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POLICING INTERNATIONAL PEACE AND SECURITY: INTERNATIONAL POLICE FORCES

HENRY H. PERRITT, JR.¹

I. INTRODUCTION

An international police force is a desirable tool to supplement economic sanctions and application of peace keeping and peace enforcement measures² as they have so far been understood. Such a force will be more effective in specific situations if it can be deployed according to a permanent organizational and legal plan.³ To be successful, the force structures and rules of engagement of an international police force must be integrated with measures aimed at establishing a broader rule of law. International policing can succeed only if it occurs under a well understood legal framework, including an appropriate mandate, supporting rules of engagement, and shielded by privileges and immunities. Concepts of privileges and immunities for international forces under Status of Forces Agreements (SOFAs)⁴ and the draft Convention on the Safety of United Nations and Associated Personnel,⁵ can provide an appropriate shield when a sufficient mandate and rules of engagement exist.

¹ Dean and Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; co-founder of Project Bosnia, which uses information technology to support a rule of law in the Balkans; member of the bar: Virginia, Pennsylvania, District of Columbia, Maryland, Illinois and the United States Supreme Court. The author appreciates suggestions from Frederick M. Abbott, Harry E. Ashton, Stuart P. Ingis, Bartam S. Brown, Charles S. Rudnick, Matt Strickler, Suzanne Strickler, Andrew Wachtel, Walter J. Kendall, III, and Mark Wojcik on drafts of this article.

² The UN Secretary General has suggested that "peace operations" encompass: "1. Preventive Diplomacy; 2. Peacemaking; 3. Peacekeeping; 4. Peace-enforcement; and, 5. Peace-building." LCDR Glenn T. Ware, *The Emerging Norm of Humanitarian Intervention and Presidential Decision Directive*, 44 NAVAL L. REV. 1, 12 (1997).

³ An organizational and legal plan includes the legal basis for intervention (the "mandate"), specification of the legal relationship between international forces and domestic legal institutions ("status of forces"), an appropriate definition of mission and rules pursuant to which force can be used ("rules of engagement"), prescriptions for training, calling up and deploying forces, and definitions of command structures, unit composition and unit function ("force structures").

⁴ Status of Forces Agreements determine the relationship between military authority and domestic legal authority. Such agreements may, for example, waive jurisdiction in civilian court over military personnel acting under orders. In the absence of the Status of Forces Agreement, military personnel are subject to domestic criminal and civil jurisdiction unless some principle of international law provides them with immunity or a privilege. Martial law imposed by occupation forces is one such source of immunity.

⁵ *Convention on the Safety of United Nations and Associated Personnel*, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, at art. 2, U.N. Doc. A/RES/49/59 (1994), reprinted in 34 I.L.M. 482 (1995) [hereinafter *Convention on Safety*]; see Steven J. Lepper, *The Legal Status Of Military Personnel In United Nations Peace Operations: One Delegate's Analysis* 18 HOUS. J. INT'L L. 359, 370 (1996).

II. AN INTERNATIONAL POLICE FORCE WOULD BE A USEFUL ADDITION TO THE TOOLS AVAILABLE TO THE INTERNATIONAL COMMUNITY

"As we consider ways to support the IPTF (the international police advisory force in Bosnia), we may want to look to the kinds of capabilities that can be found in many countries, in the form of Gendarmes and Carabinieri. Such forces could increase SFOR's (the international military force in Bosnia) flexibility, enhancing the implementation of Dayton as well as force protection."⁶

Threats to international peace and security now come as much from a breakdown of law and order within states as from military aggression by one state against another.⁷ Traditional international peace-operations forces are not well suited to deal with these threats. Recognizing the inappropriateness of the traditional peace keeping model, the international community has struggled to define the circumstances under which other forms of involvement under international auspices are appropriate.⁸ In recent crises in Somalia, Bosnia, Haiti, Albania, and Kosovo, the options for international action seemed too stark: diplomacy alone, economic sanctions, use of peace keeping forces in situations in which peace had not been established, or large scale introduction of conventional military forces. In all of these cases, the goal was to restore law and order, not to achieve or to maintain an armistice between opposing armies.⁹ The mismatch between the forces available and the problems to be solved is manifest in the reluctance of NATO commanders to move aggressively to arrest indicted war criminals in Bosnia. They perceived arrest as a police problem, themselves as military forces. Superficially, the problem was the rules of engagement. More fundamentally, it was a mismatch between the mission and the type of force

⁶ Secretary of State Madeline Albright, Statement at North Atlantic Council Ministerial Meeting NATO Headquarters, Brussels, Belgium (December 16, 1997).

⁷ See generally ARTHUR I. CYR, *AFTER THE COLD WAR* 142-57 (1997) (noting need to rethink NATO mission and foreign policy generally in terms of new threats); GIDON GOTTLIEB, *NATION AGAINST STATE* 90-91 (1993) (explaining need for international law of intervention to accommodate intervention in "domestic" conflicts produced by ethnic conflict); DANIEL PATRICK MOYNIHAN, *PANDAEMONIUM* 148-49 (1993) (describing international law struggle to define limits of self-determination principle).

⁸ See U.N. Press Release, *Security Council Encourages States To Make Trained Civilian Police Available At Short Notice For United Nations Operations*, SC/6397, July 14, 1997; (wherein the Special Committee urges the Secretary-General to continue to strengthen the Civilian Police Unit within the Department of Peacekeeping Operations, which should develop a coherent strategy for the logistic support of peacekeeping operations. It also expresses the belief that the United Nations should be able to promptly deploy a peacekeeping operation on the adoption of an authorizing mandate by the Security Council and encourages the Secretariat to intensify its efforts in that area); U.N. Press Release, *Assembly Would Endorse Recommendations Of Special Committee On Peacekeeping, By Fourth Committee Draft*, GA/SPD/121, November 14 1997.

⁹ In Bosnia, an armistice had to be established first, but thereafter, the problem was as the text states.

available.

The type-of-force and rules of engagement questions are interrelated. If the nature of the force does not match the mission, the rules of engagement are not likely to match the mission either. In circumstances in which the mission is to establish and preserve law and order, a police presence, more than a traditional military presence, is necessary. For the international community to cope effectively with the post Cold War order and to the threats to international peace and security likely to be found in it, it must have a new force option: some kind of international police force.

This proposition enjoys increasing support.¹⁰ The Dayton Accords provided for an International Police Task Force ("IPTF") -- unarmed¹¹ observers intended to detect problems with the indigenous civilian police and to provide training.¹² Although the effectiveness of the IPTF has been questioned,¹³ it is a significant effort to respond to the need suggested by this article. A Haitian Interim Police and Security Force (IPSF) was used to retrain the Haitian police. The combined joint task force concept within a revised NATO doctrine can accommodate the international police idea. The Italian-led intervention in Albania was an example of a movement to new types of international law enforcement forces. Italian Carabinieri¹⁴ participated in the United Nations Observers Mission in El Salvador ("ONUSAL"), verifying compliance by opposition forces and promoting establishment of a rule of law, in the United Nations Transitional Authority in Cambodia ("UNTAC") to maintain order and to protect human rights

¹⁰ Nor is the possibility of international police activity a new phenomenon. In the early part of this Century, United States Marines regularly performed police duties in Latin America. See William Rosenau, *Non-Traditional Missions and the use of Force: The Debate over Peacekeeping, Peace Enforcement, and Related Operations*, 18-SPG FLETCHER F. WORLD AFF. 31, 44 (1994) (describing role of Marines in Haiti in 1915-1934, Santo Domingo in 1916-1924 and Nicaragua in 1927-1932).

¹¹ In his report preceding the establishment of the IPTF, the Secretary General discussed and rejected the possibility of arming members of the IPTF:

Given the widespread availability to the population of long arms and even heavier weapons, I have given consideration to the possibility of arming the International Police Task Force monitors. The traditional side-arms carried by police officers would, however, be no match for the type of weapons likely to be at the disposal of those who might threaten the monitors. The security of the Task Force must flow from the authority granted to it by all parties under the Agreement and from the fact that its personnel represent no threat to any armed element in that area of operation. I strongly recommend, therefore, that the Task Force monitors should not be armed.

REPORT OF THE SECRETARY GENERAL PURSUANT TO SECURITY COUNCIL RESOLUTION 1031 (Dec.13, 1995).

¹² See *Dayton Accords, Annex 11* <http://www.vcilt.org/vcilt/bosnia/dayton/annex_11.htm>.

¹³ Fionnuala Ni Aolain, *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, 19 MICH. J. INT'L L. 957, 990-93 (1998) (summarizing shortcomings of IPTF experience, including lack of resources, lack of sensitivity to local legal culture including procedure in civil law system, slow and cumbersome vetting and training processes local forces, and inaccessibility to ordinary citizens).

¹⁴ Sometimes known colloquially in Italy as the "military police."

after the cease fire and before elections. Some Carabinieri officers served in Guatemala to monitor compliance with agreements between the government and the revolutionary opposition ("UNIMIGUA").¹⁵

The United States Institute for Peace organized a workshop on police functions in international police operations in 1996.¹⁶ In July 1997, the president of the UN Security Council "took particular note of the increasing role and special functions of civilian police" in peacekeeping operations¹⁷ and endorsed an "increasingly important role for civilian police . . . in order to prevent conflict, to contain conflict, or to build peace in the aftermath of conflict."¹⁸ He encouraged joint military/police training and encouraged member states "to make available to the United Nations at short notice appropriately trained civil police, if possible through the United Nations standby arrangements."¹⁹ Colonel Michael Dziedzic, drawing on the lessons of Bosnia, Somalia, and Haiti, has edited a book on international police forces.²⁰

Analysis of international police force issues has become more important because of three recent developments. Negotiations with Yugoslav President Slobodan Milosevic resulted in organization of a multinational observer force to be assigned to the Kosovo province of Serbia. While the initial force is unarmed, its duties are similarly to those likely to be undertaken by an international police force. Many of the legal issues relating to an international police force also may arise in connection with the Kosovo observer force, although those relating to arrest powers are not likely to arise. Two multinational police forces actually were organized in late 1998. A multinational Carabinieri force was deployed as a part of NATO's SFOR in Bosnia. In late 1998, the NATO stabilization force in Bosnia organized a multinational specialized unit," which includes 380 Carabinieri officers from Italy, 70 Gendarmes from Argentina and 23 military police from Romania. Organized as a battalion within SFOR, this force has been trained to deal with civilians as much as enemy troops.²¹ NATO's American commander, General Wesley K. Clark, advocated creation of the force to fill a gap between NATO's military resources and

¹⁵ Gabriella Venturini, *Italy and the United Nations: Membership Contribution and Proposals for Reform*, 20 HAMLINE L. REV. 627, 630 (1997).

¹⁶ See Roxane D. V. Sismanidis, *Police Functions in Peace Operations: Report from a workshop organized by the United States Institute of Peace*, PEACEWORKS NO. 14 (United States Institute of Peace ed., 1997).

¹⁷ Statement by the President of the Security Council, (S/PRST/1997/38) (July 14, 1997).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ ROBERT B. OAKLEY ET AL., *POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY* (1998).

²¹ Steven Lee Myers, *NATO Sends in the Foreign Police in Bosnia*, N.Y. TIMES, Oct. 6, 1998 at A11.

local authorities.²² The size of the force is expected to grow in the future.²³ More generally, Italy and other southern European countries agreed to establish a multinational police force drawing from police-trained forces in Italy and the other participating countries.

An international police force obviously is not suitable for all kinds of international involvements. Bosnia is a good example. One of the reasons that UNPROFOR did not succeed in Bosnia was that the UNPROFOR forces were too lightly armed to deal with more heavily armed Bosnian Serb forces.²⁴ A related problem was that the rules of engagement for UNPROFOR were too defensive. At the early stages of the Bosnian conflict and certainly after the siege of Sarajevo began, use of regular military forces rather than international police was more appropriate.

Even after the Dayton accords were agreed to, before it was clear that Serb, Croat, and Bosnian forces would respect the military provisions of the Dayton accords, a substantial military presence was appropriate, along the lines reflected by the NATO IFOR involvement. After the first year, however, and certainly after the second, a transition to an international police force structure, backed up by traditional military capability, would have been appropriate if that option had existed as a practical matter.

Policing like most of aspects of international relations, is a political process. Before focusing on the details of force structures, rules of engagement, or justification under international law for involvement, it is appropriate to consider whether an international police force is likely to provide greater political benefits than costs to the international community. Regime theory is useful in that regard because it bridges the gap between the realist school international relations, which questions the efficacy of any form of international institution and the liberal institutionalist school of international relations, concentrating on international institutions.

