From Congo to East Timor in Forty Years: The UN Finally Crossing the Rubicon Between Peace-Keeping and Peace-Making?

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I. Introduction

Peace-keeping operations are an invention of the United Nations.[1] They were developed in response to the political realities of the Cold War, brought about by the need to address conflicts which occurred after entry into force of the *UN Charter* and for which the mechanisms provided for in Chapters VI and VII of the Charter could not be used.[2] The means provided for in Chapter VI, concerning the pacific settlement of disputes, were inadequate. The means provided for in Chapter VII, concerning the enforcement measures, could not be agreed upon by Members of the Security Council due essentially to the profound ideological differences that

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1 Peacekeeping operations have been defined broadly as: [O]peration[s] involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and cooperation. While they involve the use of military personnel, they achieve their objectives not by force of arms, thus contrasting them with the 'enforcement action' of the United Nations under Article 42. United Nations, *The Blue Helmets: A Review of United Nations Peace- Keeping* at 4, UN Sales No. E.90.I.18 (2d ed. 1990) [Blue Helmets II].

2 For a discussion of the development of peacekeeping and the early operations, see: D.W. Bowett, *United Nations Forces: A Legal Study ,London: Steven & Sons*, 1964; United Nations, *Blue Helmets: A Review Of United Nations Peace-Keeping*, 3d ed, New York: United Nations Publications, 1996 [Blue Helmets I]; R Higgins, *United Nations Peacekeeping, The Middle East 1946-1967: Documents And Commentary*, Vol. I, New York: Oxford University Press, 1969; R Higgins, *United Nations Peacekeeping, Asia 1946-1967: Documents And Commentary*, Vol. 2. New York: Oxford University Press, 1970; R Higgins, *United Nations Peacekeeping, Africa 1946- 1967: Documents And Commentary*, Vol. 3, New York: Oxford University Press, 1980; R Higgins, *United Nations Peacekeeping, Europe 1946-1979: Documents And Commentary*, Vol. 4, New York: Oxford University Press, 1981; M Goulding, 'The Evolution of United Nations Peace-Keeping', (1993) 69 *International Affairs* 451.

prevailed during the Cold War. Peacekeeping emerged as a mode of international intervention other than those provided for in Chapters VI and VII of the Charter.

As the concept of peacekeeping evolved, UN peace-keeping operations developed core legal principles that became fundamental to their operation. They embody the essence of peace-keeping and permeate all aspects of an operation.[3] The three main legal principles underlying peacekeeping are: (1) consent of all parties concerned and a competent organ of the UN, usually the Security Council;[4] (2) impartiality; and (3) non-use of force except in self-defence. These principles developed over time and are based on sound legal and practical reasoning. For example, Article 2(7) of the *UN Charter* prohibits the United Nations from intervening in the domestic affairs of a Member State except where Chapter VII enforcement measures are involved.[5] Thus, a UN peace-keeping force can only intervene into the domestic affairs of a State if the State concerned has consented to that intervention and to the peace-keeping operation as a whole.[6] Similarly, if the UN is to effectively "keep the peace", it must be impartial and unbiased in its operations. It is obvious that it would be extremely difficult, if not impossible, for the UN to engage in coercive force and still be regarded as a neutral body. For this reason the use of force by UN peace-keeping forces has traditionally been limited to that used in self-defence.

In more recent times a "second generation" of peace-keeping has evolved.[7] These operations, occurring principally since the end of the Cold War, have increasingly involved civilian personnel and have been given

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3 See Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: Model of Status of Forces Agreement for Peace-Keeping Operations: Report of the Secretary-General, UN GAOR, 45th Sess., Agenda Item 76, UN Doc. A/45/594, 1990; Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations: Report of the Secretary-General, UN GAOR, 46th Sess., Item 74 of the Preliminary List, UN Doc. A/46/185. 1991.

4 Peacekeeping operations, unlike enforcement measures, can be authorised by the General Assembly (GA), but the GA has only done this on two occasions: UNEF I (United Nations Emergency Force) which was established to secure the withdrawal of troops from Egyptian territory and to serve as a buffer between Egypt and Israel; and UNSF (United Nations Security Force) which was created to maintain peace and security in the West Irian territory, 'UN Peacekeeping History', (1994) 1 *International Peacekeeping* 1, 9.

5 Article 2, paragraph 7 reads as follows:
"Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." *UN Charter* Article 2, para. 7.

6 Although it is worth noting that previously the majority of peace-keeping operations have involved interstate disputes as opposed to intrastate disputes. It is only more recently that peace-keeping operations have been involved in disputes contained within a single State. See S. R Ratner, *The New UN Peace-keeping: Building Peace In Lands of Conflict After The Cold War*, New York: St Martins Press, 1996.

7 Boutros-Ghali acknowledges this development in his introduction to the United Nations publication, The Blue Helmets: above n 2 at 5. Ratner similarly discusses these

more complex and challenging mandates, such as helping to promote human rights and national reconciliation and organising and monitoring elections.[8] Whilst the fundamental characteristics of these peace-keeping operations have not changed from those of earlier operations, there is no doubt that all three of the main legal principles underlying peace-keeping have been strained by the new demands placed upon these operations. For example, it has become increasingly difficult to gain the consent and cooperation of all parties involved in UN peace-keeping operations.

With the end of the Cold War, the United Nations has taken on a new, aggressive role in the use of military force as a peacemaker. Iraq's aggression in Kuwait, for instance, was met by a UN authorised international coalition of armed forces. The humanitarian crisis precipitated by the Iraqi oppression of the Kurds and the inability to supply food and assistance in a war ravaged Somalia to the civilian population presented the UN with new challenges with regard to political perspectives on matters of an internal nature and the issue of force in its military perspectives. But it is the recent humanitarian intervention in East Timor by an international force expressly authorised to use force to bring law and order to the territory and protect fundamental human rights that has shaken the UN's classical interpretation of its foundational principles of sovereignty and non-intervention.

The arena of peace-keeping has evolved from the use of force only in self-defence and a goodwill presence authorised by host government to active military action by UN authorised international forces against aggressive governments and recently the humanitarian peace-making action by an international force in East Timor, to halt human rights violations and restore law and order in a territory to which a sovereign nation lays claim, characterised by the use of 'all necessary' force and a lack of goodwill by the host government to the peace-keeping and peace enforcement action.

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developments in his book. Ratner, Id. See also D Warner (ed.) *New Dimensions of Peacekeeping*, Boston: Kluwer Academic Publishers, 1995; M. R Berdal, "The Security Council, Peacekeeping and Internal Conflict After the Cold War", (1996) 7 *Duke Journal of Comparative and International Law* 71; K. A Childers, "United Nations Peacekeeping Forces in the Balkan Wars and the Changing Role of Peacekeeping Forces in the Post-Cold War World" (1994) 8:1 *Temple International and Comparative Law Journal* 117; R Wedgwood, "The Evolution of United Nations Peacekeeping" (1995) 28 *Cornell International Law Journal* 631.

[8] Blue Helmets I, above n 2, at 3.
Ratner describes the new breadth of responsibility of UN peacekeepers as having fallen into ten categories: (1) military matters, (2) elections, (3) human rights, (4) national reconciliation, (5) law and order, (6) refugees, (7) humanitarian relief, (8) governmental administration, (9) economic reconstruction, and (10) relationships with outside actors. He describes the depth of responsibility as covering (1) monitoring, (2) supervision, (3) control, (4) conduct, (5) technical assistance, and (6) public information. Ratner, above n 6 at 42- 43.

Force and the UN: A Historical Perspective

The norm of the "non-use of force", and state sovereignty,[9] is established in the *UN Charter*. Article 2(4) contains a prohibition on "the use of force against the territorial integrity or political independence of any State",[10] providing

> " [a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations."

The Article is broader than the Kellogg-Briand Pact (which renounced war as an instrument of national policy) in that it prohibits the use and the threat of use of force rather than just recourse to war in recognition by the international community in the aftermath of the World War II that war is not a national right but an international crime. Although Article 2(4) was first thought to outlaw the use of force of any sort by one state against another, exceptions to the Article were subsequently used to justify unilateral interventions.[11] One exception expressly built into the Charter was Article 51's recognition that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member" and the enforcement actions authorised by the Security Council under Chapter VII. Implicit exceptions to Article 2(4) have been derived from the Article based on the argument that Article 2(4) prohibits only the use of force against the "territorial integrity" or "political independence" of another state, and would not apply to an intervention which is not intended to withhold or even temporarily occupy the state's territory or to interfere with the state's political autonomy or sovereignty.[12] But even this argument is now under siege after the UN Secretary-General Kofi Annan and the US President Bill Clinton pointed out recently that rogue states should not expect their borders to protect them arguing that international concern for human rights takes precedence over claims of non-interference in internal matters.[13]

The doctrine of state sovereignty, long protected by the principles of non-intervention and self-determination in the domestic affairs of states,

[9] Sovereignty, according to Professor Scheffer, is the "central pillar of international law"' and thus legitimised the Nation-State as entitled to the protection of international law. For further details see his article "Toward a Modern Doctrine of Humanitarian Intervention", (1992) 23 *University of Toledo Law Review* 253.

