

WATCHING THE WATCHDOGS: HOLDING THE UN ACCOUNTABLE FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW BY THE 'BLUE HELMETS'

JACKSON NYAMUYA MAOGOTO *

I INTRODUCTION

Peacekeeping and peace-enforcement are concepts that have their origins in the *United Nations Charter*.¹ Among other things, the Charter is based on principles of sovereignty, non-intervention and the peaceful settlement of international disputes.² Although peacekeeping was not explicitly provided for in the Charter, it has evolved over the past half century into a well-developed concept governed by a distinct set of principles. During the Cold War the United Nations was rendered powerless to deal with many of these crises because of vetoes—279 of them—cast in the Security Council.³ However, since the end of the Cold War there have been fewer vetoes, and the security arm of the United Nations, once disabled by circumstances beyond its control, has emerged as a central instrument for the prevention and resolution of conflicts and for the preservation of peace. Between 1947 and 1985, a span of 38 years, the United Nations undertook 13 'peacekeeping' missions

* LLB (Hons), Moi University, 1999; LLM Candidate, University of Melbourne. The author acknowledges the helpful and enlightening comments of an anonymous referee.

¹ The *Charter of the United Nations* (the 'Charter') was established as a consequence of the United Nations Conference on International Organisation held at San Francisco and was brought into force on 24 October 1945. As of May 2000, membership in the UN had reached a total of 189 states. For a reproduction of the Charter, see Ian Brownlie, *Basic Documents in International Law* (4th ed, 1995) 1-35.

² Charter, above n 1, arts 2(1), 2(7) and 33 respectively.

³ *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping, Report of the Secretary-General*, GA 47th Sess, Agenda Item 10, UN Doc A/47/277-S/24111 (1992) [14]; 31 ILM 953, 958 ('*Agenda for Peace*').

of varying scope, duration, and degree of success.⁴ Between 1985 and 1992, a span of only seven years, the United Nations undertook an equal number of missions with increasingly ambitious mandates.⁵ The UN has chosen the avenue of active military involvement in situations characterised by an escalating level of hostility that endangers the lives of its troops.

Following the end of the Cold War, the UN has developed a new aggressive role in its peacekeeping efforts. Military-style enforcement actions such as the 'humanitarian interventions' in Somalia, Iraq and recently in East Timor, and situations like Bosnia, where a traditional peacekeeping mission⁶ involves an escalating use of force, are to be anticipated as peacekeeping⁷ and peacemaking⁸ operations blend

⁴ The 13 missions between 1947 and 1985 include in chronological order: UN Special Committee on the Balkans ('UNSCOB') 1947-1951; UN Truce Supervision Organisation ('UNTSO') 1948-; UN Military Observer group in India and Pakistan ('UNMOGIP') 1949-; UN Emergency Force ('UNEF I') 1956-67; UN Observation Group in Lebanon ('UNOGIL') 1958; UN Operation in Congo ('ONUC') 1960-64; UN Temporary Executive Authority ('UNTEA') 1962-63; UN Yemen Observation Mission ('UNYOM') 1962-63; UN Force in Cyprus ('UNFICYP') 1964-; UN India Pakistan Observer Mission ('UNIPOM') 1964-66; UN Emergency Force II ('UNEF II') 1974-79; UN Disengagement Observer Force ('UNDOF') 1974-; and UN Interim Force in Lebanon ('UNIFIL') 1978-. See William Durch (ed), *The Evolution of UN Peacekeeping* (1993) 8.

⁵ In chronological order these missions include: UN Good Offices in Afghanistan and Pakistan ('UNGOMAP') 1988-89; UN Iran-Iraq Military Observer Group ('UNIMOG') 1988-91; UN Angola Verification Mission ('UNAVEM I') 1988-91; UN Transition Assistance Group ('UNTAG') 1989-90; UN Observer Group in Central America ('ONUCA') 1989-91; UN Angola Verification Mission II ('UNSVEM') 1991-; UN Iraq-Kuwait Observation Mission ('UNIKOM') 1991-; UN Mission for the Referendum in Western Sahara ('MINURSO') 1991-; UN Advance Mission in Cambodia ('UNAMIC') 1991-92; UN Transitional Authority in Cambodia ('UNTAC') 1992-; UN Protection Force in Yugoslavia ('UNPROFOR') 1992-; and UN Operation in Somalia 1992-. See Durch, *ibid* 10.

⁶ Traditional peacekeeping normally occurs in the aftermath of cross-border disagreements or conflicts where the belligerents have either fought themselves to exhaustion or have lost their appetite for conflict. At that point, the UN sends in military personnel to separate hostile forces and/or monitor borders, ceasefires, or force movements. These lightly armed peacekeepers operate with the consent of all involved and with strict concern for impartiality and minimising interference in any States domestic affairs. This was the original non-offensive peacekeeping operation fashioned by Dag Hammarskjöld, preventive rather than corrective solutions to keep great powers out of peripheral crises and thus forestall their escalation.

⁷ Symbolising the new post-Cold War spirit, in January 1992 the UN Security Council met for the first time ever at the level of heads of State or government. The summit asked the Secretary-General Boutros Boutros-Ghali to prepare a keynote strategy document for UN peace operations in the new era. Entitled *An Agenda for Peace* (see above n 3) it set out to define more diverse and robust roles for the UN. Two proposed departures from previous practice were critical. First, it defined peacekeeping as 'the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned' (at [20]). Here was a clear signal that the UN might, in some instances, seek to deploy peacekeepers without local consent. Second, the document noted that ceasefires had often been agreed to in the past but not complied with, making it necessary for the UN to try and restore a ceasefire. The Secretary-General recommended that the Security Council consider the utilisation of peace-enforcement units (at [44]). Here the Secretary-General was calling for a new United Nations military role (a quasi-enforcement role) altogether, beyond traditional peacekeeping (non-offensive military presence).

⁸ 'Peacemaking' is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter – see *Agenda for Peace*, above n 3, [20]. Peacemaking differs from traditional peacekeeping in at least two ways. One is that the UN now engages in preventive deployment in that it places a robust force along a border or 'hotspot' before a crisis even occurs. A second way is when the UN involves itself in intrastate affairs by helping new or collapsed States set up governmental structures and maintain law and order.

together in humanitarian interventions. The arena of peacekeeping has evolved from the use of force only in self-defence and a goodwill presence authorised by host government to active military action by UN authorised international forces against aggressive governments. With the practice of the Security Council during interventions in Iraq and Somalia, the former Yugoslavia and more recently in East Timor, 'humanitarian interventions' have taken on a new role in collective international use of force through 'police' action. The Security Council's authorisation to use force, in part to combat the 'widespread and flagrant' violations of international humanitarian law, has resulted in the gradual embossment of peace enforcement⁹ over peacekeeping missions as evidenced by the subsequent expansion of the mandates of UNOSOM and UNPROFOR.¹⁰

While the norms of sovereignty, territorial integrity and political independence continue to play a pivotal role in international relations today, they have been weakened by the numerous international treaty obligations that States have taken on, as well as the growing idea that through collective UN authorisation, governments have the right to 'intervene' when a human rights violation might threaten international peace. In addition, there has developed a norm that member States of the UN have the responsibility to ensure that human rights violations in other States are addressed. The growing body of human rights law and the developing practice of the UN Security Council's Article 39 determinations in Iraq, Somalia, Bosnia and recently in East Timor that led to forcible interventions all point to an emerging customary norm of UN humanitarian intervention in member States where the humanitarian violations are severe but with only the slightest transboundary effect.¹¹ As the Security Council liberalises the finding of 'threat to the peace' to include non-military threats, the likelihood of future humanitarian interventions will also increase.¹²

⁹ Peace enforcement is where a specific act of aggression, or more general set of hostile actions, are collectively identified as a threat to international peace and security, and the aggressor State is subjected to an array of sanctions until its violation is reversed (see arts 42 and 43 of the Charter, above n 1). Ultimately, enforcement can involve flat-out war—see the 'all necessary means' of SC Resolution 678, authorising what became *Operation Desert Storm*.

¹⁰ UNOSOM—United Nations Operation in Somalia, established by SC Resolution 751, 24 April 1992; UNPROFOR—United Nations Protection Force, established by UN SC Resolution 776, February 1992.

¹¹ Iraq-SC Resolution 688, 5 April 1991; Somalia-SC Resolution 794, 3 December 1992; Bosnia-SC Resolution 836, 4 June 1992; East Timor-SC Resolution 1264, 15 September 1999.

¹² During the post-Cold War era, a number of UN sanctioned military operations have been carried out in the name of humanitarianism. This involves coercive military interference in the sphere of jurisdiction of a sovereign State motivated or legitimated by a commitment to promote international order and human rights. The Security Council has linked humanitarian crises to the right to use force under Chapter VII of the Charter in order to restore international peace and security. As the Secretary-General notes in *Report of the Secretary-General on the Work of the Organisation*, GA, 54th Sess, Sup No 1 (A/54/1) there is need to protect civilians in armed conflict, facilitate access to humanitarian assistance and address the flouting of humanitarian norms (at [191]). It should be noted that Oppenheim laid out authoritatively intervention in light of the territorial supremacy of States by virtue of State sovereignty. He defined intervention as 'dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things'. He noted that such intervention can take place by right or without right. While intervention is as a rule forbidden by the Family of Nations, Oppenheim analysed instances in which intervention without right (forcible intervention) can be admissible or

The 'New World Order', which envisions collective police actions by the members of the international community, presents an alternative to the traditional wars of self-defence. The Security Council can authorise enforcement measures under Chapter VII of the Charter, ranging from economic sanctions (under Article 41) to collective military action (under Article 42). Article 39 states that 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.' Although collective action would usually take the form of global action, authorised under Article 42, it could also be implemented by regional organisations, authorised under Article 53.¹³ Thus, under the new world order, the UN will 'police' wars by getting involved at the outset of conflicts and enforcing peace through the measures authorised under Chapter VII.¹⁴ This erosion of the principle of non-intervention set forth by Article 2(7) of the Charter has contributed, in part, to the increase in UN interventions in the post-Cold War world, which in turn has occasionally led to complex operations that include elements of both peacekeeping and peace enforcement.