III. A PERMANENT ORGANIZATIONAL AND LEGAL PLAN FOR INTERNATIONAL POLICE INTERVENTION IS DESIRABLE

A. Regime Theory Provides a Useful Matrix

Merely because establishment of an international police force for involvement in failed or transitional states is desirable or logical in a particular case does not mean that the international community will

²² See *id.*

²³ See *id.*

²⁴ See generally DAVID ROHDE, END GAME 22-23 (1997) (describing panic and abandonment of observation post by Dutch UN peacekeepers perceiving that they were overmatched by Bosnia Serb forces with tanks).

establish one. Game theory teaches international relations scholars that the operation of rational self-interest may lead to sub-optimal results.

The Prisoner's Dilemma, a common example from game theory, involves prisoners being questioned separately by a prosecutor. Under the terms offered by the prosecutor, if neither confesses, the worst that can happen is that each will be convicted of a misdemeanor and sentenced to 30 days. If both confess, both will be convicted and sentenced for one year. The prosecutor has promised each of them separately that if he confesses while the other refuses to confess, the confessing prisoner will not be prosecuted at all and the one refusing to confess will be punished with a five-year sentence.²⁵

In these circumstances, the best outcome for both prisoners is for neither to confess. But if both confess, each will be better off than if he refuses to confess and the other confesses. The results in terms of self-interest will be two confessions, resulting in a one-year prison term for each, although both would have been better off if both had refused to confess. This prisoner's dilemma game shows how circumstances may exist in which rational pursuit of self-interest does not lead to a Pareto optimal solution.²⁶

Related theories of group action postulate that rational self-interest may make it difficult to engage in collective action even though collective action would be beneficial to everyone. Mancur Olson's 1965 *Logic of Collective Action* postulates sub-optimal results because of the self-interest in free riding when collective action is proposed.²⁷

The prisoner's dilemma and the *Logic of Collective Action* suggest that sovereign states, acting without any overarching international legal system to shape their decision-making, may be unable to cooperate on things like international police activity. But another body of international relations theory -- regime theory -- suggests that cooperation may be possible. Regimes are sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actor expectations converge.²⁸ John Ruggie introduced the concept of international regimes in 1975.²⁹

Realists and neo-realists in the field of international relations -- the

²⁵ See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION & DISCORD IN THE WORLD POLITICAL ECONOMY* 68 (1984).

²⁶ Pareto optimality refers to the state in economics in which each good and service has been distributed so that aggregate welfare has been maximized, without making anyone worse off.

²⁷ For example Germany would benefit from reduction in refugee flows from the Balkans if other states organize an appropriate political and security solution to the crisis in Kosovo, even if it makes no contribution to the solution. Germany thus has an interest in being a free rider on initiatives developed and supported by others.

²⁸ Robert O. Keohane, *The Demand for International Regimes*, in *INT'L REGIMES* at 141 (Stephen D. Krasner ed., 1983).

²⁹ See KEOHANE, *supra* note 25, at 57.

group most skeptical about the efficacy of international law and international legal institutions -- have suggested how regimes might make a difference in the sense of influencing the dynamics of international relations. At the highest level of abstraction, they say that regimes can alter the outcome of the prisoner's dilemma. More specifically, they suggest that:

1. Regimes may crystallize norms, thus making compliance with the norms more likely because they are easier to understand.
2. Regimes may reduce transaction costs for developing norms.
3. Regimes may reduce ambiguity as to what conduct constitutes norm compliance and what constitutes violation, making voluntary compliance more likely.
4. Regimes make it easier to focus social, political, and coercive disapproval for norm violation by reducing the transaction costs for rule compliers who wish to express their disapproval of rule violators.
5. Regimes facilitate international response because they permit domestic political pressures to be focused on norms and make it easier to mobilize domestic public opinion against norm violators.

Robert Keohane agrees, distinguishing his analysis of regimes from that of the liberal institutionalists. Keohane accepts the realist model of "rational egoism" on the part of state actors.³⁰ But Keohane goes beyond the basic assumption of rational egoism and the first-order prisoner's dilemma and free riding models, explaining why these simple rational choice models are misleading in terms of their implications for international relations.³¹ More sophisticated versions of the prisoner's dilemma, including repeated plays by a small number of players, suggest that cooperation may be the result of interaction.³² The possibility of negotiation -- which is the whole point of international regimes, makes cooperation even more likely.³³

Experience in domestic fields reinforces the correctness of these theoretical constructs. In U.S. collective bargaining, difficult problems necessitating agreement between labor and management are easier to solve when there is some kind of standing mechanism supplementing periodic negotiations over new collective bargaining agreements. This is particularly

³⁰ *See id.* at 67.

³¹ *See id.* at 72-73.

³² *See id.* at 76.

³³ *See id.*

true in industries such as the railroad industry that have multiple unions and multiple employers that bargain together. The Railway Labor Executives Association and the Railway Labor Conference are examples of domestic regimes. In federal agency rulemaking, the establishment of rule negotiation committees has facilitated the development of regulation drafts in controversial areas. More fundamentally, the establishment of an agency itself can be characterized as a regime, substituting for ad hoc political negotiations and litigation in regular judicial forums.³⁴

Merely because regimes may be helpful in some areas of international (or domestic) relations, of course, does not necessarily mean that they can be helpful in the international security area. Writing before the end of the Cold War, Robert Jervis considered whether there is a demand for regimes in the security arena as well as in the trade arena.³⁵ He concluded that the political dynamics creating incentives for regimes can exist in both trade and security arenas. Tariff wars can be seen as analogous to arms races; beggar-thy-neighbor trade policies look like attempts to gain short run security, the dispoiling of the global common resembles a war that both sides hope to avoid.³⁶ He identified, however, four important differences:

1. Greater competitiveness in security than in economics, in part because trade competition is not as likely to be a zero sum game as security competition
2. Both offensive and defensive security motives can lead to an arms race.
3. Prisoner's dilemma stakes are higher in the security arena than in the trade arena.
4. Detecting what others are doing and measuring one's own security is more difficult than determining relative positions in trade.

These factors, he suggested, make the prisoner's dilemma more acute in the security arena.³⁷ When one thinks about Jervis' four factors, however, it becomes obvious that all of them relate to international *competition* in the security area rather than international *cooperation*. They are more appropriate to evaluating the prospects for a disarmament regime than they are to evaluating the prospects of an international peace operations force.

³⁴See Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COMP. L. 1, 64 (1997) (noting need to consider relationship between regime theory and administrative law).

³⁵See ROBERT JERVIS, *SECURITY REGIMES & INTERNATIONAL REGIMES* 173 (ed. Stephen D. Krasner 1983).

³⁶See *id.* at 174.

³⁷See *id.* at 174-75.

The failed state problem is closer to a trade problem than to an arms race. An arms race is a zero-sum game. A failed state raises the possibility of refugee flows, and domestic political controversy over human rights violations. Defending against those possibilities is not a zero-sum game. These are problems similar to trade problems which Jervis suggests are more amenable to cooperation than competition. So without disagreeing with Jervis' analytical framework, one can conclude that situations calling for international police activities are more like international trade cooperation than cooperation over arms control in a bilateral structure. When international cooperation is necessary to shape determinants of intervention, to design an appropriate force, to decide on an rules of engagement, and to construct an appropriate set of privileges and immunities, the incentives and disincentives operating on states are not obviously different in kind or magnitude from those operating on the same states when they establish trade agreements and the organizational machinery necessary to implement them.³⁸

Robert Keohane has observed that maintenance of international regimes is easier than their creation. This would explain why NATO is a more effective regime for the application of multinational military power than extraordinary U.N. operations such as that attempted in Bosnia.³⁹ Keohane's observation also suggests that a standing international police force would engender fewer political costs than international police intervention organized on ad hoc bases.⁴⁰ The July 1997 statement by the President of the UN Security Council⁴¹ is consistent with this proposition, calling for joint training and standby arrangements for international police cooperation.

B. An International Police Force Would Facilitate Norm Development at Three Levels

While regimes can facilitate interstate cooperation of any kind, much of regime theory focuses on how regimes facilitate development of

³⁸ See generally Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 NW. J. INT'L L. & BUS. 900 (1996-97) (comparing institutional structures for trade management in Europe with those of the Americas); Frederick M. Abbott, *Symposium: The Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform* Regional Integration Mechanisms In *The Law Of The United States: Starting Over*, 1 IND. J. GLOBAL LEGAL STUD. 155 (1993).

³⁹ See generally Alan K. Henrikson, *The United Nations and Regional Organizations: "King-Links" of a "Global Chain,"* 7 DUKE J. COMP. & INT'L L. 35 (1996) (suggesting possibility of regional security organizations being tied more tightly to UN to enhance prospects for successful international military intervention).

⁴⁰ See KEOHANE, *supra* note 25, at 50.

⁴¹ See Statement, *supra* note 17.

international norms and state compliance with those norms. Peacekeeping norms exist at three levels: norms for intervention, norms for participation, and norms representing rules of engagement in a given intervention. Rules of engagement may be expressed in orders issued by particular institutions such as international courts.⁴²

Regime theory is pertinent to decisions to commit forces and the related decision whether to contribute to the forces once a basic decision has been made to commit. The existence of institutional mechanisms facilitates multilateral decisionmaking associated with any of the grounds for involvement under international law. For example, the existence of the Security Council (a regime) reduces transaction costs in reaching the kind of international consensus among major powers necessary for involvement under Article 42 of the Charter. Regardless of how difficult decision making is in the Security Council, it surely is less difficult than if the Security Council did not exist.⁴³ Of course, to the extent that hegemony exists, the hegemon may find it easier to act unilaterally than to build a consensus multilaterally through the Security Council or otherwise,⁴⁴ but the Security Council nevertheless, is useful when international consensus is desirable.⁴⁵ Institutional mechanisms facilitate a multilateral conclusion that self defense justifies intervention.⁴⁶ This would be the case, for example, if an international police system included norms for supplementing border protections with international forces, more or less as international forces have been used in Macedonia.

A pre-existing regime may also make it easier to obtain consent for intervention -- an important consideration in international law -- because it provides a framework within which the intervenors and the host country can determine the exact nature of the intervention. The existence of an standby international police force, with accompanying agreements on rules of engagement and privileges and immunities, also can facilitate consent because it makes it clearer and more predictable what form the intervention will take.

It is also reasonable to conclude that a standing international police

⁴² As explained *infra*, at notes 71-83 and accompanying text, rules of engagement and the mandate for action are closely linked.

⁴³ The proposition is debatable. The United States was ambivalent about seeking Security Council approval for military opposition to Iraq in the Gulf War, because it was afraid it would get the wrong answer.

⁴⁴ But see RICHARD HAAS, *THE RELUCTANT SHERIFF* (1997) (arguing that truly unilateral action by the United States is becoming less feasible).

⁴⁵ Richard Haas, in *The Reluctant Sheriff*, does not give enough attention to the role of regimes and institutions in organizing the kind of consensus he rightly explains is necessary to support U.S. intervention in the post Cold War world.

⁴⁶ Some commentators argue that the threat of refugee flows from failed states can trigger the privilege of self-defense under international law. See Brian K. McCalmon, *States, Refugees, And Self-Defense*, 10 GEO. IMMIGR.L.J. 215, 216-17 (1996).

mechanism will facilitate creation of norms for participation and norms comprising the rules of engagement. The permanent staff structure of NATO is useful in establishing the details of force structure and of the rules of engagement which then simply can be ratified by member states at periodic ministerial meetings. Having to work out norms for participation and for rules of engagement from scratch every time intervention is decided upon obviously is much more difficult. The experience of the International Criminal Tribunal for the Former Yugoslavia ("ICTY" or "Hague Tribunal") is another example. International legal questions that would have been extremely difficult to work out without standing institutional machinery can be worked out in the routine course of deciding individual cases.⁴⁷

Political agreement among nations on norms, of course, depends on sufficient domestic political support within each nation. Regimes in general assist in conferring legitimacy on multinational activities. More specifically, the existence of a continuing international police force would make it easier for domestic mass audiences to understand and accept the nature and legitimacy of multinational intervention.

Political will to use an international police force may be easier to mobilize, compared with the political will to use an international military force. That has much to do with the decision-making structure through which intervention is decided upon. Simply activating a previously agreed-upon standby arrangement usually attracts less political fire than novel, ad-hoc intervention. The outcome, however, can be influenced by the possibility of smaller scale intervention, the possibility of intervention of forces made up of contributions from one or a few states rather than only from large states. It may also lessen the perception that international intervention entirely overbears the sovereignty of the host state. Asking for international police assistance is more consistent with maintaining sovereignty than asking for foreign military forces.

C. Regional or Global Organization?

If a regime is helpful in establishing the three types of norms for international peace operations, the final question is whether the regime would be more useful if constructed on a global or regional basis.⁴⁸ Regional institutions are easier to establish. Within them, consent is easier to obtain

⁴⁷ See *Prosecutor v. Tadic*, (visited Mar. 7, 1999) <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>> (I.C.T.F.Y. Oct. 2, 1995 appeals chamber decision on defense motion for interlocutory appeal on jurisdiction, finding that Security Council validly assigned judicial authority to tribunal).