[10] See also the *UN Charter*, Article 2(3).

[11] L Henkin, "The Use of Force: Law and US Policy" in *Right v Might: International Law and Use of Force*, Council on Foreign Relations Press, 1991 p.39.

[12] Henkin, above n 11, at 39-40.

[13] Opening address of the UN Secretary-General, Kofi Annan to the General Assembly on its 54th Annual Session on 27 September 1999 and the address of the US President during the Session. Text of the speeches can be accessed at the following URL <http://unbisnet.un.org/webpac-bic/wgbroker>.

is both recognised as customary international law and enshrined in the *UN Charter*. Article 2(7) acknowledges that; "[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State." The Article, however, is limited by an exception which allows the "application of enforcement measures under Chapter VII."

Article 2(7) is a prohibition against the United Nations, not states, from intervening in the internal affairs of member-states.[14] However, the principle of non-intervention has been eroded by the numerous intrusive treaty obligations to which states have committed themselves.[15] The large body of human rights law that has developed in conventional and customary law has also contributed to the development of Article 2(7), which indicates that violations of internationally recognised standards are not always matters completely within the internal jurisdiction of a member-state. This erosion of the principle of non-intervention set forth by Article 2(7) has contributed, in part, to the increase in UN interventions in the post-Cold War world,[16] which in turn has occasionally led to complex operations that include elements of both peace-keeping and peace enforcement.

This trend mirrors the effects of globalisation, accelerated especially with the end of the Cold War, in which states have taken on numerous obligations through international treaties and conventions, a trend that has reduced the world into a global village where actions (whether military, political or economic) by one sovereign nation may adversely affect neighbouring sovereignties.[17] Sovereignty has thus undergone the metamorphosis from individual supremacy which accompanied the birth of the nation-state to collective responsibility which is consonant with globalisation and contemporary cohesiveness of the international community of nations. The notion that sovereignty does not entitle a government to slaughter its own people and that outsiders have a duty to take action is captured in the recent words of the UN Secretary-General Kofi Annan that "nothing in the [UN] Charter precludes a recognition that there are rights beyond borders."[18]

Since the end of the Cold War, the role of United Nations' operations in the area of international peace and security has increasingly become a topical issue for the different nations of the world. In particular, the use of force by, and in support of, peace-keeping has raised questions concerning the future role of UN peacekeeping operations in the resolution of international and internal conflict. During the Cold War there were

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14 See V Kartashkin, "Human Rights and Humanitarian Intervention" in L Fisler Damrosch & D. J Scheffer (eds.) *Law and Force in the New International Order* (1991) 202.

15 Scheffer, above n 9 at 262.

16 Of the 26 UN authorised missions since its creation, half of them have been in the post-Cold War era.

17 This is for instance through a mass trans-boundary movement of refugees or regional tension created by arms testing.

18 Annan, above n 13.

two accepted forms of United Nations operations: peace-keeping and peace-enforcement. Since the end of the Cold War, however, despite increasing difficulties faced by UN peacekeeping operations, no accepted mode of action beyond these two operations has emerged. This has become problematic as the UN has consistently chosen to use peace-keeping forces as its primary tool in its effort to restore peace and security; despite the fact that peace-keeping, in itself, is not always an effective means to achieve these ends.

Primarily because peacekeeping provided a legal and "palatable" form of intervention in intrastate conflicts, during the Cold War, the use of UN peacekeepers to intervene and resolve conflict was acceptable to Member States and met with their growing demands and expectations that action be taken to contain state fragmentation and resolve humanitarian crises. Due to their acceptability, such forces were authorised and implemented. With the end of the Cold War, the circumstances into which the UN intervenes, however, are often volatile and not conducive to effective peacekeeping. Situations where, for example, the consent of the warring factions can only be obtained conditionally or where there is no governmental authority in existence with whom the UN could negotiate and work. The Security Council has increasingly authorised the use of force by and in support of some of these UN peace-keeping operations to enable their mandates to be achieved. Ultimately this has meant that UN peacekeeping has moved beyond the three main legal principles upon which it was originally based, notably the principles of consent, impartiality and non-use of force except in self-defence. Arguably, peace-keeping has outstripped its original doctrinal justifications and as a result now flounders without guidelines and with ill-defined purpose.[19]

II. Peace-Keeping Within the Framework of the Community of Nations

Generally, peace-keeping can be separated into two categories: observer missions and actual peace-keeping forces. One of the first peace-keeping operations established by the Security Council was the United Nations Truce Supervision Organisation (UNTSO), which was created with the consent of the parties to supervise the truce and Armistice Agreements between the newly formed state of Israel and four of her Arab neighbours in 1948-9. The observers were (and remain) unarmed. This is the traditional model of UN peacekeeping fashioned by the then UN Secretary-General Dag Hammarksjold who blocked by superpower hostility to anything bigger fashioned the half-way house of peace-keeping lightly

[19] K. E Cox, "Beyond Self-Defence: United Nations Peacekeeping Operations & the Use of Force", (1999) 27 *Denver Journal of International Law and Policy* 239, 240-241.

armed units of military personnel acting more like policemen than soldiers.

The 1956 Suez conflict provided the UN with its first opportunity to deploy an armed peace-keeping force, the United Nations Emergency Force (UNEF I). UNEF's primary mandates under General Assembly Resolution 1000 were to secure a cease-fire between British, French, Israeli and Egyptian forces in the Sinai Peninsula; to direct the withdrawal of the non-Egyptian forces from Egyptian territory; and to patrol the border areas. In addition, the Emergency Force was responsible for trying to achieve the aims of the Egypt-Israeli Armistice Agreement.[20] The peacekeepers were instructed never to initiate the use of force, although they could respond to armed attacks with force and could resist attempts to make them withdraw from their positions.[21] In his report on UNEF I, Dag Hammarskjold wrote:

> " [T]he rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander ... The basic element involved is clearly the prohibition against any initiative in the use of armed force."[22]

This definition of self-defence was narrow and yet adequate for the UNEF I operation because the UN troops involved in UNEF I were maintaining a cease-fire on a frontline between two orderly armed forces. Furthermore, there was only a small civilian population living in the area.[23] Thus, the amount of force which UNEF I was authorised to use was sufficient for the purposes of fulfilling its mandate. The Secretary General, Dag Hammarskjold, indicated that he wanted to ensure that the Emergency Force "was in no way a military force temporarily controlling the territory in which it was stationed." UNEF troops, while more than just observers, were clearly intended to be deployed for peaceful purposes alone. The same was not true of the Operation in the Congo (ONUC), where a larger and potentially more dangerous deployment of UN peacekeepers occurred when the UN established the Operation in the Congo (ONUC) from 1960 to 1964. Circumstances eventually compelled the UN to

[20] M Ghali, "United Nations Emergency Force I" in William J. Durch (ed.) *The Evolution of UN Peacekeeping*, New York: St Martins Press, 1993 at 112-113.

[21] UNEF I operated from November 1956 - June 1967. Its function was to "secure and supervise the cessation of hostilities, including the withdrawal of the armed forces ... from Egyptian territory, and after the withdrawal, to serve as a buffer between Egyptian and Israeli forces." United Nations, *UN Peacekeeping Booklet* (1996) 9.

[22] United Nations Emergency Force, Summary Study of the Experience Derived From the Establishment and Operation of the Force: Report of the Secretary General, UN GAOR, 13th Sess., Agenda Item 65(c) 179, UN Doc A/3943 (1958) (emphasis added).