With the end of the Cold War, the ideological barrier between the 'East' and 'West', which for decades gave rise to distrust and hostility, and had prevented the United Nations from doing the job for which it was created, crumbled.¹⁵ In the post-Cold War era the ability of the Security Council to achieve 'Great Power Unanimity'¹⁶ on operations authorised under Chapter VII of the Charter (to maintain or restore international peace and security once peace has been threatened or breached) has enabled the UN to carve out a much broader security role by acting as a watchdog over international disputes, a peacemaker and peacekeeper after the event of conflict, and a facilitator of disarmament and peaceful dispute resolution under

excusable. Among the basic criteria that Oppenheim sets out for admissible intervention is, to enforce international treaty obligations in a delinquent State and, in the case of violation by a State of universally recognised principles of the Law of Nations, whether violations occurred in time of war or peace. He emphasised that the Law of Nations recognises the rule that 'interventions in the interests of humanity are admissible provided they are exercised in the form of a *collective* intervention of the Powers' noting that intervention is a *de facto* matter of policy, not constrained by any hard and fast rules. In present time in view of Oppenheim's analysis, UN sanctioned multinational humanitarian interventions premised on promotion of international peace and security, and protection of human rights in States violating international norms are thus justifiable as these are interests common to all members of the international community, and laid down in international conventional and customary law. See L Oppenheim, *International Law: A Treatise (Peace)* (1905) vol 1.

¹³ See Thomas M Franck and Faiza Patel, 'Agora: The Gulf Crisis In International and Foreign Relations Law: UN Police Action in Lieu of War: the Old Order Changeth' (1991) 85 *American Journal International Law* 63.

¹⁴ Cf Stanley Hoffman, 'Delusions of World Order', *New York Review of Books* (New York, USA), 9 April 1992, 37 (noting the difficulty of establishing 'world order' given the distinction between international and domestic legitimacy, and advocating a limited strategy for peacekeeping centred in the United Nations).

¹⁵ See generally, Durch, above n 4, 1.

¹⁶ Charter, above n 1, art 27(3).

Chapter VI of the Charter.¹⁷ As the number of both formal UN peacekeeping operations as well as other UN authorised missions increases, it is important to note that in the 1990s, UN missions had a chequered existence with instances of violations of international humanitarian law by UN troops.¹⁸ The rules of engagement and field operations by UN forces must be modified and articulately enunciated. The stakes are high: these include the credibility of the UN missions,¹⁹ the accountability of UN troops to international humanitarian law standards and the adherence to the international rule-of-law regime envisioned in the drive to establish the permanent International Criminal Court.²⁰

This article focuses on the issue of holding the UN accountable for violations of international humanitarian law by UN forces. While the UN has acknowledged that international humanitarian law applies to its forces, a general policy that leaves enforcement to States to which the UN troops belong does not guarantee justice for the victims of international humanitarian violations in the face of competing national political and international justice interests.²¹ This is discussed later in the article. Holding the UN accountable for international humanitarian law violations by troops serving under its command can only be achieved by the UN directly possessing rights and duties under international humanitarian law,²² thus making these rights and duties binding on the UN as a concerned subject and to whom the law really intends them to be addressed.²³ Because rules of international law are formulated in such an elliptical way, they transpose from the subject to the objects

¹⁷ See generally, A V Patil, *The UN Veto in World Affairs 1946-1990: A Complete Record and Case Histories of the Security Council's Veto* (1992).

¹⁸ See the discussion in Part II of this article.

¹⁹ UNOSOM faced a dramatic loss of international and local credibility in Somalia in relation to standards (or lack of them) applied in dealing with the public security function.

²⁰ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999 (not yet in force) ('*Rome Statute*'), adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. The final vote recorded was 120 in favour, seven against and 20 abstentions. As at 1 January 2000, there were 89 signatures and four ratifications.

²¹ Section 4, *Secretary-General's Bulletin, Observance by United Nations of International Humanitarian Law*, 6 August 1999, UN Doc ST/SGB/1999/13 Section 4 ('*Secretary-General's Bulletin*'). The Secretary-General's Bulletin is to be viewed as enshrining the observance of international humanitarian law in UN military operations as a matter of authoritative reaffirmation of UN policy. The Bulletin entered into force on 12 August 1999. The Secretary-General's Bulletin does not mark the first time in the acceptance of applicability of international humanitarian law to UN military operations. The applicability of humanitarian laws was recognised as early as 1991 in the *Model Agreement Between The United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations*, Annex to Report of the Secretary-General to the General Assembly, A/64/185, 23 May 1991, Article X, 'Applicability of international conventions' [28] ('*Model Agreement*').

²² This will fulfil the *lex specialis*, so that whenever UN troops act, international humanitarian law will apply *de jure*. In other words the law specifically expressed in the relevant instruments will regulate the given situation. This is as opposed to a general UN policy that '[t]he fundamental principles and rules of international humanitarian law ... are applicable to United Nations forces' See Secretary-General's Bulletin, above n 21, 1.

²³ This will ensure that the UN is bound by certain parts of international humanitarian law that lack *opinio juris* and only apply to State Parties. See generally Michael J Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999) 149-81.

concerned, in this case from the UN to the individual troops involved in UN military operations.

II PANDORA'S BOX: HUMANITARIAN LAW VIOLATIONS BY UN TROOPS IN SOMALIA

This section of the article will look at the documented international humanitarian law violations by UN troops in the UN-sanctioned peacekeeping operation, UNOSOM and will highlight the failure of national adjudicative mechanisms²⁴ to guarantee justice to the victims of violations.²⁵ This focus on UNOSOM is in no way to suggest that other international humanitarian law violations in any other UN mission have not occurred²⁶ but rather because this particular humanitarian law violation was also supported by the testimonies of fellow troops, and by photographic evidence in some instances. Moreover, concerned States did establish investigative/judicial commissions²⁷ to look into the allegations and some of the troops did in fact get prosecuted for their acts and even in one case, an entire battalion was disbanded as a result of the allegations of its actions that degraded and abused the rights of Somalis.²⁸

In March and April 1997, the press published the allegations of a former Belgian paratrooper that human rights abuses had been committed against Somali citizens by members of the Belgian armed forces who served in the multinational task force operating in Somalia in 1993. The allegations were accompanied by photographs, one of which showed two uniformed soldiers swinging a Somali boy over an open fire and was accompanied by the claim of the former paratrooper that such behav-

²⁴ This is the method of enforcement of international humanitarian law among UN forces that has been endorsed by the UN in s 4 of the Secretary-General's Bulletin, above n 21. Yet the short history of enforcement of international humanitarian law violations by States has already demonstrated a lack of political will and great reluctance of States to prosecute their troops as discussed further in this section of the article.

²⁵ The article will focus on Belgium and Italy. The Canadian contingent was also implicated in the violations which resulted in the disbanding of the Canadian Airborne Regiment Battle Group battalion (CARBG) and the prosecution of two soldiers who were part of the battalion for the death of a Somali youth in UN custody. See, (1997) 27(5) *Amnesty International News* 1.

²⁶ In fact, most notable were the allegations relating to international humanitarian law violations by Dutch troops who formed part of the UNPROFOR contingent. See generally, 'Dutch Soul-Searching Over Srebrenica' (17 August 1998) Reuters, <http://www.centraleurope.com/ceo/news-/98081710.html> (Copy on file with author); Andrew Kelly, 'Tribunal Hears How UN Troops Abandoned Srebrenica Victims' (24 August 1998) <http://linder.com/trbunal.html> (Copy on file with author). The history, however, stretches further back to UNTAC where damage was done by the troops of the Bulgarian contingent who were amnestied convicts and whose discipline was highly suspect. See, eg, J E Heininger, *Peacekeeping in Transition—The UN in Cambodia* (1994) 75-6.

²⁷ Italy established two investigative commissions, the first in May 1997 was a military commission headed by General Vanucchi, the second in June was a judicial commission headed by Ettore Gallo. In Belgium, an administrative investigative tribunal was established by the Ministry of Defence headed by an army general. See, Amnesty International, 'Italy: A Briefing for the UN Committee Against Torture' AI Index EUR 30/02/99, (May 1999); Amnesty International, 'AI Concerns in Europe: January-June 1997' AI Index EUR 01/06/97 (September 1997) 1.

²⁸ See, *Amnesty International News*, above n 25.

our was a regular practice in the paratroopers camp and that the boy in this case had been threatened with being burnt alive. The ex-paratrooper also made allegations, partly supported by photographic evidence, that a Somali child had been forcibly fed with salt water and possibly pork (a prohibited food for Muslims) until he vomited and was made to eat his own vomit. Photographs also showed a soldier urinating on the inanimate body of a Somali man lying on the ground, with a foot pressed on the man's body, and of soldiers holding a Somali man by his hair.²⁹ There were also allegations that around 23 October 1993 a child caught stealing food had been locked in a container, in stifling heat, without food or drink, for two days and two nights, that his cries of distress were ignored and that when the container was opened the child was found to be dead.³⁰

In May 1997, Michele Patrino, an Italian who had served as a conscript in Somalia, claimed that during 1993 Italian soldiers had kept prisoners for interrogation tied up in the sun and deprived of water, or given only spicy food to increase their thirst. If they refused to talk, they were subjected to blows, burning cigarettes applied to the soles of their feet, electric shocks to the body, including to the testicles, or were thrown against razor wire fences. His allegations were supported by photographs depicting soldiers apparently preparing to apply electrodes to the body of a young Somali man lying half-naked on the ground.³¹

Between June and August 1997, a number of former Italian paratroopers also made public allegations, sometimes supported by photographic evidence, that in 1993 and 1994 while serving as part of a UN peacekeeping operation in Somalia, they had witnessed colleagues torturing and ill-treating Somalis. In some cases the treatment was said to have resulted in death. Somalis and Somali human rights monitors made similar allegations.³²

A *Accountability Under the National Adjudicative Process*³³

1 *Belgium*

In Belgium, judicial investigations were promptly opened into the allegations by the military authorities and resulted in two former paratroopers being tried before a military court in June in connection with the treatment of the Somali boy held over the open fire. On 30 June 1997 the court acquitted both men of the charges of assault and battery and of using threats. The military prosecutor, who had requested a sentence and a fine of 10,000 Belgian francs for each of the defendants, reportedly lodged an appeal. A sergeant was due to stand trial before a military court on 8 September 1997 in connection with the alleged forcible feeding of a Somali child and, reportedly, a sergeant major was to stand trial in September 1997, apparently

²⁹ Amnesty International, 'AI Concerns in Europe', above n 27, 1.

³⁰ Ibid.

³¹ Ibid 3.

³² Amnesty International, 'Italy: A Briefing for the UN Committee Against Torture', above n 27, 10.

