

*LAW AND PEACE: A LEGAL FRAMEWORK FOR
UNITED NATIONS PEACEKEEPING*

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SUMMARY

The hypothesis of this work is that international human rights law and not international humanitarian law is the legal framework that applies to United Nations (UN) peacekeeping operations in collapsed States where the peacekeepers do not become a party to an armed conflict.

In order to test this hypothesis the work begins by examining what is meant by peacekeeping and charts the evolution of peacekeeping from its origins as a passive ad hoc activity to the modern highly complex operations capable of providing the foundations for the recreation of civil society.

Chapter two of the work builds on the first chapter by analysing the UN's theoretical approach to peacekeeping through its major reports. This chapter provides insight into the development of peacekeeping as a theoretical construct and then into a central tool in the UN's attempt to implement the Charter.

Chapters three and four analyse peacekeeping as practiced by the UN in operations conducted under Chapters VI and VII of the UN Charter. This analysis leads to the conclusion that as a matter of practice the UN and the State parties that have provided the troops to perform peacekeeping under UN control have acted in accordance with international human rights law and that as a result there is evidence of State practice to support an argument that as a matter of customary international law international human rights law applies as the framework for peacekeeping in collapsed States.

With a clear grounding in the practice and theory of peacekeeping the work then examines the competing claims of international humanitarian law and international human rights law as the legal framework for peacekeeping operations. Suggestions are made with regard to the triggers for international humanitarian law to apply and the conclusion is drawn that the vast majority of UN operations between 1949 and 2003 were conducted beneath the threshold for the application of international humanitarian law.

The final chapter of the work analyses the practical application of a human rights framework to peacekeeping and concludes that it provides a flexible and adaptive tool for the restoration of peace and the reconstruction of civil society.

As a result of the analysis of UN peacekeeping theory, practice and the competing claims of international humanitarian law and international human rights law, the work concludes that international human rights law provides the framework for UN peacekeeping in collapsed States and that international humanitarian law will only apply where peacekeepers cross the threshold into armed conflict.

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UNITED NATIONS PEACEKEEPING OPERATIONS 1948-2003

Abbreviation	Full Name	Dates	Location
UNTSO	UN Truce Supervision Organisation	1948 - present	Levant and Egypt
UNMOGIP	UN Military Observer Group in India and Pakistan	1949 - present	Kashmir
UNEF I	First UN Emergency Force	1956 – 1967	Egypt, Gaza Strip
UNOGIL	UN Observer Group in Lebanon	1958	Lebanon
UNUC	UN Operation in the Congo	1960 – 1964	Congo
UNTEA/UNSF	UN Temporary Executive Authority and UN Security Force in West New Guinea (West Irian)	1962 – 1963	West Irian
UNYOM	UN Yemen Observation Mission	1963 – 1964	Yemen and Saudi Arabia
UNFICYP	UN Peacekeeping Force in Cyprus	1964 - present	Cyprus
DOMREP	Representative of the Secretary General in the Dominican Republic	1965 – 1966	Dominican Republic
UNIPOM	UN India-Pakistan Observer Mission	1965 – 1966	India and Pakistan
UNEF II	Second UN Emergency Force	1973 – 1979	Egypt
UNDOF	UN Disengagement Observer Force	1974 - present	Syria (Golan Heights)
UNIFIL	UN Interim Force in Lebanon	1978 - present	Lebanon
UNGOMAP	UN Good Officers Mission in Afghanistan and Pakistan	1988 – 1990	Afghanistan and Pakistan
UNIIMOG	UN Iran-Iraq Military Observer Group	1988 – 1991	Iran and Iraq
UNAVEM I	UN Angola Verification Mission I	1989 – 1991	Angola
UNTAG	UN Transition Assistance Group	1989 – 1990	Namibia
ONUSCA	UN Observer Group in Central America	1989 – 1992	Central America
UNIKOM	UN Iraq-Kuwait Observation Mission	1991 - 2003	Iraq and Kuwait
UNAVEM II	UN Angola Verification Mission II	1991 – 1995	Angola
ONUSAL	UN Observer Mission in El Salvador	1991 – 1995	El Salvador
MILURSO	UN Mission for the Referendum in Western	1991 - present	

	Sahara		
UNAMIC	UN Advance Mission in Cambodia	1991 – 1992	Cambodia
UNPROFOR	UN Protection Force	1992 – 1995	Former Yugoslavia
UNCRO	UN Confidence Restoration Operation in Croatia	1995 – 1996	Croatia
UNPREDEP	UN Preventative Deployment Force	1995 – 1999	Macedonia
UNPROFOR	UN Protection Force	1995	Bosnia Herzegovina
UNTAC	UN Transitional Authority in Cambodia	1992 – 1993	Cambodia
UNOSOM I	UN Operation in Somalia	1992 – 1993	Somalia
ONUMOZ	UN Operation in Mozambique	1992 – 1994	Mozambique
UNOSOM II	UN Operation in Somalia II	1993 – 1995	Somalia
UNOMUR	UN Observer Mission Uganda-Rwanda	1993 – 1994	Uganda and Rwanda
UNOMIG	UN Observer Mission in Georgia	1993 – 1997	Georgia
UNOMIL	UN Observer Mission in Liberia	1993 - 1997	Liberia
UNMIH	UN Mission in Haiti	1993 – 1996	Haiti
UNAMIR	UN Assistance Mission for Rwanda	1993 – 1996	Rwanda
UNASOG	UN Aouzou Strip Observer Group	1994	Chad and Libya
UNMOT	UN Mission of Observers in Tajikistan	1994 – 2000	Tajikistan
MONUA	UN Angola Verification Mission III	1995 – 1997	Angola
UNMIBH	UN Mission in Bosnia Herzegovina	1995 - 2002	Bosnia Herzegovina
UNTAES	UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium	1996 – 1997	Croatia
UNMOP	UN Mission of Observers in Prevlaka	1996 - 2002	Croatia
MINUGUA	UN Mission for the Verification of Human Rights and of Compliance with the Comprehensive Agreement on Human Rights in Guatemala	1996 - 1997	Guatemala
MONUA	UN Observer Mission in Angola	1997-1999	Angola
UNTMIH	UN Transitional Mission in	1997	Haiti

	Haiti		
MIPONUH	UN Civilian police Mission in Haiti	1997 – 2000	Haiti
UNPSG	UN Civilian Police Support Group	1997 - 1998	Croatia
MINURCA	UN Mission in the Central African Republic	1998 – 2000	Central African Republic
UNOMSIL	UN Observer Mission in Sierra Leone	1998 - 1999	Sierra Leone
UNMIK	UN Interim Administration Mission in Kosovo	1999 - present	Kosovo
UNAMSIL	UN Mission in Sierra Leone	1999 - present	Sierra Leone
UNTAET	UN Transitional Administration in East Timor	1999 - 2002	East Timor
MONUC	UN Organisation Mission in Democratic Republic of the Congo	1999 – present	Democratic Republic of the Congo
UNMEE	UN Missin in Ethiopia and Eritrea	2000 – present	Ethiopia and Eritrea
UNMISET	UN Mission of Support in East Timor	2002 – present	East Timor
UNMIL	UN Mission in Liberia	2003 - present	Liberia

MEMBER STATES OF THE UN

Following is the list of the 191 Member States of the United Nations with dates on which they joined the Organization.¹

Member -- (Date of Admission)

Afghanistan -- (19 Nov. 1946)
Albania -- (14 Dec. 1955)
Algeria -- (8 Oct. 1962)
Andorra -- (28 July 1993)
Angola -- (1 Dec. 1976)
Antigua and Barbuda -- (11 Nov. 1981)
Argentina -- (24 Oct. 1945)
Armenia -- (2 Mar. 1992)
Australia -- (1 Nov. 1945)
Austria-- (14 Dec. 1955)
Azerbaijan -- (2 Mar. 1992)
Bahamas -- (18 Sep. 1973)
Bahrain -- (21 Sep. 1971)
Bangladesh -- (17 Sep. 1974)
Barbados -- (9 Dec. 1966)
Belarus -- (24 Oct. 1945)

On 19 September 1991, Byelorussia informed the United Nations that it had changed its name to Belarus.

Belgium -- (27 Dec. 1945)
Belize -- (25 Sep. 1981)
Benin -- (20 Sep. 1960)
Bhutan -- (21 Sep. 1971)
Bolivia -- (14 Nov. 1945)
Bosnia and Herzegovina -- (22 May 1992)

The Socialist Federal Republic of Yugoslavia was an original Member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission as new members of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia, The former Yugoslav Republic of Macedonia, and the Federal Republic of Yugoslavia.

The Republic of Bosnia and Herzegovina was

¹ *UN Press Release ORG/1360/Rev.1 (10 February 2004)*
Updated 24 February 2005 <http://www.un.org/Overview/unmember.html> (6 Jun 2005).

admitted as a Member of the United Nations by General Assembly resolution A/RES/46/237 of 22 May 1992.

Botswana -- (17 Oct. 1966)
Brazil -- (24 Oct. 1945)
Brunei Darussalam -- (21 Sep. 1984)
Bulgaria -- (14 Dec. 1955)
Burkina Faso -- (20 Sep. 1960)
Burundi -- (18 Sep. 1962)
Cambodia -- (14 Dec. 1955)
Cameroon -- (20 Sep. 1960)
Canada -- (9 Nov. 1945)
Cape Verde -- (16 Sep. 1975)
Central African Republic -- (20 Sep. 1960)
Chad -- (20 Sep. 1960)
Chile -- (24 Oct. 1945)
China -- (24 Oct. 1945)
Colombia -- (5 Nov. 1945)
Comoros -- (12 Nov. 1975)
Congo (Republic of the) -- (20 Sep. 1960)
Costa Rica -- (2 Nov. 1945)
Côte d'Ivoire -- (20 Sep. 1960)
Croatia -- (22 May 1992)

The Socialist Federal Republic of Yugoslavia was an original Member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission as new members of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia, The former Yugoslav Republic of Macedonia, and the Federal Republic of Yugoslavia.

The Republic of Croatia was admitted as a Member of the United Nations by General Assembly resolution A/RES/46/238 of 22 May 1992.

Cuba -- (24 Oct. 1945)
Cyprus -- (20 Sep. 1960)
Czech Republic -- (19 Jan. 1993)

Czechoslovakia was an original Member of the United Nations from 24 October 1945. In a letter dated 10 December 1992, its Permanent Representative informed the Secretary-General that the Czech and Slovak Federal Republic would cease to exist on 31 December 1992 and that the Czech Republic and the

Slovak Republic, as successor States, would apply for membership in the United Nations. Following the receipt of its application, the Security Council, on 8 January 1993, recommended to the General Assembly that the Czech Republic be admitted to United Nations membership. The Czech Republic was thus admitted on 19 January of that year as a Member State.

Democratic People's Republic of Korea -- (17 Sep. 1991)
Democratic Republic of the Congo -- (20 Sep. 1960)

Zaire joined the United Nations on 20 September 1960. On 17 May 1997, its name was changed to the Democratic Republic of the Congo.

Denmark -- (24 Oct. 1945)
Djibouti -- (20 Sep. 1977)
Dominica -- (18 Dec. 1978)
Dominican Republic -- (24 Oct. 1945)
Ecuador -- (21 Dec. 1945)
Egypt -- (24 Oct. 1945)

Egypt and Syria were original Members of the United Nations from 24 October 1945. Following a plebiscite on 21 February 1958, the United Arab Republic was established by a union of Egypt and Syria and continued as a single Member. On 13 October 1961, Syria, having resumed its status as an independent State, resumed its separate membership in the United Nations. On 2 September 1971, the United Arab Republic changed its name to the Arab Republic of Egypt.

El Salvador -- (24 Oct. 1945)
Equatorial Guinea -- (12 Nov. 1968)
Eritrea -- (28 May 1993)
Estonia -- (17 Sep. 1991)
Ethiopia -- (13 Nov. 1945)
Fiji -- (13 Oct. 1970)
Finland -- (14 Dec. 1955)
France-- (24 Oct. 1945)
Gabon -- (20 Sep. 1960)
Gambia -- (21 Sep. 1965)
Georgia -- (31 July 1992)
Germany -- (18 Sep. 1973)

The Federal Republic of Germany and the German Democratic Republic were admitted to membership in the United Nations on 18 September 1973. Through the accession of the German Democratic Republic to

the Federal Republic of Germany, effective from 3 October 1990, the two German States have united to form one sovereign State.

Ghana -- (8 Mar. 1957)
Greece -- (25 Oct. 1945)
Grenada -- (17 Sep. 1974)
Guatemala -- (21 Nov. 1945)
Guinea -- (12 Dec. 1958)
Guinea-Bissau -- (17 Sep. 1974)
Guyana -- (20 Sep. 1966)
Haiti -- (24 Oct. 1945)
Honduras -- (17 Dec. 1945)
Hungary -- (14 Dec. 1955)
Iceland -- (19 Nov. 1946)
India -- (30 Oct. 1945)
Indonesia -- (28 Sep. 1950)

By letter of 20 January 1965, Indonesia announced its decision to withdraw from the United Nations "at this stage and under the present circumstances". By telegram of 19 September 1966, it announced its decision "to resume full cooperation with the United Nations and to resume participation in its activities". On 28 September 1966, the General Assembly took note of this decision and the President invited representatives of Indonesia to take seats in the Assembly.

Iran (Islamic Republic of) -- (24 Oct. 1945)
Iraq -- (21 Dec. 1945)
Ireland -- (14 Dec. 1955)
Israel -- (11 May 1949)
Italy -- (14 Dec. 1955)
Jamaica -- (18 Sep. 1962)
Japan -- (18 Dec. 1956)
Jordan -- (14 Dec. 1955)
Kazakhstan -- (2 Mar. 1992)
Kenya -- (16 Dec. 1963)
Kiribati -- (14 Sept. 1999)
Kuwait -- (14 May 1963)
Kyrgyzstan -- (2 Mar. 1992)
Lao People's Democratic Republic -- (14 Dec. 1955)
Latvia -- (17 Sep. 1991)
Lebanon -- (24 Oct. 1945)
Lesotho -- (17 Oct. 1966)
Liberia -- (2 Nov. 1945)
Libyan Arab Jamahiriya -- (14 Dec. 1955)
Liechtenstein-- (18 Sep. 1990)
Lithuania -- (17 Sep. 1991)

Luxembourg-- (24 Oct. 1945)
Madagascar -- (20 Sep. 1960)
Malawi -- (1 Dec. 1964)
Malaysia-- (17 Sep. 1957)

The Federation of Malaya joined the United Nations on 17 September 1957. On 16 September 1963, its name was changed to Malaysia, following the admission to the new federation of Singapore, Sabah (North Borneo) and Sarawak. Singapore became an independent State on 9 August 1965 and a Member of the United Nations on 21 September 1965.

Maldives-- (21 Sep. 1965)
Mali -- (28 Sep. 1960)
Malta -- (1 Dec. 1964)
Marshall Islands -- (17 Sep. 1991)
Mauritania -- (27 Oct. 1961)
Mauritius -- (24 Apr. 1968)
Mexico -- (7 Nov. 1945)
Micronesia (Federated States of) -- (17 Sep. 1991)
Monaco -- (28 May 1993)
Mongolia -- (27 Oct. 1961)
Morocco -- (12 Nov. 1956)
Mozambique -- (16 Sep. 1975)
Myanmar -- (19 Apr. 1948)
Namibia -- (23 Apr. 1990)
Nauru -- (14 Sept. 1999)
Nepal -- (14 Dec. 1955)
Netherlands -- (10 Dec. 1945)
New Zealand -- (24 Oct. 1945)
Nicaragua -- (24 Oct. 1945)
Niger -- (20 Sep. 1960)
Nigeria -- (7 Oct. 1960)
Norway -- (27 Nov. 1945)
Oman -- (7 Oct. 1971)
Pakistan -- (30 Sep. 1947)
Palau -- (15 Dec. 1994)
Panama -- (13 Nov. 1945)
Papua New Guinea -- (10 Oct. 1975)
Paraguay -- (24 Oct. 1945)
Peru -- (31 Oct. 1945)
Philippines -- (24 Oct. 1945)
Poland -- (24 Oct. 1945)
Portugal -- (14 Dec. 1955)
Qatar -- (21 Sep. 1971)
Republic of Korea -- (17 Sep. 1991)
Republic of Moldova -- (2 Mar. 1992)
Romania -- (14 Dec. 1955)
Russian Federation -- (24 Oct. 1945)

The Union of Soviet Socialist Republics was an original Member of the United Nations from 24 October 1945. In a letter dated 24 December 1991, Boris Yeltsin, the President of the Russian Federation, informed the Secretary-General that the membership of the Soviet Union in the Security Council and all other United Nations organs was being continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States.

Rwanda -- (18 Sep. 1962)
Saint Kitts and Nevis -- (23 Sep. 1983)
Saint Lucia -- (18 Sep. 1979)
Saint Vincent and the Grenadines -- (16 Sep. 1980)
Samoa -- (15 Dec. 1976)
San Marino -- (2 Mar. 1992)
Sao Tome and Principe -- (16 Sep. 1975)
Saudi Arabia -- (24 Oct. 1945)
Senegal -- (28 Sep. 1960)
Serbia and Montenegro -- (1 Nov. 2000)

On 4 February 2003, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia, the official name of “Federal Republic of Yugoslavia” was changed to Serbia and Montenegro.

The Socialist “Federal Republic of Yugoslavia was an original Member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission as new Members of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia, The former Yugoslav Republic of Macedonia, and the Federal Republic of Yugoslavia. The Federal Republic of Yugoslavia was admitted as a Member of the United Nations by General Assembly resolution A/RES/55/12 of 1 November 2000.

Seychelles -- (21 Sep. 1976)
Sierra Leone -- (27 Sep. 1961)
Singapore -- (21 Sep. 1965)
Slovakia -- (19 Jan. 1993)

Czechoslovakia was an original Member of the United Nations from 24 October 1945. In a letter dated 10 December 1992, its Permanent Representative

informed the Secretary-General that the Czech and Slovak Federal Republic would cease to exist on 31 December 1992 and that the Czech Republic and the Slovak Republic, as successor States, would apply for membership in the United Nations. Following the receipt of its application, the Security Council, on 8 January 1993, recommended to the General Assembly that the Slovak Republic be admitted to United Nations membership. The Slovak Republic was thus admitted on 19 January of that year as a Member State.

Slovenia -- (22 May 1992)

The Socialist Federal Republic of Yugoslavia was an original Member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission as new members of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia, The former Yugoslav Republic of Macedonia, and the Federal Republic of Yugoslavia.

The Republic of Slovenia was admitted as a Member of the United Nations by General Assembly resolution A/RES/46/236 of 22 May 1992.

Solomon Islands -- (19 Sep. 1978)

Somalia -- (20 Sep. 1960)

South Africa -- (7 Nov. 1945)

Spain -- (14 Dec. 1955)

Sri Lanka -- (14 Dec. 1955)

Sudan -- (12 Nov. 1956)

Suriname -- (4 Dec. 1975)

Swaziland -- (24 Sep. 1968)

Sweden -- (19 Nov. 1946)

Switzerland -- (10 Sep. 2002)

Syrian Arab Republic -- (24 Oct. 1945)

Egypt and Syria were original Members of the United Nations from 24 October 1945. Following a plebiscite on 21 February 1958, the United Arab Republic was established by a union of Egypt and Syria and continued as a single Member. On 13 October 1961, Syria, having resumed its status as an independent State, resumed its separate membership in the United Nations.

Tajikistan -- (2 Mar. 1992)
Thailand -- (16 Dec. 1946)
The former Yugoslav Republic of Macedonia -- (8 Apr. 1993)

The Socialist Federal Republic of Yugoslavia was an original Member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission as new members of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia, The former Yugoslav Republic of Macedonia, and the Federal Republic of Yugoslavia.

By resolution A/RES/47/225 of 8 April 1993, the General Assembly decided to admit as a Member of the United Nations the State being provisionally referred to for all purposes within the United Nations as "The former Yugoslav Republic of Macedonia" pending settlement of the difference that had arisen over its name.

Timor-Leste -- (27 Sep. 2002)
Togo -- (20 Sep. 1960)
Tonga -- (14 Sep. 1999)
Trinidad and Tobago -- (18 Sep. 1962)
Tunisia -- (12 Nov. 1956)
Turkey -- (24 Oct. 1945)
Turkmenistan -- (2 Mar. 1992)
Tuvalu -- (5 Sept. 2000)
Uganda -- (25 Oct. 1962)
Ukraine-- (24 Oct. 1945)
United Arab Emirates -- (9 Dec. 1971)
United Kingdom of Great Britain and Northern Ireland-- (24 Oct. 1945)
United Republic of Tanzania -- (14 Dec. 1961)

Tanganyika was a Member of the United Nations from 14 December 1961 and Zanzibar was a Member from 16 December 1963. Following the ratification on 26 April 1964 of Articles of Union between Tanganyika and Zanzibar, the United Republic of Tanganyika and Zanzibar continued as a single Member, changing its name to the United Republic of Tanzania on 1 November 1964.

United States of America -- (24 Oct. 1945)
Uruguay -- (18 Dec. 1945)
Uzbekistan -- (2 Mar. 1992)
Vanuatu -- (15 Sep. 1981)
Venezuela (Bolivarian Republic of) -- (15 Nov. 1945)

Viet Nam -- (20 Sep. 1977)

Yemen -- (30 Sep. 1947)

Yemen was admitted to membership in the United Nations on 30 September 1947 and Democratic Yemen on 14 December 1967. On 22 May 1990, the two countries merged and have since been represented as one Member with the name "Yemen".

Zambia -- (1 Dec. 1964)

Zimbabwe -- (25 Aug. 1980)

Introduction

In 1994 the torture and death of a Somali youth by Canadian peacekeepers tarnished the reputation of United Nations (UN) peacekeeping and resulted in the disbandment of a Canadian airborne unit. The subsequent inquiry by the Canadian government¹ found that one of the causes of the incident was the frustration felt by the soldiers at having no means of dealing with criminal activity by the local population. Although the Canadian example was by far the worst it was:

“not an uncommon practice of administering some form of physical punishment to those caught stealing or breaching perimeters as a means of discouraging further attempts and seeing some ‘justice’ done.”²

Michael Kelly was an Australian Army legal officer serving in Somalia with the Australian contingent that formed part of the Unified Task Force (UNITAF) from 8 January to 3 May 1993 and the United Nations Operation in Somalia II (UNOSOM) from 4 to 20 May 1993. He realised that a legal framework must be clearly identified and understood by the peacekeepers on the ground so as to provide certainty to the peacekeeping force and avoid the perceived need to attack the local population; the very people the operation was design to protect and support. Kelly found that although there was limited commentary on the point there was some support in the body of academic literature relating to peacekeeping and international humanitarian law for the law of occupation to be applied.³ Kelly therefore turned to international

¹ Canadian Government. *Report of the Somali Commission of Inquiry*. (2 July 1997) <http://www.dnd.ca/somalia/somaliae.htm>. (5 Oct 2005).

² Kelly M. *Restoring and Maintaining Order in Complex Peace Operations*. (1999) at 29.

³ For example Roberts A. “What is Military Occupation” 55 *British Yearbook of International Law* 257 (1984) who stated at 250 “One might hazard as a fair rule of thumb that every time the forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions on the law of occupation are applicable.” This point was also taken by Eyal

humanitarian law and in particular the law of occupation to provide the legal framework. When he returned from Somalia he augmented the literature by publishing *Restoring and Maintaining Order in Complex Peace Operations*.⁴

The basis of the application of humanitarian law as a legal framework in peacekeeping flows from common Article 2 of the Geneva Conventions which inter alia provides for application of the Conventions in:

“cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

Kelly looked at the history of the law of occupation and its development over time and, in his view, embodiment into the Geneva Conventions in the form of common Article 2. The result for Kelly of applying the law of occupation was that it brought in the provisions of the Fourth Geneva Convention and the powers and responsibilities set out therein for the treatment of civilians wherever a military force had de facto control over a population or territory. This includes certain situations where the UN conducts peacekeeping operations.⁵

While this approach no doubt assisted in the relative success of the Australian contribution to the operations in Somalia, it is the position of this work that as a matter of law, international humanitarian law and in particular, the law of occupation, does not apply in peacekeeping operations simply because the executive arm of the

Benvenisti in his book *The International Law of Occupation* (2005) but Benvenisti appears to do this from the pragmatic rather than the legal point of view that only the law of occupation can provide the coverage. That assertion is disputed in this work.

⁴ Above n 2.

⁵ Id at 172-178.

host government has failed or the State has collapsed so that a UN force or administration is in de facto control. This is not due to any inability of the UN to be a party to the Conventions as suggested by some commentators,⁶ indeed in this work it is argued that as a subject of international law the UN is subject to customary international law and that the Conventions form part of this body of law. Rather it is the position of this work that international humanitarian law does not apply until and unless the threshold into armed conflict has been crossed and that this threshold is armed conflict or in the event of an occupation by a hostile force.

This work is not intended as a comprehensive critical analysis of Michael Kelly's work. This work is aimed at establishing the *de jure* law in UN peacekeeping operations in collapsed States.

In this work it is argued that the role and nature of the UN, when it engages in peacekeeping operations, is such as to clearly distinguish it from a force in occupation as intended by common Article 2. Certainly, there is no dispute that in the event that a UN force, such as the Congo operation of 1960-3 or UN authorised force, such as the first Gulf War in 1991, engages in armed conflict, then international humanitarian law, including the law of occupation applies. However, in the vast majority of UN led operations between 1949 and 2003 the UN peacekeeping force has not attracted the application of international humanitarian law because it has not been engaged in armed conflict or an occupation of the nature envisaged in common Article 2 of the Conventions. Further, except for the Australians in Somalia, neither any State nor the UN has accepted that the law of occupation applies to UN peacekeeping.

⁶ Shraga D. Zacklin R. "The Applicability of International Humanitarian Law to United Nations Peace-Keeping Operations: Conceptual, Legal and Practical Issues." In ICRC *Symposium on Humanitarian Action and Peace-Keeping Operations Report*. (1994) at 43.

The question may be posed: what if international humanitarian law does not apply? After all, as argued by Kelly, international humanitarian law is capable of providing a legal framework for peacekeepers to operate in and can provide a basic working structure until the UN force is removed. In Somalia, relying on the Fourth Geneva Convention, the Australian contingent re-established, at least on a temporary basis, the domestic court system that tried, convicted and executed a Somali warlord, Gutaale.⁷

There are a number of problems with this approach. Firstly, in the view of the author, it is not sufficient to simply accept an approach that is expedient. It is incumbent upon lawyers to determine what the law is, not what the most convenient law might be. Secondly, from a practical perspective, the law of occupation fails to provide a lasting solution for peace. If the UN force was in occupation then once the peacekeeping force left and the occupation was at an end the provisions would cease to apply and the legal system would have to be rebuilt from scratch. Thirdly, there are political realities surrounding the acceptance by the international community of a legal position whereby the UN is in occupation of sovereign territory.⁸ Finally, there are the very real risks to peacekeepers of international humanitarian law applying since, if the Fourth Geneva Convention applies then so do all the other conventions. Questions could well arise as to whether the peacekeepers were legitimate targets and combatants. This would seriously undermine the peacekeeping force's ability to achieve peaceful resolution.

⁷ Above n 2 at 54-61.

⁸ Even Kelly concedes that this is a difficulty with his approach; above n 2 at 179-181.

The advantage the application of the Fourth Geneva Convention would have is that it gives the occupying authority the power to re-establish, at least to some extent, security, law and order and the judicial processes of the State. It is axiomatic that these are essential ingredients for peace so that understanding which legal framework applies goes to the very heart of peacekeeping in situations where the domestic State is unable to carry out functions that are at the core of civil society.⁹ If Kelly is wrong, and that is the position of this work, then what legal framework does apply to UN peacekeeping in collapsed States? The answer provided by this work is that international human rights law provides the framework.

This branch of international law does not have the history associated with international humanitarian law. International human rights law is a strand of international law developed in the twentieth century and in particular it has been developed significantly over the last 50 years by the international community. Unlike international humanitarian law, international human rights law applies in times both of peace and armed conflict.¹⁰ During armed conflict international human rights law acts in mutual support of international humanitarian law, they are not mutually exclusive but act together to provide a holistic framework of protection.¹¹

This work argues for an international human rights law framework in collapsed State peacekeeping based on the following: The mandate imposes certain obligations on the peacekeepers either expressly or by necessary implication. One of these

⁹ On the rule of law being at the core of civil society see for example Navari K “Hobbes, the State of Nature and the Laws of Nature” and Williams H. Booth K. “Kant: Theorist beyond Limits” in Clark I. Neumann I.B. (eds) *Classical Theories of International Relations*. (1999) at 21 and 75-76.

¹⁰ *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion of 8 July 1996 (Nuclear Weapons Case)*. ICJ Advisory Opinion at 25.

¹¹ Human Rights Committee. General Comment No.31 CCPR/C/21/Rev.1/Add.13. (26 May 2004).

obligations is to re-establish law and order and provide security for the operation to achieve its mission. There are also international law obligations placed on the contributing States. As there are no Article 43 agreements set up under the UN Charter the troops remain liable to discharge the obligations of the contributing State. International human rights law forms part of the obligation either as a result of treaty law or customary international law. In this work particular emphasis is placed on the obligations imposed by the International Covenant on Civil and Political Rights¹² (ICCPR). It is the synthesis of the obligation under the mandate and obligations under international human rights law that provides the framework for collapsed State peacekeeping. This synthesis is a powerful tool to re-establish the rule of law.

This proposition can be demonstrated using the example of a State that is a party to the ICCPR. The obligation and authority to re-establish law and order comes from the mandate. The obligation to apply international human rights law and specifically the ICCPR comes from the Troop Contributing Nation (TCN) obligations under international law to apply the ICCPR where it has jurisdiction over territory;¹³ they will have such jurisdiction in a collapsed State over the sector allocated to them. For States not a party to the covenant and the UN, those parts of the ICCPR and other international human rights covenants that form part of customary law must be applied.

In order to fulfil their obligations under international human rights law the peacekeepers will need to pass ordinances or rely on the extant law of the domestic State. The power to pass ordinances flows from the mandate as an implied power.¹⁴

¹² U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

¹³ *Ibid.*

¹⁴ The doctrine of implied powers flows from the *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 149.

It is argued in this work that it may also flow as an implied power from the obligation to apply the human rights covenants such as the ICCPR. The articles of the ICCPR provide the framework for the reconstruction of law and order and provide the basis for peace building and the recreation of the State. Contained within the ICCPR are provisions that are capable of forming the foundations of laws dealing with arrest, detention and the treatment of detained persons. The provisions put in place on the basis of the ICCPR can then be adopted or adapted as the State is reconstructed and can form the basis of constitutional government.

The aim of this work is to set out the argument regarding which law applies to UN peacekeeping in collapsed States and to test the hypothesis that human rights law and not humanitarian law provides the legal framework. The way in which this will be done is by looking at different aspects of peacekeeping and the applicable law in seven chapters.

Chapter one of this work is the foundation chapter and looks generally at the practice of peacekeeping, its legal foundation and the terms used to define it. The chapter asks what is peacekeeping? In answering this question the chapter uses as its start point the legal basis for peacekeeping found in the powers implied from Chapter VI of the UN Charter. It outlines the growth of peacekeeping out of Chapter VI and the incremental development of peacekeeping. Also examined in this chapter is the Uniting for Peace Resolution of the General Assembly that aimed to fill any void created by the Cold War deadlock in the Security Council. This important Resolution demonstrated the central role that peacekeeping had come to play in the activities of the UN.

Chapter one goes on to examine the legal basis of peacekeeping under Chapter VII of the UN Charter. This Chapter of the Charter is more explicit in the ability of the Security Council to use military force and it is on the basis of Chapter VII that peacekeepers have found themselves in the position of a force authorised to use the force of arms to achieve its mission.

Having outlined the legal basis of peacekeeping the chapter looks at the evolution of peacekeeping from small lightly armed observer missions to the forces capable of defending populations from attack and forming the basis of the administration of a State or territory. Out of this logically flows an examination of the development of the terms used to describe peacekeeping activities and terms such as “traditional peacekeeping,” “peace making,” “peace enforcement,” wider peacekeeping and peace building are defined. The chapter then looks briefly at peacekeeping in support of humanitarian missions and the interaction between Non Governmental Organisations and UN peacekeeping operations.

The chapter concludes by noting the evolution of peacekeeping from a relatively simple, low key placement of a lightly armed force on the ground to observe a process or the relations between States across a border to a highly complex operation capable of supporting a State. In performing these complex operations the UN needs to ensure that peacekeeping operations do not lose legitimacy by stepping outside the boundaries of the law. The purpose of this work is to contribute to the legal legitimacy of UN peacekeeping by providing legal certainty to peacekeeping operations in collapsed States.

Chapter two focuses on what the UN sees as the theory of peacekeeping through its own reports and significant reports presented to it. This is important as it leads to an insight into the UN's understanding of what peacekeeping is about and how it fits within the Charter, from where peacekeeping mandates obtain their legal authority and legitimacy. The start point for this is the first report of the UN in 1992 that directly addressed the issue of peacekeeping, *An Agenda for Peace* by Secretary-General Boutros-Boutros Ghali.

In *An Agenda for Peace* the Secretary-General laid out his vision for a robust and effective form of peacekeeping that was to be the panacea for many of the trouble spots around the globe. At the time the Secretary-General had high hopes that the end of the Cold War would lead to greater agreement in the Security Council. This proved not to be the case and many of the reforms proposed in *An Agenda for Peace* proved to be impossible in the political climate of the Security Council.

The Australian response to *An Agenda for Peace* was set out in *Cooperating for Peace*. It developed many of the concepts that were introduced in outline form by *An Agenda for Peace* and put forward a response to the introduction of many of the measures advocated. These are set out and analysed in chapter two of this work. Its contribution to the debate helped to strengthen the vision set out by the Secretary-General towards a well planned and legitimate form of robust peacekeeping, equipped with the mandate and arms to complete its mission.

In 1995 the Secretary-General issued another report on peacekeeping titled *Supplement to An Agenda for Peace*. This report was not as positive as the first report and highlighted the failures of the Security Council to implement the recommendations put forward in *An Agenda for Peace*. The possibilities for peacekeeping are more limited in the Supplement and the express criticisms of the Security Council set out in the report may well have been a factor in the failure of the Security Council to re-elect Boutros Ghali to a second term of office.¹⁵

By 2000 the UN realised that peacekeeping operations were not functioning as they should and commissioned a report from a panel of experts headed by Ambassador Lakhdar Brahimi of Algeria, who gave his name to the report. The panel made 60 recommendations covering the field of peacekeeping operations. Specific recommendations related to doctrine, strategy, planning, decision-making, headquarter organisation staffing levels, logistics, rapid deployment and public information. While the report made recommendations that were necessary to the efficient and effective running of UN peacekeeping operations many of the recommendations were ignored in practice due to the politics of international relations.¹⁶

The failure to implement the practical requirements for peacekeeping articulated in *An Agenda for Peace* was highlighted by a UK report in 2002 *An Agenda for Peace Ten Years On*. However the report was positive to the extent that while it acknowledged that peacekeeping had passed through some tough times it was hopeful that there

¹⁵ Shawcross, W. *Deliver us From Evil* (2000) at 204-206.

¹⁶ Sir Jeremy Greenstock in International Peace Academy. *Refashioning the Dialogue: Regional Perspectives on the Brahimi Report on UN Peace Operations*. (Feb – Mar 2001) at http://www.ipacademy.org/Publications/Reports/Research/PublRepoReseBrahimi_body.htm. (5 Oct 2005)

would be full implementation of the Brahimi recommendations and the emergence of genuine support for peacekeeping operations by the Security Council.

The *Responsibility to Protect* was a report primarily aimed at the issue of humanitarian intervention that by necessity included robust peacekeeping operations. It was drafted in response to a question posed by Secretary-General Kofi Annan who asked:

“...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”

The international community was slow to react to the Secretary-General’s appeal so the Canadian government took the initiative. The *Responsibility to Protect* report aimed to bring the debate to a level of agreement between the parties.¹⁷

The *Responsibility to Protect* represented a shift in the thinking of the basis for international intervention. Although it put the primary responsibility to protect those living under its sovereignty on the State concerned it also placed an obligation on the community of nations to act where the domestic State was unable or unwilling to do so. This represented a major shift in the rationale that could underpin the deployment of a peacekeeping operation.

¹⁷ International Commission on Intervention and State Sovereignty. *The responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. International Development Research Centre, Ottawa, Canada. (December 2001).

The final report discussed in this work is 2005 report by Secretary-General Kofi Annan *In Larger Freedom*. In this report the Secretary-General aimed at recommending structural changes to the Security Council and refocusing on the priorities set out in the report. As such it had broader application than just to peacekeeping. With regard to peacekeeping the report did not advocate for implementation of Article 43, the UN standing force. Instead it advocated the setting up of regional rapid reaction forces that could deal quickly and efficiently with situations that threatened international peace and security. Of particular note for this work, *In Larger Freedom* recommended the setting up of a permanent office within the UN which would *inter alia* be responsible for making early efforts to establish the necessary institutions to rebuild the State, including the administration of justice. This work provides the legal basis upon which this aspect could be fulfilled.

The reports of the UN set out in chapter two of this work provide the context in which peacekeeping operations were conducted and the vision that was behind their creation. In the next chapters the operations established by the UN under Chapters VI and VII of the UN Charter are examined to see what as a matter of practice the UN and contributing States have done in terms of legal framework in peacekeeping operations. The chapters on Chapters VI and VII peacekeeping operations provide the basis for an argument concerning State practice with regard to the law applied in peacekeeping operations.

Chapter three of this work examines the Chapter VI operations and analyses the operations that have been conducted in terms of the legal framework applied by the peacekeepers in each case. This analysis links in with the evolution of peacekeeping

set out in chapter one as over time the operations can be seen to become more complex in form while retaining essential characteristics required for Chapter VI operations. From this analysis principles of Chapter VI peacekeeping are identified and set out as consent of the parties, impartiality as between the parties and the use of force strictly limited to self defence.

Chapter three then looks at the “Trusteeship” model operations that have been conducted by the UN in West Irian, Namibia and Cambodia. The legal Charter basis for these operations is analysed and the key deduction is made that in collapsed State peacekeeping under Chapter VI the *opinio juris* or State practice is for international human rights law to provide the legal framework and not the law of occupation.

Chapter four examines Chapter VII peacekeeping operations. It divides Chapter VII peacekeeping into three distinct types of operation. The first type are those that closely resemble Chapter VI peacekeeping with the elements of consent of the parties, impartiality and the use of force only in self defence. The second are those operations that run concurrently with an operation conducted by a Member State or regional organisation. The final type are those operations that could be termed more robust operations in that they are conducted without consent, impartiality or permit the use of force beyond self defence.

As a result of its anomalous position in the peacekeeping continuum, chapter four analyses the UN operation in the Congo between 1960 and 1964. This operation is set apart from all other UN peacekeeping as the UN became engaged as combatants with

rebel separatists and as a result applied the laws of armed conflict to at least part of the operation.

Chapter four of this work then turns to the operation in Somalia that led Kelly to form his opinion that the law of occupation applies to peacekeeping in collapsed States. In this section the operation in Somalia is set out in order to provide a factual basis upon which to directly challenge Kelly's thesis in chapter six of the work.

Chapter four then goes on to examine the peacekeeping operations and administrations in Kosovo and East Timor. The legal basis for these operations is analysed with a finding that the authority for the operation was founded on the mandate with the legal framework being a blend of the domestic law of the State and international human rights law.

As with chapter three of this work, the conclusion drawn with regard to the legal framework applied to Chapter VII operations in collapsed States is that as a matter of State practice as contingents of the UN force and pillars of the administration, the legal framework is international human rights law, not the law of occupation.

As identified above, the competing views set out in this work are whether international humanitarian law or international human rights law provides the legal framework for UN peacekeeping in collapsed States. In chapter five of the work international humanitarian law is examined in order to establish exactly what it is. The chapter examines the genesis and growth of international humanitarian law, highlighting the global nature of its development, in order to provide an

understanding of its purpose and limits. The sources of international humanitarian law, the basic principles underpinning it and the specific conventions that form its substance are analysed for suitability in peacekeeping.

This is achieved by examining the sources of international humanitarian law and discussing customary international law. The applicability of these to peacekeeping is examined. The chapter then goes on to look at the western and non western foundations of international humanitarian law and concludes that the wide acceptance of international humanitarian law flows from the common foundation of its principles across all major societies.

The chapter then goes on to analyse the modern principles of international humanitarian law and the codification of those principles into the modern international humanitarian law conventions. The chapter finishes with an examination of the enforcement of international humanitarian law.

The conclusion drawn in chapter five is that international humanitarian law has developed over time on a global basis and has become a refined system of regulation of armed conflict. It does not however regulate activities that fall outside the hostile or belligerent activities of combatants. Peacekeeping that falls short of armed conflict does not lend itself to regulation by a highly developed system of law designed to regulate and protect in situations of armed conflict. Even under the laws of armed conflict offences that are not related to the conflict have been dealt with under civil domestic legislation and not under legislation drafted to fulfil international

humanitarian law obligations or the international courts and tribunals set up to prosecute breaches of international humanitarian law.

As a result of the conclusion drawn in chapter five that international humanitarian law does not apply outside armed conflict, chapter six seeks to determine where the limits of international humanitarian law lie. The chapter examines the treatment of individual rights under international humanitarian law to demonstrate the importance of the accurate assessment of which law applies.

Chapter six then moves to examine situations in which peacekeepers may find that they must apply international humanitarian law. An analysis is made of the extant definitions of armed conflict and those suggested in the literature. It is demonstrated in this section that there are occasions when the extant definitions of armed conflict are not helpful in accurately determining which law applies. The next section of the chapter therefore attempts to set out more precise definitions of armed conflict, international and internal, so that peacekeepers can have more certainty in determining which law applies as the legal framework in an operation.

The next section of the chapter sets out how the Secretary-General's Bulletin on Observance by United Nations forces of International Humanitarian Law¹⁸ and the argument put forward by Michael Kelly have muddied the waters with regard to the accurate determination of which law to apply in collapsed State peacekeeping. The section argues that the Bulletin was intended to act only as a guideline in situations of self defence by UN troops that fell short of actual armed conflict and not as an

¹⁸ ST/SGB/1999/13 (6 August 1999).

indication that international humanitarian law applied to situations where the UN troops were required to use force only in a policing role.

The argument against Michael Kelly's thesis that international humanitarian law applies to collapsed State peacekeeping is directly challenged and the flaws in this argument are explored in this section of the chapter.

The conclusion reached in chapter six of this work is that the key to determination of which legal framework applies lies in determining when the threshold has been crossed into armed conflict. If, the threshold has not been crossed international humanitarian law will not apply and to attempt to stretch it to cover collapsed State peacekeeping is not only misconceived, as a matter of law it is also dangerous for peacekeepers and unhelpful in providing a foundation for reconstruction and long term peace and security.

The concluding chapter in this work is chapter seven. Having established in chapter six that the argument that international humanitarian law provides the legal framework in collapsed State peacekeeping is flawed, this chapter sets out the argument for the application of international human rights law. The chapter charts the development of international human rights from the UN Charter itself through the International Bill of Human Rights and the conventions, covenants and UN Resolutions flowing from it. Chapter seven then examines customary international human rights law and establishes that there are fundamental human rights that peacekeepers are obliged to protect regardless of whether their sending State has become a party to specific international human rights treaties.

Chapter seven then explores the extent that implied powers are available to peacekeepers to assist in fulfilling the obligations created under international human rights law. The issue of the enforcement of international human rights law is examined in this context. Having established the obligation owed by peacekeepers to international human rights law the chapter then proposes a solution to the problem of enforcing international human rights law. This is through the use of a military justice system. The advantage of this system is that it can be placed on the ground immediately. It can be used to train individuals who will form part of the domestic legal system where such systems have collapsed beyond repair. The point is made in this part that only those military systems that comply with international human rights requirements can be deployed by the UN to fulfil these roles. Although many States may offer their justice systems for deployment the UN will be required to ensure that only those systems that fully comply with human rights norms are deployed. If this is not done then the system will lose legitimacy and defeat the object of its deployment.

The chapter concludes by distinguishing UN peacekeeping and its use of a Trusteeship model of administration, under which the UN provides the functions of the domestic State, from sovereignty. Here the point is made that in cases of peacekeeping in a collapsed State situation the UN administers the State on behalf of the people of the State in whom sovereignty is vested.

This work concludes by arguing that peacekeeping in collapsed States is as a matter of fact a very different situation from an occupation in violation of the sovereign State.

Where the force is not involved in armed conflict international humanitarian law does

not apply. State practice as well as a proper construction of international law supports this argument International human rights law has developed so as to negate the requirement to stretch international humanitarian law beyond its proper boundaries; by utilizing the military justice system a rapidly deployable justice system can ensure that Member States meet their international human rights obligations when deployed as part of a UN peacekeeping force in a collapsed State.

CHAPTER ONE

What is Peacekeeping?

Introduction

“Our aims must be:

- To seek to identify at the earliest possible stage situations that could produce conflict, and to try through diplomacy to remove the sources of danger before violence results;
- Where conflict erupts, to engage in peacemaking aimed at resolving the issues that have led to conflict;
- Through peace-keeping, to work to preserve peace, however fragile, where fighting has been halted and to assist in implementing agreements achieved by the peacemakers;
- To stand ready to assist in peace-building in its differing contexts: rebuilding the institutions and infrastructures of nations torn by civil war and strife; and building bonds of peaceful mutual benefit among nations formerly at war;
- And in the largest sense, to address the deepest causes of conflict: economic despair, social injustice and political oppression. It is possible to discern an increasingly common moral perception that spans the world's nations and peoples, and which is finding expression in international laws, many owing their genesis

to the work of this Organisation.”¹

By the time Secretary-General Boutros-Ghali wrote these words in his “Agenda for Peace” peacekeeping was an established part of the UN’s arsenal in attempting to realise the vision for world peace set out in the Charter. But what is peacekeeping and how did it come to hold such a prominent place in the activities of the UN?

What is peacekeeping?

In the past, truce monitoring has been the traditional function of UN peacekeeping operations. But recently, with the changing nature of conflicts and the surge of intra-state confrontations, the functions of peacekeeping operations have become much more complex and comprehensive, encompassing conflict prevention, peacemaking, post conflict peace-building and assistance to the activities of international tribunals in bringing war criminals to justice.²

“Peacekeeping” is a term that imparts virtually no information about what type of operation is taking place. Yet how many times would the reader of a national newspaper or television news viewer read or hear the word and believe instantly that he or she knew exactly what the article was about? In common parlance the term implies that an operation short of armed conflict is taking place, although not necessarily that the operation excludes armed conflict, as many peacekeepers have discovered. For most it probably conjures up the image of soldiers in their instantly recognisable blue helmets. The blue helmet is an evocative symbol. Many authors, and the UN itself, have relied upon it to set the scene for books and articles about UN peacekeeping activities.

¹ Boutros Boutros Ghali *An Agenda for Peace, Preventative Diplomacy, Peacemaking and Peace-keeping*. A/47/277 S/2411 17 June 1992: Report of the Secretary-General pursuant to the statement adopted by the summit meeting of the Security Council on 31 June 1992. (*Agenda for Peace*. (1992)) UN publications at paragraph 15.

² Han Seung-soo ‘The Chronicle Interview: The Peaceful Resolution of Crises’ (June 2001) 38 *UN Chronicle* at 0251-7329.

In 1990 the UN defined peacekeeping;

... as an operation 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 co-operation. 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.³

Despite what may have been an authoritative definition in its time, peacekeeping has come to encompass many types of activity, both military and civilian, including the use of military force to attain peace. With each post Cold War operation the potential categories of peacekeeping seem to increase in diversity and complexity. In his book *Blue Helmets*,⁴ John Hillen noted that UN military operations are generally referred to as “peacekeeping” regardless of which of the multiplicity of peace operation categories that have developed they fall into. Hillen himself identifies three broad categories of operation: these being observer missions, traditional peacekeeping, or the later and more complex operations also referred to as second generation peacekeeping missions.⁵ All of these terms appear frequently in the literature with observer missions and traditional peacekeeping being particular favourites. Regardless of the frequency of their use even these terms are not always used with the same meaning and so do not assist in reaching an understanding of peacekeeping or its purpose.

³ United Nations *The Blue Helmets: A Review of United Nations Peacekeeping* (2nd ed, 1990) at 4.

⁴ Hillen, J. *Blue Helmets. The Strategy of UN Military Operations*. (1998).

⁵Id at 79: These are Hillen’s classifications, there are very many more nomenclatures for these operations.

A number of commentators⁶ attribute the rise of peacekeeping to the deadlock between the permanent members of the Security Council arising out of the Cold War, although, in a spirit of perversity the number and complexity of peacekeeping operations have increased exponentially since the end of the Cold War. In the early days of peacekeeping military forces were sent in to a State as an act as much of display as any attempt to make an effective contribution to keeping the peace. Over time however peacekeeping operations have benefited from the shift in the world political structure and have as a result become arguably both more complex and effective.

Of increasing importance in peacekeeping is the issue of human suffering. The UN intervention in Somalia represented the acceptance of humanitarian intervention as a legitimate option.⁷ In the Balkans enforcement measures were also implemented on the basis of averting human suffering. While justification for humanitarian intervention is not the focus of this work, it must be acknowledged as an increasingly common cause for the deployment of peacekeepers in the post Cold War era and as a result will be returned to later in this chapter. Peacekeepers must respond to the requirement to integrate humanitarian assistance into the more traditional military issues facing peacekeeping operations. The military is not expected to perform this humanitarian role alone. The increasing role of Non Governmental Organisations (NGOs) in peacekeeping makes it difficult to define any form of modern peacekeeping operation without acknowledging the inevitable presence of such organisations. Many of these organisations see the military merely as security providers not as aid givers, with the NGO role as the real focus of the operation.

⁶ Eckert, A.E “United Nations Peacekeepers in Collapsed States”. *Journal of International Law and Practice*. (Summer 1996) at 275; Bialke, J.P. “United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict” *Air Force Law Review* 50.1 (1996) at 10.

⁷ Kelly, M *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999) at 14; International Development Research Centre “The Responsibility to Protect Report of the International Commission on Intervention and State Sovereignty” (2001).

Through a combination of the rise in humanitarian focused operations and the resulting presence of NGO there are few military commanders who would contemplate a peacekeeping operation without dedicated civil affairs planning.⁸ The independence of NGOs can be a major obstacle in peacekeeping operations and if planning does not take into account the need to establish liaison and of the fact that NGOs will not always operate in accordance with military wishes, the operation is doomed to failure. NGOs are often distrusting of military organisations, even those under the auspices of the UN. There is also the potential for conflict between NGOs that have contradictory goals and objectives or that are competing for the same resources.⁹

The UN has recognised the need to coordinate humanitarian activity. In East Timor for example the UN Office for the Coordination of Humanitarian Affairs established a civil-military cooperation component within the office to coordinate use of resources between the NGOs and to ensure military resources were used in direct support of humanitarian assistance operations.¹⁰

Arguably the ability of peacekeeping to be so flexible and adaptable stems from its not being tied to a specific definition or intention articulated in the Charter.

⁸ Abigail, P. in Smith, H. (ed) *The Force of Law: International Law and the Land Commander*. (1994) at.87.

⁹ Ross, J.N. "Civil-military Co-operation in Humanitarian Interventions: Opening Dialogue and Increasing NGO Influence Over Defence Policy." *Paper Presented at the Second Annual Graduate Student Seminar*. Ottawa: Canadian Centre for Foreign Policy Development. (30 April – 5 May 2000).

¹⁰ Elmquist, M. *CIMIC in East Timor: An Account of Civil-Military Co-operation, Coordination and Collaboration in the Early Phases of the East Timor Relief Operation*. Relief Web. <http://www.relifweb.int> 1999 (20 Mar 2005).

The legal basis for Peacekeeping

“The technique of peacekeeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947.”¹¹

Although peacekeeping is primarily an activity associated with the UN there is no direct reference to peacekeeping in the UN Charter. Indeed ‘the organisation’s founders never envisioned such activities’.¹² Despite this alarming¹³ lack of express reference peacekeeping was scrutinised in the *Certain Expenses Case*,¹⁴ an advisory opinion of the International Court of Justice (ICJ), and was confirmed as a legitimate tool of the UN under the auspices of the UN Charter. In light of the rather unusual extra Charter position it is on the face of it surprising that such a significant activity as peacekeeping came into being and went on to be accepted as a legal and legitimate tool. Given that the legitimacy of peacekeeping was confirmed over twenty years after the first operation it can be quite reasonably argued that the legal justification for peacekeeping has lagged behind reality, no very uncommon occurrence in the development of the law.

In a tacit acknowledgment of this state of affairs the first UN peacekeeping force was described by the then Secretary-General Dag Hammarskjöld as a “Chapter Six and a Half” operation. This term has stuck and the theme has even been developed by some commentators to describe more robust operations as Chapter Six and Three-Quarters.¹⁵ The reason that the Secretary-General adopted this description is that peacekeeping does not fit precisely into the provisions of either Chapter VI or Chapter VII. They can also appear to have been set up within a Chapter VII framework but operate

¹¹ Urquhart, B. “The United Nations, Collective Security, and International Peacekeeping” in Henrikson, A.K. (ed) *Negotiating World Order: The Artisanry and Architecture of Global Diplomacy* at 62.

¹² Turley, S. “Keeping the Peace: Do the Laws of War Apply?” 73 *Texas Law Review* 139 (2000) at 150.

¹³ Alarming because of a lack of support for its legal legitimacy on the face of the Charter.

¹⁴ *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 149.

¹⁵ Bialke above n 6 at 23.

as if they were formed under Chapter VI. In other words the legal underpinning of their establishment may have no effect on their operation. Peacekeeping is a continuum and even within a single operation different places on the continuum can be reached at different times or in different places. In some of its forms peacekeeping is conducted on the basis of a recommendation of the General Assembly and not by the Security Council. Historically this has occurred because the Security Council has been unable for political reasons to agree to establish an operation. When the General Assembly recommends a peacekeeping operation it only has the power to establish it under Chapter VI. Most commonly since the end of the Cold War peacekeeping has been a tool of the Security Council.

Peacekeeping has been argued to be an implied power of the UN deriving from Article 1, which states that the primary purpose of the UN is to maintain international peace and security¹⁶. The argument that legitimate powers can be implied from the Charter has been found to be good in law by the ICJ. In the *Reparations Case* the ICJ stated that ‘the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to it in the course of its duties’.¹⁷ This is a critical point, which will be returned to in detail later in this work.

Although the implied powers for the use of peacekeeping forces is derived from the primary purposes of the UN set out in Article 1 of the Charter, the purposes or grounds for which the implied powers may be used are found in Chapters VI and VII. It is upon these two Chapters that all peacekeeping operations have been founded. The Chapters set out a number of options available to Member States, the General Assembly and the Security Council. Not all of the options set out in the Chapters are relevant to peacekeeping. On one side there are the options that have no

¹⁶ Id at 9.

¹⁷ *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] ICJ Rep 174 at 182.

scope for third party military intervention such as taking the dispute to the ICJ. On the other hand there comes a point within Chapter VII where the more robust aspects of peacekeeping, usually referred to as enforcement, are replaced by armed conflict. An attempt to identify where the divide between enforcement and armed conflict is to be found will be made in a later chapter of this work.

Chapter VI

While Article 1 of the Charter represents the general head of power on which legitimacy for peacekeeping can be founded there are elements in both Chapters VI and VII which are relied upon as the basis for different types of operations in the peacekeeping continuum. Chapter VI operations are generally understood to be derived from Article 33 as a “peaceful means” of achieving a settlement of a dispute between the parties.¹⁸ Article 33 generally deals with the peaceful settlement of international disputes that may threaten international peace and security. It sets out a form of means such as negotiation, inquiry, mediation and so on, by which parties should settle disputes peacefully rather than by resort to armed force. Importantly, the article does not give the UN the power to impose peaceful solutions on the parties but clearly states that any solution listed in the article, or in the catch all of ‘other peaceful means’, is exclusively within the parties’ own choice.

Chapter VI has a total of six articles dealing with international disputes. The position of both the Security Council and the General Assembly throughout Chapter VI is that they may only make recommendations to parties. Neither the General Assembly nor the Security Council may impose a particular course of action on a party to a dispute being addressed under Chapter VI. However, pursuant to Article 37(1) parties’ that cannot achieve a settlement through the pacific means

¹⁸ Above n 16 at 8.

indicated in the Chapter or by voluntarily bringing matters before the General Assembly or the Security Council,¹⁹ are obligated to refer the matter to the Security Council. While being obliged to refer such matters to the Security Council and obtaining a recommendation there is no express obligation to comply with the recommendation, or authority for the Security Council to enforce such compliance. The power to force compliance with a Chapter VI recommendation that a peacekeeping operation be launched must therefore come from a political source not a legal one.

The legal result is that if a peacekeeping operation derives from a request from the parties under Article 33, or from any other provision of Chapter VI, for example from a recommendation under Article 36, consent of the parties to the peacekeeping operation is mandatory. If consent is not present, regardless of the reason why consent has been withheld, regardless of the benign nature of the operation and regardless of the implied powers of the UN, without the acknowledgment that it is the parties own choice, a peacekeeping operation cannot be a Chapter VI operation. Where the UN is dealing with a situation in which the government has collapsed without successor and there is therefore no means by which the State can give consent, or accede to a recommendation of the General Assembly or Security Council, then any peacekeeping operation, must be initiated under Chapter VII. The requirement for a State to make a choice within Article 33 is in this sense active not passive.

Under the Charter the Security Council has the primary responsibility for maintaining international peace and security but it is not only the Security Council that may make recommendations under Chapter VI. The *Certain Expenses Case*²⁰ went further than merely cementing the position of peacekeeping in the UN store of available actions, it also confirmed that the General Assembly has the potential to initiate peacekeeping operations, subject to there being consent to such a

¹⁹ and thereby undertaking to submit to its decisions.

²⁰ Above n 14.

deployment by the receiving State. In other words, while peacekeeping operations under Chapter VII of the UN Charter can only be authorised by the Security Council, Chapter VI operations may be initiated on the basis of a recommendation from the General Assembly. The caveat to this being that the General Assembly cannot involve itself if the Security Council is simultaneously considering the matter. The General Assembly's power to recommend peacekeeping operations is useful where a member of the Security Council is using the veto to prevent a peacekeeping operation, as was the case with the United Nations Emergency Force operation in Egypt, the operation that precipitated the *Certain Expenses Case*.²¹

While Chapter VI can provide the basis for peacekeeping it does not give any guidance on the detail. The details are to be agreed between the UN and the States involved as suppliers or recipients of peacekeepers. Although the Security Council does not ratify these agreements they are legally binding on the parties as treaties.²²

Uniting for Peace Resolution 1950

The Uniting for Peace Resolution, the General Assembly's most important contribution to strengthening the UN collective security system²³ changed the role of the General Assembly under Chapter VI from that originally envisaged under the Charter. With this Resolution the General Assembly clearly stated its intentions to take action in the case of a moribund Security Council.

The General Assembly passed the Uniting for Peace Resolution as a direct result of the events in the Security Council that occurred prior to the Korean War. The USSR had decided to boycott the

²¹ Ibid.

²² Higgins, R. *United Nations Peacekeeping 1946-1967: Documents and Commentary*. (1970) at 506.

²³ Goodrich, L.M. and Fox, W.T.R. (eds) *Legal Effects of United Nations Resolutions* (1969) at 81.

Security Council at the time that the vote for action was taken.²⁴ In its absence the deadlock previously encountered was temporarily removed and a decision made to commit a UN force to Korea.²⁵ The USSR realised it had made a mistake in absencing itself and rushed back to the Security Council, arguing that its absence amounted to a veto. This argument was rejected and the Korean War proceeded as planned. The General Assembly realised that neither the USSR nor the other permanent members would make the same mistake again and that if action were not taken to avoid deadlock the Security Council would be unable to fulfil its responsibilities with regard to peace and security.²⁶ Relying on the Uniting for Peace Resolution the General Assembly passed Resolution 498(V) of February 1, 1951²⁷ recommending the use of force by Member States against the Chinese forces in Korea.²⁸

In Uniting for Peace²⁹ the General Assembly noted the responsibilities of the Security Council with regard to international peace and security. It also noted in the event that the Security Council failed to discharge those responsibilities, the General Assembly maintained its rights and responsibilities with regard to international peace and security. The General Assembly then resolved that, in the event of a threat to peace, breach of the peace or act of aggression that it would consider the matter and make recommendations to Member States, including recommendations for the use of armed force.

As well as amending its own procedures to enable the General Assembly to consider such matters, the General Assembly also established a commission to observe areas of international tension.

²⁴ Above n 4 at 226.

²⁵ Goulding, M. *Peacemonger* (2002) at 12.

²⁶ Ratner, M and Lobel, J. *A UN Alternative to War: Uniting for Peace*.

http://www.danirak.dk/english/ratner_final_op_ed_uniting.htm. (2 Feb 2003).

²⁷ *Intervention of the Central People's Government of the People's Republic of China in Korea*. Adopted at the 51st session 1 February 1951

²⁸ Above n 23 at 89-90.

²⁹ General Assembly 377 (V) Uniting for Peace. 302nd Plenary meeting 3 November 1950.

Further, a recommendation was made to all Members States to maintain forces to be made available for service with the UN at the recommendation of the Security Council or the General Assembly. The Secretary-General was requested to establish the panel of military experts to advise Member States on the requirements for the preparation of units for UN service. Finally the General Assembly established a collective measures committee to look at assisting in the maintenance of international peace and security through collective self-defence measures.

This resolution has to be viewed as a recommendation under Chapter VI and can only legally relate to Chapter VI operations despite the rhetoric used, as the General Assembly cannot make an Article 39 finding or impose measures under Chapter VII.³⁰ However, Uniting for Peace clearly foreshadows the General Assembly's role in encouraging the practice of peacekeeping, which at that time was extremely new. It also came some 12 years before the *Certain Expenses Case*³¹ confirmed the power of the General Assembly to make recommendations for peacekeeping forces. The Uniting for Peace Resolution represents a corner stone of the legal and political development of the legitimacy of peacekeeping in terms of both traditional peacekeeping and enforcement action.

Chapter VII

It is trite law that peacekeeping operations initiated with the consent of the parties to a dispute can be initiated under Chapter VI. In situations where the parties are unable to give consent or where there is no dispute but a threat to or breach of the peace or an act of aggression by one or more State, then the Security Council may be required to act under Chapter VII. Even with consent of the participating State or States the Security Council may determine that the matter should be dealt

³⁰ See Castaneda, J. *Legal Effects of United Nations Resolutions*. (1969) at 81 – 89.

³¹ Above n 14.

with under Chapter VII.³² Proceeding under Chapter VII despite the fact that consent has been obtained can occur and could for example be caused by an assessment that the peacekeepers will be obliged to use force in excess of self-defence in order to achieve their mission.

Chapter VII provisions are also extremely useful as reliance on the Chapter expressly overcomes the prohibition that otherwise exists in Article 2(7), which provides that except for the enforcement measures in Chapter VII the UN is not authorised to intervene ‘...in matters which are essentially within the domestic jurisdiction of any State...’. There is considerable debate regarding where the line is to be drawn in terms of what is and what is not within domestic jurisdiction, particularly regarding human rights issues³³. The use of Chapter VII action avoids this debate and clears away what might otherwise prove a complex hurdle to resolving issues by intervention.

The first article in Chapter VII is Article 39. This article sets out the grounds upon which the Security Council may make recommendations³⁴ or decide upon measures under Chapter VII.

These grounds are;

- a. any threat to the peace,
- b. breach of the peace, or
- c. act of aggression.

Only the Security Council is given the power to act under Chapter VII. The General Assembly is limited to making recommendations under Chapter VI, although the General Assembly is able to recommend that the Security Council take action under Chapter VII. If the Security Council

³² For example, UNSC Resolution 1264 authorising the deployment of INTERFET.

³³ Above n 25 at 23.

³⁴ Again these are only recommendations under Art 39 and as such not binding, contrast this with Art 40 resolutions that are binding.

decides to utilise the powers under Chapter VII it must first make a finding that one or more of the grounds set out in Article 39 exists.³⁵ It has been argued that the Security Council must actively make the finding, it cannot simply be inferred; as without making such a finding it cannot lawfully use the Chapter VII powers.³⁶ It has not always been expedient or possible for the Security Council to openly make a finding and in these circumstances it will have to rely upon Article 39 recommendations.³⁷

Article 39 permits the Security Council to make recommendations as well as make findings and decide on measures. The recommendations alone can be used very effectively when there is agreement within the Security Council. The first instance of this was the Korean war where the recommendations of the Security Council under Article 39 were considered sufficient to permit individual member States led by the USA, to engage in armed conflict on the basis of an Article 39 recommendation.³⁸

While recommendations of the Security Council have been used as the basis for peacekeeping operations, it is under Article 42 that the post Cold War robust Chapter VII peacekeeping operations are now conducted.³⁹ Where persuasive measures short of armed force have failed or are considered inadequate, then action by air, sea or land forces is permitted. While the article specifically identifies demonstrations and blockades as examples of the type of action that may be taken under Article 42, it leaves all the military force options open to the Security Council. Such

³⁵ Sohn, L. (ed) *Cases on United Nations Law*. (2nd ed. 1967) at 303.

³⁶ Eckert above n 6 at 296.

³⁷ Although the action in the Congo had all the hall marks of an Article 42 operation the Security Council was at pains to point out that it was, while binding, not an Article 42 resolution [Goodrich, L.M, Hambro, E. and Simons, A.P. *Charter of the UN Commentary and Documents*. Third ed 1969, p.316]. It is difficult to see how this could be achieved other than by arguing that it was binding due to the agreement of all concerned to accede to the Security Council's recommendations.

³⁸ The actions of the Security Council in this instance were based on expediency as the Article 43 agreements had not yet been signed. There was also some debate over the legality of the resolutions recommending military action in support of South Korea given the absence of the USSR; Harris D. *Cases and Materials in International Law* (5th ed 1998) at 954 – 955.

³⁹ See for example Somalia, above n 7 at 14. Prior to the end of the Cold War Article 42 was noted more for its disuse.

actions are left to the words “any other operation by air, sea, or land forces of the Members of the United Nations”. This action can be up to and including international armed conflict as occurred for example with the first Gulf War. The Charter intends that States that have entered into an Article 43 agreement provide the forces for an operation conducted under Article 42.⁴⁰ However, the absence of Article 43 agreements does not mean that military forces cannot be provided to the UN⁴¹ as it has always been possible for Member States to provide military forces on an *ad hoc* and voluntary basis.⁴²

When drafting a Chapter VII resolution it is the practice of the Security Council to avoid reference to the specific article under which the resolution is being drafted. One of the main reasons for this ambiguity is that the US, for reasons related to its constitution, favours this form of drafting. The basis of this concern is that a mandatory direction binding on the US may be given to apply armed force to a particular situation without the prior approval of Congress.⁴³ If the resolution refers generally to Chapter VII then the details of whether the force is being approved as an Article 39 measure, Article 42 means or as collective self defence under Article 51 is open to interpretation.

Rostow put forward another reason for leaving ambiguity over the Article to be applied. He argues that Article 42 is not a reliable foundation and is open to challenge without support from the other articles in the Chapter and in particular Article 51. Article 43 agreements for the provision of forces to the UN have not been entered into. Rostow argued that as a result of the relationship between Articles 42 and 43, the military measures authorised by Article 42 can only be prosecuted

⁴⁰ Harris, above n 38 at 950.

⁴¹ Article 43 agreements were not entered into for action in the Gulf or Somalia; Palwanker, U. “Applicability of International Humanitarian Law to United Nations Peacekeeping Forces” *International Review of the Red Cross* No 294 (30 June 1993) at 227.

⁴² United Nations Institute for Training and Research. *The United Nations and the Maintenance of International Peace and Security*. (1987) at 215.