⁴⁸ See generally UN CHARTER art. 52 (preserving privilege of establishing regional agreements for dealing with peace and security).

simply because there are fewer parties.⁴⁹ However, establishing an international police force on a regional basis means that more forces must be established for the world as a whole (one for each region) which multiplies the total costs of establishing the forces. There are no doubt economies of scale associated with an international police force.⁵⁰

D. Regimes at the Tactical Level

Certain aspects of regime theory also help evaluate the implications of various force structures for international police forces and the rules of engagement. Regimes compensate for a kind of "market failure" in the political arena, caused by insufficient information and other transaction costs.

Insufficient information exists in the failed state setting at the tactical level: military intelligence is not well suited to obtain the requisite information for reestablishing a rule of law. Other transaction costs include the likelihood that application of military force will inflame the local populace, thus making achievement of the goal of the rule of law more difficult; and the likelihood that the military force structure is too cumbersome to respond to small-scale threats to security from bandits and from informal and ad hoc acts of intimidation. In Bosnia, the integration between military forces and the rest of the civil justice system has been difficult, making arrest, detention, pre-trial bail determination, and presentation for trial cumbersome at best. A well-constructed international police force may make the integration with other criminal justice institutions easier.

IV. ELEMENTS OF THE OPERATIONAL AND ORGANIZATIONAL PLAN

A. Linking Policing and Rule of Law

The relationship between policing and a rule of law⁵¹ presents a conundrum. Training and beefing-up resources for policing without establishing the elements of a rule of law simply results in a police state --

⁴⁹ See KEOHANE, *supra* note 2, for comments about fewer parties mitigating the free rider and prisoners dilemma problems.

⁵⁰ See generally David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L LAW 209 (1996).

⁵¹ See generally Richard H. Fallon, Jr., *"The Rule Of Law" As A Concept In Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (noting that rule of law concept is made up of multiple strands). This paper uses a conception of rule of law closest to the "legal process" strand identified by Professor Fallon.

a goal not likely to be desired by the international community. The police state problem is all the more serious when police personnel are foreigners. Conversely, establishing rule of law institutions while failing to provide for enforcement of their decisions does little good. No matter how fair its procedures, no matter how independent its decision-makers, and no matter how wise its decisions, if its decisions are not enforced, no legal institution will retain credibility for long.

This inter-relationship between rule of law and enforcement suggests that a successful international initiative will focus on both aspects in parallel. The rule of law component of the initiative will seek to establish the well-known elements of due process,⁵² anchored in the procedural guarantees of the covenant on civil and political rights.⁵³ In order to attain this state, the international community must organize and implement an appropriate training program for the judiciary. Resources must be mobilized by a combination of host-country and international community efforts to ensure adequate compensation for judicial officers. Additionally, organization structures must be established to ensure the independence of the judiciary from coercion by executive or legislative branch actors as well as from intimidation by terroristic forces in the community. Ideally, these conditions can be established with indigenous courts staffed entirely by local personnel. In some instances, it may be necessary to bring nationals from other parts of the host country to sit as judges to enhance independence from local forces. In some instances it may be necessary to establish international tribunals, sometimes civilian, sometimes military.⁵⁴

Equal attention must be given to the policing function. There must be some practical mechanism for bringing wrongdoers before the judicial machinery, and there must be some mechanism for executing the judgments of the judicial machinery. Ideally, local law enforcement forces with minimal training and appropriate political direction will be equal to the task.

⁵² S.C. Res. 1101, U.N. SCOR, 3758th mtg., at art. 2, U.N. Doc. S/RES/1101 (1997) (authorizing member states participating in multinational protection force to conduct operations "facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance" and "to ensure the security and freedom of movement of the personnel of the said multinational force."); S.C. Res. 940, 3413th mtg., at art. 4, U.N. Doc. S/RES/940 (1994) (authorizing multinational force to use "all necessary means to facilitate the departure from Haiti of the military leadership"); S.C. Res. 751, U.N. SCOR, U.N. Doc. S/RES/751 (1992) (creating the United Nations Operation in Somalia (UNISOM I)).

⁵³ See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS arts. 9 & 14 [hereinafter ICCPR] (enumerating arrest and criminal trial procedural rights).

⁵⁴ As the text accompanying notes 127-136 explains, the legality of an international court may be easier to establish in the context of military occupation and martial law than otherwise. The controversy over the security council's authority to establish the special criminal tribunals for the former Yugoslavia and Rwanda continues, for example.

In many instances, however, local forces will be unsuitable. They may have been so much a part of predecessor repressive regimes that they enjoy no public support. They may be so corrupt that they can not be trusted. They may lack the discipline to carry out orders. The orders from political authority may not be forthcoming because of lack of support for the international presence.

The greater the change in the judicial machinery, the less likely are existing local forces to be effective enforcement agents. That is so because existing police forces are likely to have been comfortable with the old judicial order and therefore, to resent or simply to mistrust new judicial apparatus. Instances can exist in which the populace so dislikes the existing police regime that they would welcome not only new judicial machinery, but also new international police presence. The international community must be careful, however, not to assume that such conditions exist. Far more likely is the prospect that a highly visible foreign force, unable to speak the local language, can be easily scapegoated by irresponsible political forces. The problem is similar in many ways to the resentment focused on predominantly white municipal police forces in predominantly black urban ghettos in the United States.

All of this makes it extremely important that the details of the police/judiciary apparatus be tailored closely to the conditions existing in the host-country, with appropriate variations from region to region within the country. It also means that careful training and community policing is essential so that international forces will be sensitive to the kinds of things that can reduce their acceptance by the local populace.

The interface between police -- whether international or domestic -- and the judicial institutions is defined in terms of certain procedural protections defined under international law⁵⁵ and the vices they are meant to address. (See Table following page).

How these specific functions will be performed and the international law requirements met provides the planning framework for defining an appropriate strategy for deployment of an international police force, including an exit strategy. Moreover, the relationship between international police and judicial institutions and their domestic counterparts

⁵⁵ The following table summarizes procedural protections required by articles of the ICCPR, *supra* note 53.

Problem	Procedural protection
Coerced confession	Exclusion of confessions – “Miranda rule” Civil action against coercing actors
Detention without criminal conduct	Probable cause determination By neutral magistrate ⁵⁶ Within short period of time ⁵⁷ Habeas corpus ⁵⁸
Prolonged detention without adjudicated guilt	Prompt trial guarantee ⁵⁹ Entitlement to bail ⁶⁰
Inadequate defense	Notice of charges ⁶¹ Entitlement to counsel of choice ⁶² Availability of independent defense counsel
Nulla poena sin crimen	No ex post facto laws ⁶³ Independent judiciary Competent, trained judiciary Access to content of law

must be carefully defined.⁶⁴

Staffing of both judiciary and domestic police forces is important

⁵⁶ See *id.* at art. 9(3).

⁵⁷ See *id.* at art. 9(3).

⁵⁸ See *id.* at art. 9(4).

⁵⁹ See *id.* at art. 9(3).

⁶⁰ See *id.* at art. 9(3).

⁶¹ See *id.* at art. 14(3)(a).

⁶² See *id.* at art. 14(3)(b).

⁶³ See *id.* at art. 15(1).

⁶⁴ See generally Aolain, *supra* note 13, (addressing interdependent relationship between international and domestic legal institutions in Bosnia); *but cf.* Bartram S. Brown, *Nationality And Internationality in International Humanitarian Law*, 34 STAN. J. INT'L L. 347 (1998); Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals* 23 YALE J. INT'L L. 383 (1998)

to ensure impartiality and credibility with the population. Often the need for an international police force will be determined by the period of time necessary to provide for reform of indigenous police and judiciary institutions, including vetting and training of personnel. Any practicable exit strategy for international police presence depends on having in place a suitable system for vetting and training domestic police and judiciary officers.

B. Defining International Police Involvement

Two operational questions are important in designing international police involvement:⁶⁵

1. What kind of functions and force structures should be introduced?
2. What should be the rules of engagement?

1. Functions and Force Structures

It is easiest to describe the nature of an international police force by comparing such a force with more traditional military forces.

The functions to be performed by an international police force, and the characteristics of such a force differ significantly from the functions and characteristics of international military forces. The matrix on the following page summarizes some of the important differences.

International police forces could be organized in a variety of ways. Major alternatives have been summarized in Colonel Dziedzic's work. One straightforward way to organize such forces is simply to augment the existing UNCIVPOL. This option is unlikely because it would involve significant increases in UN employees in a time of budget stringency at the UN. Moreover, it is far from clear that the existing UN organization has the capacity to train and manage an operational force of this kind.

A second basic option is for states to train reserve forces that could be deployed as part of an international force, as suggested in Security Council presidential⁶⁶ and General Assembly statements.⁶⁷ For example, in the United States, members of municipal, county, state, and federal law enforcement activities could be designated and trained to deal with international problems. In the event of a threat to international peace and

⁶⁵See Ware, *supra* note 2, at 1 (wherein LCDR Ware suggests a somewhat similar framework, including questions of "just cause" for intervention, and assessment of different means for intervention).

⁶⁶See Statement, *supra* note 17.

⁶⁷See *supra* note 8.

Factor	Military force	Police force
Size of minimum unit	Squad ⁶⁸ /platoon ⁶⁹	Individual or pair
Opposing forces	Military Unit	Individual or small group
Need for detention	Rare	Routine
Accompanying units	Armor, artillery	None
Trained to collect evidence	No	Yes
Integration with civilian judicial institutions	Low	High

security, these forces could be called up (probably subject to a veto by the state supplying them). The advantage of this approach is that it builds on existing trained police forces. Two disadvantages are apparent: calling up substantial numbers of law enforcement personnel would disrupt domestic law enforcement, and, there would be no mechanism for integrating and directing the resulting multi-national force. Focusing on the national guard might minimize the disruption, except for military police units,⁷⁰ but it is not clear that National Guard personnel would have the appropriate training.

A third alternative could be implemented on the NATO model and/or within the largely un-implemented concept of Article 43 of the UN Charter. There would be a permanent joint staff such as exists at NATO headquarters and such as is envisioned by Article 47. This standing joint

⁶⁸ A squad is a military unit comprising 5-10 people, usually commanded by a sergeant.

⁶⁹ A platoon is a military unit comprising 30-50 people, organized into squads, usually commanded by a lieutenant. Force structure concepts for military deployed in operations other than war are more flexible than the table suggests. Now, U.S. Army doctrine allows for significant tailoring of unit definitions, missions and rules of engagement at the theater, sector, and movement levels.

⁷⁰ Military police are trained primarily to deal with law enforcement problems involving military personnel. Although they sometimes are used to dealing with civilian law enforcement problems during an occupation or martial law situation, one should not assume that military police have the training, force structures, or rules of engagement appropriate for international civilian policing.

staff would prepare and update tactical plans, doctrine, training materials, and technical standards for integrating police forces from different states. Police commanders would be detailed to the joint staff with periodic in-service training. Force components from different states would participate in joint training exercises. One of the lessons from the Bosnian IFOR and IPTF experience is the difficulty of getting multinational forces to work effectively together. Often members of a multi-national civilian police force arrive with completely different concepts of what effective policing is. Deployment of national units, as opposed to individuals from different countries, which is suggested in the second alternative, is one way to ameliorate this problem. Maintenance of a permanent international command staff, which trains together, is another which has proven effective in the NATO context.

In designing international police capability, both exit and escalation strategies are essential. Planners must understand how to define the conditions for return of responsibility to domestic policing and judicial institutions. They also must understand and define with some precision, the circumstances under which international police resources need military backup and provide for the deployment of such military backup.

2. Rules of Engagement

The rules of engagement⁷¹ for an international police force would resemble the rules of engagement for domestic law enforcement units. In framing the rules of engagement, one must think about the relationship between the law enforcement entity and the judicial system. Should the international police force be analogous to an American sheriff, or should it be equivalent to an American municipal police force?⁷²

The sheriff analogy views an international police force as the

⁷¹ Rules of engagement are standing orders to military forces specifying how military personnel should respond to specific situations and when force can be used. For example, rules of engagement might authorize a platoon commander, acting on his own, to use deadly force against an objective he perceives to be a threat to the personnel under his command. Conversely, rules of engagement might allow a platoon commander to use deadly force only when his platoon is fired upon, and require recourse to higher authority in all other situations before using force. Violation of rules of engagement potentially subjects actors to court martial. Rules of engagement implement mandates for intervention, considered *infra* in the legal framework sections.