[23] Marrack Goulding, 'The Use of Force by the United Nations' in *Mountbatten-Tata Memorial Lecture At The University of Southampton* (1995) 8.

authorise the peace-keeping operation to use more extensive force.[24]

ONUC was deployed in the summer of 1960 to essentially assist the Government of the Congo in carrying out tasks related to the maintenance of law and order by defusing the separatist civil war taking place in the recently decolonised Congo. Belgium, the former colonial power, was required to remove her troops from the Congo under the UN's mandate. Although not deployed for the purpose of initiating any use of force, ONUC's mandate included assisting the Congolese government with the restoration of law and order. Initially, the establishment of the force was based upon the principles of UNEF I. Including the principle that there should be no initiative in the use of force by UN troops. This is made clear in the First Report of the Secretary-General on the Implementation of Security Council Resolution S/4387 of 14 July 1960[25] in which Hammarskjold reiterated his earlier comments made in the UNEF I Report regarding the limits on the use of force by UN troops. In this report he again emphasised the prohibition of any initiative by UN forces in the use of armed force.[26]

After the central government disintegrated and attacks on UN personnel took place in February 1961, the Security Council authorised ONUC to

> "take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including . . . the use of force, if necessary, in the last resort."[27]

As Bowett has stated, "it is difficult to avoid the conclusion that the Security Council by this Resolution [S/RES/161(1961)] abandoned a strict reliance on the principle of self-defence."[28] However it is interesting that the Secretary-General continued to express the opinion that troops should

[24] ONUC operated between July 1960-June 1964. Its initial function was to "ensure the withdrawal of Belgian forces, to assist the Government in maintaining law and order and to provide technical assistance." Later this function was modified to include "maintaining the territorial integrity and political independence of the Congo, preventing the occurrence of civil war and securing the removal from the Congo of all foreign military, paramilitary and advisory personnel not under the UN command and all mercenaries." UN Peacekeeping Booklet above n 21 at 19.

[25] First Report by the Secretary General on the Implementation of Security Council Resolution S/4387 of 14 July 1960, United Nations Emergency Force, Summary Study of the Experienced Derived From the Establishment and Operation of the Force: Report of the Secretary-General, UN SCOR, UN Doc. S/4389 (1960).

[26] He stated as follows:
"In my initial statement I recalled the rule applied in previous United Nations operations to the effect that the military units would be entitled to act only in self-defence. In amplification of this statement I would like to quote the following passage from the report to which I referred. [M]en engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Security Council and within the scope of its resolution." The basic element involved is clearly the prohibition against any initiative in the use of armed force. Above 26, at 15.

[27] GA Res. 161, UN SCOR, (1961).

[28] Bowett, above n 2 at 201-02.

only engage in defensive action, or they would risk becoming a party to the conflict.[29] Bowett regards this statement as "clinging to the 'self-defence' concept."[30]

The mandate was again expanded in November 1961 and by January 1963, ONUC numbered some 20,000 fully armed troops including tanks, heavy artillery and fighter jets. This operation was shorn off the UN tradition model set in 1949 by Dag Hammarskjold of non-confrontation and "anti-Rambo" form of military discipline. It broke new frontiers when its mandate was expanded in 1961 to remove foreign mercenaries. The troops were authorised to have free movement throughout Congo. The UN troops' military intervention successfully prevented the secession of Katanga. However this model of peace-keeping through peace-making was quashed by subsequent mandates and only resurrected three decades later with the end of the Cold War during the Gulf War.

In many ways the UN's experience in the Congo was a premonition of the difficulties that came with the evolution of the more complex second generation of peace-keeping operations. Although it is generally agreed that ONUC was a peace-keeping operation, there is no doubt that it involved some enforcement elements. In the operation's aftermath, and as a result of the UN's experiences in the Congo, the narrow definition of self-defence was revised. It was thought that a broader definition of self-defence would make peace-keeping operations more viable and would enable the United Nations to effectively carry out peace-keeping mandates without the need to resort to "enforcement measures." Thus ONUC, while not the definitive peace-keeping operation of the Cold War period due to its expansive use of force, played a notable role in the development of the use of force within the realm of peace-keeping.[31]

Classical Peace-keeping Paradigms

Peacekeeping is a United Nations non-enforcement action which is not expressly provided for by the *UN Charter*. Since the signing of the Charter in 1945, there have been twenty-six distinct UN peace-keeping operations. The early peace-keeping missions, which involved unarmed observers, were impliedly authorised by the Security Council under Articles 24 and 36. These articles provide for procedures of the Security Council on "the settlement of dispute [s]." The legal authority for the UNEF and ONUC operations, however, was a subject of great controversy. When the Soviet Union and France refused to pay their apportioned dues for

29 See Report of the Secretary-General on Certain Steps Taken in Regard to the Implementation of the Security Council Resolution Adopted on 21 February 1961, UN SCOR, 942d mtg., UN Doc. S/4752, Annex 7 (1961).

30 Bowett, above n 2 at 202.

31 Cox, above n 19 at 252-253.

those missions, the International Court of Justice (ICJ) had an opportunity to issue an advisory opinion on the legality of withholding the funds, as well as on the overall lawfulness of peace-keeping operations. In the *Certain Expenses Case,*[32] the ICJ ruled that Article 14 empowered both the Security Council and the General Assembly to authorise peace-keeping operations[33] and rejected the view that Article 43 agreements were required to establish the peace-keeping forces and found that the operations were not "coercive or enforcement action [s]" which would require Security Council authorisation.[34] Based on the ICJ's opinion, evidently the authority for peace-keeping operations is contained in both Chapter VI and Chapter VII.

The ICJ stressed that although peace-keeping operations were not to be regarded as "enforcement measures" within the domain of Chapter VII of the Charter,[35] there was no doubt that because the Security Council had those enforcement powers it was within the power of the Security Council to implement less forceful measures.[36] However, whilst it was made clear that the Security Council had the legal capacity to establish peace-keeping operations, no opinion was given as to where the constitutional sources of such operations lay.[37] However, in so far as UN peace-keeping forces are entitled to use force in self-defence they cannot be regarded as purely pacific means of dispute settlement under Chapter VI. It is for this reason that Chapter VII is usually thought to provide the general legal basis for UN peace-keeping operations, although such operations are not Chapter VII enforcement measures and should not be regarded as such. Considerable debate still exists as to which Articles of Chapter VII have actually been used to authorise the various operations.[38]

The early peace-keeping campaigns had several elements or guiding principles in common; the UN operations had the political support, or at least acquiescence, of the five permanent members of the Security Council, second, the consent and cooperation of the local parties to the dispute was seen as essential to the deployment of the UN peace-keepers and third, the neutrality or independence of the UN was a primary factor in

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32 *Certain Expenses of the United Nations*, 1962 IJC 151 (advisory opinion of 20 July 1962).

33 *UN Charter*, Article 14 provides that 'the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations.'

34 Id.

35 The ICJ stated that the 'operations known as UNEF and ONUC were not enforcement actions within the compass of Chapter VII....' Id. at *Certain Expenses of the United Nations Case*, 1962 ICJ 151, 166.

36 *Certain Expenses Case* Id. at 167. The idea presumably being that the power to implement forceful measures encompasses the power to implement less forceful measures. This principle, ('qui peut le plus peut le moins' which is loosely translated as the 'greater encompasses the lesser') is acknowledged by Georges Fischer. See G Fischer, "Article 42", in Jean- Pierre Cot & Alain Pellet (eds.) *La Charte Des Nations Unies*, 1985, 705.

37 *Certain Expenses Case*, 1962 ICJ at 166-67.

38 The five main Articles which have been put forward as providing the possible legal basis for peacekeeping operations under Chapter VII of the Charter are Articles 39, 40, 41, 42 & 48(1) and various combinations thereof.

an effective peace-keeping operation. These guiding principles have come to distinguish peace-keeping operations in the arena of conflict from more aggressive peace-making actions.[39]

The concept of self-defence, as well as the principles of non-intervention and sovereignty, were blurred and modified in the Congo operation. While peacekeepers today continue to heed to the principle of self-defence, the political and mandate complexities of operations such as those in Iraq and former Yugoslavia have blurred the strict "neutrality and impartiality" of these operations. The UN has chosen the avenue of active military involvement in situations characterised by some sort of inadequate presence or absence of UN forces. Thus in the recent past, the UN has authorised member states to undertake enforcement action aimed at more specific goals whose achievement necessitates the use of troops in arenas of conflict.[40]

III. The UN Charter and the Rise of Peace-Making

The reconfiguration of the traditional peace-keeping status of the UN from a non-confrontational role with the consent and goodwill of the host State to an "aggressive" presence lacking in goodwill by the host party whose will has been bent by the international community or a change in mandate necessitated by conditions in an arena of conflict that puts the lives of UN troops in jeopardy has been through two primary avenues. These avenues are enforcement actions and interventions based on humanitarian grounds (referred to as humanitarian interventions in this Article).