⁴³ Glennon, M. “The Constitution and Chapter VII of the United Nations Charter” *85 American Journal of International Law*. 74 (1991) at 74-87.

by an Article 43 force. He points in particular to the first Gulf War, which he argued was fought on the basis of collective self-defence with a Security Council Resolution acting simply as a focal point rather than as the legal authority for the military action.⁴⁴

The arguments against Article 42 make an interesting impact on peace enforcement operations. As discussed above, the Article 39 findings that invariably precede a Chapter VII operation mean that the Security Council must make a recommendation or decide on measures set out in Articles 41 and 42. Therefore while States may opt to act under Article 51 with UN backing; a UN force could not. Even if a UN force appeared to be acting in collective self-defence it would legally be acting on an Article 39 'recommendation' not under Article 51.⁴⁵

The recommendations in Article 39 differ from the use of force provisions in Article 42 because recommendations are just that while the Article 42 provisions require mandatory action by Member States. As a matter of practice States are not keen to be dictated to over the use of their armed forces and as identified in the case of the US, it could cause constitutional difficulties. A specific direction under Article 42 could well draw a veto from the US if prior consent had not been obtained under the US Constitution. In any event, if Article 43 forces are required to implement the use of force provisions in Article 42, then action under Article 42 will be impossible until such agreements have been concluded. Therefore, Chapter VII peacekeeping can only be based on Article 39 recommendations. Given the difficulties inherent in specifying which article is to be relied upon it is not surprising that the Security Council prefers to make a general reference to Chapter VII.

⁴⁴ Rostow, E.V. *Agora: The Gulf Crisis in International and Foreign Relations Law Continued: "Until What? Enforcement Action or Collective Self Defence"* 85 *American Journal of International Law*. 74 (1991) at.452-473.

⁴⁵ The first Gulf War resolution was in effect making an Article 39 'recommendation' for collective self-defence seems to be the basis of the argument put forward by Rostow, and that in effect the resolution was unnecessary for the action to be lawful as it drew legality from Article 51.

Regardless of which specific article authorises action, an examination of Chapter VII reveals that peacekeeping can be initiated under Chapter VII for four reasons. Firstly because the operation cannot for some reason be initiated under Chapter VI, including, but by no means limited to a situation where there is an absence of consent or the ability to give consent. Secondly, because the Security Council needs to make the action enforceable rather than merely a recommendation. Thirdly, because the Security Council wishes to use or authorise the level of force provided for by Article 42. And finally, on the basis of Article 51 in a type of authorised self defence. In UN resolutions it has become normal for the Security Council to issue a blanket Chapter VII mandate without detailing which article is specifically relied upon. This situation provides flexibility and been the form favoured by the Permanent Members⁴⁶.

As a result, peacekeeping operations under Chapter VII can appear at any stage of the peacekeeping continuum. Simply because an operation has been commenced under Chapter VII does not automatically mean that it will have characteristics markedly different from a Chapter VI operation. The use of force (other than in self-defence) is not inevitable and consent of the parties may also be obtained. This has proven to be the case in East Timor.

The evolution of peacekeeping

As with every human endeavour peacekeeping did not emerge from the deliberations of the UN in a complete form. As noted above, peacekeeping was something of an accident rather than a planned child of the Charter. Since its inception peacekeeping has been developing and commentators have charted the journey. Segal,⁴⁷ for example, has been able to identify five chronological phases of

⁴⁶ See for example Security Council Resolutions 1244 (Kosovo) and 1264 and 1272 (East Timor).

⁴⁷ Segal (in Lee, R.) "The United Nations Peacekeeping Success but Peace Enforcement Failures" *Australian International Law Journal* (2000) at 182.

peacekeeping in an evolutionary progression.⁴⁸ The first of these phases, sometimes referred to as “first generation peacekeeping”,⁴⁹ is represented by the operations conducted between 1946 and 1955. These operations are labelled by Segal ‘observer missions’. They are characterised by the unarmed and impartial observer deploying in small numbers to supervise a truce or monitor an armistice. The key ingredient in these missions is consent of the parties. Violations of the truce or armistice would not be dealt with by the peacekeepers but were either dealt with by mediation between the parties or referred to the Security Council. In other words the active measures were to be taken not by the peacekeepers but at the political level. The observer missions were a purely passive tool.

Phase two operations ran from 1956 to 1965. These operations saw a shift from small, unarmed groups to the deployment of armed forces. Operations were still governed by the paramount principles of consent and impartiality but these two were joined by an express prohibition on the use of force except in self-defence. One aberration in the phase two period was the Operation in the Congo (ONUC) in 1960. In this operation the Security Council authorised an increase in the permissible use of force in order to remove foreign mercenaries and restore freedom of movement to the peacekeepers within the bounds of the Congo operation.

Phase three, 1966 to 1985, saw very little in the way of peacekeeping missions due to a moribund Cold War Security Council and it is this lack of use of peacekeeping rather than the nature of the operations that cause them to be identified as a separate phase. Consent remained the dominant principle and peacekeepers were not expected to use force. The operations were in what had become the traditional mould of monitoring the cessation of hostilities, supervising buffer zones

⁴⁸ Id at 182 – 188.

⁴⁹ McCoubrey, H and White, N.D. *The Blue Helmets: Legal Regulations of United Nations Military Operations*. (1996) at 4.

and providing support to peace settlements. Peacekeepers were still not considered to be an active measure but remained the passive tool of the Security Council.

The fourth phase of peacekeeping from 1985 to 1990 still relied upon consent (of the parties and of the world powers) as the guiding principle for the insertion of peacekeepers. However, the operations were now on a grander scale with elements of nation building being inserted as an integral part of the operation. Peacekeepers were also being used to implement, as well as merely monitor, comprehensive settlements. This phase represents the change in attitude towards peacekeeping from a solely passive tool to one that could also be utilised in a more active role. These operations are also referred to as “second generation”⁵⁰ peacekeeping.

The advent of “third generation” peacekeeping,⁵¹ (the fifth and final phase for Segal) was marked by the demise of consent as the guiding principle. It also represents a period where from time to time there is also a loss of impartiality. This loss of impartiality arises from the nature of the operation rather than by accident. Increasingly peacekeepers are inserted into internal armed conflicts rather than as a buffer between hostile States. Their missions are to disarm belligerents, rebuild infrastructure, physically as well as organisationally, in addition to providing security and basic administration for the State. Segal does not go on to identify humanitarian intervention as a specific part of the fifth phase of the evolution of peacekeeping nor as the beginning of a fresh phase. It is possible to argue both ways. It is quintessential phase five in that it has been done without consent⁵² and from time to time with the loss of impartiality.⁵³ However, the stated humanitarian purpose of the intervention does represent a significant shift, from the purposes of the other phases, which concerned themselves solely with the restoration or maintenance of peace.

⁵⁰ Id at 6.

⁵¹ Ibid.

⁵² In Iraq to protect the Kurds, Somalia, the former Yugoslavia and East Timor for example.

⁵³ The aerial bombing campaigns in the former Yugoslavia.

The argument concerning the legality of such intervention is another issue and not within the scope of this work.

The evolution of peacekeeping has seen the emergence of a whole family of terms to describe the nature of a particular operation. Although described above as an evolution, unlike the evolution of the human species the progenitors of Chapter VII enforcement have not perished along the way but survived to create an extant family of peacekeeping operations. Each genus in the family is described in terms of the task that is to be undertaken by the peacekeeper. Operations can also be run within operations as with an observer mission running in tandem with an enforcement mission.⁵⁴ As will be seen below, because it is human activity that is being described the terms are not always discrete. Often one operation may have the characteristics of more than one label or an operation identifiable at its commencement may develop into something quite different before it concludes. There are however a number of advantages in being able to identify or categorise operations. Using the different titles at least gives some doctrinal basis for commanders who are responsible for planning an operation. It also provides some guidance as to the boundaries within which the operation is likely to be conducted and it is of course useful as a political tool in reassuring nervous States.

Definitions of Peacekeeping

As peacekeeping has evolved it has developed its own unique nomenclature. However, these are not definite and fixed definitions under which operations can be labelled. The terms themselves have meant different things at different times. In 1970 Fabian defined peacekeeping very simply as “UN political-military control of local conflict by politically impartial, essentially noncoercive

⁵⁴ See for example in East Timor where unarmed Observer groups operated in the same area as Chapter VII peace enforcers.

methods”.⁵⁵ Thirty odd years later some forms of peacekeeping still have these characteristics but it is inconceivable that such a definition would be offered today as an attempt to cover the peacekeeping field.

From a purely Australian perspective, in its 1994 report to the Parliament the Joint Standing Committee on Foreign Affairs, Defence and Trade adopted a number of definitions relating to peacekeeping.⁵⁶ By way of a general definition it accepted the much more complex proposition that peacekeeping;

involves the deployment of military or police, and frequently civilian, personnel to assist in the implementation of agreements reached between governments or parties who have been engaged in conflict. Peacekeeping presumes cooperation, and its methods are inherently peaceful; the use of military force, other than in self-defence, is incompatible with the concept. Although neither described nor defined in the UN Charter itself, peacekeeping operations have been, both in the pre-Cold War years and subsequently, the most numerous and visible manifestations of the UN’s cooperative security efforts. ‘Traditional’ peacekeeping operations involve not much more than unarmed or lightly armed military contingents being engaged in monitoring, supervision and verification of ceasefire, withdrawal, buffer zone and related agreements. ‘Expanded’ peacekeeping by comparison, involves the supplementation of traditional peacekeeping with activities such as election monitoring or organisation, human rights protection, and assisting or exercising civil administration functions during transition to independence or democracy.⁵⁷

This definition itself appears to subdivide peacekeeping into separate types of operation by function. It identifies ‘traditional’ peacekeeping, ‘observer’ missions, humanitarian operations and

⁵⁵ Fabian, L. *Soldiers Without Enemies: Preparing the United Nations for Peacekeeping*, (1970) at 16.

⁵⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade *Australia’s Participation in Peacekeeping*. (December 1994) at 150.

⁵⁷ Ibid.

nation building. It is clearly intended to be a broad based definition, even so it does not cover the field in terms of the wide variety of peacekeeping operations undertaken under the auspices of the UN.

The other general definition of peacekeeping that was adopted by the committee was from the Department of Defence. This definition was shorter and stated that peacekeeping;

involves non-combat operations (exclusive of self defence), that are undertaken by outside forces with the consent of all major belligerent parties, designed to monitor and facilitate implementation of an existing truce agreement in support of diplomatic efforts to reach a political settlement to the dispute.⁵⁸

This second definition is more succinct and focuses on the key components of peacekeeping operations emphasising consent, third party peacekeepers facilitating essentially diplomatic action. But by the very act of emphasising consent and the absence of combat the definition fails adequately to define modern peacekeeping.

Although more comprehensive definitions of peacekeeping could be adopted to cover the field in terms of the peacekeeping operations prosecuted around the world, it should be recognised that peacekeeping is as descriptively complex as operations are diplomatically sensitive. Some of the distinctions are subtle; each nuance is vital to a commander tasked to carry out a mission. Often it is better to recognise that peacekeeping is a general term that requires a second level of inquiry. The term ‘peacekeeping’ is rather like the term dog: before the purchase it is advisable to determine if you are going to get a Great Dane or a Toy Poodle.

⁵⁸ Id at 151.

Traditional Peacekeeping

Traditional peacekeeping is unfortunately something of a catch all term that takes historical fact as the point of reference to describe a particular method or structure of peacekeeping operation. It is historical in the sense that it is a definition that describes what was originally the only way (save for the Congo operation) that peacekeeping was conducted immediately after World War Two. Rather than even use the term “traditional” peacekeeping Sergio Vieira De Mello⁵⁹ preferred to be more precise by describing such operations as ‘historical peacekeeping’ rather than traditional peacekeeping. Traditional peacekeeping is conducted exclusively under Chapter VI of the UN Charter.

The original peacekeeping operations were conducted in order to maintain the status quo by containing a conflict with the aim of gaining time for diplomatic pressure to be brought to bear on the parties so that an enduring settlement could be reached.⁶⁰ Given the limited means at their disposal the deployment of traditional peacekeepers was far more a political statement than a military intervention.

The pattern of troop deployment through which this was achieved formed the basis of the category of peacekeeping that is still used to describe traditional peacekeeping operations. Traditional peacekeeping involves lightly armed troops forming a line or a buffer between former or potential combatants with authority to only use force in a passive manner.⁶¹ Critically, traditional peacekeepers are limited to the use of force only in self-defence. Diehl⁶² emphasised the passive stance implicit in the initial development of traditional UN based peacekeeping by noting that non-

⁵⁹ De Mello, S. V. in Gordon D.S. and Toase F.H.(eds) *Aspects of Peacekeeping* (2000) at 115.

⁶⁰ Above n 56 at 6.

⁶¹ Above n 4 at 79.

⁶² Diehl P. F. “Institutional Alternatives to Traditional U.N. Peacekeeping: An Assessment of Regional and Multinational Options.” *Armed Forces and Society* 19, no.2 (Winter 1993) at 5.

coercion was the distinguishing feature of traditional peacekeeping. In other words, traditional peacekeeping must be non-coercive or it is not traditional peacekeeping. In the wider use of the term peacekeeping, and particularly in the most recent operations, it would be very difficult to put forward “non-coercion” as a distinguishing feature of the majority of modern peacekeeping operations either Blue Helmet or national contingents operating under the authority of a Security Council mandate.

The pacific nature of traditional peacekeeping operations was cynically emphasised by Trevor Findlay when he wrote “The term “peacekeeping” was a misnomer; there usually was no peace to be kept, only a sullen truce, and the “keeping” to be done was entirely dependant on the goodwill of the parties.”⁶³

Findlay’s amusing description of the realities of peacekeeping no doubt was felt to be an accurate description of the facts faced by peacekeepers on the ground. Rather than being dependent on either non-coercion or goodwill traditional peacekeeping cannot begin or continue without consent. Consent consistently has the starring role in the evolution of peacekeeping. Consent is the element identified universally in the literature and in military doctrine as the principal and essential element of traditional peacekeeping. It remained for that matter the central theme of peacekeeping in the more general sense during the Cold War period.⁶⁴

Traditional peacekeeping is conducted under Chapter VI of the UN Charter. This is not surprising given that the guiding principle of traditional peacekeeping is consent of the parties. With a mandate permitting only self-defence traditional peacekeeping forces are lightly armed and depend upon the legitimacy of their mission to maintain a position that could not be held by force.

⁶³ Findlay, T. (in Horner, D. ed) *The Army and the Future. Land Forces in Australia and South-East Asia.* (1993) at 75.

⁶⁴ The references to consent in this context are legion. See for example above n 56 at 151; Bellamy, C. *Knights in White Armour* (1997) at 156.

Legitimacy, so crucial for the survival of the peacekeepers on the ground, is derived from the consent of the parties and is supported by the exercise of neutrality and impartiality on the part of the force. Impartiality and neutrality in traditional peacekeeping is ensured by the multinational composition of the force as well as by its limited armament capability.⁶⁵ The multinational make up of the contingents was especially important in the era immediately after the Second World War. Contingents of the time consisted exclusively of middle and small powers in order to allay the fears of the parties that they might be subject to take over by the great powers or become satellite States as a result of a foreign military presence.⁶⁶ This model represents traditional peacekeeping as a delicate combination of factors that must be maintained by all the actors to achieve success.

Although Featherston⁶⁷ uses the term peacekeeping rather than traditional peacekeeping, the place of consent in her definition makes it expedient to deal with it as traditional, although more complex political dimensions are also described in her article. Rather than use categories separated by the descriptions often found in military use Featherston defines peacekeeping by breaking it down into its core requirements. For Featherston the key distinguishing factor between peacekeeping and any other type of political⁶⁸ activity is that a third party must perform the peacekeeping role. This third party must have certain essential characteristics. The third party is inserted on a voluntary and non coercive basis, it advocates for a particular outcome, process or both, it attempts a resolution of the dispute or issue, it is impartial, and the operation results in a change in the dynamics of a conflict situation. This last requirement seems rather to imply that Featherston sees only successful operations as being genuine peacekeeping operations.

⁶⁵ Above n 59 at 115.

⁶⁶ Smith, H. (ed) *International Peacekeeping: Building on the Cambodian Experience* (1994) at 201-2; Above n 54 at 5-6.

⁶⁷ Featherston A.B. *Making United Nations Peacekeeping More Peaceful: Relating Concepts of 'Success' to Field Reality*. Working Paper No.139. The Australian National University Research School of Pacific Studies. (October 1993) at 1-3.

⁶⁸ Political in the sense that every action on the world stage is by definition political.

The definition does not recognise a change over time in the principles of peacekeeping rather it asserts that the principles of peacekeeping were established and fixed in 1956. These immutable principles are identified as:

- a. Consent to insertion of peacekeepers by the parties to the dispute,
- b. Impartiality, and
- c. Non use of force, except in self-defence.⁶⁹

The issue of consent has central significance in identifying the nature of a particular peacekeeping operation. Success of peacekeeping operations and the reaction of actors to peacekeepers have been repeatedly dictated by the level of consent obtained for the mission at every level. While Featherston does not draw this from the analysis, consent is rightly shown as the first and cornerstone principle of traditional peacekeeping.

With regard to the principle of impartiality Featherston adds the clarification that this means impartiality towards the parties involved in the dispute not impartiality towards achieving a particular goal or mission. Peacekeepers are not inserted independently of a plan for a particular political outcome.⁷⁰

Featherston goes on to further define peacekeeping operations by reference to their complexity. Three categories are identified. These are; “force-level, observer and multidimensional.”⁷¹ The force-level operations are primarily military missions with thousands of troops involved and a

⁶⁹ Above n 67.

⁷⁰ Ibid.

⁷¹ Id at 2.

small civilian contingent, usually UN Secretariat staff. Observer missions on the other hand are relatively small contingents of tens to hundreds at most, of military personnel carrying out observation and verification. Finally multidimensional missions are a species of force level mission with the explicit task of dealing with socio-political and / or humanitarian situations. Typically such operations will have a large civilian component as was the case with the United Nations Transitional Administration East Timor (UNTAET).⁷²

Both Featherston and Hillen in their definitions recognise the place of traditional peacekeeping in the international political arena. The fact that military forces are only used as part of the political continuum is of course well understood, particularly by military forces imbued with a respect for the writings of Sun Tzu and Clausewitz. Nevertheless, traditional peacekeeping is generally defined by the activities of the force on the ground rather than the political context from which its activities are inseparable. The interactions between military and civilian segments of the operation are equally inseparable elements of traditional peacekeeping. This is in contrast to the more robust operations where civilian elements are small or non-existent.

One of the most important political aspects of peacekeeping is how consent of the parties is obtained and how strong and genuine that consent is. Hillen⁷³ quotes from a number of sources that emphasise the requirement for strong political support and pressure from major powers combined with the willingness of the parties in order to make any headway in traditional peacekeeping operations. It would be naïve to suppose that anything less than this kind of support is required in any form of international diplomacy let alone when even the lightly armed forces of a foreign State are to be deployed onto another State's sovereign territory.

⁷² Although UNTAET was not a 'traditional' peacekeeping operation.

⁷³ Above n 67 at 84-5.

Observer Missions

The observer mission is generally considered to sit within the traditional peacekeeping umbrella. Indeed observer missions are arguably the quintessential form of traditional peacekeeping. Returning to Hillen's definitions,⁷⁴ he describes observer missions as the most militarily pacific type of peacekeeping operation. In observer operations UN forces stand as impartial representatives of the UN watching an area and doing no more than reporting on the activities that they witness. They may or may not be armed and if they are armed they will only be able to use those arms in self-defence. These operations are also characterised by being almost solely military, a fact that is on the face of it at odds with the highly pacific nature of these operations.

The vital ingredients of consent, impartiality and the non-use of force except in self-defence are central and unambiguous. In these operations it is hard not to question whether the military is being used merely as a man power resource in an environment where presumably use of civilian resources would be cheaper and as such a more attractive alternative. Why then should there be such a preponderance of military in observer missions?⁷⁵

The answer to this is both historical and practical. Military staff have been used on observer missions since 1948 and the duties performed are of a technical nature requiring technical expertise and the professional standing of the personnel deployed.⁷⁶ This level of technical expertise is uncommon among civilian employees, although with the civilisation of military functions by many western States this situation may change in the future. There are also the significant advantages to

⁷⁴ Above n 4 at 79.

⁷⁵ While military may be a cost effective tool for the UN, for nations supplying forces, especially Western Nations, civilians are a cheaper option. In particular contracted civilians are highly cost effective as the wages, benefits and allowances are less than those paid to a military equivalent. This factor has been the driving force in much of the Australian move to contract out and civilianise Defence functions.

⁷⁶ Above n 4 at 33-4.

be gained from having a disciplined force that can be deployed at short notice and trained quickly to perform the necessary duties.

Hillen notes that the success of observer missions in their ability to be cheap and politically acceptable, in part due to the absence of force also means that they are effectively failures. This assertion is based on examples such as observer missions in the Middle East and India/Pakistan running without closure from 1948 and 1949 respectively. Although there has not been a major invasion by either State⁷⁷ this is most likely due to other international political factors and not the observer mission.⁷⁸ The aim of most peacekeeping missions is to reach an end point and withdraw. As neither these missions nor the observer mission in Cyprus is yet concluded and with no conclusion in prospect after more than fifty years, it is probably fair comment to accuse them of being failed missions. Indeed, Secretary-General Kofi Annan has threatened Cyprus with withdrawal of the peacekeeping operation unless a settlement was reached.⁷⁹

Wider Peacekeeping

For a short period the British Army used a doctrine known as Wider Peacekeeping.⁸⁰ It was defined as “the wider aspects of peacekeeping operations carried out with the general consent of the belligerent parties but in an environment that may be highly volatile.”⁸¹

The doctrine, although brief in tenure, is important as it represents something of a bridge between traditional peacekeeping and the modern post Cold War doctrines. Although transitory, failing due

⁷⁷ At the time of writing this work the relationship between these two nations has reached a point where armed conflict over the region of Kashmir is being openly predicted in the media. See for example SBS World News 1830h 29 May 2002.

⁷⁸ Above n 4.

⁷⁹ www.un.org/news/press/docs/03/030311sgsm11.htm. (11 March 2003).

⁸⁰ Gordon, D.S and Toase, F.H. (eds). *Aspects Of Peacekeeping* The Sandhurst Conference Series. (2001) at xxv.

⁸¹ Bellamy above n 64 at 151.

to its hasty construction in response to rapidly changing international circumstances, it did represent a transition mechanism from cold war era tactical peacekeeping thinking to the modern expectation of complex civil and political situations.⁸² For example, Wider Peacekeeping doctrine tackled the thorny issue of peace enforcement operations defining them as “an operation carried out to restore peace between belligerent parties who do not all consent to intervention and who may by engaged in combat.”⁸³ Note the key place of consent in this definition.

The British Wider Peacekeeping doctrine allowed for movement between peacekeeping and enforcement actions with the line of consent being the point at which the transformation from one to the other occurred. The doctrine was flexible in that it was not intended that an isolated incident on the ground caused a shift in the total operation. Tactical elements could be involved in a firefight because a domestic authority with control over a specific area had removed consent for a patrol to move through that area. Only the troops involved in that firefight would have crossed the consent line and when the situation had been resolved and local consent re-established then the tactical element involved would have crossed back again to the safety of peacekeeping.⁸⁴

At this point it is interesting to note that the US was also using consent as a crossing point between peacekeeping and enforcement. The notable difference in the US doctrine was that once the consent line had been passed there was no return; effectively the peacekeeping mission was in a state of collapse. It has been argued that this approach arose from the US experience in Somalia in crossing the ‘Mogadishu line’.⁸⁵ Experience in Bosnia seemed to support the British doctrine as tactical elements did cross and recross local consent lines without plunging the whole operation into enforcement.

⁸² Ibid.

⁸³ MoD. *Wider Peacekeeping* (1994) at 1.2.

⁸⁴ Above n 82

⁸⁵ Id at 152-3.

Although it was not to last, with the definition of Wider Peacekeeping British doctrine recognised and marked the passing of the traditional requirement that any peacekeeping operation required consent, however grudging, from the parties or potential parties to the conflict as a mandatory prerequisite for the insertion of an international peacekeeping force. While Wider Peacekeeping indicated the crossing of the consent Rubicon it did not mean the end of traditional peacekeeping, or of peacekeeping as a general term. Traditional peacekeeping remains as a legitimate description of a particular genus of peacekeeping operation but from this point it was doctrinally recognised that it was no longer alone.

Peace Support Operations

The successor definition to Wider Peacekeeping is the far wider concept of ‘Peace Support Operation’. The term describes the;

complex, multinational, military operation in support of diplomatic efforts to achieve the settlement of armed hostilities, including the use of force in restricted circumstances.⁸⁶

The term Wider Peacekeeping was not one used in Australian doctrine. Instead the term ‘Peace Support Operations’ appeared in the early 1990s as a response to the dramatic changes in the use and type of peacekeeping operation that occurred at the end of the Cold War. The doctrinal term Peace Support Operation was designed to cover the entire peacekeeping continuum as the term peacekeeping was felt to be inappropriate in light of the burgeoning activities in which forces were obliged to take part. Indeed the doctrine identified nine separate categories of operation in the

⁸⁶ Gow, J. and Dandeker, C. “The Legitimation of Strategic Peacekeeping: Military Culture, the Defining Moment”. In Gordon and Toase (eds) *Aspects of Peacekeeping* (2001) at 181.

peacekeeping continuum stretching from traditional observer mission activities through to enforcement action.⁸⁷ Wilkinson⁸⁸ sees the term inextricably linked with the post Cold War emergence of increasingly complex emergencies. The peacekeeping response is not simply the provision of force but “a wide range of political, diplomatic, economic, humanitarian and other considerations...”⁸⁹ Wilkinson argues that peace support operations are based on three key principles: consent of the recipient State, impartiality and the use of minimum force.⁹⁰ Although on this basis peace support operations are distinguishable from peace enforcement, the reliance by Wilkinson on consent makes them Chapter VI operations. This situation is at odds with his model, set out below.⁹¹

⁸⁷ Waddell, J.G. *Legal Aspects of UN Peacekeeping*, Smith (ed) *The Force of Law International Law and the Land Commander* (1994) at 48.

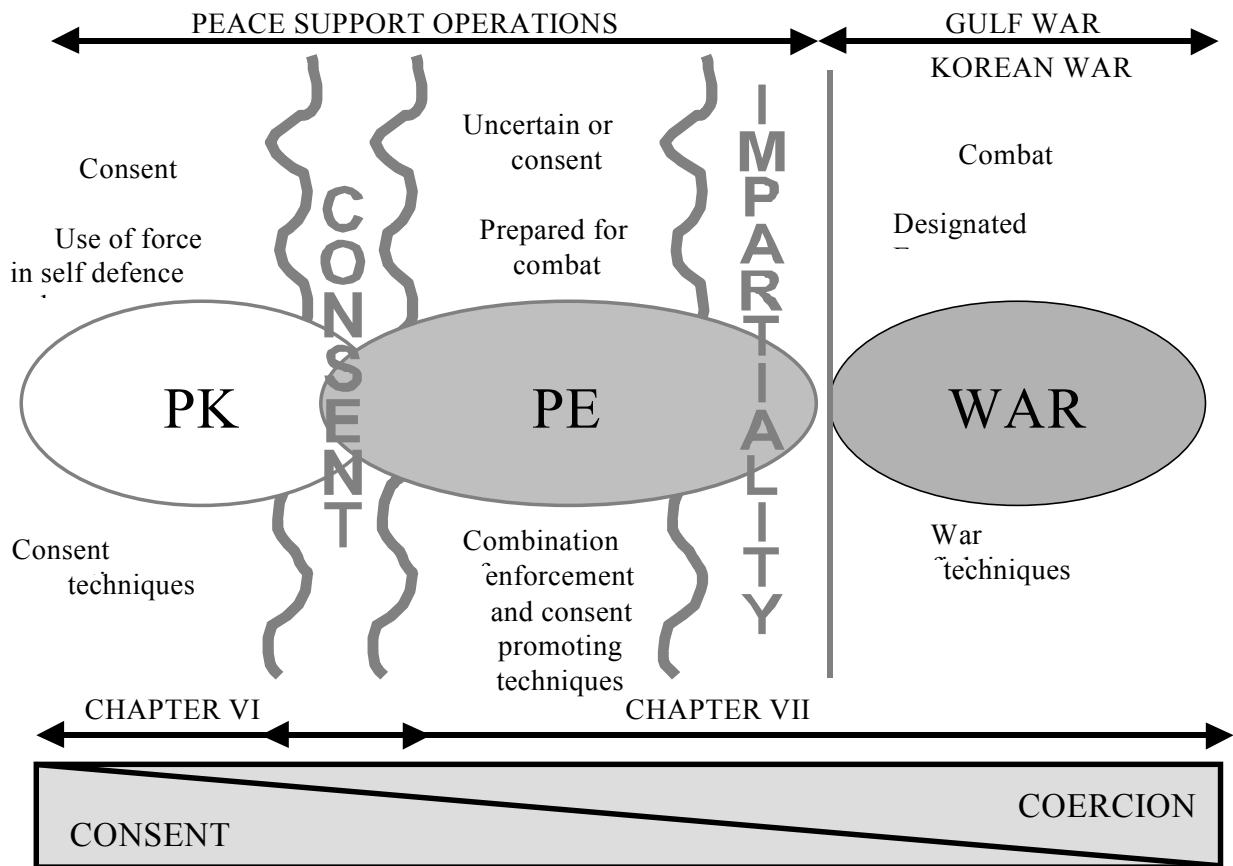
⁸⁸ Wilkinson, P. “Sharpening the Weapons of Peace: Peace Support Operations and Complex Emergencies” in Woodhouse, T and Ramsbottom, O (eds). *Peacekeeping and Conflict Resolution*. (2000) at 63.

⁸⁹ *Id* at 66.

⁹⁰ *Id* at 77.

⁹¹ *Id* at 73.

Wilkinson's Conceptual Model.



It can be seen immediately that Wilkinson contradicts his own definition of peace support operations by including Chapter VII operations. It has already been established in this work that Chapter VII operations are characterised by the option to proceed without consent.

Adopting Wilkinson's model rather than his definition, it is argued that the term 'Peace Support Operation' is something of a catch all for any modern peacekeeping operation. Even when used by respected authors there seems to be confusion as to the precise nature of the operation contemplated. As a result of this umbrella intent it is no more helpful as a descriptive term than peacekeeping itself. The definition is so broad it may well be regarded as just another alternative

word to peacekeeping. What the development of the term and its associated doctrine does represent however, is an acknowledgment that peacekeeping is complex, and regardless of the category of operation the focus is always on peace as the operational End State. The term peacekeeping on the other hand seems to be a more simplistic term, descriptive of a point in time rather than an on going process. The issue of peacekeeping as part of the peace process will be addressed in a later chapter of this work when examining the contribution made to the debate by UN Secretary-General Boutros Boutros-Ghali.

Peace making

In 1994 the Joint Standing Committee stated that peace making was;

best understood as a close relative of preventive diplomacy, involving the same range of methods described in Article 33 of the UN Charter – ie ‘negotiation, conciliation, arbitration, judicial settlement, resort to regional agencies or agreements, or other peaceful means’ – but applied *after* a dispute has crossed the threshold into armed conflict. As with preventative diplomacy, ‘peace making’ has at least two distinct chronological dimensions. Initial (or ‘Stage I’) peace making efforts will usually be aimed at the immediate goals of cessation of hostilities, and stabilisation of the situation on the ground; subsequent (or Stage II’) efforts – which might continue in parallel with the deployment of peace keeping mission – might be aimed rather at securing a durable political settlement.⁹²

As well as presenting its own definition the Committee also adopted the Department of Defence definition of peace making, which;

⁹² Above n 56 at 150.

involves the process of arranging an end of disputes, and resolving issues that lead to further conflict, primarily through diplomacy, mediation, negotiation, or from other forms of peaceful settlement.⁹³

In both of these definitions the diplomatic process is paramount, although in the Department of Defence definition it is exclusively the domain of the diplomat and politician while in the Committee's adoption of the Department of Defence's submitted definition, peace making appears as an amalgam of military and diplomatic action. Waddell⁹⁴ notes that there is some confusion over the definition of peace making and that it is often confused with peace enforcement but that in his view peace making is properly a purely political activity. The preponderance of the literature agrees with this point.

Featherston for example, describes peacemaking as a predominantly diplomatic activity aimed at achieving a peaceful settlement to a dispute. It is conducted at the State or macro level. The means by which the UN deals with peacemaking in the Featherston definition is primarily through the means made available to it in Chapter VI of the UN Charter.⁹⁵ Featherston therefore clearly separates the military peacekeeping operation from the form of political activity that does not use the military as part of the tools of diplomacy.

Peace enforcement

Enforcement operations may be simply defined by contrast. "Peacekeeping is consensual whereas enforcement is non-consensual."⁹⁶ Peace enforcement is generally conducted under Chapter VII of

⁹³ Above n 56 at 151.

⁹⁴ Above n 87 at 48.

⁹⁵ Above n 67.

⁹⁶ Above n 49 at 19.

the UN Charter because as the name implies, the operations are designed to be capable of going beyond pacific settlement should the need arise. As frequently observed in this work and elsewhere, the willingness of the UN to use the Chapter VII powers in peacekeeping operations has increased significantly since the end of the Cold War. Between the inception of the UN and 1990 there had been only two occasions on which the UN had authorised peace enforcement these being in North Korea and the Congo. On neither occasion was Article 42 cited as the basis upon which the operation was conducted. Since 1990 the UN has relied upon Chapter VII military enforcement action against Iraq, in Somalia, the former Yugoslavia, Sierra Leone and East Timor.

Waddell has suggested that there are three triggers to which the UN may respond by initiating enforcement action. The first of these is in response to aggressive, large-scale armed incursion across State borders. Both the Korean and Gulf wars were responses to this type of activity although whether UN sanctioned armed conflict can genuinely be included in the category of peacekeeping is questionable. This type of enforcement of peace is probably better considered in a category of its own. The second is enforcement of a ceasefire or to re-establish a buffer zone as seen in the former Yugoslavia. The third and final occasion is in response to significant humanitarian need which was the basis for intervention in Somalia and East Timor.⁹⁷

Featherston's approach to defining this category is essentially a practical one. She declines to refer to this final category as 'peace enforcement' on the basis that there is little peaceful about it. Preferring to refer to it simply as 'enforcement' this category represents the use of coercive measures and mechanisms under Chapter VII of the UN Charter. Featherston is perhaps focusing a little too heavily on the military involvement in such operations, as even under Chapter VII non-

⁹⁷ Above n 56 at 50.

military means are equally available. Indeed armed military enforcement is not expressly referred to within the Charter of the UN, being coyly described in Article 42 as;

such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.⁹⁸

A better use of the word 'peace' in 'peace enforcement' has been made by Rich who uses the expression to distinguish the middle ground between what he calls genuine peacekeeping and actions such as the Gulf War, which he describes as 'enforcement'.⁹⁹

However, Featherston's point is well made in terms of the realities of peace enforcement operations as part of the peacekeeping continuum. The Australian Joint Standing Committee certainly adopted a military definition of peace enforcement accepting the Department of Defence's submission that:

Peace enforcement operations are a form of combat, armed intervention, or the threat of armed intervention, that is pursuant to international licence authorising the coercive use of military power to compel compliance with international sanctions or resolutions – the primary purpose of which is the maintenance or restoration of peace under conditions broadly accepted by the international community.¹⁰⁰

Under British doctrine the concept of peacekeeping separates traditional peacekeeping from other forms of operation performed by military forces. As noted above, British doctrine sees peacekeeping operations as being expandable to a point where the host State or the fighting factions

⁹⁸ Article 42 of the United Nations Charter.

⁹⁹ Rich, P.B. *Warlordism, Complex Emergencies and the Search for a Doctrine of Humanitarian Intervention*. In Gordon, D.S and Toase, F.H. (eds) *Aspects Of Peacekeeping* The Sandhurst Conference Series (2001) at 267.

¹⁰⁰ Above n 56 at 152.

within the State no longer consent to the presence of peacekeepers. At this point whether armed force is to be involved or not the operation changes its nature to become peace enforcement.

Enforcement is then defined as a;

coercive operation carried out to restore peace in a situation of chaos or between belligerent parties who may not all consent to intervention.¹⁰¹

In British doctrine enforcement action is defined by reference to boundaries. Between peacekeeping and enforcement is the boundary of consent, the key principle of the traditional peacekeeping operation. Between enforcement and international armed conflict is another equally important boundary, that of impartiality. This boundary is absolutely crucial in this work because it is submitted that it is this boundary that also marks the legal boundary between humanitarian law and human rights law as the *de jure* law applicable in peacekeeping and enforcement actions that do not cross the threshold into armed conflict. The difference between enforcement as seen in Timor and armed conflict as seen in the first Gulf War is that in the former there is no identification or targeting of an 'enemy'. To use the language of humanitarian law, in enforcement operations there are no legitimate combatants as between the UN and other forces on the ground, while in armed conflict there are combatants who may be lawfully killed.

While British doctrine introduced flexibility of terms crossing and recrossing boundaries the US military did not view peacekeeping and peace enforcement as representative of a continuum divided only by consent. Although heavily influenced by British doctrine¹⁰² US Army doctrine in referring to the transition between peacekeeping and enforcement stated that enforcement operations;

¹⁰¹ Bellamy, above n 64 at 252.

¹⁰² *Id* at 152.

are not part of a continuum allowing a unit to move freely from one to the other. A broad demarcation separates these operations.¹⁰³

Despite eschewing enforcement as part of the peacekeeping continuum the US definition is not immediately clear on what would constitute the broad demarcation. The obtaining of consent or otherwise at the strategic State level rather than the more capricious vacillations faced by the troops at the tactical level on the ground would seem the intent of the demarcation, but this is by no means clear.

As can be seen from this brief outline of some elements of British and American doctrine, even within such a significant regional alliance as the North Atlantic Treaty Organisation (NATO) there is no standardised model for military peacekeeping.¹⁰⁴ However, a consensus does emerge on the issue of consent as the key demarcation between peacekeeping and peace enforcement. Without consent there can only be peace enforcement or in the extreme an armed conflict such as was the case in the Gulf War. Even if the UN plans for a Chapter VI peacekeeping operation, in circumstances where the conflicting parties withdraw their consent to its presence the troops on the ground will almost inevitably be forced into peace enforcement once consent is withdrawn, regardless of the doctrinal demarcation. If the UN has not planned for this the troops will be left exposed until the Security Council has passed resolutions recommending or authorising the use of force under Article 39 or 42.

The area of enforcement is arguably the most difficult category to deal with at its extremes. In particular it seems false to call operations such as the Gulf War peace enforcement operations

¹⁰³ Department of the Army. *FM 100-23: Peace Operations* (1994) at 12; Bellamy, above n 62 at 153.

¹⁰⁴ Topan, A. Braun, G. "UN Deployments in the Crossfire" *International Peacekeeping*. (July – October 1999) at 128.

rather than moving to a further category or relying on the distinction between peace enforcement and enforcement. The reason that this extreme of the peacekeeping continuum is particularly troublesome is that it straddles the divide between human rights and humanitarian law. It is also the point at which the UN ceases to be an impartial third party and becomes an active participant. For these reasons it is suggested that the time is ripe for the recognition of a new category in the continuum, the trigger for which is the identification of an enemy in the humanitarian law sense and the concomitant adoption of combatant status by the UN forces. Rather than adopt the subtle distinction between peace enforcement and enforcement it is suggested that such operations are more properly described as UN-sanctioned military operations.

Peace enforcement operations alone will not bring peace to violent situations. Somalia and the former Yugoslavia have been instrumental in demonstrating a way of transitioning from peace enforcement to the more progressive phase of 'peace building' operations. The peace building operations sit between peacekeeping and collective military action.¹⁰⁵ It is arguably in East Timor that this transition has been the most effective to date.

Peace building

Featherston argues that peace building is the term used to describe the operation that takes place post-conflict and concerns the reconstruction of one or all of a number of key infrastructures such as the economy, society or political functions. Peace building is planned and implemented with the aim of ensuring that conflict does not break out again. The peace building activity is planned at the macro-level either within the UN system or international Non governmental organisations (NGO)

¹⁰⁵ Lee, R.J. "The United Nations Peacekeeping Success but Peace Enforcement Failures" *Australian International Law Journal*. (2000) at 182.

but it is conducted at the local community, or micro-level.¹⁰⁶ Unlike peace making, peace building is an amalgamation of military and civilian activity.

Past Secretary –General of the UN Boutros Boutros-Ghali defined peace building as an;

action to identify and support structures designed to strengthen and consolidate peace ... often [started] prior to the end of a conflict, to hasten the establishment of peace on firm foundations.¹⁰⁷

In the definitions presented to the Joint Standing Committee on Defence, Foreign Affairs and Trade, the Department of Defence submitted that peace building

involves post conflict diplomatic and military actions that seek to rebuild the institutions and infrastructure of a nation that is torn by civil war; or build mutually beneficial bonds amongst nations formally at war in order to avoid a relapse into conflict.¹⁰⁸

From this selection of definitions it would appear that peace building is a combination of traditional peacekeeping, perhaps an observer mission, or the provision of border security with a concerted diplomatic effort. The emphasis in these operations should be on the diplomatic and civilian exercise of restoring a civil infrastructure. East Timor has recently been the focus of UN efforts in peace building with UNTAET facilitating the reconstruction of the judicial, policing, military and political infrastructure. Peace building operations are inevitably the desired End State of any peacekeeping operation as the balance shifts from the military to unquestioned civil primacy of the operation. The transition between INTERFET and UNTAET and the shift within UNTAET itself to Timorese self-government is arguably the model example of a successful movement from

¹⁰⁶ Above n 67 at 3.

¹⁰⁷ Boutros-Ghali in Ocran, T. "The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping" *Boston College International & Comparative Law Review* [Vol 25:1] (2002) at 2.

¹⁰⁸ Above n 56 at 152.

enforcement to peace building. As noted by Strohmeier ‘You can force your way in but you have to build your way out.’¹⁰⁹

Kosovo provides another excellent demonstration of the requirement for building out of an operation. In Kosovo, as in East Timor, the UN invested significant efforts in building civil administrations from scratch. One of the earliest institution-building activities in Kosovo was the establishment of an emergency judicial system, when on 30 June 1999 the District Court was opened in Pristina.¹¹⁰ Another more mundane requirement for early attention in any peacekeeping mission required to move towards peace building is the establishment and enforcement of road traffic rules. Such simple steps are easy to overlook but the seeds of progress toward the withdrawal of the UN force are to be found in such mundane activities.

Peacekeeping in support of humanitarian missions

In the introduction to this chapter humanitarian crisis was identified as an increasingly significant catalyst for the insertion of peacekeeping forces with the concomitant role of support to humanitarian aid agencies or NGO. Given the importance of this catalyst for peacekeeping it is deserving of at least brief attention at this point by highlighting an interesting perspective on the legal basis on which NGO and military peacekeepers cooperate, put forward by Ted A. Van Baarda.¹¹¹

¹⁰⁹ Strohmeier, H. “Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor” *Fletcher Forum of World Affairs* (Summer 2001) at 108.

¹¹⁰ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo S/1999/987 16 (September 1999) at 38.

¹¹¹ Van Baarda, T.A. “A Legal Perspective of Cooperation Between Military and Humanitarian Organisations in Peace Support Operations”. *International Peacekeeping*, Vol 8, No.1, (Spring 2001) at 99-116.

Van Baarda begins by pointing out that there is a treaty or convention basis upon which NGO and military may cooperate within extant international law. The roots of the relationship he identifies in the Convention of 1864 on the Amelioration of the Wounded in Armies in the Field.¹¹²

Although acknowledging that the references to medical services, which receive special protection under the Convention, are intended to be military, the work performed is humanitarian and a level of civilian cooperation is found in the arrangements made for placing and supplying the medical establishments.

The next step on Van Baarda's path is found in the 1929 Convention for the Amelioration of the Wounded and Sick in Armies in the Field.¹¹³ In this Convention there is recognition for civilian medical services set up by 'Voluntary Aid Societies', which Van Baarda sees as the natural progenitors of the NGO.¹¹⁴ The concept of international organisations of this character is contemplated within the Convention, as demonstrated by express reference to such organisations in Article 11. However, this article only permits international aid societies from neutral countries to offer aid, provided they have obtained the consent of their own State and authorisation from the belligerent State. Van Baarda sees this as implying that the aid organisation would be required to operate in accordance with the instructions of the belligerent, not a situation likely to be tolerated by any modern NGO. This state of affairs is effectively the modern position in international humanitarian law as far as care for sick and wounded is concerned, indeed Article 27 of the First Geneva Convention¹¹⁵ expressly states in addition to the requirements referred to above;

[t]hat personnel and those units shall be placed under the control of that Party to the conflict

¹¹² (ser. 1) 607, 129 Consol. T.S. 361, *entered into force* June 22, 1865. Geneva, 22 August 1864

¹¹³ 11 L.N.T.S. 440, *entered into force* August 9, 1907

¹¹⁴ Certainly organisations such as *Medecins sans Frontieres* would fulfil precisely the roles envisaged in the 1929 and 1949 Conventions.

¹¹⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of (August 12, 1949).

NGOs keen to assert that humanitarian law is the applicable law in the more robust peacekeeping operations may perhaps want to be careful what they wish for!

Perhaps fortunately, humanitarian aid practice is considered to have moved beyond that covered by the Conventions with discussion being directed rather towards the practical operational considerations versus the NGOs independence dilemma that are often at the heart of tension between NGOs and the military.¹¹⁶ In the process Van Baarda notes that the NGOs often have been the ones effectively directing the way in which humanitarian aid is provided. The specific example given is that of UNPROFOR which gave support to UNHCR under an enlarged mandate. UNHCR in turn coordinated requests from the NGO so that UNPROFOR could provide protection as required through liaison with UNHCR. This solution to the cooperation and coordination problem was both innovative and outside anything provided for under the Conventions, which at this point in time provide the only legal basis for military and NGOs cooperation.

Returning to a more incremental legal development, Van Baarda seems to be arguing for a development of humanitarian law into peacekeeping by the extension of the:

Draft agreement relating to hospital zones and localities' as annexed to the First Geneva and the Fourth Geneva Conventions. The form of the extension would be to include refugee camps and presumably other humanitarian aid posts where the term 'hospital zone' appears. Also advocated is the inclusion of cooperation in the field of heavy logistics.¹¹⁷

Van Baarda's suggestion may certainly be an acceptable method of alleviating the tensions between NGOs and military but there are a number of difficulties in adopting this course of action. The

¹¹⁶ Above n 111 at 102.

¹¹⁷ Id at 114.

establishment of a new convention is a politically complex and time-consuming operation at the best of times. In this case there is the potential for significant division between those nations traditionally supplying international humanitarian aid and those receiving it, as well as between traditional suppliers of the organisations and military forces. The US for example, is particularly sensitive toward its military being dictated to by agencies outside the control of the US government.¹¹⁸ Another major difficulty with this approach is that it leaves less room for flexibility. By mandating a role in the facilitation of cooperation for, for example, the UNHCR, the Security Council could provide a legal basis for military and NGOs cooperation that is both flexible and has the advantages born of legitimacy.

Certainly the current ad hoc arrangements on an operation by operation basis do not appear to suit any one but it seems unlikely for the reasons outlined above that Van Baarda's suggestions will be taken up for the foreseeable future.

Internal Stages

It has been identified in this work that peacekeeping has moved through a number of historical phases of development to reach the modern complex form. Commentators have also recognised that peacekeeping operations themselves also move through phases in their individual development. Each stage in this development is linked with a particular peacekeeping strategy. Ryan¹¹⁹ identifies these stages noting that although different commentators use different terminology to describe each stage and that some operations may stagnate in a stage for very long periods, there is broad agreement that there is common ground as to the process. Ryan sets the stages out as follows:

¹¹⁸ See for example the US attitude towards the International Criminal Court.

¹¹⁹ Ryan, S "United Nations Peacekeeping: A Matter of Principles?" in Woodhouse, T and Ramsbottom, O. *Peacekeeping and Conflict Resolution*. (2000) at 34.

<i>Stage</i>	<i>Strategy</i>
1. Pre-violence	Conflict prevention
2. Escalation	Crisis / humanitarian intervention
3. Endurance	Peacemaking and relief work
4. De-escalation	Peacemaking and 'traditional' peacekeeping
5. Post-violence	Peace building / transformation. ¹²⁰

The importance of the internal stages in the peacekeeping process is that one of the tasks of the peacekeeping operation will be to shape the environment to achieve the conditions conducive to the next stage in the process. Where peacekeepers themselves are unable to achieve this then the responsible international actors will be responsible for attending to this task. Planners responsible for the peacekeeping operation should be identifying the markers for the process and planning the elements of the operation in such a way as to make shaping the environment an achievable task.

Conclusion

As can be seen from this brief overview, peacekeeping is an increasingly complex phenomenon. It is both military and civilian; it is used to keep international peace, to build nations and to relieve the suffering of peoples. It has arguably become the keystone in the Security Council's fortress against the destabilisation of nations and the spread of the 'scourge that is war.'¹²¹ The legal basis for peacekeeping does not appear in the UN Charter but the ICJ has confirmed its legitimacy as a tool. The UN needs to ensure that peacekeeping operations do not lose legitimacy by stepping outside the boundaries of the law. This work is aimed at contributing to that process by identifying the legal framework to be applied in peacekeeping in collapsed States.

¹²⁰ Id at 34.

¹²¹ Preamble to the UN Charter.

CHAPTER TWO

The Theory of Peacekeeping from a UN Perspective

Introduction

In chapter one of this work the question was asked what is peacekeeping? A review of the literature demonstrated that peacekeeping has its legal basis in the implied powers of the UN Charter and that it has developed through a continuum of change from a traditional, lightly armed group of observers to a highly complex and sophisticated organisation capable of providing the basic infrastructure upon which a State can be pacified or even recreated.

While chapter one identified what is meant by the term peacekeeping this chapter focuses on the development of the UN's approach to the role of peacekeeping in achieving the aims of the Charter.

This chapter will use UN reports and responses from State or State based actors to identify the UN's vision for peacekeeping from the Secretary-General's report on the future of peacekeeping in 1992 to the report of the Secretary-General Kofi Anan in 2005.

The reports

The UN has grown in size and complexity since its inception. The organisational requirements for peacekeeping operations have also grown and become more complex as the polarisation created by the Cold War fragmented. As discussed in chapter one of this work, the end of the Cold War heralded an increase in the use of peacekeeping

operations as an option available to the Security Council. Although the UN Charter and the implied powers drawn from it provided the legitimacy for peacekeeping, it became clear to Secretary-General Boutros-Ghali that a vision and policy were required to direct its use.

In January 1992 the Security Council held its first ever meeting at the Heads of State level and asked the newly elected Secretary-General,¹ Boutros Boutros-Ghali, to prepare a report mapping the future of peacekeeping operations. This report was to see the commencement of a dialogue regarding peacekeeping within the UN as well as from critics, academics and interested parties.

The key reports that concern the development of a vision and plan for peacekeeping and are therefore the subject of this chapter are:

1. *An Agenda for Peace*, prepared by the Secretary-General in 1992,
2. *Cooperating for Peace*, which was the Australian response to *An Agenda for Peace* submitted to the UN in September 1993,
3. *Supplement to An Agenda for Peace*, prepared by the Secretary-General in 1997 after it became clear that the end of the Cold War was not the panacea that had been hoped for,

¹ Goulding, M. *Peacemonger* (2002) at 14.

4. *The Brahimi Report*, prepared at the direction of the Secretary-General to get peacekeeping operations back on track after perceived failures in peacekeeping operations in 2000,

5. *An Agenda for Peace Ten Years On*, A UK commentary on the progress made ten years after publication of the original report in February 2002,

6. *Responsibility to Protect*, the report prepared by the International Commission on Intervention and State Sovereignty in response to a request from the UN issued December 2001, and

7. *In Larger Freedom*, prepared by Secretary-General Kofi Annan to encourage a return to the principles of the United Nations following the invasion of Iraq by the Coalition of the Willing issued in 2005.

An Agenda for Peace

Secretary-General Boutros Boutros-Ghali presented “*An Agenda for Peace, Preventative Diplomacy, Peace Making and Peacekeeping*” to the UN Security Council which adopted it on 31 January 1992. In *An Agenda for Peace* Boutros-Ghali reminded the Security Council that the fundamental requirement for any action by the UN is founded on the Security Council’s ability to reach agreement. It was hoped that the end of the Cold War had ushered in a new era of cooperation within the Security Council, which would result in the practical implementation of the Charter ideals, specifically including the securing of human rights.²

By the time Boutros Boutros-Ghali became Secretary-General peacekeeping was already a central part of the UN strategy for the preservation of international peace and security. But in *An Agenda for Peace* Boutros-Ghali presented:

“a coherent conceptual framework for the UN’s efforts to help maintain peace and security in the post-Cold War era and to define some of the techniques that would be needed.”³

Peacekeeping was only one of the techniques for achieving peace developed in *An Agenda for Peace* but the report made a significant contribution to the practice of peacekeeping by articulating the underlying concepts, legitimising its operation and outlining future possibilities. The report defined peacekeeping as:

² Boutros-Ghali, B. *An Agenda for Peace*, A/47/277 – S/24111. (17 June 1992) at para 1.

³ Above n 1 at 20.

“the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.”⁴

As well as peacekeeping the report addressed the related concepts of preventative diplomacy, peacemaking and post-conflict peace building. These concepts were presented as tools to be used individually or in combination by the UN to respond proactively to a situation that threatens peace and security. It is this proactive vision for the role of the UN that is at the core of *An Agenda for Peace*.

Collective Human Security

In *An Agenda for Peace* Boutros-Ghali sets out his view that each element of the UN, including each Member, has an indispensable role to play in the maintenance of human security.⁵ This has led commentators to argue that Boutros-Ghali was identifying a new basis for intervention by the UN. Peou for example, argues that *An Agenda for Peace* gave rise to a new concept of “collective human security.”⁶ For Peou this concept is a considerable step from the way peacekeeping had evolved up to that point. He argues that although *An Agenda for Peace* emphasised the importance of sovereignty in the UN process it also noted that absolute and exclusive sovereignty was no longer, if it ever had been, a viable concept.⁷

⁴ Above n 2 at 20.

⁵ Above n 2 at 16

⁶ Peou, S. “The UN, Peacekeeping and Collective Human Security: From An Agenda for Peace to the Brahimi Report” *International Peacekeeping* Vol 9 No2 Summer (2002) at 51-68.

⁷ Above n 2 at.6.

Peou suggests that Boutros-Ghali put forward an alternative approach to the sovereign State as the key to international action on the basis of a system of collective human security. This sees the individual, not the State as the point of reference. The concept challenges the basic premise that intervention by the international community is for the purpose of preserving the State and instead puts forward collective intervention action as a means of achieving human security.⁸ It also challenges arguments that the State is the only entity responsible for providing security to the people. The adoption of the concept of collective human security effectively eliminates arguments over the ability to intervene in circumstances where human security is endangered. As a result intervention on this basis must override State sovereignty.

The concept of collective human security has the potential to provide a justification for humanitarian intervention, not only in the absence of a State with the ability to provide consent, but potentially also against the express wishes of the State. The Security Council can be seen to have adopted the concept through Security Council Resolution 1296 (2000). In this Resolution the Security Council stated that:

the targeting of civilians in armed conflict and the denial of humanitarian access to civilian populations afflicted by war may themselves constitute threats to international peace and security.

Such a finding in a specific circumstance would amount to an Article 39 finding enabling the Security Council to adopt the measures available under Chapter VII, including the use of force. One option available to the Security Council in such a

situation would be to intervene in the conflict with a military force to protect the civilian population. Effectively a new argument has been introduced into the debate regarding humanitarian intervention. Humanitarian intervention may now be based upon the concept of collective human security, which gives authority to the UN, or a regional Chapter VIII peacekeeping force, to intervene regardless of the wishes of the sovereign State, despite Article 2(7) of the UN Charter, which prohibits the UN from intervening in matters essentially within the domestic jurisdiction of the State.

Although Peou's argument is persuasive it overlooks the clearly articulated intention of *An Agenda for Peace* not to undermine State sovereignty or to go as far with the concept of human security as Peou suggests. Boutros-Ghali makes numerous references to the importance of the sovereign State.⁹ In *An Agenda for Peace* Boutros-Ghali sees the State as the primary means of achieving the ideals set out in the Charter. He also reiterates the General Assembly Resolution 46/182¹⁰ that *inter alia* stressed the importance of the respect for the sovereignty and territorial integrity of a State as well as requiring the consent of the State where humanitarian aid is to be provided.¹¹ The term collective human security is not even used in the report, although as noted above, there is reference to the responsibility of all elements of the UN including its individual Members, to maintain human security. Indeed, it is clear that protection of fundamental human rights was recognised well before the report as a matter that did not contravene the prohibition in Article 2(7).¹²

⁸ Above n 6 at 51.

⁹ See for example at paras.3,5,6,7.

¹⁰ 19 December 1991.

¹¹ Above n 2 at 12.

¹² *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania Case* ICJ Rep (1950) at 65; *Schmidt Case* (1984) ILR, 75 at 1.

A better view of the report's reference to human security is that it is a restatement of the underpinning Charter commitment to human rights. Rather than forming a basis for intervention by the UN, human security is used in the report to remind each Member that it contributes to the maintenance of peace as part of the UN. If understood in this sense then the reference to human security is reinforcing the human rights basis of the Charter rather than foreshadowing humanitarian intervention to the extent suggested by Peou and evident in later reports, particularly the *Responsibility to Protect*. It may be that the concept of collective human security found its inspiration in the report's reference to human security but it was not the intended effect of *An Agenda for Peace* to provide a basis for humanitarian intervention beyond that which had already been recognised.

Preventative Deployment

An Agenda for Peace noted that the UN has been reactive to situations of conflict and called for action in future to precede and prevent conflict. Boutros-Ghali suggests that preventative deployments should be on the basis of consent from a State fearing invasion from another. Consent of the State should be obtained to place a peacekeeping force on that State's side of the border to act as a preventative or deterrent to invasion.¹³ Preventative deployment may be further expanded into a demilitarised zone where there is consent from both parties to the dispute. Again the emphasis is placed on consent of the State. Although difficulties with preventative deployments exist, not the least of which is determining the amount of weaponry that is required to create a deterrent, there have been situations in which the interposition

¹³ Above n 2 at 13.

of such a force could have averted a humanitarian disaster. Bellamy¹⁴ argues that disaster could have been averted in Rwanda and Bosnia by the insertion of a preventative deployment. Had this aspect of *An Agenda for Peace* been implemented many lives may have been saved.

The report emphasises the requirement for consent of the host State where deployments are to be made. From the express reference to Chapter VI of the Charter as well as the requirements of neutrality and impartiality it seems that the report was developing along the lines of the traditional form of peacekeeping operations for preventative deployments.

With regard to peace making the emphasis in *An Agenda for Peace* is on the interaction between the States. The provision of such humanitarian assistance as may facilitate the peace making process is seen as working through the State mechanisms not through the independent imposition of aid.¹⁵ This is also the position where sanctions form part of the peace making strategy. The alleviation of suffering caused as a result of the imposition of sanctions is seen as a responsibility of the State and not as a situation requiring provision of aid directly to the people.

UN Standing Force

An Agenda for Peace calls upon the Member States to provide forces to the UN on a permanent basis for enforcement action under Chapter VII. Article 43 of the Charter provides for the provision of military personnel and equipment by Member States in

¹⁴ Bellamy, C. *Knights in White Armour* (1997) at 162-163.

¹⁵ Above n 2 at 16.

the form of a standing force for use where required for the purposes of Chapter VII. Member States had effectively rendered Article 43 useless by failing to detach troops to form the UN force. *An Agenda for Peace* saw the post Cold War climate as finally providing the environment for this concept to be put in action. It was acknowledged that the size of such a force may be difficult to accurately assess but that such a force would be useful in meeting a threat from States, other than those equipped with sophisticated weapons.¹⁶

An Agenda for Peace gives very little guidance on the size or makeup of the force. What it does provide is a mission for the force, “to respond to outright aggression, imminent or actual.”¹⁷ However, this mission is too broad and is effectively meaningless; it is in effect a vision rather than a practical mission for a force. Forces are put together in the mix of combat forces, logistic and service support arms to achieve a specific mission. Such a general mission does not provide any assistance in determining the type of force to be set up. Nor does it assist in determining the combination of naval, land and air components required. Some attempt to define the operations to be undertaken by an interim force was identified; these were to be in the form of ceasefire enforcement units. These units were envisaged as being deployed to support existing units where a firmer hand was required to bolster an operation. The troops would be volunteers; more heavily armed than peacekeepers and having undergone extensive peacekeeping training within national forces. Although it is not articulated in *An Agenda for Peace*, it seems that the Secretary-General envisaged that these units would form the nucleus of the future Article 43 force.

¹⁶ Above n 2 at 17-18.

¹⁷ Above n 2 at 18.

From a practical perspective there were always going to be difficulties with Article 43. Firstly and most significantly are the political difficulties in providing such a force to the UN, issues of command, control, conditions of service and funding to name but a few.¹⁸ The military specific challenges do not end at the size and composition of a force. Some of the questions that would have to be addressed are:

1. Which State would be responsible for the through life support¹⁹ of the equipment?
2. Would the UN force be based on the equipment used by one Member State or generate new equipment to achieve inter-operability within the force?
3. What authority would be responsible for determining current capability against major capital equipment procurement?
4. What level of operational security would be required?
5. How would cryptographic material be generated and handled?
6. How could States be prevented from accessing operational information relating to the force through their national contingents? Such access might compromise the mission.

¹⁸ These will be discussed further below in an analysis of *Cooperating for Peace*.

¹⁹ “Through life support” is the term used to describe the process of maintenance and repair of equipment from its introduction into service until it becomes redundant or is replaced.

7. Members of the force would be required to use a standard operating environment so as to effectively administer the force and operate. This would require the generation of standing and operational orders, presumably in multiple languages. Modern Defence Forces develop orders over decades while this force would be required to have them in an instant. Is it feasible to create and maintain such a force or is it even achievable?

8. Would members of the force be trained simultaneously in their own and UN procedures and processes or would training be left until attachment to the UN force and then how would the training be done and by whom?

9. What would be the position of a force member where breaches of national or international obligations were alleged?

10. Would different standards apply to members whose parent State were or were not signatories to conventions that may be violated by the force?

11. If the Security Council became responsible for making the decisions normally made by the State with regard to its defence forces, would the Security Council have become a super State rather than merely a forum for States to discuss and determine international activities?

These problems are not new; many of them are encountered in every UN operation. In such operations however, the forces remain in their national units with only the major headquarters being fully integrated. National units are controlled operationally

by the UN headquarters but remain under command of their national command elements. From a practical perspective the UN simply does not have the capacity to set up its own force, and there can be no doubt that this and nothing less would be required to fulfil the requirements of Article 43.

Improving Peacekeeping

An Agenda for Peace notes the changing nature of peacekeeping. Boutros-Ghali sets out the requirements for a successful operation as:

“a clear and practicable mandate. the cooperation of the parties in implementing that mandate; the continuing support of the Security Council; the readiness of Member States to contribute the military, police and civilian personnel, including specialists, required; effective UN command at headquarters and in the field; and adequate financial and logistic support.”²⁰

These requirements are not contentious and remain the key basis for a successful operation. In particular the provision of a mandate that is robust enough to permit the deployed force to effectively contribute to the restoration of peace and civilian government is a recurrent theme. What is noteworthy in *An Agenda for Peace* is the clear articulation of the requirements and the acknowledgment that peacekeeping has moved beyond a purely military response option to become a complex, integrated military and civilian response. This articulation of the increasing complexity of peacekeeping opened the way for the future operations that were capable of

²⁰ Above n 2 at .20.

replicating many of the functions of government bureaucracy in places such as Cambodia, the former Yugoslavia and East Timor.

Peace Building

Although peace building is primarily a diplomatic and civilian led part of the peacekeeping process, *An Agenda for Peace* acknowledges the military role in providing the infrastructure for peace building. Provision of logistic support as well as specialist skills, such as de-mining, are specifically identified as key areas in which the military may be involved.²¹ Many of the structures of State that have collapsed and require rebuilding post conflict to avoid the danger of relapse into conflict can be provided in the first instance by the military.

Protection of UN Personnel

An Agenda for Peace raises the issue of protection for the UN personnel performing the roles within the peacekeeping operations and notes that efforts need to be made for their protection at an international level. In *An Agenda for Peace* the Security Council is urged to take action against elements that attack the peacekeepers and UN workers or to withdraw from operations as a result of such attacks.

The Security Council has condemned assaults upon peacekeepers and in Somalia withdrew the operation altogether, although the withdrawal was as a result of the

²¹ Above n 2 at 24.

domestic US response to US losses rather than owing anything to *An Agenda for Peace*.

There was however the development of an international covenant to protect those working for the UN, including peacekeepers. The *Convention on the Safety of United Nations and Associated Personnel*²² owed in large part its existence to the advocacy of Boutros-Ghali in *An Agenda for Peace*.

Conclusions on an Agenda

An Agenda for Peace was intended to set the tenor for the brave new world that faced the international community at the end of the Cold War. The Secretary-General wanted it to act as a catalyst for refocusing the world community on the original purposes of the UN. Peacekeeping was a central theme of *An Agenda for Peace* because it had developed into an increasingly useful tool for the UN despite its absence in express terms from the Charter. A number of the issues advocated by Boutros-Ghali came to fruition such as the *Convention on the Safety of United Nations and Associated Personnel*. The report provided the basis for development of ideas in subsequent reports and some of the measures advocated were not to be followed. In some part this was due to the visionary rather than *real politik* approach of the report.²³

Perhaps the best example of this idealistic approach is the recommendations regarding raising the UN standing force set out in Article 43. Article 43 was not designed in the

²² UN Doc A/RES/49/59 (1994), (entered into force 15 January 1999)

Charter to provide a peacekeeping force, its purpose was to provide the UN with the military means to conduct the enforcement measures made available by Article 42. In *An Agenda for Peace* this role is specifically preserved and it is expressly stated that the standing force was not intended to be used for peacekeeping or even peace enforcement, for which separate units were to be made available.²⁴ It is very clear that in *An Agenda for Peace* the Secretary-General saw a distinction between peace enforcement and the larger scale operations for which an Article 43 force would be deployed. Article 43 forces would only be deployed “to respond to outright aggression, imminent or actual.”²⁵ It seems then that the Secretary-General was making a distinction between peace enforcement and a situation where an armed conflict was imminent or actual. Regrettably peace enforcement is not defined in *An Agenda for Peace* so that it is difficult to assess whether the Secretary-General was intentionally drawing a distinction between peace enforcement and armed conflict in which the UN would intentionally engage.

Implementation of Article 43 simply could not withstand the realities of what the international community was practically able to do. The planning and logistic requirements for a standing UN force would have been considerable and the cost of such an undertaking would have put a significant drain on the resources of a UN organisation that consistently suffers from funding constraints.²⁶

²³ See for example Rostow, E. “*Should UN Charter Article 43 Be Raised from the Dead*” *Global Affairs* (Winter 1993) at 109-124.

²⁴ Above n 2 at 43-44.

²⁵ *An Agenda for Peace* paragraph 42.

²⁶ Even areas as central to the Charter provisions as the work of the High Commission for Human Rights cannot adequately perform their mission as a result of funding shortfalls; Arbour, L. “*Commissioner Laments UN Funding Shortfall*” <http://www.abc.net.au/news/newsitems/200505/s1379157.htm> (16 Jun 2005).

Despite the practical problems with the Article 43 force a number of States including the US took an active interest. President Clinton commissioned a report into the viability of the proposal, expanding it to include peace enforcement operations.²⁷

However, the US experience in Somalia in 1993, graphically depicted in the popular movie “Black Hawk Down,” put an end to the US interest in expanding the Article 43 role and indeed for some time the US lost interest in UN peacekeeping altogether.²⁸ With the loss of US support the interest in raising an Article 43 force disintegrated.

Peou’s argument that *An Agenda for Peace* raised the concept of collective human security, particularly as a basis for humanitarian intervention, is interesting but it does not seem to have been developed in the report to the extent argued for by Peou. Boutros-Ghali certainly highlighted the increasing amount of room created for intervention by the development of peacekeeping, but he still maintained that the State must be preserved as the main conduit through which the benefits of united international action must function. The issue of peacekeeping by consent is raised on a number of occasions and although the proliferation of Chapter VII intervention is foreshadowed, there is a clear preference that at least one State party involved should be consenting.

Perhaps the greatest significance as far as peacekeeping is concerned in *An Agenda for Peace* is that it did for the first time clearly articulate the central place of peacekeeping in the UN planned response to threats to international peace and security. It provided;

²⁷ Snyder, J.W. “*Command versus Operational Control: A Critical Review of PDD-25*” <http://www.ibiblio.org/jwsnyder/wisdom/pdd25.html> (16 Jun 2005).

