

Most authors consider the agreement of the host State, and the eventual agreement of the other warring factions, to be crucial to the deployment and goals of a peacekeeping mission. Typically, however, such agreement is weak and forced on one or more parties to the conflict. Even when the agreement is robust, peacekeepers may still find themselves, once deployed, in armed conflict. More often than not, peacekeeping operations are deployed in situations that are non-peaceful, to say the least, and this fact should be enough to affirm the de jure applicability of the Geneva and other relevant Conventions to these troops, both as a means of protection from the parties—at least until a better régime is established—and as a set of duties the peacekeepers must respect.

The UN Secretary-General has, in essence, accepted this view by adopting the Bulletin on the Observance by UN Forces of International Humanitarian Law. The importance of the document cannot be over emphasized. Though concise, it is a very effective synthesis of hundreds of provisions scattered in at least a dozen international treaties. It is a document that can be disseminated among troops in a relatively easy and fast manner. Its binding character, both as an internal command from a superior (the Secretary-General) to a subsidiary organ (the peacekeeping operation) as well as an exposition of the main customary obligations of the United Nations in this area, is beyond doubt. The main grounds for criticism lie in the Bulletin's narrow or ambiguous scope. The first section of the Bulletin provides that it should only be observed by peacekeepers when they are actively engaged in armed combat as combatants. The rest of the Bulletin, however, demonstrates that it mandates more than that.
International humanitarian law is applicable, to the UN or to any international subject, in any armed conflict. And, as explained above, given the facts on the ground and the Martens Clause, the United Nations needs to observe international humanitarian law de jure in peacekeeping operations more often than not. In these cases, the only limitation on the UN's obligations lies in those areas where the Organization is truly incapable of discharging such duties, that is, whenever it is materially impossible for the UN to respect them.

In terms of its scope, the Bulletin provides only a minimum threshold, not a ceiling, and the same is true of its substantive provisions. Beyond the instructions laid down by the Bulletin, persons detained by UN troops, if they are actual combatants, should be treated de jure as prisoners of war. When the United Nations administers a territory, the Fourth Geneva Convention is the minimum rule that the Organization and its agents must observe. Likewise, UN forces must also ensure that other parties to the conflict also observe their international humanitarian obligations. This does not mean that the peacekeepers should put themselves in harms' way, but they must take the appropriate measures, commensurate with their strength and position in the conflict, to achieve this result. Finally, the reference rules for UN forces in these situations are those relating international armed conflicts, irrespective of the domestic or international nature of the underlying armed conflict.

Blue helmets must respect and ensure respect of the relevant norms of international humanitarian law in every situation that calls for its application. They are simultaneously permanently protected by the provisions of the 1994 Safety Convention, an international treaty that builds upon pre-existing treaty and customary obligations and defines the protected status of UN agents as experts in mission. Admittedly, this implies that UN troops are treated differently from other parties in the conflict: they must respect international humanitarian law but are shielded by a set of norms that establish a higher standard of protection. The set of rights and duties at stake for the different actors is unbalanced because UN peacekeeping forces are neither belligerents nor parties to the conflict. Given their mission and status, UN forces deserve a larger degree of protection. This does not, however, preclude them from being burdened by legal obligations, particularly those that require them to comply with the rules of international humanitarian law.

In case of an infringement of international humanitarian law by a peacekeeping operation, there is little doubt that the United Nations as a legal entity will bear international responsibility and will be obliged to make reparations for any injury caused by such breach. But it will not be the only responsible subject. Individuals, in case the breach amounts to a war crime, will be subject to international prosecution by the International Criminal Court or by any other appropriate national
tribunal. And, more importantly, the contributing State whose troops have actually committed the breach will also be responsible, because States always control the final implementation of UN commands on the ground, and they have the duty to respect humanitarian law in "all circumstances."