Since the end of the Cold War the number of peace-keeping operations authorised by the Security Council has outstripped the previous operations not only in number but also in complexity and size.[41] Many of the peace-keeping operations established since 1989 have gone beyond the traditional peacekeeping role of monitoring cease-fires and controlling buffer zones between belligerent States. Although peace-keeping operations continue to carry out such tasks, they have been entrusted additionally with mandates as varied as the monitoring of troop withdrawals, elections and human rights violations.[42] Peace-keeping forces have also provided assistance in the resettlement of refugees and displaced persons, the rebuilding of political and administrative structures

[39] John E Fink, "From Peacekeeping to Peace Enforcement: The blurring of the Mandate for the Use of Force in maintaining International Peace and Security" (1995) 19 *Maryland Journal of International Law and Trade* 1, 14.

[40] Korea-1950 by SC Res. 82, Iraq-1990 by SC Res. 660 & 678, Somalia-1992 by SC Res. 794, Rwanda -1994 by SC Res.92, Haiti-1994 by SC Res.940, Bosnia-1992-1994 by SC Res. 770,781,787 & 816 and recently East Timor-1999 by SC Res. 1264.

[41] During the Cold War there were 15 peacekeeping operations. Since 1989 there have been 26 established. See Blue Helmets I, above n 6, at 3.

[42] Cox, above n 19 at 256-257.

and the protection of deliveries of humanitarian relief supplies.

During the Cold War, except in the case of the Congo, the concept of self-defence remained static and force was not widely used in practice by UN peacekeeping forces. Since then, as peace-keeping itself became more complicated and difficult, peace-keepers have been authorised to use force more liberally and have increasingly resorted to the use of force. Both the authorization and use of force has come about for several reasons: first, due to the number of attacks against civilian and military personnel engaged in peace-keeping operations; secondly, in order to more effectively carry out difficult mandates; and thirdly, due to more complex conflict situations in which peace-keepers are engaged.[43]

(a) Enforcement Actions

The first occasion on which the UN Security Council authorised the use of force in a military enforcement action was in June 1950 after North Korean troops crossed the 38th parallel into South Korea. The Security Council met on June 25 to note that "the armed attack on the Republic of Korea by the forces from North Korea . . . constitutes a breach of the peace" in accordance with Article 39 of the Charter.[44] Two days later, the Security Council in Resolution 83

> "[r]ecommend[ed] that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."[45]

Unable to utilise the Military Staff Committee (MSC-established under article 47 of the Charter) to direct the military action, the Council established a unified military command with an American commander who reported to the United States Joint Chiefs of Staff and the US President.[46]

Although the Korean enforcement action was the first time that the UN authorised Chapter VII use of force, curiously, none of the resolutions mentioned either Chapter VII or Article 42. This evidently had to do with the nature and military scope of the expected operation in which the

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[43] Ratner describes this second generation peacekeeping in the following way: (1) Second generation operations aim primarily at assisting a State or group of states in executing an agreed political solution to a conflict; (2) Second generation peacekeeping operations are limited to an exclusively military mandate, but can have a substantial or predominantly non-military mandate and composition;(3) Second generation peacekeeping has complex agendas;(4) The new peacekeeping is as likely to respond to an ostensibly internal conflict as an interstate conflict; (5)Second generation operations involve numerous types of actors; (6)The new peacekeeping is a fluid phenomenon. See Ratner, above n 6 at 21-24.

[44] SC Res. 82 (25 June 1950).

[45] SC Res. 83 (27 June 1950).

[46] SC Res. 84 (7 July 1950).

UN's action amounted to a sub-contraction of peace enforcement ostensibly to the USA in the face of underlying political complexities in view of the interplay of reciprocating power relations involving the super powers in the two states, which effectively frustrated any more definitive or decisive action by the Security Council, arguably dominated by the political and military might of the two.[47]

The UN was able to act in this situation, in the middle of the Cold War, due to the chance absence of the Soviet Union from the Security Council during the timeframe of these resolutions but the text of the resolution mirrored caution and provided for a formal UN command to prevent a political backlash from the Soviet Union by providing a General Assembly (and in effect an international) alibi to the operation. This was a mere Realpolitik facade as the Korean military operation was under the US President and the US joint command was essentially in charge of the operation.[48] It is important considering that subsequent UN authorised military actions in the post Cold War era involving aggressive use of force have had no formal UN command.[49]

The end of the Cold War provided the Security Council with the means to authorise the use of force in a large-scale enforcement action for the second time. After Iraq invaded Kuwait on 2 August 1990, the Security Council quickly condemned the action and demanded the immediate and unconditional withdrawal of Iraq's forces. In response to Iraq's subsequent claim that it had annexed Kuwait, the Security Council, on 25 August, authorised the deployment of naval forces to enforce the sanctions of Resolution 661.[50]

The Security Council took action to authorise the maritime interdiction operations as well as to authorise, as of November 1990, member states

> "to use all necessary means to uphold and implement resolution 660 . . . and to restore international peace and security in the area."[51]

This Security Council interdiction helped prevent fragmentation of opinion by the world political caucus against the assertion of the US that such UN authority was not necessary. A feeling that the Security Council was being replaced by a "world sheriff with a posse" (the US President and army) would have muddied the political issue of the world's reaction and would be further proof of the Security Council's over-politicisation,

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47 For a more detailed analysis, see A. C Arend and R. J Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm,* London: Rutledge, 1993.

48 Id. The Soviet Delegation was absent from Security Council meetings in protest of the seating of Taiwan at the Security Council in the place of the People's Republic of China.

49 Gulf War under US command, military intervention in Haiti under US command, Somalia humanitarian intervention under US command and recently humanitarian intervention in East Timor under Australian command.

50 SC Res. 665 (25 August 1990).

51 SC Res. 678 (29 November 1990).

action or inaction based on the interests of its powerful stakeholders and the unwelcome emergence of the USA as "globocop" with the end of the Cold War.

The allied coalition forces which liberated Kuwait acted pursuant to the Chapter VII authorisation of Resolution 678. Unlike the Korean action, there was no formal UN command, rather the allied forces operated under the leadership of an American commander. From the pattern of the actions in Korea and the Persian Gulf, for a time it appeared that the UN was most likely to take action only where there is large scale aggression by one state against another state and where the vital interests of at least some of the permanent members of the Security Council are at stake.[52] Departures from this view have recently been seen in cases where states under the authority of the UN have justified their use of force in Somalia and recently in East Timor on the basis of humanitarian violations with no visible or invisible underlying political or economic considerations.

(b) Humanitarian Interventions

The principle of "non-intervention" in the domestic or internal affairs of states is grounded in Article 2(7) of the *UN Charter*. In the past, humanitarian intervention had been defined as 'the use of armed force by a state (or states) to protect citizens of the target state from large-scale human rights violations.'[53] Although the *UN Charter* never explicitly mentions the use of force for humanitarian purposes, relief operations in northern Iraq and Somalia were authorised by the UN to protect fundamental human rights and recently this was the basis for intervention by an international peace-keeping force (InterFET) in East Timor.

(i) Iraq

In response to renewed uprisings after defeat in the Gulf War, Saddam Hussein's military forces began to stage attacks on the populations in northern and southern Iraq in order to quell uprisings against his regime. The renewed post Gulf War onslaught led nearly two million Kurds to leave the region, fleeing into Turkey and Iran. Kurds were denied entrance into Turkey, and remained in the inhabitable mountains of northern Iraq. There were reports of hundreds of deaths each day.[54]

[52] See P Fifoot, "Functions and Powers, and Interventions: UN Action in respect of Human Rights and Humanitarian Intervention" in Nigel S. Rodley (ed) *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* 1992 48.

[53] Arend & Beck, above n 47 at 113.

[54] For a detailed exposition, see, Lawrence Freedman & David Boren, " 'Safe Havens' for Kurds in Post War Iraq" in Nigel S. Rodley (ed) *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights*, 1992

On 5 April 1991, at the behest of Turkey and France, the Security Council adopted Resolution 688 which "condemn[ed] the repression of the Iraqi civilian population" and "[d]emand [ed] that Iraq . . .immediately end this repression. . . .".[55] The "interventionist" portion of the Resolution is contained in the third paragraph where the Security Council:

> "[i]nsists that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations."[56]

The acrimonious debate in the Security Council over Resolution 688 indicated that the Resolution was controversial. Both Yemen and China argued that the intervention based on humanitarian grounds contravened the principle laid out in Article 2(7) and would lead to a dangerous precedent[57] as Resolution 688 dictated that Iraq forgo its right to territorial integrity and allow the allies to go into the country to set up the relief operation without the consent of the host state. What became known as the "Safe Havens" Operation began with the deployment of unarmed guards and subsequently lightly armed guards. At the height of the Safe Havens Operation, over 21,000 American, British and French troops were deployed to the region.[58]

(ii) Somalia

In January 1991, President Said Barre's dictatorial regime was overthrown by combating rival factions resulting in lack of an effective government in Somalia. The disjointed civil war in Somalia that fragmented the country into fiefdoms under various warlords presiding over clan alliances prevented the transport of food and humanitarian aid to millions of starving Somalis. In January 1992, the situation had deteriorated to such a degree that the Security Council unanimously enacted a weapons embargo on the country.[59] As the year progressed, the Security Council sent a team to observe the administration of humanitarian aid and deployed fifty UN observers through the creation of the United Nations Operation in Somalia (UNOSOM I)[60] necessitating the Security Council to invoke Chapter

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55 SC Res. 688 (5 April 1991).