“a coherent conceptual framework for the UN’s efforts to help maintain peace and security in the post Cold War era and to define some of the techniques that would be needed.”²⁹

An Agenda for Peace also introduced the concept of peace enforcement units that would perform a more robust, interventionist form of peacekeeping that would hold a place between the traditional consensual operations and all out armed conflict as used in Korea.³⁰ By necessity such operations would fall under Chapter VII of the Charter. The concept of peace enforcement supporting a more interventionist role for UN peacekeeping would be one of the key themes further developed by the reports discussed in the remainder of this chapter. As it turned out Chapter VII operations would form the basis of the majority of peacekeeping operations post *An Agenda for Peace*.

Cooperating for Peace

On 27 September 1993 Gareth Evans, the then Australian Foreign Minister, presented *Cooperating for Peace*³¹ to the UN as an Australian contribution to the debate initiated by *An Agenda for Peace*. It developed many of the concepts that were introduced in outline form by *An Agenda for Peace* and put forward a response to the introduction of many of the measures advocated.

²⁸ Ibid.

²⁹ Above n 1 at 14.

³⁰ Rich, P. B. “Warlordism, Complex Emergencies and the Search for a Doctrine of Humanitarian Intervention” in Gordon, D.S. and Toase, F. H.(eds) *Aspects of Peacekeeping*” (2001) at 267.

³¹ Evans, G. *Cooperating for Peace: The Global Agenda for the 1990s and Beyond*. (1993).

Cooperative Security

A concept introduced for the first time by *Cooperating for Peace* was the concept of “cooperative security”. Cooperative security is closely aligned to “comprehensive security” and “collective security”. Comprehensive security is defined as a:

“notion that security is multi-dimensional in character, demanding attention not only to the political and diplomatic disputes that have so often produced conflict in the past, but to such factors as economic underdevelopment, trade disputes, unregulated population flows, environmental degradation, drug trafficking, terrorism and human rights abuse.”³²

Collective security is a term that has a mainly military response focus. Cooperative security embraces both collective security and comprehensive security and develops and integrates them. Cooperative security is:

a broad approach to security which is multi-dimensional in scope and gradualist in temperament; emphasises reassurance rather than deterrence; is inclusive rather than exclusive; is not restrictive in membership; favours multilateralism over bilateralism; does not privilege military solutions over non-military ones; assumes that States are principal actors in security systems, but accepts that non-State actors may have an important role to play; does not require the creation of formal security institutions, but does not reject them either; and which above all, stresses the value of ‘habits of dialogue’ on a multilateral basis.³³

³² Id at 16.

In practical terms the scope of cooperative security was to be very wide-ranging and inclusive. The aim of introducing the new definition was to move away from terminology that already implied certain well used measures and find a new description that would include all the options available to the international community without giving bias to any particular option. This approach was to encourage selection and integration of means and methods appropriate to the particular situation. Peacekeeping, as it is defined for the purposes of this work, forms a small part of this integrated response system. Peacekeeping within the cooperative security framework was to have increased flexibility and responsiveness.

Preventative Deployment

Military intervention in the form of preventative deployment is introduced in *An Agenda for Peace* and followed up in *Cooperating for Peace*. This strategic response is based on the positioning of military forces or observers in such a way as to deter the escalation of a particular situation into armed conflict.³⁴ The difficulty for insertion is to select a situation in which the insertion of force acts as a deterrent and not a trigger to escalation. *Cooperating for Peace* points out that such a deployment must by its nature be conducted under Chapter VI of the Charter. The report saw difficulties with this approach as Chapter VI imposes the necessary restrictions on force to self-defence and the need for consent of the parties; from the report's perspective this may mean that the insertion of the force was pointless. It saw the self-defence requirements as meaning that the force is without teeth, while it expressed concern that the receipt of consent would mean the deployment was

³³ Ibid.

³⁴ Id at 81.

without purpose given that if States are prepared to consent to the insertion of such a force, prevention of the dispute can probably be achieved without the need for it.³⁵

This reaction tends to overlook the realities of international politics where consent is not necessarily given freely but as a result of pressure from other international actors. In East Timor, for example there is some suggestion that US diplomatic pressure was applied to Jakarta to ensure that armed conflict between the Australian led contingents and the Indonesian armed forces did not break out. The fact that a US Marine Expeditionary Unit was placed just over the horizon may also have been a settling factor.³⁶

Cooperating for Peace argues that any intervention on the basis of preventative deployment needs to be either backed by the will to transition to a Chapter VII operation, or the ability to withdraw from the operation entirely.³⁷ The process must also be characterised by a sophisticated level of integration into the diplomatic and political effort. There is a tendency in UN operations of the type envisaged by *Cooperating for Peace* as being amenable to preventative deployments, to be reactive to crises rather than to be well planned responses to foreseen events. The UN has had difficulty in developing the concept beyond a theoretical weapon in the UN's arsenal of responses. To make it work, planning time frames must be shortened by decisive political decision making. The issue of proactive response is a repeated theme in the UN reports and responses and an issue that the UN appears to be constantly grappling with.

³⁵ Id at 84.

³⁶ Cobb, A. "East Timor and Australia's Security Role: Issues and Scenarios" Current Issues Brief 3 1999-2000. <http://www.aph.gov.au/library/pubs/cib/1999-2000/2000cib03.htm#5>. (11 Jul 2005).

³⁷ Above n 31 at 84-85.

Even in the former Yugoslavia where preventative deployment was utilised it became necessary to turn to NATO under a Chapter VII mandate to provide the teeth required for any form of successful outcome. However, despite its limitations and the fact that use of preventive deployment may be impractical in many cases, it is possible to envisage situations where it may be an effective option. General Sir Roderick Cordy-Simpson when providing answers to the UK Defence Select Committee in 1999 was of the view that a preventative intervention in Kosovo would have been the right solution subject to timing.³⁸ The issue comes down once more to creating the environment in the Security Council where decisive action can be taken and responses to situations planned instead of hastily cobbled together solutions provided at the last moment.

Peace Making

It has been noted in this work that confusion often exists in the literature between peace making and peace enforcement. *Cooperating for Peace* does not fall into this error but clearly separates the essentially diplomatic activity of peace making and the military responses of peace enforcement and peacekeeping. Peace making in *Cooperating for Peace* is based on the peaceful diplomatic means of dispute resolution found in Article 33 of the UN Charter, but implemented after a dispute has spilled over into armed conflict.³⁹ The process is broken down into two stages with Stage I being containment of the dispute and the implementation of measures such as

³⁸ Cordy-Simpson, R. (1999). United Kingdom Parliament. <http://www.parliament.the-stationary-office.co.uk/pa/cm/199899/cmselect/cmdfence/39>. Q.200. (15 Nov 2003)

³⁹ Above n 31 at 89.

a ceasefire, while Stage II is the production of a lasting condition of peace between all concerned.⁴⁰

Peacekeeping may be used in the peace making process to assist with the supervision of Stage I agreements, such as through the deployment of peace monitors, observers or election monitors. These operations are inserted in order to create the conditions for Stage II peace making but are not essential or required within the peace making process, which may well occur without the insertion of a peacekeeping operation.⁴¹

The crucial requirement and the rock upon which many operations have floundered, is to maintain the aim of achieving Stage II and not to permit the operation to stagnate into a comfortable status quo; arguably the fate of the operation in Cyprus.

Peacekeeping

With regard to peacekeeping, *Cooperating for Peace* notes that it is performed either by the police or the military, usually supported to a greater or lesser extent by civilians. There is also a distinction between peacekeeping and the preventative deployments, as well as between peacekeeping and peace enforcement. Peacekeeping is viewed as an activity performed primarily after armed conflict. It is about ensuring that the agreements reached in Stage I of the peace making process are fulfilled. The methods used in peacekeeping are inherently peaceful. Peace enforcement is carried out in the face of resistance by one or more of the parties and as a result the methods are performe not peaceful.⁴²

⁴⁰ Above n 31 at 90.

⁴¹ Above n 31 at.90-91.

One of the disadvantages noted for peacekeeping in *Cooperating for Peace* is the risk that parties to a dispute will prefer to keep the status quo created by the introduction of peacekeepers and never move into Stage II. Specific examples of this are identified as the operations in Cyprus and Kashmir. The increasing complexity of peacekeeping operations is also noted. In hindsight the rush towards complexity had hardly begun when *Cooperating for Peace* was written but the trend was already evident though not fully anticipated in the report.

Traditional Peacekeeping. A number of categories and descriptions of Chapter VI peacekeeping have already been set out in chapter one of this work. In *Cooperating for Peace* only two categories are advanced. The first is traditional peacekeeping with the identified requirements of consent from all parties, use of force only in self-defence and impartiality. Other requirements in traditional peacekeeping set out in the report are: a requirement for the united backing of the international community, command and control by the UN and a multinational composition of the deployed force⁴³. These expansions of the basic requirements for a traditional peacekeeping operation seem rather descriptive of many of the operations rather than an appropriate definition of what is required. It is suggested that a traditional peacekeeping operation would still be defined as such even if a permanent member of the Security Council abstained from the resolution establishing the operation. There are also examples of classic traditional peacekeeping operations that do not fall under UN command and control. For example, the Multinational Force Observers (MFO), in the Middle East to which Australia currently contributes members of the ADF fall into this category. Finally, the requirement for a peacekeeping force to be multinational is

⁴² Above n 31 at 99.

⁴³ Above n 31 at 104.

again descriptive of the majority of operations rather than a requirement. Provided that the rules of impartiality, force only in self defence and consent of the parties are met there seems no reason to exclude a single nation operation from the category of traditional peacekeeping operations.

Expanded Peacekeeping. The other form of peacekeeping set out in *Cooperating for Peace* is titled ‘expanded peace keeping’. This form of peacekeeping is seen in the report as a form that goes beyond Stage I and becomes an integral part of the Stage II process. Additional complexity is added from the traditional ‘interposition’ type operations as many of the expanded operations involve the settlement of disputes between non State groupings, not all of whom may have control over the tactical elements of their organisation.⁴⁴ A variety of actors, military, police and civilians perform a variety of functions but the share of responsibility and the functions performed by these actors varies considerably from operation to operation. Expanded operations may even require the establishment of a temporary UN administration, a formula that has worked well in West Irian, Cambodia, East Timor and Kosovo; or may be limited to the provision of humanitarian assistance, such as provision of food and water or the clearance of mines. More often the operations involve complex amalgamations of tasks and responsibilities requiring a formidable bureaucratic framework to be constructed within the operation.

Rules for Effective Peacekeeping. Mindful of the increasing complexity of peacekeeping operations, *Cooperating for Peace* cautions the automatic use of peacekeeping as a panacea to every dispute. It urges the Security Council to make a

⁴⁴ Above n 31 at 104-106.

realistic assessment of the likely success of any form of operation rather than inserting a peacekeeping force so as to be seen to be doing something about a difficult situation. Without attempting to limit the use of peacekeeping as a response, *Cooperating for Peace* suggests that an operation should only be mounted if certain identified criteria are met. These are:

clear and achievable goals; adequate resources; close coordination of peacekeeping with peace making; impartiality; local support; external support; and a signposted exit.⁴⁵

In addition to the detailed preconditions for the deployment of peacekeepers *Cooperating for Peace* also marks out the requirement for detailed planning.

Peace Enforcement

Having emphasised the integration of peace making with peacekeeping in the traditional and expanded forms, *Cooperating for Peace* highlights the need for a cautious approach to the military options in the application of the Chapter VII methods with the use of force as the very last resort.⁴⁶ At the time of the publication of *Cooperating for Peace*, Chapter VII enforcement deployments were ‘extremely rare.’⁴⁷ This situation has changed considerably. Despite the preference for the resolution of problems through peaceful means there are times when there has to be a resort to force.

⁴⁵ Above n 31 at 109.

⁴⁶ Above n 31 at 133.

In *Cooperating for Peace* an assumption is made that in enforcement actions the Geneva Conventions will apply.⁴⁸ It is suggested that this is based on the historical use of Chapter VII in armed conflict situations, such as the Congo and Korea. The applicability of the Geneva Conventions and humanitarian law generally in peacekeeping are discussed at length in chapters six and seven of this work as determining their application is a central element in understanding which legal framework must be applied in collapsed State peacekeeping. It is suggested that the enforcement actions envisaged in *Cooperating for Peace* are those that amount to armed conflict rather than any operation that is authorised under Chapter VII. The understanding of peace enforcement found in *Cooperating for Peace* represents a different approach from *An Agenda for Peace* where, as discussed above, peace enforcement was set out as a response that was more forceful than peacekeeping but appeared to fall short of armed conflict.

Cooperating for Peace identifies three situations in which peace enforcement operations are warranted. These are: cross-border aggression, support of peacekeeping operations, and support of humanitarian objectives.⁴⁹

Cross Border Aggression is perhaps the most straightforward and least controversial of the bases for enforcement action. The function of the UN is essentially to protect and uphold the integrity of the Nation-State. If a State is invaded then the UN has a fundamental obligation to protect it. *Cooperating for Peace* emphasises the importance of the UN in this role and identifies enforcement action in response to

⁴⁷ Above n 31 at 143.

⁴⁸ Above n 31 at 145.

⁴⁹ Above n 31 at 146-158.

such an act as being at the core of the UN's obligations.⁵⁰ *Cooperating for Peace* rejects the Orwellian argument that some States may be more equal than others, particularly oil producers, when it comes to a UN reaction to invasion. As stated in the report:

“It would be deeply unfortunate if any such impression were to become conventional wisdom. There are few bottom lines in international affairs, but this is one of them. If there is ever another case of naked aggression as clear-cut as Iraq's against Kuwait, the Security Council must act totally consistently with its authorisation of peace enforcement in that case, and the international community must act just as swiftly, decisively and effectively.”⁵¹

Once an enforcement operation has begun then control over it must be manifest. *Cooperating for Peace* urges the continued use of mandated reporting by States to demonstrate this control,⁵² especially given that the most usual form of enforcement is a contracted out operation. That is an operation performed by the Member States under a Security Council, or on rare occasions a General Assembly, Resolution. In such circumstances command and control is vested in the States concerned and the distinctive Blue Helmets are not worn.

Support to Peace Operations. The use of force in support of peacekeeping operations was raised in *An Agenda for Peace*. *Cooperating for Peace* noted that enforcement action in this role had only been used once, that being in the former Yugoslavia. The use of enforcement is divided into two areas: Firstly to protect the peacekeepers and

⁵⁰ Above n 31 at 146.

⁵¹ Above n 31 at 147.

⁵² Above n 31 at 149.

secondly to force compliance with a mandate that is being frustrated.⁵³ *Cooperating for Peace* noted some concern with regard to the first proposition on the basis that it is very difficult for the Security Council to transform quickly enough into a secondary Chapter VII option where that became necessary at short notice. It was also noted that there were concerns among some States as to the appropriateness of such an action. The report recommended that rather than moving from one operation to another the Chapter VI operation should be recalled and the new Chapter VII operation should be inserted. Where Chapter VI and Chapter VII operations were to be inserted simultaneously then it was recommended that they be kept separate with distinct mandates.⁵⁴

Support of Humanitarian Objectives. The issue of humanitarian aid and peacekeeping has been raised in chapter one of this work. At the time that *Cooperating for Peace* was written the issue was very topical with the Somali operation, the first purely humanitarian Chapter VII operation, having been raised and deployed in the year *Cooperating for Peace* was published.⁵⁵

Cooperating for Peace identifies that there are major practical difficulties in determining which humanitarian disasters will and will not be the object of peacekeeping efforts. However, this point is not dwelt upon. Instead a series of conditions are suggested that should be met before the UN undertakes any humanitarian enforcement operation. These conditions are: a consensus from the international community, including non State actors regarding the threat to life;

⁵³ Above n 31 at 151.

⁵⁴ Above n 31 at 152.

⁵⁵ Above n 31 at 155.

necessity of intervention; that there is a capacity in practical terms to achieve the ends sought.⁵⁶

While *Cooperating for Peace* highlighted the need for consensus and planning it did not discuss the legality of humanitarian intervention. A strong inference can be drawn from the detailed consideration of the factors that should be addressed in making the decision to intervene that it is considered a legitimate and lawful activity under the UN Charter. Humanitarian interventions have been seen subsequently in Rwanda, Kurdistan, Haiti and Bosnia.⁵⁷ Despite these practical applications of the principle there is still a strong debate surrounding the legality of humanitarian intervention, which arguably has not made much headway since *Cooperating for Peace* was published. What is certain is that the ingredients for successful intervention set out in *Cooperating for Peace* have not been followed, to the detriment of the operations.⁵⁸

UN as Trustee

Another issue subject to examination in this work and that is raised in *Cooperating for Peace* is the role of the UN as a Trustee. In *Cooperating for Peace* the issue is addressed with disappointing brevity.⁵⁹ The point is made that while Article 73 of the UN Charter cannot be used because of the restriction on application to non UN members, the machinery behind the Article is still available. Regrettably this point is

⁵⁶ Above n 31 at 156-157.

⁵⁷ Wray, R.J. <http://www-cgsc.army.mil/milrev/English/DecFeb99/Johnson.htm> (20 Nov 2003).

⁵⁸ Arguably action could have been taken to prevent the massacre at Kigali had the conditions and preparation advocated in *Cooperating for Peace* been followed: For debate regarding humanitarian intervention see for example, Abiew, F. K. *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, (1998): Meron, T. "The Humanization of Humanitarian Law," *American Journal of International Law*, 94 (2000) at 239-278.

⁵⁹ The issue is limited to less than a page at 158.

not developed and a weak argument relating to the cost of establishing an administration is used to terminate further consideration of the issues. In later chapters it will be demonstrated that the UN has effectively used the mechanisms without articulating the source. At this stage it is sufficient to note that *Cooperating for Peace* could have made a valuable contribution to preparing the ground work for the subsequent operations in Kosovo and East Timor but did not have the foresight to predict the rise of this aspect of UN activities.

The remaining attention to peace enforcement in *Cooperating for Peace* is directed primarily at the administration of operations. One strand that is picked up from *An Agenda for Peace* is the call for the allocation of a standing force for peacekeeping as envisaged by Article 43 of the UN Charter. This is at odds with *An Agenda for Peace* which expressly excluded peacekeeping from the role of the Article 43 force.

While the benefits of a standing force are acknowledged in *Cooperating for Peace* the point is made that practically such a force will never be raised, even from volunteers recruited specifically to the UN. The reasons for this are simple. Firstly, it would be too costly to maintain the size of a standing force required and secondly, even if a standing force could be maintained, it would be impossible to accurately assess the number of troops and skill sets required to respond to every conceivable peacekeeping operation. *Cooperating for Peace* concludes that the current ad hoc arrangement is the only practical solution but that this solution needs better management and organisation.⁶⁰

⁶⁰ Above n 31 at 163-165.

Concluding Cooperating for Peace

In concluding *Cooperating for Peace* a number of recommendations for reform of the UN are set out. Some of these recommendations are structural, such as restructuring the Secretariat and regenerating the Security Council. Many of the recommendations urge a rethink of the approach to peace operations, particularly with regard to the management, coordination and resourcing of the diverse areas and approaches.

Finally, *Cooperating for Peace* poses questions that relate to planning.⁶¹ In this work, informed planning is seen as the most basic and fundamental requirement for the successful implementation of any form of peace or peacekeeping operation. This is a theme that also runs through *Cooperating for Peace* and underpins *An Agenda for Peace*. Despite the clarion call from these key works for more detailed planning prior to deployment of peacekeeping operations the absence of detailed planning persisted and constituted the major weakness of peacekeeping operations.

Cooperating for Peace provided a sound planning tool for UN peacekeeping activities. Some of the recommendations set out in the report would not be followed. This was due to the inherent and inescapable political nature of the UN and the realities of operations on the world stage. The setting up of an Article 43 force, for example, advocated in both *An Agenda for Peace* and *Cooperating for Peace* was arguably never a viable option for the UN.

Overall *Cooperating for Peace* made a valuable contribution to the debate regarding peacekeeping in the UN. It built and expanded on the themes raised in *An Agenda for*

⁶¹ Above n 31 at 169-189.

Peace and assisted in maintaining the momentum towards more robust, better structured and planned operations.

Supplement to An Agenda for Peace

In January 1995 Secretary-General Boutros-Ghali presented a report for the 50th anniversary of the UN entitled “*Supplement to An Agenda for Peace.*”⁶² This paper was more cautious in its approach in comparison with the almost euphoric tone of *An Agenda for Peace*. The purpose of the paper was:

“to highlight selectively certain areas where unforeseen, or only partly foreseen difficulties have arisen and where there is a need for the Member States to take the “hard decisions” I referred to two and a half years ago.”⁶³

Major Changes

Supplement noted the change in the nature of conflict in that during the Cold War conflict was seen as an issue between States while post Cold War conflict was more likely to be intra State. The incidence of peacekeeping and the complexity of the operations had increased concomitantly. The incidence of operations within collapsed States had also increased substantially. The result of this change in the predominant form of peacekeeping operation had led to the overburdening of the UN peacekeeping headquarters.⁶⁴

⁶² Boutros-Ghali, B. *Supplement to An Agenda for Peace* A/50/60-S/1995/1 (3 January 1995).

⁶³ *Id* at para.6.

The increase in humanitarian operations was also highlighted as a major area of change in the peacekeeping field. *Supplement* observed that the change in operational character had led to the emergence of a new type of peacekeeping operation under a Chapter VII mandate but with the force attempting to maintain impartiality between factions.⁶⁵

As well as the extended types of operation that peacekeepers were engaged in *Supplement* drew attention to the increased integration of military and civilian elements within an operation to respond to the increasingly complex operational requirements. Specifically, the rebuilding of the civilian infrastructure had led to the integration of specialist administrators to achieve reconstruction and reform of the remnants of the existing system of government.⁶⁶

Finally peacekeeping operations were no longer to be viewed as amenable to rapid insertion and withdrawal. The UN had accepted that a peacekeeping operation was unlikely to succeed unless a long-term commitment could be given to sustain the operation until reliable institutions could be built up to replace the UN.⁶⁷

Peace and Security

Supplement noted that the UN does not have a monopoly on many of the peacekeeping response options and that regional organisations had been increasingly involved in collective security operations due to a perceived short fall by the UN.

⁶⁴ Id paras 8-17.

⁶⁵ Id paras 18-19.

⁶⁶ Id at paras 20-21.

⁶⁷ Id at para 22.

Supplement urges the UN to find ways of improving its response to these situations as the UN is better equipped to bring about a long term and long lasting resolution.⁶⁸

Supplement identified the reforms effected in the UN organisation to improve information flow and situational awareness, an area thought to have contributed to the poor performance of the UN. The effectiveness of these changes demonstrated that the major point of failure was not information and bureaucracy but the reluctance of States to accept UN assistance.⁶⁹ This situation created tension with Article 2(7) of the UN Charter as without consent the Security Council would be required to make an Article 39 finding that a threat exists to peace and security and establish an operation under Chapter VII.

Peacekeeping

Although peacekeeping was acknowledged to have proved highly adaptable the three basic principles of traditional peacekeeping were underlined: consent of the parties, impartiality and the use of force only in self-defence. *Supplement* asserted that the maintenance of these principles was often the difference between successful and unsuccessful operations.⁷⁰

Where the principles have been compromised it has been in the areas of impartiality and the use of force. The specific circumstances highlighted by the report were the protection of civilians in safe areas, protecting humanitarian operations and pressing parties to achieve reconciliation at a faster pace than they were prepared to accept.

⁶⁸ Id at paras 23-25.

⁶⁹ Id at para 27.

Supplement reserved particular criticism for operations where mandates permitting operations without the consent of the parties and increased use of force were overlaid on extant operations without providing the military force to support such a mandate. These operations were seen as doomed to failure as mixing enforcement with peacekeeping creates an insurmountable tension between coercion and the diplomatic process peacekeeping is designed to facilitate.⁷¹

Supplement is highly critical of the impatience displayed by the international community. Settlement of complex situations required time; processes were complex and setbacks frequent. *Supplement* urged that the temptation to use military force be resisted. The use of force in peacekeeping must be kept separate and cannot be used as an interchangeable alternative.⁷²

Another problem in peacekeeping highlighted by the *Supplement* was the command and control arrangements. Three levels of command and control were identified: Overall political direction vested in the Security Council; executive direction and command vested in the Secretary-General;⁷³ Command in the field vested in the special representative or military commander.⁷⁴ *Supplement* criticised the failure to observe these distinctions in levels of authority and particularly the tendency towards micro-management from above. Emphasis was placed on the need for information to flow through the established channels to avoid confusion in the field. Linked to this

⁷⁰ Id at para 33.

⁷¹ Id at paras 34-35.

⁷² Id at paras 36-37.

⁷³ Generally recognised by military forces as “control” as the S-G has no legal authority to “command” under national laws.

⁷⁴ Command over Australian troops can only be exercised by an Australian military officer, even the Minister for Defence does not “command” Australian military members (see ss8 and 9 *Defence Act*). Therefore a UN Force commander has control but not command. Command of an Australian contingent is vested in the National Contingent Commander. The US, NZ and UK take the same view.

condemnation of interference was the need identified in *Supplement* for unity of command and the equal treatment of all contingents to avoid the implication that some States were receiving special treatment. *Supplement* did however recognise the need for national contingents to consult their own channel provided this did not interfere with the needs of the operation.⁷⁵

Supplement reserved the most urgent call for assistance to the availability of troops and equipment. A decline in the willingness of Member States to supply troops and equipment was noted. The conclusion was drawn that the UN needed to consider the creation of a rapid reaction force. This is a significantly more detailed proposal than the impractical suggestion put forward in *An Agenda for Peace* for an Article 43 force. The size was not articulated other than as an unspecified number of battalion units:

“These units would be trained to the same standards, use the same operating procedures, be equipped with integrated communications equipment⁷⁶ and take part in joint exercises at regular intervals. They would be stationed in their own countries but maintained at a high state of readiness.”⁷⁷

This proposition was a significant improvement on the proposed Article 43 force although there are problems with its practical implementation. Before troops can be allocated to a task the problem must be defined. This is the basis of all strategic planning. In *Supplement* the problem is not articulated; rather there is a leap straight to the solution. There is also no specific discussion of the role envisaged for the force.

⁷⁵ Above n 62 at paras 38-42.

⁷⁶ A feat not yet achieved within the Australian Defence Force.

The temptation to move on to the practical issues such as training regimes and interoperability has obscured the real failing in the plan. It is impossible for a force to be trained and equipped for every contingency, particularly when national tax payers are expecting their armed forces to be prepared for defence of the State.

Finally in regard to peacekeeping, *Supplement* advocates the use of radio as a medium to disseminate information to the local population.⁷⁸ Care must be taken with this approach. Information Operations, regardless of how well intentioned, are likely to be criticised and labelled propaganda, particularly by the NGO community, which can lead to unwanted complications in the operation. However, the UN learned in Cambodia the value of providing clear and accurate advice to the ordinary people, free from the biased information being put out by the parties to a conflict or dispute.⁷⁹

Peace Building

Supplement was positive with regard to the progress made in the field of peace building but warned that care was still required. Two kinds of peace building situations were examined. The first form was where a comprehensive peace agreement had been reached and a ‘multifunctional’ peacekeeping operation would be engaged to oversee the process. The second was where peace building was taking place before or after conflict but without the support of a peacekeeping operation.⁸⁰

⁷⁷ Above n 62 at para 44.

⁷⁸ Above n 62 at para 46.

⁷⁹ Boutros-Ghali had not always been a fan of the use of Radio in this way but had been persuaded to use it in Cambodia to good effect, ensuring that the civilian population had access to information from the UN perspective rather than solely from groups opposed to or critical of the UN intervention: Shawcross, W. *Deliver us From Evil* (2000) at 42.

In *Supplement* the Secretary-General was more explicit about the abilities, and even the requirement in appropriate cases, for the peacekeeping operation to provide the structures of administration than he was in *An Agenda for Peace*.⁸¹ This was an important acknowledgment, particularly in the context of the justice system in collapsed State peacekeeping operations.

Without reference to sovereignty, it is envisaged in *Supplement* that the special representative would run the activities of government in a collapsed State or territory.⁸² This is exactly what happened in East Timor and parts of the former Yugoslavia.

Peace enforcement

The *Supplement* discussed the issue of peace enforcement. Unlike *An Agenda for Peace* the Secretary-General did not call for the formation of Article 43 agreements, perhaps tacitly acknowledging the impracticality of such agreements in the prevailing political environment. In a continuation of the less optimistic tone adopted by *Supplement*, concern was raised with regard to the proliferation of contracted out enforcement operations to Member States. This concern was based on the lack of control that the UN had over these operations and a fear that actions may go further than envisaged by the Security Council. *Supplement* also questioned whether the use of force other than in self-defence was ever appropriate in a peacekeeping operation. Despite these concerns and warnings the *Supplement* was in general positive towards

⁸⁰ Above n 62 at paras 48-49.

⁸¹ Above n 62 at para 53.

⁸² Above n 62 at para 53.

the use of peace enforcement operations as they were seen as more desirable than unilateral action.⁸³

Marks⁸⁴ sees the position in *Supplement* as going further than acknowledging a case by case role for Member States in enforcement operations. He argues that in *Supplement* the Secretary-General was making a clear distinction between Chapter VI and Chapter VII operations with the latter being run directly by the Security Council under contracted out arrangements, while the Secretary-General is restricted to running the Chapter VI operations.⁸⁵ Whether *Supplement* goes as far as separating the responsibility for operations to this degree is not as clear as Marks suggests but it is certainly the case that UN doctrine set out in *Supplement* was that:

“[C]oercion cannot be combined with consent-based peacekeeping; they are alternatives and a choice has to be made between them.”⁸⁶

This doctrine did not last long with the emerging demands of complex, multifunctional operations such as Kosovo, East Timor and Sierra Leone forcing the Secretariat to adopt a new approach to mixed peacekeeping and enforcement operations.⁸⁷

Coordination

⁸³ Above n 62 at paras 77-80.

⁸⁴ Marks, E. *Peace Operations Involving Regional Organisations* National Defense University, <http://www.ndu.edu/inss/strforum/forum25.html> (23 Nov 2003).

⁸⁵ *Ibid.*

⁸⁶ Above n 2 at 17.

⁸⁷ Above n 2 at 74.

Supplement acknowledged the inability of the UN to deal with every problem in the world. Cooperation and integration with Members States, individually and as Chapter VIII peacekeepers as well as regional organisations, NGO and a variety of combinations of actors was noted as essential to achieve human security, the concept developed in *An Agenda for Peace*. This cooperation was identified as having many purposes, including consultation, diplomatic support, operational support and co-deployment.⁸⁸

While Chapter VIII peacekeeping was seen in *Supplement* to have considerable potential it was emphasised that even where the resources were available to run the operation independently the UN should be involved. Some basic principles that should be applied were identified;

- a. mechanisms for consultation with the UN,
- b. acknowledgment of the Charter primacy of the UN,
- c. clear identification of the division of labour between the UN and the relevant organisation, and
- d. common standards and policy approaches to problems common to the UN and the organisation such as standards for peacekeeping operations.⁸⁹

⁸⁸ Above n 62 at paras 82-86.

⁸⁹ Above n 62 at paras 87-89.

As well as cooperation and coordination outside the UN, *Supplement* also addressed the issue of interdepartmental cooperation within the UN. A number of different departments had become involved in peacekeeping, peace building and provision of humanitarian aid. The need for coordination up and down as well as between departments was identified as in need of attention. In *Supplement* a move was signalled toward an improvement in the functional relationships and processes both internally and external to the UN warranting the formation of a committee and the personal attention of the Secretary-General.⁹⁰

Financial resources

The financial difficulties commented on in *An Agenda for Peace* were dealt with in *Supplement* with feeling. The Secretary-General pointed out that the funding situation had become a crisis and that the UN ability to establish peacekeeping operations was threatened as a result. In particular the Security Council was criticised for failing to ensure the resources were available before establishing operations in Bosnia and Rwanda.⁹¹

Conclusion

Supplement is concluded by stating that it was:

⁹⁰ Above n 62 at paras 90-96.

⁹¹ Above n 62 at paras 97-101.

“[I]ntended to serve as a contribution to the continuing campaign to strengthen a common capacity to deal with threats to peace and security.”⁹²

Supplement called on the UN to make the hard decisions, warning that a failure to do so would spell trouble for the future.⁹³

The tone of *Supplement* is in contrast to that of *An Agenda for Peace* where all kinds of possibilities for peacekeeping and the future of UN cooperation were laid out.

Supplement seems more to outline the failings of the UN and warn of the dangers inherent in inaction. *An Agenda for Peace* was a child born in the euphoria of the end of the Cold War. *Supplement* was a morose adolescent, warning that the cause of peace could be lost in the negligence and self-interest of the Security Council and General Assembly.

Until the Boutros-Ghali Secretary-Generalship the Security Council had not been so roundly criticised since Dag Hammarskjöld had fought with the Members over the Congo peacekeeping operation. *Supplement* was the Secretary-General calling in the strongest terms for action on the part of the Security Council and the UN in general. The approach was not a diplomatic one and it has been suggested that the approach adopted by Boutros-Ghali led to his being the first Secretary-General not to be elected for a second term.⁹⁴

⁹² Above n 62 at para 102.

⁹³ Above n 62 at paras 103-105.

Brahimi Report

On 7 March 2000, Secretary-General Kofi Annan selected a panel of ten experts in the area of UN peacekeeping operations to prepare a report that would make frank, specific and realistic recommendations for the future of peacekeeping operations. Ambassador Lakhdar Brahimi of Algeria, who was to give his name to the panel's report, was appointed as the panel leader. The findings of the panel were released on 23 August 2000. The panel made 60 recommendations covering the field of peacekeeping operations. Specific recommendations related to doctrine, strategy, planning, decision-making, headquarter organisation staffing levels, logistics, rapid deployment and public information. Initially at least, the Brahimi Report was received with the approval of key States. In particular the US claimed that the Report highlighted areas in which it had held concerns and urged the Secretary-General, Security Council and General Membership to give the Brahimi Report 'serious and expeditious consideration'.⁹⁵

As a precursor to its recommendations the Brahimi Report noted the fundamental importance of the ability to project credible force if complex peacekeeping in particular, is to succeed. It also noted that force alone was not sufficient. Force was seen as the means used to create a space within which peace building can occur. The Brahimi Report made it clear that none of its recommendations would have an impact on effectiveness unless the Member States were prepared to support operations politically, financially and operationally.⁹⁶ The call for genuine support for

⁹⁴ Above n 79 at 204-206.

⁹⁵ Boucher, R. *The Brahimi Report on UN Peacekeeping*. <http://www.us-mission.ch/press2000/084boucher.htm> (21 Nov 2003).

⁹⁶ Brahimi, L. *The Brahimi Report*. http://www.un.org/peace/reports/peace_operations (16 Jun 2005)

peacekeeping operations rather than empty rhetoric in favour of commencing them was a theme repeated from *An Agenda for Peace* through the *Supplement*.

Recommendations

The Brahimi Report made it clear that the tendencies of the past to deploy to situations of military stalemate and where at least one party to the conflict was not committed to the intervention, was not sustainable without a commitment to achieve specified outcomes. Peacekeepers were seen as the means to create the space and security for peace builders to achieve self-sustainment of the peace process. The report emphasised the partnership between peacekeepers and peace builders, which must be seen as an inseparable one. For future success the role of peace builders in complex operations must be acknowledged as a key role. A number of the recommendations of the Brahimi Report were focused on the development and improvement of the integrated peacekeeping – peace building process. In particular, with regard to the integration of peace building, the Brahimi Report recommended:

“A doctrinal shift in the use of civilian police and related rule of law elements in peace operations that emphasises a team approach to upholding the rule of law and respect for human rights and helping communities coming out of a conflict to achieve national reconciliation; consolidation of disarmament, demobilisation, and reintegration programs into the assessed budgets of complex peace operations in their first phase; flexibility for heads of United Nations peace operations to fund “quick impact projects” that make a real difference in the lives of people in the mission area;

and better integration of electoral assistance into a broader strategy for the support of governance institutions.”⁹⁷

Robust doctrine and the use of force

The Brahimi Report supported the previous core principles of impartiality, consent of the parties and the use of force only in self-defence. However, referring to the purposes set out in the UN Charter, the Report also identified the need, and in some cases the requirement, to preserve the distinction between the victim and aggressor. The report identified as a fundamental premise the ability of the UN to respond effectively to violations of the Charter. As a result the UN must be prepared to pass more robust mandates including specific authority to use force. As a consequence deployed forces would need to be larger, better equipped and possessed of rules of engagement that permitted them to use force, not merely to defend themselves but to deny the initiative to their attackers and attacks on the subject of the operation.

The effect of this requirement would be that better planning processes would be required in the Secretariat, complex operations would need to be allocated field intelligence and enhanced capabilities in order to defend the operation. The Report identified the requirement that UN peacekeepers, both troops as well as civilian police, who witnessed violence against civilians must be presumed to be authorised to stop it.⁹⁸ Acceptance of this principle gives weight to the argument that the passing of Ordinances such as those passed under INTERFET for the arrest and detention of persons committing criminal acts was an inherent right under the mandate.

⁹⁷ Ibid.

⁹⁸ Ibid.

Fearson and Latin⁹⁹ are critical of what they view as the implied requirement for UN forces equipped with robust rules of engagement to be involved in what they argue are effectively counterinsurgency actions. They put forward the argument that such operations involve a level of information protection that cannot be achieved in a multinational command. Also, such operations impeach the impartiality of UN forces. They recommend that counterinsurgency should be left to national or regional forces. Bosnia, Kosovo and Haiti are pointed to as examples of this approach being taken in practice.

Fearson and Latin argue that where a UN force must be involved in any form of combat that instead of automatic support for the authority in control, that is the extant government, the UN should choose which side to support. The basis of support should be which side is better suited for the governance and peace of the State. The examples given to back this view are the African National Congress in South Africa and the insurgency led by Museveni in Uganda.¹⁰⁰

This view seems somewhat misconceived as it is at odds with the UN Charter. The UN is effectively obliged to recognise the sovereignty of the State as it finds it. What the UN can do is choose not to intervene or withhold authorisation for a Member State to take action. The point that can be more appropriately made regarding the robust forms of peacekeeping is that which was made by White. He observed that the UN peacekeeping operations envisaged by the Brahimi Report are a muscular form of peacekeeping that does not cross the line into enforcement actions, the enforcement

⁹⁹ Fearson, J.D and Latin, D.D. *International Institutions and Civil War*. (June 2001) www.duke.edu/web/licep/4/laitin/fearonlaitin.pdf (16 Jun 2005) at 1-30.

role being better suited to Member States. However, White questions the accuracy of the assumption that seems to pervade the Brahimi Report that the line into enforcement had not been crossed in situations of more robust prosecution of the mandate.¹⁰¹

Fearson and Latin were not the only commentators to raise concerns over the issue of impartiality. The International Peace Academy (IPA) published the results of its regional meetings of February to March 2001 at which the Brahimi Report was discussed.¹⁰² It was noted that while impartiality should remain one of the key principles of peacekeeping it should mean a fair application of the mandate and “not as an excuse for moral equivocation”.¹⁰³ States participating in the meetings seemed to remain suspicious of peacekeeping and concerned that a peacekeeping operation was an excuse for the interference in internal affairs, particularly where the basis of the operation was humanitarian intervention.¹⁰⁴

Another area that received criticism from the Brahimi Report related to the contribution of troops by Member States. To improve this aspect of operations the Report recommended that the Secretariat must be empowered to be fully honest with the Security Council regarding the needs of an operation. Troop contributing nations should be involved throughout the planning process. Advice from contributing States was identified as necessary during the planning and implementation phases and it was

¹⁰⁰ Above n 99 at 22-23.

¹⁰¹ White, N.D. Commentary on the Report of the Panel on United Nations Peace Operations (Brahimi Report). *Journal of Conflict and Security Law*. (2001), Vol.6 No.1, at.130.

¹⁰² International Peace Academy. *Refashioning the Dialogue: Regional Perspectives on the Brahimi Report on UN Peace Operations*.

[\(http://www.ipacademy.org/Publications/Reports/Research/PublRepoReseBrahimi_bod.Regional Meetings February – March 2001. \)](http://www.ipacademy.org/Publications/Reports/Research/PublRepoReseBrahimi_bod.Regional Meetings February – March 2001.) (16 Jun 2005).

¹⁰³ Above n 102 at 4.

¹⁰⁴ Ibid.

suggested that a subsidiary organ of the Council should be created under Article 29 of the Charter for this purpose. It was considered to be beneficial for Member States contributing troops to an operation to attend Security Council briefings where the safety of their troops was affected or where there was to be a change to the mandate regarding the use of force.¹⁰⁵ These initiatives were aimed at integrating the State and UN interests and reducing the risk of failure due to the isolation of contributing States. What was not as clear from the Report was how the Secretariat was to exercise control and enforce uniformity on convergent State interests which would undoubtedly have impacted on the planning process.

Information management and strategic analysis

The Report made a number of recommendations in the area of information management and strategic analysis. It recommended that a new information gathering and analysis entity should be created to support the Secretary-General and members of the Executive Committee on Peace and Security (ECPS). It was proposed that an ECPS Information and Strategic Analysis Secretariat (EISAS) would be created. EISAS would maintain an integrated database on peace and security issues, distribute knowledge within the UN system, be responsible for policy analysis, formulate long-term strategies and bring incipient crises to the attention of the ECPS leadership. It was also proposed that the EISAS would consolidate the existing Situation Centre of the Department of Peacekeeping Operations (DPKO) with the addition of all small scattered policy planning offices and military analysts, experts in international

¹⁰⁵ Above n 96 at 4.

criminal networks and information systems specialists. EISAS would then serve the needs of all members of the ECPS.¹⁰⁶

The focus of analysis of the Brahimi Report has tended not to be in the area of intelligence and information management. The IPA meetings only reported on this aspect with regard to the London meeting. The London meeting called for a more detailed analysis of the issue and a greater clarity in the allocation of responsibility for information analysis and dissemination. It was noted that when tackling organised crime the State should be given the support required to deal with the situation as the local authorities would have the only true understanding of the problem. For other operations it was recommended that an intelligence function should be raised to coordinate and guide information. This function should be kept separate from the dissemination of information to the public, which in turn should be separate from “military propaganda”.¹⁰⁷ The London meeting called also for greater journalistic skill and the more effective use of print and electronic media. This approach to the use of media is an expansion of the theme introduced by Broutros-Ghali following the success of radio in Cambodia where the UN was able to use this medium to present information on its activities directly to the people.

The issue of intelligence gathering on UN operations is fraught with difficulties at the practical level. Many States are deeply concerned about the protection of national information.¹⁰⁸ The UN is reluctant to approve rules of engagement that permit the clandestine acquisition of information. Even with nationals working within the UN there have been occasions of conflicting State and UN interests in the preservation of

¹⁰⁶ Ibid.

¹⁰⁷ Above n 102 at 20-21.

information and open allegations of espionage. As early as 1948 for example Jim Hill, working in the UN department of the Australian government, was accused of espionage for being the source of information that had been passed to Soviet UN delegates.¹⁰⁹ If Martin Van Creveld is right about the future of conflict and its asymmetrical nature¹¹⁰ then the UN will need to invest far more time and effort into this area of its operations and overcome the natural reluctance of States to engage in information sharing.

Improved leadership and rapid deployment

In order to overcome the difficulties created by delays in the deployment of UN forces the Brahimi Report proposed the identification of potential operation leaders and key appointments as well as the development of a stand-by force consisting of approximately 1500 troops for rapid deployment. Deployability of the force was to be enhanced by a streamlined logistic support system including the development of stockpiles of resources to be used on operations. Pools of civilian personnel were also recommended as well as enhancement of the recruitment system. The identification of individuals vital to the rule of law function was also recommended, emphasising the central role of the return of law and order to the peace building process.

These enhancements to the process would undoubtedly improve the ability of the UN to deploy a force at short notice on a robust mandate. The recommendations received broad support from the IPA meetings and the process of building a military

¹⁰⁸ See for example above n 102 at 13.

¹⁰⁹ McKnight, D. *Australia's Spies and Their Secrets*. (1994) at 15-16.

¹¹⁰ Van Creveld, M. *On Future War*. (1991).

component on the lines proposed in the Brahimi Report commenced with the formation of the European Rapid Reaction Force.¹¹¹

Integrated Mission Task Force

The Brahimi Report proposed the establishment of an Integrated Mission Task Force (IMTF) to plan operations and support field headquarters. The staffing for the IMTF was to be drawn from across the UN staff to improve the efficiency of operational planning. This proposal received support at the IPA meetings although it did not appear to stimulate significant debate.

Conclusion

Many of the issues addressed in the Brahimi Report built on issues raised in *An Agenda for Peace* and the *Supplement*. The Brahimi Report was required because little action had been taken to implement the recommendations of those previous reports. One issue omitted in the Brahimi Report is implementation of the Article 43 agreements. It would seem that the concept of using Article 43 had been abandoned as impractical. The need for rapid response in force still remained and the solution put forward in the Brahimi Report seems to have been followed by the European Community in the form of the Rapid Response Force.

¹¹¹ Above n 102 at 20. The European Rapid Reaction Force deployed to the former Yugoslavia in 2003 despite scepticism regarding its capacity to conduct anything other than very limited operations. See for example Reymont, S. "No EU Rapid Reaction Force for a Decade" Telegraph Newspaper UK . <http://www.telegraph.co.uk/news/main.jhtml?xml> (11 Jul 2005).

The European lead seemed to have been followed by other States in the form of commitment to the stand-by agreement system that was set out in the Brahimi Report. The proposals have been realised in the form of the United Nations Stand-by Agreement System (UNSAS). States have agreed to provide certain components on specified periods of notice in order to rapidly deploy to new peacekeeping operations or reinforce existing ones. Stand-by resources may only be used for peacekeeping operations mandated by the Security Council.¹¹² On 19 February 2003 there were 77 States that had signed up to at least the initial stages of the Stand-by process. 39 of these, including the majority of European Union States, had signed a Memorandum of Understanding to provide resources and two, Jordan and Uruguay, had reached full deployment level.¹¹³ Although on paper the UNSAS appeared functional by 2003, it is difficult to assess whether it could ever be operationally functional.

As eloquently acknowledged by Sir Jeremy Greenstock, UK permanent representative to the UN, the main stumbling blocks to the full implementation of the Brahimi Report are the politics of conflict management and the politics of international interaction rather than the efficiency and effectiveness of the proposals.¹¹⁴

Agenda for Peace Ten Years On

In 2002, ten years after the publication of *An Agenda for Peace*, the United Kingdom United Nations Association (UNA-UK) published an assessment of the progress made in the UN's peace activities resulting from *An Agenda for Peace* and subsequent initiatives, particularly the Brahimi Report. UNA-UK noted the optimistic outlook of

¹¹² (16 Jun 2005).

¹¹³ Ibid: A model MOU for the provision of Stand-by resources can be found at this site.

the original report subsequently tempered by the world realities evident in *Supplement* and the lack of progress towards some of the key recommendations in both papers as noted in the Brahimi Report.¹¹⁵ The UNA-UK was of the view that many of the recommendations put forward by Boutros-Ghali, while received enthusiastically, were not supported. Had they been supported they were of the view that peacekeeping disasters in Somalia, Bosnia and Rwanda may have been avoided.¹¹⁶

Specific issues identified as major contributors to these failures were: the lack of sufficient resources to implement peacekeeping mandates, vital aspects of post conflict peace building not being funded or integrated into peacekeeping operations and reluctance by UN staff to put the true costs of operation support before the Security Council. After Brahimi, the UNA-UK assessment was that the situation appeared to have improved to some extent. The UK led operation in Sierra Leone was pointed to as evidence that Member States had finally attempted to address issues outlined in the Brahimi report, particularly the need for robust mandates and a credible size of force capable for implementing them.¹¹⁷

¹¹⁴ Above n 102 at 2-3.

¹¹⁵ [http://www.una-uk.org/UN&C/agendafor peaceplus10.html](http://www.una-uk.org/UN&C/agendafor%20peaceplus10.html). (16 Jun 2005)

¹¹⁶ Id at 6.

¹¹⁷ Id at 6-7.

The UNA-UK assessment is a positive one. While it acknowledged that peacekeeping had passed through some tough times it was hopeful that there would be full implementation of the Brahimi recommendations and the emergence of genuine support for peacekeeping operations by the Security Council.

Responsibility to Protect

The *Responsibility to Protect* was a report prepared by the International Commission on Intervention and State Sovereignty (ICISS) examining the dilemma of ‘humanitarian intervention’. And specifically it questions:

“When, if ever, is it appropriate for states, individually or collectively, to take coercive action, and in particular military action, against another state, for the purpose of protecting people at risk within a state?”¹¹⁸

The *Responsibility to Protect* report was produced by a commission established by the Canadian government, which was responding to calls from Secretary-General Kofi Annan to reach international consensus on the issue of humanitarian intervention. Opposing views had developed within the international community regarding intervention, with international actors divided between intervention on humanitarian or human rights grounds and the supremacy of State sovereignty. Secretary-General Kofi Annan asked:

¹¹⁸ ICISS. *The responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. International Development Research Centre, Ottawa, Canada. (December 2001).at vii.

“...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to a Serbrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”

The international community was slow to react to the Secretary-General’s appeal so the Canadian government took the initiative. The *Responsibility to Protect* report aimed to bring the debate to a level of agreement between the parties.¹¹⁹

The report is divided into eight chapters dealing with; The policy challenge; New approach; The responsibility to prevent; The responsibility to react; The responsibility to rebuild; The question of authority; The operational dimension and; The responsibility to protect and The way forward.¹²⁰

Core principles

Underpinning the Responsibility to Protect four core principles and eleven sub-principles for intervention were developed. These were:

(1) Basic Principles

- a. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the State itself.

¹¹⁹ Ibid.

¹²⁰ ICISS. *The responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. International Development Research Centre, Ottawa, Canada. (December 2001).

- b. Where a population is suffering serious harm, as a result of international war, insurgency, repression or State failure, and the State in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(2) Foundations

The foundations of the responsibility to protect, as a guiding principle for the international community of States, lie in:

- a. obligations inherent in the concept of sovereignty;
- b. the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
- c. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
- d. the developing practice of States, regional organisations and the Security Council itself;

(3) Elements

The responsibility to protect embraces three specific responsibilities:

- a. **The responsibility to prevent:** to address the root causes and the direct causes of internal conflict and other man-made crises putting populations at risk.
- b. **The responsibility to react:** to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
- c. **The responsibility to rebuild:** to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of harm the intervention was designed to halt or avert.

(4) Priorities

- a. **Prevention is the single most important dimension of the responsibility to protect:** prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.
- b. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.¹²¹

¹²¹ Id at xi.

The *Responsibility to Protect* core principles are in many respects a synthesis of the reports and commentaries that had preceded it. In general terms the *Responsibility to Protect* developed the concepts of human security and peace building while basing the primary responsibility for these functions not on the international community but on the individual State. The Charter position of the State as the primary functionary in international relations is unambiguous, as is the ultimate responsibility of the Security Council to ensure international peace and security.

The policy challenge

The first chapter of the report is dedicated to identifying the policy challenges facing the international community, specifically with regard to the issue of humanitarian intervention. The report identified the changing international environment, especially the new security challenges and implications for State sovereignty with the shifting of international power and conditions of sovereignty since 1945. Of particular note was the emergence of the concept of human security and the impact it would have on concepts of sovereignty. Having identified the changing world and additional responsibilities of States in it, the report was supportive of strong State identity and the role of the sovereign State in international affairs. The sovereign State in the modern context was not viewed as having unlimited power within its borders but as having a dual responsibility: to respect the sovereignty of other States and to respect the dignity and basic rights of all people within the State.¹²²

¹²² Id at 1-8.

While upholding the key role of State sovereignty the report raised the issue of intervention and related it to the performance of the obligations and responsibilities of States.¹²³

Responsibility to protect

The approach of the report to the responsibilities of States in the context of modern sovereignty is that a State must protect, prevent, react and rebuild. As identified above, these form the basic elements of the responsibility to protect. The responsibility to protect is about practical protection for people at risk of death because their sovereign State is unwilling or unable to protect them. The report identified the four basic objectives that must be met before any intervention could be contemplated. These four objectives were identified as:

To establish clear rules, procedures and criteria for determining whether, when and how to intervene;

To establish the legitimacy of military intervention when necessary and after all other approaches have failed;

To ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimise the human costs and institutional damage that will result; and

¹²³ Id at 8-9.

To help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.¹²⁴

The report was concerned to point out that military intervention was not the only intervention referred to and acknowledged that many States viewed any international involvement, even the provision of aid, as a form of intervention.

The report was concerned to reinforce the commitment of the international community to the concept of the nation State and to uphold the definitions and protection of sovereignty in the UN Charter. What the report aimed to do was to shift the defensive posture of some States toward a debate regarding the ‘right to intervene’ by changing the focus of the debate to the responsibility of the State to act for the benefit of those people who needed support from the State.¹²⁵ This changing of the emphasis to the responsibility of the State demonstrated the commitment and intellectual rigour applied to the report and the genuine commitment to improve the lot of those in need rather than advance the standing of particular international actors.

Responsibility to prevent

While there is a clear responsibility on a State to take action to prevent conflict and other man made disasters, the report also identified a responsibility on the part of the international community to act *in response to the failure of protection*. That is not a response to the conflict but to the failure of the State to maintain peace. The report made an important distinction by this approach, one supportive of the concept of

¹²⁴ Id at 11.

¹²⁵ Id at 11-18.

sovereignty. The report traced the UN's role in fostering support for States to assist, both directly and through encouragement of regional organisations. In order for regional and UN organisations to be effective however, the report identified the importance of providing early warning and analysis of potential crisis situations. The sharing of intelligence, though difficult with regard to protection of State interests, was seen as of significant importance in assisting in early identification of crisis situations.¹²⁶

The report emphasised the role of the Security Council in attempting to tackle the root causes of conflict, which were identified as: political, diplomatic, economic, legal and military. The 'toolbox' for direct preventative efforts were to consist of components designed to tackle these root causes. The report set out suggested approaches using the toolbox and concludes by identifying the need to change from a culture of reaction to a culture of prevention within the international community, a change that should be led by the Security Council.¹²⁷

Responsibility to react

The report identified a responsibility for the international community 'to react to situations of compelling need for human protection.'¹²⁸ Again the toolbox approach to intervention was advocated with military intervention representing the last resort. The basis for military intervention in the *Responsibility to Protect* was essentially, though not expressed as such, the principle of human security. The trigger for intervention was expressed as 'serious and irreparable harm occurring to human

¹²⁶ Id at 19-22.

¹²⁷ Id at 22-27.

beings' with such harm identified as 'large scale loss of life' such as through actual or apprehended genocide or large scale ethnic cleansing. Once the threshold for intervention is met the intervention must be conducted with the intent of averting human suffering, as a last resort using proportional means and with reasonable prospects of achieving the aim. The only source of authorisation for intervention was seen as the Security Council. The Security Council should be supported and upheld to allow it to function as it was intended in the Charter. Security Council authorisation should precede intervention and the Security Council must respond promptly to requests for intervention, subject to confirmation of allegations of large-scale loss of human life. There was a warning akin to presentiment however, that if the Security Council refuses or is unable to act States may take matters into their own hands. This approach was not supported by the report but it was identified as a practical result of Security Council inaction ¹²⁹

The issue of intervention on the basis of a just cause was raised and the bases that are set out reflect the original Just War principles found in the work of St Augustine and Grotius.¹³⁰ The criteria for a just war are that it is declared by a legitimate authority, the cause must be just, the intention must be just, not just expedient, force can only be used after all other reasonable means have failed, there must be a reasonable hope of achieving an outcome, the amount of force must be proportional to the threat faced and the outcome should bare a close relationship to the cost.

¹²⁸ Id at.29.

¹²⁹ Id at 32-37.

¹³⁰ ICISS 2001 at 32-35. See also Frame, T. "The Melbourne Anglican" http://www.media.anglican.com.au/tma/2003/03/war_yes.html (31 March 2003); Frame, T. "Living by the Sword: The Ethics of Armed Intervention" (2004); Chesterman, S. *Just War or Just Peace?: Humanitarian Intervention and International Law* (2002).

Responsibility to rebuild

The report was concerned that any international intervention on the grounds of prevention or reaction should be followed by the obligation to rebuild. This was seen as the only way to effect a durable peace. Post intervention strategy must be planned as part of the intervention process. Some of the key elements of post intervention strategy were identified as: security, justice and reconciliation, and economic development.¹³¹

Of significance to this work, the report identifies Chapter XII of the UN Charter as providing a framework to adapt to a UN authority in a collapsed State.¹³² While the basic provisions provide a helpful model, Chapter XII itself prohibits its revival now that all the trustee nations have achieved full sovereignty. It would seem a dangerous process to attempt to invoke Chapter XII rather than rely on a Security Council mandate that has the authority to implement a tailor made solution to a specific situation. Nevertheless the Trusteeship model is a useful model and has a distinct human rights basis thereby supporting the argument that a human rights framework should be used in collapsed State peacekeeping.

Question of authority

Chapter six¹³³ of the report examined the source of authority to intervene in the affairs of a sovereign State where the criteria for intervention had been met. The report identified the non intervention principles set out in Articles 2(4) and 2(7) of the

¹³¹ Above n 120 at.39-43.

¹³² Id at 43.

Charter and the provisions in Chapter VII which permit the Security Council to intervene, if necessary with force, in the event of a threat to peace and security. Although noting the Article 51 provisions for the use of force in self-defence, the report dismisses these provisions as irrelevant to the purposes of the responsibility to protect. Chapter VIII provisions for regional action are also noted but identified as subordinate to the Security Council, the authorisation of which is required, albeit after the event in certain situations.¹³⁴

By examining the legal capacity and responsibilities of the Security Council to uphold international peace and security the report concluded that where domestic authorities, either alone or in conjunction with external agencies, had failed in their responsibility to act then that responsibility fell to the Security Council. Where the Security Council fails to take action the General Assembly may be called upon to fill the void and in the last resort regional organisations under Chapter VIII must step in, if necessary with *ex post facto* approval from the Security Council. However, if the Security Council fails to act, particularly in ‘conscience-shocking’ situations then the report warned that other agencies may act with the risk that the activities are not conducted for the right reasons or commitment to precautionary principles. Secondly, and perhaps most portentously, the report warned that if the Security Council failed to act and successful military action was taken by others, observing the criteria for intervention set out in the report, then there might be enduring serious consequences for the credibility and position of the UN itself.¹³⁵ While outside the scope of this work, it is difficult not to wonder if this is not the situation faced as a result of the second Gulf War.

¹³³ Id at 47-55.

¹³⁴ For example, ECOWAS intervention in Liberia in 1992 and Sierra Leone in 1997.

Operational dimension

The report distinguished military intervention for human protection purposes from armed conflict and traditional peacekeeping on the basis that there were different objectives to such interventions. Armed conflict is aimed at destruction or defeat. Traditional peacekeeping had consisted of monitoring, supervision and verification of ceasefires and peace agreements, with consent, neutrality and the use of force only in self defence as the core operating principles. Enforcement action had consistently been performed by coalitions of willing States rather than the UN directly. The report saw human protection as requiring a new approach.¹³⁶

The report identified the need for preventative deployments where robust use of force options were made available. Deployments must be planned in detail and integrated into the broader political effort, including detailed post intervention strategies. The report emphasised the importance of coalition building between the intervening States, common objectives based on the responsibility to protect principles, a clear and unambiguous mandate and the commitment of resources for the full term of the operation, including the rebuilding phase.¹³⁷

Conditions for the successful conduct of interventions were identified in the report. A clear and strong command structure free from political micro management was the first requirement. The development of good quality civil-military relations was identified as imperative to the effective provision of support to the people. Rules of

¹³⁵ Above n 120 at.55.

¹³⁶ Id at.57.

engagement tailored to the operational environment and drafted so as to reduce the requirement for individual States to add national clarifications. The principle of proportionality was given particular emphasis so as to restrain excess but also to provide for sufficient force to avoid paralysis of a force trapped on the ground by superior firepower or an inability to seize the initiative. Control of troops was emphasised and the report called for the development of national codes of conduct to avoid discredit being brought on the operation through the unchecked misconduct of the troops. Finally, the report addressed the importance of limiting casualties and development of good media relations, again emphasising the constant requirement for planning.¹³⁸

Following military intervention the report identified the need for the rapid transition to civil administration and expression of the principle of self-determination in the form of free and fair elections. Notably, the report identified the role of the military as the ‘only viable instrument’ in the re-establishment of the national law enforcement.¹³⁹

Five protection tasks were identified after enforcement. These were: protection of minorities; security sector reform, including the rebuilding of police and judicial functions; disarmament, demobilisation and reintegration; protection tasks such as mine clearance; finally, pursuit of war criminals.

¹³⁷ Id at 58-60.

¹³⁸ Id at 61-64.

¹³⁹ Id at 65.

In concluding the chapter, the Secretary-General was urged to take steps to initiate a doctrine for intervention on the basis of human protection based on the principles set out in the report.¹⁴⁰

The way forward

The report concluded by identifying that the concept of the responsibility to protect resolves the past conflict between intervention and State sovereignty. A consensus was identified that the responsibility of a State to protect its people from killing and other grave harm underpinned the very concept of sovereignty, and where that obligation could not be fulfilled then intervention by the community of States may be warranted. The key issues for intervention were the mobilisation of domestic and international political will to take action. For the future, the report recommended the acceptance by the General Assembly of the concept of the responsibility to protect as a sovereign responsibility of States. This responsibility was based on: sovereign responsibility; responsibility of the community of States to prevent, react and rebuild; definition of a threshold justifying military intervention; and the precautionary principles that must be met to justify military intervention. It recommended that the Security Council embrace and adopt the guidelines for military action and that the permanent members abstain from use of the veto in matters of intervention for human protection purposes. Finally the report recommended that the Secretary-General work towards the adoption and implementation of the report and its recommendations.¹⁴¹

¹⁴⁰ Id at 66-67.

¹⁴¹ Id at 69-74.

Although the report put the primary responsibility to protect those living under its sovereignty on the State concerned it also placed an obligation on the community of nations to act where the domestic State was unable or unwilling to do so. This represented a major shift in the rationale that could underpin the deployment of a peacekeeping operation.

In Larger Freedom

Although this work looks primarily at peacekeeping from 1949 to 2003 it would be remiss to omit the 2005 *In Larger Freedom*¹⁴² report. The report was primarily aimed at recommending structural changes to the Security Council and refocusing on the priorities set out in the report. There was also a proposal to abolish the “enemy clauses,” the Trusteeship Council, and the Military Staff Committee from the Charter, the latter proposal representing a tacit acceptance that the Article 43 agreements will never be implemented.

As requested in the *Responsibility to Protect* there was a call for acceptance and adoption of the *Responsibility to Protect* recommendations and a commitment to collective security. In relation to a commitment to the collective security regime of the Charter, the Secretary-General appealed to the Security Council to specifically examine the issue of the use of force and clearly articulate the basis for its use.

¹⁴² Annan, K. <http://www.un.org/largerfreedom.htm> (16 Jun 2005).

In Larger Freedom makes proposals for the UN to combat the causes of threats to international peace and security. In particular it proposes action be taken to reduce poverty, criminal activity and for the Members to work together to eliminate terrorism by denying terrorists access to resources and support.

Of particular significance to this work, the report specifically identified human rights as the foundation and framework of Charter and therefore UN activities. The Secretary-General made it clear that it is under this framework that the conditions can be created to establish and maintain justice and the rule of law.¹⁴³ It could be argued that as human rights is the framework for the Charter then international human rights law must be the legal framework for activities conducted under it such as peacekeeping and peacebuilding.

As the report covers a number of issues that are concerned with the far reaching challenges to world peace, it is intended to examine here only those parts of the report that are directly relevant to peacekeeping.

Peacekeeping

The report did not call for the revitalisation of Article 43 as the first report, *An Agenda for Peace* had done. Instead there is a recommendation that Member States form strategic reserves that can be called upon to deploy rapidly for peacekeeping operations. The report noted the increasing success of regional peacekeeping operations and recommended that a mechanism be set up so that regional groups such

¹⁴³ Id at para 13.

as the European Union and African Union could work together with UN peacekeepers.¹⁴⁴ In effect this recommendation amounted to the identification of a requirement for interoperability between the UN and the regional peacekeeping organisation. From a Charter perspective this approach would lead to a seamless continuum between Chapter VI or VII operations and Chapter VIII operations. This approach also appears to be a shift away from the Boutros-Ghali reports that envisaged a clear separation between regional and UN peacekeeping.

In Larger Freedom drew attention to the importance in peacekeeping of the rule of law and the UN commitment to the implementation of human rights and international law as well as basic standards of due process. The Secretary-General made a commitment to deal with individual members of contingents behaving improperly and called on Member States to do the same within the contingents.¹⁴⁵ The report does not develop the theme of the implementation of law by peacekeepers but the conclusion could be drawn that the report intended that where necessary peacekeepers would be involved directly in setting up and administering a justice system. If this were not the case then it would not have been necessary for the report to expressly direct peacekeepers to adhere to “the basics standards of due process”. This part of the report may support the assertion made in later chapters of this work that peacekeepers have a duty to administer justice where the domestic system has failed and is also consistent with the *Responsibility to Protect*.

¹⁴⁴ Id at para 112.

¹⁴⁵ Id at para 113.

Peacebuilding

The report noted that there is a gap in the machinery of the UN with regard to the process of Peacebuilding.¹⁴⁶ While the UN is able to negotiate peace agreements and deploy peacekeepers there is no mechanism to continue the process through to completion. The report therefore recommended the establishment of a Peacebuilding Support Office to undertake this role. One of the many functions of this office (which included the coordination of troop contributions) would be to make “early efforts to establish the necessary institutions.”¹⁴⁷ This would include the institutions for the administrations of justice and indeed the report made specific reference to the role of the Office in strengthening rule-of-law institutions. Such institutions would have to be sustainable through to stable domestic State administration. The report clearly intended that if necessary Member States could request support before conflict erupted and the State collapsed.

Use of Force

The report did not deal specifically with the use of force in peace enforcement;¹⁴⁸ it referred to the use of force generally, from Member States under Article 51 through to the UN mandated Chapter VII operations. The report picked up on a theme from *Responsibility to Protect* in recommending that the Security Council determines a method for establishing the principles to be applied in determining the level of response required to a threat. The aim was for the Security Council to be more transparent in its determination of a situation requiring the use of force.

¹⁴⁶ Id at para 114.

¹⁴⁷ Id at para 115.

Conclusion to In Larger Freedom

The *In Larger Freedom* Report builds on its predecessors in the area of peacekeeping while recognising the realities of the extant world situation. Unlike the Boutros-Ghali reports, there is no implied hierarchy of deployments as between regional Chapter VIII operations and UN operations. *In Larger Freedom* prefers an approach in which regional and UN operations can operate together to achieve the desired result.

The recommendation for the abolition of the Military Staff Committee is a tacit acknowledgement that the Article 43 provisions would never be set in place. In the event that the report's call for strategic national forces was implemented, this would effectively replace the Article 43 force. In this way the report can be seen to support the original concept of the Charter and achieve the intent by other means.

The recommendation for a Peacebuilding Office is of considerable significance to the development of a coherent process to bring collapsed States back to functionality. It would be the element in the Peacebuilding process that would determine which legal framework would be used to rebuild on and then coordinate the process through to hand back to the reconstructed domestic State. If the Peacebuilding Office could be implemented it would be invaluable to States concerned over the lack of a coherent exit strategy that often plagues UN peacekeeping operations.¹⁴⁹

¹⁴⁸ Id paras 122-126.

¹⁴⁹ See for example the addresses by the Australian and US Ambassadors to the UN calling for more coherent planning by the UN: Wensley, P. *Open Debate - No Exit Without Strategy* 15 November 2000. www.australia.un.org/unWeb/content/statements/securityCouncil/11.15.2000_SEC.pdf (20 Jun 2005); Holbrook, R, C. *United States Permanent Representative to the United Nations Statement in the*

The process set out in the report would require the Peacebuilding Office to consider which legal framework to apply in reconstructing a State. Given the emphasis in the report on human rights and compliance with the rule of law it is wholly consistent with the approach of the report that international human rights law would be the legal framework to be applied.

Conclusion

Articulation by the UN of the place that peacekeeping should hold as a response mechanism to threats to international peace and security began with the vision of Boutros-Ghali in *An Agenda for Peace*. The vision for peacekeeping in this report was based essentially on the notions of traditional peacekeeping with the consent of the parties as a vital ingredient for success. As times changed and the world became a less stable place the concept of peacekeeping became more complex and the operations were no longer restricted to single functions. Multidimensional operations mingling civilian and military branches, traditional observer elements integrated with robustly mandated sizeable forces capable of enforcing the mandate became common.