³³ National adjudicative process is used here to denote both civilian court process and military tribunals.

on suspicion of having killed the Somali on whose body he was photographed urinating.³⁴

Following the publication of further allegations and the photographs, the Minister of Defence ordered a broader, administrative, investigation, carried out by an army general heading the Operational Command of the Belgian Ground Forces.³⁵ In July 1997, Amnesty International sought further information about several trials, which reportedly took place during 1994 and 1995 concerning soldiers prosecuted in connection with alleged human rights violations in Somalia. The trials followed an inquiry into the conduct of Belgian forces in Somalia, carried out in 1993 by a Commission of Inquiry composed of three regular army officers and a civilian assistant to the Minister of Defence.³⁶ The reports included:

- acquittal in December 1994 of two soldiers accused of manslaughter of two Somali men and a third accused of assaulting a Somali woman. The sentences were apparently appealed.
- the issuing of verdicts in January 1995 following the trial of three soldiers in connection with the fatal shooting of two Somali men and with alleged illegal trafficking in arms and ivory.
- suspended sentences to two soldiers who (while drunk) had kicked, punched and subjected a handcuffed Somali prisoner to electric shocks.
- the trial in October 1995 of a group of 16 soldiers accused to varying degrees of threatening and ill-treating Somali citizens, mainly children, in spring 1993.
- a military tribunal apparently acquitting nine officers, suspending judgment in the case of another six and sentencing one officer to eight days' suspended imprisonment for subjecting two children to mock execution.³⁷

2 *Italy*

In early June 1997, the Italian government announced that the army had opened an internal administrative investigation into the conduct of the armed forces in Somalia, overseen by army General Vannuchi, and that the military prosecutor's office in Rome had opened judicial investigations into specific alleged human rights violations. A number of cases were subsequently transferred to civilian prosecutors for further investigation. In mid-June 1997 a Ministry of Defence decree established a five-member government Commission of Inquiry to look into the conduct of Italian troops, composed of military and civilian members and led by Ettore Gallo, a former Constitutional Court President. Before submitting what was intended as its conclusive report to the government in August 1997, the so-called Gallo Commission, accompanied by members of the magistracy, gathered information in Italy,

³⁴ Amnesty International, 'AI Concerns in Europe', above n 27, 1.

³⁵ *Ibid.*

³⁶ *Ibid.* 2.

³⁷ *Ibid.*

Ethiopia and Kenya. It interviewed 141 people, including a small number of Somalis, but did not visit Somalia.³⁸

The Commission concluded that the overall conduct of the Italian troops in Somalia had been good, but that specific violations did occur at the troop level without involvement of professional senior officers. Within days of the report being lodged, new information came to light about further human rights violations by Italian troops in Somalia, accompanied by claims that high ranking army officers had been aware of them and had not intervened to prevent them. The Minister of Defence asked the Gallo Commission to reopen its inquiry. In May 1998 the Commission submitted its second report³⁹ which indicated it had interviewed 11 Somalis flown to Italy in January 1997 but had not carried out on-site investigations in Somalia. The Commission concluded that episodes of violence were 'sporadic and localised', not 'widespread and general'. Some middle-ranking officers were blamed for not having known what the men in their charge were doing. The Commission addressed specific episodes of alleged human rights violations by the armed forces in Somalia and laid them out on the basis of whether they were 'credible', 'probably true', 'undecided as to the veracity' and 'not considered credible'.⁴⁰

In a letter to Amnesty International dated 17 September 1997 the Minister of Justice stated that Public Prosecutors attached to first instance courts in Livorno and Pescara had initiated five proceedings in connection with Italian soldiers accused of various alleged offences, including sexual assault of Somali women (the Minister did not specify the number of women involved); deliberate infliction of injuries leading unintentionally to death of Somali citizens (the Minister did not specify the number of citizens involved); the infliction of ill-treatment and physical injuries (again, the Minister did not specify the number of Somali citizens involved), and theft with violence from a Somali woman.

When the Gallo Commission lodged its second report with the Italian government on 22 May 1998, the Ministry of Defence announced that by that date some five disciplinary sanctions had been issued at ministry level and seven had been issued at army command level. These sanctions apparently entailed punishments ranging from formal reprimands to temporary suspension from service and confinement to barracks.⁴¹

³⁸ Amnesty International, 'Italy: A Briefing for the UN Committee Against Torture', above n 27, 10.

³⁹ See *Relazione Conclusiva*, 26 May 1998.

⁴⁰ Amnesty International, 'Italy: A Briefing for the UN Committee Against Torture', above n 27, 10-11. It is interesting to note that the tenor of the report focused singularly on the credibility of the alleged international humanitarian law violations and did not in any way focus on the possible guilt of the Italian troops. Interestingly, the Commission, made up of military officers as well as jurists and chaired by a senior Italian judge, did not use any legal standard—notably not adjudging the weight of evidence in relation to the particular offences alleged.

⁴¹ Amnesty International, 'Italy: A Briefing for the UN Committee Against Torture', above n 27, 14.

B *Politics vs International Justice*

While the nature of sentences issued to the various guilty troops in Belgium and Italy is of interest, this article will not look into the legal adequacy of ministerial sanctions and army command reprimands for troops charged with sexual assault, infliction of injuries leading to unintentional death and torture of prisoners.⁴² Rather, it will focus on general aspects of the disciplinary processes in both countries that demonstrate that the investigation and subsequent judicial proceedings were clearly biased in favour of the accused troops. At first glance, it seems unjust for a soldier accused of manslaughter not to be subjected to a criminal trial but to instead get off with a ministerial sanction, or a soldier accused of sexual assault to get off with an army command reprimand.

First, in the cases of both Belgium and Italy, no consideration seems to have been given to establishing a comprehensive inquiry independent of the military in order to ensure a demonstrably impartial examination of facts as advocated under the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁴³ and under the *UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.⁴⁴ Both countries are signatories to the former and come within the auspices of the latter as members of the UN. Instead, there was a combination of civilian and military mechanisms, without delineation as to investigation or sentencing criteria, by the military and civilian adjudicative mechanisms. Essentially, then, a loophole was created that allowed troops who should have been subject to a criminal trial for manslaughter and sexual assault, to be subject to the lower standard within the framework of the military internal disciplinary mechanism. This procedure allowed the accused to escape justice with reprimands, fines, and dishonourable discharge.

Secondly, the biases of investigations need to be discussed. Both military—high ranking generals—and civilian personnel—government bureaucrats—were involved as investigators. Both groups had certain specific interests to protect. For the military, the armed forces reputation was at stake; for the government bureaucrats, the country's international image. For instance, the Gallo Commission in its first report

⁴² Ibid 13 (reports the general contents of a letter dated 17 September 1997 from the Italian Minister of Justice in response to Amnesty International inquiries for specifics of criminal proceedings undertaken and copies of the verdicts). See also, Amnesty International Report 1999: Italy (1999) 3.

⁴³ Adopted by the General Assembly on 10 December 1984, came into force on 26 June 1987, 1465 UNTS 85. It has 66 signatories and 119 parties. Given the present state of the *lex lata*, torture is a recognised crime in international law. It is prohibited by a number of international instruments, some of which form part of customary international law. Article 3 Common to the four 1949 *Geneva Conventions*, below n 59 (recognised as part of customary international law) prohibits parties from committing at any time or in any place acts of 'violence to life and person, ... mutilation, cruel treatment, and torture' or 'outrages against human dignity, in particular, humiliating and degrading treatment'. Other instruments prohibiting torture are the 1948 *Universal Declaration of Human Rights* (art 5), 1966 *International Covenant on Civil and Political Rights* (art 7), 1985 *Inter-American Convention to Prevent and Punish Torture* (art 2), 1981 *African Charter on Human and Peoples Rights* (art 5).

⁴⁴ Principles are a species of soft law hence not legally binding. But, they contain general binding obligations on States which usually reflect other legally binding obligations assumed by States in multilateral treaties.

concluded that the overall conduct of the Italian troops had been good, and it exonerated senior professional officers. However, subsequent evidence implicated the officers who had been exonerated.⁴⁵ Even then, according to Amnesty International, the Commission, in its second report, submitted in broad and vague terms that

At the highest level, which the Commission did not define, there was an inability to foresee that certain events might occur and a failure to make checks which might have ensured that repeatedly given orders and instructions were properly applied.⁴⁶

Further the Commission did not bother to carry on-site investigations in Somalia even in light of new evidence and allegations.⁴⁷

Thirdly, most of the trials were in military courts. While it is beyond the scope of this article to delve into the criminal law structure of the two countries, generally the military courts ruled on matters based on internal military disciplinary procedures and did not refer cases of a criminal nature to civilian courts for criminal trials which would entail criminal penalties. Thus, the soldiers faced the tribunals most probably on charges of failing to conduct themselves according to the army manual rather than the violation of human rights of their victims. Proof of this as essentially an internal disciplinary matter seems to be borne out by the nature of sentences given—temporary suspension of service, confinement to barracks and army command reprimands.⁴⁸ Further, there is no information to suggest that any of the troops' victims or other witnesses (Somali citizens) ever appeared before the military tribunals even though it was within the power of the respective governments to trace a good number of them down and bring them to testify before the tribunals.

Lastly, there seemed to be a broader governmental conspiracy in the sense that all briefs and ministerial reports were long on recommendations but short on specific details. For instance on 8 July 1997 the Belgian Minister of Defence highlighted to parliament certain findings. The report recommended better selection of candidates and improved training, including educating soldiers and disseminating information on humanitarian law. It also indicated that excessive delays in disciplinary proceedings and a problem of alcohol abuse in the army needed to be addressed. The Minister of Defence added that he wished to set up an independent inquiry on racism within the army.⁴⁹ Requests by concerned parties for information on specificity of verdicts issued elicited no response or were referred to the Byzantine maze of government bureaucracy.⁵⁰ Evidently, the governments were more eager to give the impression that something was being done rather than affirmative action to ensure proper prosecution of accused troops. For instance in a 17 September 1997 letter, by Italy's Minister of Justice in response to Amnesty International's call for

⁴⁵ Amnesty International, 'Italy: A Briefing for the UN Committee Against Torture', above n 27, 10.

⁴⁶ *Ibid* 11.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* 14.

⁴⁹ *Ibid* 10-14.

⁵⁰ See generally AI Index EUR 01/01/98 and AI Index 01/02/98.

an effective complaints mechanism for Somalis, the Minister stated 'in the Italian system anyone, whether citizen or foreigner, is allowed access to the justice system in order to protect their own interests whether in the civil or criminal area.' How the affected Somalis living in a country decimated by civil strife and without a central government were expected to gain access to Italy's justice system is left to imagination. The trials that did take place were evidently a public relations exercise that made a mockery of justice.

III INTERNATIONAL HUMANITARIAN LAW: HOW CAN THE UN BE HELD ACCOUNTABLE FOR VIOLATIONS BY ITS FORCES?

This section of the article is an inquiry into whether the United Nations can be held accountable for the violation of the international humanitarian law by forces under its command during Security Council authorised action to maintain international peace and security.⁵¹ Article 1 of the 1907 *Hague Regulations Respecting the Laws and Customs of War and Land*⁵² lays down the qualifications of 'belligerents': that of groups entitled to take part in armed conflict. Key among this is command, a distinctive emblem, open bearing of arms and the requirement of adherence to the laws and customs of war. It is important to bear in mind that the Hague Laws are part of customary international law.⁵³ While it is easy for international armed forces acting under the auspices of the UN to fulfil these criteria, an important ingredient is whether they qualify to be classed as 'belligerents' in their operations. The important thing though to be borne in mind is that in peace enforcement, UN troops do militarily intervene in the territory of States notwithstanding that they do so without the intention of being active combatants. The issue of belligerence of UN operations will be considered in the next part of the article which discusses whether the laws of war which are binding upon the States who are members of the United Nations, are also binding upon the Organisation itself.