⁷² The distinction is only approximately similar to the distinction between administrative police and judicial police in France. The administrative police perform a patrol function, while the judicial police have arrest powers and conduct criminal investigations. The administrative/judicial police distinction is not reflected in force organization, but in qualifications and powers of individual members of the force. See Edward A. Tomlinson, *Symposium: Comparative Criminal Justice Issues in the United States, West Germany, England, and France - Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 157 (1983) (describing organization of French justice system, including police).

execution arm of a judicial system, focusing, for example, on arrest of war criminals accused by an international criminal tribunal such as the Hague Tribunal or the new International Criminal Court.⁷³ Setting up an international police force that only, or primarily, would execute process issued by a court national or international would have the advantage of limiting the role of an international police force and thus minimizing the mission creep problem.⁷⁴ It would also increase legitimacy of police intervention because police would be acting pursuant to a writ issued by some other institution -- one presumably enjoying a measure of legitimacy. Focusing on the warrant enforcement function ties international policing more tightly to rule of law as discussed earlier in this article.⁷⁵

In many cases, however, restoration of law and order could not be accomplished if an international police force must go to some tribunal for a writ for everything it wants to do.⁷⁶ In those cases, the municipal police model would be more appropriate. The municipal police concept would emphasize the patrol and order-maintenance function, necessitating attention to organization in the executive sense.⁷⁷ The administrative task would be rather like organizing a municipal police department. Visibility is an important goal in this type of policing, necessitating more personnel than warrant execution. Establishing a rule of law, of course, requires more than effective policing; it also requires establishing an effective criminal justice system, including courts, prosecutors, defense counsel, and a prison system. The relationship between an international police force and those aspects of a rule of law must be understood in particular cases.⁷⁸ The legal relationships that would permit a generalized patrol function by armed international police with arrest powers are summarized *infra*. Order maintenance during patrol may require broader warrantless arrest powers than are comfortably derived from existing international crimes. The only

⁷³ See *supra* notes 76-83 and accompanying text.

⁷⁴ Mission creep refers to the tendency for the mandate for international intervention to broaden over time as a limited mandate proves ineffective.

⁷⁵ See *infra* notes 81 to 83 and accompanying text.

⁷⁶ See generally Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1 (1996) (arguing for amendments to UCMJ to authorize court martial or military commission jurisdiction to try persons committing international crimes during Operations Other Than War (OOTW), drawing from experiences in Somalia, Bosnia and Haiti).

⁷⁷ Order maintenance and peacekeeping are distinguished from law enforcement in that "the goal of the latter is to enforce the law rather than to maintain a pattern of public order." Albert J. Reiss, Jr., *Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion*, LAW & CONTEMP. PROBS., Autumn 1984, at 83, 84 n.3. In practice, however, the distinction is somewhat murky because police commonly use law enforcement as a means to maintain order in public places, though they also rely heavily upon informal methods to resolve public order problems. See Debra Livingston, *Police Discretion And The Quality Of Life In Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 672 (1997).

⁷⁸ See Sismanidis, *supra* note 16.

clear mechanisms for such broad powers would be a Security Council resolution, designating the international police to perform the functions of a domestic police force or martial law⁷⁹ accompanied by designation of international police personnel as members of the military forces enforcing martial law.⁸⁰ Each of these authority mechanisms presents difficulties. With respect to a generalized patrol function, the best approach is to use international police personnel as back up to local police. They would patrol with local police, frequently accompanied by a member of military forces, thus reinforcing the impression that the local police are (1) obligated and tied to appropriate procedures and observance of human rights and (2) likely to be backed up when confronted with physical opposition to the performance of their duties.

The process-execution function is less problematic in terms of legal authority because the set of crimes is pre-defined and relatively well-accepted and because the process being executed by the international police forces is *prima facie* evidence of their authority in a particular instance. The best approach for the more aggressive international police activities -- those clearly associated with executive powers⁸¹ -- is to organize special tactical units or warrant squads that would be called into action pursuant to the process issued by local or international judicial tribunals, usually in coordination with local police. Tactically, the activities of such a unit would be similar to those of a force of the United States Marshals executing a federal arrest warrant in territory policed by local, county, and state forces in the United States.⁸²

Unless a perception of military occupation is appropriate, the warrant squad approach is more clearly associated with rule of law than the patrol approach and thus, more likely to legitimize police activity in a transitional political system. An arrest or suppression of opposing mass action need not be supported only by the personal idiosyncratic decision of a police commander or an international official with possibly dubious authority in the situation; it would be supported by a formal decision from a formal body observing formal procedure. While mere judicialization of

⁷⁹ "Martial law is the immediate and direct effect and consequence of occupation or conquest." General Orders No. 100, §1, ¶ 1, *reprinted in* RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 45 (1983).

⁸⁰ *Id.*

⁸¹ Executive powers include at least the use of armed force and arrest.

⁸² See 28 C.F.R. § 0.112 (1998) (authorizing appointment of state and municipal authorities as deputy U. S. Marshals to assist federal authorities); see also *United States v. Hoy*, 137 F.3d 726, 731 (2d Cir. 1998) (rejecting constitutional challenge to authorization for U. S. Marshal involvement in enforcing state law); *Wilson v. Collins*, 141 F.3d 111, 113 (4th Cir. 1998) (referring to joint execution of arrest by state authorities and U. S. Marshals); *but cf.* *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287-88, 113 S.Ct. 753, 786-69 (1993) (Kennedy, J., concurring) (explaining procedure for state and local authorities to call upon U. S. Marshals for assistance).

such decisions does not insulate against challenges or questions about jurisdiction and remedial power, it narrows the focus of such challenges.

In addition, the warrant-squad approach helps answer another question: how the decisions of new types of international judicial machinery ought to be enforced. In the absence of some kinds of international enforcement machinery for such decisions, decisions of new institutions such as the ombudsman, the property commission,⁸³ the constitutional courts in Bosnia, and the International Criminal Court may become a dead letter. Obviously, enforcement of decisions of international bodies by an international force, over the objection of or without any cooperation by local forces, reverts to the occupation force/martial law model. On the other hand, the existence of an international force with warrant enforcement duties makes it easier to enlist the involvement and cooperation of local police forces, moving toward a state in which they would effectively undertake enforcement of such orders themselves.

C. Legal Framework

1. Under what circumstances is international involvement permissible and appropriate?
2. How should the justification for intervention be expressed in mandates for intervention and in rules of engagement?
3. How can members of an international police force be shielded from legal liability arising from performance of their duties, and how can legal sanctions discourage physical resistance to their authority?

Politics, physical power, and law are inseparable in international relations. The preceding sections of this article have focused on politics and organization of physical power in international police intervention. This part considers the legal framework for international police activities. The context for international police intervention must provide a parity between physical power and law. If legal norms are more extensive than the physical power to enforce them, the result will be an erosion of the respect for law and the result may be worse than no intervention at all. If physical power is not backed up by legal norms, legitimacy for exercise of the physical power will be eroded in the host country and in the world community.

Several connections exist between politics and law. Whether a multi-national police operation complies with international law influences the willingness of states to participate in it. Compliance with international law affects domestic political will to participate in the force. A multinational

⁸³ See generally John M. Scheib, *Threshold of Lasting Peace: The Bosnian Property Commission, Multi-Ethnic Bosnia, and Foreign Policy*, 24 SYRACUSE J. INT'L L. & COM. 119 (1997).

police operation that violates international law faces increasing likelihood that some states will oppose it politically or ultimately with force.⁸⁴

Of course there are other political factors independent of international law, including domestic political reaction to casualties of multinational police force members contributed by the country.

Legal analysis for multinational police operations must consider five configurations of protection and legal responsibility: (1) protecting the concept of sovereignty, (2) protecting civilians from the police force, (3) protecting civilians from their own government, (4) protecting police officers from civilians, (5) protecting civilians from other civilians. The fifth is the broadest, indistinguishable from conventional law enforcement. It involves integration between international police activities and domestic rule of law.⁸⁵ The other four are more likely to implicate international law.

1. Legal Basis for Intervention

The first question, regarding the legal basis for commitment of international police forces, has two dimensions. The first dimension is whether intervention is permissible under international law.⁸⁶ The second dimension is whether an intervention is desirable as a matter of policy.⁸⁷

International police activity without either consent⁸⁸ or a mandate from the U.N. Security Council may infringe upon the sovereignty of the state where it occurs, thus violating article 2(4) or 2(7) of the U.N. charter.⁸⁹ On the other hand, that article prohibits only three types of conduct: (A) the use or threat of force against the territorial integrity, (B) the threat or use of force against the political independence of any state, or (C) the threat or use of force in any other manner inconsistent with the purposes of United Nations.

One can argue that police activities, as opposed to military activities, do not constitute the "threat or use of force,"⁹⁰ but if the police forces are armed, that might not be a persuasive argument. Presumably, introduction of an armed police force with arrest powers into the territory

⁸⁴ For example, the Russian response to proposed NATO bombing of Kosovo.

⁸⁵ See notes 51 to 64 and accompanying text.

⁸⁶ This dimension is discussed in this section.

⁸⁷ This dimension is discussed in notes 25-50 and accompanying text.

⁸⁸ See generally Captain Davis Brown, *The Role Of Regional Organizations In Stopping Civil Wars*, 41 A.F. L. REV. 235 (1997) (consent to intervention depends on (a) incumbency, and (b) international recognition).

⁸⁹ Article 2(4) and article 2(7) together preserve the sovereignty of states. Article 2(4) prohibits UN members from threatening or using force against the territorial integrity of political independence of any state. Article 2(7) denies UN authority to intervene in matters within the "domestic jurisdiction" of any state unless pursuant to "enforcement measures" under Chapter VII.

⁹⁰ See the discussion of peacekeeping forces *infra*.

of a state without its consent would represent the threat or use of force" against the political independence" of the host state.

On the other hand, a failed state could be deemed to have lost its political independence, and thus to have lost its sovereignty.⁹¹ Under that view, introduction of an international police force could not violate any sovereignty and therefore would not violate article 2 (4).

Consent vitiates the sovereignty problem. If the lawfully constituted authority of a state requests the international police presence, that would remove any possible inconsistency with the political independence of the state.⁹² Assuming that a plausible case for recognizing a government can be made out, a particular political authority can be recognized and its invitation of international police assistance accepted. There is a fair amount of state practice in this regard, with Grenada being one clear example.⁹³ Other examples include the African force introduced into Liberia.⁹⁴

The use of force under international law is permissible without the consent of the target state under either one of two theories. First, force is permissible if the Security Council finds it necessary to prevent threats to international peace and security.⁹⁵ Second, force is permissible as an

⁹¹ Somalia and Albania, after the political crisis in the Spring of 1997 are good examples of failed-state situations.

⁹² The application of these grounds in the failed state scenario is somewhat artificial. The self-defense justification, while plausibly based on the spectre of refugee flows, is certainly divorced from its original context -- self-defense against a conventional military attack across borders. In that respect, however, the second ground is no more artificial than the first, inasmuch as the peace-and-security-threat threshold for UN Security Council authorization similarly requires interpretation to include refugee flows or humanitarian concerns. The consent ground also is artificial because in a failed state the authority capable of consenting to the introduction of force will be ambiguous or contested. Perhaps most important, all grounds are artificial because if the only forces to be introduced are police forces, their presence will be ineffective unless basic pacification has been accomplished. In other words, international police forces cannot successfully resist opposition to their presence by conventional military forces. In the absence of de facto consent, international police forces simply become an international intelligence presence or commandos.

⁹³ See Wippman, *supra* note 50, at 232 (explaining consent basis for U. S. intervention in Grenada).

⁹⁴ See *id.* at 226 (explaining consent basis for international intervention in Liberia).

⁹⁵ Such a legal decision by the Security Council is apparently unreviewable by any other institution, although commentators have presented arguments that the International Court of Justice should have jurisdiction to review Security Council decisions. See W. Michael Reisman, *Comment, The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 93 (1993) (questioning whether there are any substantive limits on the Security Council when it is operating under Chapter VII, and finding the Council's application of the term "threat to the peace" to be "quite elastic"); Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643, 671 (1994) (arguing that the Council is constrained by Charter provisions, but that its finding of a threat to the peace will be challenged only in the event of "a manifest irregularity or abuse of power"); see generally Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 2-4 (1996) (discussing the debate between "realists," who oppose the idea of judicial review of the Council's actions, and "legalists," who favor such review); David Wippman, *Defending Democracy through Foreign Intervention*, 19 HOUS. J. INT'L LAW 659, 672 n.76 (1997) (citing foregoing authorities). Security Council Resolution 794, adopted in December, 1992, for the first time authorized the introduction of peace operations forces into a country (Somalia) without its consent.

exercise of self defense under customary international law, preserved by Article 51 of the UN Charter.⁹⁶

Neither of the two bases for international involvement is necessary for mere peace keeping. Classic peace keeping forces are not introduced for the purpose of applying force and thus, their intervention does not contravene Section 2(4). Whether they are invited or authorized by the Security Council or both, their use does not implicate Articles 51 or 53, nor does the Security Council's authority come from Chapter VII. Instead, Security Council authority comes from Chapter VI and Article 24. Traditional peace keeping personnel may use force for individual self defense. Police intervention can be likened to traditional peace keeping, especially when the foreign police personnel are unarmed. Even when foreign police personnel are armed, the argument is available that they will use force only to protect themselves individually and thus, fall into the same category of classic peace keeping forces who typically are armed. This legal characterization of an international police force would be most consistent with a police force primarily intended to engage in the patrol function as explained below.