The consent of the parties was seen by Boutros-Ghali as almost indispensable for peacekeeping operations. Through the reports it can be seen that this approach has changed over time and that there has been a shift towards the position that it is the responsibility of the State, and if the State fails then of the international community to

Security Council on "Exit Strategies" in Peacekeeping Operations 15 November 2000.
http://www.un.int/usa/00_173.htm (20 Jun 2005).

protect, prevent, react and rebuild. Where necessary the international community, through the Security Council, will act without the consent of the State.

The position of sovereignty has seen a change in fortunes over the period of peacekeeping development. Boutros-Ghali saw sovereignty as receding under the tide of Security Council initiated intervention, despite his emphasis on the need for consent in peacekeeping operations. *The Responsibility to Protect* had a less passive notion of sovereignty, with an emphasis on the independence of States and an obligation to maintain the protections encompassed by the concept of human security. Rather than have the State competing with the Security Council for the right to deal with State citizens, *The Responsibility to Protect* preserved respect for the State and only sought intervention where specific State obligations were breached. This theme is again reinforced by *In Larger Freedom* where State responsibilities were emphasised in the context of working within the collective security model set out in the Charter.

The *Brahimi Report* was less concerned with the theoretical position of peacekeeping and was concerned primarily with the practical conduct of peacekeeping operations. Although the Rapid Reaction Force was declared operational¹⁵⁰ it is yet to be genuinely tested. It also runs the risk of competing for military resources with the European Union and NATO.¹⁵¹ Progress in other areas stimulated by the report has slowed; for example, no further progress has been made with regard to the Stand-by Arrangements.¹⁵² Many of the practical arrangements for peacekeeping have also been slow to materialise, in particular the UN mandates authorising force under

¹⁵⁰ <http://usinfo.state.gov/is/Archive/2004/Jun/29-182400.html> (7 Jul 2005).

¹⁵¹ <http://forums.military.com/eve/ubb.x/a/tpc/f/8001934822/m/41100372713> (7 Jul 2005).

Chapter VII remain very general in character, although they do now tend to be clear that Chapter VII is the basis of the mandate.

In Larger Freedom built on the *Brahimi Report* in that it provided the most coherent strategy to date for peacekeeping by proposing the formation of a mechanism to integrate the different stages and responses required to rebuild a State from collapse to independent action. If adopted, the Peacebuilding Office will be responsible for identifying from the outset how a State could be rebuilt and coordinating the elements involved in achieving this goal. The planning and implementation will for the first time run from troop insertion through rebuilding bureaucracy to handover of a functioning independent domestic State. This process would overcome the concerns seen in early reports for stagnation in peacekeeping.

The reports set out in this chapter demonstrate that peacekeeping from a UN perspective has changed significantly over the years. Although the first of the reports considered in this chapter was presented fairly late in the development of peacekeeping, there has clearly been a shift over the past 13 years in the UN approach to the use of peacekeeping as a tool. Peacekeeping has moved from a discreet activity used to monitor ceasefires or elections and on occasion to act as a force capable of intervening between parties in order to prevent armed conflict to an element of an integrated plan to recover a failed State, where necessary by temporarily undertaking activities such as the administration of justice normally associated with sovereignty.

¹⁵² <http://www.un.org/Depts/dpko/rapid/StatusReport.html> (7 Jul 2005).

As demonstrated by this and the previous chapter, peacekeeping has grown over time to become a key tool of the UN. Its development has been watched, documented and debated within the UN and in the wider community. The next two chapters of this work move from a theoretical review of peacekeeping and examine the practicalities of peacekeeping and the legal frameworks that have been applied in Chapter VI and Chapter VII UN peacekeeping operations.

CHAPTER THREE

Chapter VI Peacekeeping Operations

Introduction

The previous chapters of this work looked at the concept of peacekeeping, what it is and how it has developed from a theoretical perspective. From this examination it has been established that the UN has engaged in peacekeeping from two Chapters of the UN Charter. The original Chapter VI peacekeeping described in chapter one of this work has over time been superseded by the advent of more complex operations with their legal authority derived from Chapter VII. However, peacekeeping based on a Chapter VI mandate remains part of the peacekeeping responses available to the UN and as such is relevant to the inquiry into whether international human rights law or international humanitarian law is the law applicable in peacekeeping operations in collapsed States. This chapter will examine the Chapter VI UN operations from 1946 to 2003.

While the majority of Chapter VI operations will be dealt with briefly to identify certain legal principles and establish that they do not assist in determining the legal framework to be applied in collapsed State peacekeeping, the 1962 operation in West Irian, the 1989 operation in Namibia and the 1992 operation in Cambodia will be examined in more detail as they raise interesting issues concerning the use of the Trusteeship provisions as a model in collapsed State peacekeeping operations.

In order to set out the contribution made by Chapter VI operations this chapter is divided into two parts. The first part will examine Chapter VI operations that did not use the Trusteeship as a model and draw conclusions from the reliance on host State

consent and the resultant agreements that are set in place to regulate the interaction of peacekeepers and the local population. The second part examines in more detail the legal framework applied in West Irian, Namibia and Cambodia.

Peacekeeping under Chapter VI

In chapter one of this work it was established that over time peacekeeping has become more complex and moved from the traditional, or first generation, peacekeeping through a continuum to complex or second generation peacekeeping. Although second generation peacekeeping is more commonly associated with Chapter VII operations it will become evident that Chapter VI operations have also become more complex over time and become increasingly integrated into Chapter VII operations. Despite this increased complexity Chapter VI operations have still maintained the core requirements of impartiality as between the parties, use of force only in self defence and consent from the domestic State or States.

By considering how these principles have been applied in Chapter VI peacekeeping it will be demonstrated that the UN is not in a position to impose a legal framework on this style of operation. However, an extant legal framework can be adapted through use of agreements between the UN and the host State. The Chapter VI operations in this part will be considered chronologically so that the emerging trend towards complex operations can be clearly seen.

Greece 1946 UNSCOB

The first peacekeeping mission undertaken under the United Nations was in Greece in 1946. The mission was not initially military in character but comprised a Commission of Inquiry into the Greek allegation that neighbouring States were compromising its northern borders and were also assisting guerrillas within Greece.¹ Although the Commission made a number of recommendations to the Security Council these could not be implemented due to the consistent use of the veto by the USSR, whose satellite States, Yugoslavia and Albania, were alleged to be involved. With no way around this impediment in the Security Council the matter was brought to the General Assembly and in October 1949 the United Nations Special Committee on the Balkans (UNSCOB) was founded. The Committee was empowered to investigate the issues, report on the situation and provide the parties with mediation assistance.²

By 1952 the situation had settled to the extent that a subcommission of the Peace Observation Commission³ replaced UNSCOB. This was in turn terminated in August 1954 with the UN withdrawal from Greece.⁴

UNSCOB made recommendations and reports to the General Assembly.⁵ Analysis of the recommendations leads to the conclusion that the committee was acting on the

¹Fabian, L. *Soldiers Without Enemies: Preparing the United Nations for Peacekeeping*. (1971) at 261.

² Ibid.

³ A body established by the General Assembly under the Uniting for Peace Resolution.

⁴ Above n 1.

⁵The report of the Australian delegations recording the recommendations of the committee to the General Assembly is recorded in the Department of Foreign Affairs and Trade Historical Publications. Cablegram 87, LONDON[1], (14 September 1948): <http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/vVolume/CB0713C44AA7820CCA256CD900161913> (10 Mar 2005).

basis of Article 35 of the Charter⁶ and under the powers of the General Assembly found in Article 11. This conclusion is supported by the rejection by the Security Council at its 188th meeting on 19 August 1947 to specifically bring the problem under Chapter VII.⁷

Although the make up and function of UNSCOB would not today be immediately recognised as a peacekeeping operation, it is included here because it was the step that paved the way for subsequent military operations. Peacekeeping had been born and over the remainder of the twentieth century it would mature into a useful tool and arguably the most universally recognised face of the UN.

Palestine 1949 UNTSO

The British mandate in Palestine expired in May 1948. Prior to this the UN attempted to facilitate a Jewish-Arab settlement on the future of Palestine; however, these efforts were unsuccessful and when on 15 May 1948 the provisional Israeli government declared independence the neighbouring Arab States invaded Palestine.⁸ After considerable diplomatic efforts by the UN, an armistice was concluded and agreements were entered into for the positioning by the Security Council of the United Nations Truce Supervision Organisation (UNTSO), which was to observe and report on the ceasefire and armistice agreement.⁹

⁶ <http://www.un.org/aboutun/charter/> (10 Mar 2005).

⁷ United Nations Report http://untreaty.un.org/cod/repertory/art40/english/rep_orig_vol2-art40_e.pdf (10 Mar 2005).

⁸ Above n 1 at 261.

⁹ Id at 262.

UNTSO was the first clearly identifiable peacekeeping operation¹⁰ and was established 11 June 1948. It is one of the UN's longest serving missions, it continues to the present day. The tasks performed by UNTSO have varied over the years with its present concerns being to assist with other missions in the Israeli – Syria sector, the Golan Heights and in the Israeli – Lebanon sector. UNTSO also has a level of presence in the Egypt – Israeli sector in the Sinai and offices in Beirut and Damascus.¹¹

The UNTSO operation was established as a traditional peacekeeping operation. However, it was made clear in the Security Council's call for the cessation of hostilities:

that if the present resolution is rejected by either party or by both, or if, having been accepted, it is subsequently repudiated or violated, the situation in Palestine will be reconsidered with a view to action under Chapter VII of the Charter.¹²

The Israelis indicated that they were prepared to abide by a prolonged truce in Palestine but the Arab League rejected the Security Council's approaches. The Security Council did consider whether Chapter VII action was necessary. In Security Council Resolution 54¹³ the Security Council expressly found that there was a "threat to the peace within the meaning of Article 39 of the Charter of the United Nations". The Security Council at this stage was content to order the cessation of military action

¹⁰ Golding, M. *Peacemonger*. (2002) at 13.

¹¹ United Nations *The Blue Helmets* (3rd ed 1996) at 691.

¹² SC Res. S/801 29 May 1948; See also Higgins, R. *United Nations Peacekeeping 1946-1967: Documents and Commentary*. (1970) at 15.

under Article 40 and threaten further action under Chapter VII rather than to issue a broad mandate to UNTSO. The crisis seems to have been averted by the strong words rather than by strong action from the Security Council. The tone of Security Council Resolution 73¹⁴ is quite different from its predecessors with high hopes for the success of the armistice and directions to the Secretary-General to continue the work of UNTSO in maintaining the ceasefire.

UNTSO is an example of an express rejection by the Security Council of a Chapter VII mandate.¹⁵ The operation was set up as traditional peacekeeping with unarmed observers monitoring the situation. UNTSO continues to have no means of intervening in any conflict between the parties and depends upon consent to continue.

Kashmir 1949 UNMOGIP

Following the partition of India and Pakistan as part of the post World War Two policy of decolonisation, the disposal of Kashmir became a source of considerable tension between the two States due to its incorporation into India despite its having a predominantly Moslem population.¹⁶ Allegations were made of raids and incursions and the UN responded by sending in the United Nations Commission for India and Pakistan (UNCIP) to investigate, report and mediate between the parties. Once the Karachi agreement had been reached on a ceasefire a traditional peacekeeping operation was commenced by way of an observer group, the United Nations Military

¹³ (1948) of 15 July 1948.

¹⁴ (1949) of 11 August 1949.

¹⁵ Above n 7.

¹⁶ Above n 1 at 262.

Observer Group in India and Pakistan (UNMOGIP).¹⁷ UNMOGIP was positioned in the state of Jammu and Kashmir to supervise the ceasefire that had been agreed between India and Pakistan in the Karachi Agreement. In 1972 an agreement was reached between India and Pakistan to establish a ‘Line of Control’ in Kashmir that “closely followed the ceasefire line established under the Karachi Agreement.”¹⁸

A further disagreement arose between India and Pakistan at this point as the Indian government was of the view that UNMOGIP had effectively been terminated. Pakistan took a contrary view. The Secretary-General made it clear that as far as he was concerned only the Security Council could terminate UNMOGIP and until the Security Council adopted a resolution to that effect, UNMOGIP was to continue.¹⁹ Pakistan has continued to interact with UNMOGIP in the usual manner but India has not and although transport and facilities have been supplied, India does not send reports to UNMOGIP. Despite India’s approach UNMOGIP has not to date been terminated by the Security Council and so continues to function.

Security Council Resolution 47,²⁰ which enlarged UNCIP, arguably²¹ made an Article 39 finding by stating “that the continuation of the dispute is likely to endanger international peace and security”. Despite what appears to be an activation of Chapter VII the Security Council has opted only to place an observer group on the ground.

It appears that from the earliest days of peacekeeping the difficulty was not in the Security Council making an Article 39 finding, as has been suggested by the

¹⁷ Ibid.

¹⁸ UN. <http://www.un.org/Depts/DPKO/Missions/unmogip/unmogipB.htm> (15 Jul 2002)

¹⁹ Above n 11 at 703.

²⁰ (1948) of 21 April 1948.

commentators referred to in chapter one of this work, but in following that finding through with a robust peacekeeping operation.

UNMOGIP could have been an anomaly in the traditional peacekeeping model²² due to the withdrawal of consent by India in 1972. However, India did not make any moves to remove UNMOGIP, continuing to provide logistic support²³ and as a result can be construed as accepting that UNMOGIP is legitimately acting under Chapter VI despite withdrawal of consent.

Egypt 1956 UNEF I

A dispute resulting in the use of force developed between Israel, France, Britain and Egypt due to the perceived Egyptian threat to the Suez Canal. The Security Council was unable to act due to the use of the veto by Britain and France so the provisions of the Uniting for Peace Resolution²⁴ were invoked and the matter transferred to the General Assembly.²⁵

As a result of General Assembly resolutions and recommendations, agreement was reached for the insertion of the United Nations Emergency Force (UNEF I).²⁶ This operation consisted of a relatively large military force of some 6,000 observers at its

²¹ It is arguable because of the use of the word “likely” rather than a clear finding of a threat.

²² Consent is a key element in the traditional peacekeeping model as per chapter one of this work.

²³ <http://www.gmu.edu/departments/t-po/resource-bk/mission/unmogip.html> (10 Mar 2005).

²⁴ The Uniting for Peace Resolution was passed by the General Assembly as a method of ensuring that where the Security Council was rendered ineffective through use of the veto then the General Assembly could take action to ensure that the responsibilities of the world community towards peace and security were met.

²⁵ Above n 1 at 262.

²⁶ General Assembly Resolution 1000 (ES-I), 5 November 1956.

height.²⁷ The function of the operation was to ensure the cessation of hostilities and the withdrawal of forces by France, Israel and the UK from Egypt's territory. After withdrawal the force was to act as a buffer between Israeli and Egyptian forces.²⁸ The observers operated between Israel and Egypt until Egypt requested their withdrawal in May 1967²⁹ and the operation was formally terminated in June of that year.³⁰

UNEF I was an immensely important operation due to its establishment being an act of the General Assembly and not the Security Council. The right of the General Assembly to establish a peacekeeping operation was challenged in the *Certain Expenses Case*.³¹ However, the ICJ upheld the right of the General Assembly to establish peacekeeping operations as an implied power found under the UN Charter. Operations established by the General Assembly are limited in character by the Charter. The General Assembly does not have the powers set out in Chapter VII, these being exclusively the province of the Security Council. As a result it was impossible for UNEF I to have powers of coercion.

Lebanon 1958 UNOGIL

In May 1958 Lebanon made accusations against the United Arab Republic (Egypt and Syria) regarding its interference in internal Lebanese affairs. Alternative diplomatic efforts were unsuccessful so following Security Council Resolution 128 of 11 June

²⁷ Above n 11 at 693.

²⁸ Ibid.

²⁹ Above n 1 at 263.

³⁰ Above n 27.

³¹ *Certain Expenses of the United Nations Case* Advisory Opinion ICJ Rep 1962 151. This challenge will be discussed in chapter seven of this work.

1958³² the Security Council sent in the United Nations Observer Group in Lebanon (UNOGIL).³³ There was no Article 39 finding so that the operation was authorised under Chapter VI. The operation was formed to confirm that weapons, personnel or other military support was not being infiltrated across the Lebanese borders.³⁴ Following considerable diplomatic and military activity in the region matters were sufficiently resolved by mid-December for UNOGIL to be terminated. The operation was formally concluded on 9 December 1958.³⁵

Yemen 1963 UNYOM

During 1962 civil war raged in Yemen with royalists ranged against republicans. Foreign States supported both sides with Saudi Arabia backing the royalists and the United Arab Emirates behind the republicans. However by early 1963 a concerted diplomatic effort by the UN and the USA resulted in a disengagement of forces.³⁶

Under the agreement reached between the parties demilitarised zones were formed and these were to be policed by the United Nations Yemen Observer Mission (UNYOM), which was formed by Security Council resolution 179 of 11 June 1963.³⁷

³² [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/128%20\(1958\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/128%20(1958)&Lang=E&Area=RESOLUTION) (10 Mar 2005).

³³ Above n 1 at 263.

³⁴ http://www.un.org/Depts/dpko/dpko/co_mission/unogilmandate.html (10 Mar 2005).

³⁵ Ibid.

³⁶ Above n 1 at 264.

³⁷ Above n 11 at 702.

Unfortunately compliance with the agreement was poor and without the ability to enforce compliance UNYOM was helpless. As a result the mission was terminated in September 1964.³⁸

Despite the tensions that eventually led to the termination of UNYOM, the Security Council established the operation as a Chapter VI observer operation. There was no Article 39 finding in the establishing Resolution.

Dominican Republic 1965 DOMREP

The operation in the Dominican Republic represents one of the smallest, most successful and relatively short lived of the UN peacekeeping operations. The operation's formal title was Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP). It was established by Security Council Resolution 203 of 14 May 1965 with the purpose of observing a ceasefire that had been reached between two de facto authorities in the Dominican Republic. The military element consisted of a Major-General Military adviser and two military observers. The operation was concluded on 22 October 1966 following agreement on a new government in the Dominican Republic.³⁹

Not surprisingly, given the purpose of DOMREP and its staffing, DOMREP was a classic traditional peacekeeping operation. It was designed and conducted merely to establish a UN presence, which in the circumstances was sufficient to achieve the purpose of a peaceful reconstitution of government.

³⁸ Above n 1 at 264.

India and Pakistan 1965 UNIPOM

In August 1965 armed conflict broke out between India and Pakistan. With the support of the Superpowers, the Security Council demanded in the strongest language that the parties effect a ceasefire immediately. Three days later the parties put the ceasefire into effect.⁴⁰

UN observers were already operating in Kashmir as UNMOGIP and these forces were supplemented and strengthened in order to patrol the borders of India and Pakistan in areas other than Jammu and Kashmir where UNMOGIP continued its operations. The operation that supplemented UNMOGIP was called the United Nations India-Pakistan Observation Mission (UNIPOM). UNIPOM was created by Security Council Resolution 211, which was adopted on 20 September 1965.⁴¹ It remained in place until after the withdrawal of Indian and Pakistani troops to those areas held prior to 5 August 1965. Once the withdrawal was complete UNIPOM was terminated.⁴² The operation lasted from 23 September 1965 to 22 March 1966.⁴³

UNIPOM was a traditional peacekeeping operation conducted under Chapter VI of the Charter. The use of a large force to oversee the withdrawal was effective despite the restrictions on the use of force inherent in a Chapter VI operation. Unfortunately the withdrawal of UNIPOM did not permanently solve the underlying issues in Kashmir and further conflict erupted.

³⁹ Above n 11 at 771.

⁴⁰ Above n 1 at 265

⁴¹ Above n 11 at 705.

⁴² Ibid.

Egypt 1973 UNEF II

The ceasefire between Israel and her Arab neighbours did not resolve into a lasting peace. Tensions continued to mount and on 6 October 1973 in an unexpected move Egypt advanced into Israel across the Suez Canal while Syria simultaneously advanced from the Golan Heights. Although the USSR and US were able to agree regarding a call for a ceasefire no agreement could be reached in the Security Council on the deployment of peacekeepers. The USSR was willing to respond to a call by Egypt for Soviet and US peacekeepers but the US was not. Finally, following a tense period of posturing between the superpowers, agreement was reached on a new UN peacekeeping force, which was to be known as the second United Nations Emergency Force (UNEF II). With the deployment of UNEF II on 25 October 1973 and the establishment of a fresh ceasefire the crisis between the superpowers was resolved without resorting to armed conflict.⁴⁴

The mission of UNEF II was to supervise the fresh ceasefire that had been negotiated between Egypt and Israel. Following agreements reached between the parties on 18 January 1974 and 4 September 1975 UNEF II was to supervise the redeployment of troops and to work in the buffer zones that had been agreed by Egypt and Israel.

UNEF II was formally terminated on 24 July 1979 when its mandate lapsed following the implementation of the peace treaty concluded between Egypt and Israel.⁴⁵ As with UNEF I, UNEF II was established as a traditional peacekeeping operation.

⁴³ Ibid.

⁴⁴ Above n 11 at 59.

⁴⁵ Id at 70.

Syria 1974 UNDOF

While UNEF II was conducting operations on the borders between Egypt and Israel no new force had been deployed to the Syrian sector. Although some peacekeeping observer posts were established tension remained high and an escalating pattern of ceasefire violations emerged. Eventually the US Secretary of State conducted a diplomatic mission to the area, which resulted in an Agreement of Disengagement between Israel and Syria on 31 May 1974. The United Nations Disengagement Observer Force (UNDOF) was established on 3 June 1974 under the agreement and began operating in the Syrian Golan Heights maintaining the ceasefire between Israel and Syria. As part of its duties UNDOF was required to supervise areas of separation that had been created by the Agreement on Disengagement.⁴⁶

UNDOF continues to function in its role of supervision. A new priority for the operation, reflecting the emergence of different world interests, is to ensure that the force itself does not contribute to environmental degradation of the area.⁴⁷

Consideration of environmental factors is an additional legal consideration for all military operations. Although in certain circumstances international law may operate to diminish environmental obligations⁴⁸ tighter domestic and international environmental regimes mean that compliance with environmental law will be a

⁴⁶ Id at 73.

⁴⁷ UN <http://www.un.org/Depts/DPKO/Missions/undof/undofB.htm> (10 Jul 2002).

⁴⁸ For an example of the effect of international armed conflict on environmental law see Boelaert-Suominen, S. "International environmental law: the effect of marine safety and pollution conventions during international armed conflict" (December 2000) *Newport Papers* No. 15. Chapter VI operations will usually be performed where there is consent. Where the host State has treaty obligations it will be the host State's responsibility to ensure that it enters into an agreement with the UN to ensure that the force does not breach those obligations.

significant consideration in the planning and implementation phases of future operations.

UNDOF was set up as a Chapter VI operation by Security Council Resolution 350 (1974) of 31 May 1974 and has continued as such through its life span. UNDOF was intended merely as an observer mission with no references made to the restoration of international peace and security. The Security Council left the detailed arrangements to the Secretary-General, not feeling it necessary to incorporate the details of the mandate into the resolution.

Lebanon 1978 UNIFIL

The borders of Israel were very volatile in the 1970s. UN peacekeeping operations were being planned and undertaken in Syria and Egypt with tensions mounting along the border with Lebanon. The Palestine Liberation Organisation (PLO) were operating across this border and in 1978 claimed responsibility for an attack which killed a number of Israeli civilians. The Israeli response was swift and within a few days of the attack Israel had occupied a large part of southern Lebanon.

The Lebanese government protested to the UN on the grounds that it had nothing to do with the PLO attack. In response to the Lebanese protest the Security Council adopted resolutions calling for the withdrawal of Israel and the establishment of the United Nations Interim Force in Lebanon (UNIFIL). UNIFIL deployed its first troops into the area on 23 March 1978.⁴⁹

⁴⁹ UN <http://www.un.org/Depts/DPKO/Missions/unifil/unifilB.htm>. (10 Jul 2003).

By June 1982 tensions had increased to a level where Israel felt justified in invading Lebanon. This time the Israelis were not satisfied with limited incursions and pushed through to the Lebanese capital Beirut. UNIFIL personnel remained at their posts and were left behind the Israeli lines to provide what humanitarian assistance and protection they could to the local population. Although Israel carried out a partial withdrawal in 1985, elements of the Israeli Defence Force (IDF) remained in control of an area of southern Lebanon. Although the Security Council issued resolutions demanding an Israeli withdrawal it was not until 25 May 2000 that confirmation was received that Israel had finally complied with the Security Council resolutions.⁵⁰

UNIFIL did not remain static after the Israeli withdrawal. Violations of the ceasefire had been numerous and clearance of ordnance and mines was required for the safety of the local inhabitants as well as for UNIFIL itself. As rear areas were cleared they were handed over to the Lebanese government and UNIFIL reorganised the deployment in the south. UNIFIL remains in place due to the on going, although low level, violations. Tensions remain between Israel and Lebanon, particularly over the activities of Hezbollah so that UNIFIL is likely to remain for the foreseeable future.⁵¹

Security Council Resolution 425⁵² requested the Secretary-General to establish the operation that became UNIFIL. It is interesting that the Security Council called for the foundation of UNIFIL for the purpose of “restoring international peace and security”, but did not go on to make a finding under Article 39 enabling the use of

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² (1978) of 19 March 1978

Chapter VII measures. This appeared again in Security Council Resolution 516⁵³ where condemning the Israeli attacks upon Beirut, it only authorised the Secretary-General to deploy an observer group to monitor the situation around Beirut. Security Council Resolution 517⁵⁴ again demanded an Israeli withdrawal noting the violation of the ceasefire but failed again to make a finding under Article 39 of the Charter. Instead authorisation was given for an increase in the number of observers in Beirut. This became the set pattern for the resolutions relating to UNIFIL. Apart from extending the mandate to include the provision of humanitarian and administrative assistance, the Security Council declined to give UNIFIL the power under Chapter VII to intervene in order to force Resolution compliance by Israel.

As a result of the increasingly complex legal and political environment faced by the operation, UNIFIL is a good example of the more complex Chapter VI operations that the UN began to get involved in as the practice of peacekeeping developed.

Afghanistan 1988 UNGOMAP

Soviet forces moved into Afghanistan on 27 December 1979 on the basis of a claim that the Afghan government had requested their intervention. Almost immediately armed conflict erupted between Soviet forces and the Afghan mujahideen. The UN Security Council commenced discussions over the issue and in January 1980 called for the withdrawal of foreign troops from Afghanistan. A year later in February 1981 the Secretary-General appointed an official to coordinate peace talks aimed at achieving compliance with the Security Council's demand for withdrawal. Talks

⁵³ (1982) of 1 August 1982

continued for a number of years, with a break through only finally occurring due to the Soviet government's need to withdraw its forces back into the Soviet Union. In April 1988 accords were signed between USSR, USA, Pakistan and Afghanistan.⁵⁵

A traditional peace observer operation was requested as an integral part of the peace accords. The Security Council agreed to the operation and on 31 October 1988 adopted Resolution 622 (1988) establishing the United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP). The UNGOMAP operation was to monitor the separation of the parties, the withdrawal of Soviet forces and assist in the repatriation of refugees. Although UNGOMAP was originally expected to operate for only 20 months from the signing of the accords, it was not terminated until 15 March 1990.⁵⁶ UNGOMAP was a traditional peacekeeping operation.

Iran / Iraq 1988 UNIMOG

Armed conflict developed between Iran and Iraq in 1980. Despite calls from the Security Council for a cessation of the violence and a negotiated settlement, the conflict continued with mounting civilian casualties. Through the activities of the Secretary-General an agreement was reached that civilians would no longer be targeted and in June 1984 elements of UNTSO were detached to Baghdad and Tehran to support this agreement. Matters continued to escalate however, with attacks on merchant shipping in the Persian Gulf causing a number of States to provide armed protection to ensure safe passage for their vessels. UN attempts at reaching a settlement were increased and on 20 July 1987 the Security Council issued Resolution

⁵⁴ (1982) of 4 August 1982

598 (1987). This Resolution made an Article 39 finding that the conflict represented a threat to international peace and security. As well as demanding a cessation of the conflict it also called upon the Secretary-General to deploy UN observers.⁵⁷

Talks continued, as did the conflict and it was not until August 1988 that the parties were in a position to receive a peacekeeping operation. Finally on 9 August 1988 the Security Council adopted Resolution 619 (1988) establishing the United Nations Iran-Iraq Military Observer Group (UNIIMOG). UNIIMOG was to monitor the ceasefire and withdrawal of the parties to their pre-conflict boundaries. With the assistance of the prepositioned elements of UNTSO, UNIIMOG was able to deploy on 20 August 1988. While progress was initially good the security situation deteriorated dramatically when Iraq invaded Kuwait in August 1990. However, although ceasefire violations were not uncommon, the Iran-Iraq border was relatively peaceful. The work of UNIIMOG was not complete at the advent of the first Gulf War, which meant that the observers could only work in Iran. However, by February 1991 UNIIMOG reported that it had been informed that both sides had withdrawn in compliance with Resolution 598 (1987). As the UNIIMOG mandate was complete it was terminated on 28 February 1991.⁵⁸

UNIIMOG is an example of the increasingly frequent move by the Security Council to conduct traditional peacekeeping operations in an environment where Chapter VII measures are also being taken.

⁵⁵ Above n 11 at 661-662.

⁵⁶ Id at 662-666.

⁵⁷ Id at 669-670.

⁵⁸ Id at 670-678.

Angola 1988 UNAVEM I / Angola 1991 UNAVEM II / Angola 1995 UNAVEM III

The UN peacekeeping operations in Angola have proved to be successful. Angola was a former Portuguese colony fighting for independence. In 1974 Portugal changed governments and its attitude towards colonialism. In Angola this translated into a move to support independence by reaching an agreement for government between the three Angolan liberation movements: the Movimento Popular de Libertacao de Angola (MPLA), the Frente Nacional de Libertacao de Angola (FNLA) and the Uniao Nacional para a Independencia Totalde Angola (UNITA).⁵⁹

Although agreement was initially achieved this was short lived and armed conflict erupted with the different factions receiving support from States such as Cuba, South Africa, USA and USSR. By November 1975 MPLA found itself strong enough to declare the Peoples Republic of Angola. MPLA received continued support from the USSR and Cuba while UNITA, the only other viable military group remaining, received backing from the USA and South Africa. As the Cold War began to fizzle out Soviet and Cuban commitment to Angola waned. Following delicate international negotiations, agreement was reached for the withdrawal of foreign troops from Angola. On 20 December 1988 the Security Council adopted Resolution 626 (1988) establishing the United Nations Angola Verification Mission (UNAVEM I) to monitor the withdrawal of Cuban troops from Angola.⁶⁰

UNAVEM I was clearly a Chapter VI operation. It was traditional in character, in that it was a monitoring task.

⁵⁹ Id at 233.

Progress towards peace in Angola continued. A ceasefire was effected in May 1991 and the government of Angola requested that the UN verify the implementation of the peace agreements. On 30 May 1991 the Security Council responded by passing Resolution 696 (1991) establishing UNAVEM II. UNAVEM II was to verify and report on the implementation of the Angolan peace agreements.⁶¹

Although established under a separate Resolution with an amended mandate, UNAVEM II was established under the same Chapter VI framework as its predecessor. Where UNAVEM I was tasked with observing troop withdrawal UNAVEM II was concerned primarily with monitoring and reporting on the ceasefire and disarmament. By Security Council Resolution 747 (1992)⁶² the mandate was enlarged to include monitoring Angolan elections.

The elections were conducted peacefully but UNITA was not prepared to accept the result and launched a State wide campaign against local government administrative structures. By the end of October 1992 the UN received reports of widespread resumption of hostilities. With UN negotiation a further ceasefire was agreed, which came into effect on 2 November 1992 and was monitored by UNAVEM II. At the end of the month the ceasefire broke down and the return to hostilities became widespread. A humanitarian disaster threatened as large segments of the civilian populations were dislocated by the conflict. Although it was suffering from attacks by UNITA rebels, UNAVEM II was repeatedly extended on its Chapter VI mandate.

⁶⁰ <http://www.un.org/Depts/DPKO/Missions/Unavem2/UnavemIB.htm> (12 Jul 2002).

⁶¹ <http://www.un.org/Depts/DPKO/Missions/Unavem2/UnavemIIB.htm> (13 Jul 2002)

⁶² 24 March 1992.

It was not given authority to establish any form of administration to support the rule of law.

On 15 September 1993 the Security Council decided that tougher measures were required against UNITA and adopted Resolution 864 (1993).⁶³ Resolution 864 (1993) changed the environment for UNAVEM II. The Security Council made an Article 39 finding “that, as a result of UNITA’s military actions, the situation in Angola constitutes a threat to international peace and security.” The use of the Chapter VII powers was an attempt to block the sale and supply of arms and materiel to UNITA. The UNAVEM II position was not expressly addressed, leaving a small, dispersed military force in an operation designed under Chapter VI operating in a situation where Chapter VII measures were also being taken.

The UN continued talks in an attempt to bring about a final settlement in Angola. As peace negotiations appeared to bear fruit, the UNAVEM II mandate was again extended and in October 1994 the size of the military monitoring force was raised to 350 personnel. On 20 November 1994 a peace agreement was signed in Lusaka. Although the military situation remained tense it was decided to spread UNAVEM II activities and assess the future requirements for peacekeeping. In December 1994 the UNAVEM II mandate was again extended to monitor the UNITA ceasefire agreement.⁶⁴

In order to further facilitate the peace process an enhanced role for UNAVEM was planned. On 8 February 1995 the Security Council adopted Resolution 976 (1995)

⁶³ Above n 11 at 661-662.

establishing UNAVEM III. The fresh mandate was aimed at assisting compliance with the peace agreements and national reconciliation.⁶⁵ UNAVEM III was a much larger force with some 7,000 military personnel deployed. It was protected by a Chapter VII requirement that all Member States assist by containing UNITA and protecting the security of the operation and its logistics.⁶⁶ As compliance with the agreements was successful UNAVEM III completed its mission and was terminated in December 1996. It was replaced by a fresh monitoring operation, the United Nations Observer Mission in Angola (MONUA).⁶⁷

Although the size of UNAVEM III was a significant increase on its predecessor the framework remained the same. UNAVEM III operated along side Chapter VII measures but was not mandated to conduct an enforcement operation.

The UNAVEM operations are an example of the increasing tendency of the Security Council to favour complex operations in which Chapter VII measures are mixed with Chapter VI peacekeeping operations.

Central America 1989 ONUCA

The United Nations Observer Group in Central America (ONUCA) was established by Security Council Resolution 644 (1989) on 7 November 1989⁶⁸ as a Chapter VI operation to verify compliance by the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Security Council Resolution 1127 (1997) of 28 August 1997.

⁶⁷ http://www.un.org/Depts/dpko/dpko/co_mission/unavem_p.htm. (14 Jul 2002)

These States were to comply with their undertakings to cease aid to irregular forces and insurrectionist movements in the region and not to allow their territory to be used for attacks on other States. In addition, ONUCA played a part in the voluntary demobilisation of the Nicaraguan Resistance and monitored a ceasefire and the separation of forces agreed by the Nicaraguan parties as part of the demobilisation process.⁶⁹

ONUCA was a short-term traditional observer operation.

Western Sahara 1991 MINURSO

One of the potential new States that emerged from the period of de-colonisation in the 1970's was the Western Sahara. Western Sahara has three neighbouring States, Morocco, Mauritania and Algeria. Until 1976 Spain administered Western Sahara but on Spain's withdrawal Morocco and Mauritania both laid claim to it.⁷⁰ These claims were opposed by the indigenous Frente Popular para la Liberacion de Saguia ei-Hamra y de Rio de Ore (Frente POLISARIO). When Morocco moved to incorporate Western Sahara fighting broke out between Morocco and Frente POLISARIO, which was supported by Algeria. The UN attempted to negotiate a settlement with the support of the Organisation of African Unity (OAU), which became involved in 1979 following the withdrawal of the Mauritanian claim.⁷¹

⁶⁸ <http://laws.justice.gc.ca/en/N-5/SI-90-15/text.html> (15 Jul 2002).

⁶⁹ <http://www.un.org/Depts/DPKO/Missions/onusca.htm> (15 Jul 2002).

⁷⁰ The dispute was brought before the ICJ for an advisory opinion, *Western Sahara Case* ICJ Reports 1975 at 12. This case found that the principle of self-determination is part of customary international law.

⁷¹ <http://www.un.org/Depts/DPKO/Missions/minurso/minursoB.htm>. (15 Jul 2002).

Eventually in 1988 Morocco and Frente POLISARIO accepted peace proposals put forward by the UN and OAU. Acceptance of the peace proposals was followed in 1990 by the Secretary-General's report, which *inter alia* recommended a peacekeeping operation to facilitate self-determination by the people of the Western Sahara. The Security Council accepted the Secretary-General's recommendations and issued Resolution 690 (1991)⁷² that established the United Nations Mission for the Referendum in Western Sahara (MINURSO). The plan was for MINURSO to assist in the registration of people eligible to vote in the Western Saharan referendum and to monitor the ceasefire agreement between Frente POLISARIO and Morocco. While the ceasefire has held to a greater or lesser degree there has been significant delay in agreeing the process for identification and its implementation. Currently the process of identification of people eligible to vote is complete but disputes continue regarding the appeal process and the repatriation of refugees. MINURSO continues to monitor the ceasefire and give support to the settlement process.⁷³

MINURSO is an integrated military and civilian organisation. It is clear from an examination of the operation that the military component conducted a traditional observer operation under Chapter VI of the Charter. Consent to the operation was based on the agreement of the parties to the UN and OAU settlement proposals accepted by Morocco and Frente POLISARIO in 1988.

⁷² (1991) of 29 April 1991.

El Salvador 1991 ONUSAL

Civil war supported by neighbouring States had raged in El Salvador between the government and the Frente Farabundo Mart para la Liberacion Nacional (FMLN) for many years before the UN was able to bring the parties to the negotiation table in September 1989. After a complex process, an agreement was reached that aimed to bring democracy and unity to El Salvador. A preliminary agreement was reached on 26 July 1990 that included provision for a UN mission to monitor human rights. After discussion with El Salvador and consideration of the situation the Secretary-General recommended the establishment of a peacekeeping operation to the Security Council. The Security Council responded by passing Resolution 693 (1991),⁷⁴ which established the United Nations Observer Mission in El Salvador (ONUSAL). The peacekeeping operation was to be an integrated military and civilian operation. The initial task of ONUSAL was to monitor the human rights agreements reached by the parties.

Although ONUSAL had deployed, negotiations were still being conducted to achieve a final peace settlement. On 31 December 1991 the parties finally signed a comprehensive settlement and agreed to sign a final peace agreement on 16 January 1992. The signing of the peace agreements required an extension of the ONUSAL mandate to include monitoring of the ceasefire and separation of the armed forces as well as law and order duties for the civilian police element while the national El Salvadorian service was being created. The Security Council responded by passing

⁷³ <http://www.un.org/Depts/DPKO/Missions/minurso/minursoB.htm>. (15 Jul 2002).

⁷⁴ Of 20 May 1991.

Resolution 729 (1992),⁷⁵ which expanded ONUSAL to enable it to perform the additional tasks related to the final peace agreement. The Security Council was to expand the mandate again for ONUSAL in order to assist in elections and stabilisation of the government. ONUSAL was not terminated until April 1995. During this time El Salvador had survived threats to the peace agreement caused by the discovery of arms caches in violation of the agreement and an election, monitored by ONUSAL, that was declared to be free and fair.

ONUSAL is a good example of the type of Chapter VI operation being developed by the UN. The military and civilian components were integrated, with the military predominantly performing a traditional peace observer operation while the civilian elements engaged in peace building. The overall effect was to stabilise the government while remaining impartial and thereby reducing the likelihood of a return to armed conflict. The deployment was consensual as it arose from the peace agreements signed by the parties.

ONUSAL was more dynamic than the traditional model of peacekeeping with a fully incorporation civilian component. It was also mandated to strengthen respect for human rights and assist the domestic authorities to embed human rights into the administration of the law.⁷⁶

Cambodia 1991 UNAMIC

The United Nations Advance Mission in Cambodia (UNAMIC) was established as a traditional peacekeeping operation in order to assist in maintaining the ceasefire

⁷⁵ Of 14 January 1992.

achieved in Cambodia following the horrific regime of Pol Pot and the subsequent civil war. One of its major roles was to train the local population in mine awareness and subsequently to establish a self help training program in mine detection and mine clearance, particularly along repatriation routes, reception areas and resettlement areas.⁷⁷

UNAMIC was essentially a specifically directed humanitarian operation set up under Chapter VI. It was not in a position, either in terms of numbers or equipment, to operate under Chapter VII.

Mozambique 1992 ONUMOZ

Mozambique became independent of Portugal in 1975 as a result of a change in the Portuguese attitude to colonial possessions. Peaceful independence did not last long before the government found itself involved in civil armed conflict with the South African backed Mozambican National Resistance (RENAMO). Finally in 1990 the parties were brought to the negotiating table and after two years of discussion a general peace agreement was signed. Placement of a UN observer operation formed part of the agreement. The Security Council responded by passing Resolution 797 (1992),⁷⁸ which established a traditional peacekeeping operation, the United Nations Operation in Mozambique (ONUMOZ). It was established as a peace observer operation to monitor the ceasefire, assist in demobilisation, recovery of weapons, oversee elections, assist UNHCR in their humanitarian mission and assist in the

⁷⁶ Garcia-Sayan, D in Henkin, A (ed) *Honoring Human Rights and Keeping the Peace: Lessons from El Salvador, Cambodia and Haiti: Recommendations for the United Nations*.(1995) at 39.

⁷⁷ http://www.un.org/Depts/dpko/dpko/co_mission/unamic.htm. (16 Jul 2002).

⁷⁸ Of 16 December 1992.

integration of former combatants into the new national army. ONUMOZ was terminated on 9 December 1994 on the successful completion of its mission. A civilian UN peace building mission continued in Mozambique after the departure of ONUMOZ.⁷⁹

Rwanda / Uganda 1993 UNOMUR

The Rwandan Government and the Rwandese Patriotic Front (RPF) were engaged in armed conflict that erupted in October 1990. Fighting was mainly focused in the north where the RPF fought from the Ugandan border. Ceasefire agreements were numerous but ineffective despite the active involvement of the OAU in attempting to achieve a permanent settlement. In February 1993 the Rwandan government approached the Security Council for assistance. A goodwill mission was sent to Rwanda to investigate the potential for a UN operation. Meanwhile the OAU continued talks with the parties and managed to conclude an agreement on March 1993.⁸⁰

Following the report of the Secretary-General into the feasibility of deployment to Rwanda, the Security Council passed Resolution 846 (1993) establishing the United Nations Observer Mission Uganda-Rwanda (UNOMUR). The operation was based in Uganda and was to monitor the transport or transit of weapons and materials of military use across the border. UNOMUR also provided liaison with the OAU

⁷⁹ http://www.un.org/Depts/dpko/dpko/co_mission/onumozS.htm. (16 Jul 2002).

⁸⁰ <http://www.gmu.edu/departments/t-po/peace/unomur.html>, at 1. (18 Jul 2002)

Chapter VIII operation, the Neutral Military Observer Group (NMOG), so that the peacekeeping effect could be coordinated.⁸¹

In August 1993 the parties reached a final settlement and the Security Council moved to establish a further mission of assistance to rebuild Rwanda. UNOMUR was to continue to monitor the border between Uganda and Rwanda. Although plans for the continuation of the operation were laid the operation came to an abrupt halt when its mandate was ended on 21 September 1994.⁸²

The end of UNOMUR and the subsequent reluctance of the Security Council Members to support robust⁸³ peacekeeping for some time⁸⁴ was caused by events in Somalia where a failed operation by US forces that formed part of the Unified Task Force (UNITAF). UNITAF was a Chapter VII mandated US led operation set in place to protect humanitarian aid distribution. The US forces decided to capture a Somali warlord but the mission failed, two Blackhawk helicopters were shot down and a number of servicemen were killed. The graphic television pictures of the dead bodies of US aircrew being dragged through the streets caused a negative response from the US public.

UNOMUR was a small traditional model observer operation consisting of 81 military observers supported by a small civilian staff.

⁸¹ Id at 2.

⁸² http://www.un.org/Depts/dpko/dpko/co_mission/unomur.htm. (18 Jul 2002)

⁸³ Robust peacekeeping is defined in chapter one of this work as a peacekeeping operation where the mandate and equipment given to the operation allows the peacekeepers to take a more aggressive stance with regard to the use of force.

⁸⁴ Above n 10 at 343.

Rwanda 1993 UNAMIR

In response to a request from the parties contained in the Rwandan peace accords of August 1993, the Security Council passed Resolution 872 (1993) establishing the United Nations Assistance Mission to Rwanda (UNAMIR).

While the Security Council was stunned by the Somali failure, genocide went unchecked in Rwanda where some 800,000 ethnic Tutsis and moderate Hutus were murdered by Hutu extremists. Some 250,000 Tutsi women were raped, many of them subsequently dying from the brutality of the ordeal or AIDS contracted from their rapists.⁸⁵

UNAMIR was set up as a Chapter VI operation and when the genocide began was under resourced, under manned and without the mandate to act. In a terrible indictment of the operation the force commander General Dallaire stated that he believed that the poor handling of the operation, including the lack of proper military response, had abetted the genocide.⁸⁶

In 1999 Secretary-General Kofi Annan commissioned a report into the failure in Rwanda. The report found the:

Overriding failure... was the lack of resources and political will to stop the genocide.

UNAMIR was not planned, deployed or instructed in a way which would have

⁸⁵ Harman, D. "A Woman on Trial for Rwanda's massacre"
<http://news.findlaw.com/csmonitor/s/20030307/07mar2003103456.html>. (30 Jun 2005).

⁸⁶ Shawcross, W. *Deliver Us From Evil*. (2000) at 104-124.

enabled the mission to stop the genocide. UNAMIR was also the victim of political will in the Security Council and on the part of Member States.⁸⁷

The UN force, conducting a traditional peacekeeping operation under a Chapter VI mandate was neither armed nor mandated to take action. Peacekeeping had reached a low point and the UN reputation for peacekeeping was tarnished.⁸⁸ Had the Security Council seen fit to authorise a Chapter VII operation the force would at least have had the legal ability to attempt to prevent the disaster. Soldiers forming part of the Australian contingent found it difficult to stand by and do nothing. Some of them attempted to trigger the rules of engagement by creating a situation where they would be entitled to return fire in self defence. Fortunately for the outnumbered force they were unsuccessful.⁸⁹

Chad / Libya 1994 UNASOG

The Republic of Chad and the Socialist People's Libyan Arab Jamahiriya (Libya) commenced a dispute over an area between Chad and Libya known as the Aouzou Strip in 1973. Though initially violent, the parties were able to reach diplomatic agreements but not a total settlement, so in 1990 the parties referred the matter to the ICJ. The ICJ gave its determination in February 1994 and on 4 April 1994 the parties signed a final agreement which was formally notified to the UN. As part of the agreement UN observers were to monitor the withdrawal of forces and implementation of the agreement. The Security Council agreed to deploy

⁸⁷ UN Independent Report of 1999 <http://www.un.org/Docs/sc/letters/1999/1257e.pdf> (24 Mar 2005).

⁸⁸ Above n 10 at 18.

⁸⁹ Australian Command and Staff Course seminar with Lieutenant Colonel Durant-Law Australian Defence Collage (7 Feb 2005).

peacekeepers and on 4 May 1994 adopted Security Council Resolution 915 (1994) establishing the United Nations Aouzou Strip Observer Group (UNASOG). On 30 May 1994 Chad and Libya jointly declared that the withdrawal was complete and the agreements complied with as witnessed by UNASOG. UNASOG was duly terminated in June 1994.⁹⁰

UNASOG is yet another example of an observer operation being conducted under Chapter VI in a Chapter VII environment. The Security Council had used the Article 41 embargo powers to limit the arms flow into the area thereby forcing the parties to a diplomatic solution. This approach appears to have been successful and the Security Council did not recall the Chapter VII Resolution when dealing with the establishment of UNASOG. As a result UNASOG would not have had the option of upgrading its resources to act under Chapter VII without a fresh Resolution.

Tajikistan 1994 UNMOT

Tajikistan became an independent State in September 1991 following the break up of the USSR. Tajikistan did not have a stable government and in May 1992 opposition elements tried to seize power. Civil war erupted with the government forces finally gaining the upper hand effectively ending the civil war in early 1993. Although the government had been successful the rebels were not eliminated and continued to strike against the government across the Tajik-Afghan border. Tajikistan sought aid from the Russian Federation, which provided troops to protect the border. Although a measure of stability had been restored, the population of Tajikistan had experienced

⁹⁰ http://www.un.org/Depts/dpko/dpko/co_mission/unasogM.htm. (16 Jul 2002).

major disruption with a significant number of civilians killed or displaced internally and into neighbouring States as refugees.⁹¹

Regional States moved to assist in stabilising Tajikistan and to support humanitarian aid programs. The UN was also involved in diplomatic efforts to coordinate political and material support. By September 1994 the UN had brought about an agreement for a temporary ceasefire across the Afghan-Tajik border. A request for the deployment of a UN observer operation formed part of the agreement. Preliminary work to establish an operation was commenced while further talks between the parties further defined the role the operation was required to undertake. On 16 December 1994 the UN adopted Resolution 968 (1994) establishing the United Nations Mission of Observers in Tajikistan (UNMOT). Although the operation was an integrated military and civilian deployment it consisted primarily of military observers.⁹²

Despite talks fighting flared and by July 1996 the ceasefire had collapsed. Diplomatic efforts intensified resulting in a further peace agreement being established in June 1997. UNMOT was strengthened in November 1997 to assist in the demobilisation and repatriation efforts set out in the agreement. Elections, monitored by the UN were held in February and March 2000. Although the UN monitors criticised the elections and sporadic violence continued the Secretary-General was confident that stability was attainable and he was keen to establish a peace building operation to continue the stabilisation process. By May 2000 the Security Council was satisfied

⁹¹ <http://www.un.org/Depts/DPKO/Missions/unmot/UnmotB.htm>. (19 Jul 2002)

⁹² Ibid.

that UNMOT had successfully completed its mission in Tajikistan and the operation was terminated on 15 May 2000.⁹³

UNMOT was a traditional military observer operation with a small civilian element.

Bosnia and Herzegovina 1995 UNMIBH

On 15 December 1995 the Security Council welcomed the deployment into Bosnia Herzegovina of the International Force (IFOR), a NATO led operation, following the termination of armed conflict. IFOR was in turn replaced by another NATO based multinational stabilisation force (SFOR), authorised by the Security Council in 1996 under a Chapter VII mandate. While the NATO led SFOR provided the military presence, the UN decided to deploy a non military peacekeeping operation, the United Nations Mission in Bosnia and Herzegovina (UNMIBH). UNMIBH was established by Security Council Resolution 1035⁹⁴ and consists of the United Nations International Police Task Force (IPTF) and a United Nations civilian office.⁹⁵

While it has not been uncommon for the UN to run an observer mission alongside a contracted out peacekeeping operation or to have integrated civilian and military operations, this operation is the first UN peacekeeping operation that consisted entirely of civilians. This operation exemplified a developing practice of the UN to mandate Member States or regional organisations such as NATO, to conduct peacekeeping operations and in conjunction establish a UN peacekeeping operation,

⁹³ Ibid.

⁹⁴ (1995) of 21 December 1995.

⁹⁵ Above n 91.

normally consisting of UN military observers conducting a traditional observer operation.

Although IFOR was expressly established under Chapter VII, UNMIBH appears in a clearly separate section of the Resolution with no express Chapter VII authority.

Also, although in recalling Resolution 1035⁹⁶ the Article 39 finding that the situation creates a threat to international peace and security is imported, the Security Council appears to have avoided expressly identifying UNMIBH as a Chapter VII operation.

This is a form the Security Council appears to have adopted over recent years to distinguish between Chapter VI and Chapter VII operations that are running simultaneously.

The task of UNMIBH was entirely one of peace building with the implementation of a civil justice system. It should be noted that the human rights mandate was a key component of this. UNMIBH is another example of the complex second generation combinations of Chapter VI and Chapter VII operations.

Haiti 1996 UNSMIH

The UN had deployed a civilian mission to Haiti in 1993 to monitor human rights and uphold the human rights defined in the Haitian Constitution⁹⁷ The re-establishment of the rule of law was not complete however. In particular the Haitian police were not yet fully trained and able to ensure a stable environment. The presence of a UN force was felt to be necessary in order to maintain stability until the Haitian authorities were

⁹⁶ (1995) of 15 December 1995.

able to take on this role for themselves. As a result on 28 June 1996 the Security Council adopted Resolution 1063 (1996) establishing the United Nations Support Mission in Haiti (UNSMIH) to train the police force and maintain a stable environment in Haiti for peace building. UNSMIH finished when its mandate expired on 31 July 1997.⁹⁸

The UNSMIH mission and the structure under which it was set up are a little troubling. Although previous resolutions were referred to in a general way in Resolution 1063 (1996), no specific previous resolution was adopted into it. There was no Article 39 finding and no express adoption of Chapter VII from previous resolutions. As a result, although UNSMIH had as part of its mission to provide a secure environment in Haiti, it could not use force other than in self-defence because of its status as a Chapter VI operation. UNSMIH also had some difficulties in meeting the normal requirements for a Chapter VI operation. Although it was present by consent and could use force only in self-defence, it was not impartial, having been set in place to provide security to Haiti from the rebel forces threatening to undermine Haitian stability. UNSMIH therefore represents a modification of the standard model for a Chapter VI operation. Impartiality had always been one of the key principles of Chapter VI peacekeeping, even in internal disputes. UNSMIH was not impartial with regard to the rebels and therefore provides an exception to the norms that had been established with regard to impartiality in Chapter VI peacekeeping operations.

Guatemala 1997 MINUGUA

⁹⁷ Martin, I in Henkin, A (ed) *Honoring Human Rights and Keeping the Peace: Lessons from El*

One of the longest running conflicts in South America was between the government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG). In 1994 the General Assembly contributed to the efforts to resolve the situation by establishing a human rights verification and institution-building mission. Peace negotiations made significant progress and in December 1996 the parties signed the last of a series of agreements aimed at achieving a lasting peace. The Security Council moved to support the peace process by passing Resolution 1094 (1997),⁹⁹ which *inter alia* attached 155 military observers to the civilian verification mission as the United Nations Verification Mission in Guatemala (MINUGUA). The traditional observer operation commenced on 3 March 1997. The observer element of MINUGUA was to monitor the ceasefire agreement between the parties. On 14 May 1997 a list of destroyed and deactivated munitions was provided to the Guatemalan government, verified by the Chief UN Military Observer, marking the completion of the observer operation. The operation was terminated on 27 May 1997.¹⁰⁰

Angola 1997 MONUA

The UN had been actively involved in Angola for some time in attempting to settle the civil war between the government and the Uniao Nacional para a Independencia Total de Angola (UNITA). A series of Chapter VII operations were established, which are discussed in the following chapter of this work.

Salvador, Cambodia and Haiti: Recommendations for the United Nations. (1995) at 86.

⁹⁸ http://www.un.org/Depts/dpko/dpko/co_mission.unsmih.htm. (20 Jul 2002).

⁹⁹ Of 20 January 1997.

¹⁰⁰ http://www.un.org/Depts/dpko/dpko/co_mission/minugua.htm. (20 Jul 2002).

On 30 June 1997 Security Council Resolution 1119 (1997) established the United Nations Observer Mission in Angola (MONUA). MONUA was to take over the previous Chapter VII operation UNAVEM III and:

assist the Angolan parties in consolidating peace and national reconciliation, enhancing confidence-building and creating an environment conducive to long-term stability, democratic development and rehabilitation of the country.¹⁰¹

The plan for MONUA was that it would takeover and then downsize the UN military force. Civil police and other civilian staff were to have been the primary component with a small military traditional observer group remaining. This plan was never completed as the situation in Angola seriously deteriorated. The UN tried to revive the stalled peace process, postponing the withdrawal of MONUA troops. Eventually, after the loss of UN lives and two aircraft, the UN acknowledged that the peace process had collapsed and MONUA was withdrawn in February 1999.¹⁰²

MONUA differed from many of the operations running at the time because it was formed separately as a Chapter VI operation instead of being part of the Chapter VII operation.

Haiti 1997 UNTMIH

The Security Council determined that following the termination of UNSMIH in July 1997 Haiti was still in need of support but that this support would only be for a period

¹⁰¹ <http://www.un.org/Depts/DPKO/Missions/Monua/monua.htm> (20 Jul 2002).

¹⁰² Ibid.

of four months from the end of UNSMIH until 30 November 1997. The new operation was predominantly civilian in order to complete the training of the Haitian police force. This operation was established by Security Council Resolution 1123 (1997)¹⁰³ and was known as the United Nations Transitional Mission in Haiti (UNTMIH).¹⁰⁴

Given that the UNTMIH operation was predominantly designed to finalise the restructure of the Haitian civil police it is not surprising that the resolution providing the mandate for UNTMIH set it up as a Chapter VI operation. The thrust of the operation was peace building with the military element performing a quasi-policing role as the security operation run by the military was limited to providing for itself and the UN personnel involved in the operation. UNTMIH demonstrates the trend that was developing towards combined peacekeeping and peace building operations.

Haiti 1997 MIPONUH

Although the UN military operations in Haiti finished with the termination of UNTMIH in November 1997, the UN remained in Haiti in the form of a peace building operation to establish a modern and capable police force. In order to achieve this the Security Council adopted Resolution 1141 (1997),¹⁰⁵ which established the United Nations Civilian Police Mission in Haiti (MIPONUH). As well as finishing the work of previous operations in providing Haiti with a highly capable police force, the operation laid the groundwork for a subsequent UN and the Organisation of American States (OAS) mission aimed at developing the civil justice system, which

¹⁰³ of 30 July 1997.

after years of neglect was in much need of assistance and promoting human rights within Haiti. MIPONUH was terminated in March 2000.

As MIPONUH was a civilian police operation at the invitation of the Haitian government it inevitably had the characteristics as well as the mandate of a Chapter VI operation. In some respects it does not belong in an analysis of military peacekeeping operations because it was staffed by civilian police. However, the operation does provide an example of an operation that is conducted as part of the transition from a military peacekeeping operation to a civilian staffed peace building mission, where the aim is not to stand between or monitor parties potentially in conflict but to assist in the re-establishment of the necessary structures of a State.

Croatia 1998 UNPSG

The United Nations Civilian Police Support Group (UNPSG) was established on 19 December 1997 by Security Council Resolution 1145 (1997) at the termination of the Chapter VII United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES). The UNPSG operation represents a continuation of the movement towards the civilianisation of the peacekeeping process, as there was no military component to the operation at all. Like its predecessor MIPONUH, it was established solely as a civilian police mission to monitor the Croatian police and to take over the policing tasks performed by the military staffed UNTAES.¹⁰⁶ Although it followed directly from UNTAES, it was established under Chapter VI, underlining

¹⁰⁴ http://www.un.org/Depts/dpko/co_mission/untmih.htm. (20 Jul 2002).

¹⁰⁵ of 28 November 1997.

¹⁰⁶ <http://www.un.org/Depts/DPKO/Missions/cropol.htm>. (22 Jul 2002).

the reservation of Chapter VII to military operations or operations with a significant military component that may be called upon to use force.

Ethiopia and Eritrea 2000 UNMEE

There has been a long history of conflict and resultant humanitarian crisis in and around Ethiopia and Eritrea. Mindful of this history of crisis following the outbreak of fresh fighting between Eritrea and Ethiopia in May 1998 the Secretary-General moved to assist in the mediation that was being conducted between the protagonists by the Organisation of African Unity (OAU). Some success was achieved and proposals for redeployment of forces, demobilisation and demilitarisation were put forward. Despite efforts by the UN and regional organisations fighting again erupted in May 2000. The Security Council reacted by condemning the resort to arms and implemented an embargo to prevent the parties from accessing the means to continue the conflict. As anticipated, a significant humanitarian crisis was also developing as a result of the conflict and the UN moved to support the provision of humanitarian aid to the region.¹⁰⁷

Finally in June 2000 an agreement was reached between the parties. As had become increasingly common in such circumstances, the agreement called upon the UN to provide peacekeepers to implement the agreement. The Security Council responded by passing Resolution 1312 (2000),¹⁰⁸ which established the United Nations Mission in Ethiopia and Eritrea (UNMEE). This operation was further expanded by

¹⁰⁷ <http://www.un.org/Depts/dpko/unmee/unmeeB.htm>. (22 Jul 2002).

¹⁰⁸ of 31 June 2000

Resolution 1320 (2000),¹⁰⁹ under which up to 4,300 troops could be deployed.¹¹⁰ On 12 December 2000 a comprehensive peace agreement was signed between the parties and the process of compliance with the agreement commenced.

UNMEE was essentially a traditional peacekeeping operation but the size of the force was larger than usually associated with the traditional model and was somewhat more sophisticated with a detailed mandate set out in the body of the Resolution rather than provided by the Secretary-General as was usually the case in the early traditional operations.

Afghanistan 2002 UNAMA

The terrorist attack by Al ‘Quaida on the US in September 2001 resulted in a major shift in US policy and ultimately led to the invasion of Afghanistan and expulsion of the Taliban rulers by armed force. Afghanistan is a State that has been subject to conflict since its creation as a buffer between empires over 130 years ago. In the 19th Century the British fought several wars in the region.¹¹¹ The USSR invaded Afghanistan and fought to control it from 1979 to 1992. Internal armed conflict raged intermittently throughout its history as a State and even the Taliban, victors of internal armed conflict following the withdrawal of the USSR, failed in their bid to rule the whole of Afghanistan.¹¹²

¹⁰⁹ of 15 September 2000

¹¹⁰ <http://www.un.org/Depts/dpko/unmee/unmeeB.htm> (23 Jan 2003).

¹¹¹ See for example Allen, C. *Soldier Sahibs* (2000) for accounts of activities during the First and Second Afghan Wars and the Sikh Wars in the mid 19th Century.

¹¹² Brogan, P. *World Conflicts*. (1998) at 123-136.

The UN involvement in Afghanistan dates back to early 1980 with efforts to provide aid to the conflict ridden State. Following the US invasion of Afghanistan and defeat of the Taliban the Security Council, under Resolution 1386 (2001) established under Chapter VII the International Security Assistance Force (ISAF). The US led force was a contracted out operation tasked with providing stability and creating the conditions necessary to initiate peaceful government in Afghanistan and the implementation of the Bonn Agreement.¹¹³

On 28 March 2002 the Security Council established a UN operation in Afghanistan under Resolution 1401 (2002). The operation was to be known as the United Nations Assistance Mission in Afghanistan (UNAMA). Its tasks were to coordinate the provision of assistance from the UN, there being some 16 UN agencies deployed to Afghanistan in addition to a number of NGOs, and to assist in police and security functions. The Resolution did not specify that UNAMA was to be a Chapter VII operation although the resolution did recall the previous Resolutions made under Chapter VII.¹¹⁴

UNAMA is another example of the emerging trend for the Security Council providing for multiple levels of peacekeeping in terms of the legal basis underpinning the operation. As with the former Yugoslavia, a contracted out operation was provided with a robust Chapter VII mandate while the UN operation was maintained on a Chapter VI basis under the protection of the Chapter VII operation. UNAMA is therefore a good example of the complex form of Chapter VI operation being developed by the UN.

¹¹³ Security Council Resolution 1386 (2001) 20 December 2001.

Ivory Coast 2003 MINUCI

Between independence in 1960 and the death of its founding president in 1993 the Ivory Coast was politically stable and relatively prosperous. The death of the founding president plunged the Ivory Coast into a political power struggle, which was not resolved until a military coup d'état in December 1999. Elections held in October 2000 produced more disputes, this time resulting in violent clashes between political supporters that resulted in the death of at least 50 people. The Supreme Court was required to determine the election result and found against the military candidate. The new president attempted a policy of open elections and reconciliation. This policy resulted in general agreement between the political adversaries and the founding of a new government of national unity on 5 August 2000.¹¹⁵

The promise of a return to the post independence stability and prosperity was not to come to fruition. On 19 September 2002 soldiers mounted attacks on a number of key cities, including the capital, Abidjan. A number of political leaders were killed in the subsequent fighting and although the capital was recaptured the rebels held a number of towns and cities in the north and west of the country. In an attempt to resolve the impasse the Economic Community of West African States (ECOWAS) stepped in to support a resolution to the crisis. With assistance from ECOWAS and the UN Special Representative, a ceasefire agreement was reached on 17 October 2002 and a monitoring force from ECOWAS and France was put in place while peace talks continued. Although a peace agreement was reached on 26 January 2003 there were

¹¹⁴ <http://www.unama-afg.org/about/index.html>. (2 Mar 2003).

demonstrations against aspects of the settlement and the defence forces rejected provisions for power sharing with the rebels. Further negotiations and manoeuvring took place that finally resulted in a settlement on 8 March 2003.¹¹⁶

On 13 May 2003 by Resolution 1479 (2003)¹¹⁷ the Security Council established the United Nations Mission in the Ivory Coast (MINUCI). An Article 39 finding was made that the situation in the Ivory Coast constituted a threat to international peace and security but the Security Council did not go on to specifically establish MINUCI under Chapter VII. As it had by this time become the custom of the Security Council to specify Chapter VII activities MINUCI must be considered as a Chapter VI peacekeeping operation. This position is distinguishable from the approach taken regarding the operation in Cyprus because at the time that the Cyprus Resolution was taken the Security Council had not developed the practice of specifically nominating the elements of a Resolution that belonged to Chapter VII.

The very small military component, initially 26 members with approval to increase that number only by 50, supports the view that MINUCI was intended to be a Chapter VI operation. The military component was established only to provide and establish liaison with key actors such as the French and ECOWAS forces, the Ivory Coast forces and to monitor disarmament and demobilisation. Although performing a quintessentially traditional role the combination of Chapter VI and Chapter VII operating environments gives the operation a different flavour to its predecessors.

¹¹⁵ <http://www.un.org/Depts/dpko/missions/minuci/background.html>. (24 Mar 2005).

Principles of Chapter VI Peacekeeping

Chapter VI is the legal basis for the traditional form of peacekeeping. The traditional model of peacekeeping was based on the implied power within Chapter VI.¹¹⁸ The first traditional peacekeeping operation was implemented in 1949. Although a mandate under Chapter VI gives life to the operation it is not a process of violation or negation of a State's rights and all States have sovereign equality under Article 2(1) of the Charter so can, at least in theory, reject suggestions by stronger States or the UN for a Chapter VI operation to be conducted on their territory.¹¹⁹

The requirements for equality between the States also means that the UN must treat inter State situations in accordance with this Charter provision. This has led to the establishment in peacekeeping of the principle of impartiality between the parties, including for the most part, during intra State disputes.

As Chapter VI of the Charter does not contain any provision for an imposed solution on a State or inter State issue, any Chapter VI operation must have consent of the parties at its foundation. States are also at liberty to enter into agreements with other States or regional organisations to obtain intervention. The Security Council has expressly recognised this right of States to request and consent to intervention by another State.¹²⁰ However, there is a risk of abuse of this process, particularly where there is dispute as to the lawful government. Collective action for the benefit of the

¹¹⁶ Ibid.

¹¹⁷ S/RES/1479 (2003)

¹¹⁸ As determined by the ICJ in the *Certain Expenses Case*.

¹¹⁹ Israel has repeatedly rejected moves to establish a peacekeeping operation as a solution to its difficulties with the Palestinians.

¹²⁰ Jenkins, R and Watts, A (eds) *Oppenheim's International Law* (9th ed 1996) Vol 1 at 435.

international community is not considered to present such a risk so that a UN operation may have more latitude than an invited State or regional organisation.¹²¹

From these observations on the centrality of consent and continued sovereignty of the host State or States, it is clear that some form of agreement must be entered into with the host States in order to provide for such things as entry and exit of forces, entry and exit of personal belongings, labour, claims and contractors, and susceptibility to income and sales taxes as well as the operation and jurisdiction of host State law, carriage of arms and so on.¹²² Such agreements are known as Status of Forces Agreements (SOFA) and can be traced back to the 19 June 1951 agreement between the NATO States for the interaction of their armed forces. The UN developed a model SOFA of 9 October 1990 and in 1997 the Secretary-General recommended that the model SOFA¹²³ provisionally apply to all peacekeeping operations unless a specific SOFA had been entered into for that operation. The General Assembly adopted this approach in Resolution 52/12,B of 19 December 1997.