56 Id.

57 Rodley, above n 52 at 29.Yemen voted against the resolution while China abstained on the basis that this was an in internal affair meriting no intrusion. China still holds this position as evidenced by the strongly worded speech of its Foreign Minister Tang Jiaxuan to the UN General Assembly during its 54th Annual Session which lambasted "a new form of gunboat diplomacy."

58 Freedman, above n 54 at 63.

59 SC Res. 733 (23 January 1992).

60 Mark R. Hutchinson, "Restoring Hope: UN Security Council Resolutions For Somalia and an expanded Doctrine for Humanitarian Intervention", (1993) 34 *Harvard International Law Journal* 624, 627.

VII of the *UN Charter* and increase the troop levels of the UNOSOM I peacekeepers. In November 1992, following calls by the Secretary-General, Boutros Boutros-Ghali the United States offered to lead a military operation in order to deliver humanitarian aid to the Somalis, the Security Council unanimously adopted Resolution 794. The resolution:

> "authorise [ed] the Secretary-General and Member States cooperating to . . . use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."[61]

Based on this resolution, the United States sent a large armed force contingent into Somalia. The Security Council's mandate to use force was unique as the operation was not in response to an act of aggression. The catalyst for the explicit action under Chapter VII was an Article 39 determination that the humanitarian situation in Somalia and the continuing civil war constituted a threat to international peace and security.[62]

The UN's involvement in the Somalia is long and complicated: it consisted of three operations (and phases) being UNOSOM I, UNITAF and UNOSOM II. UNOSOM I can be regarded as essentially a traditional peace-keeping operation that failed primarily because the situation into which in went was not conducive to peace-keeping. UNITAF, a US-led multinational operation, followed UNOSOM. Its mandate, under Chapter VII of the Charter, was to use force to establish a secure environment for humanitarian relief operations.[63]

Upon restoration of peace (albeit of a precarious nature) in southern and central Somalia, a second peace-keeping operation, UNOSOM II, took over operational responsibility for the area. This operation is sometimes described as a peace-keeping force, and yet was

> "deployed without the consent of the parties, [and had] the right to use all necessary measures to carry out its mandate - including the right to the use of force."

In this respect, UNOSOM II must be regarded as an enforcement measure, albeit under the control and command of the United Nations.[64] The mandate of UNOSOM II was to "take appropriate action, including enforcement measures, to establish throughout Somalia a secure environment for humanitarian assistance."[65] Although UNOSOM II had many other purposes and duties,[66] this was the driving force behind the opera-

61 SC Res. 794 (3 December1992).
62 See Arend & Beck, above n 47 at 55-56.
63 SC Res. 794, UN SCOR, 3145th mtg., UN Doc. S/RES/794 (1992).
64 Cox, above n 19 at 260.
65 SC Res. 794. See also SC Res. 814, UN SCOR, 3188th mtg., UN Doc. S/RES/814 (1993) (establishing UNOSOM II); Blue Helmets I, above n 2 at 722.
66 These duties included, through disarmament and reconciliation, the restoration of peace, stability, law and order. Its main responsibilities included monitoring the cessation of hostilities, preventing resumption of violence, seizing unauthorised small arms, main-

tion. This theme was picked up subsequently in the peacekeeping operation in Yugoslavia, UNPROFOR. With regard to East Timor, however, the multinational peacekeeping force was "saddled" with a Chapter VII mandate from the outset.

(iii) East Timor

In 1998, after economic turmoil led to widespread unrest in Indonesia, General Suharto resigned. His resignation, coupled with the democratic election of a new president, B. J. Habibie, generated strong hopes for political and economic reform. In early 1999 President Habibie indicated that he would respect the results of a referendum that would enable the East Timorese people to choose between special autonomy within Indonesia and independence from Indonesia. The UN Secretary-General then helped broker agreements between Indonesia and Portugal concerning the referendum.[67] To organise and conduct the balloting called for in the agreements, a UN mission (UNAMET) was deployed in East Timor.[68] On 30 August 1999, 78.5 percent of East Timor's voters opted for independence.[69] Immediately after the vote, however, East Timorese militias opposed to independence undertook a campaign of violence against other East Timorese civilians, unchecked by the Indonesian military and police. Hundreds of East Timorese were killed, and at least 200,000 fled their homes.[70]

In an effort to place pressure on Indonesia to end the violence and accept a multinational peace-keeping force, President Clinton made a strong speech on 12 September during the Asia-Pacific Cooperation (APEC) meetings in New Zealand, touching on human rights violations

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taining security at ports, airports and lines of communication required for delivery of humanitarian assistance, continuing mine clearing and assisting in repatriation of refugees in Somalia. See SC Res. 814, above n 78; Further Report of the Secretary- General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794 (1993), UN SCOR, 48th Sess., Addendum 1, UN Doc. S/25354/Add.1 (1993); Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794 (1993), UN SCOR, 48th Sess., Addendum 2, UN Doc. S/25354/Add.2 (1993) (proposing that the mandate of UNOSOM II cover the whole country and include enforcement powers under Chapter VII of the Charter).

[67] East Timor was regarded by the UN General Assembly as a non self-governing territory and its status was regularly on the agenda of both the General Assembly and the Security Council. West Timor (previously under Dutch control) became a part of Indonesia in late 1949. For a contemporary history of Indonesia, see Robert Cribb & Colin Brown, *Modern Indonesia: A History Since 1945*, London: Longman Publishing, 1995.

[68] See SC Res. 1246 (11 June 1999); SC Res. 1257 (3 August 1999).

[69] The vote was officially announced on Sept. 4, 1999. See Seth Mydans, "In East Timor, Decisive Vote for a Break from Indonesia", *New York Times*, 4 September 1999, at A1.

[70] Barbara Crossette, "UN Says a Quarter of East Timorese Have Fled", *New York Times*, 8 September 1999, at A1; Keith B. Richburg, "E. Timor Militias Return to Streets", *Washington Post*, 1 September 1999, at A1; Doug Struck, 'Nuns Describe Slaughter in E. Timor', *Washington Post*, 1 September 1999, at A1.

and democracy including the issue of economic cutbacks to Indonesia.[71] Later that day, Indonesia agreed to the deployment of the multinational peace-keeping force to East Timor.[72] On 15 September the Security Council unanimously adopted Resolution 1264 authorizing a multinational force under a unified command structure to restore stability in East Timor, to protect and support UNAMET, and to facilitate humanitarian assistance operations.[73] Although the force was deployed at the invitation of the Indonesian government, the Security Council nevertheless invoked Chapter VII of the *UN Charter* in passing Resolution 1264, thus ensuring that InterFET had full mandate to use force to secure its objectives. After the chairman of Indonesia's national assembly announced that it had decided by consensus to end that country's rule in East Timor,[74] on 25 October the Security Council created a UN Transitional Administration in East Timor (UNTAET) to replace the Australian-led multinational force and to administer East Timor until it becomes stable enough to function as a fully independent nation, a process that could take several years.[75]

The changing status in the mandate of UN authorised action is exemplified by Security Council Resolution 1264[76] which authorised an Australian led international force for East Timor following international outrage and international calls for an end to the blood letting in the territory by pro-Jakarta militia after the 30 August 1999 UN sponsored referendum after growing evidence of "political cleansing", "systematic torture and execution", and "massive, organised detention and translocation" of pro-independence Timorese.[77] The force was mandated to undertake a full "no-holds-barred" military operation. This may have been partly due to implicit involvement of the Indonesian army (TNI) through the support of pro-Jakarta militia, a fact initially reflected in the first and second drafts of the Security Council Resolution, but later toned down in the hope of securing unconditional Indonesian troop withdrawals and less national outrage at the operation.[78]

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71 President Clinton, "Remarks to American and Asian Business Leaders in Auckland", 35 *Weekly Comp. Pres. Doc.* 1727, 1727-28 (20 September 1999).