A police force intended to execute arrest warrants or otherwise to carry out the orders of an international tribunal falls less comfortably within the classic peace keeping category because it is expected to use whatever amount of force is necessary to overcome opposition. Then, there are several possible bases for legal authority within the broad categories identified *supra*. Obviously, the Security Council can authorize this kind of intervention once it validly finds that execution of tribunal orders is necessary to protect international peace and security. Second, this type of international police undertaking can be an exercise of the privilege of self defense under Article 51.⁹⁷ Most often, the international police presence would be invited (consented-to) and thus, consistent with Article 2(4). The consent basis is potentially limited by the possibility that the host country would withdraw its invitation, either because it changes its mind or because

A growing number of commentators agree that large-scale refugee problems and other humanitarian problems constitute threats to international peace and security, justifying UN intervention. See Brown, *supra* note 88, at 272-73 (providing basis for humanitarian intervention by international community). Professor O'Connell has suggested however, that the UN Charter and the Security Council's interpretation of it are likely to revert to the norm that only cross-border conduct can constitute a threat to international peace and security; Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT'L L. 473 (1997). This would diminish this basis for intervention in an intrastate breakdown of law and order.

⁹⁶ However, U.N. CHARTER art. 51 conditions the privilege of self defense providing, "Nothing . . . shall impair the inherent right of . . . self defense if an armed attack occurs . . ." [emphasis added].

⁹⁷ The self defense privilege could be asserted on behalf of the host state, in which case the article 51 basis would converge with the consent basis. Alternatively it could be asserted on behalf of surrounding states, in which case the consent of the host state would not be necessary.

the government changes. Such a change might be provoked by actions of the international police force itself. There is some basis, however, for suggesting that consent to international intervention to protect human rights in a failed state is irrevocable.⁹⁸

A more general problem with both the Chapter 7 and the Article 51 bases is that the international peace and security (chapter 7) and armed attack (Article 51) preconditions for intervention were not originally understood to be satisfied by purely domestic unrest -- precisely the circumstance with which an international police force is intended to deal. Professor O'Connell cautions that the elasticity of the precondition for Chapter VII authorization may not be as great as some commentators have suggested. Nevertheless, the Albanian intervention by the WEU under Security Council authorization is a good precedent for the kind of legal authority likely to be necessary for use of a new kind of international police

⁹⁸ Professor Wippman believes that there may be limitations on revocation of consent to international intervention:

It does not follow, however, that the Greek Cypriot-dominated government could unilaterally revoke the state's consent to the Treaty. As argued above, in divided states such as Cyprus, only the concurrent will of the contending communities should suffice to constitute the will of the state. Under this approach, only both Cypriot communities acting jointly could revoke Cypriot consent to the Treaty.

David Wippman, *International Law And Ethnic Conflict On Cyprus*, 31 TEX. INT'L L.J. 141, 159 (1996).

Because this effort to reconcile the interests of both communities required both internal and external constraints on the political development of Cyprus, it is open to the criticism that those constraints violated peremptory international norms prohibiting external interference in a state's internal affairs. However, in sharply divided states such as Cyprus, where political identity centers on membership in a particular subnational community, full self-determination and political independence for the dominant community can only be achieved at the expense of the subordinate community. In such societies, the consent of both communities to a set of constraints that are reasonably necessary to a joint realization of the benefits of self-determination and political independence should be deemed consistent with peremptory norms. In such cases, self-determination and political independence for the state can legitimately be understood as self-determination and political independence for the communities that jointly form the state. From this perspective, forcible intervention to maintain a previously agreed upon intercommunal balance qualifies as intervention based on the consent of the state, unless the communities that compose the state choose jointly to revoke that consent.

Id. at 160-61.

Accordingly, although the ad hoc consent of the effective government of a state is usually necessary to validate an external military intervention, in cases of severe or protracted intercommunal conflict, the contending subnational communities may validly consent to a treaty that authorizes external enforcement of whatever settlement they may reach. In such cases, the state's consent to treaty-based intervention can only be given or withdrawn by joint action of the communities involved.

David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 612 (1995)

force. In Security Council Resolution 1101, the Security Council:

2. Welcome[d] the offer made by certain Member States to establish a temporary and limited multinational protection force to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance;
3. Welcome[d] further the offer by a Member State contained in its letter (S/1997/258) to take the lead in organizing and commanding this temporary multinational protection force and takes note of all the objectives contained in that letter;
4. Authorize[d] the Member States participating in the multinational protection force to conduct the operation in a neutral and impartial way to achieve the objectives set out in paragraph 2 above and, acting under Chapter VII of the Charter of the United Nations, further authorizes these Member States to ensure the security and freedom of movement of the personnel of the said multinational protection force;
5. Call[ed] upon all those concerned in Albania to cooperate with the multinational protection force and international humanitarian agencies for the safe and prompt delivery of humanitarian assistance;
8. Encourage[d] the Member States participating in the multinational protection force to cooperate closely with the Government of Albania, the United Nations, the OSCE, the European Union and all international organizations involved in rendering humanitarian assistance in Albania;
9. Request[ed] the Member States participating in the multinational protection force to provide periodic reports, at least every two weeks, through the Secretary-General, to the Council, the first such report to be made no later than 14 days after the adoption of this resolution, inter alia specifying the parameters and modalities of the operation on the basis of consultations between those Member

States and the Government of Albania;⁹⁹

based on its finding that the present situation of crisis in Albania constituted a threat to peace and security in the region.¹⁰⁰ The mandate was extended by Security Council Resolution 1114. One of the two factions in Albania invited in the WEU. Thus, both the Chapter 7 and the consent/Article 51 grounds were implicated.

Even when legal grounds exist for intervention, the decisions necessary to invoke them are in substantial part political. Accordingly, one cannot neatly separate the legal aspects from the political aspects of decision making. The politics of intervention are links to the suitability of the available forces.

2. Mandates and Rules of Engagement

As the preceding section explained, affirmative authority for international police intervention can come either from consent of the host state or from a Security Council resolution. To simplify discussion, the term "mandate" applies to both types of affirmative authority. The mandate for intervention defines the scope of authority possessed by the international police forces. It is important for three reasons: for justifying intervention under international law; for shaping the types of physical power likely to be asserted; and in determining the privileges and immunities likely to be available, as considered in the following section.

One important step in adapting international law to international police intervention is to define the role of coercive peacekeeping forces.¹⁰¹ UN Security Council Resolution 794 represented exercise of Chapter VII authority to deploy armed force in territory of state (e.g., Somalia) without its consent and Security Council Resolution 1031 did the same with respect to IFOR in Bosnia.¹⁰²

A clear example of affirmative authority is paragraph 5 of Security Council Resolution 837, issued in connection with the conflict in Somalia:

5. Reaffirms that the Secretary-General is authorized under resolution 814 (1993) to take all necessary measures against all those responsible for the armed attacks referred to in paragraph 1 above, including against those responsible for publicly

⁹⁹ S.C. Res. 1101, U.N. SCOR, 52nd Sess., U.N. Doc. S/RES/1101 (1997) [hereinafter S.C. Res. 1101] (on the situation in Albania).

¹⁰⁰ *Id.*

¹⁰¹ Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 105 (1996) (explaining need to go beyond concept of belligerent army of occupation).

¹⁰² See *id.* at 106-07.

inciting such attacks, to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment.¹⁰³

Mandates can confer authority on regional forces as well as on forces directly established and controlled by the UN. After the Dayton Accords were signed providing for a NATO force in Bosnia, the Security Council extended relatively complete authority to the force, under Chapter VII of the Charter,¹⁰⁴ extending beyond mere force protection.¹⁰⁵ Once IFOR was transformed into SFOR, the Security Council extended similar authority to SFOR in Security Council Resolution 1088,¹⁰⁶ referring also to the status

¹⁰³ S.C. Res. 837, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/837 (1993). Note that the phrase "including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment," present in paragraph 5 of the Somalia resolution was absent from the Albanian resolution. Such language would be necessary for an international police mandate going beyond traditional peacekeeping. The Bosnia resolution, quoted in note 79, expressed a more limited mandate, limiting offensive enforcement to that necessary to ensure compliance with Annex 1A, pertaining to military aspects of the Dayton Accords.

¹⁰⁴ See S.C. Res. 1031, U.N. SCOR, 50th Sess., at ¶¶14-17, U.N. Doc. S/RES/1031 (1995) [hereinafter S.C. Res. 1031] (Paragraph 14 authorizes the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to establish a multinational implementation force (IFOR) under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement; Paragraph 15 authorizes the Member States acting under paragraph 14 above to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement, stresses that the parties shall be held equally responsible for compliance with that Annex, and shall be equally subject to such enforcement action by IFOR as may be necessary to ensure implementation of that Annex and the protection of IFOR, and takes note that the parties have consented to IFOR's taking such measures; Paragraph 16 authorizes the Member States acting under paragraph 14 above, in accordance with Annex 1-A of the Peace Agreement, to take all necessary measures to ensure compliance with the rules and procedures, to be established by the Commander of IFOR, governing command and control of airspace over Bosnia and Herzegovina with respect to all civilian and military air traffic; Paragraph 17 authorizes Member States to take all necessary measures, at the request of IFOR, either in defense of IFOR or to assist the force in carrying out its mission, and recognizes the right of the force to take all necessary measures to defend itself from attack or threat of attack).

¹⁰⁵ Note that the language authorizes all necessary measures "to assist the force in carrying out its mission," and to assure the implementation of Annex 1A to the Dayton Accords.

¹⁰⁶ See S.C. Res. 1088, U.N. SCOR, 51st Sess., at ¶¶18-22, U.N. Doc. S/RES/1088 (1996) (Paragraph 18 authorizes the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to establish for a planned period of 18 months a multinational stabilization force (SFOR) as the legal successor to IFOR under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement; Paragraph 19 authorizes the Member States acting under paragraph 18 above to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement, stresses that the parties shall continue to be held equally responsible for compliance with that Annex and shall be equally subject to such enforcement action by SFOR as may be necessary to ensure implementation of that Annex and the protection of SFOR, and takes note that the parties have consented to SFOR's taking such measures; Paragraph 20 authorizes Member States to take all necessary measures, at the request of SFOR, either in defence of SFOR or to assist the force in carrying out its mission, and recognizes the right of the force to take all necessary measures to defend itself from attack or threat of attack; Paragraph 21 authorizes the Member States acting under paragraph 18 above, in

of forces provision of the Dayton Accords.¹⁰⁷

The mandates for the force in Somalia and for IFOR and SFOR in Bosnia were much broader than mandates simply allowing self defense. In Security Council Resolutions 1101¹⁰⁸ and 1114, the Security Council used Chapter VII to authorize self-protection by the Albanian Multinational Protection Force.¹⁰⁹

Some mandates confer no affirmative authority at all. The Security Council authorization for UNPREDEP in Macedonia did not contain any explicit authority.¹¹⁰ Similarly, the Security Council's resolution pertaining to the IPTF simply endorsed the force without extending any authority to it.¹¹¹

Rules of engagement translate broad mandates for intervention into operating instructions for personnel on the ground.¹¹² They represent a kind of delegation of authority granted by nation states to commanders and the forces operating under their command. Rules of engagement are orders to personnel in the field, determining their willingness to use force, and their legal rights and obligations.

There are several problems in extrapolating from military rules of engagement to the context of a civilian multinational police force. For one thing, drafters must shift from a preoccupation with defense and force

accordance with Annex 1-A of the Peace Agreement, to take all necessary measures to ensure compliance with the rules and procedures, to be established by the Commander of SFOR, governing command and control of airspace over Bosnia and Herzegovina with respect to all civilian and military air traffic).

¹⁰⁷ See *id.* at ¶ 25.

¹⁰⁸ See S.C. Res. 1101, *supra* note 99 at ¶¶2, 4 (Paragraph 4 authorizes the Member States participating in the multinational protection force to conduct the operation in a neutral and impartial way to achieve the objectives set out in paragraph 2 above and, acting under Chapter VII of the Charter of the United Nations, further authorizes these Member States to ensure the security and freedom of movement of the personnel of the said multinational protection force; Paragraph 2 "welcomes the offer made by certain Member States to establish a temporary and limited multinational protection force to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance").

¹⁰⁹ See S.C. Res. 1114, U.N. SCOR, 52nd Sess., at ¶4, U.N. Doc. S/RES/1114 (1997) (authorizing the Member States participating in the multinational protection force to conduct the operation in a neutral and impartial way to achieve the objectives set out in paragraph 3 above and, acting under Chapter VII of the Charter of the United Nations, further authorizes these Member States to ensure the security and freedom of movement of the personnel of the multinational protection force).

¹¹⁰ See S.C. Res. 983, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/983 (1995).