The UN had recognised the importance of agreements with the host State in the earliest days of peacekeeping. In 1957 the UN entered into an Exchange of Letters with Egypt to specify the status of UNEF in Egypt. This agreement on the status of UNEF was the first document of its kind to be used by the UN. Similarly, in 1989, the UN entered into an agreement with South Africa to detail the status of UNTAG.¹²⁴

The SOFA has been used extensively by the UN and it has been argued that the model

¹²¹ The General Assembly has for example spoken out against intervention by outside States in suppressing groups seeking self determination. Id at 439-449.

¹²² Topic covered under such agreements are discussed for example at Global Security *Status of Forces Agreement* <http://www.globalsecurity.org/military/facility/sofa.htm>. (31 Mar 2005)

¹²³ (A/45/594)

SOFA developed in 1990 by the UN for use in peacekeeping operations has passed into customary international law.¹²⁵ The SOFA is not imposed on the State by the UN but entered into as an act of sovereignty by the State. If the SOFA has indeed passed into customary international law then acceptance of the provisions represents an act of compliance with the State's international obligations.

While under Chapter VII the mandate may be the only legal authority for the peacekeeping operation, under Chapter VI operations the consent of the parties supported by individual agreements, Memoranda of Understanding (MOU) and/or a SOFA provides the legal authority for the activities of the peacekeepers. In situations where a SOFA has not been established it may be that in modern Chapter VI operations the UN Model SOFA provides support on a customary international law basis.

While reliance on the Model SOFA is a relatively recent development, Chapter VI operations have since their inception had available the provisions of the Convention on the Privileges and Immunities of the United Nations.¹²⁶ The Privileges and Immunities Convention provides for varying levels of privileges and immunities for the representatives of members, officials of the United Nations, the Secretary-General and Assistant Secretaries-General, and experts on mission. Under the Model SOFA the position of UN peacekeepers was clarified as "experts on mission" under the

¹²⁴ Sharpe, W. "Protecting the Avatars of International Peace and Security" 7 *Duke Journal of Comparative and International Law* 93 (1996).

¹²⁵ Wellens, K. "The Practice of the (UN) Security Council With Regard To Treaties and Other Agreements Governed By International Law" http://www.javeriana.edu.co/Facultades/C_Juridicas/Facultad/revistainternacional/LAW%201.pdf. (1 Jul 2005) at 22.

¹²⁶ 13 February 1946.

Convention provisions.¹²⁷ The model SOFA goes further than the Convention as it gives exclusive criminal jurisdiction to the sending State over its military personnel.

Peacekeepers operating as part of a contracted out, regional or coalition operation, such as the Multinational Force Observers (MFO) in the Sinai, must rely upon an agreed SOFA with the host State as the Convention and Model SOFA do not apply to non-UN operations.

In addition to the provisions set in place by the UN, Greenwood argues that peacekeepers are entitled to protection under the Geneva Conventions, specifically GC IV, and the 1977 Protocols.¹²⁸ He argues that peacekeepers engaged in Chapter VI operations are essentially in the same position as civilians and that as a result the protections must apply. Clearly these protections are only relevant where peacekeepers are operating in a situation of armed conflict.¹²⁹ As a Chapter VI operation is by definition unable to engage in armed conflict, not only because of its mandate but also because it is practically unable through lack of arms, this is a logical position. A Chapter VI operation may therefore find itself in a relatively complex situation legally, having to comply with convention¹³⁰ provisions, MOU and SOFA requirements and in dire situations, humanitarian law provisions to ensure preservation of their protected status. This does not however mean that they are parties to any conflict, merely that where the laws of armed conflict have been engaged they are subject to such provisions as are relevant, for example, provisions

¹²⁷ Above n 123.

¹²⁸ Greenwood, C “Protection of Peacekeepers: The Legal Regime” 7 *Duke Journal of Comparative and International Law* 185, 190 (1996).

¹²⁹ See McCoubrey, H and White, N *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996) at 169 for agreement with this position.

regarding nationals, civilians and so on. As demonstrated in Cambodia, even in a post conflict environment, where the Chapter VI operation has been responsible for establishing a legal framework it has relied on human rights law to provide that framework not humanitarian law.

Despite the protections afforded, UN peacekeepers have not been immune from attack. In response to a number of violations of UN neutrality the Secretary-General presented the Safety and Security of United Nations Personnel Report to the General Assembly in 2001.¹³¹ The report does not alter the legal position of UN peacekeepers but urges an increased level of compliance with the extant protection for UN personnel and puts in place resources and plans for evacuation of UN personnel, including peacekeepers, in the event that the host State lacks the will or ability to protect them. In return for the services of a peacekeeping operation a State will be required to comply with its agreements and provide a level of protection to the peacekeeping operation if required.

As well as the principles of impartiality and consent in Chapter VI peacekeeping, there is one other principle that can be identified. The use of force limited to self defence has been strictly adhered to in Chapter VI peacekeeping. In any event until the most recent operations the size of the force was very often a significant limiting factor in the ability of the operation to use force other than in self defence. The situation that emerged in Rwanda is perhaps the most graphic example of this limitation. The restriction on the use of force is consistent with the absence of

¹³⁰ As well as the Convention on immunities there is the *Convention on the Safety of United Nations and Associated Personnel*. 9 December 1994: 34 ILM (1995) 482-493.
¹³¹ UN General Assembly A/55/494. Fifty-fifth Session. (2001).

provisions in Chapter VI that are found in Chapter VII, Article 42 authorising the use of armed forces to achieve peace.

In addition to the principles of consent, impartiality and the use of force only in self defence another consistent theme that appears in the Chapter VI operations set out above is that the legal framework under which peacekeepers operate is that of the host domestic State as modified by agreements and conventions. These operations therefore contribute by ruling out humanitarian law or indeed human rights law as the legal framework in the majority of Chapter VI operations. There are however exceptions to the general rule that the legal framework will be provided by the host State and these exceptions are discussed in the next section of this chapter.

“Trusteeship” style model

The majority of Chapter VI operations have been conducted in circumstances where the host domestic State legal framework has been functioning to a greater or lesser degree. There have however been three notable exceptions to this situation. These are West Irian, Namibia and Cambodia. These are examined in detail as in these operations the UN has provided the legal framework. This framework, which it will be argued is a legal framework, has been applied in circumstances where there has been an absence or collapse of the domestic State framework.

West Irian 1962 UNSF

After World War Two the Dutch were in a weakened position and unable to maintain effective control of its former colonies. This situation led to the formation of Indonesia. The former Dutch colony of West New Guinea or West Irian did not however immediately become part of Indonesia. It continued to be administered by the Dutch against Indonesian protest that often spilled into isolated low level armed conflict. Eventually agreement was reached regarding the future sovereignty of the territory and the UN set up an interim administration to transfer authority to Indonesia pending a plebiscite¹³² as required under Article 76.

In September 1962 the General Assembly moved the formation of the United Nations Temporary Executive Authority (UNTEA).¹³³ The United Nations Security Force (UNSF) was established by the Security Council under Resolution 1752 (XVII) of 21 September 1962. The administration and military force was mandated to administer the territory including the maintenance of local security.¹³⁴ UNSF also monitored the ceasefire that had been established with Indonesia.¹³⁵ UNTEA administered West New Guinea until Indonesia took over in May 1963¹³⁶ and UNSF was formally terminated on 30 April 1963.

UNSF was a Chapter VI operation in the traditional form but it was part of a new breed of peacekeeping that would later become more common. Although the military aspect, UNSF, fitted into the traditional model the legal basis of UNSF and UNTEA

¹³² http://www.un.org/Depts/dpko/dpko/co_mission/unsf.htm (10 Mar 2005); Above n1 at 264.

¹³³ Resolution 1752 (XVII) of 20 September 1962.

¹³⁴ http://www.un.org/Depts/dpko/dpko/co_mission/unsfmandate.html (10 Mar 2005).

¹³⁵ Above n 11 at 770.

was quite different. UNTEA and UNSF were not set up under Chapter VII, as would later be the case for combined administration and peacekeeping operations such as Kosovo and East Timor, but was based on an agreement between Indonesia and the Netherlands, part VIII of which provided for UNSF. The operation was dispatched by the UN on the basis of a General Assembly Resolution¹³⁷ that did no more than endorse the agreement between Indonesia and the Netherlands.¹³⁸

The legal basis for this action was not set out in the Resolution but it appears that although not articulated it was very closely modelled on Chapter XII of the Charter, the International Trusteeship System.¹³⁹ The process of agreements was certainly consistent with the procedure laid down for the Trusteeship system. Chapter XI of the Charter provides for the administration of territories prior to self-government but it is restricted to administration by Members of the UN not the UN itself as occurred in West Irian. There is on the other hand clear authority for the process that was undertaken in UNTEA as Chapter XII provides expressly for the General Assembly to authorise the UN to act as the administration. Article 81 relevantly provides:

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more States or the Organisation itself.

¹³⁶ Above n 1 at 264.

¹³⁷ Above n 133.

¹³⁸ <http://www.hampapua.org/skp/hukum/unga1752-1962e.pdf> (10 Mar 2005).

¹³⁹ The NGO “West Papu Action” claim that the territory was in fact brought under the Trusteeship but this is not substantiated by the mandate or the fact that Trusteeship Council was not involved as required under the Trusteeship provisions: <http://westpapuaaction.buz.org/ft-hrw.htm> (10 Mar 2005).

West Irian was still under colonial rule prior to the UN administration and had therefore not become a Member of the UN¹⁴⁰ so the process did not fall foul of the prohibition against the trusteeship applying to Members set out in Article 78, which provides:

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

On the face of it the West Irian operation was a case of a UN combined administration and peacekeeping operation under a system closely resembling the Trusteeship.¹⁴¹ The administration was empowered to make laws for West Irian and to do all things necessary for the government of the territory as if it were the government. The framework for such government is outlined in Article 76:

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- a. to further international peace and security;
- b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

¹⁴⁰ Even where a State administered a Trusteeship territory the State did not gain sovereignty over the Trust territory as residual sovereignty remained with the UN or the people; Jennings, R and Watts, A *Oppenheim's International Law* (9th ed, 1996) at 316.

¹⁴¹ http://www.un.org/Depts/dpko/dpko/co_mission/unsfbackgr.html (21 August 2006)

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

If the Trusteeship can be used as a basis for peacekeeping operations then the legal framework to be applied must be human rights law because of the effect specifically articulated in Article 76(c) and the general provisions of the article, which are consistent with the major human rights conventions.

Setting aside the political opposition to use of the Trusteeship in modern operations based on a fear of a return to colonialism, particularly from the non-aligned States; the question is whether the Trusteeship basis for the West Irian operation could provide a model for modern collapsed State operations such as Somalia, Kosovo and East Timor?

Accepting that there would be considerable political barriers to use of the model, the Charter itself places limitations on the use of the Trusteeship provisions that apply to territories. These provisions would prevent its use in situations, such as Somalia, where a State or territory of a State was involved.

Article 77 provides:

1. The trusteeship system shall apply to such territories in the following categories as may be placed there under by means of trusteeship agreements:
 - a. territories now held under mandate;
 - b. territories which may be detached from enemy states as a result of the Second World War; and
 - c. territories voluntarily placed under the system by states responsible for their administration.
2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

There are no territories that remain held under mandate or that have been detached from enemy States as a result of the Second World War. Note that the provision here is very specifically linked to the Second World War. There is no room for a wider interpretation that the sub clause may have had in the event that it had referred only to “war”. The only category that would be available in modern peacekeeping operations would be those territories falling into sub clause c, as did West Irian.

Another limitation to the use of Chapter XII in collapsed States is the provision in Article 78 which limits application of the trusteeship system by providing that:

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

The majority of the world's States are now Members of the UN. Somalia was in 1992 so that a Trusteeship model could not have been used to support the UN operation and could not be used in any other Member State.

With regard to territories that have broken away from States, the wording of the article does not relate to States that have become Members but to territories. It could be argued therefore that where territories of Members States break away, such as Kosovo from the Member State Yugoslavia and East Timor from the Member State Indonesia (or Portugal noting that the UN did not recognise Indonesia's claim), that they cannot be dealt with under the Trusteeship. Whether the doctrine of succession could be applied in such situations to confer UN Membership on a territory is "uncertain and controversial."¹⁴² but given the political opposition in the UN to the Trusteeship it is unlikely that the UN would act as if Article 78 applied to territories formally belonging to Member States and as a result refuse to use the Trusteeship for such operations.

While at first blush the West Irian operation looks like the first of the modern Chapter VII operations where an administration and peacekeeping operation is set up¹⁴³ it is in fact almost the last of the Trusteeships and represents a legal basis for peacekeeping that would no longer be viable or acceptable.¹⁴⁴ What it did provide however was a model upon which future collapsed State peacekeeping could be built. The

¹⁴² Jennings, R and Watts, A *Oppenheim's International Law* (9th ed, 1996) Vol 1 at 209.

¹⁴³ As would be the case in East Timor and Kosovo.

¹⁴⁴ Partly because of Article 78 but also due to the unpopularity of the Trusteeship, particularly among the non aligned States; see Marks, E. "Transitional Governance A Return to the Trusteeship System?" (1999) IV *American Journal of Diplomacy* 1; Inman, H & Sharp, W. "Revisiting the UN Trusteeship

Trusteeship provisions relating to human rights would be persuasive in the argument towards human rights as opposed to humanitarian law legal framework for future peacekeeping operations.

Namibia 1989 UNTAG

Post World War Two and the collapse of the League of Nations Namibia, or South West Africa as it was then known, became the subject of dispute between the emergent UN and South Africa. South Africa refused to accept a Trusteeship agreement to replace the League of Nations Mandate granted in 1921. In 1966 the UN gave up trying to pressure South Africa and assumed direct responsibility itself. In 1968 the UN declared that the territory would be henceforth known as Namibia. South Africa meanwhile continued its opposition and refusal to cooperate with the UN administration in Namibia instead running its own administration, enforcing its laws and converting the natural resources to its own ends.¹⁴⁵

Throughout the 1970's the UN continued to oppose South Africa's activities in Namibia instead providing support and recognition to the South West Africa People's Organisation (SWAPO). In 1978 Canada, France, the Federal Republic of Germany, the UK and USA proposed a solution leading to independent elections in Namibia under UN auspices and supported by a UN peacekeeping operation. The Security Council adopted Resolution 435 (1978)¹⁴⁶ establishing the United Nations Transitional Assistance Group (UNTAG). However, due to disagreements over troop

System – Will it Work? (1999) VI *American Journal of Diplomacy*

http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_13/inman_somalia.html (11 Mar 2005).

¹⁴⁵ http://www.un.org/Depts/dpko/dpko/co_mission/untagS.htm. (14 Jul 2002): Conversion of the natural resources to its own ends was unlawful in any event, see above n 43.

withdrawals and South African demands for equivalent action in Angola, UNTAG was not implemented until 1 April 1989. Despite the delay in implementation once in place the agreement proceeded swiftly with UNTAG monitoring the withdrawal of South African forces and ensuring free and fair elections. Within a year Namibia had elected a parliament, a president and had become the 160th Member of the United Nations.¹⁴⁷

UNTAG was a typical traditional integrated civilian/ military operation acting as an observer mission and monitor for the elections in Namibia. The operation was conducted under Chapter VI with no Article 39 finding evident in Resolution 435 (1978). The requirements of consent, impartiality and force only in self-defence were present. What it did provide however was a model for the administration of a State and it was out of the UNTAG concept that the United Nations Transitional Authority in Cambodia would be born.¹⁴⁸

From a legal framework perspective the operation was effectively under the Trusteeship system. As had occurred with West Irian the process was not articulated as such but was conducted as if there had been a voluntary handover to the UN by South Africa under Article 77 (a) of the Charter rather than a forced transfer of the territory. As Namibia did not become a member of the UN until 1990 the process did not fall foul of the prohibition against Member State Trusteeship. From a practical perspective the legal framework remained the domestic system operating under South African rule so that a fresh framework was not required although all discriminatory

¹⁴⁶ of 29 September 1978.

¹⁴⁷ Above n 143.

¹⁴⁸ Above n 10 at 247.

laws were repealed¹⁴⁹ thus complying with the human rights requirements of Article 78. UNTAG reinforces the argument that operations set up under the Trusteeship model will use human rights law, in accordance with the Article 78 requirement as the legal framework or to supplement the extant domestic legal framework.

Cambodia 1992 UNTAC

Following the successful deployment of UNAMIC the Security Council adopted Resolution 745 (1992)¹⁵⁰ establishing the United Nations Transitional Authority in Cambodia (UNTAC). UNTAC was to ensure the implementation of the peace agreements reached in Paris in October 1991. This agreement included agreement by all parties that the UN conduct a peacekeeping operation in Cambodia, thereby fulfilling the Chapter VI requirement for consent. The Resolution made no Article 39 finding or any mention of Chapter VII. However, at paragraph 6 of the Resolution the Security Council called “upon all parties” to comply with agreements, cooperate with UNTAC “and to take all necessary measures to ensure the safety and security of all United Nations personnel”. This is a very unusual mandate to find in what is in all other respects a Chapter VI operation. In later mandates the Security Council tended only to use such terminology when anticipating the use of force. When anticipating the use of force the Security Council has become accustomed to passing the Resolution under Chapter VII or authorise another party to “take all necessary measures” under Chapter VII, as with NATO forces in support of the United Nations Protection Force (UNPROFOR) in the former Yugoslavia. The UNTAC forces would have been put in a very difficult position if they had relied upon previous mandates

¹⁴⁹ http://www.un.org/Depts/dpko/dpko/co_mission/untagM.htm. (6 Jun 2005).

that permitted the “use of all necessary measures” to use force. Had such force exceeded mere self-defence they would have been acting outside their mandate, a view clearly held by the UNTAC force commander General Sanderson.¹⁵¹ This example underlines the need for planners and peacekeepers to be fully aware of the legal framework establishing each individual operation rather than relying on the interpretation of terminology from previous operations. As a Chapter VI operation use of force could only be in self defence.

Henkin claims that the legal framework for Cambodia was provided by a “de facto trusteeship authority.”¹⁵² However, the legal basis could not be Chapter XII because Cambodia had been a Member of the UN since 1955 and therefore could not be dealt with under the Trusteeship system as a result of the prohibition in Article 78.

The issue of the use of force was not then the only difficulty raised by the Security Council dealing with Cambodia under Chapter VI. Had an Article 39 finding been made then the Security Council would have been able to rely on the wide powers of Chapter VII to impose a solution such as a de facto Trusteeship. Article 42 provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

¹⁵⁰ Of 28 February 1992.

¹⁵¹ Above n 86 at 43.

This Article could have provided the Security Council with the legal authority to provide a military force to set up a peacekeeping operation to administer Cambodia. The power to do this would be a continuation of the implied power under which peacekeeping itself was found to be available.¹⁵³

The peace agreements reached in Paris however could be relied upon as authority for the assumption of the administration of the State. Article 33 of the Charter could provide the legal basis as it provides:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

The administration of Cambodia on a Trusteeship model was effectively an “arrangement” arising from the October 1991 Paris agreement and the delegation of powers to the UN by the Supreme National Council of Cambodia.¹⁵⁴

The legal framework that was adopted by UNTAC was human rights based. The Human Rights component of UNTAC was involved in the development of legislation

¹⁵² Henkin, A in above n 76 at 7.

¹⁵³ As determined by the ICJ in the *Certain Expenses Case*, above n 31.

¹⁵⁴ Above n 76 at 57-61

and procedures for arrest and detention.¹⁵⁵ There is no evidence of consideration of humanitarian law as providing the framework while respect for human rights and their promotion was specifically incorporated into the peace settlement and therefore the mandate for UNTAC.

Key deduction

From an examination of UN practice it can be deduced that where the legal framework applied is not expressly articulated it is only by looking at what was done that the law applicable can be deduced. On this basis West Irian, Namibia and Cambodia all provide evidence that supports the hypothesis of this work that human rights law and not humanitarian law is the legal framework to be applied in peacekeeping operations in collapsed States, to the extent that it demonstrates that human rights law was the framework used in situations where the domestic legal system had collapsed or did not exist, requiring the UN operation to act in its place pending construction or reconstruction. To this extent the *opinio juris*, or State practice, in such circumstances is that international human rights law is the legal framework to be applied.

¹⁵⁵ Thayer, C.A. “The United Nations Transitional Authority in Cambodia: The Restoration of Sovereignty” in Woodhouse, T., Bruce, R. and Dando, M. (eds) *Peacekeeping and Peacemaking*.(1998) at 154; Findlay, T *The Legacy and Lessons of UNTAC*. SIPRI Reseach Report No. 9. (1995) noted as part of his lessons learned from Cambodia that “Human rights should be a paramount concern in cases where government authority has collapsed or when a neutral political environment is required for electoral purposes. The UN should develop 'justice packages' comprising all the elements of a model legal system which can be employed when the UN is required to take over

Conclusion

Three principles emerge from the practice of Chapter VI peacekeeping. These are consent of the host State or States, impartiality between the parties and the use of force only in self defence.¹⁵⁶ In addition it may be observed that generally the legal framework for the operation will be provided by the host State as modified by agreement or convention.

Given the level of consent required and the limitations placed on Chapter VI peacekeeping it is clearly not a belligerent occupation of the State within the specific meaning of occupation provided under the Geneva Conventions.¹⁵⁷ As a result there is no transplanting of the domestic law of the State and peacekeepers and the operation itself, where relevant, are bound by the laws of the host State as modified by international treaties and specific agreements. The extant State bureaucratic apparatus continues in place, where such apparatus exists. Where it has not existed there have been two approaches by the UN. The first approach was to implement an operation that appears to have been closely based on the provisions of Chapter XII and subsequent operations developed this model.

There are many advantages to the Trusteeship style model as the power to administer the territory under the Trusteeship was clearly articulated in Chapter XII. It is also

the administration of 'failed states' or those otherwise needing temporary international tutelage." See also UN. <http://www.gmu.edu/departments/t-po/peace/untac.html> (10 Jun 2005).

¹⁵⁶ Above n 129 at 78.

¹⁵⁷ That occupation under the Geneva Conventions has a specific definition in international law will be the subject of analysis later in this work. It has been argued by Kelly, M in his book *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* that occupation within the meaning of GCIV can be used to provide a legal framework. That position is rejected in chapter six of this work.

helpful to the argument put forward in this work that human rights is the legal framework that applies to collapsed State peacekeeping as human rights is specifically incorporated into Chapter XII.

Once Chapter XII had fallen into disuse, the UN had to improvise and develop and it did so on the theme of Chapter XII.

As explored in chapter one of this work, there has been an expansion of peacekeeping within Chapter VI operations. While traditional operations and even some of the more complex combined Chapter¹⁵⁸ operations have operated under the legal framework provided by the domestic State structures the operation in Cambodia was a major step away from the traditional form of Chapter VI peacekeeping.

In Cambodia a Chapter VI operation was set up to temporarily administer the territory as if it were under a Trusteeship. However, the process adopted was very similar to a Trusteeship, though its legal basis was Chapter VI. There was no suggestion that humanitarian law be used as the legal framework to legitimise passing laws and implementing them, rather there was an automatic assumption that human rights would form the basis for the laws enacted by the administration.

One reason for this automatic use of human rights law may be that as a result of the character of the operations and the requirements for consent, impartiality and the use of force only in self defence, it would be difficult to engage international humanitarian law as a tool, other than in a passive sense as a protective measure for

peacekeepers caught in the middle of an armed conflict. If caught in armed conflict peacekeepers benefit from the protections provided but as they are not a party to the conflict they cannot use the authority of the Geneva Conventions and Protocols to supplant or prop up domestic structures, nor do they take on the responsibilities of a party to the conflict.¹⁵⁹

These are practical considerations but it is also the case that in Cambodia, as with all UN Chapter VI operations, authority was consensually passed to the UN and was not an imposed solution. The humanitarian law provisions in the Fourth Geneva Convention that would form a humanitarian law framework for a UN administration are based on an occupation in the belligerent sense.¹⁶⁰ This is incompatible with a situation of consent or an express request for the operation.

As identified above, the UN will not always state explicitly what provisions of law it is relying upon to conduct operations, it must be inferred from conduct. In the case of the operations discussed in this chapter the only logical conclusion that can be reached from the evidence of Chapter VI operations in collapsed State situations is that the UN is acting as if the *de jure* law applicable in the absence of a domestic State framework is human rights law. To this extent then the conduct of Chapter VI operations by the UN support the hypothesis of this work that human rights law and not humanitarian law is the legal framework to be applied in UN peacekeeping operations in collapsed States.

¹⁵⁸ “Combined Chapters” are operations that have mandates operating under both Chapter VI and Chapter VII.

¹⁵⁹ Above n 129 at 153-173.

¹⁶⁰ This point will be argued in a later chapter of this work.

CHAPTER FOUR

Chapter VII Peacekeeping Operations

Introduction

The purpose of chapter three and chapter four of this work is to establish what the UN has done in practice with regard to the legal framework applied to peacekeeping.

Chapter three of this work examined Chapter VI operations. Although the majority of Chapter VI operations were reliant on the domestic State law as modified by agreements and international conventions there were exceptions where the UN established peacekeeping operations using the Trusteeship model in collapsed States such as West Irian and Cambodia. It was argued that in the Trusteeship model operations the UN has in practice relied upon a human rights based framework to re-establish the rule of law.

This chapter examines the Chapter VII operations established by the UN between 1960 and 2003 in order to establish the legal framework that has been used in such operations and in particular whether the Trusteeship model has been used in Chapter VII operations in collapsed States and whether international human rights provided the basis for the legal framework. The Chapter VII operations will be divided into categories rather than examined individually except for the UN operations in Kosovo and East Timor, which will be analysed as case studies to establish the legal framework used in these collapsed States by the UN. The operation in the Congo 1960-3 will be outlined as it represents an exception to the practice of UN peacekeeping not to become directly engaged in internal armed conflict. The facts of the operation in Somalia will also be set out in order to contextualise the argument

made out by Michael Kelly¹ that humanitarian law provides the legal framework for peacekeeping in collapsed States. Kelly's argument will be analysed in chapter six of this work.

By looking at what peacekeeping operations have done in practice, the chapters of this work on Chapter VI and Chapter VII peacekeeping operations provide the basis for the analysis of the application of international humanitarian law or international human rights law as the framework for collapsed State peacekeeping operations in the subsequent chapters of this work.

Chapter VII Operations

Between 1949 and 2003 there were 22 UN operations conducted under Chapter VII. Some of these were conducted as a series of operations in the same State. For example, in the former Yugoslavia the UN operation commenced as the United Nations Protection Force (UNPROFOR) covering the whole of the former Yugoslavia. It was subsequently broken down into a number of separate operations as Yugoslavia was divided into multiple separate States. Other operations such as those in Angola, Somalia and East Timor followed a linear pattern with different operations being formed to take account of the changing situation. In East Timor for example, a Chapter VI traditional election monitoring operation was replaced by a UN administration under Chapter VII when the situation deteriorated and the territory collapsed. This was in turn replaced by a less robust operation as democracy and self

¹ Kelly M. Restoring and Maintaining Order in Complex Peace Operations. (1999).

government was restored and finally a Chapter VI assistance mission supporting the elected government of the new State of East Timor brought the process full circle.

Three distinct types of Chapter VII operations can be discerned between 1949 and 2003. The first type are the operations that were established under Chapter VII but had the Chapter VI characteristics of consent, impartiality and the use of force only in self defence. The 1993 UN Observer Mission in Georgia is an example of this type of Chapter VII operation. The operation closely resembled a traditional peace monitoring operation but was established under Chapter VII. The second type of UN operations were those that operated in a complementary role to UN mandated operations conducted by Member States. The operations in the former Yugoslavia with NATO and the operation in Sierra Leone in 1998 with the Economic Community of West African States (ECOWAS) are examples of this type of operation. The final type of operation is the where the UN peacekeeping operation permits the use of force beyond self-defence and may also include the absence of consent and impartiality. The operation in East Timor² in 2000 is an example of this type of operation, although there was official consent from the Indonesian and Portuguese governments.

An operation that stands out from the Chapter VII peacekeeping operations between 1949 and 2003 is the operation in the 1960-4 operation in the Congo. The reason that this operation is significantly different is that the UN became involved in armed conflict. The pattern and policy³ that has emerged in UN peacekeeping operations involving the potential for enforcement through armed conflict is for the UN to contract out such operation to a Member State. Only in the Congo, 1960-64, Somalia

in 1993 and Bosnia and Herzegovina from 1994–1995 has the UN been directly involved in the significant use of force beyond self defence.⁴

Of the 22 operations conducted under Chapter VII between 1949 and 2003 the majority have not been conducted in such a way as to leave the UN as the effective administration of the State. Indeed, as noted above, many have been conducted in a way that but for the mandate would make them difficult to distinguish from Chapter VI operations. These have been characterised by consent of the parties, impartiality and the use of force only in self defence. The legal framework has been that of the domestic State.

Peacekeeping and armed conflict:

Congo 1960 ONUC

The Congo attained independence at the end of June 1960 and within weeks the army had mutinied followed by a general collapse of the State. When the province of Katanga seceded, the central government turned to the UN for help.⁵ The UN responded by forming The United Nations Congo Operation (ONUC), which was a composite of up to 20,000 civilian and military units authorised to use force in order to restore basic structure to the Congo. The operation was initially commenced in order to assist the government in maintaining law and order, to provide some level of

² Although the mandate permitted it, force was not used beyond self defence as defined in the UN Rules of Engagement.

³ Goulding, M. *Peacemonger* (2002) at 12 and 337.

⁴ Chersterman, S. *The Use of Force in UN Peace Operations*. External Study. New York University School of Law. (2004).

⁵ Fabian, L. *Soldiers without Enemies: Preparing the United Nations for Peacekeeping*. (1971) at 263.

technical assistance and facilitate the withdrawal of Belgian troops. As matters deteriorated the purpose of ONUC was extended to cover the maintenance of territorial integrity and political independence as well as preventing civil war with this aim supported by the removal of foreign military, paramilitary and other non UN advisory personnel including mercenaries.⁶ The operation was terminated, mainly due to financial constraints⁷ although not before the operation had achieved its primary objective of stability for the Congo.⁸

The Congo operation represents one of the most interesting operations undertaken by the UN because of where it occurs in terms of the peacekeeping continuum. In the 1960's peacekeeping was still in its traditional paradigm. The key features of the operations surrounding it were consent, impartiality and the use of force strictly limited to self-defence. In the Congo operation however there was a loss of impartiality as the UN forces were a party to the armed conflict fighting against the rebels.

Security Council Resolution 143⁹ authorised the Secretary-General to provide military assistance to the government of the Congo but there was no finding under Article 39 of a threat to international peace and security to trigger the use of Chapter VII measures. Security Council Resolution 145¹⁰ did consider “that the complete restoration of law and order in the Republic of the Congo would effectively contribute to the maintenance of international peace and security” but this is not the

⁶ United Nations *The Blue Helmets: A Review of United Nations Peacekeeping*, (Third ed. 1996) at 709.

⁷ Above n 5 at 263-264.

⁸ Dorn, A.W. and Bell, D.J. “Intelligence and Peacekeeping: The UN Operation in the Congo 1960-64” *International Peacekeeping*, Vol. 2, No. 1 (Spring 1995) at 12.

⁹ (1960) of 14 July 1960

determination required by Article 39. Security Council resolution 146¹¹ relied upon Article 49 of the Charter, a Chapter VII article, in calling for support from all members of the United Nations in carrying out the resolutions. Further confusion as to the legal status of the operation was added where the Security Council noted in the resolution that the UN force:

will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise.

This statement seems to contradict the earlier resolution providing military support to the government of the Congo.

The running of the operation was further complicated when the Security Council, finding itself blocked by the use of the veto by the Cold War powers, passed the operation to the General Assembly under the provisions of the Uniting for Peace Resolution in September 1960. Despite initial progress the General Assembly split into factions making the passing of substantial resolutions impossible and the matter was handed back to the Security Council.¹²

As the Congo dissolved into civil war, complicated by the death of the Prime Minister, the Security Council was reunited and finally moved to establish an

¹⁰ (1960) of 22 July 1960.

¹¹ (1960) of 9 August 1960.

¹² McCoubrey, H. and White, N. *The Blue Helmets: Legal Regulation of United Nations Military Operations*. (1996) at 49.

unambiguous Chapter VII operation. Resolution 161¹³ stated that the Security Council was:

Deeply concerned at the grave repercussions of these crimes and the danger of widespread civil war and bloodshed in the Congo and the threat to international peace and security.

The use of force, not limited to self defence, was authorised. With this resolution the Security Council had made the necessary Article 39 finding that permitted the use of Chapter VII powers and the exercise of those powers was brought to bear by the ability to use force.

Security Council Resolution 169¹⁴ was more specific regarding the authorisation of the use of force. This resolution authorised the use of such force as was necessary for the:

“immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel and political advisers not under the United Nations Command, and mercenaries.”

Although the Congo operation was commenced as a Chapter VI operation it was from its inception far more robust than its predecessors. With the original mandate setting it up in support of the government it is difficult to see how it could have been described, even in the beginning, as an impartial operation. The ambiguities in the

¹³ (1961) of 21 February 1961.

¹⁴ (1960) of 24 November 1960.

operation were removed by the Security Council fulfilling the Article 39 requirements and from that point a Chapter VII operation was commenced.

The legal framework on the ground was mixed in nature due to the differences in circumstances across the territory. Where the civilian government remained in control the normal domestic framework of the State continued to function to a greater or lesser extent, with support from the peacekeeping force. However, where the UN force was engaged in armed conflict the provisions of international humanitarian law applied and the Geneva Conventions were specifically directed by the force commander to apply.¹⁵ The UN force did not set up an administration in the territory as the government, despite barely functioning, remained in existence. The UN force was required to provide security and law and order, although what law was to be used was unclear as the newly independent State had not had time to adapt the colonial Belgium law.¹⁶ Regardless of the practicalities of the situation the fact remained that the legal framework was the domestic law of the State with humanitarian law used only to regulate the fighting and treatment of prisoners of war. As a result the overarching legal framework used in the Congo was the domestic law of the State with humanitarian law use to complement this framework in areas where the threshold had been crossed into armed conflict. The UN force did not act as if it were in occupation of territory, rather it deferred to the civilian government and acted in a manner consistent with a force present by consent.¹⁷

¹⁵ Above n 8 at 11-33.

¹⁶ Above n 4 at 2.1.

¹⁷ Jennings, R. and Watts, A. (eds) *Oppenheim's International Law* (ninth ed 1996) Vol 1 at 1156-1165.

While the operation in the Congo caused a financial crisis for the UN, a fact that put the UN off such operations until the 1990s, it was generally considered to be successful and was the model for UN action in the former Yugoslavia.¹⁸

Humanitarian assistance and peace enforcement

Somalia 1992 UNOSOM / Somalia 1993 UNOSOM II

While many academic books and articles have been written about peacekeeping and specific peacekeeping operations, there had not been much interest in the popular ‘paperback’ market. Other than as an incidental aside, Hollywood had not the slightest interest in such a mundane activity. After all, the whole aim of peacekeeping is to avoid the type of action that Hollywood finds stimulating. Somalia was to change that,¹⁹ although the focus of attention was not the UN peacekeeping operation but the US led, UN approved, Unified Task Force (UNITAF).

By the end of 1991 Somalia had degenerated into civil war. Government infrastructure was destroyed and the State was torn between clan based factions. Two of the major protagonists in the capital Mogadishu were General Mohamed Farah Aidid and Mr Ali Mohamed Mahdi. In other parts of the State local leaders were attempting to secede from Somalia. Starvation and displacement were wide spread. The UN estimated that by 1992 300,000 people had died and some 2 million had been displaced.²⁰

¹⁸ Above n 12 at 12, 34.

In January 1992 the Security Council sought to limit the capacity of the factions to continue conflict by placing an arms embargo on Somalia. Humanitarian aid was of primary concern with a number of regional organisations and NGO represented on the ground. UN personnel were also involved in the provision and coordination of aid with UN security personnel deployed to provide protection to the aid workers. The UN also worked to facilitate a ceasefire agreement, which was signed on 27 and 28 March 1992.²¹

In order to monitor the ceasefire the Security Council adopted Resolution 751 (1992)²² establishing the United Nations Operation in Somalia (UNOSOM). Initially UNOSOM consisted of unarmed observers but by July the operation was strengthened to provide operational zones in Berbera, Bossasso, Mogadishu and Kismayo. In October 1992 General Aidid withdrew his support for UNOSOM in the Mogadishu zone, attacking UN peacekeepers and humanitarian aid workers. Pakistani peacekeepers returned fire in self-defence. With the situation in Somalia becoming increasingly unstable the Security Council responded by authorising the US led UNITAF to act under Chapter VII to create a secure environment for the delivery of humanitarian aid.²³ UNOSOM remained under its Chapter VI mandate.

On 3 March 1993 the Secretary-General recommended the transition from UNITAF to UNOSOM II. Although UNITAF had improved the security situation and the provision of humanitarian aid, Somalia was still without a government and civil infrastructure. Security in many regions of the State still remained unsettled.

¹⁹ See Bowden M. *Black Hawk Down*. (1999).

²⁰ UN. http://www.un.org/Depts/dpko/dpko/co_mission/unosomi.htm, (15 Aug 2003)

²¹ Ibid

²² Of 24 April 1992.

UNOSOM II was to continue to create a secure environment for the provision of humanitarian aid and was also to commence peace-building operations. On 26 March 1993 the Security Council adopted Resolution 814(1993) establishing UNOSOM II.²⁴

Although agreements had been put in place with the major actors within Somalia, attacks on UNOSOM II persisted. The Security Council condemned the attacks and the resultant loss of life and in Resolution 837(1993)²⁵ reiterated UNOSOM II authorisation under Resolution 814:

to take all necessary measures against all those responsible for the armed attacks Including against those responsible for publicly inciting such attacks, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment.²⁶

In order to implement the resolution UNOSOM II targeted and destroyed militia weapons, equipment, storage facilities and military facilities as well as wresting control of the radio station in Mogadishu from General Aidid. Attempts were also made to arrest General Aidid in relation to the militia attacks. US forces still remained in Mogadishu, although these were not under UN command or control. The US forces decided to assist in the arrest and detention process by capturing General Aidid and his key supporters. During the course of this attempt two US Black Hawk helicopters were shot down, US soldiers were killed and mutilated while the events

²³ Above n 20.

²⁴ Ibid

²⁵ Of 6 June 1993.

²⁶ Security Council Resolution 837 (1993) of 6 June 1993, para 5.

were transmitted around the world in news broadcasts. The US reacted by withdrawing its forces from Somalia.²⁷

Although the situation in Somalia became calmer with a ceasefire being declared by the major factions, Somalia still remained devoid of a functioning government and infrastructure. The UN commenced major initiatives to achieve a permanent settlement; in particular initiatives were aimed at resolving Hawiye intra clan rivalries, which were identified as the major obstacle to peace in Somalia. Although advances were made with regard to the provision of humanitarian aid and some progress was made in rebuilding the police and court system, peace remained elusive. In March 1993 UNOSOM II was terminated as it was assessed that no further progress could be made.²⁸

UNOSOM I was a Chapter VI operation conducted in a Chapter VII environment. The Chapter VII action was in the form of an arms embargo but there was no reference to Chapter VII in the establishment of UNOSOM I. While UNOSOM I was permitted to use force only in self-defence and was to be impartial as between the parties, the issue of consent raises some difficulties. Without a sovereign authority in Somalia consent was sought from the major warring factions. It is argued that this approach was incorrect as a matter of law. The parties were not capable of claiming that they inherited the rights of the State. The UN expressly accepted the absence of legitimate government when investigating the attacks on UNOSOM II²⁹. Although factions had usurped the rights of government the factions had no legitimate authority. There was therefore no entity in Somalia capable of granting consent for a Chapter VI

²⁷ UN. <http://www.un.org/Depts/DPKO/Missions/unosom2b.htm>,

operation. The model that the UN wanted to use appears to have been based on the Chapter VI and a form of the trusteeship model approach taken in UNTAC.³⁰

As the situation worsened in Somalia and UNOSOM II was established, the Security Council finally moved to a Chapter VII operation. In Resolutions 814(1993) and 837(1993) the Security Council made Article 39 findings that the situation in Somalia threatened peace and security in the region. This permitted deployment without consent and the ability to take on arrest and detention activities normally reserved to the sovereign State. While arrest and detention were authorised under Resolution 837 (1993) for the purposes of prosecution, trial and punishment, there was no guidance as to the authority to conduct such proceedings. It is argued that the Security Council missed an opportunity in Somalia to establish a human rights framework to compliment the 837(1993) mandate. They also failed to adequately set up an administration of the type that had proved successful in Cambodia.

UNOSOM II attacked and destroyed militia weapons, equipment, storage facilities and military facilities. The authorisation for this action was Resolution 837(1993). It is argued that this was done in the form of a policing action rather than as an armed attack on the militia. The militia themselves were not directly the subject of the attack but on the militia's means of conducting attacks on humanitarian relief and UNOSOM II were targeted. At no time did the militia become an "identified enemy," in other words, combatants, so as to cross the threshold into international humanitarian law. The legal framework remained the domestic law of what was left of the State, which

²⁸ Ibid.

²⁹ Above n 1 at 87.

was bound to apply international human rights law, not the Geneva Conventions,³¹ until UNOSOM II was withdrawn in March 1995.

A major problem for UNOSOM II was that the Security Council lacked the will to establish a Trusteeship model operation in Somalia. As a result the legal position was left in a state of confusion and the peacekeepers with a feeling of helplessness that eventually contributed to the torture and death of a Somali youth by the Canadian Airborne Regiment.³²

UN administrations

The situation in Somalia contrasted significantly with the operations in East Timor and Kosovo where successful administrations were set up and as a result the legal environment was articulated.

Former Yugoslavia 1992 UNPROFOR

To provide a background to the UN administration in Kosovo it is necessary to briefly summarise the involvement of the UN mission in the Balkans that led to its establishment.

³⁰ Henkin, A. (ed) *Honouring Human Rights and Keeping the Peace; Lessons from El Salvador, Cambodia and Haiti*. (1995) at 7: Or “governance-in-trust”; Chopra J. “UN Civil Governance-in-Trust” in Weiss T.G (ed) *The United Nations and Civil Wars*. (1995) at 69-88.

³¹ It was only Australia that argued that the Fourth Geneva Convention applied. The argument for its application is set out in Kelly’s work, above and will be discussed in detail in latter chapters of this work. The nature of the operation was in any event intended as a policing action: See Sapir D.G. Deconinck H. “The Paradox of Humanitarian Assistance and Military Intervention in Somalia” in Weiss T.G (ed) *The United Nations and Civil Wars*. (1995) at 166: also Lewis W. Marks E. *Police Power in Peace Operations: Civilian Police and Multinational Peacekeeping: A Workshop Series*. (April 1999) at 13.

The UN peacekeeping activities in the former Yugoslavia represent arguably the most complex and challenging peacekeeping situation that the UN had ever faced.³³ Post Cold War Yugoslavia became prey to ethnic tensions following the death of Tito and the adventurism of Milosevic. By June 1991 armed conflict had erupted in Croatia because Croatia and its northern neighbour Slovenia had declared independence from Yugoslavia, a move opposed by the Yugoslav People's Army (JNA) and ethnic Serbs. All efforts at peace brokered by regional agencies and the UN failed to resolve the conflict or even obtain a ceasefire. Eventually after much diplomatic effort in Europe and the UN, the Security Council adopted Resolution 743 (1992)³⁴ establishing the United Nations Protection Force (UNPROFOR). The area of responsibility for UNPROFOR covered Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia, with a liaison presence in Slovenia.³⁵ It was the largest ever peacekeeping operation.³⁶

Croatia UNPROFOR was to ensure the demilitarisation of United Nations Protected Areas (UNPA), monitor the local police and protect human rights. Outside the UNPA it was to support humanitarian agencies and verify the withdrawal of the JNA. Although UNPROFOR was expanded both in size and mandate, hostilities again broke out in January 1993 at the instigation of the Croatian army, a move responded to by the Serbs. On 25 January 1993 the Security Council demanded in Resolution 802 (1993) inter alia a ceasefire. Eventually after several rounds of talks an

³² Canadian Government. *Report of the Somali Commission of Inquiry*.
<http://www.dnd.ca/somalia/somaliae.htm> (5 Oct 2005).

³³ Above n 2 at 298-299.

³⁴ Of 21 February 1992.

³⁵ UN. http://www.un.org/Depts/dpko/dpko/co_mission/unprof_b.htm. (15 Jul 2003).

³⁶ Above n 3 at 310.

agreement was reached implementing the Resolution. Tensions flared however again in July 1993 over the rebuilding of the Maslenica bridge. Agreement could not be reached and conflict escalated. A ceasefire agreement was finally reached on 15 September 1993 and UNPROFOR moved into the disputed area. On 17 December 1993 the Serb and Croat representatives in Croatia entered into a ceasefire agreement that held until the termination of UNPROFOR.³⁷

Bosnia and Herzegovina presented a more challenging situation. The conflict was between the Bosnian Muslims and Bosnian Croats on one side and the Bosnian Serbs on the other. Fighting in and around Sarajevo became so intense that much of UNPROFOR was withdrawn. Fighting continued despite an enlargement of the UNPROFOR elements and their return to open the airport at Sarajevo for humanitarian lifts. Humanitarian aid became a key concern and UNPROFOR was again expanded in order to provide protection for aid agencies, as well as to observe airfields following the establishment of a military no fly zone over Bosnia and Herzegovina. Further expansion of the force was proposed by the Secretary-General in December 1992 in order to enforce the sanctions at the international borders. Throughout the UNPROFOR operations in Bosnia Herzegovina the local government was critical of its activities and tended to sheet blame for real or perceived failures on to it.³⁸

In March 1993 Member States and UNPROFOR were authorised by the Security Council to use “all necessary measures” to enforce the no fly zone. Meanwhile Bosnian Serb attacks on the “safe areas” intensified. UNPROFOR’s mandate was

³⁷ Above n 35.

again strengthened and further “safe areas” established following ceasefire agreements reached between the parties. However in May 1993 fighting broke out in central Bosnia between Bosnian Muslims and Croats. UNPROFOR had to move to provide humanitarian relief and protect supply lines. Ceasefire agreements within the State continued to be broken and NATO began in early 1994 to plan for pre-emptive air strikes. By the end of February 1994 a further ceasefire agreement had been negotiated. However, this ceasefire was broken in March 1994 precipitating NATO air strikes against Bosnian Serb positions. By the end of April 1994 a further ceasefire had come into effect. In July 1994 only western Bosnia remained actively in conflict. The situation changed in August and September 1994 with renewed fighting in several regions with the Bosnian Serbs renewing attacks on the “safe areas” and implemented a policy of ethnic cleansing. Further negotiations resulted in a ceasefire agreement between the Bosnian government and the Bosnian Serbs taking effect on 1 January 1995.³⁹

Former Yugoslav Republic of Macedonia formed part of the UNPROFOR mandate at the request of the Macedonian government, which was concerned that tensions might spill over from the other former States. This deployment “represented the first preventative deployment operation in the history of UN peacekeeping.”⁴⁰ Although tensions were high, mainly due to economic pressures and disputes between Macedonians and ethnic Albanians, UNPROFOR was successful in maintaining peace and security.⁴¹

³⁸ Ibid

³⁹ UN. http://www.un.org/Depts/dpko/dpko/co_mission/unprof_b.htm (20 Jul 2003)

⁴⁰ Ibid.

⁴¹ Ibid.

UNPROFOR was terminated in March 1995 when peacekeeping operations were restructured by the formation of three separate but interconnected operations⁴².

Throughout its existence it was operating alongside regional peacekeeping operations established by NATO. It was also able to draw on protection from these forces such as the close air support provided by NATO jets.

UNPROFOR had a complex and fluid legal basis. It was established on 21 February 1992 by Security Council Resolution 743 (1992). In this Resolution the Security Council confirmed the Article 39 finding by stating concern:

that the situation in Yugoslavia continues to constitute a threat to international peace and security as determined in resolution 713 (1991).

The NATO elements in the area of operations were called upon under the Resolution to “take all necessary measures to ensure the safety of..” UNPROFOR. The UNPROFOR position was not expressly stated to be under Chapter VII but the effect of the Article 39 finding and the mandate to NATO meant that at the very least UNPROFOR was conducting its operation in a Chapter VII environment. As consent of the parties was unlikely to be universally available at all times during the operation a Chapter VII operation was effectively necessary.

On 30 May 1992 the UN Security Council was unambiguous in relying upon the Chapter VII embargo provisions in Resolution 757 (1992). It was also unambiguous on 13 August 1992 with Resolution 770 (1992) in expressly acting under Chapter VII in calling on States to take “all measures necessary” to assist in the humanitarian

⁴² Ibid.

effort in Bosnia and Herzegovina. The Resolution also demanded that “all parties and others” take “all necessary measures to ensure the safety of UN and other personnel” involved in the humanitarian effort. The humanitarian elements of the UNPROFOR mission were thereby expressly protected, although not expressly conducted, under Chapter VII.

Again, when dealing expressly with UNPROFOR, on 14 September 1992, Resolution 776 (1992) was silent as to the Chapter under which it was operating.⁴³ This reticence was not apparent on 31 March 1993 when Resolution 816 (1993) expressly operating under Chapter VII required UNPROFOR action in regard to monitoring compliance with the no fly zone. Although the role is a passive monitoring role it is none the less expressly a Chapter VII activity. Member States were given wider powers to enforce the no fly zone in the same Resolution.

By 4 June 1993 the ambiguity in the legal basis was beginning to clear. Resolution 836 (1993) expressly placed the UNPROFOR operation in Bosnia Herzegovina under Chapter VII. This followed on 4 October 1993 with Resolution 871 (1993) which expressly acting under Chapter VII authorised UNPROFOR in Croatia while:

acting in self-defence, to take the necessary measures, including the use of force, to ensure its security and its freedom of movement.

Although this clarified the mandate position of UNPROFOR in Croatia it was silent with regard to the remainder of the operation in other areas.

Although further embargo provisions were enacted under Chapter VII no further clarification was given to UNPROFOR up to its termination. It is therefore arguable that the Macedonian element of UNPROFOR should be viewed as a Chapter VI operation. It was after all present not just with the consent but at the express request of the Macedonian government. It was an impartial force and used force limited to self defence without extensions such as that found under Resolution 871 (1993). The purpose of the operation in Macedonia was also fundamentally different from the remainder of UNPROFOR. Such disjointed operations are not efficient and the division of UNPROFOR into separate operations was a much more efficient method of dealing with the situation.

In Macedonia the legal framework relied upon was the domestic State law as modified by the SOFA. In other areas UNPROFOR relied on the NATO operations to provide security while attempting to maintain impartiality and neutrality.⁴⁴ At times UNPROFOR appears to have been engaged in armed conflict and it has been argued that it should have applied the laws of armed conflict. However, it has not been suggested that UNPROFOR was in occupation and persons captured when UNPROFOR acted in self defence were handed over to the State authorities not dealt with under powers that would have been available had UNPROFOR been acting as though it was relying on humanitarian law as the legal base of its actions.⁴⁵ To this extent the UN practice militates against humanitarian law as the legal framework even in a situation which appears to make it a temporary party to an armed conflict. The

⁴³ Ibid.

⁴⁴ Although it failed to maintain these objectives and therefore created many of the problems which beset the UN operation in the former Yugoslavia; see Weller, M "The Relativity of Humanitarian Neutrality and Impartiality." *The Journal of Humanitarian Assistance* (2002) <http://www.jha.ac/articles/a029.htm> (15 Apr 2005).

⁴⁵ Rogers, A.P.V, *Law on the Battlefield* (2nd ed 2004) at 245-247.

question for UNPROFOR was what legal framework did apply? This was a question that they were unable to answer.⁴⁶

Kosovo 1999 UNMIK

Although NATO and UNPROFOR had been operating in the former Yugoslavia since 1992 the fighting between the ethnic groups continued. In 1998 fighting between the Serbian forces and the Kosovo Liberation Army caused 200,000 people, or a tenth of the population of Kosovo, to flee. A Serbian campaign of ethnic cleansing caused NATO to launch air strikes against Serbian targets in March 1999. Retaliation for these strikes caused some 700,000 Albanian Kosovars to cross the borders into Albania and Macedonia as refugees.⁴⁷ On 10 June 1999 the Security Council established a UN in Kosovo by Resolution 1244 (1999). The United Nations Mission In Kosovo (UNMIK) was primarily a civilian organisation with a civilian head.

UNMIK was established under Chapter VII but this was concerned with the placing into a territory of an administration capable of operating as a State rather than to permit the use of armed force by the UN force. The security role was primarily a function of the civilian police arm of the operation with the military performing a secondary role as observers. The military were not to be the main tool of the operation,⁴⁸ although NATO in the form of the Kosovo Force (KFOR) remained in place to act in a security role if required. As with UNTAC, the operation functioned as on the basis of the trusteeship model with the establishment of law and order,

⁴⁶ Id at 247.

⁴⁷ Strohmeyer, H. "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor." *The American Journal of International Law*. Vol. 95 No.1 (January 2001) at 48.

legislation and the justice system based on the authority of a resolution drafted in very broad terms. The UN structure in Kosovo has four departments:

Law and Order (NATO forces in the form of KFOR and UN civilian Police).

Civilian administration,

Institution building (led by the Organisation for Security and Cooperation in Europe (OSCE)),

Reconstruction, and

Regeneration (both led by the European Union).⁴⁹

In this way the UN utilised the services of the international community to perform administrative tasks, although as noted by Matthias, the legal basis for this type of cooperation is rather weak as the Security Council's powers under Chapter VII are binding on States rather than international organisations.⁵⁰

There was no suggestion from any participant State or the UN that UNMIK was operating under the Geneva Conventions, rather the administration in Kosovo was seen as operating on the basis of Security Council Resolution 1244.⁵¹

⁴⁸ UN. <http://www.un.org/Depts/dpko/unmik/unmikB.htm>. (1 Feb 2004)

⁴⁹ Matheson M.J. "United Nations Governance of Postconflict Societies." *The American Journal of International Law*. Vol.95 No.1 (January 2001) at 79-80; Royal New Zealand Navy: *Navy Today*. Vol 103. (September 2005) at 16.

⁵⁰ Matthias R. "The Administration of Kosovo and East Timor by the International Community" *International and Comparative Law Quarterly*. Vol.50 No.3 (July 2001) at 619.

⁵¹ Strohmeyer H. "Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor" *Fletcher Forum of World Affairs*. Vol.25 No.2 (Summer 2001) at 109: See also above n 50 Matheson at 83:

Matheson has argued that as the scope of powers under Chapter VII is very wide the administration was founded on the basis of adequate legal authority provided under Chapter VII. In examining this issue Matheson, referring to Article 41, concluded that:

“There is no reason in principle why the Council cannot authorise other measures of governance that it believes necessary to restore and maintain the peace, including the creation of administrative and judicial structures, the promulgation of laws and regulations, and the imposition of taxes and other financial measures.”⁵²

Support for this conclusion may be based on the authority of the Security Council found in the implied powers doctrine.⁵³ This doctrine flows from the finding of the International Court of Justice that the United Nations:

“...must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties”⁵⁴

UNMIK was therefore able to administer the territory of Kosovo under the mandate as part of the UN’s responsibility to maintain international peace and security through the powers set out in Chapter VII. Although UNMIK administers the territory Serbia retains *de jure* sovereignty as evidenced by the actions of the Human Rights Committee in inviting Serbia to report on the human rights situation in Kosovo.

⁵² Above n 49 Matheson at 84.

⁵³ Above n 51 at 620.

Although Serbia declined as it did not have de facto control over Kosovo the Human Rights Committee agreed on 19 October 2005 to allow Serbia to attend the presentation of a report by UNMIK.

Although the power to administer Kosovo flows from the UN Charter, UNMIK used the laws of the previous administration as the legal framework as modified by⁵⁵ and within the framework of international human rights law.⁵⁶ The legal framework that applied as a matter of fact in Kosovo was therefore a blend of local domestic law⁵⁷ and international human rights law. International humanitarian law was not relied on.

UNMIK was to provide a useful role model for the operation in East Timor. While the UN had set up an administration for a brief period in Cambodia, UNMIK was the first example of the UN providing a full governmental system, acting as the custodian of government until the people of Kosovo could assert their UN Charter right to self-determination or an agreement can be reached with Serbia as to the future status of Kosovo.

East Timor 1999 UNAMET / UNTAET / UNMISSET

As with many States in Asia and Africa the territorial boundaries of Indonesia are the result of colonial settlement rather than ethnic groupings. On the island of Timor two

⁵⁴ ICJ *Reparation for Injuries Suffered in the Service of the United Nations* Case. ICJ Rep. 1949, 174 at 182.

⁵⁵ UNMIK/REG/1999/24 of 12 December 1999, s1(3) set out the international human rights conventions to be applied.

⁵⁶ Above n 47 at 49.

⁵⁷ Above n 49 Matheson at 80; Above n 51 Strohmeyer at 111. The law originally set in place was the Federal Republic of Yugoslavia law, however this was violently objected to by the Kosovars so

colonial powers, Portugal and the Netherlands, had sat side by side dividing the island roughly in half. Post World War Two the colonies, which had previously formed the Dutch East Indies, revolted. In a weakened post war condition the Dutch were not in a position to resist and Indonesia was able to emerge as a predominantly Islamic archipelagic State. While the former Dutch colony in West Timor became part of Indonesia the predominantly catholic population of East Timor remained under Portuguese rule. By 1974 the Portuguese were seriously questioning the political acceptability of colonial possessions. As a result Portugal sought to set East Timor on the path to autonomy and eventual independence. Some factions were advocating integration with Indonesia while others wanted to see an independent State of East Timor.⁵⁸

Almost inevitably, civil war erupted giving Indonesia the excuse in 1975 to move in and later forcibly annex East Timor as its 27th province. The UN did not recognise Indonesia's sovereignty over East Timor, although many States including Australia did.⁵⁹ The Timorese independence movement remained active, both politically and with armed force, in East Timor and continued to lobby internationally for independence. From 1982 the UN facilitated discussions between Portugal and Indonesia in an attempt to reach a political solution in East Timor. In June 1998 a limited autonomy proposal was agreed to by Indonesia and on 5 May 1999 Portugal

UNMIK decided that the law would be the law applicable in Kosovo on 22 March 1989, which was the law applicable before the removal of Kosovo autonomy:

⁵⁸ UN <http://www.un.org/peace/timor/unmissetB.htm>. (15 Apr 2005)

⁵⁹ For a detailed analysis of the recognition of Indonesia's incorporation of East Timor see Shearer I. "A Pope, Two Presidents and a Prime Minister" 7 *ILSA Journal of International and Comparative Law* (2001) at 429-440.

and Indonesia signed an agreement that included provision for “popular consultation” on the question of special autonomy or independence for East Timor.⁶⁰

By Resolution 1246⁶¹ the Security Council established the United Nations Mission in East Timor (UNAMET) to assist in administering and observing the vote. On 30 August 1999 approximately 90% of East Timor’s voters rejected integration with Indonesia and elected for independence for East Timor. The response from the pro-integrationists was swift and violent. Militia, with assistance from some regular military forces, effectively razed the majority of East Timor’s infrastructure to the ground, killing and deporting thousands of East Timorese in the process. The UN responded with diplomatic efforts to halt the devastation and procured Indonesian consent to the insertion of a Member State led peacekeeping force, the International Force for East Timor (INTERFET).⁶²

Indonesia finally recognised the result of the consultation on 19 October 1999. On 25 October 1999 the Security Council adopted Resolution 1272,⁶³ establishing the United Nations Transitional Administration East Timor (UNTAET). UNTAET was to be a complex operation with civilian administration, humanitarian and peacekeeping elements providing a basic structure for government until the East Timorese were in a position to replace UNTAET with self-government. By February 2000 UNTAET was in a position to take over from INTERFET, which was terminated and duly replaced by UNTAET⁶⁴. UNTAET successfully concluded its mission and was terminated on

⁶⁰ Ibid.

⁶¹ (1999) of 11 June 1999.

⁶² Above n 58.

⁶³ (1999) of 25 October 1999.

⁶⁴ Above n 58.

20 May 2002 when the elected government of East Timor held its first parliamentary session and declared the independent State of East Timor.⁶⁵

Although East Timor is an independent State the UN recognised that it is still in need of significant assistance before it can stand completely independent of outside assistance. On 17 May 2000 the Security Council adopted Resolution 1410⁶⁶ bringing into existence on 20 May 2002 the United Nations Mission of Support in East Timor (UNMISSET). UNMISSET is to continue to assist in the civil administration of East Timor such as guiding and training Timorese public officials and supporting the fledgling judiciary. This assistance also includes training of East Timorese civilian police (ETPS) as well as contributing to internal and external security through the deployment of armed military units, most notably along the East / West Timor border.

Both UNTAET and UNMISSET were established expressly under Chapter VII of the Charter. UNMISSET relies upon the previous Article 39 finding being imported by recalling previous resolutions containing the finding. It seems that the Security Council does not have to make the finding in order to make Chapter VII applicable to each operation but only to the geopolitical situation or State. Both operations consist of a combination of armed military force operating on the basis of the ability to use force for the purposes of the operation and unarmed observers carrying out a traditional peacekeeping operation. This has become something of a hallmark of UN peacekeeping operations. The main operation is put onto a footing which is capable of performing an enforcement mission if required, while running parallel to that operation is an observer mission using unarmed military staff under a separate chain

⁶⁵ Ibid.

of command, although both groups are ultimately under the commander of the peacekeeping force (PKF).

This approach gives the UN a significant degree of flexibility as the structures are in place to react to an aggressive escalation as well as a withdrawal of the enforcement operation leaving the observers in place rather than being required to initiate a fresh operation. The use of the observer operation again highlights the point that simply because an operation is conducted under Chapter VII it does not necessarily follow that an enforcement operation will be conducted. What it does mean is that there is no legal impediment to the use of force or of the conduct of the operation without the consent of the relevant State or that impartiality is totally sacrificed.⁶⁷

As with UNMIK, the legal authority for the UN administration was Chapter VII of the Charter. Also as with UNMIK, the UN administration passed laws to establish a legal framework. The law that formed the framework was the law applicable prior to collapse, the Indonesian penal code, as modified by international human rights law.⁶⁸ There was no recourse to international humanitarian law either by INTERFET or UNTAET and indeed it was the position of Australia, the lead nation in the operation, that international humanitarian law did not apply as there was no armed conflict.⁶⁹ The legal framework for UNTAET was therefore the domestic law blended with international human rights law.

⁶⁶ (2002)

⁶⁷ Impartiality was sacrificed to the extent that the Indonesian armed forces and the militia were not persons for whom armed force was permitted to be used for their protection under the rules of engagement.

⁶⁸ UNTAET Regulation 1999/1 (27 November 1999).

Conclusion

In 1969 when considering the lessons learned from the UNEF operation, Rosalyn Higgins wrote that it was inconceivable that a UN force, even one constituted under Chapter VII should be placed in a State without the consent of that host State.⁷⁰ The UN has gained a significant and varied amount of experience since that time and some trends can be drawn from the UN experience of Chapter VII operations.

Despite the powers available under Chapter VII the UN still demonstrates a marked preference for the consent of a State into which it is to deploy peacekeepers almost regardless of whether a Chapter VI or Chapter VII operation is contemplated.

Although there has been less reluctance, or perhaps more ability, to operate under Chapter VII in the post Cold War years, the structures of the operations have closely followed the Chapter VI model. In East Timor for example, UNTAET, a Chapter VII operation, was not commenced until consent had been received from the Indonesian and Portuguese governments.⁷¹

The end of the Cold War saw a rise in the number and complexity of Chapter VII operations. From operations with a simple strategy of deterrence Chapter VII operations became the vehicle by which the UN took custody of sovereignty for the people of collapsed States and Territories until the people could exercise their UN Charter right of self determination. This approach was particularly clear in the

⁶⁹ Australian Defence Force Military Law Centre *Law and Military Operations in East Timor September 1999 – February 2000: Lessons Learnt for Legal Officers*. (2000) at 17

⁷⁰ Higgins, R. *United Nations Peacekeeping 1946-1967: Documents and Commentary*. (1970) at 524 -5.

⁷¹ The UN did not recognise Indonesia as the lawful government therefore the consent of the former colonial power was obtained in addition to the former *de facto* government.

Chapter VII operations in Kosovo and East Timor, although it had begun in the Chapter VI operations in West Irian, Cambodia and so on. It is important to recognise that in these roles the UN does not act as a super State but as a simple administration on appointment from the Security Council.

The fact that an operation is being conducted under Chapter VII does not mean that it can be distinguishable on the ground from a Chapter VI operation. The majority of Chapter VII operations have used force only in self defence, been impartial between the parties and to some extent enjoyed the consent of the parties, where there have been parties capable of giving it. What the modern use of Chapter VII permits is the escalation of an operation when that is required without the need to approach the Security Council for a new mandate.

Modern peacekeeping operations under Chapter VII also tend to be integrated with a traditional observer mission. These missions are not run as separate operations but parallel to it with a separate chain of command up to the main in-country peacekeeping headquarters.

While the legal authority for peacekeepers to be in a State is Chapter VII,⁷² the legal framework to be applied is not articulated. In many of the Chapter VII operations the applicable legal framework was clear. Some early operations were conducted in a situation of armed conflict, such as the Congo operation, and therefore international humanitarian law applied; while in others the domestic State was fully operational so that the domestic State law applied, subject to any variations agreed in a SOFA. In

⁷² Rather than the consent of the State.

these situations the peacekeepers would be able to deal with law breakers and detainees by handing them over to the civilian State authorities.

In States where the domestic framework had collapsed, such as Kosovo and East Timor, the UN set up an administration, preserving sovereignty until the people were able to exercise their Charter right of self determination. In these situations peacekeepers are able to apply the law as set up and administered by the UN administration as if it were a functioning domestic State.

To date, except for the operation in the Congo which amounted to armed conflict, international humanitarian law has not been applied on the basis that the UN has not been a party to an armed conflict. In collapsed States where the UN has conducted successful operations, the UN has applied the law applicable before collapse and blended this law with international human rights law. In Somalia the UN was not successful and the lack of certainty as to the law that applied may well have contributed to the failure.

In order to understand why international humanitarian law was not applied to peacekeeping in collapsed States the next chapter of this work will examine what international humanitarian law is, where it begins and more significantly for peacekeeping, where it ends.

CHAPTER FIVE

What is International Humanitarian Law?

Introduction

In the previous chapters of this work the theory and practice of peacekeeping was examined. That examination has demonstrated that over time peacekeeping has evolved from a simple deployment of troops with the consent of the parties, operating impartially as between the parties and able to use force only in self defence, to a complex operation capable of providing the basic infrastructure upon which a State can be reconstructed. Force in such circumstances may not be limited to self defence and peacekeepers may be taking an active role in defending one party against another.

It has also been demonstrated that the legal framework applied to peacekeeping will vary. In simple traditional peacekeeping operations the law of the domestic State will apply, as amended by agreement and conventions. Where a UN peacekeeping operation has been established to administer a collapsed State, human rights law has been used as the foundation for the legal framework. The operations have then facilitated the process of transition to a domestic government, established through the people exercising their right to self determination.

The position of this work is that international human rights law is the *de jure* law to be applied in peacekeeping operations where the domestic State has collapsed. The alternate view, put forward by Michael Kelly¹, is that international humanitarian law is the *de jure* law in such circumstances and in particular that the Fourth Geneva

¹ *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework*. (1999).

Convention should be used to provide the legal framework for peacekeeping operations in a collapsed State on the basis that the UN is in occupation.

In order to analyse the argument that international humanitarian law is the *de jure* law to be applied in collapsed State peacekeeping, it is necessary to establish what international humanitarian law is. This chapter examines the genesis and growth of international humanitarian law, highlighting the global nature of its development, in order to provide an understanding of its purpose and limits. The sources of international humanitarian law, the basic principles underpinning it and the specific conventions that form its substance are analysed for suitability in peacekeeping.

Sources of international humanitarian law

As with all international law, humanitarian law has developed from treaties, custom, general principles of law, judicial decisions, writings of publicists and the resolutions or decisions of international organisations.² Many of the international humanitarian law conventions and treaties have become customary international law, they are considered to be binding on all States not just the signatories. The status of these rules as customary international law restricts the ability of States to opt out of the rules and adds to their morally binding character due to their being seen to be embedded and deeply rooted in community values.³ An excellent example of this

² Dixon, M. *Textbook on International Law*. (4th edition 2000) at 24-47.