72 Seth Mydans, "Indonesia Invites a UN Force to Timor", *New York Times*, 13 September 1999, at A1.

73 SC Res. 1264 (15 September 1999); see SCOR S/PV.4045, 54th Sess., 4045th mtg. (1999).

74 Seth Mydans, "Stung by Debate, Indonesian Leader Ends Election Bid", *New York Times*, 20 October 1999, at A1; Seth Mydans, "Indonesia Chooses an Islamic Cleric As New President", *New York Times*, 21 October 1999, at A1.

75 SC Res. 1272 (25 October 1999).

76 S/RES/1264, 15 September 1999.

77 See e.g. Clinton Remarks, above n 71.

78 The silent hand of the Indonesian army was initially at play through financial, military and logistic support for the pro-Jakarta militia and justified more than ever the blank cheque handed to the international force (InterFET) by the Security Council. See e.g. Clinton Porteus, "Ambush Anger: Howard Appeals to the UN", Herald *Sun*, 12 October 1999 at 14; Ian McPhedran, "Border War Threat: Indons Fired First", *Herald Sun*, 12 October 1999 at 15.

(c) Basis of Enforcement Action in International Law

Enforcement actions under Chapter VII, such as those in Korea and Iraq, are clearly permissible under the Charter when authorised by the Security Council. The trans-boundary impact of a humanitarian violation is easier to gauge than the measurement of a violation's severity and thus a trigger to Security Council action within the framework of Article 39's clause of "threat to peace". The trans-boundary effect of the refugee problem which was created in Iraq by the exodus of the Kurds gave the Security Council leeway in determining that a threat to international peace and security existed. With the greater emphasis that is now placed on human rights and the recent UN authorised multinational force (InterFET) in East Timor to halt the blood bath orchestrated by pro-Jakarta militia and ensure the protection of fundamental human rights, it would appear that the Security Council's expanded interpretation of what constitutes a threat to the peace now includes severe humanitarian violations.[79]

As peace-keeping and peace-making operations blend together in humanitarian interventions, proponents of humanitarian intervention point to UN Articles 1, 55 and 56 to demonstrate the Charter's emphasis on the protection of human rights as well as the maintenance of international peace and security.[80] Several norms in international human rights law have emerged since the signing of the *UN Charter*. While certain efforts have been aimed towards general human rights at a universal level,[81] others have been intended to protect against specific abuses including genocide,[82] war crimes and crimes against humanity,[83] slavery,[84] and torture.[85]

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[79] For a comprehensive history of humanitarian interventions from the early nineteenth century to the present, see Scheffer, above n 9.

[80] Arend & Beck, above n 47 at 132.

[81] These conventions include the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the 1966 Covenant on Economic and Social Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights, which are collectively known as the international bill of rights. Richard P. Claude & Burns H. Weston (eds.) *Human Rights in the World Community, Issues and Action*, Philadelphia: University of Pennsylvania Press, 1992.

[82] 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 278.

[83] The war crimes tribunals at the end of the Second World War termed the violation of certain fundamental obligations as "crimes against humanity". Further work was done on the codification of this crimes as international crimes has been undertaken by the ILC in the 1954 Draft Code of Offences and the 1974 Draft Code of Crimes Against Peace and Security of Mankind. This body of crimes could now seem to constitute part of international customary law after their incorporation into the Statute of the International Criminal Court Article 7) adopted by a staggering 120 countries (including 3 of the Big Five) in Rome, Italy on 17 July 1998.

[84] See 1926 Slavery Convention, 60 LNTS 253 and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 266 UNTS 4.

[85] *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 10 December 1984, UNGA. Res. 39/46, 38 UN GAOR Supp. (No. 51) 197, UN Doc. A/39/51 (1984).

While the doctrine of sovereignty continues to play a pivotal role in international relations today, it has been weakened by the norms and conventions as well as the growing idea that through collective UN authorisation, governments have the right to "intervene" when a human rights violation might threaten international peace.[86] In addition, there has developed a norm that member states of the UN have the responsibility to ensure that human rights violations in other states are addressed.[87] The forcible interventions into Somalia and northern Iraq support this idea as well as the international force in East Timor sent after the international community bent the will of the Indonesian government which had originally termed such a force as an unacceptable violation of its territorial integrity and an abuse of its political independence.

With the practice of the Security Council during interventions in Iraq and Somalia, the former Yugoslavia and more recently in East Timor, humanitarian interventions have taken on a new role in collective international use of force with the cultivation of human rights law and the recent practice of the UN. The Security Council's authorisation to use force, in part to combat the "widespread and flagrant" violations of international humanitarian law, has resulted in the gradual expansion of peace-keeping to peace enforcement as evidenced by the subsequent expansion of the mandates of UNOSOM and UNPROFOR. These two UN missions are a manifestation that peace-keepers, generally trained in the ways of self-defence and non-violent reaction, when confronted with hostile local parties have to adopt an "aggressive" dimension and ultimately the missions come to resemble enforcement actions.

The situation in the former Yugoslavian republics presented the UN with a challenge which tested both the organisation's ability to respond flexibly to a rapidly growing conflict and the efficacy of non-traditional peace-keeping operations. The crisis, which progressively escalated since 1991, is an example of the inherent dangers that the UN will face in a dynamic arena of potential as well as real conflict.

The much publicised and criticised bungles of the UNPROFOR are not so much reflections of the military calibre of the peace-keepers but rather the over-politicisation of peace-keeping issues within the UN and thus an emasculation of the force in its crisis management ability. The issue of mandate of peace-keeping forces has dogged all discussions in the UN General Assembly and Security Council in the Cold War era and such forces have had virtually no military capability. With the end of the Cold War, it was expected that the UN could quickly revise its guiding principles on the mandate of peace-keeping forces as well as their status as a reactive rather than as a proactive measure but this was stymied in

[86] B. G. Ramcharan, "Strategies for the International Protection of Human Rights in the 1990s" in Claude & Weston, above n 81 at 275.

[87] See Scheffer, above n 9 at 275-81 where he contends that the global geo-political changes following the end of the Cold War and regional organisational developments have brought a marked change in the attitudes of governments to humanitarian interventions.

1993 by squabbling between the Americans, Canadians and Europeans over the issue of command of a possible permanent peace-keeping force. Further in a world where so many are weak and so few mighty, the issue of the mandate of UN authorised forces will continue to be a thorny matter for the UN caucus but it is heartening that the UN is refreshing its political perspectives and military dimensions in its peace-keeping efforts.

It is largely due to expected military action that the UN action in East Timor was divided into two phases. Initially, an Australian-led international force to wrestle control of East Timor from the pro-Jakarta militia (which clearly envisaged the prospect of military conflict) followed subsequently by deployment of the traditional peace keeping force, UNTAET. It must be due to the UNPROFOR's impotence in Srebenica and the lesson learnt that the Security Council gave the international force a blank cheque in its military operations. The mantra is not one of consent and goodwill but rather military expedience in establishing a robust internationally supported socio-political infrastructure in East Timor to curb the human rights atrocities and protect fundamental human rights. It must have galled the UN along with the international community that a traditional mandate to the international force could allow a ragtag collection of not so well armed but overzealous militia to humiliate an international UN authorised force.

(d) Bosnia: The Heralding of a New Role for the UN in Peace-Making

Freedom of movement is deemed to be essential to the functioning of all peace-keeping operations and is generally provided for in the Status of Forces Agreements establishing an operation.[88] The right to use force in self-defence to defend one's freedom of movement has existed since ONUC. With regard to ONUC, Bowett has stated that:

> "In simple terms, it may be said that ONUC was entitled to assert its freedom of movement and to resort to self-defence against any action constituting a denial of freedom of movement: this would not have meant abandoning the principle, then operative, that ONUC could not take the initiative in military action".[89]

Schachter has likewise recognised that a "significant extension of self-defence resulted from granting the ONUC freedom of movement through-

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[88] Bowett states that 'the right to freedom of movement should be acknowledged by the host State as early as possible [and] recognised in the basic agreement, but the details of the right should be worked out in the SOFA.' See Bowett, above n 2 at 434.

[89] Bowett, Id. at 204.

out the country."[90] UNPROFOR, however, was the first peace-keeping operation to be explicitly authorised to use force in self-defence to ensure freedom of movement and some commentators regard this authorisation as significantly expanding the concept.[91]

On 25 August 1992, the UN General Assembly demanded an end to the fighting in Bosnia, while condemning the massive violations of human rights and humanitarian law. General Assembly Resolution 46/242 focused on the human rights violations taking place in Bosnia. The Assembly condemned the practice of "ethnic cleansing" and demanded that it be stopped. In addition, the Assembly demanded that the enormous, forcible displacement of the population around Bosnia be ended.[92] In recognition of these humanitarian problems, the General Assembly demanded that the International Committee of the Red Cross (ICRC) be "granted immediate, unimpeded and continued access to all camps, prisons and other places of detention" in former Yugoslavia as well as ensuring that the ICRC be allowed free movement throughout that territory in order to gain access to those facilities. Security Council Resolution 787 of 16 November, 1992 attempted to address these concerns. Resolution 787 called for all parties "to cooperate fully with the humanitarian agencies and with the United Nations Protection Force to ensure the safe delivery of humanitarian assistance" in former Yugoslavia. The Council demanded an end to all interference in Bosnia from outside parties. In addition, the Council, acting under Chapters VI and VII, imposed an embargo on commodities to Serbia and Montenegro.