¹¹¹ See S.C. Res. 1035, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1035 (1995).

¹¹² See Colonel John T. Burton, *War Crimes" During Operations Other Than War: Military Doctrine And Law 50 Years After Nuremberg And Beyond*, 149 MIL. L. REV. 199 (1995) (explaining why individual members of American armed forces had no obligation to execute arrest warrants from international tribunal); see generally Major Mark S. Martins, *Rules Of Engagement For Land Forces: A Matter Of Training, Not Lawyering*, 143 MIL. L. REV. 3 (1994); Lieutenant Commander Guy R. Phillips, *Rules Of Engagement: A Primer* 1993-JUL ARMY LAW. 4 (1993) (explaining rules of engagement as part of the law of war).

protection¹¹³ to protection of third parties and use of force incident to arrest, the typical concerns of police forces. Additionally, mechanisms for enforcing the rules of engagement must be rethought. Rules of engagement are enforced through the military justice system. Military personnel deviating from the rules of engagement are subject to court martial. A civilian analog of court martial must be designed. Simple termination of employment may be an insufficient protection against use of force outside the scope permitted by rules of engagement. Legal sanctions for violating the rules of engagement will shape the conduct of international police personnel although in a different legal matrix from that applicable to traditional military situations. Military rules of engagement implement international law on the use of forces in armed conflict.¹¹⁴ The typical context for insertion of multinational police forces does not qualify as armed conflict under international law.¹¹⁵

3. Liability, Privileges and Immunities

Granting affirmative authority to intervene, expressed through consent or Security Council mandates and elaborated through rules of engagement, is hardly the end of the legal challenge. The law also determines whether persons opposing international police force are liable civilly or criminally, and when members of the force are themselves legally liable for their activities. Domestic legal restrictions on the use of force exist

¹¹³ See Phillips, *supra* note 112, at V. (B), (C) (discussing role of hostile intent and self defense). Rules of engagement typically implement the privilege of self defense under international law. Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998). International police operations, to be effective, must have rules of engagement that allow offensive action to oppose violence against third parties or to effectuate arrests. Force protection dominated the IFOR and SFOR mission in Bosnia, especially for United States forces. For example, after the arrests of indicted war criminals members of U.S. forces, including engineer units, were prohibited from engaging in movements outside convoys. Such restrictions reduce visibility, which can be important for civilian pacification.

¹¹⁴ See Phillips, *supra* note 112, at 4 (characterizing J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV. Jan.-Feb. 1983, 46, 46 (Roe are a "smaller and totally contained subset of the larger set of actions permitted under the law of armed conflict").

¹¹⁵ But see Robert O. Wein Er & Fionnuala Ni Aolain, *Beyond the Laws of War: Peace Keeping in Search of a Legal Framework*, 27 COLUM. HUM. RTS. L. REV. 293, 346-51 (1996) (arguing that common article 3 to Geneva conventions can apply to non-international armed conflict in certain internal strife situations). See also Phillips, *supra* note 112, at III (A)(1) (providing, "international law also requires a state to repress international crimes, such as piracy, and the use of force may be authorized in international crimes, even when not directly related to the immediate needs of self defense or the protection of nationals).

everywhere. In the United States¹¹⁶ and Canada¹¹⁷ even military forces are subjected to domestic law restrictions, backed up by civil and criminal sanctions. This background suggests that international police officers might be subject to criminal prosecution and civil suit based on the domestic law of the place to which they are assigned¹¹⁸ unless status of forces agreements or other international law norms waive or modify those obligations.¹¹⁹ This liability might arise from performance of basic duties such as executing international arrest warrants.¹²⁰

Several conceptually distinct but overlapping questions arise:

1. When can a civilian in the host country be arrested and successfully prosecuted by multinational police forces? (The Aided/Karadic/Mladic problem). This question includes subordinate issues regarding (a) the source of law defining the crime and (b) the source of the power to arrest.
2. When is a member of a multi-national police force liable under the laws of his own country for conduct in peace enforcement? (The Lieutenant Calley problem). The Lieutenant Calley problem arises when a member of a national force engages in conduct, whether or not authorized by his rules of engagement, which violates international law. In the case of Lieutenant Calley, he was prosecuted by the state of which he was a national. The same conduct might result in prosecution before host country tribunals or before international tribunals.
3. When is a member of a multinational police force liable under laws of the host country? (The CWO Durant problem¹²¹). The CWO Durant problem arises

¹¹⁶ See Phillips, *supra* note 112, at III (C)(1) (characterizing *Tennessee v. Garner*, 471 U.S. 1 (1985), as prohibiting more than minimal force in response to domestic disturbance and prohibiting use of deadly force until all lesser means have been exhausted).

¹¹⁷ See *id.* at III (C)(2) (providing members of Canadian armed forces acting in aid of civil power have status of constables and peace officers, subjecting them to legal justifications and defenses according peace officers).

¹¹⁸ See Sharp, *supra* note 101, at 115 (noting problems arising from application of receiving state law to foreign forces, and explaining how absolute immunity should exist for Chapter VII forces).

¹¹⁹ See Phillips, *supra* note 112, at III (C)(2) (providing, "ideally, status of forces agreement should address possible immunity from criminal or civil liability").

¹²⁰ See Sharp, *supra* note 101, at 150-51 (noting absurdity of proposition that execution of international arrest warrant subjects arresting personnel to retaliation as lawful targets because they become combatants); see also *id.* at 160-61 (reporting on Yugoslav tribunal chief prosecutors argument that IFOR's role in executing arrest warrant should be analogized to that of national policemen).

¹²¹ Chief Warrant Officer Michael Durant, an army helicopter pilot, was captured during international peace enforcement operations in Somalia. See Lepper, *supra* note 5, at 359.

when a member of a multinational force, acting according to orders, is arrested or otherwise seized by persons within the host country. That problem overlaps with the subquestion relating to arrest and prosecution -- the potential liability of the arresting authority. The CWO Durant problem is, however, broader. CWO Durant was seized simply in connection with his participation in a multinational force, not with respect to his involvement in any particular arrest.

4. When is a member of a multinational police force liable for action that conflicts with orders? (The Captain Rockwood problem). The Captain Rockwood problem arises when a member of a multinational police force engages in conduct that may be perfectly lawful -- indeed compelled -- by international law¹²² but exceeds authority granted him by the applicable rules of engagement. In such cases, the actor is liable under the disciplinary rules applicable to the particular force. Rockwood, for example, a military officer, was court martialled.¹²³

The first issue relating to arrest and prosecution of civilians in the host country is the broadest legal question. Its sub-elements link closely to the other legal questions. The best analytical framework for analyzing this issue comes from the common law of arrest in the Anglo American legal system. A purported arrest can occur whenever the arresting authority possesses sufficient physical power to confine the arrestee. The question of the legality of the arrest is potentially presented in two different procedural contexts. The first involves prosecution or tort action against the arresting agents. The second involves defenses to the prosecution of the arrester stemming from the illegality of the arrest, as under habeas corpus procedures under Anglo American law. It should be noted, however, that illegal arrest rarely frustrates conviction. Rather, the general rule under Anglo American law is that the court of prosecution does not inquire into how the defendant came to be within the physical power of the court.¹²⁴

¹²² See Wein Er, *supra* note 115, at 293 (providing individual members of peacekeeping force have affirmative obligation to prevent gross humanitarian violations under expansive definition of armed conflict to include internal conflicts); See Burton, *supra* note 112, at 199 (discussing Rockwood problem).

¹²³ See Wein Er, *supra* note 115, at 293 (reviewing court martial of Captain Rockwood).

¹²⁴ See *United States v. Manbeck*, 744 F.2d 360, 381 (4th Cir. 1984) (providing, "An illegal arrest does not preclude the prosecution of the arrestee, nor does it usually vitiate a subsequent conviction").

The first legal element for a lawful arrest is the commission of a crime by the arrestee. Whether the arrest is pursuant to warrant or based on a determination by the arresting officer, someone must determine probable cause to believe that a crime has been committed by the arrestee.¹²⁵

Analyzing duties, privileges, powers, and immunities¹²⁶ with respect to arrests by international police personnel is more interesting in connection with a police force authorized to perform the patrol as well as the warrant-execution function. When an international police officer executes a warrant the judicial officer has found the power of arrest to exist, and it is reasonable to conclude that the police officer has privileges and immunities necessary to carry out the judicial mandate.

On the other hand, when an international police officer on patrol witnesses conduct he believes to be criminal and further believes that an arrest is appropriate, it ultimately may become necessary to determine the extent of the officer's powers, privileges, and immunities on a post-hoc basis. As when a police officer executes a warrant, a police officer making a warrantless arrest should enjoy privileges and immunities coextensive with the scope of the officer's legal power. Accordingly, the power inquiry is fundamental. The scope of an arresting officer's power involves three dimensions: (1) the substantive crimes for which the arrest power exists,¹²⁷

¹²⁵ This over simplifies things somewhat. Under Anglo-American law, some warrantless arrests are permissible only if a crime has in fact been committed. Probable cause to believe a crime has been committed is not sufficient if the belief turns out to be wrong.

¹²⁶ "Power" refers to the legal capacity to establish or change legal relationships. Thus, use of a power to arrest changes the duties and privileges of the arrestee, negating his privilege to oppose restrictions on his freedom, while also expanding the privileges and immunities of the arresting officer to encompass a privilege to restrict freedom of the arrestee—conduct that otherwise would constitute false imprisonment, and immunizing the arresting officer from prosecution for the arrest. "Privilege" negates a legal duty. For example, conduct by an arresting officer that otherwise would be a battery, false imprisonment, or homicide if privileged, cannot result in legal liability for the arresting officer nor justify the use of force to oppose the privileged conduct. "Immunity" negates the power of legal institutions over the arresting officer.

¹²⁷ Under the doctrine of "nulla poena sine crimen" no one may be subjected to criminal punishment except for a crime defined in advance by law. Article 9 of the International Covenant on Civil and Political Rights prohibits deprivations of liberty "except on such grounds . . . as are established by law". ICCPR *supra*, 53 at art. 9. Article 15 of the same covenant provides, "no one shall be held guilty of any criminal offence on account or any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed." *Id.* at art. 15. Arrest or detention by an international police force thus would be impermissible except for conduct criminalized by appropriate legal authority. Appropriate legal authority certainly includes the domestic law of the host state. The hard question is where legal authority may be found in the absence of a crime under domestic law.

Walter Gary Sharp, Sr. has suggested a useful analytical framework for evaluating a criminal duty not to oppose international forces. See generally Walter Gary Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT'L L. & TRADE 1 (1998). He suggests recognizing a war crime for firing upon or knowingly attacking military forces serving under the authority of the UN. See *id.* at 75. Before conduct constitutes such a crime, UN forces must provide notice of an obligation to surrender to UN forces. See *id.* Sharp's analysis focuses on military forces opposing UN forces. Modification would be necessary to extend his

(2) the level of probable cause justifying an arrest, and (3) the means that can be used to effectuate an arrest. The narrowest scope of arrest power would extend only to international crimes, presumably those within the jurisdiction of the Hague Tribunal or the proposed International Criminal Court. An intermediate scope would extend to international crimes and other serious crimes as defined by legislative authority established in conjunction with the international police operation, for example legislative power such as that possessed by the high representative for Bosnia. The most extensive scope of the arrest power would include the full range of conduct criminalized by domestic legal authority.

analysis to international police forces opposed by civilians.

The Convention on Safety, *supra* note 5, does not go far enough to provide a basis directly for the arrest of civilians engaging in misconduct. Its article 9 obligates states party to the Convention to criminalize attacks on UN forces and associated personnel, and authorizes jurisdiction over article 9 crimes committed in their territories or by nations of those states, among other things. *See id.* at art. 9. This would not result in criminalization of attacks on UN and associated personnel in a state that had not acted to incorporate article 9 into its own domestic law. *See id.* It also is not broad enough to encompass attacks on civilians not associated with UN police operations, for example ethnic "hate crimes" that might be a legitimate concern of international police forces. *See id.*

One possibility is inherent authority of a military tribunal or military commission to try foreigners for violations of the law of war. *See* Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL.L.REV. 114, 121-22 (1995) (citing *In re Yamashite*, 327 U.S. 1 (1946), finding jurisdiction in military commission to try Japanese general for violations of law of war committed in Phillipines during World War II); *see also* Newton, *supra*, 76 at 13-14 (describing practice of using military commissions to punish violations of international law dates back to 1688, but practice probably is limited to international armed conflicts). The problem with this concept is that, as noted with respect to the Sharp article, *supra*, much of the conduct likely to concern an international police force does not violate the laws of war.

A second possibility is occupation law imposed by an occupying military force to supplement or supplant the civilian legal system. *See* Gibson, *supra* at 122 (briefly explaining concept of occupation law). The problem with this concept is that the international community does not consider OOTW to constitute military occupation. Of course, OOTW concepts could be modified to characterize certain international police operations as military occupations, but this would be controversial, to say the least.