³ Meron, T. in Gutman, R and Reiff, D (eds) *Crimes of War: What the Public Should Know*. (1999) at 113.

process is the De Martens clause which was drafted by Feodor Martens in the preamble to the Hague Convention of 1907.⁴

More particularly, international humanitarian law is derived from part of the law applicable to the use of force between States (referred to hereafter as the laws of armed conflict). There is a separation of the law pertaining to the use of force into *jus ad bellum*, the legal status of the resort to the use of armed force and *jus in bello*, the legality of the force used during conflict. Humanitarian law pertains to the *jus in bello* and is similar to human rights law in that it routinely regulates the actions of individuals as well as States, and renders individuals liable to prosecution both nationally and internationally for contravention of its provisions.⁵

The International Committee of the Red Cross (ICRC) defines international humanitarian law as:

The body of rules which, in wartime, protects people who are no longer participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict. The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 are the principal instruments of humanitarian law.⁶

⁴ Howard, M. "Constraints on Warfare" in Howard, J, Andreopoulos, G and Shulman, M. (eds) *The Laws of War. Constraints on Warfare in the Western World*. (1994) at 10.

⁵ A number of offences are created in, for example, the Geneva Conventions, inter alia the grave breach provisions which States are obliged to prosecute. The International Criminal Court (ICC) also provides a forum for international prosecution as have the various *ad hoc* tribunals. The ICC statute has effectively been incorporated into Australian law through the *Criminal Code Act 1995*.

⁶ ICRC <http://www.icrc.org/eng/ihl>. (2 May 2005).

The ICRC definition clearly places humanitarian law as a law applicable in armed conflict and relevant to the conflict participants. As demonstrated in chapters three and four of this work, it is very rare for UN peacekeepers to become directly engaged in armed conflict. Certainly peacekeepers operate in areas where there has been armed conflict and on occasions where armed conflict is still occurring but in such circumstances they would be entitled to the protection of humanitarian law as neutrals or civilians.

Customary international humanitarian law

Despite the ICRC reference to codified humanitarian law in the four Geneva Conventions of 1949, international humanitarian law has a very long customary history. Armed conflict is after all as old as man. Ober, for example, points out that in the classical Greek age, about the late fifth century B.C., there were at least 12 clearly identifiable customary rules regulating interstate conflict.⁷ Bev, on the other hand, attributes the first humanitarian law to King Hammurabi who in ancient Babylon issued a decree prohibiting the strong from oppressing the weak.⁸ Many of the ancient Greek rules are specifically echoed in modern humanitarian law, such as the protection of sacred sites, observance of truces, returning enemy dead, prohibition on executions or mutilations of prisoners of war and the prohibition on attacks against non combatants. While these rules were often ignored or deemed not to apply to the members of certain social groups, they were at least acknowledged. The primary

⁷ Ober, J. "Classical Greek Times" in Howard, J, Andreopoulos, G and Shulman, M. (eds) *The Laws of War. Constraints on Warfare in the Western World*. (1994) at 13.

⁸ Bev, J.S. *Human Rights Laws vs Humanitarian Law (Part II of II)* (2000) http://www.suite101.com/article.cfm/human_rights/31140.(2 May 2005).

Judaeo-Christian references to early elements of humanitarian law are to be found in the Old Testament.

References to the treatment of prisoners of war are to be found in 2 Kings 6:22. The prophet Elisha advised the king of Israel regarding prisoners of war. The king would have killed the prisoners' but the prophet advised differently:

And he answered, Thou shalt not smite them: wouldest thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread and water before them, that they may eat and drink, and go to their master.⁹

The Qur-an also contains imprecations against the misuse of enemies. At 1234¹⁰ It prohibits the taking of prisoners for ransom. At 1238 the Qur-an advises that:

If the kindness shown to them is abused by the prisoners of war when they are released, it is not a matter for discouragement to those who show kindness... The Believers have done their duty in showing such clemency as they could in the circumstances of war.

These examples from two of the world's major religions demonstrate a concern with humanitarian issues and the generation of express rules for the treatment of prisoners of war that are consistent with the principles of modern humanitarian law. They are also rules that pertain only to the participants in the conflict.

⁹ *The Bible* <http://www.bartleby.com/108/12/6.html#S9> (2 May 2005).

¹⁰ *Holy Qur-an* (2000) at 1410H.

Despite a long history of influence from the roots of western civilisation, the rules of Chivalry have often been pointed to as the foundation for the development of modern humanitarian law in the west. These rules were considered to have had their genesis in the wars of the late republic¹¹ and imperial Rome. Certainly the Romans observed prohibitions on the slaughter of non-combatants, even if the prohibitions only applied to Roman citizens. In the age of Chivalry (the European Middle Ages) this interpretation of Roman practice manifested itself in the application of nascent humanitarian principles, such as the proper treatment of prisoners of war and a level of respect for non-combatants. Respect for the dead, at least the noble dead, was also a part of the customs of war as evidenced by the punishment meted out to one of William the Conqueror's knights who struck the dead body of King Harold. However, these principles, following the Roman tradition, applied only to Christian forces, while pagans could be dealt with as the victor saw fit.¹² A stark demonstration of this differentiation between the treatment of Christian and non-Christian enemies was the slaughter of Moslem women, children and prisoners of war during the Christian crusades of the 11th and 12th centuries.¹³

Other examples of customary humanitarian rules practised during the Middle Ages are found in Shakespeare's plays written in about the 1590s. In *Henry V* Act IV Scene VII, Fluellen, coming upon the slaughter of the baggage handlers and other non-combatants cries:

¹¹ Such as the civil war between Pompeius Maximus, Gaius Crassus and Gaius Julius Caesar, as well as Gaius Julius Caesar's German, Gallic and British wars.

¹² Stacey, R.C. "The Age of Chivalry" in Howard, J, Andreopoulos, G and Shulman, M. (eds) *The Laws of War. Constraints on Warfare in the Western World.* (1994) at 28.

¹³ Foss, M. *People of the First Crusade.* (1997) at 159-181.

Kill the boys and the luggage! 'tis expressly against the laws of arms.¹⁴

Respect for prisoners of war did not appear to be quite so well entrenched as King Henry ordered all the prisoners throats slit in retaliation for breaches of the rules as Gower tells the audience in response to Fluellen:

'Tis certain there's not a boy left alive; and the cowardly rascals that ran from the battle ha' done this slaughter: besides, they have burned and carried away all that was in the kings tent; wherefore the king, most worthily, hath caused every soldier to cut his prisoner's throat. O, 'tis a gallant king!

But then reprisals also form part of the modern law of armed conflict and arguably the issue of reprisals is intertwined with the concept of reciprocity, a concept central to the development of the laws of armed conflict. The concept of reciprocity centred traditionally on the reciprocal protection of a small number of specifically identified people, mainly persons 'belonging to the enemy'.¹⁵

Protection of non-combatants was seen as a key principle in the law of arms (as it was known) but this did not prevent the pillaging of defeated territory. The argument raised to defend this apparent violation of the principle of distinction was that the peasants and merchants were the support base without whom an army could not operate, thus exposing them as legitimate targets.¹⁶ This is an argument that is recognisable under the modern law of armed conflict and was (in conjunction with

¹⁴ Shakespeare, W. Volume 2 *Histories and Poems* (1995) at 126.

¹⁵ Meron, T. *Human Rights in Internal Strife: Their International Protection*. (1987) at 11; Meron, T. *Henry's Wars and Shakespeare's Laws: Perspectives on War in the Later Middle Ages*. (1993).

¹⁶ Above n 12 at 35.

economic warfare) the rationale for the bombing of industrialised areas by both sides during the Second World War.¹⁷

Western medieval foundations of modern international humanitarian law

Inherent in certain modern linguistic terms are shadows of criticism for offences against the law of arms that have been handed down from the early Middle Ages. The most obvious examples relate to the Vandals and Huns. Both these terms have come into the modern vocabulary from the activities of tribally based armies of the early Middle Ages. In *The Australian Concise Oxford Dictionary*¹⁸ vandal is defined as:

1 a person who wilfully or maliciously destroys or damages property. 2 (Vandal) a member of a Germanic people that ravaged Gaul, Spain, N. Africa, and Rome in the 4th-5th c., destroying many books and works of art.

The same publication defines Hun as:

1 a member of a warlike Asiatic nomadic people who invaded and ravaged Europe in the 4th-5th century. 2 *offens.* a German (especially military context) 3 an uncivilised devastator; a vandal.

It seems that the critique of the activities of these tribal groups in the 4th and 5th century implicit in modern usage of their names is closely related to their breaching of accepted rules of warfare at the time. In modern terms their activities would be considered grave breaches of international humanitarian law and the collective

¹⁷ Best, G. *War and Law Since 1945*. (1994) at 50.

disapproval of such behaviour ran deep enough to leave a lasting impression in linguistic censure.

For the west the Middle Ages marks the rise of the modern concepts in international humanitarian law. Parker¹⁹ identifies five foundations of humanitarian law in the Middle Ages. These are; natural and divine law, ecclesiastical precept, military law, common custom and self-interest. Natural and divine laws were derived from a series of texts: The bible, Roman law, canon law, the writings of Augustine and the *Summa Theologica* of Thomas Aquinas. The ecclesiastical precept, distilled from the Peace of God movement founded in 11th century France, was based on the principle that the weak who could do no harm should not in turn be harmed. At much the same time, armies were beginning to formally self regulate and military law was emerging to control the activities of troops on the basis of duty to God, obedience to superiors, vigilance, loyalty and (qualified) humanity towards civilians. Common custom was formed from the conduct of war and used as the basis to justify or condemn activities in conflict. Finally, self-interest was born from a dawning realisation that mutual restraint, such as honouring surrenders, respecting flags of truce, sparing the wounded and so on, was mutually beneficial. Although all these principles were developing during the Middle Ages it was not until the period 1550 to 1700 that a consistent western practice was seen to emerge.²⁰ From that period on however, the majority of the modern international humanitarian law, or at least the “self-evident and unalterable” parts of it, were in existence.²¹

¹⁸ (Third ed). Oxford University Press. (1997).

¹⁹ Parker, G. “Early Modern Europe” in Howard, J, Andreopoulos, G and Shulman, M. (eds) *The Laws of War. Constraints on Warfare in the Western World*. (1994) at 40-58.

²⁰ Id at 41-42.

A feature of the development of international humanitarian law is that it was a distinct area of law active only in the event of armed conflict. This may seem an obvious point but it is an important one when searching for the boundary of the laws of armed conflict and to whom they may apply. The law also applied only to participants in conflict. It bound individuals engaging in armed conflict to certain rules pertaining to the use of force. These individuals would in the modern context be understood to be combatants. The use of force outside armed conflict was controlled by domestic criminal law. Peacekeepers are not normally combatants. In robust peace enforcement operations it has been the practice of the UN to contract out operations that may amount to armed conflict.²² Certainly in the examples highlighted in the previous chapters of this work where the UN has administered collapsed States, UN peacekeepers have not been involved in armed conflict and have not been combatants.

Non Western foundations

China

It would be an ethnocentric assertion to claim that international humanitarian law stems only from the customs and practices of the west. China has one of the oldest civilisations in the world. Over two thousand years ago, at some point during the fifth to third century B.C., the Chinese warrior-philosopher Sun Tzu wrote the *Art of War*. The essential proposition in the *Art of War* is the most fundamental humanitarian principle of all, war should be avoided where at all possible.²³

²¹ Id at 58.

²² For example the first Gulf War, former Yugoslavia, the initial phase of East Timor. In the Korean War the fighting was contracted out to the US.

²³ Sun Tzu Translated by Cleary, T. *The Art of War* (1998) at 1.

Therefore those who win every battle are not really skilful – those who render others' armies helpless without fighting are the best of all.²⁴

The Art of War is based on spiritual Taoist principles. To some extent, then, the rules for warfare set out in it have a parallel with Christian and Moslem traditions in that there is a spiritual underpinning to their development.

Specific parallels in the development of western humanitarian law are evident in the approach to the treatment of prisoners of war. Sun Tzu advises commanders to treat them well and take care of them.²⁵ Respect for the property of civilians is also alluded to in Sun Tzu's advice to divide up troops that have to live off the land so as not to over burden the local population.²⁶ And nowhere in the text does Sun Tzu refer to attacking anything other than enemy armies, except where a siege on a fortified defence is required.

Pre-Conquistador South America

The rules for combat amongst the Aztecs also displayed attributes consistent with modern humanitarian principles. The aim of battle was to capture an enemy rather than kill him. Admittedly he was then sacrificed to the gods but this was an honour and not something to be granted to non-combatants. As with modern humanitarian law, spies were not considered to be legitimate combatants and were dealt with summarily. Defeat was inflicted on an enemy not by the slaughter of troops, non-

²⁴ Id at 67.

²⁵ Id at 63.

combatants and the ransacking of the town but by capturing and burning the local temple, thus defeating the local gods who were the real focus of the conflict. Where these rules were broken, for example by Atzcapotzalco and his son who tried to destroy the dynasty of Texcoco, they became a disgrace and are the outcasts of Mexican historical writings.²⁷ In modern terms they were castigated because they had violated the principle of distinction.

The Inca were not as interested as the Aztec in preserving prisoners of war and were reported to have taken few prisoners except those considered sufficiently important to sacrifice or ritually humiliate then kill. The Inca did however respect the difference between combatants and civilian populations that were conquered and wide spread destruction of territory was not acceptable. The logic of this prohibition related not to a desire to implement humanitarian principles but to the preservation of populations and territories that would be added to the empire.²⁸

India

Many of the principles by which civilisations live are laid out in the ancient texts. One of the central Sanskrit stories, the *Mahabharata*, is such a text and with the Ramayana captures the essence of Indian cultural heritage.²⁹ The vehicle for transmitting this heritage is the story of a feud between two branches of a ruling Indian family. The feud culminates in a battle of cataclysmic proportions.

²⁶ Id at 118.

²⁷ Soustelle, J. *The Daily Life of the Aztecs* (1961) at 212-216.

²⁸ Mason, J.A. *The Ancient Civilizations of Peru*. (1965).

²⁹ Van Nooten, B.A. in Buck, W. (translator) *Mahabharata* (1973) at xiii.

One of the central characters in the *Mahabharata*, Bishma, sets out the rules to be complied with during battle when he tells Duryodhana:

But I will never slay the innocent, or those without weapons, or chariot drivers, or women, or those who run away or surrender or are fighting with others.³⁰

And at the end of the great battle the king orders that silk be found to wrap the dead and pyres made from the broken chariots.

The principles set out in the *Mahabharata*, are wholly consistent with the modern humanitarian concern with the protection of non-combatants, prisoners of war and respect for the dead.

International nature of humanitarian law

It is very easy to take only a western perspective in examining the origins of customary international humanitarian law. This very brief selection from some of the major continents of the world demonstrates that the development of the core principles of humanitarian law was not the preserve of the west, although it is not suggested that in the face of expedience these rules would, as a matter of practice, be complied with, at least they existed in principle in most of the major civilisations of the world. The code of conduct in armed conflict that developed from the fifteenth century in Western Europe, while unconscious of parallel developments outside of Europe and the Mediterranean, was not alone in the world and while Grotius might have been the western father of international law he was not articulating a unique

system of international relations. That international humanitarian law passed with relative ease into universal service as public international law is to a great degree due to the familiarity with the principles that had for some time before the spread of European influence been practiced or regarded as a principles of warfare in other regions of the world.³¹

There is also a pragmatic side to the adoption of humanitarian law based on one of the foundations of international relations and international law; reciprocity. Some aspects of this can be found in common Article 2 of the 1949 Geneva Convention and Article 96(2) of Protocol I which govern belligerent relations among High Contracting Parties. An example of the practical application of reciprocity in international humanitarian law can be seen in the Second World War where Germany complied with the 1929 Convention in relation to the treatment of prisoners of war from treaty parties such as France and the UK but would not do the same for prisoners from the USSR on the basis that it was treating German prisoners poorly, although in any event the USSR was not a party to the 1929 Convention.³²

As can be seen from the examples set out above, there has been a global emergence of recognisable rules for those engaging in armed conflict. Participants apply the rules, non participants benefit from them. Effectively the only rule for non participants is that they stay out of the conflict. The rules do not otherwise regulate non participants, they remain subject to domestic laws or the laws imposed by a belligerent occupier under the Fourth Geneva Convention. If public international law was to be stripped

³⁰ Id at 268.

³¹ Best, G. *War and Law Since 1945*. (1994) at 16.

³² Provost, R. *International Human Rights and Humanitarian Law* (2002) at 153.

back to the roots outlined above it would be clear that as non combatants and non participants in the conflict the rules would not apply to peacekeepers.

From the rich international heritage of customs and traditions there have emerged basic principles that underpin the development of specific provisions of the law of armed conflict. These principles are primarily concerned with limiting suffering within armed conflict.

Principles of humanitarian law

A number of references have already been made in this chapter to the development of the modern principles of international humanitarian law. There are four basic international humanitarian law principles and the prohibitions and restrictions in treaties and customary international law can be related to one or a combination of these principles. The four principles of international humanitarian law are; prevention of unnecessary suffering, military necessity, proportionality and distinction.

Prevention of unnecessary suffering

The principle of the prevention of unnecessary suffering, also known as the principle of humanity, is shared with international human rights law as one of the fundamental principles.³³ It provides a general prohibition against inhumane activities that are not specifically prohibited by treaty law.³⁴ Much of the body of treaty law that has built up restricting the means and methods of warfare that is known as the “law of the

³³ Above n 15 (1987) at 10.

³⁴ Rogers, A. *Law on the Battlefield* (2004) at 7.

Hague”³⁵ is aimed at limiting unnecessary suffering. The prevention of unnecessary suffering was the motivation behind the establishment of the organisation that became the International Committee of the Red Cross (ICRC). A Swiss businessman Henri Dunant, who witnessed the aftermath of the battle of Solferino in 1859, founded the Red Cross in 1863-4. He was so appalled by the suffering of the wounded soldiers that he was determined to take action to improve conditions for them. The inaugural conference of October 1863 set out the principles of the movement and led to the adoption in August 1864 of the first of the Geneva Conventions.³⁶

Arguably one of the best known expressions of the principle of humanity that underlies all humanitarian law comes from The Law of the Hague. Originating in 1874 it was passed on through the Hague Conventions of 1899 and 1907 to Protocol 1 of 1977 and states that in any armed conflict the means and methods of warfare are not unlimited.³⁷

On 13 April 2003 the Supreme Court of Israel delivered a judgement that directly considered the principle of unnecessary suffering. In *Physicians for Human Rights and the Palestinian Centre for Human Rights v Major-General Doron Almoj, Southern Commander and the State of Israel-Minister of Security*,³⁸ the petitioners claimed that the use of ‘flechette’³⁹ tank rounds by the Israeli Defence Force (IDF) in the Gaza-Strip breached the principle of unnecessary suffering. Specifically it was

³⁵ See for example International Committee of the Red Cross, *International Law Concerning the Conduct of Hostilities: Collection of Hague Conventions and Some Other International Instruments*. (1996).

³⁶ Best, G. *Humanity in Warfare*. (1980) at 150.

³⁷ Article 35(1) *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977*.

³⁸ Supreme Court of Israel <http://www.ihlresearch.org/portal/ihli/summary.php?a=5748>. (16 Aug 2003)

³⁹ A flechette is a thin metal dart. Multiple flechettes are delivered in a round and lodge in the body like large splinters so that the victim suffers a slow painful death by a thousand cuts.

claimed that the use of these rounds breached the principle found in the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious Or To Have Indiscriminate Effects* (the ‘*Convention on Conventional Weapons*). The Court found against the petitioners on the grounds that the use of the flechette shells was not inconsistent with the guidelines found in the Convention. And that in any event, normal tank rounds would, in the circumstances of the case, have caused the injuries that had been suffered by the civilians. As a result, the injuries complained of could not necessarily be imputed to the flechettes. Finally, the Court held that flechettes had not been specifically banned by the *Convention on Conventional Weapons* and that as a result their use was not contrary to the laws of armed conflict.

This case illustrates the difficulties that codification of the principles of armed conflict can create. Debate continues with regard to the use of flechettes because they are difficult to remove from the body and cause multiple injuries. If they do not strike a vital organ or sever a major blood vessel the victim can take a considerable period of time to die. However, agreement on their use was not reached in the debate over the *Conventional Weapons Convention* and it remains open for courts to make decisions such as that made by the Israeli Supreme Court. The decision is relevant to the laws of armed conflict as Israel is in occupation of the Palestinian territories.⁴⁰

The Australian Defence Force’s doctrinal definition of the principle of unnecessary suffering provides a concise definition of the principle:

⁴⁰ Wallace, R.M.M. *International Law* (1997) at 98; Darcy, S. *In the Name of Security: IDF Measures and the Law of Occupation*. (2003).

The principle of unnecessary suffering forbids the use of means or methods of warfare which are calculated to cause suffering which is excessive in the circumstances. It has also been expressed as the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military objectives.⁴¹

This definition clearly shows that the principle applies to armed conflict. It refers to “warfare” and “military objectives.” In situations where the peacekeepers are not participants in armed conflict,⁴² this principle as it is defined above, could not apply.

Military Necessity

The doctrine of military necessity recognises that conflict is entered into for the purpose of winning and that as a result things may be done in order to achieve the mission that would otherwise be impermissible. For example, an attack on a military objective will cause damage if not destruction of the target and may cause the death of combatants and non-combatants. Death, damage and destruction for their own sake are not permitted, only military objectives can be legitimately attacked. Military objectives are defined in Article 52(2), Additional Protocol I of 1977 as:

objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

⁴¹ Australian Defence Force Publication 37. *The Laws of Armed Conflict*

⁴² The extent to which peacekeepers can become involved in armed conflict is discussed in the next chapter of this work.

The principle of military necessity developed partly from the very liberal interpretations of the nineteenth century European powers and the more restrictive provisions set out in the Lieber Code. That the European rules were developed in relation to international armed conflict while the Lieber Code's contribution emerged from an internal armed conflict, the American Civil War. This may well have been the reason for the more restrictive approach of the Lieber code as it is easier to be harsh with members of another State than ones own citizens.

The European rules were of particular interest to the German statesmen of the time and was refined to become the doctrine of *Kriegsraison*. This doctrine allowed violation of the laws of war and the majority of international law in general in order to avoid defeat. The Lieber Code in contrast was a far more restrictive interpretation of military necessity allowing only the means and methods indispensable for victory *and* not in violation of the laws of war.⁴³ The modern interpretation of the principle is closer to the Lieber Code than to *Kriegsraison*.

Military necessity can be raised as a defence as well as a permission to act in a manner that would otherwise be prohibited. The best example of the development of the principle of military necessity in the form of a defence is to be found in the post Second World War Nuremberg trials. The principles of law under which the tribunal was to operate were ratified under a Resolution of the General Assembly⁴⁴ headed: "Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal." The principles laid out the basis upon which a person could be

⁴³ Stephens, D. "Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case" *Yale Human Rights & Development Law Journal* Vol 4, (2001) at 17-18.

⁴⁴ General Assembly Resolution 95 of 11 November 1946.

prosecuted by the tribunal⁴⁵ and these principles form the basis of the modern International Criminal Court. The defences were not comprehensively set out and defendants could rely upon such defences as were available at law.

The German defendants claimed protection under the wider *Kriegsraison* based interpretation. For example, U-Boat commander Eck was tried by the Nuremberg Tribunal for the murder of shipwrecked survivors from the merchant ship *Peleus*. Eck argued that he was following the orders of the Grand Admiral Doenitz, then commander of the German navy and that the destruction of survivors was on the basis of military necessity; namely preservation of the U-Boat fleet. While the tribunal was critical of the order it accepted that the terms of the order were based on the principle of military necessity in circumstances where the existence of wreckage may well give away the position of the U-Boats. However, the tribunal did not accept that the order was intended to include the murder of protected persons and Eck was found guilty and executed.⁴⁶ In Eck's case military necessity was accepted for the attack on civilian shipping and its destruction but the murder of specifically protected non-combatants, namely persons who were shipwrecked, was a violation of international humanitarian law that could not be condoned under the principle of military necessity.

In a rejection of the *Kriegsraison* doctrine the Nuremberg Tribunal set out the parameters of the defence of military necessity as:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel submission of the enemy with the least possible

⁴⁵ Best, G. *Law and War Since 1945* (1994) at 180.

⁴⁶ Nizkor. <http://www.nizkor.org/hweb/imt/nca/nca-oz/nca-02-06-01.html>. (16 Aug 2003)

expenditure of time, life and money ... It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war...⁴⁷

Following on from the Nuremberg position Hampson identifies three rules of the modern international law that limit the action that may be taken under the provisions of military necessity. First, an attack must be aimed at contributing to the defeat of the enemy; if an attack does not achieve this then it cannot be justified under military necessity because it would have no military purpose. Second, any attack that complies with the first criterion must not cause damage or harm to non-combatants or protected objects that is excessive in relation to the concrete and direct military advantage anticipated. Finally, military necessity cannot justify violation of the other rules of international humanitarian law.⁴⁸

Despite Hampson's assertion that military necessity cannot justify the violation of other rules of international law, there are a number of examples of situations where military necessity has been pointed to as an argument excusing such violations. For example, the sack of Drogheda to keep up troop morale. The killing of Irish prisoners by the English on the basis that the English position would be untenable while they lived. The elimination of American Indians through fear of what they might do. The German U-boat campaign against neutral shipping seen as the only way to win the war in 1917 and the dropping of the atomic bombs on Hiroshima and Nagasaki to win

⁴⁷ Stephens D. "Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case" *Yale Human Rights & Development Law Journal*. Vol 4. (2001) at 1-23.

⁴⁸ Hampson, F. "Military Necessity" in Gutman, R and Reiff, D (eds) *Crimes of War: What the Public Should Know*. (1999) at 251-2.

the Second World War.⁴⁹ These examples demonstrate the subjectivity of the test that was applied by a commander or government in determining that certain courses of action were acceptable within the principle of military necessity. Despite the turn towards an interpretation of military necessity more closely aligned to the Lieber Code, the more serious the situation the broader the permission to act becomes, even to the point of using nuclear weapons where the survival of the State is at stake.⁵⁰

The Australian Defence Force's doctrinal definition of the principle of military necessity is:

The principle of military necessity states that a combatant is justified in using those measures, not forbidden by international law, which are indispensable for securing complete submission of an enemy at the soonest moment. Military necessity requires combat forces to engage in only those acts necessary to accomplish a legitimate military objective. It permits the killing of enemy combatants and other persons whose death is unavoidable. It permits the destruction of property if that destruction is imperatively demanded by the necessities of war. Destruction of property as an end in itself is a violation of international law. There must be a reasonable connection between the destruction of property and the overcoming of enemy forces. The principle cannot be used to justify actions prohibited by law, as the means to achieve victory are not unlimited. This also reflects the principle of war of economy of effort.⁵¹

As with the principle of humanity, the definition of the principle of military necessity places it as a principle of international law applicable only to participants in armed

⁴⁹ Kennedy, P and Andreopoulos, G "The Laws of War: Some Concluding Remarks" in Howard, J, Andreopoulos, G and Shulman, M. (eds) (1994) at 218.

conflict. As a result it is not applicable to UN peacekeepers that are not party to an armed conflict.

Proportionality

The principle of proportionality is very closely aligned to military necessity. Proportionality strikes a balance between military necessity and the principle of unnecessary suffering or humanity.⁵² The key to this balance is whether the damage to otherwise protected people or property is excessive in relation to the anticipated concrete and direct military advantage.⁵³ In other words, is the death or destruction worth the step it gives toward victory. The issue of proportionality and the balance with military necessity has raised a number of long standing debates. The bombing of Dresden and the Dam Busters raids are but two famous World War Two examples that continue to be debated. As the law currently stands it is probable that the bombing of Dresden and much of the carpet-bombing perpetrated by both sides offends the principle of proportionality.⁵⁴ However, these conclusions are with the benefit of hindsight and advancements in the attention paid to international humanitarian law principles in the environment after World War Two. It should also be noted that the principle is applied against the knowledge or understanding of the situation and circumstances at the time. For example, the Dam Busters raid was anticipated by the allies to have caused a considerable level of disruption to German electricity supplies and had a significant effect on their war effort. The loss of life and damage was considered proportional when balanced against the military necessity

⁵⁰ *Legality of the Threat or Use of Nuclear Weapons* (1996) I.C.J. 226 at 105E.

⁵¹ Above n 41.

⁵² Waibel, M. *International Humanitarian Law – An Overview*.

<http://afa.at/globalview/042002/international3.html> (5 May 2005).

⁵³ Article 51(5)(b) *Additional Protocol I of 1977*.

of the planned disruption to the German war effort. In fact the electricity supplies came back on line very quickly and had little or no effect at the cost of some 8000 lives, many of whom were Russian forced labourers held in a detention camp in the path of the river and unable to escape.

A more recent example of the interactions of the principles of proportionality and military necessity was the bombing by the US of the Amiriyah bunker in Baghdad during the 1991 Gulf War. Many civilians were sheltering in the bunker, which was considered by the US to be a military target of such importance that the death of civilians was sufficiently within the principle of proportionality to permit the attack. The US claimed that the bunker was still operating as a command node although intelligence reports allegedly identified the civilian presence. Whether the assessment on the basis of military necessity was correct remains the subject of debate and again highlights the subjective nature of many of the decisions made under the laws of armed conflict and its principles.⁵⁵

Proportionality does not mean that the same weapons or level of force must be used. This would effectively create a stalemate and in any event would be over ridden by military necessity instead of creating a balance. An illustration of the implementation of proportionality would be a sniper in the bell tower of a heritage-listed church. The opposing force must clear the sniper quickly and without loss of any of their troops in order to achieve their mission. There are a number of ways to safely clear the sniper

⁵⁴ Above n 45 at 200-202, 277-278.

⁵⁵ McCoubrey, H. and White, N. *The Blue Helmets: Legal Regulation of United Nations Military Operations* at 164: See also Fischer, H. "Proportionality, Principle of." in Gutman, R and Reiff, D (eds) *Crimes of War: What the Public Should Know*. (1999) at 294; It should be noted that the US argued that this was not an issue of proportionality but of mistake of fact, reliance having been placed on faulty intelligence reports:

without risking the lives of the troops. They could call down artillery fire, obliterating the church and probably most of the village, or they could use heavy calibre or tank rounds that would damage and possibly destroy the belltower but leave the main structure and other buildings in the vicinity untouched. In this example the use of heavy calibre or tank rounds would not offend against the principle of proportionality despite being a use of greater force than would be available to a lone sniper. The use of an artillery barrage most certainly would offend against the principle of proportionality. This is particularly the case if it wiped out a village in the process given that artillery fire does not achieve pinpoint accuracy. The amount of damage that would be caused would far exceed the military advantage in a situation where other methods that do not offend the principle are available.

From these examples and illustrations it can be seen that the principle of proportionality is subject to a number of factors. There is knowledge and belief in the effects of the action weighed at the time that the action is taken against the progress to victory or aversion of defeat. The availability of means and methods to achieve the desired or required ends are set in the context of the laws and principles of armed conflict. Implementation of the principle of proportionality is above all the subjective analysis of all these factors by the commander. Although the situation can be judged against the circumstances that the commander believed prevailed at the time it is still the commander's judgement that is applied as to the effect that an attack, for example, will have and some commanders are more confident in the outcomes than others.

The Australian Defence Force's doctrinal definition of the principle of proportionality is:

The principle of proportionality provides a link between the concepts of military necessity and unnecessary suffering. In simple terms, the principle generally relates to the reduction of incidental injuries caused by military operations and requires that the losses and damage resulting from military action should be proportionate (i.e. not be excessive) in relation to the anticipated military advantage. It is self evident that the proportionality principle, together with the unnecessary suffering principle, dictates that civilians should not be made the object of attack, and that while civilian casualties may be an inevitable consequence of an attack, every effort must be made to spare them, and other parties who are noncombatants, from becoming adversely affected. The principle of proportionality not only requires that an attacker must assess what feasible precautions must be taken to minimise incidental loss, but must also make a comparison between different methods or axis of attack so as to be able to choose the least excessively destructive method or axis compatible with military success. When making that assessment the attacker should naturally take into account likely friendly casualties.

Again, this principle is applicable only to situations of armed conflict and would not apply to peacekeepers performing a policing role in State reconstruction.

Distinction

The principle of distinction has always been inherent in the concepts and articulation of international humanitarian law. In simple terms it is the differentiation or distinction between legitimate objects of attack; persons, places and things, and

unlawful objects of attack, such as prisoners of war, hospitals, civilians and so on. As detailed above, military objectives are defined in Article 52(2) Additional Protocol I of 1977 as:

objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Objects that cannot legitimately be attacked must be avoided or protected, subject as always to the principle of military necessity and proportionality in terms of collateral damage.

The principle of distinction is usually expressed in terms of protections from attack rather than a formal direction to distinguish. The prisoners of war, civilians and so on that are to be distinguished from combatants are all specifically protected people or things under the laws of armed conflict. This approach can be seen in the ICRC definition of distinction which states:⁵⁶

The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked. Attacks may be made solely against military objectives. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated

⁵⁶ ICRC “What are the essential rules of international humanitarian law?” *International Law: Answers to your Questions*. <http://www.icrc.org/web/eng/sitrrng0.nsf/iwpList133/C2195351DEAF06EC1256C> (1 Sep 2003).

with humanity, without any unfavourable distinction whatever. It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting.

Many of the Hague Regulations and Geneva Conventions are effectively concerned with the principle of distinction although the word “distinction” is not expressly used. Geneva Convention I, for example, distinguishes the wounded, sick and all facilities and personnel concerned with their care from lawful combatants. Geneva Convention II requires a similar distinction to be applied to sea based operations while Geneva Conventions III and IV provide for the distinction between prisoners of war and civilians from lawful combatants respectively.

The principle of distinction is expressly articulated with regard to civilians in Article 48 of Protocol I;

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

The provisions in the Geneva Conventions requiring distinctions to be made with regard to objects of attack are underlined by Article 51(2) of Protocol I which specifically prohibits attacks against the civilian population, Article 51(6) prohibiting reprisals against civilians, Article 52(1) prohibits reprisals against civilian objects, Article 53(c) protecting cultural objects and places of worship, Article 54(4) protecting objects indispensable to the survival of the civilian population, Article 55(2) protecting the natural environment and Article 56(4) prohibiting attacks against

works and installations containing dangerous forces. As well as codifying the distinction between the military and civilians Protocol I also prohibits reprisals against non-combatants such as the wounded, sick, shipwrecked and so on.

The Australian Defence Force is an example of the approach that the principle of distinction is not a basic principle. Its doctrinal definition of the principle of distinction is:

Although not a basic principle, distinction is said to be a related principle and seeks to ensure that only legitimate military objects are attacked. Distinction has two components. The first, relating to personnel, seeks to maintain the distinction between combatants and noncombatants or civilian and military personnel. The second component distinguishes between legitimate military targets and civilian objects. Military operations must only be conducted against enemy armed forces and military objects. Noncombatants and civilian objects are protected from attack, that is, they are not legitimate objects of attack. LOAC⁵⁷ therefore requires that belligerents maintain the clear distinction between armed forces and civilians taking no direct part in hostilities; that is, between combatants and noncombatants, and between objects that might legitimately be attacked and those protected from attack.⁵⁸

From the text it seems that the Australian doctrinal position is that distinction is not a basic principle, this differs from the position of the UK, NZ, US⁵⁹ and Canada⁶⁰, all of which view distinction as a basic principle.⁶¹

⁵⁷ Laws of Armed Conflict.

⁵⁸ Australian Defence Force Publication 37. *The Laws of Armed Conflict*.

From the definitions and descriptions of the principles of the Laws of Armed Conflict it can be seen that unless a peacekeeping force is engaged in armed conflict they do not apply.

Codification of the Principles

Although the principles outlined above deal with protection of non-combatants they are acted on by the parties to a conflict. The principles are rules for combatants so that where peacekeepers are not combatants their involvement with the principles would appear to be passive, that is as recipients of the protections and not as persons or forces required to implement them. An argument that peacekeepers can use the laws of armed conflict as a framework could not therefore be maintained on the firmest or best basis, that it comes from the basic principles. If such an argument that the laws of armed conflict can be used as a framework for collapsed State peacekeeping is to be maintained it must be founded on something more than the basic principles. This means that there must be something to draw on from the codification of the laws of armed conflict.

The principles of humanitarian law and the customary rules that had developed over the centuries crystallised into their modern form and began to be codified in the 19th century into formal national rules and international treaties. It is helpful for the

⁵⁹ US Field Manual 27-10 *The Law of Land Warfare* <http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/toc.htm>. (1 Oct 2003).

⁶⁰ Canadian Defence Force. National Defence Joint Doctrine Manual B-GJ-005-104/FP-021 http://www.dnd.ca/dcds/jointDoc/docs/LOAC_e.pdf (1 Oct 2003) at.32.

⁶¹ While Australia's view that distinction is not a basic principle is perhaps esoteric the difference in approach is noted here for completeness.

purpose of contextualising the laws of armed conflict to examine the formation of the major contributors to show how significant conflicts and events have shaped that development as well as to search for evidence of the basis for an extension of the laws of armed conflict into peacekeeping.

Lieber code

The Lieber Code is generally acknowledged as the earliest codification of the modern laws of armed conflict. It came into existence during the American Civil War as the “Instruction for the Government Armies of the United States in the Field”, US Army General Order No. 100 on 24 April 1863.⁶² It was named after its primary drafter Francis Lieber, a German born American who was a professor of history, political science and law. He researched world military history in creating the rules of warfare at the direction President Abraham Lincoln for use during the American Civil War.⁶³

The Lieber Code created a distinction between the conduct that was permitted toward combatants and non-combatants. Non-combatants were clearly articulated as being protected from the ravages of the conflict. The Lieber Code also established the conditions that were to be followed for the treatment of prisoners of war by the capturing force. Underpinning the Lieber Code was the principle that all soldiers were to be treated equally regardless of their social, ethnic or economic origins. The

⁶² Above n 45 at 200.

⁶³ Parks, H. in Gilmore, G.J. “Modern Law of Warfare Instituted During the Civil War” *American Forces Information Service News Articles*. (16 May 2003)

particular concern behind this principle was for the treatment that the black soldiers of the Union force might receive if captured by the Confederacy.⁶⁴

The Lieber Code was divided into ten divisions relating to areas of conduct within the conflict:

Section I. Martial Law - Military jurisdiction - Military necessity - Retaliation.

Section II. Public and private property of the enemy - Protection of persons, and especially of women, of religion, the arts and sciences - Punishment of crimes against the inhabitants of hostile countries

Section III. Deserters - Prisoners of war - Hostages – Booty on the battlefield.

Section IV. Partisans - Armed enemies not belonging to the hostile army - Scouts- Armed prowlers - War-rebels.

Section V. Safe-conduct - Spies - War-traitors – Captured messengers - Abuse of the flag of truce.

Section VI. Exchange of prisoners - Flags of truce - Flags of protection

Section VII. The Parole

Section VIII. Armistice - Capitulation

⁶⁴ Mahle, A.H. *Traditional Laws of War*. <http://www.pbs.org/wnet/berga/crimes/laws.html> (5 May

Section IX. Assassination

Section X. Insurrection - Civil War - Rebellion

The majority of the issues covered under the Lieber Code would be well known to modern international humanitarian lawyers and military operations lawyers. It represents a codification of much of the international customary law of the time and would be heavily drawn upon as a basis for subsequent Hague and Geneva law.

Some of the Code has been expressly withdrawn as a legitimate method of warfare, for example:

Art. 17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

Art. 18. When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

These Articles are found under the provisions for military necessity.

While the Lieber Code represents the first modern codification of international humanitarian law it is also very much a prototype when compared to the twentieth

century iterations of the law. The modern law of armed conflict would not accept starvation as a legitimate method of warfare and would certainly not permit the return of civilians to a place where they would be purposely starved, even on the ground of military necessity. It has indeed been suggested that far from a genuine attempt to ameliorate the sufferings of armed conflict the code was little more than a piece of propaganda. Professor Thomas DiLorenzo expresses this position most forcefully:

The Lieber Code paid lip service to the notion that civilians should not be targeted in war, but it contained a giant loophole: Federal commanders were permitted to completely ignore the Code if, "in their discretion," the events of the war would warrant that they do so. In other words, the Lieber Code was purely propaganda.

The fact is, the Lincoln government intentionally targeted civilians from the very beginning of the war. The administration's battle plan was known as the "Anaconda Plan" because it sought to blockade all Southern ports and inland waterways and starving the Southern civilian economy. Even drugs and medicines were on the government's list of items that were to be kept out of the hands of Southerners, as far as possible.

As early as the first major battle of the war, the Battle of First Manassas in July of 1861, federal soldiers were plundering and burning private homes in the Northern Virginia countryside. Such behavior quickly became so pervasive that on June 20, 1862 – one year into the war – General George McClellan, the commanding general of the Army of the Potomac, wrote Lincoln a letter imploring him to see to it that the war was conducted according to "the highest principles known to Christian

civilization" and to avoid targeting the civilian population to the extent that that was possible. Lincoln replaced McClellan a few months later and ignored his letter.⁶⁵

Regardless of the true motives behind the Lieber Code the fact remains that it provided a basis for the codification and development of international humanitarian law. With the exception of Henri Dunant, the start point for many of the treaties that have become customary international law or that underpin international humanitarian law have been commenced or participated in on the basis of a State's own best interests. Such is the nature of international relations.

Geneva Conventions

The Geneva Conventions were the result of the activities of a Swiss businessman, Henri Dunant. In 1859 Dunant was pursuing a business venture requiring the approval of the French Emperor Napoleon III. He travelled to the Emperor's headquarters near the Italian town of Solferino in time to witness one of the bloodiest battles of the age. The battle had a deep effect on Dunant and he determined to improve conditions for the fighting men. He set out his plan to alleviate the suffering of the combatants in his book *A Memory of Solferino*. Using the influence he had gained as a businessman he set about implementing his plan to set up national organisations which would educate and train volunteers to relieve suffering on the battlefield. These organisations became the national Red Cross Societies and eventually the International Committee of the Red Cross (ICRC). Expending vast amounts of time, effort and personal financial resources, Dunant travelled Europe obtaining backing for his plan and

⁶⁵ DiLorenzo, T. *Targeting Civilians*. <http://www.lewrockwell.com/dilorenzo/dilorenzo8.html> (8 May 2005).

agreement from governments to send representatives to the Conference of October 1863. On 22 August 1864 twelve States signed a treaty known as the Geneva Convention.⁶⁶ The Convention guaranteed neutrality to sanitary personnel, expedite

⁶⁶ *Convention signed at Geneva August 22, 1864;*

22 Stat. 940; Treaty Series 377

[TRANSLATION]

*CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES
IN THE FIELD*

ARTICLE 1

Ambulances and military hospitals shall be acknowledged to be neuter, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein.

Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

ARTICLE 2

Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality, whilst so employed, and so long as there remain any wounded to bring in or to succor.

ARTICLE 3

The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfil their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong.

Under such circumstances, when these persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

ARTICLE 4

As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property.

Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

ARTICLE 5

Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free. The generals of the belligerent Powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it.

Any wounded man entertained and taken care of in a house shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

ARTICLE 6

Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.

Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties.

supplies for their use and adopt an emblem. The emblem that was adopted was the Red Cross, an inversion of the Swiss national flag.⁶⁷

The Convention of 1864 was not to be the last word on the subject, indeed it would prove to be merely the beginning of an important series of agreements codifying and upgrading international humanitarian law. In 1928, as a result of the horrific effect on combatants of mustard gas used in the trenches of WWI, a new Geneva treaty came into effect, the *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating Gas, and for Bacteriological Methods of Warfare*. This protocol prohibited the use in

Those who are recognized, after their wounds are healed, as incapable of serving, shall be sent back to their country.

The others may also be sent back, on condition of not again bearing arms during the continuance of the war.

Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

ARTICLE 7

A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuations. It must, on every occasion, be accompanied by the national flag. An arm-badge (brassard) shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority.

The flag and the arm-badge shall bear a red cross on a white ground.

ARTICLE 8

The details of execution of the present convention shall be regulated by the commanders-in-chief of belligerent armies, according to the instructions of their respective governments, and in conformity with the general principles laid down in this convention.

ARTICLE 9

The high contracting Powers have agreed to communicate the present convention to those Governments which have not found it convenient to send plenipotentiaries to the International Conference at Geneva, with an invitation to accede thereto; the protocol is for that purpose left open.

ARTICLE 10

The present convention shall be ratified, and the ratifications shall be exchanged at Berne, in four months, or sooner, if possible.

In faith whereof the respective Plenipotentiaries have signed it and have affixed their seals thereto.

Done at Geneva, the twenty-second day of the month of August of the year one thousand eight hundred and Sixty-four.

<http://www.yale.edu/lawweb/avalon/lawofwar/geneva04.htm>

warfare of ‘asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices’ as well as ‘bacteriological’ methods of warfare.⁶⁸

The next convention in the Geneva series came in 1929 with the convention Relative to the Treatment of Prisoners of War. This convention was to be the longest so far in the series, amounting to 97 articles. The Convention dealt comprehensively with the way in which prisoners of war and those civilians entitled to prisoner of war status should be treated. Annexed to the convention was a model agreement for the repatriation or removal to a neutral State of prisoners with serious health concerns.⁶⁹

Following WWII it was decided that a more comprehensive convention structure was required and an update of the conventions already in existence. To this end, on 12 August 1949 the four Geneva Conventions currently extant came into being. The four conventions are for the protection of the members of the armed forces who are sick and wounded on land (First Geneva Convention), protection of members of the armed forces who are sick, wounded or shipwrecked at sea (Second Geneva Convention), conditions and treatment of prisoners of war (Third Geneva Conventions) and protection of civilians in time of war (Fourth Geneva Convention). These conventions are almost universally subscribed to. There are less than a hand full of States that are not signatories to the Geneva Conventions and as a result they are generally considered to represent a statement of the customary international law.⁷⁰

⁶⁷ Art 38 GCI.

⁶⁸ Full text of the convention is set out at <http://www.yale.edu/lawweb/avalon/lawofwar/geneva01.htm> (8 May 2005).

⁶⁹ Full text of the convention is set out at <http://www.yale.edu/lawweb/avalon/lawofwar/geneva02.htm> (8 May 2005).

In recognition that further clarifications and expansions were required to the Geneva Conventions, Protocols additional to them were agreed at the diplomatic conferences of 1974-1977. The Protocols were finally adopted on 8 June 1977 and came into force on 7 December 1978.⁷¹ They are generally referred to as the Protocols of 1977. The Protocols are divided into the rules relating to international armed conflict (Protocol I) and the protection of victims of non-international armed conflict (Protocol II). Protocol II is concerned with expanding the provisions of common Article 3 of the Geneva Conventions for the benefit of those involved in internal armed conflict. The Protocols do not enjoy the same universal recognition as that enjoyed by the Geneva Conventions; particularly as the US has not ratified them and the UK only recently became party to both. However, they still enjoy widespread recognition and application in principle by the US despite not being formally ratified.

The rules that are set out in the body of treaties known as Geneva law and contained primarily in the four Geneva Conventions and Protocols are not the only treaties that aim to provide protection from the chaos of armed conflict. A second strand of treaties commenced at about the same time as the first of the Geneva Conventions and is known collectively as Hague law. While Geneva law is concerned with safeguarding military personnel who are no longer taking part in hostilities and those not involved in the conflict, such as civilians, Hague law is concerned with the rights and obligations of those engaged in armed conflict and limiting the means and methods of armed conflict.⁷²

⁷⁰ Paust, J.J. "Judicial Power to Determine the Status and Rights of Persons Detained Without Trial" *Harvard International Law Journal* Vol.44, No.2 (Spring 2003) at G1-G30.

⁷¹ ICRC. *Protocols Additional to the Geneva Conventions of 12 August 1949*. (1996).

⁷² ICRC. http://www.redcross.org.sg/IntSvc_IHL.htm. (8 May 2005).

Hague Law

The body of customary international law that was codified⁷³ following the Hague Conference of 1899 into the Hague Conventions of 1907 were the result of the concerns felt by the Russian Tsar Nicholas II over the willingness of the European powers to use force in international relations.⁷⁴ The Tsar's concerns were not entirely altruistic. Russia at the time was suffering economically from the burdens placed upon it by attempts to keep pace militarily with the other European industrialised powers. Defence spending was running at about 4.4 per cent of net national product, the highest spending at that time in Europe, and still the Russian General Staff could not find the funds for the necessary replacement of the Russian artillery stock. Contemporary commentators were also warning of the vast financial burden of modern warfare and the Tsar was particularly influenced by the writing of Jan Bloch, prominent banker and author of the pessimistic and to the Tsar and like minded European readers disturbing book *The Future of War*.⁷⁵ The Tsar was not alone in wishing to limit the financial burden of the burgeoning arms race, Lord Salisbury, the British prime minister, was also expressing concern and calling for the limitation of arms and the concomitant expenditure. While the Hague Conventions are now seen as significant contributors to international humanitarian law they did not achieve the purposes for which they were ratified, namely the limiting of the use of force in international relations or the reduction of arms manufacture in Europe.⁷⁶

⁷³ Jennings, R, Watts, A. *Oppenheim's International Law* (9th ed, 1996) at 99.

⁷⁴ O'Brien, J. *International Law*. (2001) at 22.

⁷⁵ Roberts, A. "Land Warfare" in Howard, J, Andreopoulos, G and Shulman, M. (eds) *The Laws of War. Constraints on Warfare in the Western World*. (1994) at 120.

⁷⁶ D.F. Vagts "Symposium: The Hague Peace Conferences The Hague Conventions and Arms Control." *94 American Journal of International Law* (31 January 2000) at 31.

Twenty-six States attended the first conference. The conventions were signed on 29 July 1899 and came into force on 4 September 1900. The conventions that were signed were:

Hague I -- Pacific Settlement of International Disputes

Hague II -- Laws and Customs of War on Land

Hague III -- Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864

Hague IV -- Prohibiting Launching of Projectiles and Explosives from Balloons

Declaration I - on the Launching of Projectiles and Explosives from Balloons

Declaration II - on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases

Declaration III - on the Use of Bullets Which Expand or Flatten Easily in the Human Body

Final Act of the International Peace Conference; July 29, 1899 ⁷⁷

Although the Geneva Conventions were by this time in force a second series of Hague Conventions were called by Theodore Roosevelt. The Second Peace Convention was attended by 44 States. Thirteen conventions were signed on 18 October 1907 following the Second Hague Conference. The conventions were to come into force on 26 January 1910. The conventions signed at the Conference and subsequently ratified were:

Hague Convention I -- The Pacific Settlement of International Disputes

Hague Convention II -- The Limitation of Employment of Force for Recovery of Contract Debts

Hague Convention III -- The Opening of Hostilities

Hague Convention IV -- The Laws and Customs of War on Land

Hague Convention V-- The Rights and Duties of Neutral Powers and Persons in Case of War on Land

Hague Convention VI -- The Status of Enemy Merchant Ships at the Outbreak of Hostilities

Hague Convention VII -- The Conversion of Merchant Ships into War-Ships

Hague Convention VIII -- The Laying of Automatic Submarine Contact Mines

Hague Convention IX -- Bombardment by Naval Forces in Time of War

Hague Convention X -- Adaptation to Maritime War of the Principles of the Geneva Convention

Hague Convention XI -- Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War

Hague Convention XIII -- The Rights and Duties of Neutral Powers in Naval War

One other convention in the 1907 series was signed but was never ratified; Hague Convention XII -- The Creation of an International Prize Court.⁷⁸

The Geneva Protocol to Hague Convention, titled Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological

⁷⁷ Full text of the convention is set out at <http://www.lib.byu.edu/~rdh/wwi/hague.html> (8 May 2005).

Methods of Warfare, which was signed on 17 June 1925 and came into force on 8 February 1928; and finally the conventions for the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which was signed on 14 May 1954 and came into force on 7 August 1956.⁷⁹

The early Hague conventions were considered by the parties to be a new statement of law based on the treaty obligations of the parties. They contained the *si omnes* clause that provided that if one party to the conflict was not party to the convention then the convention obligations would not apply to any of the parties to the conflict. This was generally considered to be the position until the Nuremberg trials following the Second World War where in the trial of German Major War Criminals the defence raised the *si omnes* clause as several of the belligerents were not parties to the Hague Convention No IV of 1907. The International Military Tribunal acknowledged the facts raised by the defence but stated in regard to the Hague Convention IV of 1907 that:

by 1939 these rules laid down in the Convention were recognised by all civilized nations, and were regarded as being declaratory of the laws and customs of war.⁸⁰

This approach was followed by the Tribunal in subsequent cases during the Nuremberg trials. The substance of Hague Convention IV of 1907, along with much

⁷⁸ Ibid.

⁷⁹ Ibid. And the Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict 1999.

⁸⁰ *Trial of German Major War Criminals*, (1946) Cmd. 6964, Misc. No. 12, at 65.

of the Hague series of conventions, is now considered to form part of customary international law and the *si omnes* clause is regarded as having fallen into desuetude.⁸¹

Although the Hague Conventions form the majority of Hague law there are other treaties which are considered to fall under Hague law. These have been compiled by the ICRC⁸² and consist of the following treaties and other instruments:

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Washington, 15 April 1935

Declaration Concerning the Laws of Naval War. London, 26 February 1909 (not ratified by any signatory)

Procès-verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930. London, 6 November 1936

San Remo Manual on International Law Applicable to Armed Conflicts at Sea:
Prepared by a group of international lawyers and naval experts convened by the International Institute of Humanitarian Law. June 1994.

Convention of Maritime Neutrality. Havana, 20 February 1928

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. St. Petersburg, 29 November – 11 December 1868

⁸¹ Meron, T. "The Humanization of Humanitarian Law" *94 American Journal of International Law* (April 2000) at 247-248.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (UN General Assembly Resolution 31/72). 10 December 1976

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980 and Protocols thereto

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. Paris, 13 January 1993.

Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa 1997

Rome Statute of the International Criminal Court, Rome 1998

Hague law can be seen to make a significant contribution to the limiting of the methods and means of armed conflict available to the parties. The achievement of customary law status⁸³ means that not only are States bound to comply with the

⁸² ICRC. *International Law Concerning the Conduct of Hostilities: Collection of Hague Conventions and Some Other International Instruments*. (1996).

⁸³ McCoubrey, H and White, N. *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996) at 158-159; Note also that Art 8 of the Statute of the International Criminal Court includes as a definition of war crimes a violation in terms that are recognisable as restatement of Hague Law:

Art 8 (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

limitations placed on them by its rules but that in internal armed conflict the limitations also apply despite the inability of parties other than the State, to formally undertake to be bound by it.⁸⁴

It is in the provisions of the Geneva Conventions that the argument for use of the laws of armed conflict and in particular the Fourth Geneva Convention by peacekeepers arises. As can be seen above, the Fourth Geneva Convention is a relatively late development in international humanitarian law. The Geneva Conventions of 1949 represented a significant codification of the principles and rules that were already widely understood, if not always applied. The Geneva Conventions could be argued to be the product of a mature understanding of international humanitarian law at a time when peacekeeping was unthought of. However, peacekeeping would develop and become more complex. It was certainly in existence and well known by the time that the Additional Protocols of 1977 were adopted. However, the argument that the Geneva Conventions applies to peacekeeping is not founded on the later amplifications but must revert to arguments based on articles drafted before peacekeeping was invented by the UN. One inference that may be drawn from the absence of reference to peacekeeping in the Additional Protocols is that they were never intended to apply to it. This would be consistent with the state of development of peacekeeping as by 1977 the vast majority of operations were traditional operations with limited use of force.

⁸⁴ If this argument were incorrect it would mean that the means and methods of warfare were not limited in the way envisaged by Hague law in internal armed conflict. This is inconsistent with the

Enforcement of international humanitarian law

As States are the subject of international law it is usually States that have enforcement action taken against them, subject to treaty arrangements such as the statute of the International Court of Justice. International humanitarian law is an exception to this rule and individuals can be liable to prosecution for breaches.

Domestic courts

Even breaches of the nascent principles of international humanitarian law would have been dealt with under domestic legal arrangements. For example, in the 12th Century king Edward III gave the English Courts of Chivalry⁸⁵ the exclusive right to deal with breaches of the law of arms. The Court of Chivalry is a civil court and has been presided over by the Earl Marshal, head of the college of arms, as sole judge since 1521. Although technically still in existence it now deals exclusively with matters of heraldry.⁸⁶

Ratification of treaties through the enactment of domestic legislation has also contributed to the ability of States to prosecute breaches of international humanitarian law as domestic criminal law. In Australia the *Geneva Convention Act 1957* incorporates the four Geneva Conventions and Protocols but does not expressly create offences except in relation to the misuse of the Red Cross and identity cards. Acts

intent of Art 1(2) of Protocol I (international law derived from established custom).

⁸⁵ The Court of Chivalry is an ancient English civil court under the jurisdiction of the Earl Marshall of England, the Duke of Norfolk that judges cases regarding heraldry. The court was last convened in 1954, in a case in which a theatre (the Manchester Palace of Varieties) was using the arms of the City of Manchester both inside the theatre and on its seal; the city had requested that the theatre cease the

that amount to grave breaches of the Geneva Conventions such as murder, torture, wanton destruction of property and so on have been incorporated into domestic criminal law. For a soldier serving overseas the *Defence Force Discipline Act 1982* would apply which incorporates through s61 of the act the *Crimes Act 1900* (ACT) and all laws of the Commonwealth in force in the Jervis Bay Territory.

The ICC

Until the end of the Second World War offences were dealt with under the domestic law of States. The Nuremberg Tribunals and the associated tribunals such as the Tokyo Tribunal marked a departure from this practice and the beginning of a move toward an internationalisation of the jurisdiction over breaches of international humanitarian law by individuals. Initially this jurisdiction was entrusted to ad hoc tribunals formed for the purpose of dealing with specific conflicts, such as the tribunals for Rwanda, the former Yugoslavia and so on. Since the coming into force of the Rome Statute there is, for some States at least, the prospect of trial by a permanent international court in the form of the International Criminal Court (ICC).

The ICC is not intended to take away from States the ability to deal with matters. Indeed the jurisdiction of the court is restricted to situation where the State voluntarily passes jurisdiction to the court, fails to exercise jurisdiction or holds a sham trial or if the matter is passed to the court by the Security Council under Chapter VII.⁸⁷ The

usage, and had met with refusal. The court ruled in favour of the City of Manchester: <http://www.nationmaster.com/encyclopedia/Court-of-Chivalry> (8 May 2005).

⁸⁶ College of Arms: <http://www.college-of-arms.gov.uk/about%5C12.htm> (5 Nov 2003).

⁸⁷ Articles 13-15 *Rome Statute of the International Criminal Court*

court is also limited to jurisdiction over only the most serious crimes identified in the statute as:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.⁸⁸

These crimes are further defined within the statute. Although generally understood as representing an international tribunal for the prosecution of violations of international humanitarian law, the Rome statute is not limited to activities committed during armed conflict. For example, the crime of apartheid⁸⁹ listed under crimes against humanity does not require a state of armed conflict or occupation to be in effect. The ICC therefore represents a point of conversion between international humanitarian law and international human rights law.

In Australia the Rome Statute has been ratified and incorporated into domestic law as the *International Criminal Court Act 2002* (ICC). Unlike the *Geneva Conventions Act 1957* the ICC Act creates offences that parallel those that can be prosecuted under the Rome Statute and makes them offences under domestic law.

⁸⁸ Article 5(1) *Rome Statute of the International Criminal Court*; The crime of aggression has not yet been defined and is subject to future agreement.

Conclusion

International humanitarian law has its roots in the more positive side of human nature. Some of the basic principles of humanitarian law are associated with the earliest recorded cultures and are seen in the Judeo-Christian and Moslem religious text. In its development in Europe during the Middle Ages it was associated with the noble knights and the rules of chivalry. Although distinguished as much in their breach as in their application, recognisable tenets of international humanitarian law were evident across diverse populations of the world. This wide spread recognition in terms both of geography and history has arguably assisted in the universal acceptance of international humanitarian law in the modern context.

Basic principles of international humanitarian law began to emerge and crystallised as the principles of military necessity, humanity or the prevention of unnecessary suffering, proportionality and finally distinction. In the mid to late 19th century these rules, primarily for reasons of political expediency on the part of States, were codified into a series of treaties. While there is some level of interaction between them these treaties are seen as representing two strands. Geneva law relates to the protection of non combatants and those *hors de combat* while the law of the Hague limits the means and methods of armed conflict.

A shift has also been seen in the method of dealing with breaches by individuals of international humanitarian law. Until the Second World War breaches of humanitarian law would primarily be dealt with under extant State domestic

⁸⁹ Article 7(1)(j) *Rome Statute of the International Criminal Court*

legislation. The Nuremberg, Tokyo and related tribunals marked an internationalisation of the prosecution of breaches of international humanitarian law. *Ad hoc* tribunals in the former Yugoslavia and Rwanda followed in the foot steps of Nuremberg.

In the latest stage of development the most serious breaches by individuals of international humanitarian law may be dealt with by an international tribunal in the form of the ICC rather than domestic courts, although the requirement for bringing a case before the ICC that the domestic court is unable, unwilling or engage in a sham trial probably means that in effect the domestic courts remain the dominant forum.

The ICC Statute also marks a convergence with international human rights law as unlike Nuremberg and the *ad hoc* tribunals, which had jurisdiction only over armed conflict, the ICC, with the exception of the crime of war crimes, does not require an armed conflict to occur before assuming jurisdiction.

International humanitarian law is the law that governs armed conflict. From the beginning of its development it was restricted in application and applied only to and during an armed conflict. As discussed in the previous chapters of this work, the UN has demonstrated a reluctance to deploy UN forces where it is anticipated that the force will become engaged in armed conflict. The use of force by UN peacekeepers has been restricted in practice to policing and deterrent activities. Since Korea and the Congo UN peacekeepers have not been directly involved in armed conflict, there has not been an identified enemy, there have not been any combatants and people

apprehended have been dealt with as detainees, where necessary prosecuted in criminal courts, not as prisoners of war.

In Cambodia, East Timor and Kosovo the UN peacekeepers were not participants in armed conflict. How then could international humanitarian law have been the *de jure* legal framework? The next chapter of this work aims to discover the threshold that must be crossed to trigger the application of international humanitarian law. It will also analyse in detail the specific argument put forward by Michael Kelly.

CHAPTER SIX

The Boundary Between International Humanitarian Law and International Human Rights Law.

Although human rights have precedence over the rights of States they do not possess the same legal quality because international law implicitly regards the State as the guarantor for human rights within the nation¹

Introduction

In the previous chapter of this work it was established that the purpose and application of international humanitarian law is very specifically concerned with the regulation of armed conflict. For parties engaged in armed conflict international humanitarian law is the *lex specialis* that regulates activities between the parties and places obligations on them for the protection of identified persons, places and things. Unless UN peacekeepers are involved in armed conflict, which as demonstrated in chapters three and four of this work is highly unusual,² this work argues that UN peacekeepers will not be in a position to use international humanitarian law as a framework for operations.

However, this view is not universally held and there are influential advocates for the application of international humanitarian law to a broader spectrum of peacekeeping operations.³ It is important for peacekeepers and planners to be able to identify the legal environment in which an operation is to take place and to plan for the effect that this environment will have on core issues such as the rules of engagement and

¹Zwanenburg, M. "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations". *International Peacekeeping*. July – (October 1999) at 128

² Whether UN forces can as a matter of law become engaged in armed conflict will be discussed later in this chapter.

³ Kelly, M. *Restoring and Maintaining Order in Complex Peace Operations: The Search for Legal Certainty*. (1999): On Kelly's advice the Australian contingent in Somalia applied the law of occupation to their sector of the United Nations Operation in Somalia in 1993.

treatment of individuals in the area of operations as well as custody and detention policies. There are differences in the rights of an individual under international humanitarian law and international human rights law. There is therefore a difference in the rights that peacekeepers would be required to protect depending on the framework applied so that establishing the correct framework is more than merely an esoteric exercise. Some differences in the approach to the issue of individual rights will be examined in the first part of this chapter to demonstrate the importance to the domestic civilian population of determining the correct legal framework for an operation.

Having established that there are significant practical implications for a domestic civilian population in applying the correct framework to an operation the next section of the chapter seeks to determine at what point an operation crosses the threshold to trigger the application of international humanitarian law and as a result cause the legal framework to be international humanitarian law. In order to assist in clearly identifying this threshold, existing definitions of armed conflict are examined and shown to be inadequate in assisting peacekeepers and planners to accurately determine which framework applies. As a result, new definitions that more accurately describe the point at which international humanitarian law applies are proposed. In the penultimate section of this chapter the question is raised as to whether UN peacekeepers can as a matter of law become parties to an armed conflict. If they cannot then international humanitarian law could not be used even when peacekeepers engage as a matter of fact in armed conflict. Finally, the argument against the application of international humanitarian law as the legal framework for peacekeeping in collapsed States is made out.

Individual rights in international humanitarian law

A significant feature of the difference between international human rights law and international humanitarian law is the different way that the rights of an individual are treated. There is no doubt that international humanitarian law seeks to protect certain human interests. However, the way in which it does this differs from human rights law in that, while obligations and offences for breach are created, it does not bestow on an individual “rights” the way that human rights law does. Even though there are references in the Geneva Conventions to the ‘rights’ of protected persons, Provost⁴ argues that the Conventions do not confer rights on individuals but a minimum standard of treatment that cannot be derogated from by a State. In support of this proposition he points to the situation during the Second World War when the Vichy French government agreed to ‘transform’ a number of prisoners of war held by the Germans into civilians thus removing the protections afforded them as prisoners of war.⁵ The provisions of the extant Conventions of 1949 are drafted in absolute non derogable terms utilising the terminology of ‘right’ to prevent this type of abuse. Provost’s view on the granting or otherwise of rights to the individual, is not held universally. It should be noted that Meron⁶ relies on exactly the same provisions and example to argue that individuals have rights under international humanitarian law and that there is a convergence of international humanitarian law and international human rights law in the recognition of individual rights.

⁴ Provost, R. *International Human Rights and Humanitarian Law*. (2002).

⁵ Ibid at 28-29.

However, Provost finds further support for his proposition in the rigidity of the standards that are applied to the treatment of individuals, a standard that cannot be waived by the individual because it is not a right of the individual. The example given to illustrate this point is that of a person forced to fight for one particular party. If that person is captured he or she is not at liberty to fight for the other party but must remain a prisoner of war. The ‘right’ is not one that adheres to the individual as is the case with international human rights law, but represents a minimum standard of treatment that must be applied to all regardless of the wishes of the individual.⁷

The International Committee of the Red Cross (ICRC) supports this view of the differing status of the individual under international humanitarian and human rights law in its definitions. International humanitarian law is described as:

A set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. It protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.

In contrast the ICRC defines international human rights law as:

A set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behaviour or benefits from

⁶ Meron, T. *Human Rights in International Strife: Their Interpretation Protection*. (1987): Meron, T. “The Humanisation of Humanitarian Law” *American Journal of International Law*. (July 2000) at 239-340.

⁷ Above n 4 at 30.

governments. Human rights are inherent entitlements which belong to every person as a consequence of being human.⁸

The ICRC position accords with the proposition that one of the fundamental differences between international humanitarian and human rights law is the position of the individual. The rights are inherent to the individual in international human rights law, while international humanitarian law arguably does not give inherent rights to individuals but imposes obligations on States and individuals to comply with its provisions and is underpinned more strongly by the principle of reciprocity than is international human rights law. Perhaps the greatest difference between international humanitarian law and human rights law is with regard to the issue of killing. International human rights law specifically prohibits the taking of human life other than as a sentence following criminal proceedings according to law, while international humanitarian law permits the taking of life, even innocent civilian life within the limits of unavoidable collateral damage associated with proportionality and military necessity.⁹

The obligations and requirements placed on peacekeepers with regard to the treatment of individuals in an operation governed by international humanitarian law would be quite different from the obligations placed on them in a situation where international human rights law applied. The issue of whether international human rights law or international humanitarian provides the legal framework for collapsed State

⁸ ICRC “International Humanitarian Law and International Human Rights Law: Similarities and Differences.” *Advisory Service on international Humanitarian Law*. (01/2003).

⁹ Meron, T. “The Humanisation of Humanitarian Law” *American Journal of International Law*. (July 2000) at 239-340; Hodgson also compares the responsibilities placed on individuals in international humanitarian law and human rights law, demonstrating the broader spectrum of rights and duties under international human rights law. Hodgson, D *Individual Duty within a Human Rights Discourse*. (2003) at 61-137.

peacekeeping therefore has significant implications for the treatment of the domestic civilian population. If international human rights law applies individuals have non-derogable rights, where if international humanitarian law applies the obligations to an individual can be subordinated to situations where, for example, there is reason to apply the principle of military necessity to achieve a peacekeeping mission.