In response to the Secretary-General's request for reinforcements of the peace-keeping force, the Council authorised the expansion of UNPROFOR personnel. In addition, the mandate of UNPROFOR was extended and the Council subsequently approved the Secretary-General's request for funds to enhance the peace-keeping force. The Security Council in August 1993 reaffirmed its demand for the unimpeded delivery of humanitarian aid and continued "safety and operational effectiveness of UNPROFOR and UNHCR personnel" in Bosnia. In Resolution 859, the Council once again called for an "immediate cease-fire and cessation of hostilities."[93] UNPROFOR's mandate to use force was again expanded in October 1993 in Security Council Resolution 871 when the

[90] O Schachter, "Authorised Uses of Forces by the UN and Regional Organisations" in Lori Fisler Damrosch & David S. Scheffer (eds.), *Law and Force in the New International Order* (1991) 85.

[91] See Fink, above n 39 at 37

[92] Pursuant to this, the Security Council in Resolution 780 requested that the Secretary-General establish an impartial Commission of Experts to make findings with respect to violations of international humanitarian law and breaches of the Geneva Convention in the former Yugoslavia. In United Nations Security Council Resolution 798 (December 18,1992), the Council and the human rights atrocities in Bosnia and Herzegovina. In May 25,1993 by United Nations security Council Resolution 827,an international criminal tribunal was established 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law...in former Yugoslavia'.

[93] SC Res. 859 (August 24 1993).

peacekeeping force was authorised to use "self-defence, to take necessary measures, including the use of force, to ensure its security and its freedom of movement."[94] The peace-keepers in Bosnia had a mandate resembling the ONUC peacekeepers in the Congo operation. The authority to use force was aimed at enabling the troops to carry out their role effectively in an environment where the hostility of the local parties threatened their safety and hampered their effectiveness.

The conflict in the former Republic of Yugoslavia touched upon almost every aspect of peace-keeping and peace enforcement under UN auspices. All of the basic legal norms associated with the *UN Charter* and the use of force come into play in the Yugoslavian civil war. In many ways, the mandate of UNPROFOR was shaped by the experience of its predecessors, especially ONUC. Likewise, the performance of UNPROFOR in former Yugoslavia forms a model for successor peacekeeping forces assigned with a mission that involves the use of force beyond self-defence as is the case for the UN authorised international force in East Timor empowered to bring law and order in the territory and thus protect fundamental human rights.

It is imperative to note that nearly a year of inaction by the Security Council led to the General Assembly's strong condemnation of the human rights violations taking place in Bosnia in August 1992.[95] Although the Assembly did not authorise or attempt to authorise the peace-keeping operation in Bosnia, the Council was prompted into action by the Assembly's resolution and ultimately strengthened UNPROFOR's mandate partly on that basis. Such strong condemnation of human rights atrocities in East Timor and the persistent calls for the UN to act on the bloodletting in the territory triggered the deployment of InterFET to safeguard fundamental human rights by restoring law and order.

The lesson learnt from UNPROFOR's chequered operation in the former Yugoslavia (Bosnia, Croatia and Macedonia) is that it is foolhardy for the international community to expect a UN peace-keeping force operating within the "strait-jacket" of traditional mandates to make any meaningful contribution within the arena of military conflict and/or active hostility by the local parties. The humiliation of some of the world's best trained professional soldiers by the Serbs showed the world that an "aggressive" UN force will deliver more in an arena of military conflict and that constrains in traditional mandates render UN troops helpless and put their lives in jeopardy. This lesson is reflected in the broad mandate to the international force for East Timor (InterFET).[96]

Due to the permissive interpretation of Article 39 by the Security Council, it is likely that humanitarian interventions under the auspices of the UN will occur more frequently. While the norm of non-intervention under Article 2(7) has been diminished by the interventions in Somalia, Iraq

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94 SC Res. 871 (October 4,1993).

95 GA Res.46/242.

96 SC Res. 1299.

and Bosnia, the East Timor crisis and criticisms of the UN's response to the impeding genocide in Rwanda have shown that the status of state sovereignty in situations involving grave violations of humanitarian law is undergoing an evolution from the classical, strict conservative view to a liberal, wider construction. This reflects the fact that states are taking on numerous obligations through international treaties and conventions and opening up to international scrutiny in issues previously jealously guarded by the cloak of "domestic matters of an internal nature".

IV. The Changing Faces of UN Peacekeeping Operations

(a) Big Brother Aggression or Peace-Making?

The authority of the peace-keepers in former Yugoslavia to use force altered as the mission and the mandate of UNPROFOR changed. The initial deployment of the UNPROFOR forces impliedly carried with it the authority to use force in self- defence for the safety of the troops. The safety of UNPROFOR troops later became a specific concern of the Security Council, which in Resolution 871 explicitly authorised the use of force by the peace-keepers in order to guarantee their "security and freedom of movement." The importance of UNPROFOR's "freedom of movement" was closely related to their ability to ensure compliance with resolutions demanding "the unhindered flow of humanitarian assistance" and strengthen their self-defence mandate. Reminiscent of the Congo operation, the peace-keepers' mandate to use force for self-defence in Bosnia was greatly expanded by their authority to secure 'free movement', thereby facilitating the delivery of humanitarian aid.[97]

Another parallel with the Congo peacekeeping operation was the potential for the use of force to expel outside troops. Resolution 787 expresses the Council's frustration with these forces, where the Council demands:

> "that all forms of interference from outside the Republic of Bosnia and Herzegovina, including infiltration into the country of irregular units and personnel, cease immediately."

The Council:

> " reaffirm [ed] its determination to take measures against all parties and others concerned which fail to fulfil the requirements of Resolution 752 . . . including the requirement that all forces . . . be withdrawn."[98]

[97] For an exposition on the 'freedom of movement' mandate and rule of engagement issues, see Jeane Kirkpatrick, "Peacekeeper's Lives in Danger", *The Washington Post,* 21 March 1994 at 19.

[98] SC Res. 787(November 16,1992).

The most visible examples of UNPROFOR's enforcement authority are contained in three Security Council resolutions: Resolutions 770, 771, 816, and 836. In January 1994, when Sarajevo and other "safe areas" in Bosnia were severely threatened, Secretary General Boutros Boutros-Ghali reaffirmed the "readiness" of the UN to carry out air strikes to support the operation in Bosnia.[99] The authority in these resolutions to use force ostensibly outside of the realm of self-defence was not been without controversy or debate.[100]

The ability of peace-keepers to fulfil their mission and, the continued political support of participating nations in East Timor and elsewhere, will greatly depend upon the ability of the UN to create, execute, and modify, the rules of engagement surrounding peace-keepers' use of force as the situation demands. This will ensure that countries continue to contribute in peace-keeping operations knowing that their troops will not be "sitting ducks" to rogue armies or motley collections of armed militias. Broad mandates will help check the possible casualties among UN troops. Casualties always serve to dampen the goodwill of states in volunteering troops for international assignments.

The international community needs to determine whether it is in fact desirable to "blur" the notions of peace-keeping and peace-enforcement. Certainly once a peace-keeping operation uses force beyond that required for self-defence, the line between defensive and offensive force becomes harder to distinguish. Indeed, if a peace-keeping operation has a broad mandate, it is possible to argue that any force used is exercised in defence of the operation's purpose. Yet it is not hard to see how far removed this is from acting in strict self-defence.[101] For example, it is possible to argue that UNOSOM II was a peace-keeping operation acting in defence of its widely drawn mandate, rather than an "enforcement measure." Clearly, almost any forceful action taken by a UN operation can be described as a "peacekeeping operation defending its mandate" if the mandate is wide enough. The danger with this approach is that "once you allow a peace-keeping force to use force in defence of its purposes instead of simply in defence of its personnel, the action becomes an enforcement action." [102]

One of the legal principles of peace-keeping is that the use of force is restricted to that used in self-defence. The fact that this is a legal principle which the UN considers to be binding upon itself can be gauged from the way it responded to difficulties encountered whilst operating within this self-imposed limit. Instead of doing away with the principle, it remained, as Schachter has described, the "touchstone" of peace-keeping and the use of force was justified by adopting an expanded and somewhat artificial

[99] See "Bosnia Air Strikes Would entail More Military Assets on the Ground S-G Tells Council", *International Documents Review*, 24 January 994 at 7.