A third possibility is to look to the domestic law of the international police force for the source of criminal law. *See* Newton, *supra* note 76 at 4-9 (arguing that "Congress should modify the Uniform Code of Military Justice to give deployed commanders the authority to prosecute foreign nationals who commit international crimes during operations other than war;" and that "modified rules of engagement in Haiti permitted U.S. soldiers to use necessary force against "persons committing serious criminal acts"). The problem with this approach is in the extraterritorial application of prescriptive jurisdiction.

Most of these conceptual possibilities rely on the targeted conduct constituting an international crime. The scope of international criminal law thus would define the scope of arrest powers of an international police force (except in the case of conduct constituting a crime under domestic law of the host state, and then, in the absence of host-state consent, there may remain questions as to the authority of the international police force to enforce domestic law. Major Newton *supra* note 76, suggests a category of "continuum crimes" under customary international law, which include conduct prejudicial to human rights. Continuum crimes operate alongside codified laws of war. *See id.* at 55. He includes within this category: genocide, slavery, murder or causing disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and attacking UN personnel. He would go further however, and criminalize all attacks against non-combatants. *See id.* at 66. Major Newton's framework thus would authorize international police arrests for most hate crimes and for murder and assault and battery.

Choosing among these basic alternatives requires a policy focusing on the types of lawless conduct the international police presence is intended to diminish or eliminate. In ethnic conflicts, international crimes such as grave humanitarian violations¹²⁸ and offenses against the laws¹²⁹ of war may be more appropriately dealt with by military forces because they are most likely to be committed by armed groups, beyond the physical power of international police elements to oppose. Many other offenses are likely to be committed by individuals or irregular small groups resembling the Ku Klux Klan in the American historical experience. For example, beatings constituting assault and battery, homicide, arson, burglary, trespass, and terroristic acts, as well as certain forms of robbery, may be the principal instruments of ethnic cleansing and ethnic intimidation.

As to these crimes, three sources of arrest power exist: (1) power conferred by domestic law of the host country,¹³⁰ (2) power resulting from the incorporation of domestic criminal law into an international legal regime that defines the power of the international police force, and (3) power analogous to citizen arrest powers in the Anglo American system.¹³¹

¹²⁸ See *Prosecutor v. Tadic*, *supra* note 47 (wherein the appeals chamber of the Hague tribunal rejected the defendant's argument that no legally cognizable armed conflict -- either internal or international -- existed at the time and place that his alleged offenses were committed. The chamber held that an armed conflict exists whenever there is "protracted armed violence . . . between governmental authorities and organized armed groups or between such groups within a State." *Id.* at ¶ 70. It held that "grave breaches" of the 1949 Geneva Conventions as addressed by Article 2 of the court's statute can arise only in the context of international armed conflicts. *Id.* at ¶ 84. On the other hand, Article 3 of the tribunal's statute, giving it jurisdiction over violations of the laws or customs of war, including employment of weapons of mass destruction, wanton destruction or devastation not justified by military necessity, attack of undefended places, seizure or destruction of cultural objects or plunder of public or private property, covers any "serious offense against international humanitarian law," during [internal] armed conflict taking place anywhere within the territory of the former Yugoslavia. *Id.* at ¶ 89-91. Persons protected include civilians not taking part in the conflict. *Id.* at ¶ 119. Finally, Article 5, prohibiting crimes against humanity, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political racial and religious grounds, and other inhumane acts, may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflict. See *id.* at ¶ 142. Under this precedent, a broad range of conduct likely to be of concern to an international police force, constitutes criminal activity under international law.)

¹²⁹ See Major Richard M. Whitaker, *Civilian Protection Law In Military Operations: An Essay*, 1996-NOV ARMY LAW. 3 (1996) (describing analytical structure for understanding law of war and local law immunities).

¹³⁰ Domestic law of the intervening countries almost certainly does not extend to criminal conduct in the host country, because of the longstanding view in conflicts of laws that criminal jurisdiction to prescribe, adjudicate and enforce is confined to the territory of the prescribing, adjudicating, or enforcing state. Absent this traditional limitation, there would be no need for the limited category of "universal crimes," which can be prosecuted regardless of where they were committed.

¹³¹ A fourth source of power is practical rather than legal and is linked to the doctrine that a criminal court does not inquire into how the accused came to be before the tribunal. Under this fourth source of power, even unlawful kidnapping may be sufficient to trigger criminal prosecution. Treating warrantless arrests by international police officers as legally equivalent to kidnapping, however, is politically unappealing, and would provide no source of privileges and immunities for the arresting officers. It is, therefore, more desirable to concentrate on the first three sources.

A domestic source of arrest power can exist if the host country welcomes (or at least formally acquiesces in the presence of) the international police force and in effect delegates to its members the same authority possessed by domestic police. Such an arrangement is plausible in those contexts in which consent is the basis for international police intervention, or when unconsented-to military intervention has induced consent for subsequent international police involvement. In those cases, it is important to provide explicitly for the delegation of arrest powers in the documents expressing consent.

In other cases, in which the mandate for international police intervention comes, not from consent, but from other sources of international law -- self defense or a Security Council resolution -- the first source of arrest power is unlikely to exist. The existence of the second source depends upon acceptance of the proposition that international law permits the assertion of externally legitimated legislative power with respect to the host country. While such a power is well recognized under military-occupation law, it is less clear that established state practice legitimates legislative power in the absence of the conditions for military occupation. Accordingly, only relatively clear and explicit Security Council language would permit the second basis of power comfortably to be used.

The third, citizen-arrest analogy, maybe the most useful. There are significant choice of law issues associated with this basis, however. Domestic law of the host country may not include citizens arrest power. Indeed, a host state opposing the intervention may act legislatively explicitly to negate such a power. Then the question becomes, "What external source might provide for citizens arrest power?" Arguably, international law contemplates such a power with respect to universal crimes because of the obligation of all states to extend their jurisdiction over such crimes, even for conduct occurring in other states. But that conception narrows the scope of the arrest power so is to exclude common crimes. Because common crimes are within domestic jurisdiction, it is hard to see how the external international community can define enforcement prerogatives with respect to crimes that it cannot define.

This analysis suggests that international law must evolve either to refine the concept of externally imposed legislative power to define criminal conduct and international police operations, or it must adapt the concept of military occupation to include international police operations. The plenary power of an occupying force derives from the state of martial law which automatically comes into existence once an occupation occurs.¹³² It is not immediately apparent why the concept of occupation and marshal law is

¹³² RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR*, General Order No. 100, ¶ 1 (1995).

inappropriate for international police operations. Obviously, traditional military occupation displaces the sovereignty of the host country, but such displacement of sovereignty is inherently associated with the insertion of an international police force over the objections of the host country in any event. The justification for such displacement is no greater in the case of a military invasion than in the case of a legally sanctioned international police intervention. On the other hand, such an adaptation of martial law and occupation concepts enjoys only thin support from customary international law, including UN Security Council practice. It would appear, therefore, to depend on an explicit assertion of Security Council power to, displace domestic sovereignty, to insert the international police force, and to impose the analog of martial law.

An appropriate plan for international police intervention should include clear criminalization of resistance under the mandate for intervention. A clear example of a statement of individual legal responsibility for impeding an international force is contained in Security Council Resolution 865, issued in connection with the Somalia conflict:

3. Condemns all attacks on UNOSOM II personnel and reaffirms that those who have committed or have ordered the commission of such criminal acts will be held individually responsible for them.¹³³

In Security Council Resolution 868, discussed *infra* in connection with privileges and immunities, the Council stopped short of declaring that attacks on UN forces to be criminal acts, simply declaring them to be "interference" and threatening further action if they occur.¹³⁴

Article 7 of the 1994 Convention obligates state parties to take appropriate measures to ensure that UN personnel are not made "the object of attack or of any action that prevents them from discharging their mandate."¹³⁵ This duty does not extend to individuals.¹³⁶

Article 9, however, requires that attacks, threats, and attempts against UN personnel be made crimes against the national law of signatories.¹³⁷ Article 10 extends the effect of Article 9, by giving universal jurisdiction to any state party with respect to which the alleged offender is present in its territory, assuming it has so provided in its national law.¹³⁸ Article 10 also contains an extradition or prosecution provision.¹³⁹ In

¹³³ S.C. Res. 865, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/865 (1993).

¹³⁴ See S.C. Res. 868, U.N. SCOR, 48th Sess., at ¶ 4, U.N. Doc. S/RES/868 (1993) [hereinafter S.C. Res. 868].

¹³⁵ Lepper, *supra* note 5, at 423.

¹³⁶ *Id.* at 424.

¹³⁷ *Id.* at 429-30.

¹³⁸ *Id.* at 432-33.

¹³⁹ *Id.*

negotiations over the International Criminal Court, the United States favored extending the jurisdiction of the new court to crimes defined by the Convention.¹⁴⁰

Moreover, the mandate should make it clear whether multinational police agents are authorized to arrest for commission of crimes under domestic law and crimes defined by international humanitarian law. In some cases (as in Bosnia) this becomes the simple question whether international police agents are authorized to execute arrest warrants issued by an international tribunal.

Even if conduct by those opposing international police forces is *prima facie* a crime, it may nevertheless be justified under domestic or international law. One issue is whether international peace enforcement forces become belligerent and therefore subject to retaliatory military action under the laws of war, allowing a receiving country to oppose them by force or otherwise.¹⁴¹ One important step in adapting international law is to define the role of coercive peacekeeping forces.¹⁴² The typical context for insertion of multinational police forces does not qualify as armed conflict under international law,¹⁴³ thus negating this possible source of privilege for resistance.

Given the commission of a crime, authority in the arresting officer to arrest for commission of a crime, and the absence of justification for the arrestee's conduct, not only is the arrestee subject to sanctions, thus answering the first legal challenge presented above, but also the arresting officer is likely to be able to establish a privilege, shielding him from civil or criminal liability arising from the arrest.

When criminal or civil proceedings are taken against the arresting authority, the prosecutor or plaintiff must identify some legal duty that has been violated by the arresting authority. In domestic U.S. and British tort law, this typically would be false imprisonment, possibly battery, and, in criminal contexts, kidnapping. In the international police context, the first question therefore would be what duty the arresting agents have violated. The source of the duty may be the domestic law of the host state, it may be

¹⁴⁰ Bryan F. MacPherson, *Building An International Criminal Court For The 21st Century*, 13 CONN. J. INT'L L. 1, 44 & n. 185 (1998).

¹⁴¹ See Phillips, *supra* note 112.

¹⁴² See Sharp, *supra* note 101, at 105 (explaining need to go beyond concept of belligerent army of occupation; proposal for immunity for "coercive peace enforcement forces"). The Kosovo agreement for international monitors avoids some of the difficulties of coercive peace enforcement because Serbia has consented to insertion of international monitors. [What does the Milosevic agreement say about privileges and immunities for the international monitor force?] Indeed, the role for coercive peace enforcement is quite limited. It is most likely to be relevant in a failed-state situation such as Albania in 1996 or Somalia. When a state of reception is intact, it is likely to be able to mobilize sufficient military resistance to protect its sovereignties so that an international coercive peace enforcement force would necessarily have a military rather than a police character.

¹⁴³ But see *supra* note 115.

the domestic law of the state of which the arresting authority is an national, or it may be international humanitarian law including the laws of war, as of the case of an occupying army.

Members of an international police force may face civil or criminal liability under international human rights law.¹⁴⁴ "To determine which provisions of humanitarian law apply to a given situation and when they may take effect, two preliminary questions must be answered: Whether an armed conflict or occupation within the meaning of humanitarian law exists; and, if so, whether it is internal, international, or internationalized in nature."¹⁴⁵ In this regard, it is important to note that occupation of the territory of a state by the armed forces of other states make the rules of international armed conflict and specific rules regulating the administration of an occupied territory applicable.¹⁴⁶ The Hague Convention applies only to international armed conflicts between states.¹⁴⁷ The Geneva Conventions and Protocols I and II distinguish between international and non-international conflicts. Protocol II and Common Article 3 apply to armed conflicts between a state's military forces and internal insurgents.¹⁴⁸ Two important questions arise from this basic legal framework. First, do international police forces have the status of domestic military forces dealing within insurgencies? Second, if they do, may they administratively detain individuals not actively involved in hostilities?¹⁴⁹

If the plaintiff or prosecution proves the elements of the tort or offense under domestic or international law, the arresting authority is liable unless the arresting authority can establish some privilege or immunity. Typically, in the domestic Anglo American context, the privilege would be "authority of law."¹⁵⁰ When that privilege is asserted, conviction or liability depends on whether there is authority of law for the arrest, and whether the arresting agents acted within the scope of the authority asserted.¹⁵¹ Whether

¹⁴⁴ While prima facie liability under international humanitarian law is a theoretical possibility, and actually arose in the *Calley* case, it is quite unlikely because a well-regulated international police force will not engage in conduct prohibited by international humanitarian law.