Where international humanitarian law applies

Meron¹⁰ observed in 1987 that international humanitarian law and human rights law were converging. Despite this he questioned whether there was a lacuna in the area where humanitarian law and human rights law meshed, which for him was the key area of internal strife. Areas of internal strife have increasingly seen the insertion of peacekeeping operations, particularly operations under the robust mandates issued under Chapter VII. However, if a lacuna indeed existed in 1987 it is argued that it has been closed and that international human rights law has filled the gap. There is overwhelming support for the proposition that international human rights law applies at all times, even during armed conflict and that during armed conflict international humanitarian law and international human rights law act in a complementary not mutually exclusive way.¹¹

¹⁰ Meron, T. *Human Rights in International Strife: Their Interpretation Protection*. (1987).

¹¹ Human Rights Committee *General Comment No.31* (CCPR/C/21/Rev.1/Add.13, (26 May 2004) : See also *Abella v. Argentina*, Case No. 11.137, Report No. 5/97, Annual Report of the IACHR 1997 at para 158. The application of human rights in armed conflict was first considered by the UN at the International Conference on Human Rights in Tehran in 1968, which adopted Resolution XXIII, "Human rights in armed conflicts". The Vienna Conference on Human Rights in 1993 reaffirmed the linkage between human rights and international humanitarian law in armed conflicts (the Vienna Declaration at part II, E, para 96). International human rights law was also expressly considered to exist during armed conflict by the ICJ, *Nuclear Weapons Case*, Advisory Opinion at 25: See also Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law*. Vol 1. Rules (2005) at 299-300.

This position was supported by the ruling of the Inter-American Human Rights Commission, which issued a ruling in March 2002 on the status of detainees in the US detention centre at Guantanamo Bay.¹² The Commission recognised that human rights law applied at all times while international humanitarian law does not apply in the absence of an armed conflict, in other words the threshold must be crossed into armed conflict for international humanitarian law to apply. Although both may apply during armed conflict, the Commission found that where there is a state of armed conflict the *lex specialis* rules of international humanitarian law take precedence.¹³ The position that international human rights law continues during armed conflict is supported by State practice. During the Second Gulf War the UK adhered to the European Convention on Human Rights concurrently with the international humanitarian laws of occupation.¹⁴

Acknowledgement that international humanitarian law overrides international human rights law in armed conflict was expressly made by the UN Secretary-General in relation to Article 6 of the International Covenant on Civil and Political Rights when he reported:

to the extent that in present international law 'lawful acts of war' are recognized, such lawful acts are deemed not to be prohibited by Article 6.¹⁵

¹² Organisation of American States. Detainees in Guantanamo Bay, Cuba. (12 March 2002). *Decision on Request for Pecuniary Measures*.

¹³ Murphy, S.D. "Inter-American Human Rights Commission Decision on Cuba Detainees" *American Journal of International Law*. (July 2002) at 730.

¹⁴ Kelly, M "Legal Factors in Military Planning for Coalition Warfare and Military Interoperability" *Australian Army Journal*. Vol 11. No.2, (Autumn 2005) at 166.

¹⁵ Respect for Human Rights in Armed Conflicts, Report of the Secretary- General, UN Doc. A/8052, at 104 (1970).

As unlike international human rights law international humanitarian law does not have a continuous existence it is necessary to establish when the threshold has been crossed into international humanitarian law. Definitions that provide only general guidance are of little use.

Another complication for peacekeeping operations is that the legal framework under which the peacekeepers are operating may be different from that applicable to other actors in the environment in which they are working. When inserted into an armed conflict as an interposition force peacekeepers do not become a party to the conflict. If a peacekeeping force is fired upon they will have rules of engagement which permit them to return fire on the basis of self defence, but they cannot, for example, set ambushes with the intent to kill combatants as they themselves are not combatants.

However, peacekeepers still need to be able to distinguish when their mission has caused them to become a party to the conflict and therefore apply customary international humanitarian law. As the UN is not a State or a party envisaged in Protocol II it cannot be party to the Geneva Conventions and Protocols. The San Remo Manual position in such situations is to apply the De Martens clause: "In cases not covered by this document or by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience."¹⁶

¹⁶ Part 1 Section 1(2).

In enforcement operations with the character of the Korean War or the first Gulf War it will not be difficult. In a situation such as the US forces found themselves to be in Mogadishu when attempting to arrest General Aideed, the situation is not as clear. Fighting was not protracted but it was intense. It was more focused than a riot but it only lasted for a matter of hours. The Somalis involved in the incident were firing at will at the US forces, using rocket propelled grenades and heavy weapons. The troops reacted in accordance with their training and returned fire.¹⁷ The problem the US forces faced was that there was no identifiable enemy, indeed there was no enemy at all because they were not engaged in an armed conflict but attempting to bring humanitarian aid and create a secure climate for peace building. And yet on the ground it may have been difficult for many of the soldiers to accept that they were not involved in an armed conflict.

In order to put the Somali type of peacekeeping experiences into perspective they can be compared with situations that police authorities have faced in domestic jurisdictions. A comparable situation would be the so called “Waco massacre” in Texas, US. The Branch Davidians were a cult movement that had settled in Waco. They came to the attention of the US authorities through complaints of former members. There were allegations of abusive practices and possession of illegal arms. The US Federal Bureau of Investigation (FBI) and the Bureau of Food, Tobacco and Firearms (BFTFF) decided to move in on the community and effectively laid siege to it on 28 February 1993. The siege lasted for 51 days, during which time the US Army became involved. Although not on the physical scale of the Somali situation, where fighting covered the centre of the city, the siege was prolonged and there are parallels

¹⁷ Bowden, M. *Black Hawk Down* (1999).

in the way that the authorities engaged in a prolonged exchange of fire with the members of the Branch Davidian movement. Indeed heavier weapons were used at Waco than in Somalia as tanks were deployed to the scene by the US army. Eventually incendiary devices were deployed which destroyed the compound with the loss of 74 men, women and children.¹⁸

Despite the use of arms, including tanks and incendiary devices, and the protracted nature of the siege, there is no suggestion that the Waco incident amounted to an armed conflict. Yet it may have had a greater claim to qualify as such under extant definitions of armed conflict than the events of 1993 in Somalia. This is not to suggest that the Waco siege was an armed conflict, rather it highlights the point that the definition of armed conflict is very wide. At Waco there was a resort to armed force between government authorities and the group, the Branch Davidians. There was protracted armed violence, 51 days of it. Understanding why the Waco siege was not armed conflict may be the key to developing a meaningful test for the threshold into armed conflict that can be applied by peacekeepers. Once the threshold is clearly discernable the line between the primacy of human rights law and the requirement to implement international humanitarian law can be identified.

Definitions of armed conflict

From the Middle Ages until the mid twentieth century international law recognized a clear distinction between peace and war. If States were at war they declared it and applied the appropriate rules. States that were not a party to the conflict were dealt

¹⁸ Serendipity *The Waco Massacre* <http://www.serendipity.li/waco.html> (22 Aug 2005).

with under the rules of neutrality and at all other times the international law applicable in peace time was applied. Following the Second World War there ceased to be a clear cut distinction between peace and armed conflict. Formal declarations of war were no longer made. States behaved differently in terms of their interactions so that even where there was an armed conflict between them diplomatic, economic, political and peaceful international legal relationships, including treaties, were often maintained. As a result it may be difficult to identify when an armed conflict between States exists. Add to this the complexity of internal armed conflict with the involvement of non State actors and the threshold for the implementation of international humanitarian law becomes very difficult to discern.¹⁹

A number of definitions have been developed in an attempt to identify when the international humanitarian law threshold has been crossed. The starting points for modern definitions are those set out in the Geneva Conventions and Protocols. Common Article 2 of the Geneva Conventions identifies international armed conflict as occurring where there is a declared war or:

...any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

This provides very little assistance in identifying an armed conflict, although the definition does confirm that an international armed conflict can exist where one of the parties denies its existence. There is no assistance given in the Geneva Conventions to identifying an internal conflict as common Article 3 appears to assume that such an

¹⁹ Greenwood, C. in Fleck, D. (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, (1995) at 201-202.

event needs no interpretation. The ICRC commentaries on the Conventions are even more expansive in the interpretation of armed conflict describing it as:

Any difference arising between two States and leading to the intervention of armed forces ... even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.²⁰

Writing shortly after the Conventions of 1949, Lauterpacht²¹ defined armed conflict as:

“War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.”

As observed by Dinstein,²² this definition does not take understanding of when an armed conflict has commenced (and therefore how a peacekeeper might recognise that it is occurring), further than to effectively eliminate intra State conflict. Dinstein objects to the narrowness of the definition because it does not account for situations where a state of armed conflict exists between States and yet no shot is fired. He further criticises this definition because it relates only to comprehensive conflict and overlooks the possibility of armed conflict conducted to achieve more limited ends than total subjugation of the enemy. Finally, Dinstein takes issue with the implied

²⁰ Pictet, J. (ed) *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. (1952) at 32-33. The commentary does not provide a definition of internal armed conflict although some criteria for application of the customary principles are suggested at 49-50.

²¹ Lauterpacht, H. (ed) *Oppenheim's International Law, II*. (1952) at 202.

²² Dinstein, Y *War, Agression and Self Defence*. (3rd ed, 2001) at 4-14. Dinstein's own definition suffers from the circular argument problem. He effectively states that armed conflict occurs when it is

symmetry of the positions of the parties to the conflict, noting that the parties may well have quite different aims, for example, one party may have a very limited goal while the other desires total victory. Lauterpacht, it would seem, does not assist in providing a definition for armed conflict.

Although it relates to internal armed conflict Article 1(2) of Protocol II to the Geneva Conventions gives a little more assistance regarding the identification of an armed conflict generally by stating that:

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated acts of violence and other acts of a similar nature, as not being armed conflicts.²³

While this definition seems to shed a little more light on the subject it only really serves to eliminate activities at the very lowest point on the possible scale of violence. The fact that the definition comes from the Protocol that relates to internal armed conflict means that it is strictly a definition relating only to internal armed conflict but it is used here to shed some light on how any armed conflict may be defined in circumstances where a formal declaration has not been made between States. The distinction between internal and international armed conflict is vital when considering which provisions of international humanitarian law apply but it is not so vital when simply trying to determine how to recognise an armed conflict.

happening, adding that it must be comprehensive for one party. This definition does not progress the search for a definition that can be used by peacekeepers to identify armed conflict.

²³ Article 1(2) *Protocols Additional to The Geneva Conventions of 12 August 1949*.

It seems inconceivable that even without the Protocol II definition, a rational observer would have concluded that, for example, the Brixton or Toxteth riots of the 1980s in the UK amounted to armed conflict, despite their intensity and the associated loss of life. Northern Ireland presented different issues and will be discussed below. Internal armed conflict will always prove a difficult area because of the competing issues of a desire to provide a humanitarian influence on violence through international regulation and the principles of State sovereignty, particularly in light of Article 2(4) of the UN Charter. A cynical approach may be that the attempt to balance these interests is more likely to be at the root of the Protocol II definition than genuine assistance in defining armed conflict. However, for the purposes of this work the Protocol II definition will be taken as having general application in attempting to define armed conflict. That is, to qualify as an armed conflict, internal or international, there must be more than the types of disturbances and tensions identified by Article 1(2) Protocol II, regardless of the involvement of individuals or groups operating under the direction and control of a foreign State.

The ICRC Commentary on Protocol I takes understanding no further than an emphasis on the irrelevance of duration and intensity:

Humanitarian law ... covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role ...²⁴

The ICRC Commentary on Protocol II merely describes armed conflict for the purposes of the Protocol to be:

²⁴ Sandoz, Y, Swinarski, C and Zimmerman, B. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) at para. 62.

the existence of open hostilities between armed forces which are organised to a greater or lesser degree.²⁵

Greenwood²⁶ drew heavily upon the Geneva Conventions in proposing a definition of international armed conflict:

An international armed conflict exists if one party uses force of arms against another party. This shall also apply to all cases of total or partial military occupation, even if this occupation meets with no armed resistance (Art. 2, para 2 common to the Geneva Conventions). The use of military force by individual persons or groups of persons will not suffice. It is irrelevant whether the parties to the conflict consider themselves to be at war with each other and how they describe this conflict.

The only difference of substance between this definition and the Geneva Conventions is the recognition that an international armed conflict may take place between parties who are not High Contracting Parties. Interestingly Greenwood dismisses the ability of a group to be involved in armed conflict while using the term party instead of State to describe the entities between which force is being used. But one of the questions to arise from this definition is when does a group become a party? Is it a matter of size or intent? These issues are not addressed in the definition and as a consequence it takes understanding little further than the Convention definition. The Convention, Commentaries, Protocol and definitions by respected scholars such as Greenwood all seem to be out of step with modern practices in the use of armed force and acknowledgement of the existence of armed conflict. It is generally accepted that

²⁵ Ibid at para. 4341.

isolated incidents such as border clashes, military surveillance operations and small scale raids do not amount to armed conflict.²⁷

In the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994²⁸ (San Remo Manual) the threshold for international humanitarian law to be applied is described in Part 1 Section 1 as:

1. The parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used.²⁹

Although the San Remo Manual is aimed at providing a contemporary restatement of international humanitarian law provisions that relate to armed conflict at sea, as well as some progressive developments,³⁰ there are necessarily findings as to the extant state of the law of armed conflict generally. San Remo Manual article 1 above, is based on a rejection of intensity as a relevant consideration in determining whether an armed conflict exists. This position is drawn from the ICRC Commentary on Article 2 of the Geneva Conventions.³¹ The ICRC commentary defines armed conflict as:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one

²⁶ Above n 19 at 202.

²⁷ Schmitt, M. "Wired Warfare: Computer Network Attack and *jus in bello*". IRRC (June 2002). Vol. 84, No.846, at.372: *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v USA)* ICJ Rep 1984, 392.

²⁸ Doswald-Beck, L. (ed) *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995)

²⁹ *Id* at 7.

³⁰ *Ibid* at ix.

³¹ *Ibid* at 73.

of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.³²

The San Remo Manual goes slightly further than the ICRC commentary as in the Manual formulation of Article 1 it is make clear that the intervention involves the use of armed force. Two warships or two bodies of troops facing each other would not be sufficient to amount to an armed conflict until at least one shot is fired.

These statements of the law appear to be based on the assumption that armed conflicts, at least international ones, would occur between the legitimate armed forces of a State. While non State actors are acknowledged as becoming involved in non-international armed conflict in Protocol II,³³ it is probably correct, despite the statements of prominent politicians such as the US President Bush regarding “the war on terror”, that international armed conflict can only be conducted legitimately through armed forces. Lawful combatants are indirectly defined in Article 13 of the First Geneva Convention:³⁴

The present Convention shall apply to the wounded and sick belonging to the following categories:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

³² Pictet, J. S. (ed) *ICRC Commentary on Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*. (1960).

³³ Protocol II of 8 June 1977 “Relating to the Protection of Victims of Non-International Armed Conflicts” *Protocols Additional to the Geneva Conventions of 12 August 1949*.

³⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of August 12 1949.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power. 4. Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.

5. Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law. 6.

Inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Article 4 of the Third Geneva Convention uses the same definition for describing persons who are to be treated as prisoners of war.

The definition is further refined by Article 43 of Protocol I³⁵

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

As the Party to a conflict referred to is a High Contracting Party international armed conflict can only occur between States. This may have put the UN in an ambiguous position had the Article 43³⁶ agreements been signed. In the circumstances, each State Party contributing troops to a UN force will be a Party to the conflict.³⁷ In the event that an internationally recognised actor such as the UN or a future East India Trading Company³⁸ engages in armed conflict the international customary law rules

³⁵ “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977”.

³⁶ Article 43 of the United Nations Charter.

³⁷ Although troops are contributed to a UN force there remains a National Command Element that approves the directions given by the UN so that each national force remains effectively under national command regardless of UN operational control. See for example: Stephens, D, “The Lawful Use of Forces: The Tactical Imperative.” *International Peacekeeping*, Vol.12 No.2 (Summer 2005) at 160. http://www.vanguardcanada.com/ftp_folder/pdf/01-3_nether.pdf (17 Jul 2005). http://www.aph.gov.au/house/committee/jfadt/raaf14_17july2003/raaf_report/chapter3.pdf (17 Jul 2005):

³⁸ In the mid 18th century the East India Trading Company developed its own private army. By the end of the 18th century the company army numbered 150,000 troops, which was a larger number than the

will apply, many of which, and certainly those relating to armed conflict at sea, are contained in the San Remo Manual.

Returning to the definition of armed conflict, the San Remo Manual does advance the understanding of armed conflict by establishing that international armed conflict is concerned with the use of force between combatants. If an individual is not a lawful combatant he or she cannot be involved in armed conflict.

The difficulty with the majority of the definitions canvassed so far is that they convey more about what armed conflict is not than how an armed conflict can be recognised, except that international armed conflict at least, is engaged in by combatants. Neither do the definitions articulate the degree of force that must be used to constitute an armed conflict, an issue clearly relevant to a modern understanding of armed conflict despite rejection of this position by the ICRC. Is intensity or purpose of the conflict relevant? The acid test is whether a definition of armed conflict can be used to understand the legal status of events such as the deployment of troops to East Timor under the International Force East Timor (INTERFET) and actions against Aided in down-town Mogadishu by the United Task Force (UNITAF) in 1993. These are the types of situation that UN peacekeepers may increasingly be required to analyse, although both these examples were faced by multinational rather than blue helmet operations.

The ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) provided a definition when it was required to determine what constituted an armed

British army of the time: Addington, L. *The Patterns of War Since the Eighteenth Century*. (Second ed. 1994) at 7.

conflict in the course of the trial of Dusko Tadic.³⁹ In its Decision on the Interlocutory Appeal on Jurisdiction (October 2, 1995), the Appeals Chamber defined an armed conflict as existing:

whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international [humanitarian] law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party whether or not actual combat takes place there.⁴⁰

This test attempts to clarify when international humanitarian law applies and also when armed conflict begins and ends. As pointed out above, peacekeepers in such a situation would not be a party to the conflict and therefore would still be required to apply international human rights law themselves while receiving the benefits of protected status under international humanitarian law.

Despite an apparent shift towards a qualitative assessment of the force required to amount to armed conflict, Jinks argues that the identification of a requirement for protracted armed violence in *Tadic* is no more than an affirmative restatement of the Protocol II requirement that the violence be more than merely sporadic or limited to

³⁹ *The Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* Appeals Chamber, (2 October 1995).

⁴⁰ See also Zwanenburg, M. "UN Deployments in the Crossfire". *International Peacekeeping*. (July – October 1999). at 128. This dictum goes against the ICJ in the *Nicaragua* case.

rioting.⁴¹ In other words the insertion into the definition of a requirement for the violence to be protracted does not take understanding of the threshold of armed conflict further than Protocol II.

The test laid out in the *Tadic* case appears to have influenced the drafting of the Statute of the International Criminal Court (ICC) as at Article 8(2)(f) the statute identifies internal armed conflict as follows:

...armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.⁴²

The advantage of the ICC definition is that it caters for situations where armed conflict is occurring between a State or organised armed groups operating across State borders.

These definitions lead to an understanding that armed conflict exists, and therefore that humanitarian law must be applied, when there are two or more parties using armed force against one another. The nature of the arms is not specified but must presumably be capable of doing violence to a human being. The violence or force must be more than isolated acts of violence, however intense, and when not of an international character, must be protracted violence against the government of the State or between parties. Protracted violence means that the violence must be more than something in the nature of riots or sporadic unrest. It appears that the purpose of

⁴¹ Jinks, D. *The Temporal Scope of Application of International Humanitarian Law to Contemporary Conflicts* <http://www.ihlresearch.org/portal/ihli/Session3.pdf> (3 Mar 2003).

the violence or conflict is not relevant except with regard to defining whether the conflict is an internal or external conflict, an issue which will be addressed separately in this chapter.

The definitions of armed conflict that appear in the conventions and cases have made little progress in clearly defining what armed conflict is. Even where situations appear to fit into the definitions the reality of State practice means that situations which may be argued to fit at the penumbra of the definitions of armed conflict, such as “Waco,” are not considered by either the State or the international community to be armed conflict.

This state of affairs is not helpful to peacekeepers who must deal with practical situations on the ground. An alternative definition must be found to properly describe the threshold of armed conflict.

Schmitt argues that the underlying purpose of humanitarian law is to protect certain people, places and things from injury, suffering, death, damage or destruction. These effects must be intended or foreseeable and more than merely sporadic and isolated incidents.⁴³ This approach seems to give a much more practical starting point to develop a working definition that peacekeepers can use to identify their status in the field.

In 1998 The Armed Conflict Report of Project Ploughshares defined armed conflict in a different way from that seen in the Conventions, ICTY and ICC. It defined it as:

⁴² *Statute of the International Criminal Court.*

⁴³ Above n 27 at 373-374.

a political conflict in which armed combat involves the armed forces of at least one State (or one or more factions seeking to gain control of all or part of the State), and in which at least 1,000 people have been killed by fighting during the course of the conflict.⁴⁴

The project makes it clear that the armed conflict is considered to have commenced when the first person dies but cannot be identified until the 1,000 person's death is attributed to the conflict. This definition recognises the purpose of the combat, political control of a State or territory and the intensity of the conflict measured in deaths. This approach is certainly more helpful in eliminating minor border incursions and so on that are not as a matter of practice seen as armed conflicts but would otherwise fit into the formal definitions. However, the selection of a number of deaths seems arbitrary and unhelpful.

A similar approach to the problem of finding a workable definition of armed conflict has been taken by Wallensteen and Sollenberg in the Uppsala Conflict Data Project.⁴⁵ They developed a more complex test to identify armed conflict based on a number of elements:

An armed conflict is a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a State, results in at least 25 battle-related deaths.

⁴⁴ Regehr, E. *The Armed Conflict Report*. Project Ploughshares. <http://ploughshares.ca/CONTENT/ACR/ACR98.html> (1 May 2003).

This definition, though rather complex and requiring its own interpretation, comes far closer than its predecessors in providing practical guidance. Again it suffers from the inclusion in the definition of an arbitrary number of deaths with no evidence of a rational explanation for the choice of figure. The most striking difference between both the Ploughshares Project and the Uppsala Data Project and the previous definitions of armed conflict is the inclusion of motive and intensity. It should be noted that the use of intensity as a guide to defining armed conflict was expressly rejected as an element by the ICRC.⁴⁶

One of the difficulties with using the number of deaths as a guide to intensity is that it creates difficulty at the commencement of an operation. While situations may certainly change and develop, it is best for planners to know what situation they are going to be working in. If an operation begins on the basis that it is not a party to an armed conflict and then the death count rises to a level that means that it has been in an armed conflict from commencement, this creates confusion and practical difficulties if people have been for example, arrested, tried and so on. Therefore, while intensity may have a valid place in helping to determine the legal status of armed conflict, to relate intensity to a body count is unlikely to prove a practical approach. Intensity may be a useful guide to identifying an armed conflict by a better approach may be to define levels of intensity by relating it to the weapons or munitions and their frequency of use in the conflict.

⁴⁵ Wallenstein, P and Sollenberg, M. "Armed Conflict 1989-2000", *Journal of Peace Research* 38(5): 629-644 (2001).

⁴⁶ Sandoz, Y, Swinarski, C and Zimmerman, B. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. (1987) at 62.

Another option that may be available for use in identifying whether an armed conflict exists is to examine the motive behind the violence. The advantage of the inclusion of a motive to seize territory or political dominance in the definition is that it can distinguish between the Waco type of situation and situations that are genuinely deserving of recognition as armed conflicts. The combination of armed force and motive seem to create powerful claims to inclusion in any definition but there are other elements that need to be included to provide a workable definition for use by peacekeepers.

Acknowledgement or otherwise of the status of a situation as an armed conflict by one or all of the parties was expressly deemed irrelevant by the Conventions, ICRC and Greenwood definitions. This approach should remain as an integral part of the definition as highlighted by the decades of conflict in Northern Ireland. The approach taken over many years by the UK government to the troubles in Northern Ireland was that it was involved in the suppression of criminal organisations. Despite protest to the contrary and some sympathy (not to mention funding) from the Irish Diaspora, particularly from the USA, the international community refused to recognise an armed conflict.⁴⁷

Under the definitions of armed conflict addressed above the euphemistically named ‘troubles’ in Northern Ireland can be argued to qualify as an armed conflict. Specifically there could be an argument made out that the troubles were an international armed conflict against colonial domination by operation of Protocol I, article 1(4). However, until recently there was no international recognition that an

⁴⁷ See for example, Council on Foreign Relations, <http://www.terrorismanswers.com/groups/ira.html> (22 Aug 2005); US Navy <http://library.nps.navy.mil/home/tgp/ira.htm> (22 Aug 2005).

armed conflict had been taking place, presumably in order to avoid embarrassment to or confrontation with the UK government.⁴⁸ Even in determining issues of law in relation to the treatment of detainees the court that was appealed to was the European Court of Human Rights that dealt with the case on the basis of international human rights law not humanitarian law.⁴⁹ This political dimension to the identification of armed conflict is one that peacekeepers must be prepared for but should not influence the legal definition of the situation into which they have been inserted. Further development of a workable definition of armed conflict must remain a purely and expressly objective approach.

Cartledge's⁵⁰ contribution to the debate of a definition of armed conflict adopted a motive based approach of a political character. This definition states that:

International armed conflict exists when there are official military or paramilitary forces performing acts of war in apparent furtherance of their government's policy, and that government or the government of any country against which the acts are being perpetrated acknowledges that armed conflict is taking place.

There are a number of problems with this definition. First there is the mixing of the terms war and armed conflict. In this definition the term armed conflict effectively rests on performance of acts of war. War is not defined but one definition offered by *The Australian Concise Oxford Dictionary* is 'a specific conflict'. This part of the definition is therefore circuitous. The second issue of considerable concern is the

⁴⁸ UN Press Release. "Special Representative for Children and Armed Conflict to Visit Northern Ireland. (14 December 2000): see also Karhilo, J. "Armed Conflict Prevention, Management and Resolution. *Stockholm International Peace Research Institute Yearbook (1999)* at chapter 2.

⁴⁹ *Ireland v United Kingdom* (1978) Eur. Ct. H.R. Rep. Series A, No.3.

⁵⁰ Cartledge, G. *The Soldiers Dilemma: When to Use Force in Australia*. (1992) at 165 n 1.

requirement for the State party against which hostilities are perpetrated to acknowledge that armed conflict is taking place. This requirement is a reflection of common Article 2 of the Geneva Conventions but is one which the ICRC Commentary was at pains to interpret as not requiring either party to acknowledge.

The danger of an interpretation requiring a party to acknowledge there is a state of armed conflict is that it could allow States wishing to avoid the implementation of international humanitarian law to do so by the simple expedient of refusing to acknowledge its existence. Subsequent definitions of armed conflict in the Protocols, ICC Statute, *Tadic* and *Nicaragua* have avoided imposing this requirement thereby leaving the threshold of international humanitarian law as an objective determination on the facts rather than at the mercy of political expedience.

Cartledge does rely on motive as an element determinative of when the threshold has been crossed. Motive as an element is represented by the cause or reason for the armed conflict, in this definition “the furtherance of government policy.” This motive based definition distinguishes between internal conflict and the accidental shot across the border. The method by which a State’s policy is furthered is through an official military or paramilitary organisation rather than a legitimate police force or crime fighting agency. Therefore in this definition armed conflict is distinguished from policing actions.

Although these definitions of armed conflict provide guidance they do not provide an adequate method for peacekeepers to identify a situation into which they are being inserted or recognising situations when they themselves have stepped over the

threshold into armed conflict. A definition of armed conflict has to be developed that can allow peacekeepers to make a judgement on the law to be applied with a reasonable level of confidence that the decision is one that can be justified both on the international stage and if necessary in the domestic court room.

There are a number of elements that can be taken from the definitions set out above that can be combined to provide a practical guide to the legal environment. First, there appears to be agreement that armed conflict must involve the use of force or violence through the application of weaponry capable of taking human life. The weaponry does not have to be conventional. For example, computer network attack that directly results in injury, death, damage or destruction can be categorised as an armed attack.⁵¹ Save for the situations envisaged by Protocol I, article 1(4), in international armed conflict the application of force must be by the representatives or citizens of one State against those of another. There needs to be some way of distinguishing activities such as criminal activities, which are not intended and do not as a matter of State practice fall under international humanitarian law, and those activities which should properly be defined as armed conflict.

Although Protocol II sets out to make this distinction in internal armed conflict by excluding criminal activities such as riots and isolated and sporadic violence, the analysis of the Waco incident demonstrates the inadequacy of the Protocol II approach because it fails to distinguish between domestic law enforcement that is protracted and properly dealt with under the domestic laws of the State and an internal armed conflict to which international humanitarian law should apply. There is a

⁵¹ Above n 27.

danger that without a more certain definition the potency and efficacy of international humanitarian law will be diluted by so broad or indistinct a definition that it becomes easy for a State to ignore it.

An element that could be inserted into a definition of armed conflict is that it is conducted by a group that has as an end political dominance over a State or territory within a State or States and attempts to gain it through force. This element would seem to meet the requirement and would certainly distinguish between a Waco type situation and universally recognised armed conflicts such as those in the former Yugoslavia identified by the ICTY in *Tadic*. Politically motivated groups committing random acts of violence to instil fear in the population to achieve certain political goals would not fit into this definition because their motive is not political dominance over a State but to change the policy of the existing order.

However, there may be violence on such a scale that it does reach the threshold in circumstances where international humanitarian law should properly apply. The Ploughshares and Uppsala projects recognised this problem and determined that a more explicit reference to intensity was required in a definition of armed conflict, although their representation of this element in terms of a body count seems a rather crude approach.

Protocol II identifies intensity in terms of the spacing of violent acts. Sporadic violence such as riots and disturbances are not armed conflict. This point was taken in *Tadic* to mean that violence had to be prolonged. The requirement for the violence to be prolonged is not applied in international armed conflict as demonstrated by the

Six Day War between Egypt and Israel in 1967. Protocol II and the *Tadic* decisions relate only to definitions of internal armed conflict and illustrated the difficulties in determining when an armed conflict is occurring.

If defining intensity in terms of the number of deaths directly related to the conflict is arbitrary and unhelpful, what other means are there of determining the intensity of the conflict? One approach might be an examination of the weapon systems used. Where light arms and skirmishes are involved there might be the prelude to armed conflict but more often as a matter of practice such encounters are ignored. Even where field artillery is used the situation may not amount to armed conflict as is the case in Kashmir and Jammu where despite skirmishes between the armed forces and the exchange of artillery fire between Pakistan and Indian, they are not considered to be engaged in an armed conflict but in a state of cease-fire monitored by the United Nations Military Observer Group in India and Pakistan.⁵² Similarly the attacks by US fighter jets on Libya in 1986 did not put the US and Libya into a state of armed conflict despite the devastating effect of the use of hi-tech weapons platforms.⁵³ In such circumstances, as with the Lockerbie plane bombing, for which Libya has accepted State responsibility, other international law provisions apply.⁵⁴

Another possibility is to look at the preparedness of a party to the conflict to target and in general treat as combatants or military objectives people, places and things associated with the other party. This would result in an element of the definition

⁵² Centre for Policy Analysis <http://www.gmu.edu/departments/t-po/resource-bk/mission/unmogip.html> (22 Aug 2005).

⁵³ Schafer, B. "The U.S. Air Raid on Libya in April 1986 – A Confidential Soviet Account from the Stasi Archives" www.isn.ethz.ch/php/documents/collection_5/texts/intro_schaefer.pdf. (22 Aug 2005).

⁵⁴ Gomes, J.G. *Public International Law* http://www.geocities.com/kjgomes.geo/Personal_International_Law.doc (22 Aug 2005).

being the interaction of the parties as combatants. The problem with this approach is that it is somewhat circuitous as it is the state of armed conflict that permits the existence of combatants in the first place. The approach could be improved by an objective assessment that the parties are behaving as combatants and adopting the Protocol II⁵⁵ approach of the parties' organisation, command structure and compliance with the laws of armed conflict as indicative of their combatant status. The definition would then partly be that 'at least one party which is organised in such a way as to engage in combat in accordance with the laws of armed conflict and has commenced targeting military objectives.'

Difficulties are also encountered with this approach; very often armed conflict and in particular internal armed conflict, is characterised by a failure to observe the laws of armed conflict.⁵⁶ Even where protagonists in the conflict are recognised State military forces, the observance of the laws of armed conflict may not provide a meaningful basis for defining the conflict, as was graphically illustrated by the massacres associated with the policies of ethnic cleansing in the former Yugoslavia. The problem remains, how does an impartial observer identify from the behaviour of parties that the intensity of the conflict is such as to cross the Rubicon into armed conflict?

Since 1945 there have been numerous internationally recognised armed conflicts ranging across a broad spectrum of conflict based activities. At one end of the scale, where the fact of armed conflict is unambiguous, there are the conflicts such as the Korean War, the Six Day War, the Vietnam War, the Falklands War, the First and

⁵⁵ Article 1 Protocol II.

⁵⁶ The murder of civilian Muslim men at Srebrenica for example during the Balkans War.

Second Gulf Wars. At the other end there are the predominately internal conflicts such as that in Northern Ireland, the pre-independence conflict between the independence movement and the Indonesian government in East Timor and the sporadic violence against the Philippine authorities. The intensity of the six international armed conflicts identified did not appear to be relevant to the fact that a state of armed conflict existed. The Falklands War for example, began with minimal resistance from the Royal Marine detachment at that time serving on the islands. It seems then that in the search for a meaningful definition of armed conflict there is no place for intensity, despite the apparent attractiveness of such a course, because there are numerous examples of armed conflicts that have commenced with little or no bloodshed.⁵⁷

The search for a meaningful definition of armed conflict has led this work to identify the need for the elements of application of force and motive to be present in any useful definition. Although the element of intensity of conflict seemed appealing it has been rejected as not warranting development beyond that already set out in Protocol II due to a review of factual situations that have been recognised internationally as armed conflict but that have not involved a level of intensity sufficient to pass the identified bench mark of Article 1(2) Protocol II. It seems that it is not the level of intensity that is of concern in international armed conflict but the violation of sovereignty through force of arms. Similarly in internal armed conflict the level of intensity must be such as to go beyond that which is consistent with the ability of the sovereign State to deal with under its national legal framework. An

⁵⁷ Ziegler, D. W. *War, Peace, and International Politics*. (7th ed. 1997).

approach to defining armed conflict which recognises the capacity of the State to deal with the situation therefore seems logical.

It is suggested that a divergence in the definitions of internal and international armed conflict requires the insertion of an element of State capacity into each definition. For international armed conflict the element should be to the effect that there has been a violation of sovereignty through force of arms that exceeds isolated or sporadic attacks accepted by the parties and the international community as not amounting to armed conflict. The key here is State control of the situation. If any party or the international community consider attacks to amount to armed conflict then under the extant principles underlying international law⁵⁸ it must be so. This does not leave a void; individuals and their property remain protected by international human rights law as well as other provisions of international law as demonstrated by the Lockerbie compensation determination. International humanitarian law should be utilised when it is needed, not squandered in debate over its application that only muddy the waters and dissipate its effectiveness.

Internal armed conflict needs more than merely the use of arms, the example of the Waco massacre highlights this point. In addition to the Protocol II exemptions a more positive approach is warranted that sees internal armed conflict as occurring when the State is no longer able to contain armed revolt or armed attacks through the primary use of its non military assets such as police. Waco style situations are distinguished in this element as although military assets were deployed they remained under the primary control of the civil authorities. In an Australian context this type of situation

may have been dealt with under the provisions of the *Defence Act 1903* which provides for the use of the military in Defence Force Aid to the Civilian Authorities (DFACA).⁵⁹ DFACA is a totally separate situation from a response by the military to an internal armed conflict. The use of force by the military in DFACA is controlled by legislation and the operation of Australian criminal law if required⁶⁰ and there is no suggestion of the application of the provisions applicable to internal armed conflict.

New definitions of armed conflict

As a result of this analysis two definitions of armed conflict can be suggested. Firstly a definition of international armed conflict:

An international armed conflict exists where a State or States use armed force, or attack capability, for political or territorial purposes against the people or interests of another State or States and such armed force or attack is more than merely sporadic or isolated.

Armed force is sporadic and isolated when it amounts only to the occasional exchange of fire or isolated raid and is accepted to fall short of the threshold of armed conflict by all parties and the international community. The international community is deemed to include the UN and ICRC.

⁵⁸ Based on the premise that international law requires the consent of the State to be bound by it and therefore a degree of pragmatism on issues of when States are subject to international law must be recognised. See for example Dixon, M. *Textbook on International Law*. (2000) at 14-19.

⁵⁹ Section 51 *Defence Act 1903*.

⁶⁰ For example, a member of the Defence Force using force in accordance with s51T is subject to the criminal law if the use of force is excessive or unlawful in the circumstances.

This definition recognises the role that sovereignty and political reality play in situations where occasional armed force is used. Isolated and sporadic use of armed force remains a breach of the UN Charter and, if damage or injury is caused, also of international human rights law so that a system of protection is maintained. Protocol I, article 1(4) applies to extend this definition to include situations covered in the article.

Secondly, the definition of internal armed conflict:

Internal armed conflict exists when there is systematic, organised armed violence within a State aimed at obtaining political change or territorial independence of, or political control over, all or part of the State, and the State is no longer able to contain armed revolt or armed attacks through the primary use of its civil assets such as civilian police.

Again in this definition the State is recognised as having the primary responsibility to deal with cases of domestic violence. Under this definition the Toxteth riots and Waco do not amount to internal armed conflict while the conflict in the Philippines and the independence movement in Aceh⁶¹ can be identified as armed conflicts that require the application of international humanitarian law. The situation in Northern Ireland may still be open to debate. There was certainly considerable involvement of the armed forces in Northern Ireland for many years⁶² but the prime responsibility remained with the Irish police and the Ulster Constabulary. In all other respects the conflict meets the definition of internal armed conflict. The situation in Northern

⁶¹ Aceh would be armed conflict as the Army have prime control not the civilian authorities.

⁶² Weale, A. *Secret Warfare: Special Operations Forces from the Great Game to the SAS*. (1997).

Ireland cannot amount to an international armed conflict despite terrorist cells allegedly operating from across the border as they do not meet the criteria set out in the Geneva Conventions and Protocol I.

Distinguishing internal from international

Having developed a test that is capable of identifying the threshold for the application of international humanitarian law in both international and internal armed conflict, it is necessary to determine when a conflict is internal and when it is international.

While it is vitally important for peacekeepers to be able to identify when they have passed the threshold into armed conflict, (that is when they have become involved in the armed conflict rather than an impartial force) they must also be able to identify whether they have been inserted into an internal armed conflict or an international armed conflict. This is important not just for the activities that can be undertaken as parties to the conflict but also what may be done for example, with persons taken into custody. In an international armed conflict combatants may be held as prisoners of war and must be returned at the conclusion of hostilities.⁶³ In an internal armed conflict there is no such provision and combatants may well find themselves dealt with under the State's extant legislation⁶⁴ if they are not granted an amnesty, a matter

⁶³ Geneva Convention III of 12 August 1949, supplemented by Protocol I of 1977 regulates the treatment of prisoners of war.

⁶⁴ Article 6 Protocol II of 1977: See also the *Criminal Code Act (Cwlth)* 1995 which provides for the crimes committed in both international and non international armed conflict to be dealt with by domestic courts in the federal jurisdiction. This act also creates certain offences against peacekeepers and peacekeeping operations.

which is wholly at the discretion of the authorities in power, regardless of an obligation to ‘endeavour’ to grant amnesty.⁶⁵

In UN peacekeeping the issue of whether there is an international or internal armed conflict is even more complicated than it might on the face of it appear. Certainly in circumstances where the force is as a matter of fact and law engaged in an armed conflict there will be combatants from several States involved thus giving the appearance of an international armed conflict. However, if the State has collapsed and the exceptional, although not uncommon situation that the UN holds sovereignty⁶⁶ on behalf of the people until they can exercise their Charter right of self determination, then the conflict may be open to classification as an internal conflict.⁶⁷ This would apply equally to a situation where the UN was acting on the request of the lawful government of the State.⁶⁸

The issue of when a conflict is internal or external has been raised with the International Court of Justice (ICJ) in the *Nicaragua Case*⁶⁹ and in a number of cases before the ICTY⁷⁰. In the *Nicaragua Case* the ICJ ruled that the test for international armed conflict through agency was one of dependence and control. This test was developed in the *Nicaragua Case* to assess the USA’s level of responsibility for

⁶⁵ Article 6(5) Protocol II of 1977.

⁶⁶ As has been the case in Namibia, Cambodia, East Timor and Kosovo.

⁶⁷ In the Congo the UN force acted as if it were involved in an international armed conflict and applied the Geneva Conventions, treating detainees as Prisoners of War under GCIII: Dorn, A.W. and Bell, D.J. “Intelligence and Peacekeeping: The UN Operation in the Congo 1960-64” *International Peacekeeping*, Vol. 2, No. 1 (Spring 1995) at 12.

⁶⁸ States are at liberty to request support from other States; Jennings, R and Watts, A (eds) *Oppenheim’s International Law* (ninth ed, 1996) at 1154-1155.

⁶⁹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)*, Nicaragua v United States, ICJ Reports (1986) at 14-546.

⁷⁰ For example see *Prosecutor v Delalic, Mucic, Delic and Landzo (Celebici)*, Trial Chamber Judgement, 16 November 1998, Case No. IT-96-21-T: *The Prosecutor v Tadic*, Appeal Chamber Judgement, 15 July 1999, Case No. IT-94-1 and *The Prosecutor v Rajic*, Review of the Indictment

violations of humanitarian law committed by the Contra rebels who were found as a matter of fact to have been supplied by the USA but not controlled by it sufficiently for State responsibility to attach to the USA for their activities.

The ICTY determined that the agency test developed by the ICJ was not an appropriate test to be used in the cases of individuals, who were liable to prosecution for grave breaches of the Geneva Conventions if the conflict was characterised as an international armed conflict.⁷¹ The ICTY applied a more liberal test in *Rajic*⁷² finding that the agency test should amount only to ‘general political and military control’ by a foreign State.⁷³

In the *Tadic* case the ICTY returned to the *Nicaragua* position finding that it laid down the test that there must be ‘dependence on the one side and control on the other’.⁷⁴ This test was seen as having a high threshold for determining the required degree of control that the foreign State must have, in other words the foreign State would seem to be required to be giving specific orders to bear State responsibility and therefore cause the conflict to be characterised as international.⁷⁵

A year after the decision in *Tadic* the ICTY rejected the *Nicaragua* test altogether in the *Celebici* Case on the basis that it was inappropriate to apply a test to individuals

Pursuant to Rule 61, 13 September 1996, Case No. IT-95-12-R61. The facts of all these cases concerned the commission war crimes by members of the Serbian forces.

⁷¹ Byron, C. “Armed Conflicts: International or Non-International?” *Journal of Conflict and Security Law*. Vol. 6No.1, 63-90, (2001) at 68.

⁷² *The Prosecutor v Rajic*, Review of the Indictment Pursuant to Rule 61, 13 September 1996, Case No. IT-95-12-R61.

⁷³ *Ibid* at para 25.

⁷⁴ *The Prosecutor v Tadic*, Trial Chamber Judgement, 7 May 1997, Case No. IT-94-1-T, at para.585.

⁷⁵ Above n 71 at 69.

that was intended to establish State responsibility.⁷⁶ In the *Celebici* case the ICTY found that once Bosnia-Herzegovina was internationally recognised that all activities associated with the conflict became international in character and particular incidents could not be separate hostilities.⁷⁷

The ICTY turned again to the *Nicaragua* test in 1999 finding that there must be specific instructions from a foreign State to an individual, organisation, coordination or military planning for a group and an:

Assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions).⁷⁸

Based on the rulings of the ICTY Byron⁷⁹ identifies five situations that will be classified as international armed conflict. These are first, conflicts between two or more internationally recognised States. Second, a conflict in one State in which another State intervenes. Third, an internal armed conflict may be internationalised by participants acting on behalf of another State. Fourth, where an internal armed conflict becomes an international armed conflict by the operation of Additional Protocol I it being:

⁷⁶ *Prosecutor v Delalic, Mucic, Delic and Landzo (Celebici)*, Trial Chamber Judgement, 16 November 1998, Case No. IT-96-21-T, para 230.

⁷⁷ *Ibid* at paras 214-5.

⁷⁸ *The Prosecutor v Tadic*, Appeal Chamber Judgement, (15 July 1999), Case No. IT-94-1 at paras 130-141.

⁷⁹ *Above n 71* at 80-83.

Where peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination.⁸⁰

Finally, it has been argued by Byron that where a State requests the assistance of another State in quelling rebel forces the conflict may become an international armed conflict if the request is not genuine or made by individuals or parties not legally capable of making the request. In civil war Byron points out that it may be argued that no authority is competent to request foreign intervention and therefore an international armed conflict results if foreign States intervene.⁸¹

Planners of UN operations must be clear before orders can be written regarding the actions to be taken with arrested persons as to whether they are involved in an internal or international armed conflict. Issues of jurisdiction between international and national courts could arise in international armed conflict. Detainees have a right to be advised on what basis they are being detained and the basis will be quite different, as will the rights and obligations, between a criminal detention and prisoners of war.

Muddying the waters

This work argues that there is a clear threshold that must be crossed for international humanitarian law to apply and until and unless that threshold, armed conflict, has been crossed it does not apply. Any ambiguity lies in determining where the threshold lies not in which law should apply once it has been crossed. In this work some fresh definitions have been suggested in an attempt to assist in clarifying when

⁸⁰ Article 1(4) Protocol I of 1977.

⁸¹ Above n 71.

the threshold into armed conflict has been crossed. Where UN peacekeeping is concerned the waters have been muddied by two quite separate publications. The first of these is the Secretary-General's Bulletin⁸² and the second is the argument by Michael Kelly regarding the use in peacekeeping of the Fourth Geneva Convention.

The Bulletin

Secretary General Kofi Annan attempted to deliver some clarity regarding the legal framework within which peacekeeping was to be conducted where armed force was to be used as part of the peacekeeping process.

To date it has been generally, although not universally, accepted that the UN is not capable of being a party to the Geneva Conventions of 1949.⁸³ However, in appropriate circumstances a military contingent would be bound by the Conventions to the extent that the contributing State is bound.⁸⁴ In operations not amounting to armed conflict, or where the UN force is not a party to the conflict, the provisions of the Conventions or customary international humanitarian law, which apply to parties to an armed conflict, do not apply to a UN force monitoring the situation or providing humanitarian assistance.⁸⁵

Application of the laws of armed conflict. The issue of whether the UN can be bound by the laws of armed conflict is an important one and central to determining which

⁸² Secretary-General's Bulletin on Observance by United Nations forces of International Humanitarian Law. ST/SGB/1999/13 (6 August 1999). Entered into force 12 August 1999.

⁸³ Palwankar, U. "Applicability of International Humanitarian Law to United Nations Peacekeeping Forces" *International Review of the Red Cross*. No 294, 227-240, (30 June 1993) at 228.

⁸⁴ Stephens, D. "The Lawful Use of Force by Peacekeeping Forces: The tactical Imperative" *International Peacekeeping* Vol.12, No.2 (Summer 2005) at 161; Roberts, A and Guelff, R. *Documents on the Laws of War*. (Third ed., 2001) at 723; Greenwood, C. "International Humanitarian Law and United Nations Military Operations" *Yearbook of International Humanitarian Law*. Vol.1 (1998) at 17-19.

⁸⁵ Above n 84 Greenwood at 28.

legal framework applies to collapsed State peacekeeping operations. As noted above, the UN cannot be a party to the Conventions and treaties that make up the laws of armed conflict. The issuing of the Bulletin was cited by Roberts and Guelff⁸⁶ as a means of clarifying to what extent UN peacekeeping forces are bound by the customary laws of armed conflict. UN forces have been required to observe the “principles and spirit” as a result of directions to UN forces by the Secretary-General, regulations pertaining to specific operations and, since 1993, through the status-of-forces agreements concluded with contingents.⁸⁷ The matter appeared to be settled with the 1994 UN Convention on the Safety of the UN and Associated Personnel, Article 2(2) of which states that the law of international armed conflict applies to enforcement actions under Chapter VII in international armed conflicts in which any of the UN personnel are engaged as combatants.

There has been considerable debate regarding the extent of the obligation on UN forces to comply with international humanitarian law although many commentators agree that the customary international law aspects of the laws of armed bind the UN.⁸⁸

Greenwood argued that despite the requirement for at least one party to an international armed conflict to be a State other parties possessing at least *de facto* international status may be subject to customary international law.⁸⁹ He noted that arguments have been raised over the ability of the UN to become involved in armed

⁸⁶ Roberts, A and Guelff, R., above n 83.

⁸⁷ Ibid at 722-723.

⁸⁸ See for example, Zwanenburg, M. “The Secretary-General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations”. *International Peacekeeping*. (July 1999 – October 1999) at 134; McCoubrey, H. and White, N. *The Blue Helmets: Legal Regulation of United Nations Military Operations*. (1996) at 157-158.

⁸⁹ Above n 83 at 7: In the *Advisory Opinions on Reparations*, *ICJ Rep.* (1949), 174 at 179 the ICJ determined that the UN is “a subject of international law and capable of possessing international rights and duties.”

conflict as its role is that of law-enforcer rather than belligerent. However, Greenwood concluded that armed conflict is a matter of fact and if, as a matter of fact, the UN becomes a party to an armed conflict then the nature of its motive is irrelevant. Once there is a state of armed conflict then international humanitarian law applies regardless of the nature of the parties. It would also be illogical if one side could benefit from and be bound by the laws of armed conflict while the other side was not.⁹⁰ Greenwood therefore concluded that UN forces are bound by customary international humanitarian law if as a matter of fact such forces become involved in armed conflict.

Bowett also argued that regardless of the *jus ad bellum* and the legal status of the opponent, once UN forces are engaged in armed conflict then the full force of customary international humanitarian law applies to them.⁹¹ McCoubrey and White, while agreeing that customary international humanitarian law will apply to UN forces engaged in armed conflict, make the point that beyond the core principles there may not necessarily be universal agreement of what constitutes customary international humanitarian law.⁹²

Whether universally accepted as being subject to customary international law or not, the events surrounding the UN operation in Somalia from 1992 to 1995 raised questions over the clarity and understanding of the rules to be applied by UN peacekeepers.⁹³ The Bulletin was preceded by a number of ad hoc statements on the state of the law in relation to particular operations and considerable lobbying by the

⁹⁰ Ibid at 14.

⁹¹ Bowett, D.W. *United Nations Forces*. (1964) at 496.

⁹² Above n 88., McCoubrey and White at 159.

⁹³ Above n 86 at 724.

ICRC.⁹⁴ The ICRC called for UN peacekeeping forces to be more explicitly bound by humanitarian provisions.⁹⁵ The UN Special Committee on Peacekeeping requested the Secretary-General to;

“complete the elaboration of a code of conduct for United Nations peacekeeping personnel, consistent with applicable international humanitarian law, so as to ensure the highest standards of performance and conduct”.⁹⁶

There seems to be implicit in this request an understanding that international humanitarian law did apply to UN peacekeeping operations but that it needed to be specifically articulated in the form of a code.

A draft of the ‘code’ was presented by the ICRC to the Secretary-General and following negotiations and consultation with members of the Security Council the Bulletin was issued in 1999.⁹⁷ The Bulletin was intended:

to set out the fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control.⁹⁸

It is only applicable to UN commanded forces⁹⁹ and therefore did not apply to forces under national command such as the International Force in East Timor (INTERFET) or the NATO led forces in the former Yugoslavia.

⁹⁴ Above n 83. Palwankar provides an analysis of the statements and the position of the ICRC prior to the Bulletin of 1999.

⁹⁵ Above n 88 Zwanenberg at 133.

⁹⁶ UN document A/50/230 of June 1995, at para 73.

⁹⁷ Secretary-General Bulletin ST/SGB/1999/13 6 August 1999.

The Bulletin is uncontentious with regard to the statements of the humanitarian law that it covers, although it expressly states that it does not cover the field with regard to the principles and rules binding military forces.¹⁰⁰ The issues that are expressly covered, based upon the four Geneva Conventions and Additional Protocols, are the protection of the civilian population, means and methods of combat, treatment of civilians in the context of non-combatants, treatment of detained persons¹⁰¹ and protection of the wounded, the sick, medical and relief personnel. It does not attempt to deal with the contentious terminology of the Additional Protocols, to have done so would have been to lose the support of the USA at the very least. While the issues themselves are not contentious, Zwanenberg complains that many of the rules do cause a conflict with the UN Safety Convention because the convention does not contemplate a situation in which members of the UN are armed and may be required to use armed force.¹⁰² This complaint is however itself inconsistent with the UN Charter which clearly contemplated the use of force by the UN in Chapter VII and Article 2(2) of the Convention itself which expressly refers to UN combatants.

While the international humanitarian law areas that are covered are uncontentious the “field of application” is troubling. In section 1.1 the Bulletin states that the principles set out:

⁹⁸ Above n 97 preamble.

⁹⁹ Above n 95 at 136.

¹⁰⁰ Above n 97 at section 3.

¹⁰¹ In dealing with detained persons the Bulletin avoids granting prisoner of war status under this category but does rely upon the Geneva Convention thus creating a contradiction where the UN is not a combatant. Above n 95 at 137.

¹⁰² Above n 95 at 136-139.

are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self defence.

The first part of this statement is not in issue. It is perfectly reasonable that UN forces should be subject to humanitarian law, and specifically the Geneva Conventions when acting as combatants in an armed conflict. What is of significant concern is the implication that when acting in self-defence members of a UN force could be acting as combatants. If members of the military contingent come under attack then they are entitled to use such force as is reasonable and necessary in the circumstances to defend themselves. The force used in self defence must be proportionate to the threat faced.¹⁰³ The form of the rules of engagement controlling the use of force in self defence for UN peacekeepers has been substantially similar to the force that may be used in most common law States by an ordinary person responding to an attack in the street. On a literal reading of the application of the Bulletin, where an individual soldier is attacked, for the period that force is being used to repel the attack, the peacekeeper is engaged in armed conflict. This is inconsistent with even the most liberal definitions of armed conflict.

If one or two individuals attack an individual peacekeeper or even a small group of peacekeepers, armed conflict simply cannot be made out. If on the other hand an

¹⁰³ This is a standard formulation of self defence used by contingents as part of the rules of engagement. For example the Orders for Opening Fire under the UNTAET PKF Individual Guidance on the Use of Force stated:

... You have the right to use the MINIMUM FORCE NECESSARY up to and including deadly force FOR THE PERIOD OF TIME NECESSARY in defence of

organised group of belligerents' conduct repeated and sustained armed attacks against a peacekeeping unit then the *Tadic* requirement for protracted armed violence between organised groups, even though one is acting in self defence, may be made out.

By failing to further define what was intended in terms of the level of self-defence required to trigger its provisions and by introducing conflict with the Safety Convention, the Bulletin is effectively introducing a further blurring of the situation from a legal perspective. Rather than a clarification of when to apply humanitarian law, peacekeepers are left in considerable doubt in the very situations when guidance is most required. The fact that the Bulletin does not apply to non-UN commanded peacekeeping operations only goes to further muddy the waters. As national contingents are responsible for implementing any disciplinary actions arising from the breaches of the rules,¹⁰⁴ it is suggested that prosecutions are far more likely to occur on the basis of individual national codes than on the basis of a UN rule. From a practical perspective given the lack of clarity surrounding its application contingents are unlikely to have the Bulletin embedded into their national disciplinary codes and in any event, the substance of it should already be present due to ratification of the Conventions and customary international law.

The Fourth Geneva Convention.

The second area where the waters have been muddied with regard to the applicable legal framework in peacekeeping operations is in relation to the application of the

yourself, your unit, other UN personnel and those it is your duty to protect.

Fourth Geneva Convention. By tracing the history of the law of occupation and the current thinking on the topic Michael Kelly¹⁰⁵ weaves an interesting argument for the application *de jure* of the laws of occupation, found primarily in the Fourth Geneva Convention of 1949, to peacekeeping in collapsed States. This assertion springs from an interpretation of the word ‘occupation’ in article 2, an article common to all four of the Geneva Conventions. The relevant section of the article reads:

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.¹⁰⁶

The difficulty with this definition of occupation is that on the face of it a situation of occupation may occur without the threshold into armed conflict, and therefore international humanitarian law, having been crossed due to an absence of armed resistance. However, as Kelly himself points out¹⁰⁷, the drafters of the 1949 conventions had in mind the advance through Europe of the German army which on occasions met with little or no resistance. Yet to consider that the annexation of States such as Poland amounted to something other than a situation to which international humanitarian law should apply fails common sense. The occupation of Poland, Czechoslovakia and Denmark was by force of arms even though little or no meaningful resistance was put up.

¹⁰⁴ Above n 84 Stephens at 160.

¹⁰⁵ Above n 3.

¹⁰⁶ ICRC *The Geneva Conventions of 12 August 1949*. (1997) at 23,51,75,153. *The Wall Advisory Opinion* [2004] ICJ (9 July 2004) at para 95 confirmed the application of the Conventions to situations where territory has been occupied without armed conflict. However, it is clear that the Court was referring to belligerent occupation rather than foreign troops on the ground simpliciter.

¹⁰⁷ Above n 3 at 121-129.

Even where there is no resistance, invasion by the armed forces of a foreign State meets the criteria suggested in this work for an international armed conflict. In the Second World War armed force was used to control and annex States to Germany. The Fourth Geneva Convention deals with occupation as a specialised part of the law of armed conflict that is not necessarily synonymous with fighting, though generally it is characterised by bloodshed. With an invasion force present in occupation of the State resistance forces may legitimately target the troops on the ground in accordance with the laws of armed conflict.¹⁰⁸ In such circumstances it is entirely logical for the laws of armed conflict to apply. However, this is wholly different from a situation where peacekeepers are present in a State assisting in the reconstruction of that State with the express or implied consent of the State.

Kelly argues that the Fourth Convention;

was designed to regulate the relationship between foreign military forces and a civilian population where the force exercises the sole authority or is the only agency with the capacity to exercise authority in a distinct territory.¹⁰⁹

In support of this position Kelly relies on Roberts¹¹⁰ who argued that in every situation where military forces of a foreign State control territory that is inhabited, there will be application of some or all of the provisions of the laws of occupation. It is the position of this work that Kelly and Roberts have attempted to push the law of occupation beyond its *de jure* limits.

¹⁰⁸ During the Second World War French Resistance fighters did exactly this often with the support of members of the British Special Operations Executive.

¹⁰⁹ Ibid at 149.

¹¹⁰ Roberts, A. "What is a Military Occupation" 55 *British Yearbook of International Law* (1984) at 250.

Kelly's argument that occupation under the Geneva Conventions can include peacekeeping situations such as were faced in Somalia, is based on an analysis of the law of occupation and its division into belligerent and non-belligerent occupation. Kelly traces this development from the 19th century¹¹¹ and concludes that by 1949 the customary law of occupation had divided into belligerent and non-belligerent occupation. The non-belligerent form was:

“a *de facto* condition founded on the actual presence of a force exercising authority over foreign territory and ceased immediately when possession ceased.”¹¹²

Such a force in a collapsed State could not assume the same level of authority as a belligerent but could enforce temporary measures to re-establish public order and safety, including the establishment of temporary tribunals to administer local law.

Kelly points to the experiences of the post World War I occupation in the Rhineland as part of the motivation for the provisions to be found in the Fourth Geneva Convention and asks whether the customary law relating to non-belligerent occupations was also taken into account and whether the Conventions extinguished non-belligerent occupation.¹¹³

Kelly answers this in the affirmative by arguing that the wording of common Article 2 is to be understood as extending the application of the Conventions to territorial

¹¹¹ Above n 3 at 111 - 143

¹¹² Ibid at 140.

¹¹³ Ibid at 143.

occupation in the absence of any state of armed conflict.¹¹⁴ The purpose of the Conventions is therefore to provide protection for persons finding themselves, for whatever reason, in the hands of an Occupying Power. This includes both belligerent occupation and non-belligerent occupation.

There is no definition of occupation in the Geneva Conventions. The Geneva Conventions rely upon the importation of certain definitions from the Hague Conventions.¹¹⁵ Occupation is defined in Article 42 annexed to Hague II of 1899 and Hague IV of 1907 and remains the extant definition of occupation. It remains extant through the operation of Article 154 of the Fourth Geneva Convention, which preserves *inter alia* Article 42 thus setting it as the definition of occupation specifically applicable to the Fourth Geneva Convention. Article 42 defines occupation as follows:

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established, and can be exercised.¹¹⁶

While territory may well be placed under the authority of UN peacekeepers either with or without the consent of the parties, it would be inconsistent with the UN Charter for a UN force to enter a State as a 'hostile' army, other than in a UN approved armed conflict. It has already been established that the guiding principles of

¹¹⁴ Ibid at 151.

¹¹⁵ Laws and Customs of War on Land (Hague II); July 29, 1899

peacekeeping are consent, impartiality and the use of force only in self-defence. Even in Chapter VII operations not amounting to armed conflict the practice has been to attempt to establish consent where there is an authority capable of granting it. These principles are inconsistent with the peacekeepers acting as a hostile army. There is also a question as to whom the peacekeepers would be hostile, particularly if it is a Chapter VII operation in a collapsed State conducted on the basis of human security.

Even in Somalia, where Kelly clearly asserts that the law of occupation and therefore the Fourth Geneva Convention applied, the UN and United States with the support of NGOs gained consent to UNITAF and subsequently UNOSOM I from factions in *de facto* rule.¹¹⁷

In dealing with the issue of “hostile army” Kelly argues that the term is rendered irrelevant because of the extension of provisions relating to occupation to non-conflict situations.¹¹⁸ He provides no other authority for reading the Article down in this way and it is the position of this work that the definition having been specifically imported it cannot be read down and dismissed without express language in the clause.

This aspect of Kelly’s argument is not accepted by the ICRC: It accepts that in order for the Geneva Conventions to apply the force must be hostile:

“The rules of international humanitarian law relevant to occupied territories become applicable whenever territory comes under the effective control of hostile foreign

¹¹⁶ Regulation 42 Annexed to the Laws and Customs of War on Land (Hague II) 29 July 1899 and to Hague IV of 18 October 1907.

¹¹⁷ Above n 3 at 14: See also http://www.un.org/Depts/dpko/dpko/co_mission/unsom1backgr1.html (24 August 2006).

¹¹⁸ Above n 3 at 149.

armed forces, even if the occupation meets no armed resistance and there is no fighting.”¹¹⁹

Kelly’s argument that the interpretation of occupation is rendered otiose is also inconsistent with Article 31(1) of the Vienna Convention On the Law of Treaties¹²⁰ which requires that the ordinary meaning be given to the terms of a treaty in their context and in the light of its object and purpose. The definition of occupation imported from the Hague Convention unambiguously requires the force to be hostile in character while the object and purpose of the Geneva Conventions is to regulate armed conflict. As stated in the preamble of the Fourth Geneva Convention:

“The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from 21 April to 12 August 1949, for the purpose of establishing a Convention for the Protection of Civilians in Time of War...”

It is submitted in this work that the issue of the force being “hostile” is key to understanding the limits of the application of the Fourth Geneva Convention to peacekeeping in collapsed States. If a UN force is deployed with consent it can hardly be said to be hostile. If it deploys in the absence of any authority capable of providing such consent in order to provide humanitarian aid to the people, to whom is it hostile?

Kelly asserts that peacekeeping operations deployed in the absence of consent will certainly attract the *de jure* application of the laws of occupation and the Fourth

¹¹⁹ ICRC “Occupation and International Humanitarian Law: Questions and Answers.” <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList594/AE4C5F11BA20DDB0C1256ED800518988> (23 August 2006)

Geneva Convention.¹²¹ However, examples of UN peacekeeping operations being deployed without consent are rare as demonstrated in earlier chapters of this work. Even in East Timor where there were differences in opinion as to which if any State could give consent, INTERFET and the UN rejected the *de jure* application of the laws of occupation, Australia using them only as a guide¹²² in the absence of the type of framework advocated in this work.

Following the practice in East Timor and Kosovo it would seem that at best the law of occupation and the Fourth Geneva Convention would only apply in situations where there was no consent to the deployment of a peacekeeping operation. This is a far less extensive application than argued by Roberts.

Roberts sets out four criteria that identify a military occupation. These are:

1. a military presence in a territory not fully sanctioned by valid agreement;
2. the military force has displaced the local public order and government;
3. there is a difference in nationality, allegiance or interests between the occupier and the population; and
4. emergency rules are needed to protect the civilian population.¹²³

The first criterion would not be met in any Chapter VI peacekeeping operation as such an operation would not take place without a valid agreement from the relevant State,

¹²⁰ United Nations, *Treaty Series*, vol. 1155 at 331.

¹²¹ Above n 3 at 155.

¹²² Kelly, M. McCormack, T. Muggleton, P. Oswald, B. “The Legal Aspects of Australia’s Involvement in the International Force for East Timor” 2001 *International Review of the Red Cross* No. 841 at 101-139

¹²³ Roberts, A. (1984) in Provost, R. *International Human Rights and Humanitarian Law*. (2002) at 251-252.

States or recognised controlling groups such as occurred in Cambodia. In Chapter VII operations there are probably only two situations where an agreement would not be forthcoming. The first would be in a situation such as the second Gulf War where an armed conflict results. In circumstances of armed conflict a Fourth Geneva Convention occupation would follow. These types of operations are not the subject of this work. The second would be where no agreement could be reached because of the absence of a government capable of reaching an agreement. In such situations, while not sovereign itself, the UN must hold sovereignty on behalf of the people until they are able to exercise it through the process of self-determination. In any event, States that are Members of the UN are bound by the Charter and as a result are bound by actions of the Security Council under Chapter VII. A duly authorised UN operation may therefore amount to a fully sanctioned military presence by implication from signing the Charter.

The second criterion requires that the military has ‘displaced’ the local public order and government. UN peacekeeping operations are not able to ‘displace’ local public order or government. Chapter VI operations would simply be incapable of performing wide governmental functions and would in any event lack the authority to do so. In Chapter VII operations there is often a requirement to rebuild order and government or to protect such local institutions from destruction. This is distinguishable from a displacement of an existing, functioning institution and to displace existing structures would be inconsistent with the Charter obligations toward sovereignty. The point about peacekeeping operations in collapsed States is that there is no local institution to displace, the UN has to provide one.

The third criterion is certainly met by UN peacekeeping operations in that the nationalities of the peacekeepers will invariably be different from the local population. The allegiance of the peacekeepers will be to the UN and their mission, although inevitably, as no Article 43 agreements have been signed, they will continue to bear allegiance to their State. With regard to a divergence in interests between the peacekeepers and the population, this is a matter of perspective. There may be elements of the population with divergent interests, Somalia being one stark example. However, where a population's interest is in a return to peaceful self-government, then the interests of the peacekeepers and the population will be aligned.

Roberts' criteria do not then support the conclusion that a UN peacekeeping operation amounts to an occupation. Not only does it fail to meet the very first of the criteria but it is difficult to find any element of the test, save for divergence in nationality, that it could meet.

Another impediment to the adoption of the Convention *de jure* is that throughout the Fourth Geneva Convention there are obligations that are inconsistent with the practice of UN peacekeeping. An example of this is found at Article 6, which states:

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

If the convention applies to cases of UN peacekeeping on the basis of *opinio juris* it is hard to find any instance of the UN demonstrating a belief that troops acting under its auspices were bound to comply with this or any other provision. Even in Somalia where Kelly argues that the Convention did apply *de jure*, the UN did not make any attempt to comply with the convention during the course of the operation let alone for one year afterwards.

Article 12 provides another example of occupation in the Fourth Geneva Convention being more properly associated with parties to an armed conflict and not with UN peacekeeping operations. Article 12 provides:

Art. 12. In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for protected persons, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

Article 12 clearly envisages that the parties involved in occupation to be belligerents or potential belligerents, a circumstance wholly consistent with the Article 42 Hague IV interpretation of occupation and wholly inconsistent with the principles of peacekeeping.

This interpretation of the boundaries of the Fourth Geneva Convention is consistent with the position of the ICRC on the limits of humanitarian law. The ICRC has stated clearly that the humanitarian conventions, including the Fourth Geneva Convention, are applicable only in times of armed conflict.¹²⁴ Where peacekeepers are not a party to an armed conflict the Geneva Conventions simply cannot apply *de jure*.