⁵¹ The question of whether the laws of war apply during the peacekeeping operations which have been transforming into peacemaking operations where the use of force has been necessary (Somalia, Yugoslavia) seems to have been settled. In 6 August 1999 the UN released the Secretary-General's Bulletin, above n 21, which at [1.1] states: 'The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.'

⁵² Dietrich Schindler and Jiri Toman, *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (3rd ed, 1988) 75.

⁵³ See Secretary-General's Commentary, below n 56.

A The Laws of War

1 The Hague and Geneva Regimes

The rules of Public International Law regulating the conduct of those armed conflicts defined as 'international' are often referred to as the *jus in bello*, and are distinguished from the *jus ad bellum*, which regulates and restricts the rights of international legal entities (particularly States) to use armed force against one another.⁵⁴ The Hague and Geneva Conventions form the core of international humanitarian law.

The Hague and Geneva Conventions are a series of treaties which state the laws of war as general principles of conduct.⁵⁵ Treaties such as the Hague and Geneva Conventions, and military manuals in various States are not, therefore, the sources of the laws of war, but rather the codification of customary international law.⁵⁶ Thus, although non-signatory nations are not bound by the precise wording and detailed prescriptions of the Hague and Geneva Conventions, they are regarded as bound by the customary laws of war from which the treaties are derived.⁵⁷

The Hague and Geneva Conventions embody the laws of war, referred to as the *jus in bello*. The Hague Conventions are a series of treaties concluded at The Hague in

⁵⁴ R H F Austin, 'The Law of International Armed Conflict' in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 765.

⁵⁵ 'In all of these treaties, the laws of war are stated as general principles of conduct, and neither the means of enforcement nor the penalties for violations are specified.' – Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970) 23.

⁵⁶ In his commentary on the Statute of the ad-hoc criminal tribunal established pursuant to Chapter VII of the Charter to contribute to the restoration of peace in the former Yugoslavia, the UN Secretary-General stated that 'part of the conventional international humanitarian law which has beyond doubt become part of international customary law' is the law of armed conflict embodied in the *Geneva Conventions for the Protection of War Victims* of August 12, 1949; the *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Customs of War on Land* and the annexed Regulations of Oct. 18, 1907; the *Convention on the Prevention and Punishment of the Crime of Genocide* of December 9, 1948 and the *Charter of the International Military Tribunal* of August 8, 1945—*Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc S/25704 (May 3, 1993) [35], [37]; 32 ILM 1159, 1170 ('Secretary-General's Commentary'). The Geneva Conventions, below n 59, constitute 'the core of the customary law applicable in armed conflicts'—*ibid* 32 ILM 1170.

⁵⁷ This was clearly recognised in the Preamble to the *Hague Convention (IV)* of 1907, which states that questions not covered by the Convention should be resolved by 'the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience.' The substance of the provisions of laws of war has been taken into the military law of many countries, and is often set forth in general orders, manuals of instruction and other official documents—see Taylor, above n 55, 23 (citing the 1914 US army field manual). Similar language is found in Article 158 of *Geneva Convention III*, below n 59, which addresses the protection of civilian persons in times of war, where it is provided that a signatory nation may denounce the treaty, but will nevertheless remain bound to abide by the 'principles of the law of nations,' which are then described in the same words used in the *Hague Convention*. The International Military Tribunal overseeing the Nuremberg Trials echoed a similar viewpoint: 'The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice. ... This law is not static, but by continual adaptation follows the needs for a changing world.' *Judgment of the International Military Tribunal at Nuremberg*.

1907, which primarily regulate the behaviour of belligerents in war and neutrality,⁵⁸ whereas the Geneva Conventions are a series of treaties concluded in Geneva between 1864 and 1949, which concern the protection of the victims of armed conflict.⁵⁹ In 1977 two Protocols to the 1949 Geneva Conventions, which further developed the protection of victims in international armed conflicts and expanded protection to victims of non-international armed conflict, were opened for signature. Whether or not these two additional protocols have been incorporated into the corpus of international customary law is still a subject of intense debate.⁶⁰

Together, the Hague and Geneva Conventions embody the rules which govern (i) laws on the use and types of weapons; (ii) laws on warfare, including rules on permissible tactics and strategies on legitimate targets; and (iii) humanitarian rules.⁶¹ These rules attempt to limit, in the name of humanity, the conduct which is directly related to war hostilities in progress between organised belligerent forces to that which is actually necessary for military purposes.⁶² And, although the traditional laws of war were understood in pre-modernised international law to apply essentially between States, under the modern international law, embodied in the Hague and Geneva Conventions, the *jus in bello*, similar to other parts of the law, applies in certain circumstances to other recognised entities as well. For example, the effective realities made it necessary to subject conflicts within States to the *jus in bello* on the basis of subjective recognition of rebel forces as belligerents.⁶³

2 The Nuremberg and Tokyo Military Tribunals

Two international tribunals were established following World War II, at Nuremberg and Tokyo, to try major war criminals. The decision of the allies in World War II to try individual Nazis before the International Military Tribunal at Nuremberg (IMT) for violations of international law was the turning point in modern history concern-

⁵⁸ For a listing and brief commentary of the major conventions in The Hague Law regime, see Cherif Bassiouni, *International Crimes: Digest/Index of International Instruments 1815-1985* (1986) vol 1.

⁵⁹ See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 75 UNTS 31 (*Geneva Convention I*); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug 12, 1949, 75 UNTS 85 (*Geneva Convention II*); *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug 12, 1949, 75 UNTS 135 (*Geneva Convention III*); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug 12, 1949, 75 UNTS 287 (*Geneva Convention IV*). These conventions were opened for signature on 12 August 1949 and entered into force on 12 January 1951; as of 30th June 2000, there are 188 signatories to these Conventions (referred to collectively as the 'Geneva Conventions').

⁶⁰ See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, 1125 UNTS 3 (*Additional Protocol I*); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 UNTS 609 (*Additional Protocol II*). As of December 31, 10 years after its signing, *Additional Protocol I* had 71 parties as against 165 to the 1949 Geneva Conventions.

⁶¹ See Ingrid DeLupis, *The Law of War* (1987) 129.

⁶² See Taylor, above n 55, 30, 34.

⁶³ See Austin, above n 54, 765.

ing the relationship between individuals and international law.⁶⁴ They expounded the basic international criminal law philosophy that even in the international arena with a multitude of different entities and collectivities, crimes against international law are committed by persons, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁶⁵

It is important to note that the principles by which the above tribunals guided themselves were recognised in 1946 by the General Assembly of the United Nations as principles of substantive and procedural international criminal law.⁶⁶ The judgments of the Nuremberg Tribunal were meant to establish plainly and forcefully that the rules of public international law should and do apply to individuals; they were also intended to demonstrate that the protection of human rights was too important a matter to be left entirely to States, a proposition already enunciated in the Preamble and Article 55 of the Charter of the United Nations.

Efforts to prosecute individuals responsible for the commission of war crimes did not end with the Nuremberg and Tokyo tribunals. Sadly, however, more than 40 years were to elapse before the community of nations revisited the issue of enforcement of international criminal law by international judicial process. In 1992, the United Nations Security Council called for the establishment of an ad hoc international war-crimes tribunal to prosecute those accused of atrocities in the former Yugoslavia.⁶⁷ It was established as an enforcement measure under the binding authority of Chapter VII, rather than through a treaty which would have created an international criminal court whose jurisdiction would be subject to the consent of the States concerned.⁶⁸ Subsequently, a second international criminal tribunal modelled along that of the former Yugoslavia was established for Rwanda.⁶⁹ The establishment of the tribunals also invoked a response from the Security Council to move forward on the establishment of a permanent international criminal court.⁷⁰ These two tribunals played an important role in fuelling the drive to the permanent International Criminal Court as they stood as a living testimony to the legal and technical viability of judicial enforcement of international humanitarian law.

⁶⁴ See Mark W Janis, *An Introduction to International Law* (1993) 246.

⁶⁵ See Taylor, above n 55, 78-94, taken from the *Judgment of the International Criminal Tribunal at Nuremberg*.

⁶⁶ The resolution of the 51st plenary session of the General Assembly of the United Nations of December 11, 1946, cited in Cherif Bassiouni and Ved Nanda (eds), *A Treatise on International Criminal Law* (1973) vol 2, 43.

⁶⁷ For the Statute of the tribunal, see Secretary-General's Commentary, above n 56, 1192.

⁶⁸ See Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *American Journal International Law* 78, 79.

⁶⁹ The crimes committed during the conflict in Rwanda made the Security Council decide by resolution 955 of 8 November 1994 to establish the 'International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994.'

⁷⁰ *Rome Statute*, above n 20.

B *Applicability of the Laws of War to the United Nations*

1 *The International Legal Personality of the United Nations*

For the United Nations to be held responsible for a violation of the laws of war, it must possess sufficient international legal personality. Legal personality is possessed by those entities with the status of being capable of bearing legal rights and duties in a given legal system.⁷¹ States are the traditional subjects of international law based on the principle of 'territorial sovereignty.'⁷² In the 20th century, international organisations have been widely received as having international legal personality.⁷³ A State, or other international legal person, may be held responsible only to the extent that it has rights and duties which it is free to exercise. Some international legal persons (notably States) have more of these than others.⁷⁴

Just as a State has the right under international law to assert an international claim for damages when another State fails to live up to certain minimum standards for safety of its nationals, vis-a-vis forces representing the United Nations, the Organisation assumes responsibility only to the extent that such forces become an organ of the UN and therefore subject to its exclusive operational control.⁷⁵ Thus, when in 1948 a Swedish national acting as a United Nations mediator in the Middle East was killed while performing his UN duties in Palestine, the International Court of Justice, in its *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, held that if in the performance of his duties, an agent of the UN suffers injury in circumstances involving the responsibility of a State, the United Nations as an organisation has the capacity to bring an international claim against the responsible *de jure* or *de facto* Government with a view to obtaining the reparation due in respect of damage caused to the victim or to his successors in title.⁷⁶ This case, therefore, established that the United Nations has the capacity to bring a claim with a view of obtaining reparations due in respect of the damage caused to the United Nations, and to the victim or to persons entitled through him, regardless of

⁷¹ See Bin Cheng, 'Introduction to Subjects of International Law' in M. Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 23.

⁷² *Ibid* 26.

⁷³ International organisations have concluded in-practice agreements with both member and non-member States, and with other international organisations—see, eg, *Interim Agreement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council*, signed at Berne on June 11, 1946 and New York on July 1, 1946, 1 UNTS 163. Without such treaty-making capacity, an international organisation could not spell out in an international agreement its legal position with a host State. See also *Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations*, UN Doc A/CONF 129/15 (March 21, 1986); 25 ILM 543. This treaty is not yet in force but is an important indicator of the acceptance of the attribution of international legal personality to international organisations.