[100] See "Serbia Asks World Court to Rule NATO Threat of Force Illegal", Associated Press, AP Worldstream, 23 March 1994.

[101] Cox, above n 19 at 268.

[102] See Hilaire Mccoubrey & Nigel White, The Blue Helmets: Legal Regulations of United Nations Military Operations (1996) 87.

definition of self-defence.[103] The actual scope of this expanded notion of "self-defence", and the extent to which it applies, and has applied, in various peace-keeping operations, is not clear. If self-defence is interpreted broadly to mean "in defence of one's mandate" in all operations, it would presumably mean that if any operation is hindered (by the use of force) from carrying out any part of its mandate, its inherent right to "self-defence" entitles it to use force in order to fulfil its duties. The ability of a peace-keeping operation to use force would then largely depend on how broad its mandate was. The broader the mandate, the more occasions in which the peace-keeping operation might find itself not only needing to use force but also legally "permitted" to do so.[104]

(b) Peace-Making: Assertive UN Human Rights Custodianship in the Making?

Enforcement actions under Chapter VII are clearly legal and the use of force authorised by the Security Council for such purposes is lawful. All of the use of force measures authorised in the conflict in Bosnia noted above are explicit Chapter VII actions. As such, the measures fall into the exception of the last sentence of Article 2(7) relating to Chapter VII enforcement actions. Due to the increasing frequency with which the Security Council has initiated Chapter VII action on the basis of humanitarian violations, it is worthwhile examining the status of interventions for humanitarian purposes in light of the UN action in East Timor.

It has been argued that "genuine instances of humanitarian intervention have been rare, if they have occurred at all."[105] Commentators point to the intervenor's non-humanitarian interest or motives, or other political or economic considerations involved, in addition to the fact that no intervening state has used the pure rationale of humanitarian intervention to justify its use of force.[106]

The intervention in Bosnia and the other former Yugoslav republics was contentious since it was a "mixed conflict" nevertheless, it can be characterised as a predominantly humanitarian disaster which required Chapter VII action by the UN. The interventions in Somalia and recently in East Timor strongly challenge the assertion above that humanitarian interventions usually have underlying political and economic considerations. The locations of the territories and the absence of any visible or invisible overarching socio-political or economic interests by the intervening powers point to purely humanitarian considerations aimed at

[103] Schachter, above n 90 at 84.
[104] Cox, above n 19 at 255.
[105] Arend & Beck, above n 47 at 135.
[106] Id. quoting Verwey, "Humanitarian Intervention" in A.S. Cassesse (ed.) *The Current Legal Regulation of the Use of Force'* (1986).

fulfilling the lofty humanitarian ideals of the international community on the protection of fundamental human rights as enshrined in the "international bill of rights" and other related international instruments.

Even in the former Yugoslavia, the Council, in several resolutions, defined the humanitarian bases of intervention: the trans-boundary effects of the refugee situation in Bosnia,[107] the inability to deliver humanitarian aid due to the civil war,[108] "ethnic cleansing" and other violations of humanitarian law.[109] The findings that these circumstances were the bases for a threat to international peace and security are grounded in the recognition that the external refugee problem and the internal "grave and systematic" humanitarian violations both warranted Chapter VII action.

The internal human rights situation in East Timor by itself triggered Article 39 in a crisis that was purely internal. The reports of "political cleansing", "massive, organised, detention and translocation" and "systematic torture and murder" of pro-independence East Timorese certainly made a compelling case for UN action. In any event, although the principle of humanitarian intervention for the purpose of preventing these violations is not yet recognised as a formal legal exception to the Article 2(4) prohibition against the use of force, the practice of the UN in triggering Chapter VII action is clearly legal and presents strong evidence of emerging customary law. The increased prospect of UN humanitarian diplomacy of this type will potentially increase the number of original peace enforcement operations. This is due to foreseeability that peacekeepers in the future will find their safety threatened as their mission involves enforcement action requiring more complex and refined rules of engagement in hostile environments.

The comprehensive UN restructuring of its peacekeeping operations in 1992 would seem to herald the genesis of a new role for the UN in peace-keeping and peace-making. Traditionally, peace-keeping operations were managed by the Office of Special Political Affairs. The organisation was administered by two Under-Secretaries General (USG), who both reported to the Secretary General. One USG managed field operations and mediation efforts associated with peace enforcement, while the other was a political trouble-shooter for the Secretary General. Eventually, the peace-making functions were transferred to the Secretary General's Executive Office, resulting in a complete separation of planning from political issues. This structure reflected the clear distinction between peacekeepers and peace enforcers in the UN organisation. This arose from the traditional UN view that peace enforcers, who receive military training, and peace-keepers, who are trained for non-violent responses to provocation, should be kept separate.[110]

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[107] SC Res. 757 (30 May 1992).

[108] SC Res. 770 (13 August 1992).

[109] SC Res .771 (13 August 1992).

[110] William J. Durch 'Running the Show: Planning and Implementation' in William J. Durch (ed) *The Evolution of UN Peacekeeping* (1993) 73-74.

The 1992 restructuring included the creation of an Office of Peace-keeping Operations as one of four designated departments which would report directly to the Secretary General. The revised structure streamlines the peace-keeping administration. A formal relationship between peace-keepers and peacemakers ought to be put in place. As the missions become blurred and conventional peace-keeping forces gradually become engaged in more aggressive Chapter VII actions, training, equipment needs, command structures and rules of engagement on the use of force will have to be reviewed to reflect the changing nature of peace-keeping.[111]

V. Conclusion

Following the end of the Cold War, the UN developed new roles concerning its peace-keeping efforts. Military-style enforcement actions such as the humanitarian interventions in Somalia, Iraq and recently in East Timor and situations like Bosnia, where a traditional peace-keeping mission involves an escalating use of force, must be anticipated. The dilemma with which UN peace-keeping is faced is a by-product of the hostilities of the Cold War and the model of peace-keeping fashioned by Dag Hammarskjold. Moreover, the failure to create a collective security regime in the early days of the UN sabotaged its authority in the use of military force. In the end, the Security Council must raise the threshold for considering whether appropriate conditions for peacekeeping exist and devise formal rules of engagement for peace-keepers which are sufficiently tailored to the dynamic arena of conflict to which the forces are sent and thus reconfigure peace-keeping to peace-making action.

The norms of sovereignty, territorial integrity and political independence have weakened with time. The growing body of human rights law and the developing practice of the UN Security Council's Article 39 determinations in Iraq, Somalia, Bosnia and recently in East Timor all point to an emerging customary norm of UN humanitarian intervention in member states where the humanitarian violations are severe and have the slightest trans-boundary effect. This norm could be finally crystallising with the UN authorised action in East Timor. As the Security Council liberalises the finding of "threat to the peace" to include non-military threats, the likelihood of future humanitarian interventions will also increase. The Council must be prepared to encounter increasing threats to the safety of its peace-keepers and be ready to exercise a level of force beyond the traditional legal meaning of self-defence.

With respect to the peace-keepers in Bosnia and their predecessors in

[111] See B Urquart, "The UN and International Security After the Cold War", in Adam Roberts & Benedict Kingsbury (eds.) *United Nations, Divided World*, 2nd ed, 1993.

the Congo, difficult issues arose because such missions were poorly defined, with unclear authority for the use of force. The recent peace-making mandate to the international force for East Timor (InterFET) in place of UNAMET with a traditional peace-keeping mandate however shows a clear indication that the UN is reviewing the military dimensions of its forces by stating in black and white the authorised use of force. This seems to answer the issues raised by the UNPROFOR mission: What is an acceptable level of force consistent with "all necessary measures" that UN authorised troops can use to deliver aid to those in need? Can UN troops use force in "anticipatory" self-defence?

As original peace-making missions such as InterFET mandated to use force are launched, the rules of engagement and the authority for the use of force must also be modified and articulately enunciated. The stakes, however, are high. The safety of the peace-makers, the continued viability of the United Nations collective security structure and the maintenance of international peace and security in future operations will all depend upon the ability of the UN to respond to this challenge.[112]

[112] The Clinton administration introduced very stringent guidelines for future participation in international peacekeeping operations. The United States will only participate when there have been grave threats to international peace and security, major disasters that require relief, or 'gross violations of human rights'. See "U.S. Eyes New Criteria for Peacekeeping Missions", *Chicago Sun Times* (USA), 30 January 1994 at 36.