¹⁴⁵ Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 65 (1997).

¹⁴⁶ See *id.* at 66-67 (citing common article 2, extending rules of armed conflict to cases of partial or total occupation; and 4th Geneva convention, Pt. III, Sec. III, providing detailed rules for protecting civilians in occupied territories).

¹⁴⁷ See *id.* at 67.

¹⁴⁸ See *id.*

¹⁴⁹ See *id.* at 71-72 (noting restrictions on administrative detention).

¹⁵⁰ See RESTATEMENT (SECOND) OF TORTS §118 (1965) (regarding use of force for purpose of effecting arrest is privileged, subject to enumerated conditions); see also *id.* at §146 (providing member of armed forces privileged to inflict harmful contact pursuant to lawful order, including general orders).

¹⁵¹ See *Belcher v. United States*, 511 F. Supp. 476 (E.D. Pa. 1981), for a good example of the interplay of authority-to-arrest, proportionality of force, and self defense claims. The plaintiff was touched on the elbow to encourage him to come in for questioning. He resisted, which justified an

there is authority of law for the arrest depends upon the definition of a crime and of arrest powers discussed above.

This analysis -- likely to be employed even in civil law traditions -- is unnecessary when explicit privileges and immunities are conferred under international law. Given the uncertainty of the common law analysis, any permanent international police regime should include an explicit statement of privileges and immunities for international police agents.

Several potential sources of privilege or immunity exist: Domestic law applicable to police officers,¹⁵² the privileges and immunities available to UN forces¹⁵³, and other privileges and immunities under international law. Status of forces agreements¹⁵⁴ define the relationship between UN forces and host states, extending international privileges and immunities to the forces, and obligating the host state to allow freedom of movement and other necessary facilities.¹⁵⁵ Status of forces agreements therefore are the principal basis for privileges and immunities rooted in domestic law (when consent to intervention exists). The UN has adopted a model status of forces agreement, and has encouraged adoption of status of forces agreements by all countries receiving peace operations forces.¹⁵⁶ Other privileges and immunities under the domestic law of the receiving country should not be overlooked, but their existence cannot be predicted in advance as a part of a permanent plan for international police intervention. Therefore, it is important to consider sources of privileges and immunities rooted in international law.

arrest. A fight ensued, justifying the use of deadly force to subdue him. His claim of self-defense was rejected.

¹⁵² Germany, like most of Yugoslavia, bases its law on civil law principles. Under civil law, the privilege to make an arrest depends on general justification principles, which in turn depend on some affirmative grant of arrest power. See Andreas Gronimus, *Allied Security Services in Germany: The NATO SOA and Supplementary Agreement Seen from a German Perspective*, 136 MIL L. REV. 43, 44-45 (1992) (explaining basic principles of arrest privileges under German law).

¹⁵³ See Sharp, *supra* note 101, at 175 (discussing draft Protocol III to Geneva Convention of August 12, 1949, extending immunity to "persons engaged or deployed by Secretary General of United Nations as members of the military, police or civilian components of a United Nations operation"). This approach could be extended to NATO or other multinational forces deployed under the authority of a U.N. Security Council resolution. It would not extend to multinational forces deployed without the benefit of the exercise of Security Council Authority.

¹⁵⁴ See *supra* note 4. Ordinarily a sovereign nation has exclusive jurisdiction within its borders unless it waives that jurisdiction. See Gibson, *supra* note 128, at 185 n. 273 (citing *Wilson v. Girard*, 354 U.S. at 529, upholding Japanese jurisdiction over U.S. soldier). On the other hand personnel of a occupation force are not subject to the jurisdiction of the occupied territory. See *id.* at 185 n. 272. "Territory is considered occupied when it is actually placed under the authority of the hostile army" *Id.* (quoting 1905 Hague Convention, art. 42). The 1993 SOFA between UN and Bosnia tracks the UN Model SOFA closely. See *id.* at 185 n.278.

¹⁵⁵ See Tittlemore, *supra* note 141, at 78 (citing status of forces agreements and convention on the safety of United Nations and associated personnel).

¹⁵⁶ S.C. Res. 868, *supra* note 130, ¶5(c). [authority for UN commitment to obtain SOFAs in all cases]. Some commentators conclude the the terms of the model SOFA are applicable everywhere as customary international law. See Sharp, *supra* note 128, at 37.

In the Durant case, the United States argued that, as a member of a multinational force operating under UN Security Council authority, CWO Durant was immune from capture, requiring immediate release if capture occurred.¹⁵⁷ In Security Council Resolution 868,¹⁵⁸ the Security Council expressed the view that privileges and immunities derived from the UN Charter and from the Convention on Privileges and Immunities¹⁵⁹ extend to all personnel involved in UN peacekeeping operations.¹⁶⁰ Similar privileges and immunities were adopted for UNPROFOR forces in Bosnia.¹⁶¹

The problem with using these general sources of privileges and immunities for multinational police operations is that they extend only to forces established and employed by the UN itself. It is not clear that they extend to national or regional forces deployed under UN Security Council authority. In the wake of the Somalia crisis, the President of the United States issued Presidential Decision Directive 25 which, among other things, determined that US forces contributed to multinational forces have adequate legal protection, including treatment as experts on mission for the UN, which would bring them within the Convention on Privileges and Immunities of the United Nations.¹⁶²

In 1993, the UN General Assembly opened for member ratification the Convention on the Safety of United Nations and Associated Personnel.¹⁶³ The Convention extends its protections to military, police or civilian personnel deployed by the Secretary General of the UN.¹⁶⁴ The negotiating history suggests that this definition excludes members of national or non-

¹⁵⁷ See Lepper, *supra* note 5, at 363 (citing Congressional statements and Security Council documents); see also S.C. Res. 767, U.N. SCOR, 47th Sess., ¶15, U.N. Doc. S/RES/767 (1992) (explicitly providing immunities for UN officials operating in Somalia, paragraph 15 affirms that all officials of the United Nations and all experts on mission for the United Nations in Somalia enjoy the privileges and immunities provided for in the Convention on the Privileges and Immunities of the United Nations of 1946 and in any other relevant instruments and that all parties, movements and factions in Somalia are required to allow them full freedom of movement and all necessary facilities); S.C. Res. 794, U.N. SCOR, 47th Sess., at ¶ 3, U.N. Doc. S/RES/794 (1992) (providing, "that all parties, movements and factions in Somalia take all measures necessary to ensure the safety of United Nations and of all other personnel engaged in the delivery of humanitarian assistance, including the military forces to be established pursuant to the authorization given in paragraph 10 below").

¹⁵⁸ See S.C. Res. 868, *supra* note 130.

¹⁵⁹ The Convention on Privileges and Immunities §22 extends privileges and immunities to persons performing missions for the UN, as necessary for the independent exercise of their functions. This convention does not make it a crime to violate the privileges and immunities, but the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons does. See Lepper, *supra* note 5, at 368.

¹⁶⁰ See *id.*, preamble, ¶ 3.

¹⁶¹ See S.C. Res. 1031, *supra* note 104, ¶37 (providing, "calls upon the parties to ensure the safety and security of UNPROFOR and confirms that UNPROFOR will continue to enjoy all existing privileges and immunities, including during the period of withdrawal").

¹⁶² See Lepper, *supra* note 5, at 365-66 (characterizing PDD-25 and explaining how experts on mission are covered by Convention).

¹⁶³ See generally Convention on Safety, *supra* note 5; see also Lepper *supra* note 5, at 370.

¹⁶⁴ See *id.* at art 1(a).

UN multinational personnel serving under a Security Council mandate.¹⁶⁵ Rather, such national and regional personnel are covered as "associated personnel" -- persons "assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations."¹⁶⁶ Protections under Article 1(c)(ii) of the convention extend to "United Nations operations" -- conducted under UN authority and control to maintain or restore international peace and security¹⁶⁷ or when the Security Council or General Assembly has declared that exception risk to the safety of personnel participating in the operation exists. It excludes international armed conflict in which UN personnel are engaged in combatants against organized armed forces.¹⁶⁸

Although the Convention urges states to negotiate SOFAs,¹⁶⁹ it is silent as to who exercises jurisdiction over members of the of a UN operation in the absence of a SOFA. The U.S. position is that the sending state exercises exclusive jurisdiction.¹⁷⁰ Article 8, however, requires the immediate release of captured or detained personnel unless a SOFA provides otherwise. This effectively precludes exercise of jurisdiction by the host state.¹⁷¹

The convention preserves the privilege of self-defense as superior to any right, duty, or limitation imposed in the convention.¹⁷² Linking the self-defense privilege to conduct consistent with ROEs was considered but rejected.¹⁷³ UN personnel using force in excess of that privilege of self defense would enjoy the Convention's protection against detention but resisting their excessive force would not be a crime under the Convention.¹⁷⁴ The scope of privileges and immunities conferred by the Convention is potentially limited by the obligation under Article 6 for UN personnel to "respect" (not "obey") the laws of host and transit states and not to exceed their authority.¹⁷⁵

Disputes over interpretation or application of the Convention must be submitted to arbitration, or, in default of arbitration, to the International

¹⁶⁵ See Lepper, *supra* note 5, at 382.

¹⁶⁶ See *id.* at 385 (citing Convention on Safety, *supra* note 159, at art 1(b)(i)).

¹⁶⁷ See Convention on Safety, *supra* note 5, at art 1(c)(i).

¹⁶⁸ See *id.* at art. 2(2).

¹⁶⁹ See *id.* at art. 4; see generally Christine Gray, *Symposium: The United Nations, Regional Organization, and Military Operation, Host-State Consent And United Nations Peacekeeping In Yugoslavia*, 7 DUKE J. COMP. & INT'L L. 241, n 56 (1996) (regarding SOFAs in Bosnia).

¹⁷⁰ See Lepper, *supra* note 5, at 415-16 (noting that in Chapter VI operations concurrent jurisdiction may be more appropriate).

¹⁷¹ See *id.* at 416.

¹⁷² See *id.* at 452-53.

¹⁷³ See *id.* at 453.

¹⁷⁴ See *id.* at 454.

¹⁷⁵ See *id.* at 420.

Court of Justice (ICJ).¹⁷⁶

Significantly, the convention extends to "police" operations as well as military operations. The convention provides not only a nearly complete framework for privileges and immunities of an international police force, it also reinforces the effectiveness of such a force by criminalizing conduct opposing such a force.

D. International Criminal Court

The international agreement on an International Criminal Court ("ICC") crystallizes two sets of issues with respect to the international policing function. First, how will arrest warrants issued by the ICC be executed?¹⁷⁷ Second, under what circumstances will members of an international police force or those opposing it be subject to prosecution before the ICC? The first question is essentially the same as the question which arose with respect to execution arrest warrants issued by the Yugoslav tribunal. One of the reasons for establishing and deploying an international police force would be its capacity to execute international warrants.

The second question would be answered under the legal framework establishing privileges and immunities for a multinational police force. Of course, it is unlikely that members of a multinational police complement would engage in conduct coming within the jurisdiction of the ICC. Typically, international police force conduct would relate to individuals and small groups targeted because of their own violation of international obligations. If international police forces were involved in grave humanitarian violations or genocide, the same privileges and immunities that would protect international police officers from prosecution or a suit under domestic law of the receiving country should protect them as well from prosecution before the ICC.

V. CONCLUSION

Support is growing in the international community for international police forces as a new tool of peace operations. A permanent organizational plan for deployment of such forces will reduce the uncertainty and political costs of using such forces when they are appropriate. Such a plan must recognize the practical difference between police operations, including warrant execution and patrol functions, and traditional military operations.

¹⁷⁶ See *id.* at 426.

¹⁷⁷ Article 89 of the Rome Statute for the International Criminal Court (<http://www.un.org/law/icc/statute/romefra.htm>) obligates states parties to execute arrest warrants issued by the court.

In order for international police intervention to be successful, international law must authorize intervention, must provide affirmative authority for arrest and prosecution of individuals opposing an international police force, and must provide appropriate privileges and immunities for international police agents performing their duties. The draft Convention on Safety of United Nations Personnel is a good framework for the necessary privileges and immunities.

Looking to consent or martial law as sources of arrest power employs the following logic:

Any police intervention over the objections of the host country presents the risk of military opposition that would overwhelm the police. Thus involuntary police intervention must be coupled with military intervention. When military intervention is not consented to, or does not result in consent, military occupation is the result. Military occupation carries with it martial law. An international police force then operates under martial law. So, an international police force can get plenary power, privileges and immunities either from domestic law through consent -- if the consent document explicitly delegates power to international police -- or it can get them from martial law.¹⁷⁸

¹⁷⁸ The author appreciates thoughtful input on this conclusion from his friends and former students, LTJG Michael G. Barton, USCGR, and Stuart P. Ingis, Esq., Piper & Marbury, Washington, DC.