⁷⁴ R S Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (1968) 229 (citing Clyde Eagleton, 'International Organisations and the Law of Responsibility' (1950) 76 *Hague Recueil* 386).

⁷⁵ Simmonds, *ibid*.

⁷⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] ICJ 174, 185 ('*Reparation Case*').

whether the respondent State is a member of the UN. In reaching this decision the Court concluded that the United Nations is an international person, a subject of international law capable of possessing international rights and duties with the capacity to maintain its right by bringing international claims.⁷⁷

Thus, it has been established that the United Nations has sufficient international legal personality to bring a claim against one of its Members who has caused injury to it by breach of the State's international obligation towards it. But rights are not conferred without corresponding duties.⁷⁸ Thus, under the theory of reciprocity, along with the right to bring an international claim, the UN also has the responsibility to be held responsible under international law for the actions of its agents.⁷⁹ One must keep in mind, however, that where a State possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity, such as the United Nations, must depend upon its purposes and functions as specified or implied in its Charter and as developed in practice.⁸⁰ The International Court of Justice (ICJ) has determined that the United Nations could not carry out the intentions of its founders without the right to bring an international claim.⁸¹ Thus, when considering whether the UN has sufficient international personality to be held responsible for the laws of war, one must consider whether the functions of the United Nations are such that they could not be effectively discharged without such a corresponding obligation.⁸²

The applicability of the laws of war to the United Nations does not, however, depend solely on the capacity of the UN to be held responsible under international law. When viewed with the powers in a Chapter VII action there is a (contentious) case to be made that the UN has both the capacity and an obligation to engage in international humanitarian law conventions regulating armed forces.⁸³ The UN, in addition to being a subject of international law, must be a direct and intended addressee of the rights and duties designated in the laws of war.⁸⁴ The following section discusses to what extent the United Nations peacekeeping forces should be bound by the laws of war.

2 *The Belligerent Status of the United Nations*

The laws of war as discussed above are codified in international treaties known as the Hague and Geneva Conventions. The parties (signatory States) to the conven-

⁷⁷ Eagleton, above n 74; Frederic Kirgis, Jr, *International Organisations in Their Legal Setting: Documents, Comments and Questions* (1977) 9.

⁷⁸ See, for eg, Julianne Peck, 'The UN and The Laws of War: How Can the World's Peacekeepers be Held Accountable?' (1994) 21 *Syracuse Journal of International Law & Commerce* 283, 301.

⁷⁹ The theory of reciprocity is an underlying basis of the laws of war. How one party behaves can influence the behaviour of another.

⁸⁰ See Kirgis, above n 77, 10.

⁸¹ *Reparation Case*, above n 76.

⁸² See generally Peck, above n 78.

⁸³ See Kelly above n 23, 174.

⁸⁴ See Cheng, above n 71, 29. The rights and duties must be directly possessed by, or binding upon, the subject concerned, to whom the law really intends them to be addressed.

tions are bound by the precise wording of these treaties, and the non-signatory States are bound by the customary international law from which the treaties are derived. In addition, we have seen that under the Nuremberg principles, individuals may also be held responsible for the violation of such laws, regardless of the fact of whether they acted as agents of a signatory State. The problem regarding the applicability of the laws of war to the United Nations arises from the fact that the peacekeeping forces are agents, not of a belligerent party/State in the traditional sense, but of an international organisation whose role is to maintain and enforce peace.⁸⁵

In a report entitled 'Should the Laws of War Apply to United Nations Enforcement Action?' presented to the American Society of International Law in 1952 by the Committee on the Study of the Legal Problems of the United Nations, its Chairman (Clyde Eagleton), stated that:

[a] war is fought by a State for its own national interest; United Nations enforcement action is on behalf of order and peace among nations ... War as between states of equal legal status has in the past been regarded as honourable; the use of force against the United Nations is now to be regarded as an offence against all Members.⁸⁶

The Eagleton committee concluded in its report that due to the different nature of the use of force by the United Nations to restrain aggression from war-making by a State, the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes.⁸⁷ It is maintained by some that acceptance of the Charter by Member States meant acceptance by them of the superior legal position of the United Nations as regards the use of force and that, consequently, the United Nations may apply such rules as it wishes.⁸⁸ This conclusion has found little support and has subsequently been severely criticised. It is arguable that the law governing the conduct of warfare arises from a fundamental humanitarian need and was not simply framed as a set of rules to permit the playing of a game of 'war' between two States.⁸⁹

In recognition of the fact that the law of war has a legitimate role to play whenever hostilities exist, its application in the past has not been confined to declared war between States.⁹⁰ Under common Article 2 of the Geneva Conventions of 1949, the

⁸⁵ Peck, above n 78, 302.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* It should be noted that this report was prepared during the Cold War, at a point in which the Cold War had greatly escalated. One important aspect of the UN's credibility (more so with the Second World War still fresh in the world's mind) was as a *neutral* deterrent against aggression and the need for it to have a standing force and coercive power. This was seen as the panacea for the League of Nation's failure which was predicated on its lack of 'teeth'.

⁸⁸ *Ibid.*

⁸⁹ See Richard R Baxter, 'The Role of Law in Modern War' (1953) *American Society International Law Process* 90, 95; See also Fritz Grob, *The Relativity of War and Peace* (1949) 217-18; Peck, above n 78, 303.

⁹⁰ See Grob, above n 89, 217-18.

laws of war are made applicable not only to all cases of declared war between the parties, but to all other armed conflicts as well. Similarly, its application in the present should not be confined to 'belligerents' in the strictest sense, but to any organised party involved in a conflict. The numerous States that have signed and ratified the Geneva Conventions of 1949 have incorporated them within the corpus of their legal system as part of the 'Law of the Land'. Therefore the argument that their troops acting under the auspices of the United Nations, are not participating in an 'armed conflict' 'would require the most ingenious casuistry'.⁹¹ The UN as an organisation can command and deploy forces, which themselves will, or may be, engaged in combat or use of force as authorised by the UN. From the beginning, the UN was projected as a potential combatant and/or occupying force. This is reflected in Article I and Chapter VII of the Charter, and, in particular, in the unutilised provisions of Articles 43-50, by which States were to assign military forces to the UN.⁹²

If the United Nations finds its distinction in its status as a superior legal and moral entity, it should be held to an even higher standard than those embodied in the current laws of war. The argument that the same laws of war should not be applied to all belligerents stems from the postulate that laws of war should discriminate between the legal and illegal belligerent.⁹³ The proposition that the superior status of the UN exempts it from being bound by the laws of war rests on the fact that when the UN acts, it is acting under the consensus of the international community.⁹⁴

The new allegiance among 'East'⁹⁵ and 'West' has created an increased opportunity for international consensus on methods for keeping the peace. It has also prompted the heads of State or governments of the permanent members of the Security Council to pledge increased support to the United Nations towards the end of creating a

⁹¹ Baxter, above n 89, 98.

⁹² The enforcement provisions of the Charter were designed by the major powers with the unravelling 1930s in mind: Manchuria, Ethiopia and how the policy of appeasement made the militarily weak Germany of 1936 the militarily powerful Germany of 1939. Chapter VII of the charter provides for an escalating ladder of collective responses to interstate aggression, ranging from diplomatic isolation to economic sanctions and ultimately, military actions. The key to the UN's credibility as a deterrent against aggression, it was widely believed in the waning months of the Second World War, was the last of these: unlike the League of Nations, the UN would have 'teeth'. Creating an international military force in some form was a central concern at the four-power Dumbarton Oaks Conference held in the summer of 1944. The Military Staff Committee (MSC) comprising national chiefs of staff of the Security Council's five permanent members (art 47) was established. In February 1946, the Security Council directed the MSC to devise plans for the force as stipulated in Article 43. The Committee met some 157 times during the next 15 months, and reached agreements-in-principle. But by mid-1947, it became clear that its efforts had fallen victim to the escalating Cold War. See generally, Robert C Hilderbrand, *Dumbarton Oaks: The Origins of the UN and the Search for Postwar Security* (1990) and D W Bowett, *UN Forces: A Legal Study* (1964) 12-18.

⁹³ See Joseph L Kunz, 'The Laws of War' (1956) 50 *American Journal International Law* 313, 317-19.

⁹⁴ See Peck, above n 78, 304.

⁹⁵ At present the term 'East' lacks its clear cut description of the communist bloc during the Cold War. While Russia continues to be the hub of the term, it would seem to encompass the former States in the USSR. Most of the States in Eastern Europe that formed part of the communist bloc have broken ranks with Russia and are keen to integrate into the 'West', as evidenced by applications to join membership of NATO.

more effective United Nations.⁹⁶ If one were to conclude that the laws of war do not apply to the United Nations because of its unique character, it would mean that as the 'Big Five'⁹⁷ transfer their sovereign power over their troops to the United Nations, in an effort to rely on the UN as a means to their end, they would simultaneously be exempting those troops from adherence to the laws of war. However, simply because those troops are acting on behalf of the international community (as opposed to a State) and supposedly have the broader aim of enforcing or maintaining peace, rather than destroying an enemy to gain political or territorial control, does not mean that the unregulated conduct of those troops presents any less of a danger to humanity.

The lack of a method for authoritatively and effectively determining that a situation justifies the application of the laws of war is a major weakness of the contemporary laws. However, with regard to UN forces, the Secretary-General's Bulletin marks an important milestone in recognising that the fundamental principles and rules of international humanitarian law are applicable to UN forces in situations of armed conflict when they are engaged as active combatants, enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.⁹⁸ Given the binding nature of Security Council resolutions as a type of *lex societatis*⁹⁹ on members of the UN, the Security Council should avoid routinely adopting mandates that do not provide militarily meaningful guidelines to missions and which do not give opportunity for systematic input by troop-contributing States to the design of the mandate. There exists a potential in the United Nations system to extend the simple broad mandate approach to one that endorses or promulgates more prescriptive guidelines for key aspects of UN operations, particularly rules of engagement, and this possibility should be explored.

C *Violations by UN Troops: A Proposed Method for International Accountability*

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

⁹⁶ See 'Summit at the UN', *New York Times* (New York, USA), 1 February 1992, 5.

⁹⁷ The five permanent members of the UN are USA, Britain, France, China and Russia.

⁹⁸ Secretary General's Bulletin, above n 21, [1.1].

⁹⁹ Law originating from and binding on the members of a collectivity—in this case, the Member States of the United Nations Organisation.

making power to become a signatory party to the treaties.¹⁰⁰ Article 1 of the Charter requires the organisation to promote and encourage respect for human rights. Such promotion and encouragement will hardly be served by the organisation itself attempting to avoid responsibility in this area.

As discussed, the United Nations has sufficient international personality to either bring or defend a claim for the breach of an international obligation. Another important aspect of international personality is treaty-making capacity. Although all entities having treaty-making capacity necessarily have international personality, all international persons do not necessarily have treaty-making capacity.¹⁰¹ The United Nations, however, has such capacity. Although Article 1 of the *Vienna Convention on the Law of Treaties* states that the Convention applies to treaties between States,¹⁰² the International Law Commission, charged with recommending the proposed codification of the Convention, explained that the fact that the scope is so defined is not intended in any way to deny that other subjects of international law, such as international organisations, may conclude treaties.¹⁰³ This is reflected in Article 3 of the Convention which States that '[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law ... shall not affect the legal force of such agreements.'¹⁰⁴ Thus, the United Nations, as an international organisation, does have the capacity to conclude treaties. This capacity has been recognised in the *Vienna Convention on Law of Treaties Between States and International Organisations or Between International Organisations* which, though not yet in force, recognises that such capacity is necessary for international organisations to perform their functions and fulfil their purposes.¹⁰⁵

Despite the fact that the United Nations has the capacity to conclude a treaty, whether the United Nations has the capacity to be a member of the particular treaties which make up the laws of war must still be determined.¹⁰⁶ The intent of the drafters of the Hague and Geneva Conventions was to limit a belligerent's conduct, in the name of humanity, to that which is actually necessary for military purposes.¹⁰⁷ As a means to achieving their humanitarian ends, the drafters did not limit the application of the rules to 'States'.¹⁰⁸ For example, rebel forces are considered belligerents. In Peck's opinion, if the parties to the Conventions are willing to treat individuals, under the Nuremberg principles, as subjects of international law in order to reach their humanitarian goals, it can hardly be argued that an international

¹⁰⁰ Peck, above n 78, 310.

¹⁰¹ See Kirgis, above n 77, 16.

¹⁰² *Vienna Convention on the Law of Treaties* 23 May 1969, opened for signature on 23 May 1969, 1155 UNTS 331, entered into force in 27 January 1980 ('*Vienna Convention*').

¹⁰³ See (1966) 2 *Year Book of the International Law Commission* 188-9, cited in Kirgis, above n 77, 16.

¹⁰⁴ *Vienna Convention*, above n 102, art 3.

¹⁰⁵ See *Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations*, above n 73, Preamble.

¹⁰⁶ Peck, above n 78, 307.

¹⁰⁷ See Taylor, above n 55, 34.

¹⁰⁸ See Austin, above n 54, 765.

organisation, which represents a significant portion of the international community, should not also be regarded as an intended subject of those rules when it is involved in an armed conflict of an international and warlike character or in a conflict that becomes internationalised due to its intervention.¹⁰⁹ Therefore, technically the UN has the capacity to formally accede to the Conventions. The eligibility of the UN to formally accede to the Hague and Geneva Conventions rests on the consent of the current parties to the treaties.¹¹⁰ For example, each of the Geneva Conventions expressly provides that accession is open only to 'Powers'. Some writers have concluded that although the term 'Power' or, '*Puissance*' is a term which is normally used in treaties synonymously with 'States,' it does not preclude other subjects of international law which may be parties to an armed conflict of an international and warlike character. Under this reasoning, the UN, too, is a 'Power'.¹¹¹ Supporting this assertion is the fact that the two Conventions are concerned with 'military power' and the protection to be afforded to victims of conflict. The Conventions are 'people-oriented' not 'territory-oriented', with all the consequential debates that might arise concerning sovereignty and State relations. The term 'Power' in the Conventions would be argued to encompass UN forces as a 'military power', party to a conflict, or an occupying power where it has recognised forces under a chain of command responsible to UN Headquarters in New York.

Although the UN may have the capacity to formally accede to the Hague and Geneva Conventions, its willingness to enforce the laws of war along its chain of command is not enough.¹¹² It is a recognised principle of the customary laws of war that an entity must also have the ability to compel its Commander and its Force to act lawfully.¹¹³ It would seem that the argument for the UN not being held accountable for international humanitarian law violations by its peacekeepers lies in the fact that the rank-and-file soldiers in the missions do not swear allegiance to the UN. The troops wear their national uniforms and the governments retain discretion as to the number and nature of command for their troops.¹¹⁴ It is important to note that while the Security Council cannot be said to have total command over UN forces, it has full authority as the force commander is under the direct authority of the UN Secretary-General or his Special Representative. In addition, the troops act under the UN flag, bear UN insignia and the Security Council creates and defines the missions under its Chapter VII powers: hence the troops are in essence an instru-

¹⁰⁹ Peck, above n 78, 308.

¹¹⁰ See Simmonds, above n 74, 182.

¹¹¹ See *ibid* (citing Finn Seyersted, *Objective International Personality of Intergovernmental Organisations. Do Their Capacities Really Depend on their Constitutions?* (1963) 350).

¹¹² See Simmonds, above n 74, 193.

¹¹³ Article 3 of the 1907 *Hague Convention (No. IV)* envisages that a 'Power' (and hence the UN if it becomes a party to the Hague Convention) should be 'responsible for all acts committed by persons forming part of its armed forces.'

¹¹⁴ Article V of the Model Agreement, above n 21, under which States contribute their troops to the UN, states that it is done on the basis that they *remain in their national service* but under the command of the UN. Responsibility for disciplinary action with respect to the military personnel rests with the officer designated by the government of the participating State for that purpose. This is reaffirmed in s 4 of the Secretary-General's Bulletin, above n 21.

ment of the Security Council as they are under an obligation to fulfil the specific mandate drawn up the Security Council and to change their military operations in accordance with the dictates of the Council.

The seeming dichotomy between the Commander's responsibility for ordering the troops and the Participating State's responsibility for discipline, raises serious questions concerning the requisite responsibility along the entire chain of command which the customary laws of war demand.¹¹⁵ A possible solution for the assurance that enforcement of discipline is mandatory would be for the UN to designate, as its agent for the purpose of fulfilling the requirements of the Conventions, one or more of the Members who have contributed national contingents to the Force.¹¹⁶ Another possibility, however, is simply to assure that no mandate or regulation ever leaves the Participating State's responsibility to discipline its nationals up to its own discretion—this happens to be the position adopted by the UN.¹¹⁷ This system has already failed three times in the 1990s.¹¹⁸ The subordination of international justice interests by national political interests in these cases highlights the unwillingness of States to investigate and prosecute their servants or agents.

IV THE UN AS A PARTY TO THE INTERNATIONAL HUMANITARIAN LAW CONVENTIONS AND THE ROME STATUTE PROVISIONS

A *Triggering Mechanisms*

This section of the article looks generally at the provisions of the *Rome Statute* of the International Criminal Court (hereafter the ICC) in so far as they relate to violations of laws of war and the interplay of national interests as well as international justice interests. It gives a general insight into the exercise of the ICC's jurisdiction with regard to the issue of UN forces. It is necessary to state that the ICC has automatic, or inherent jurisdiction over all core crimes¹¹⁹ when the alleged crime is committed on the territory of a State party or when the accused is a national of a State party. The Court's jurisdiction is thus two-fold.

The Court's jurisdiction can be 'triggered' in one of three ways. The Court may exercise jurisdiction with respect to the crimes in the Statute if a situation is referred to the Prosecutor: (i) by the Security Council acting pursuant to its Chapter VII powers under the Charter; (ii) by a State Party to the Statute; or (iii) by the Prosecutor acting *proprio motu*—on their own initiative—following an independent investigation.¹²⁰ Referrals by States Parties and the Prosecutor acting in an inde-

¹¹⁵ See Simmonds, above n 74, 195.

¹¹⁶ *Ibid* 196.

¹¹⁷ See Secretary-General's Bulletin, above n 21.

¹¹⁸ See the discussion in Part II of this article.

¹¹⁹ *Rome Statute*, above n 20, art 5 lists the core crimes within the Court's jurisdiction. These are: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

¹²⁰ *Ibid*, art 13.

pendent capacity are subject to additional limitations before the Court will be permitted to exercise its jurisdiction.

1 Security Council Referral

Pursuant to Article 13(b) of the *Rome Statute*, the ICC may exercise its jurisdiction if '[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.' This provision, in effect, acknowledges the primacy afforded to the Security Council in maintaining international peace and security.¹²¹ The Security Council has always had a wide range of powers under the Charter to determine and respond to threats to international peace.¹²² Most significant is Article 42 which authorises the Council to impose its decisions through the use of force where necessary to restore international stability.¹²³

In light of this pre-eminence of the constitutional authority of the Security Council, and particularly of the five permanent members who have the power of veto over Council decisions, all States recognised, albeit reluctantly in some cases, that the *Rome Statute* could not diminish the UN Security Council's constitutional authority. At least four of the five permanent members of the Security Council (the United States, China, France and the Russian Federation) advocated strongly for the power to veto prosecutions which involved situations of which the Council was seized under Chapter VII of the Charter.¹²⁴ Such a provision would have granted inordinate influence over the independence of the Court to members of the Council. If such a provision had been included, a member of the Council could, potentially, have precluded the Court from dealing with a case by simply including the situation on the agenda of the Council. Vesting the Security Council with power to control the Court's docket would have jeopardised the Court's judicial independence and politicised its work. Inevitably, it is unlikely that the ICC would ever have been able to prosecute any member of a UN force as the Security Council would have viewed this as an interference by the ICC in its actions exercised in accordance with its authority to maintain international peace and security.

The final provision of the *Rome Statute*, rather than prohibit the Court from investigating a matter being dealt with by the Security Council, shifts the onus onto the Security Council to affirmatively halt an investigation. Article 16 provides that no prosecution may be commenced for 12 months where the Security Council has

¹²¹ Charter, above n 1, art 24 (1).

¹²² For example, Charter, *ibid*, art 29 authorises the Security Council to establish 'such subsidiary organs as it deems necessary for the performance of its functions.' This was the provision relied upon to establish the two ad hoc Criminal Tribunals. See also arts 39, 41.

¹²³ This states: '[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockades, and other operations by air or sea, or land forces of members of the United Nations.'

¹²⁴ See Timothy McCormack and Sue Robertson, 'Jurisdictional Aspects of The Rome Statute for the New International Criminal Court' (1991) 23 *Melbourne University Law Review* 635, 641.

adopted a resolution under Chapter VII of the Charter to that effect. Permanent members of the Security Council, therefore, do not possess the right to obstruct an ICC investigation by exercising an individual power of veto. Rather, the Security Council as a whole must take an affirmative step by passing a resolution should it wish to prevent the commencement of a prosecution. In the absence of veto power by the Security Council over the ICC, a rule of thumb is that every time UN Forces commit violations of international humanitarian law, they open themselves up to the possibility of investigation and prosecution by the ICC.

2 *State Party Complaint*

The ICC will also be able to exercise jurisdiction in respect of an alleged crime under the Statute where a referral is made by a State Party in accordance with Article 14.¹²⁵ A State Party is required, as far as possible, to provide supporting documentation specifying the relevant circumstances for its referral. As the experience of human rights treaty bodies has demonstrated, mechanisms which provide for State-based complaint procedures have been greatly under-utilised to date because States are reticent to initiate proceedings against other States or their nationals due to the political and diplomatic ramifications of doing so.¹²⁶ Even within the new regime of the ICC, it is unlikely that this method will be any more popular. States are more inclined to make decisions based on political rather than judicial interests whenever the issue of investigation and prosecution of their troops by the ICC arises.

3 *Independent Investigation by the Prosecutor*

The *Rome Statute* includes a provision for the exercise of the Court's jurisdiction based on a Prosecutor with independent powers of investigation.¹²⁷ The Prosecutor is empowered under the Statute to receive information on potential crimes from a variety of sources including States, organs of the United Nations, inter-governmental and non-governmental organisations, and 'other reliable sources'.¹²⁸ This is perhaps the strongest feature of the ICC as an independent and autonomous penal court that will not be riddled with political considerations instead of proper considerations of upholding international justice. The Security Council has no power to review the Prosecutor's case docket. The *proprio motu* power is a useful tool that deflects a potential abuse of power by the veto of permanent members of the Security Council predicated on national interests and political motivations.

There are a number of provisions in the Statute placing safeguards on prosecutorial discretion to prevent or limit the likelihood of politically-motivated complaints. The Prosecutor must gain the authorisation of the Pre-Trial Chamber before proceeding

¹²⁵ *Rome Statute*, above n 20, art 13 (a).

¹²⁶ See Amnesty International, *The International Criminal Court: Making the Right Choices-Part 1* (1997).

¹²⁷ *Rome Statute*, above n 20, art 15.

¹²⁸ *Ibid*, art 15(2).

with an investigation.¹²⁹ The Pre-Trial Chamber is obliged to determine that there is a reasonable basis to proceed and that the case falls within the jurisdiction of the Court.¹³⁰ This provision is viewed by its advocates as an important victory in the establishment of a truly independent court. It is on this plane that the ICC will have authority to investigate and prosecute UN troops for international humanitarian law violations, even over the nationals of non-party States. It is significant that for the ICC to exercise jurisdiction over an accused person, it is not necessary for both the territorial State and national State to be party to the Statute. It is enough that one of them is.¹³¹ This eliminates the possibility of a State of a national controlling the Court's jurisdiction.

B Criminal Jurisdiction and Mandate

Crimes against humanity are mentioned in Article 5 of the *Rome Statute* and enunciated in Article 7. The drafting of a new definition of crimes against humanity provided a unique opportunity to develop international criminal law on the subject. The provision consists of a chapeau which outlines the threshold requirements to be fulfilled before certain acts are considered a crime against humanity and an enumerated list of acts which can constitute the crime. Article 7(2) also includes a list of clarifications on the meaning of specific words or phrases in Article 7(1) and they must be read conjunctively in any interpretation of the related provisions in paragraph 1.

The *Rome Statute* makes a significant contribution to international jurisprudence concerning the formulation of torture and gender-specific sexual offences. The Statute also includes a new ground of persecution on the basis of gender. However, the provision is accompanied by a limitation that such persecution must be committed in conjunction with another crime under the Statute.¹³² Additionally, rape and other acts of sexual violence can be separately prosecuted under the *Rome Statute* as war crimes involving grave breaches of the Geneva Conventions, which include torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health.¹³³ The definition of torture in Article 7(2)(e) no longer requires the involvement of a public official in contrast to the definition of torture in Article 1 of the *UN Convention on Torture*.¹³⁴

¹²⁹ *Ibid*, art 15(3).

¹³⁰ *Ibid*, art 15(4).

¹³¹ *Ibid*, art 12.

¹³² *Ibid*, art 7.

¹³³ *Ibid*, arts 8(2)(a)(ii) and (iii).

¹³⁴ Article 1 of the *UN Convention on Torture*, above n 43 states: '...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions' (emphasis added).

In relation to war crimes, unanimity of opinion did exist for the inclusion of grave breaches of the four Geneva Conventions of 1949 but beyond that specific category of war crimes, widespread disagreement emerged in two key areas as to whether to include, and if so precisely which, acts other than the grave breaches of the 1949 Conventions committed in the context of international armed conflicts, and whether to include, and if so which, acts committed in the context of non-international armed conflicts. The substantive provisions of Article 8 of the *Rome Statute* are now grouped in four distinct sections in order from the least to the most contentious.¹³⁵ Of significance are sub-paragraphs (2)(c) and 2(e) of Article 8 which incorporate the lists of acts which can constitute war crimes within non-international armed conflicts. Article 8(2)(c) incorporates serious violations of Common Article 3 while the list of acts in article 8(2)(e) is drawn extensively, but not exclusively, from *Additional Protocol II*.

C Threshold Level of Gravity

The *Rome Statute* does not constitute codification of international criminal law. Instead, the exercise in relation to substantive crimes at the diplomatic conference was to negotiate the subject-matter jurisdiction of the new Court which would only deal with 'the most serious crimes of concern to the international community'.¹³⁶ Thus there was need to set a general threshold level for crimes within the Court's jurisdiction. Along with the constitutional authority of the UN Security Council over the Court's docket in cases coming under its exercise of the Charter Chapter VII, the threshold level of gravity poses the second biggest obstacle to an exercise of authority by the ICC over UN troops.

Some delegations argued in Rome that, since the Court was intended only to exercise jurisdiction over the most serious international crimes, the definition of war crimes ought to include a threshold level of gravity. Other delegations objected to this proposal on the grounds that the Court ought to be able to exercise a discretion about the exercise of its jurisdiction over an alleged war crime.¹³⁷ Article 8(1) provides an indicative threshold such that '[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' The use of the term 'in particular' leaves open the possibility that the Court could exercise its jurisdiction *in respect of a single act* constituting a war crime within one or other of the acts listed in Article 8(2).¹³⁸ The possibility of a prosecution for a single act constituting a war crime pursuant to Article 8 stands in marked contrast to the threshold level of gravity for a crime against humanity.

¹³⁵ *Rome Statute*, above n 20, art 8 (2) (a-c) and (d).

¹³⁶ *Ibid*, Preamble, [4].

¹³⁷ See McCormack and Robertson, above n 124, 662.

¹³⁸ See Mahnouch Arsanjani, 'The Rome Statute of an International Criminal Court' (1999) 93 *American Journal International Law* 33.

With regard to the threshold level of gravity for inhumane acts to qualify as crimes against humanity, the two accepted indices of the gravity of alleged acts were 'widespread' and 'systematic'. Widespread relates to the scale of an attack against a civilian population—not an isolated act but large scale action directed against multiple victims. Systematic, on the other hand, carries a connotation of premeditation by an organised group—an attack carefully planned and undertaken as part of a common policy. Article 7(1) provides that the particular acts must have been 'committed as part of a widespread or systematic attack directed against any civilian population' where such an attack is understood to mean 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.'¹³⁹ This formulation therefore effectively excludes isolated and single acts as crimes against humanity. While the prosecution will not be required to prove that the alleged acts were both widespread and systematic, it will now be insufficient merely to prove one or the other indicia to constitute an indictable crime against humanity. This may make it more difficult for the prosecution to prove the elements of a crime against humanity in particular cases.¹⁴⁰

Thus it will be possible to prosecute individual UN troops for violations of international humanitarian law under war crimes without the constraints involved in the high threshold level required to prosecute for crimes against humanity. It is possible that in many cases, an act can fall under the category of crime against humanity or a war crime. But as the text of the Court's provisions provide, the particular case's classification test is premised on two indices, 'widespread' and 'systematic'. Thus, there is, in effect, a lower threshold level in war crimes that allows the prosecution of single and isolated incidents of violations as discussed above. It is unlikely that the high threshold level for crimes against humanity can be realistically fulfilled in the prosecution of UN troops for violations of international humanitarian law. This is so because the acts committed by UN troops tend to be isolated and sporadic acts of military indiscipline or indifference. Even when multiple, these incidents are not part of a 'large scale action' or 'form part of a common policy'—instead these occur as a result of 'overzealous' actions of the UN troops.

D National or International Justice Interests?

1 State-Consent Regime

The Security Council's referral of a situation to the ICC overrides any requirement of the consent of a relevant State as a precondition for the Court's exercise of jurisdiction: that authority is inherent in the Council's constitutional authority under Chapter VII of the Charter. However, in respect of cases initiated either by a complaint from a State Party or on the basis of an independent investigation on the part

¹³⁹ *Rome Statute*, above n 20, art 7(2)(a).

¹⁴⁰ See McCormack and Robertson, above n 124, 653-4.

of the Prosecutor, the Court does not exercise compulsory jurisdiction. Instead, the *Rome Statute* requires the consent of either the territorial State or the State of the accused's nationality for the case to proceed.¹⁴¹ If either territorial State or the State of nationality are not States Parties to the Statute, it is possible for one or other of them to extend ad hoc consent to allow the Court to exercise its jurisdiction in a particular case.¹⁴² It should be recognised that this State consent regime was the biggest stumbling block to US support for the *Rome Statute*.¹⁴³ The US delegation insisted that the consent of both the territorial State and the State of nationality was critical to the credibility of the Court. Essentially, the Court's jurisdiction may be exercised over any person anywhere if that person is a national of a State party or committed a crime on the territory of a State Party. A non-State party may consent on an ad hoc basis to the Court's jurisdiction where necessary. Thus, if a territorial State (party or non-party) is willing to subject itself to the tribunal, that suffices to confer the Court's jurisdiction over *any* national.

2 Complementarity

Although the *Rome Statute* does not use the term 'complementarity', the Preamble and Article 1 describe the new Court as a 'complement' to existing national courts and processes¹⁴⁴—hence the coining of the term 'complementarity'. The agreed formula in the *Rome Statute* is that a State with jurisdictional competence has the first right to institute proceedings unless the ICC decides that the State 'is unwilling or unable genuinely to carry out the investigation or prosecution.' The assumption in Rome was that such a determination would be straightforward for the ICC in either of two situations: (i) where the State, for whatever reason, chooses not to exercise its jurisdictional competence—the 'unwilling State'; or (ii) where the State's legal and administrative structures have completely broken down.

The complementarity referred to in the statute strives to harmonise, wherever possible, multiple and competing sources of jurisdiction over international crimes. It developed as a principled and pragmatic way to accommodate the conflicting imperatives of State sovereignty and the need for a permanent international institution to end impunities for atrocities at a time of global proliferation of localised armed conflict. As suggested by its name, it ensures that the ICC complements rather than replaces national judicial systems. In recognising States' concurrent jurisdiction over serious violations of international law, the Court is expected to strengthen national enforcement of human rights and human rights norms.

A critical issue of concern though, is that in the context of a permanent ICC, there seems little justification for a separate regime for Security Council referrals, which

¹⁴¹ *Rome Statute*, above n 20, art 12(2).

¹⁴² *Ibid*, art 12(3).

¹⁴³ See David Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American Journal International Law* 12, 18.

¹⁴⁴ *Rome Statute*, above n 20, art 17, having regard to Article 1 and the Statement of the Preamble in para 10.

undermines the Court's complementary juridical underpinning and its support. While acknowledging that the ICC has no authority to alter the criteria for the exercise of the Security Council's Chapter VII powers, the lack of parallel complementarity criteria for Security Council referrals to the Court raises the spectre of a Court reduced on some level to permanent institutionalised Security Council ad hocism, which re-enshrines Security Council hegemony. This would re-introduce the Security Council's power and pave the way for national interests of States to override international justice interests. In this scenario, the prosecution of UN troops would never materialise. Preferably, and ideally, the ICC should be a formally independent institution.

3 *Admissibility*

Criteria concerning admissibility and procedures that must be followed are spelled out in Articles 17 and 18, and are applied in conjunction with the double jeopardy principles of Article 20. The Statute establishes a presumption of inadmissibility whenever a State is exercising, or has exercised, its national jurisdiction over a case. Good faith is both presumed and expected in the national adjudication of such cases, whatever their outcome subject to the *ne bis idem* provision.¹⁴⁵ The standard for admissibility is articulated as a State's unwillingness or inability to genuinely carry out an investigation or a prosecution. This standard is applied to prospective and ongoing investigations and prosecutions as well as a State's decision not to go forward with a prosecution after conducting an investigation. If a State will not or genuinely cannot conduct a good faith investigation or prosecution, then the ICC may exercise jurisdiction over the case. This is to prevent a State from blocking the Court's jurisdiction on the basis of its own assertion of a bona fide process or the existence of jurisdiction that confers national primacy to it. It should be noted that for the purposes of articulating the language of admissibility, what is being reviewed is a 'case' not a 'situation.' In other words, Article 17 presumes that the Prosecutor has already made a determination that sufficient evidence exists to charge at least one individual with the commission of a crime or crimes, and that a State's investigation and/or prosecution corresponds (at least) to that particular individual.

4 *Immunities*

In recognising that in matters of international law, 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State', Article 27 of the *Rome Statute* provides against 'immunities and procedural rules which may attach to the official capacity of a person, whether under *national* or *international* law' (emphasis added) which may bar the Court from exercising jurisdiction over such a person. An unresolved but controversial issue that is related to jurisdiction is the question of amnesties and pardons that

¹⁴⁵ Prohibition of double jeopardy—preventing a person from being tried and punished for the same crime twice.

States from time to time grant to perpetrators within the Court's mandate.¹⁴⁶ Yet another issue that appears unresolved is the status of forces agreements the UN may from time to time enter into with States with regard to the presence of UN forces on the State's territory.

V CONCLUSION

The documented international humanitarian law violations by troops participating in UN military operations demonstrates the need—now that the United Nations has been given a breath of new life and may become the 'tool' for enforcing or maintaining peace—to consider whether the UN can be held accountable for laws of war violations by its troops. Traditionally international humanitarian laws have regulated the conduct of States during armed conflict, and only gradually come to be recognised as applying to United Nations forces as well. The rules, embodied in the Hague and Geneva Conventions, should regulate the conduct of UN forces, and do so in so far as they embody customary international law. It is to be noted that of the four categories of crimes (including the yet to be defined crime of aggression) in the *Rome Statute*, it is in the category of war crimes in which the black letter law most strongly establishes inherent or automatic jurisdiction.¹⁴⁷ The common articles state '[e]ach High contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts.'¹⁴⁸ This affirmative obligation will be placed on the UN which can choose to designate the municipal courts of one or more of the Participating States in a particular mission to prosecute or refer the matter to the ICC.

However, because there are those who feel that the unique status of the United Nations exempts it from the obligation to observe these rules in their entirety, the United Nations should become a party to the Hague and Geneva Conventions. By doing so, the laws of war would bind it as a subject. This, in turn, would give rise to direct rights and duties on the part of individual UN troops. Becoming a party to the Conventions will ensure that the UN Forces will be held to no less of a standard than other parties to an armed conflict. Such a result is not only desirable, but is also logical. After all, the UN is the body created 'to reaffirm faith in fundamental human rights'.¹⁴⁹ To hold the UN to a lesser standard would require the belief that the UN itself is not capable of protecting those rights or that the UN exists outside the law.

State immunity and special procedural rules are unavailable under the *Rome Statute* as a defence against the institution of criminal proceedings before the ICC. Nothing

¹⁴⁶ Daniel Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87, 119.

¹⁴⁷ See art 3 of each of the 1949 Geneva Conventions, above n 59.

¹⁴⁸ *Geneva Convention I*, art 49; *Geneva Convention II*, art 50, above n 59.

¹⁴⁹ Charter, above n 1, Preamble.

in the *Rome Statute* provides limitations to the categorisation of subjects who can have judicial proceedings instituted against them that would trigger the prosecutorial mechanism as long as they are *natural persons*.¹⁵⁰ This is important as the UN urges national courts to prosecute UN forces responsible for violations of international humanitarian law.¹⁵¹ Three times in the last decade of the 20th century, national adjudicative mechanisms failed to guarantee justice for the victims of laws of war violations by UN forces.

The issue of the ICC's judicial authority over UN forces is unpalatable to the international and national political framework and is a volatile international issue in view of its potential to cripple Security Council sanctioned 'police action'. Concomitantly there may be concern that subjecting the UN troops to the international judicial process would curtail advances in the post Cold War collective global security regime. It is instructive that the complementarity regime in the Statute represents a broad protection regime for State Parties.¹⁵² Through complementarity, State jurisdiction is preserved by efficiently operating national criminal justice systems.

It is in all of our interests that the UN be held accountable for its military operations. For too long State political interests have subsumed the interests of the world community, reducing the UN to a global association of nation-states rather than an organisation entrusted with the human rights values and aspirations of the planet's citizenry. A blank cheque to the Security Council in its 'police action' is anathema to the international rule-of-law regime that the UN is building as a foundation for the international legal order. General UN policy subscribing to the application of fundamental principles and rules of international humanitarian law is not enough. The rights and duties must be directly possessed by the UN as a subject of these laws and ultimately these rights and duties must be transposed to the objects concerned, the individual UN troops.

The reality is that the ICC is still a long off, so there is an urgent need to strengthen the current UN military operation framework. The Security Council routinely adopts resolutions long on generalities and short on particulars. It is important that the conceptual and procedural clarity of the mandate is spelt out. The Security Council should provide meaningful military guidelines of the operation in light of the mandate. Particular emphasis should be given to observance of international humanitarian law especially by UN troops involved in a spectrum of conflict.

Problems also exist throughout the entire chain of command in UN forces. The UN secretariat should carry out further reforms in the Department of Peacekeeping Operations (DPKO), by putting in place a standing command-and-control cadre.¹⁵³

¹⁵⁰ *Rome Statute*, above n 20, art 25 (emphasis added).

¹⁵¹ See, Secretary General's Bulletin and Model Agreement, above n 21.

¹⁵² *Rome Statute*, above n 20, art 1.

¹⁵³ Though it may be argued that any military planning functions should come under the Security Council (preferably as part of a rejuvenated Military Staff Committee (MSC) as intended by the authors of the Charter in art 47), that is not likely to occur soon, and it is more expedient to push for further reforms in

One of the most significant challenges of any UN military mission is the establishment of a field headquarters. Generally, new staff take a long time to get to know each other, and most important, to establish ground rules for working together and addressing issues arising from the troops as a collectivity rather than as a loose association of semi-autonomous national contingents. Inevitably, force commanders end up by-passing mission field headquarters, and receiving orders from their capitals on all aspects of troop misconduct. This is due to governments' exclusive rights to deal with troop indiscipline in their contingents.¹⁵⁴ This allows any damaging information or evidence of troop misconduct to be classified by concerned governments and thus taken out of the public domain.

The DPKO office, after its 1996 reformation, had units formed within it for, among other purposes, establishing training criteria and syllabuses for national contingents.¹⁵⁵ These units should be active especially among countries that routinely contribute troops, to ensure that the governments endeavour to disseminate international humanitarian law to the troops extensively. This will forestall government buck-passing in the event of international humanitarian violations. Governments contributing troops should be encouraged to brief troops before departure and to emphasise the need to observe international humanitarian law in the course of their duties. A reminder that they are not above the rule of international law will have a sobering effect on troops.

The DPKO should have a nucleus of civilian and military personnel who are assigned the task of discipline among UN forces.¹⁵⁶ This senior level task force should be responsible for regular consultations with the field headquarters on the issue of troop discipline and conduct. The task force should be responsible to the Security Council, and serve as an interface between the political authorities and force commanders. By being responsible to the Security Council, the task force will enjoy a sphere of institutional independence from the Secretary-General. Part of the current dilemma is that the Secretary-General plays two antagonistic roles—he is in charge of peacekeeping operations at the same time as he is expected to be a neutral mediator.

Finally, to deal with the issue of strong national political currents to the externalisation of troop discipline, senior officers of the larger contributing forces in any given mission should form a disciplinary arm as part of the field headquarters staff. Troop-contributing States should be asked to deal through this mechanism on mat-

the Secretariat with regard to peacekeeping. It also bodes well for the goodwill of member States who are ever wary of the seeming monopolisation of international peace and security issues by the Security Council's 'Big Five'.

¹⁵⁴ See, Secretary-General's Bulletin and Model Agreement, above n 21.

¹⁵⁵ For an illustrative list of these reforms, see D C F Daniel and B C Hayes, 'Securing Observance of UN Mandates Through Employment of Military Force' in M Pugh (ed) *The UN, Peace and Force* (1997) 114.

¹⁵⁶ In 1996, the number of personnel in the DPKO was increased from six civilians and three military officers to around a staff of about 450. As the personnel are present the step of assigning a particular unit a specific mandate on troop discipline ought to be practically possible.

ters of discipline affecting their contingent (even as they file reports to their capitals, which is inevitable). The representative disciplinary arm should then investigate, document and safeguard any evidence on the matter. The primary duty of the task force at the DPKO should be to second military officers as liaison persons who will forward reports to the Security Council. This will short-circuit the internalisation of a disciplinary matter by a particular contingent. This should also possibly pre-empt the governments from destroying or withholding evidence or to cover this up, which as history has shown, they are wont to do. When the information is out in the open, governments are generally keen to give a good account of themselves. Documented information and evidence will facilitate military transparency and government accountability. Hence, transparency of process and independent evidence are essential elements in this process, as governments and armies are notorious for using their code of secrecy as an alibi for conspiracies and for dealing with image-damaging information.