From a purely practical perspective, there may arguably have been an imperative before the rise to current prominence of international human rights law, for international humanitarian law to expand as far as possible to protect individuals and communities. In the next chapter of this work it will be argued that this imperative no longer exists.

Reliance on the Fourth Geneva Convention also brings with it political implications for the sovereignty of the “occupied” State. It seems inconsistent with the respect paid to sovereignty in the Charter that a UN force could be used to occupy a State or part of State territory. Such an act is inherently inimical to the concept of sovereignty. Further it has been argued in this work that the UN is capable of being the custodian of sovereignty and indeed should be so in a collapsed State for the benefit of the population and until the people can exercise their right to self determination. If the

¹²⁴ ICRC. <http://www.icrc.org/eng/ihl> (22 Aug 2005).

UN does become the custodian of sovereignty then it can hardly be in occupation of the sovereign territory. Although both these points are important, the essence of the argument put forward in this work is that occupation, as it is used in the Fourth Geneva Convention, relates to acts that are hostile and closely related to armed conflict or the political domination of territory in a way that is adverse to the interests of the majority of the population. This is not what peacekeeping is about and even in collapsed States the motive behind a UN peacekeeping operation must be to return the State to its people; otherwise it would be acting *ultra vires* of the UN Charter.

Finally and perhaps the most practically persuasive argument against the application of the Fourth Geneva Convention to peacekeeping operations, is the fact that if the Fourth Convention does apply then all the conventions apply. The article on which Kelly relies is after all common to all the Geneva Conventions of 1949. This means that the UN forces on the ground could be argued to be lawful targets and combatants. Questions could arise as to the status of persons detained by the UN force with regard to the Third Geneva Convention and their possible status as prisoners of war. It is suggested that the practical consequence of adopting the Fourth Geneva Convention as *de jure* applicable is a major reason for a failure by the UN to respond to the argument put forward by Kelly and that it is far more likely that the UN will adopt as *de jure* a human rights framework for peacekeeping operations. In any event as Greenwood has observed:

“The law of belligerent occupation is rightly considered not to apply when a United Nations force is involved in administering a territory but has not been a party to an international armed conflict. That was the case, for example, in Somalia”¹²⁵

Conclusion

In this chapter the generally uncontentious argument has been put forward that international human rights law applies at all times and that international humanitarian law applies only once the threshold into armed conflict has been crossed or a belligerent occupation has occurred to which armed conflict is a legitimate response. As pointed out by Pictet¹²⁶ with regard to armistices, they merely suspend hostilities, not end them. In an occupation where the movement into the State has been unopposed the armed response has effectively been suspended not eliminated.

Once the threshold has been crossed then as the *lex specialis* international humanitarian law has precedence. The difficulty for peacekeepers is to identify when the threshold has been crossed. In order to assist peacekeepers in identifying which framework to apply two definitions of armed conflict have been put forward. The definitions relate to international and internal armed conflict and unlike other definitions found in the literature, these definitions link motive to action. This has been done in order to assist in distinguishing the activities generally described as ‘policing’ involving the suppression of crime, from activities which properly belong under international humanitarian law. The definition of international armed conflict

¹²⁵ Above n 85 at 30.

¹²⁶ Pictet, J. *Commentary on the IV Geneva Convention Relative to the Protection of Civilians in Time of War* (1957) at 22.

also takes into consideration the intensity of a conflict in order to render it meaningful as against the practice of States.

The question of whether a UN force can become involved in armed conflict and therefore be subject to international humanitarian law has been analysed. The conclusion drawn is that a UN force could become involved in armed conflict and that in such circumstances customary international humanitarian law applies *de jure* to the force.

The difficulties created by Michael Kelly's argument for use of the Fourth Geneva Convention in peacekeeping has also been explored. The Fourth Geneva Convention argument is not the correct interpretation of the law and one which has the potential to cause more harm than good. Peacekeepers and planners need legal certainty in order to conduct their activities effectively. The death of a Somali youth at the hands of the Canadian Parachute Battalion¹²⁷ should remain as a salutary lesson to planners who fail to provide a means to deal with issues of law and order in peacekeeping situations. While it is argued in this work that the use of the Fourth Geneva Convention is not the correct legal approach, it did provide a legal basis for the operations of the Australian peacekeepers in Somalia so that the troops on the ground could see that action was being taken. This is vitally important in a peacekeeping context and while use of international humanitarian law outside of armed conflict has been shown not to be the correct approach in law there is a viable alternative available. In the next chapter a legally accurate framework under international human rights law is set out to fulfil the requirement for certainty.

¹²⁷ Canadian Government *Report of the Somalia Commission of Inquiry*
<http://www.dnd.ca/somalia/vol1/v1c9e.htm> (22 Aug 2005).

CHAPTER SEVEN

The Power of International Human Rights Law

*The establishment of an independent justice system and the prosecution of war crimes are indispensable prerequisites for the stabilisation of a civil society.*¹

Introduction

The first four chapters of this work have established what peacekeeping is, the UN vision for the development of peacekeeping through its reports, and how peacekeeping operations under Chapters VI and VII have been run in practice, focusing on the legal framework established by UN administrations. In the last two chapters the development of international humanitarian law as the *lex specialis* of armed conflict and its application to peace enforcement that amounts to armed conflict was examined so that a foundation was established for the analysis of Michael Kelly's argument that international humanitarian law, and specifically the law of occupation and the Fourth Geneva Convention, provides the legal framework in collapsed State peacekeeping. The result of this analysis was that international humanitarian law does not provide the legal framework for peacekeeping in collapsed States in circumstance, such as the UN encountered for example in West Irian, Cambodia, Kosovo and East Timor, where the peacekeeping force had not crossed the threshold into armed conflict.

Having concluded that international humanitarian law does not provide the framework for collapsed State peacekeeping the final chapter of this work seeks to provide an

¹ Zwanenburg, M. "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations". *International Peacekeeping*. (July – October 1999) at 131.

alternative framework to be applied in such circumstances and to argue that the correct legal framework to be applied is international human rights law.²

In this final chapter, major international human rights treaties and conventions are analysed. The UN Charter and the treaties forming the International Bill of Rights, in particular the International Covenant on Civil and Political Rights, as well as customary international human rights law is analysed to draw out the obligations found under international human rights law for peacekeeping operations. Having established the obligations that apply to collapsed State peacekeeping under international human rights law, a proposal is put forward to enable peacekeeping operations to fulfil the obligations relating to the administration of justice through the use of military justice systems that are structured in such a way as to comply with the requirements placed on such tribunals under international human rights law.

The Charter

When the UN established the peacekeeping operations in Kosovo and East Timor one of the first actions of the administration was to pass an ordinance directing that the law was to be administered in accordance with human rights law and that all legislation was to be read accordingly.³ Any legislation that was in violation of human rights law was effectively repealed. The examples from Kosovo and East Timor demonstrate the emphasis placed on compliance with human rights requirements in peacekeeping operations and is constant with the practice of the UN in following a Trusteeship model when administering territory. The emphasis on

² This is the legal framework that the UN has applied to collapsed State peacekeeping as set out in chapters three and four of this work.

human rights is entirely logical given that the Charter itself contains major statements of international human rights standards.

It has been argued that international human rights law is largely a creation of the UN⁴. In the preamble to the Charter one of the aims of the UN is identified as being:

“to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women.”

In order:

“to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.”

This ideal is a cornerstone of the UN Charter. The protection and promotion of a respect for human rights is expressly incorporated into the Charter obligations.

Article 1(3) of the UN Charter states that one of the purposes of the UN is the promotion of and respect for human rights. Thus there is a compelling argument that an obligation is placed on the UN to consider and promote human rights in all its activities, which includes peacekeeping.⁵

There are other Articles in the Charter directly focused on the promotion of human rights. Articles 55 and 56 are particularly relevant. Article 55 is in mandatory terms

³ Kosovo UNMIK/REG/1999/1 of 25 July 1999 and East Timor UNTAET/REG/1999 of 27 Nov 1999.

⁴ Hannum, H. “Human Rights” in Schachter, O and Joyner, C.C. *United Nations Legal Order* Vol 1. (1995) at 345.

stating that the UN "shall" *inter alia* "promote a respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"⁶. Article 56 reinforces this position with a pledge by all Members to take joint and separate action for the achievement of the purposes set out in Article 55.

Another key human rights theme of the Charter is the right of peoples to self-determination. While self-determination often forms the basis for the establishment of a peacekeeping operation it is not considered in detail here as the focus of this work is on the legal framework applicable to operations rather than specific reasons for establishment.

As a consequence of the Charter provisions, a UN peacekeeping operation is obliged to promote the observance of human rights while the Member States contributing to the operation are pledged to achieve the purpose and the promotion and observance of human rights. The problem for the implementation of Articles 55 and 56 is that the specific human rights to be promoted are not set out in the Charter itself. This situation is rectified by a number of multilateral treaties and customary international law. In many ways this approach is a more flexible solution than fixing rights in the Charter. The evolution of human rights demonstrates that the rights that may have been specifically articulated and therefore fixed in the Charter in 1945 would be considered inadequate today.

⁵ Jennings, R and Watts, A. (eds) *Oppenheim's International Law* Vol 1. (9th ed 1996) at 998.

⁶ Article 55(c).

The United Nations

The significance of human rights in the UN Charter is underpinned by action.⁷ The UN has been at the forefront of promoting, developing and interpreting human rights laws and has since its inception condemned human rights violations. One of the earliest acts of the UN was the creation of commissions on human rights and the status of women.⁸ Actions by the Security Council under Chapter VII have been taken with the intention of enforcing human rights compliance, thereby linking human rights to peace and security.⁹ From its creation as a body which merely discussed human rights issues, the Commission on Human Rights has developed into a body capable of receiving reports from special rapporteurs and adopting public resolutions expressing concern over human rights violations and even condemning a State for such violations. Despite the absence of formal enforcement measures this process has proved effective in persuading States to correct human rights violations. Statements by the Commission have also assisted in the creation or clarification of new human rights norms,¹⁰ trends which have been followed in the General Assembly where an increasing number of Resolutions have assisted in the amplification and statement of the international law obligations relating to human rights.

In moving to further discussion of the amplifications and statements of the international law relating to human rights, an examination needs to be made of the

⁷ The Secretary-General's Reform Programme of 1997, called for the integration of human rights into all major activities of the Organization at part 1, section b, paras 78-79.

⁸ Above n 4 at 322.

⁹ Id at 323.

primary treaties and conventions from which the law has developed. Given the volume of human rights material, the outline will focus on the elements relevant to the practical requirement of what must be provided by a peacekeeping force where the structures normally responsible for their provision are not in existence.

International Bill of Human Rights

The International Bill of Human Rights represents the corner stone of human rights law. The collection of interrelated treaties that make up the International Bill of Human Rights set out the fundamental human rights guarantees to be aimed for or achieved, depending on the status in international law of its various provisions. The International Bill of Human Rights is a combination of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (1966).¹¹ The ICCPR has the most direct relevance to peacekeeping and is therefore dealt with here in more detail than the other two, more aspirational, elements of the International Bill of Rights.

Universal Declaration of Human Rights

The General Assembly adopted the Universal Declaration of Human Rights in 1948 “as a common standard of achievement for all peoples and all nations.”¹² It was not designed as a binding treaty but as a statement of the aspirations of the world

¹⁰ Id at 324-5.

¹¹ The Challenges for Peace Project *Challenges for Peace Operations: Into the 21st Century*. www.peacechallenges.net/pdf/concluding1.pdf (11 Sep 2003) at 77 para 8.

¹² Preamble 217 (III). International Bill of Human Rights.

community. It has however formed the basis for the majority of binding human rights conventions since its adoption¹³ and provides the foundation of international human rights.

Significant forerunners to the binding conventions found in the Universal Declaration include; Article 5, which provides the basis for subsequent prohibitions against cruel, inhumane or degrading treatment or punishment: Article 7 provides for equality before the law free from discrimination: Article 8 identifies the right to bring violations of human rights to courts of competent jurisdiction. Of particular significance for peacekeeping is Article 9 prohibiting arbitrary arrest, detention or exile. Article 11 provides for the presumption of innocence until proven guilty at a fair trial and a prohibition on retrospectivity of offences and punishments.

Importantly, Article 12 grants a right against arbitrary interference with home, privacy, family and correspondence and from attacks on honour and reputation. The Declaration also states that there is a right to the “protection of the law against such interference or attacks.” Article 17 *inter alia* protects against arbitrary deprivation of property. Article 28 identifies a right to a “social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.” The responsibility to support and implement these articles would of necessity fall to peacekeepers in a collapsed State situation.

The Declaration was not legally binding when it was adopted in 1948¹⁴ but there is support for the view that it has passed into customary international law and it has certainly been relied upon as international law by the International Court of Justice.¹⁵

¹³ Above n 4 at 326-7.

¹⁴ Above n 5 at 1001-2.

There are human rights covenants in the International Bill of Human Rights that are binding on the State Parties and that have been adopted by States, such as the United Kingdom, the United States, Canada and Australia, most frequently involved in peacekeeping operations. These covenants have their origins in the Universal Declaration and often repeat the key provisions of the Universal Declaration. All of the provisions identified above as directly applicable to peacekeeping operations can be found in these binding treaties.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the General Assembly and opened for signature in December 1966. It finally came into force in 1976. To date there are 154 parties, including major peacekeeping contributor States such as Australia, Canada, France, the United Kingdom and the United States.¹⁶ Many of the provisions highlighted as having significance for peacekeepers in the Universal Declaration are directly repeated in the ICCPR. While the UN itself is not capable of being a party to the Covenant it is bound to comply with customary international law. Where the majority of Member States adopt such Resolutions they can effectively be seen as amounting to statements of customary international law so that the UN itself is bound to comply with the substance of the Resolution as customary international law.¹⁷ States contributing to the peacekeeping operation by providing troops or a capability are bound by their individual

¹⁵ *Namibia (Legal Consequences) Case*. ICJ Rep (1971) at 46. The Court referred to violations by South Africa of its obligations *inter alia* under the Universal Declaration.

¹⁶ As of 21 August 2002: United Nations Human Rights Website – Treaties Bodies Database. http://www.unhchr.ch/html/menue3/b/a_ccpr.htm (11 Sep 2003).

responsibility to comply¹⁸ as they are provided as State entities not as troops supplied to the UN under an agreement pursuant to Article 43 of the UN Charter.

The ICCPR is the most important of the core human rights covenants in terms of the implications for peacekeeping operations. Although it does not have a traditional enforcement mechanism the ICCPR does have a method of procuring State compliance that has proved to be effective. The Covenant creates an 18 member Human Rights Committee that examines reports submitted to it by States under Article 40. Under the Article the Committee is obliged to make an annual report to the General Assembly detailing its activities. The views of the Committee are generally accepted as accurate interpretations of the Covenant and the state of international human rights law generally. The vast majority of States wish to avoid reproach or being critically reported to the General Assembly and have thus far generally chosen compliance with the determinations of the Committee over condemnation.¹⁹

A proper understanding of Article 2 of the ICCPR is crucial because it defines the circumstances in which a State becomes subject to the Covenant. Pursuant to Article 2 the State Party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights and obligations under the Covenant. The question arises as to whether States operating outside their territory (and for

¹⁷ Bowett, D.W. *The Law of International Institutions*. (4th ed. 1982) at 46.

¹⁸ In the same way that in the event of armed conflict the military would be bound by their State being signatories to comply with the laws of armed conflict despite the UN not being a party to the Geneva Conventions: Stephens, D. “The Use of Force by Peacekeeping Forces: The Tactical Imperative.” *International Peacekeeping*. Vol 12, No.2 (Summer 2005) at 161.

¹⁹ Singh, N. *Enforcement of Human Rights in Peace and War and the Future of Humanity*. (1986) at 104.

customary international law purposes the UN, which has no territory),²⁰ are bound by the Covenant.

It has been argued that the State's obligations are only triggered under the ICCPR in territory of the State so that the Article must be read as operating only where there is territory *and* jurisdiction.²¹ This interpretation would create an anomalous situation however, as a State bound by the Covenant in its own sovereign territory would be free to ignore it in situations where it had mere jurisdiction over other territory. This would mean that the Covenant would not apply to flag ships, to members of the armed forces operating abroad or to laws of extra territorial application. Frequently in peacekeeping operations in collapsed States, the lead nation or UN has *de facto* jurisdiction but is not in its own territory.²² This would lead to a situation where the States bound by the Charter to promote human rights could ignore key provisions of human rights law in situations where they were the sole authority capable of promoting or enforcing them. This would make nonsense of the Charter and the intent of the ICCPR. In order to achieve a sensible outcome, it is argued that the requirement to observe the Covenant must be read disjunctively so that States Parties are bound in situations where they have jurisdiction as well as when they are acting on their sovereign territory.

This is clearly the position of the Human Rights Committee as expressed in its General Comments to Article 2.

²⁰ Arguably the UN has territory where it is the administrative authority. However, if this status is analogous to the mandate or Trusteeship then it does not.

²¹ Muggleton, P. Unpublished paper. Operational Law Course 1/01. Australian Defence Force Warfare Centre. (02 – 06 April 2001).

²² For example INTERFET, IFOR, SFOR etc and where areas of operation are allocated to a specific State, for example the Australian battalion (AUSBAT) was allocated the border region in East Timor.

The Committee considers it necessary to draw the attention of States Parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction.²³

The Committee has emphasised here that it is jurisdiction, rather than territory, that is the key trigger for implementation of the ICCPR. The Committee has also applied this interpretation in cases brought before it.²⁴ Specifically, in the case of *Lopez Burgos V Uruguay* where the Committee stated:²⁵

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within its territory and subject to its jurisdiction”, but it does not imply that the State Party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it... It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

The Committee has felt it necessary to issue further amplification in terms of General Comments on Article 2.²⁶ In this fresh amplification the Committee states:

²³ Human Rights Committee General Comment No. 31 (2004). See also The *Wall Advisory Opinion* [2004] ICJ 9 July 2004) at para 111.

²⁴ Joseph, S, Schultz, J and Castan, M. *The International Covenant on Civil and Political Rights: Cases and Commentary*. (2000) at 59-62.

²⁵ *Lopez Burgos v Uruguay* Human Rights Committee Case 52/79.

²⁶ General Comment No.31 *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. (26 May 2004) CCPR/C/21/Rev.1/Add.13, General Comment No.31.

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to the citizens of State Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves under the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party assigned to an international peacekeeping or peace enforcement operation.²⁷

From the perspective of the Human Rights Committee there appears to be no doubt that as a matter of law State Parties to the ICCPR must apply the Covenant on peacekeeping and peace enforcement operations. Given the status of the Committee within the UN framework this must be the position for UN peacekeeping operations.

In a climate of American hegemony it is always difficult to ignore the position of the US in Conventions to which it is a party. As part of the process eventually leading to the belated ratification of the Covenant by the US, the US Senate Committee on

²⁷ United Nations Office of the High Commissioner for Human Rights *Unedited Version: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant: 05/05/2003*. CCPR/C/74/CRP.4/Rev.3. (General Comments). 78th session Human Rights Committee: At para 11 the General Comment also reinforced the position that Covenant applies during armed conflict and that international humanitarian law and international human rights law are complementary not mutually exclusive in such situations, a position repeated in General Comment No.31.

Foreign Relations defined the official US interpretation on the scope of the covenant.

The Senate Committee stated that the role of the Covenant was to guarantee:

A broad spectrum of civil and political rights, rooted in basic democratic values and freedoms, to all individuals within the territory or under the jurisdiction of the States Party without distinction of any kind, such as race, gender, ethnicity, et cetera.²⁸

The Senate Committee also noted that the:

Covenant obligates each State Party to respect and ensure these rights, to adopt legislative or other necessary measures to give effect to these rights and to provide an effective remedy to those whose rights are violated.²⁹

Although the US has issued a number of reservations, understandings and declarations regarding the ICCPR it has not sought to formally limit the application of the Covenant solely to territory.³⁰ It follows that the US position on the application of the ICCPR is that it applies where the US has jurisdiction. As a result of this interpretation US obligations under the Covenant are that where the US is, for example, the lead State in a multinational peacekeeping operation in a collapsed State, subject to the mandate, it may have jurisdiction³¹ because of the terms of the mandate and as a result an obligation to comply with the ICCPR.

²⁸ Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23 at 1 (1992): 31 I.L.M. 645, 648; Carpenter, K.D.A. "The International Covenant on Civil and Political Rights: A Toothless Tiger?" *26 NCJILCR 1* (Fall 2000) at 4.

²⁹ *Ibid* Carpenter at 4.

³⁰ Stewart D.P. "United States Ratification of the Covenant on Civil and Political Rights: The Significance of Reservations, Understandings, and Declarations" *42 DePaul L. Rev.* 1183. (Summer 1993).

³¹ The mandate must be in such terms as to have the necessary implication, if not the express provision, for such jurisdiction as was the case for example in Kosovo and East Timor.

The US administration under President Bush has attempted to argue that US laws do not apply to situations where the US is not the sovereign over territory. In the case of the UN Naval Base at Guantanamo Bay the administration argued that it was not bound where it does not have sovereignty over territory and that Cuba had ultimate sovereignty. The US Supreme Court ultimately rejected this stance in the case of *Rasul v Bush*.³² The case resulted from a petition by prisoners at Guantanamo Bay who had been detained in Afghanistan. The petitioners filed suits under US federal law challenging the legality of their detention, alleging that they had never been combatants against the US or engaged in terrorist acts, and that they had not been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court rejected the petition as they were outside the US sovereign territory. The Court of Appeal affirmed this decision. The petitioners made a further appeal to the US Supreme Court. The Supreme Court overturned the courts below and determined that the US had “jurisdiction and control” over Guantanamo Bay and that as a result the US law applied. Consequently the ICCPR also applies.

With regard to UN operations, although the permanent Members of the Security Council are parties and individually have a responsibility to comply with the ICCPR, the Security Council is not bound to the treaties entered into by the individual members, only to customary international law or principles.³³ However, individual States engaging in peacekeeping operations are still obliged to observe their international commitments. Therefore even under a UN operation a State that is a

³² *Rasul v Bush* (03-334) 321 F.3d 1134

party to the ICCPR will be required to comply with its obligations where its forces have jurisdiction in an area. The extent to which the UN is bound in such circumstances is dependent upon the extent to which the ICCPR forms part of customary international law. However, the point is effectively moot as regards UN peacekeeping operations because the forces on the ground will be bound by their State obligation.³⁴

Returning to the provisions of the ICCPR, Article 2(3) requires the provision of remedies at law for the victims of breach and the enforcement of such judicial remedies. The setting up of courts or tribunals of competent jurisdiction becomes a planning issue for peacekeepers bound by the ICCPR. The ICCPR does not give express authority to enact legislation independently of sovereignty to support this requirement but it is a necessary implication of the obligation. Where administrative jurisdiction has expressly passed to the peacekeeping operation through the mandate, including a capacity, express or implied, to enact binding directions such as Ordinances, there can be no argument against exercise of that jurisdiction because the action is required to fulfil the ICCPR obligations.

Where no express administrative jurisdiction is granted then the operational planners must balance their powers and obligations. Where a State has collapsed and the mandate places the peacekeeping force in effective control, without granting express jurisdiction over the territory, then it would seem contrary to the clearly expressed human rights substance of the UN Charter for the operation to eschew its human

³³ Szasz, P. in Schachter, O. and Joyner, C.C. (eds). *United Nations Legal Order*. Volume 1. (1995) at 95.

rights obligations. The peacekeeping operation would therefore gain jurisdiction to execute its obligations from its mandate and the ICCPR including the customary international law embodied in it.

Fair Treatment Obligations: Article 7 of the ICCPR foreshadows the provisions of the Convention Against Torture. It prohibits torture, cruel, inhuman and degrading treatment or punishment.³⁵ Article 7 is complemented by Article 10, which relates to the humane treatment of persons in detention. Of particular note for peacekeeping planners is the requirement in Article 10 for the separation of juvenile and adult offenders and the purposes of the penitentiary system, which is for a prisoner's "reformation and social rehabilitation." This means that peacekeepers may be required to do more than merely hold a person in detention, there may also be a requirement to establish some form of reformation or rehabilitation program.

Obligations Necessitating Ordinances: Further obligations also arise necessitating the enactment of some form of legislation or ordinances by the peacekeepers. Article 6 identifies the inherent right to life and the protection of that right by the law. Article 9 protects against arbitrary detention and permits deprivation of liberty only "in accordance with such procedures as are established by law."³⁶ Article 9 goes on to require arrested persons to be advised promptly of the charges against them and brought before a court of competent jurisdiction within a reasonable time or released. Article 9(4) effectively provides for *Habeas Corpus*, an issue made the subject of

³⁴ Had Article 43 of the Charter been effective the situation would be different as the force would belong to the UN. With the failure of Article 43 the troops remain subject to the sending State obligations: see Stephens above n 18.

³⁵ This will be covered in more detail in the section on the CAT.

³⁶ ICCPR Article 9(1).

General Assembly Resolution 34/178.³⁷ This Resolution specifically identified Article 9(4) and calls upon “all Governments to guarantee to persons within their jurisdiction the full enjoyment of *amparo*, *habeas corpus* or other legal remedies to the same effect, as may be applicable in their legal systems.”³⁸ Peacekeepers will have to rely on the laws extant in the State to provide the protections demanded by the Covenant or enact laws or ordinances to fulfil the requirement to act to protect, charge, deal with according to law. If arrest and detention are contemplated in a peacekeeping operation there will have to be laws and procedures to protect the rights and access to a court of competent jurisdiction to comply with the ICCPR, as well as implementation of the related General Assembly recommendations.

Trial Provisions: Article 14 of the ICCPR provides further arrest, detention and trial guarantees. The right to a fair trial and equality before the law are set out in Article 14. These are rights historically regarded as fundamental rules of law.³⁹ Significantly for the purposes of this work, the Human Rights Committee has not used this section of the Covenant to rule out the use of military courts to try civilians provided that such courts afford the full guarantees stipulated in Article 14.⁴⁰ Article 14(3)(c) provides the requirement for trial without undue delay. This is consistent with the provisions of Article 9(3), which relates to the dealing with detainees in a reasonable time. Although the application of this provision will depend on the circumstances in each case, the Committee has found a delay of three years between

³⁷ 17 December 1979

³⁸ UN 34/178 “The Right of Amparo, Habeas Corpus or Other Legal Remedies to the Same Effect” 17 December 1979: Rauschnig, D, Wiesbrock, K and Lailach, M. *Key Resolutions of the United Nations General Assembly 1946-1996*. (1997) at 327.

³⁹ Above n 24 at 279.

⁴⁰ Id at 288-9.

arrest and final appeal to be excessive.⁴¹ It should be noted that there were persons arrested by the peacekeepers in East Timor in 1999 who in 2003 were still awaiting completion of their trial at first instance. Although a form of bail provision had been implemented there were detainees who spent more than two years in prison waiting for the establishment of the East Timor justice system.

The right set out in Article 15 of the ICCPR echoes the Universal Declaration provisions against retrospectivity of offences. Article 17 also follows the Universal Declaration provisions in prohibiting arbitrary or unlawful interference with privacy, home, correspondence and unlawful attacks on honour and reputation. Article 17(2) specifically states that “[e]veryone has the right to the protection of the law against such interference or attacks.” These provisions provide the guidelines for the introduction of protective legislation that should be established and are particularly relevant as an accompaniment to a peacekeeping mandate that includes a domestic peace and security role.

Derogation: The ICCPR has significant implication for the planning of peacekeeping operations in States where the State infrastructure capable of guaranteeing the rights under the Covenant has collapsed. It may well be argued that in serious emergency situations the immediate implementation of all measures is not possible. However, the ICCPR does have provision for derogation.

The derogation provision is set out at Article 4. It permits derogation “[i]n times of public emergency which threatens the life of the nation and the existence of which is

⁴¹ *Hill and Hill v Spain* UNHRC 526/93.

officially proclaimed.”⁴² Concerned that the derogation may be used unnecessarily, the UN Committee on Human Rights made a detailed comment on this Article.⁴³ The Committee emphasised that derogation was only to be used in exceptional circumstances and for a limited period. The criteria of public emergency threatening the life of the State and the requirement for an official proclamation must be met. The Committee pointed out that generally derogation would only be used in armed conflict and then only if the life of the State was actually threatened, for example by an armed aggressor invading in force in order to annex or control it. Even where derogation was justified the General Comment emphasised that the derogation provision would not afford blanket application. Each activity would be scrutinised and must be justified. The principle of proportionality should be used to determine whether the actions were justified under the derogation.

The Committee appeared sceptical that derogation could be invoked other than in armed conflict. As with Article 2, the General Comment expressly stated that the Covenant continued in force during armed conflict and was to operate in a complementary manner with international humanitarian law. Peacekeepers in a collapsed State operation would arguably not find themselves in circumstances in which the derogation could be invoked. Past experience has shown that the life of the nation would at that point be in the hands of the UN in a post conflict reconstruction phase and as such not in the dire situation required before derogation could be invoked.

⁴² ICCPR Article 4(1).

⁴³ CCPR/C/21/Rev.1/Add.11 31 August 2001. General Comment No. 29.

Consideration was given to derogation in the “Siracusa Principles”. A conference of international jurists sponsored by the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights and the International Institute of Higher Studies in Criminal Sciences was held from 30 April to 4 May 1984 in Siracusa, Italy. The delegates made a detailed examination of the limitations allowed for in the ICCPR. The outcome of the conference was the development of the Siracusa Principles, which it was agreed represent a statement of international law and severely restrict the manner in which limitations can be imposed. For example, on the issue of the threat to the life of the State under Article E of the Siracusa Principles it states:

39. A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation.

A threat to the life of the nation is one that:

(a) Affects the whole of the population and either the whole or part of the territory of the State, and

(b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under article 4.

41. Economic difficulties per se cannot justify derogation measures.⁴⁴

⁴⁴ UN Economic and Social Council, E/CN.4/1985/4 (28 September 1984). Commission on Human Rights Forty-first Session: See also Gosden, R. “Shrinking the Freedom of Thought: How Involuntary

The Human Rights Committee⁴⁵ was also keen to emphasise limitation on derogation both temporally and geographically, the ideal being that derogation should not apply to the whole State but only in the local area and for the strictly limited period necessitated by the situation. The Committee noted that the principle of proportionality of response was not always adhered to when States tried to claim derogation. The Committee further emphasised that derogation was not a blanket release from the provisions of the Covenant and that each Article must be separately and justifiably derogated. To date there has been no derogation by either a peacekeeping State or States participating in a UN peacekeeping operation. It would also be difficult for a peacekeeping force, particularly UN peacekeepers, to justify derogation, as deployment usually occurs after an armed conflict and in order to maintain the life of the State and prevent threats to it. The issue of derogation appears to be one that has been overlooked by States in peacekeeping operations. It is therefore an issue that planners should address, especially when considering the implementation of detention policies.

The ICCPR has been expressly cited by the ICJ as continuing to have effect during times of armed conflict regardless of that state of armed conflict and therefore international humanitarian law applying.⁴⁶ In the *Nuclear Weapons Case* the ICJ stated:

Psychiatric Treatment Violates Basic Human Rights” *Journal of Human Rights and Technology*, Vol.1, (February, 1997).

⁴⁵ See Human Rights Committee General Comment No. 31 (2004).

⁴⁶ *Nuclear Weapons Case* ICJ (1996), 226,239 (8 July).

“The protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”

It would seem therefore that peacekeepers are bound to apply the ICCPR and comply with all its requirements. As a result a method of ensuring its compliance must be found and planned for prior to the insertion of the operation into the State or territory concerned.

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature by the General Assembly at the same time as the ICCPR. As with the ICCPR it embodies many of the provisions of the Universal Declaration. The ICESCR has been described as protecting “second generation”⁴⁷ human rights. ICESCR rights are those that follow on from the basic rights such as the right to life and are characteristic of developed States. Many of the rights to be provided to the population under its provisions require some form of stable economy and social organisation to be in existence. The rights laid out in the ICESCR therefore provide a goal for peacekeeping operations where the focus is on rebuilding a collapsed State. The ICESCR is also not drafted in the same mandatory language as the ICCPR so that although the Covenant is binding the obligations represent a goal toward which a State has agreed to attempt to achieve rather than an inherent right that a State must protect.

The rights set out in the ICESCR to free association in trade unions and paid leave or adequate social security benefit systems cannot be guaranteed or provided in the initial stages of an operation in a collapsed State. Arguably even in an established State many of the ICESCR provisions have proved difficult to implement. Neither can governmental level requirements such as a social security system be provided by a military operation. However, free association and protection of the right to work are issues which may have to be addressed by peacekeepers as the operation develops and as such should be recognised in the planning process. Where the infrastructure is capable of supporting these rights, peacekeepers may be required to support them, although generally this will fall to the civilian rather than the military arm of an operation.

Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

Following on from the International Bill of Rights are a number of conventions and UN resolutions that are relevant to the human rights obligations in peacekeeping. The prohibition against torture exists in the Universal Declaration, the ICCPR and in customary international law.⁴⁸ As with the ICCPR the Torture Convention was preceded by a General Assembly declaration⁴⁹ and was considered to be a statement of customary law by the time it was adopted in 1984.⁵⁰ The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT)

⁴⁷ Above n 5 at 695.

⁴⁸ Above n 5 at 715: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 2 WLR 827 (1999).

⁴⁹ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (Dec. 9, 1975).

was adopted in line with the adoption of more detailed Conventions further developing the rights identified in the Universal Declaration. Under Article 2 of the CAT the State Parties are to take measures to prevent acts of torture in any territory under its jurisdiction. There is no ambiguity here as to whether the territory belongs to the State or not, it is sufficient that the State has jurisdiction. Therefore in a peacekeeping situation where the UN has jurisdiction by virtue of the mandate the Convention applies.⁵¹ As it is a statement of the customary international law the provisions apply equally to UN peacekeeping operations as a whole as it does to individual contributing States and regional or multinational peacekeeping operations.

Under Article 4 of the CAT, torture, with its inchoate offences, is to be a crime and punishable as a grave offence. While the Article relates to the obligation of State Parties to legislate, it is argued that a like requirement attaches where Ordinances are passed, such as occurred in East Timor, the former Yugoslavia and other Trustee model operations. In a peacekeeping operation the respective military codes are likely to already prohibit and provide sanctions against the military contingents. The civilian police may not be covered by such provisions so that an ordinance may be required in the event that it was not already provided for.

Articles 5 to 9 lay down a framework for a wide jurisdiction and extradition in relation to offences of torture. Article 10 requires that education regarding the prohibition against torture is included in the training of any person, specifically including military personnel, “that may be involved in the custody, interrogation or treatment of any individual subject to any form of arrest, detention or integration.”

⁵⁰ Above n 4 at 332.

⁵¹ Article 2(1).

Prior to the deployment of peacekeepers, planners should incorporate proposals for re-training and reappraisal based on these principles. States contributing forces to the operation should be asked to guarantee that such training has taken place in compliance with their Convention obligations. Practices such as the combination of sleep deprivation, use of “white noise”, food rationing and the use of stress positions, previously viewed by western forces as standard interrogation practice have been found to be in violation of the European Convention, the relevant clause of which is drafted in the same terms as the Covenant.⁵² This means that it is vital for the contributing force practice to be audited by the peacekeeping command, if not by the UN headquarters.

There are further articles in the CAT that are of importance to peacekeeping operations. Article 11 requires review of custody and interrogation procedures to prevent torture, while Articles 12 to 15 deal with the proper handling of complaints, evidence and compensation for torture victims. Article 16 is an undertaking by the States parties to prevent other acts, not amounting to torture but amounting to cruel, inhuman or degrading treatment. Peacekeeping operations need to plan for compliance with this Convention and ensure that detention and interrogation practices are compliant and that appropriate processes consistent with the CAT are in place. While establishing a complaints process may be onerous it is no more so than the processes that are routinely set in place during peacekeeping operations for civil claims by the local population for damage and injury caused by peacekeepers.

⁵² *Ireland v United Kingdom* (1978) Eur. Ct. H.R. Rep. Series A, No.3.

Resolutions

The General Assembly does not have the power to create international legislation; this power was specifically denied to it by the San Francisco Conference.⁵³ However, it can influence the development of international law, although the weight and significance of Resolutions vary depending on the circumstance of each Resolution and situation. Organs of the UN, including the Security Council and the General Assembly, are often seen as identifying in Resolutions or statements the customary rules or general principles of international law.⁵⁴ In effect therefore, Resolutions of the General Assembly can become evidence of international law, with the more support for the Resolution strengthening, and the less support correspondingly weakening this presumption. The accession of a large number of Members to treaties such as the ICCPR for example, strengthens the argument that its adoption by the General Assembly represents a statement of principles of international law.⁵⁵

If the Secretary-General is bound by General Assembly Resolutions it is immaterial whether the Resolutions are customary international law. If the Secretary-General is bound then peacekeeping forces controlled by the Secretary-General must also be directed to comply.⁵⁶ The fact that the Secretary-General is bound to comply with the Resolutions of the UN was clearly identified by Dag Hammarskjöld. When referring to the obligations of the Secretary-General he stated:

⁵³ Castaneda, J. *Legal Effects of United Nations Resolutions*. (1969) at 2-3.

⁵⁴ *Id* at 5.

⁵⁵ Above n 17 at 46.

⁵⁶ UN peacekeeping forces are “in a general sense organs of the United Nations” Above n 14 at 1164.

Is he entitled to refuse to carry out the decision properly reached by organs on the ground that the specific implementation would be opposed to positions some Member States might wish to take as indicated, perhaps by an earlier minority vote? ...

The answers seem clear enough in law; the responsibilities of the Secretary-General under the Charter cannot be laid aside merely because the execution of decisions by him is likely to be politically controversial. The Secretary-General remains under the obligation to carry out the policies as adopted by the organs.⁵⁷

Resolutions of the Security Council establishing a peacekeeping operation pass the control of the operation to the Secretary-General.⁵⁸ Where the Secretary-General has control of a peacekeeping operation he or she is therefore obliged to structure and conduct that operation in accordance with the Resolutions of the organs. The General Assembly is an organ of the UN. As the General Assembly has adopted the Universal Declaration, the ICCPR and the CAT the Secretary-General is therefore obliged to conduct peacekeeping operations in compliance with them. This obligation is in addition to the obligation of the UN to comply with such elements of the conventions and treaties that have passed into customary international law.⁵⁹

As the General Assembly has adopted the above Resolutions the Secretary-General is obliged to comply with them in the conduct of peacekeeping operations. In effect the obligations resulting from the decisions of the organs of the UN make UN

⁵⁷ Hammarskold, D. in Schachter, O and Joyner, C.C. (eds) *United Nations Legal Order* Vol 1. (1995) at 250.

⁵⁸ Usually expressed as command and control, however as a civilian and a non national he or she cannot legally "command" only control: Above n 17 Stephens.

⁵⁹ See for example Secretary-General's Bulletin on Observance by United Nations forces of international humanitarian law, 6 August 1999, ST/SGB/1999.

peacekeeping operations subject to more extensive obligations than the contracted out peacekeeping operations where States are required only to comply with their treaty obligations..

Setting International Standards in the Field of Human Rights 1986

In 1986 the General Assembly moved to further clarify the standards to be achieved in the field of human rights. General Resolution 41/120 Setting International Standards in the Field of Human Rights, recalled the Universal Declaration, the ICCPR and the ICESCR, reaffirming the fundamental importance to the field of human rights in their implementation. The Resolution called for broad ratification of the key human rights treaties by the Member States and importantly identified these treaties as the international legal framework. The Resolution went on to invite Members and UN bodies to follow a series of guidelines in developing international human rights; “such instruments should, *inter alia*:

- (a) Be consistent with the existing body of international human rights law;
- (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
- (c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;

(d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems;

(e) Attract broad international support.”

Given the obligation of the Secretary-General to abide by such decisions UN peacekeeping instruments must follow these guidelines.

Vienna Declaration and Programme of Action 1993

While not a treaty, the General Assembly made a statement consistent with the Universal Declaration known as the Vienna Declaration and Programme of Action (Vienna Declaration).⁶⁰ It represents an important and relevant statement of intent. The Vienna Declaration was a restatement of the commitment of the world community to fulfil the obligations that had been developing since the Universal Declaration. Of particular significance is the repeated assumption, carried on from the Universal Declaration that rights existed in customary form before being expressly articulated in treaty form⁶¹. This is important for UN peacekeeping operations as although the UN or a non signatory State may not be bound on the basis that it is not a State party to a treaty, it is subject to customary international law.

⁶⁰ 32 ILM 1661 (1993).

⁶¹ Dixon, M and McCorquodale, R. *Cases and Materials on International Law*. (3rd ed 2000) at 192.

Strengthening the Rule of Law

In December 1993 the General Assembly adopted without vote the Strengthening the Rule of Law Resolution.⁶² The aim of the Resolution was to reinforce the progress already made in human rights regulation. The General Assembly endorsed the

Recommendations of the World Conference on Human Rights that a comprehensive program be established within the United Nations under the coordination of the Centre for Human Rights of the Secretariat, with a view to helping States in the task of building and strengthening adequate national structures which have a direct impact on the overall observance of human rights and the maintenance of the rule of law.

The Secretary-General was also asked to submit proposals to support this aim and bring it to fruition. The Secretary-General controls UN peacekeeping forces. It would therefore seem incomprehensible that with the position of the Secretary-General, as eloquently summarised by Dag Hammarskjold, a peacekeeping force should be other than bound to comply with the clear wishes expressed by the General Assembly in these Resolutions. As a result UN peacekeeping operations have an obligation to use human rights law as the legal framework. This position is supported by the obligations placed on the UN and contributing States by customary international law.

Customary international law

It is uncontested that the majority of non-binding declarations, resolutions and statements of principle, where followed by State practice, become binding as customary international law.⁶³ The Universal Declaration of Human Rights, the Declaration Against Torture and the Declaration preceding the ICCPR fall into this category, although there is as yet no general agreement that the whole of the Universal Declaration has entered into customary law.⁶⁴ There are however, some basic provisions found in these major human rights conventions that have unequivocally the status of *jus cogens*, for example the prohibition on torture.⁶⁵

The most widely accepted view of human rights customary international law is found in the *Restatement (Third) of the Foreign Relations Laws of the United States*.⁶⁶ In this document six acts were identified that if practiced, encouraged or condoned by a State would violate international law. These are:

- a. genocide;
- b. slavery or slave trade;
- c. the murder or causing the disappearance of individuals;
- d. torture or other cruel, inhuman, or degrading treatment or punishment;

⁶² General Assembly Resolution 48/132 Ref: 50/179, 49/194 of 20 December 1993.

⁶³ Above n 4 at 336.

⁶⁴ Above n 4 at 341; Above n 5 at 1002.

⁶⁵ Meron, T. *Human Rights in Internal Strife: Their International Protection*. (1987) at 52.

- e. prolonged arbitrary detention;
- f. systematic racial discrimination; and
- g. a consistent pattern of gross violations of internationally recognised human rights.⁶⁷

In support of this statement of customary international law the US national courts have recognised that arbitrary detention is a violation of international law.⁶⁸ Based on the US statement there is certainty for peacekeepers that arrest and indefinite detention without legal justification is a recognised violation of international law and yet there seems to have been a disregard for this provision in recent operations⁶⁹ and with regard to the detainees in Guantanamo Bay.

In planning for peacekeeping operations the customary laws regarding the torture and detention provisions and ensuring a legal framework to regulate the arrest and treatment of detainees must be considered. Issues also arise with regard to the action to be taken against individuals or bodies found by peacekeepers to be engaging in practices prohibited by customary international law. It is argued that under customary international law peacekeepers in collapsed State environments not only have the power under the mandate to pass ordinances but are obliged to do so to protect against

⁶⁶ Above n 4 at 341.

⁶⁷ American Law Institute, 2 Restatement (Third) of The Foreign Relations Law of the United States. 709 (1987) at 161.

⁶⁸ *Rodriguez-Fernandez v Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F. 2d 1382 (10th Cir. 1981).

human rights violations and to ensure that their own action is compliant with international human right law.

Implied powers

Ordinances have been passed under the UN Trusteeship model administrations, including East Timor and Kosovo, without objection. The obligations found in the UN Charter and human rights covenants as well as from the generally worded mandates must of necessity be accompanied by the implied power to create binding rules, laws, ordinances et cetera to enforce the law. Jurisdiction must be a necessary implication of a mandate that requires the military to establish peace and security and the provision of a safe environment for the provision of humanitarian aid. The argument that the right to pass ordinances flows from the mandate is consistent with the view of the ICJ and ICTY, expressed respectively in the *Reparations Case*,⁷⁰ *Certain Expenses Case*⁷¹ and the *Tadic*⁷² case.

In these cases the courts found that “Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”⁷³ If the implied powers doctrine found in the *Expenses Case*⁷⁴ is

⁶⁹ In East Timor the UN made no provision for trial of detainees with some persons arrested and detained under the Australian led operation remaining in prison without trial for more than two years.

⁷⁰ *Reparations for Injuries Suffered in the Service of the United Nations Case*. Advisory Opinion. ICJ Reports (1949) at 174.

⁷¹ *Certain Expenses of the United Nations Case*. Advisory Opinion. I.C.J. Reports (1962) at 151.

⁷² *Prosecutor v Tadic (Jurisdiction)* (1996) 35 I.L.M. 35; (1996) 3 I.H.R.R. 578.

⁷³ Above n 66.

⁷⁴ Above n 71. This doctrine flows from the finding of the International Court of Justice that the United Nations:

followed, Article 1(3) of the UN Charter itself can be pointed to as a head of power to pass ordinances in collapsed State peacekeeping situations to promote human rights.

Article 1(3) provides:

“To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

As peacekeepers operate, at least in UN operations, as part of the Organisation⁷⁵ they must also be deemed to have the powers that are attributed to the organisation. In both UN and multinational peacekeeping operations the Security Council mandate has been deemed as authorising arrest, detention and the passing of Ordinances.⁷⁶ In both East Timor and the former Yugoslavia the Secretary-General’s Special Representatives have passed regulations setting up judicial systems and have done so without question or objection from the international community. The source of this power has not been analysed in detail by commentators but it is argued in this work that implied powers flow not only from the mandate but also from the human rights framework of treaties and Resolutions discussed above.

“...must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties”

⁷⁵ Above n 5 at 1164 referring to peacekeepers stated that “in a general sense are organs of the UN.”

⁷⁶ Ordinances were used by peacekeepers in INTERFET and by NATO forces in the former Yugoslavia operations. UNTAET passed regulations. In none of these cases was there an express power granted under the mandate.

Enforcement of human rights

The development of a process whereby human rights can be enforced in a collapsed State peacekeeping environment is vital. Nagendra Singh pointed out that;

if the legal link of enforcement is missing the word of law would degenerate to a moral recommendation to be ignored at will.⁷⁷

The State Parties to the human rights conventions, and the UN under customary law and decisions of the organs, have an obligation to take action to ensure that human rights are not the first casualties of a collapsed State. Without the implementation of a means of enforcing human rights there is every indication that they will be ignored at will as Singh predicts.

Not only is there an implied power to set up an enforcement framework but a legal requirement to do so. In the *Namibia Case*⁷⁸ Judge Morelli stated in his separate opinion that:

Any State which, having attributed certain rights to foreign nationals, prevents them from gaining access to the courts for the purpose of asserting those rights is guilty, in international law, of a denial of justice.⁷⁹

⁷⁷ Singh, N. *Enforcement of Human Rights in Peace and War and in the Future of Humanity*.(1986) at 10.

⁷⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa), notwithstanding Security Council Resolution 276 (1970)* I.C.J. Reports (1971) at 16.

⁷⁹ *Id* at 234.

States involved in peacekeeping in collapsed States that are Parties to the ICCPR have attributed rights to both nationals and non-nationals that fall under their effective jurisdiction. There is an obligation therefore to provide a system for asserting those rights. Judge Morelli was effectively restating extant obligations under the ICCPR and applying them as general principles of law.

The power of the UN to establish police and judicial mechanisms has not been challenged. In East Timor and the former Yugoslavia arrest and detention provisions were passed initially by the military authorities and were followed by the establishment of UN civilian police and judicial authorities. Hans Corell, Under-Secretary-General of the UN has publicly emphasised the urgent need for the immediate implementation of a justice framework in peacekeeping. In a keynote address to a conference on humanitarian intervention he stated:

One very clear conclusion is that, in parallel with any humanitarian assistance that would have to be given, there is an immediate requirement of putting in place a system for the administration of justice. Civilian police, a judiciary and a correctional system have to be developed almost instantaneously. Otherwise criminality will very quickly take hold.⁸⁰

UNHCR Inspector-General Dennis McNamara has echoed this position noting that:

⁸⁰ Corell, H. *To Intervene or Not: The Dilemma That Will Not Go Away*. Keynote Address at the Conference “Future of Humanitarian Intervention” Duke University, (19 April 2001).

The Achilles' heel of post-conflict peace operations is that of justice/rule of law and civilian policing.⁸¹

This view of the obligation on peacekeepers to establish a rule of law is not limited to the UN. Steve Darvill⁸² in a paper on the rule of law in peace operations noted:

For peacekeepers inserted into the anarchic conditions prevalent in contemporary armed conflict situations, the primary objective is restoration of public order.

And the purpose of this restoration;

is concerned with ensuring compliance with the 'rule of law' by would be perpetrators of crimes.

It seems clear that in modern peacekeeping operations peacekeepers must plan to provide the legal framework where none exists and that this function is pivotal to the success of any operation.

Civilian corrections staff and police can be deployed to safe areas. The military can support their activities by arresting and detaining until a hand over can be conducted, effectively creating an interim police service. This approach was taken in East Timor where strict guidelines for arrest and periods of detention by the military were put in place to protect the individuals and as the area became more secure the policing role

⁸¹ McNamara, D. "The UN has been learning how its done" *International Herald Tribune*, (29 October 2002).

⁸² Darville, S. Australian Agency for International Development (AusAID). *The Rule of Law on Peace Operations from the Perspective of an Institutional Donor*. Address at the Conference "The Rule of

was accordingly transferred to civilian police. This process, although not ideal, is viable and can be implemented relatively quickly. What has proved to be a much slower process is the implementation of a justice system to deal with the people that have been detained. Under the ICCPR there is a requirement for timely trials. In a State where the judiciary must be trained and a legal system developed with all the associated rules of procedure and practice from scratch, a timely trial is simply impossible. There is only one pre-existing judicial system that is instantly deployable and that can assist both the UN and States to comply with treaty obligations and UN directives. This is the military justice systems of the troop contributing States. The key to this solution is the provision by contributing States of a justice system that complies with international human rights law in terms of its structure and function.

The military justice system

The use of a military justice system to deal with detainees is not unheard of. The Australian military justice system was adapted and used in East Timor in the Detainee Management Unit (DMU). The DMU processed people arrested on allegations of being militia. It acted in many ways as a bail court, releasing those found not to be genuinely involved in the commission of crimes. The remaining individuals were swiftly handed over to the UNTAET administration and held in prison awaiting the setting up of the East Timor justice system. There was no complaint or outcry from any official or NGO source regarding the implementation of this system. There was no suggestion that it was unlawful to use an adaptation of the military justice system in this way.

The only arguable failing of the process was that there was no derogation by Australia from the timely trial provisions of the ICCPR. The fact that detainees were handed over to the UN within months at most may excuse this omission, the problem then being one for the UN to resolve. The DMU was not used to try people, only as a filtering or “bail court.” People that were not released had to endure up to two years of imprisonment without trial waiting for the UN assisted East Timorese system to become active. Such a long delay represents a denial of human rights under the ICCPR by the administration in East Timor. Had peacekeeping planners considered this issue in terms of the protection of human rights it would have been feasible to extend the activities of the DMU to include trial proceedings.⁸³

In the US it has been suggested that al Qaeda terrorists should be tried under the military justice system precisely because it provides fair trial guarantees consistent with human rights.⁸⁴ While there may be military justice systems that do not comply, a number of cases brought before human rights courts have ensured that many of the military justice systems used by peacekeeper contributing States are compliant. The UN is in a position to accept the offer of military justice systems from compliant States in the same way that it accepts offers of infantry battalions or logistic support. The main difficulty with this approach is that not all States have military justice systems that comply with the standards required of such a system. The UN would not be able to accept any offer from a State but would be required to limit acceptance to

⁸³ For an analysis of the DMU in East Timor see Oswald, B. “The INTERFET Detainee Management Unit in East Timor” (2000) 3 *Yearbook of International Humanitarian Law* at 347.

⁸⁴ Malinowski, T. “Court Martial Code Offers a Fair Way to Try Terrorist Suspects” *International Herald Tribune*. (December 29, 2001).

those States that can comply with the international human rights standard for fair trial provisions.

The concept of using military systems of justice to fill the gap is not unheard of. In 2001, having observed the deployment of the DMU, Strohmeyer concluded:

“In order to avoid a law enforcement vacuum in the early days of the mission, it is crucial to establish *ad hoc* judicial arrangements facilitating the detention and subsequent judicial trial of individuals who are apprehended on criminal charges. As a short-term relief effort, the quick deployment of units of military lawyers in situations where a complete breakdown of the judicial sector has occurred and where civilian arrangements cannot be deployed rapidly, could fill the vacuum until the UN is staffed and able to take over what is ultimately a civilian responsibility. It would be understood that any such *ad hoc* arrangements would have to be in strict compliance with internationally recognised human rights and other relevant legal standards, and should apply, once established, a set of UN sponsored interim rules on criminal procedure.”⁸⁵

The offences that may be dealt with by such courts would also need to be limited to those necessary to support human rights and the peace and security in the territory concerned. Jurisdiction would be limited only to those areas where the indigenous legal systems had in the assessment of the Secretary-General failed. As local court processes are returned or rebuilt the military justice system would be removed. Finally, there would have to be an automatic right of appeal against conviction and sentence to the civilian system once that system had been reconstructed. With these

safeguards and the oversight of agencies such as UNHCR the military justice system provides the best guarantee for human rights in collapsed States.

As well as being human rights compliant and instantly available, there is another advantage provided by the use of military justice systems. With the global provision of peacekeepers there is representation of all the major legal systems. A military justice system that complies with Articles 9 to 16 of the ICCPR could be selected to match the type of law that pre-existed in the collapsed State or territory or if that system was opposed by the people, an agreed system. Many of the European States have civil law and inquisitorial processes. British and Commonwealth States use the common law adversarial systems. A number of Asian States and Arab States rely upon religious law systems. The appropriate human rights compliant system can be selected and deployed with qualified and experienced legal officers who are practitioners in that system. The military system can operate until an appropriate civilian court can replace it. To reiterate the point, the system must be one that complies with international human rights so that not every State wishing to contribute would be in a position to do so.

Perhaps the most compelling argument for the immediate deployment of a human rights compliant military justice system is that regardless of any imperfections it may have it can provide a functioning justice system in a situation where the alternative is no justice system at all and therefore no means to comply with international human rights obligations.

⁸⁵ Strohmeyer, H. "Making Multinational Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor." *Fletcher Forum of World Affairs*. Vol.25 No.2 (Summer

Offences

It would not be appropriate for all the offences available against military personnel to be made available against civilians. For example disciplinary offences such as Absence Without Leave, or Failure to Comply With A Lawful Order could not be applied in a civilian context. A selection of the available criminal offences would need to be made. The most obvious offences over which the courts may be given jurisdiction are murder, rape and other crimes of violence. These offences have universal standing as violations of human rights. A reasonable start point for identifying offences that should be included within jurisdiction is the ICCPR.

Article 6 of the ICCPR requires protection for the right to life and expressly refers to the crime of genocide. As noted above, the right to life is a basic human right with the offence of murder universally legislated. In order to protect the right to life the relevant offence framework should be utilised. This would include offences related to murder such as manslaughter. Genocide, like piracy is a crime of universal jurisdiction.

The Article 7 prohibition on torture, cruel or inhuman treatment can create a number of offences. Torture itself can form the basis of an offence as it does under Australian law through s61 of the *Defence Force Discipline Act*⁸⁶ into the *Crimes (Torture) Act*.

2001) at 122.

⁸⁶ *Defence Force Discipline Act 1982* s61 provides access to the *ACT Crimes Act 1900* and all laws of the Commonwealth including the *Crimes (Torture) Act 1988*. Note that as currently drafted the *Crimes (Torture) Act* only applies to Australian citizens or persons in Australia. However, the jurisdiction

Cruel and inhuman treatment might reasonably be expected to involve some form of assault or variations of offence against the person. It would also cover indecency offences including rape. Indeed any crime that affects the right of an individual to the quiet enjoyment of his or her life could arguably be considered necessary under this provision.

Article 8 provisions against slavery and servitude can again be found in general legislation through the military codes.

Article 9, 11 and 12 relate primarily to maintaining liberty and freedom of movement. Offences such as false imprisonment, kidnap *et cetera* deal with this right. The US Uniform Code of Military Justice for example, makes specific provision against unlawful detention. At Article 97 the Code states:

Any person subject to this chapter who, except as provided by law, arrests, or confines any person shall be punished as a court- martial may direct.⁸⁷

ICCPR Article 17 rights prohibiting the arbitrary interference with a person's privacy, family, home or correspondence and attacks on honour and reputation can be upheld through assault, criminal damage, theft and in the extreme cases, criminal defamation provisions. All of these can be protected by offences and from a US and Australian

would in any event have been extended under the mandate as military courts would require an extension of jurisdiction to deal with civilians. Such an extension can be made by Ordinances, as occurred in East Timor with the DMU.

⁸⁷ *Uniform Code of Military Justice* 897. Art 97. Unlawful Detention.

perspective can be found in the *Uniform Code of Military Justice*⁸⁸ and through s61 of the *Defence Force Discipline Act* in Commonwealth legislation.

⁸⁸ The *Uniform Code of Military Justice* has some of the most detailed provisions covering offences against human rights for example:

909. ART. 109. PROPERTY OTHER THAN MILITARY PROPERTY OF UNITED STATES - WASTE, SPOILAGE, OR DESTRUCTION

Any person subject to this chapter who wilfully or recklessly wastes, spoils, or otherwise wilfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.

916. ART. 116. RIOT OR BREACH OF PEACE

Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court- martial may direct.

917. ART. 117. PROVOKING SPEECHES OR GESTURES

Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.

928. ART. 128. ASSAULT

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who--

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

929. ART. 129. BURGLARY

Any person subject to this chapter who, with intent to commit an offence punishable under section 918-929 of this title (article 118-128), breaks and enters, in the night time, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

930. ART. 130. HOUSEBREAKING

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offence therein is guilty of housebreaking and shall be punished as a court-martial may direct.

It is not a technically complex process to identify appropriate offences over which military courts should exercise jurisdiction by comparing the rights to be protected against the available military offences. By this simple expedient the overall requirement of peace and security can be met without further exacerbation of the situation by the failure to implement a timely justice system.

Compliance with international human rights requirements

Australian example

The argument for a military justice system to provide a justice system in a collapsed State is dependent upon that justice system being itself compliant with human rights requirements for a fair trial. It would be hypocritical to step in to fulfil human rights obligations while breaching them through the process established to effect protection. Ensuring compliance would should be a simple step but recent cases have suggested that procedures previously considered to be compliant with Article 14 of the ICCPR are in fact in breach of it. An analysis of the Australian military justice system provides an example of the difficulties in ensuring a fully compliant system.

In order for a matter to enter the Australian military justice system under the *Defence Force Discipline Act 1982* (DFDA) it must first be brought before an officer who is a Commanding Officer⁸⁹ for the purposes of discipline.⁹⁰ The Commanding Officer

⁸⁹ In certain specified cases a subordinate summary authority, DFDA s108.

⁹⁰ DFDA s107.

has a number of options available for dealing with the matter depending on the nature of the offence. Where the offence is outside the jurisdiction of the Commanding Officer, as the proposed peacekeeping offences would be, the Commanding Officer can direct that it not be proceeded with, refer it to a Superior Summary Authority, to another Commanding Officer or to a Convening Authority.⁹¹ A Convening Authority is an officer of senior rank appointed by the Chief of the Defence Force (CDF) to perform that role.⁹² In the proposed peacekeeping context, where there was sufficient evidence for the matter to proceed it would be referred to a Convening Authority as a Superior Summary Authority would not have jurisdiction to deal with the matter. A Commanding Officer's discretion in dealing with a matter cannot be fettered.⁹³

Where a matter outside the jurisdiction of a Summary Authority⁹⁴ is referred to the Convening Authority that officer has a number of options. The matter may be directed not to be proceeded with, referred to a Defence Force Magistrate, a Restricted Court Martial convened or a General Court Martial convened.⁹⁵ A General Court Martial consists of a President and four members. All are officers of the Australian Defence Force (ADF) without legal training and substitute for the jury in a civilian criminal trial. A Judge Advocate, who is an officer of the ADF who is also a legal practitioner, assists them in matters of law. The roles performed by the President and Members are identical to an English Magistrates Court with the Judge Advocate having the same standing as clerk of the court. A Restricted Court Martial

⁹¹ DFDA s110.

⁹² DFDA s102.

⁹³ *Re Smith* (1999) per Colonel Morcombe (DFM) Defence Force Magistrate Trial (Unreported 1999). The decision in this trial led to a public apology being made by the then Chief of Army, Lieutenant General Cosgrove, for an order given to the Commanding Officer that the member subject of the trial was to be referred for trial by DFM and not dealt with by the Commanding Officer, thus fettering the Commanding Officers' discretion to deal with the matter.

⁹⁴ Subordinate Summary Authority, Commanding Officer and Superior Summary Authority.

⁹⁵ DFDA s103.

is set up in the same way but with a president and only two members. The Judge Advocate, president and members of the Court Martial, including the prosecuting and defending officers are appointed by the Convening Authority.⁹⁶ In Defence Force Magistrate trials the Defence Force Magistrate sits alone to hear matters as a stipendiary magistrate. The Defence Force Magistrate has the same powers as a Restricted Court Martial with the most significant power being the ability to impose a maximum punishment of six months imprisonment.⁹⁷

While the Judge Advocate and Defence Force Magistrates are appointed to a particular trial by the Convening Authority the Convening Authority can only appoint an officer to that position who is a member of the Judge Advocates' panel.⁹⁸ The Judge Advocate General, who is appointed by the Governor-General,⁹⁹ makes the appointments to the Judge Advocates' panel. Although appointed to the panel by the Judge Advocate General, it is the Judge Advocate Administrator that allocates Judge Advocates and Magistrates to trials. The Judge Advocate Administrator is an officer appointed to the position by the CDF. The officers appointed as Judge Advocates and Magistrates are all members of the Defence Force and as such are ultimately subject to the command of the CDF. The Chiefs of Navy, Army and Air Force have the authority to promote members of the Defence Force. They are directly commanded by the CDF.¹⁰⁰ Therefore, except for the Judge Advocate General, there is no independence as all other actors are commanded and rely for their promotion on the CDF.

⁹⁶ DFDA ss114 – 117.

⁹⁷ DFDA s129.

⁹⁸ DFDA ss117 and 127.

⁹⁹ DFDA s179. The Judge Advocate General and Deputy Judge Advocates General must be or have been a Justice or Judge of a Federal Court or a Supreme Court of a State or Territory – DFDA s180.

¹⁰⁰ *Defence Act 1903* s9.

Following trial there is an automatic review process whereby a legal officer appointed by the CDF, on the recommendation of the Judge Advocate, ensures that any conviction and punishment is according to law¹⁰¹ and advises the Reviewing Authority appropriately. The Reviewing Authority could technically be the same officer as the Convening Authority although the Judge Advocate Administrator has issued a direction that in practice a different officer holds these appointments in any given case. A further petition of review can be requested to the CDF or Service Chief.¹⁰² Alternatively an appeal can be lodged with the Defence Force Discipline Appeal Tribunal.¹⁰³ The members of the Appeal Tribunal are appointed by the Governor General and must be or have been a judge or justice in a federal, State or Territory jurisdiction.¹⁰⁴

The Australian military justice process outlined above is based on the British system and until 2000 the two remained very similar. The changes to the British system have been effected as a result of challenges brought before the European Court of Human Rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). These challenges have significant implications for the ability of the Australian military justice system to be considered compliant with the ICCPR. The challenges to the British process have been founded on Article 6 of the ECHR, which is identical in terms to the Article 14 ICCPR requirement for an independent

¹⁰¹ DFDA s154.

¹⁰² DFDA s155.

¹⁰³ *Defence Force Discipline Appeals Act 1955*.

¹⁰⁴ *Defence Force Discipline Appeals Act 1955* s8.

and impartial tribunal. The most significant case of relevance to this issue is that of *Findlay v the United Kingdom*.¹⁰⁵

Alexander Findlay was charged with a number of offences arising out of his misuse of a firearm following a heavy drinking session. A Convening officer followed a procedure identical to that found under the DFDA to appoint all the participants in the Court Martial. The majority of participants were to some extent under that Convening Authority's direct or indirect command, not an uncommon situation given the senior rank required to perform the role of Convening Authority. The trial commenced on 11 November 1991 following which Findlay was convicted and sentenced to two years imprisonment, reduction to the rank of guardsman and dismissal from the army. The same officer that had acted as the Convening Authority performed a review of the sentence on petition. Findlay made further petitions for review through the military system, which were also rejected.

Findlay then proceeded with civil action in an attempt to have his sentence overturned. In May 1993 he complained to the European Human Rights Commission which found in its report of September 1995 that the court martial process violated the requirements for an independent and impartial tribunal. In its judgement of 21 January 1997 the European Court of Human Rights determined that "in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence." It went on to note that "impartiality"

¹⁰⁵ (1997) 24 EHRR 221.

required both the objective and subjective appearance of impartiality. The court was particularly critical of the role of the Convening Authority, a position too closely associated with the prosecution of the offences to satisfy the required degree of impartiality to appoint the court. Criticism was also made of the review process.

The decision that the British court martial process prior to amendment did not provide an independent and impartial hearing was repeatedly upheld in the cases of *Hood v United Kingdom*¹⁰⁶, *Cable and others v United Kingdom*¹⁰⁷ and most recently in the *Case of Morris v The United Kingdom*.¹⁰⁸ In *Morris* the European Court of Human Rights also cited with approval criticism of the role performed by the judge advocate made during the Canadian Supreme Court case of *R v Genereux*.¹⁰⁹ This criticism related to the lack of tenure for judge advocates. Because the judge advocate was appointed on a case by case basis, as with the Australian system, the court found that there was a reasonable apprehension that the performance of the judge advocate might be affected by concerns over future selections.

The findings against the British and Canadian military justice systems are directly applicable to the Australian system where the Convening Authority appoints the participants and instructs the prosecutor. There is also an absence of tenure for Judge Advocates and Defence Force Magistrates, a point that has been argued before the Australian courts, though as at mid 2005 without success.¹¹⁰ The ICCPR cannot be

¹⁰⁶ 18 February 1999 no. 27267/95 ECHR 1999-I.

¹⁰⁷ 18 February 1999. <http://www.onecrownofficerow.com/hru/items/item229.htm>. (12 Sep 2005)

¹⁰⁸ Application no. 38784/97 European Court of Human Rights (26 February 2002).

¹⁰⁹ [1992] 1 SCR 259.

¹¹⁰ In *Re Tyler and Ors; ex parte* (1989) 166 CLR 518 the *Genereux* point was argued with regard to the independence of the Defence Force Magistrate.

directly enforced by the Australian courts.¹¹¹ However, in the event that an Australian military justice system were to be utilised as proposed in a peacekeeping operation a review of the procedures would be required to ensure compliance with international law. Although the cases before the European Court are not binding they are persuasive. Despite Australia's domestic courts rejecting the arguments regarding the impartiality of the Australian military justice system it would seem that at an international level it might well be found that it is not compliant with Article 14 of the ICCPR. The role of the Convening Authority would require modification and the magistrate would need to have tenure. In the context of a deployment the magistrate would effectively have tenure for the period of the deployment so that this issue at least would be resolved. As a matter of practicality the Defence Force Magistrate would be utilised for deployment rather than a court martial format as the trial of the matter by peer that is the principle underlining the court martial process would not apply to a civilian.

The Australian example highlights the requirement for a careful analysis of the systems proposed for use in a peacekeeping context. The suspect areas in the Australian system can easily be rectified by modification of the process but this would require an act of parliament and could not be done by the UN. Planners have to be prepared to consider human rights law well in advance to ensure that the system that is put in place is itself compliant with the international human rights law it is designed to protect. The UN would not be able in this situation to simply accept the first offer that was made by a State but would be required to be selective. At this point in time an Australian military justice system would not be in a position to be selected.

¹¹¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

UN as sovereign?

In this work it has been argued that international human rights law is the legal framework to be applied in collapsed State peacekeeping. For completeness the issue of whether the UN assumes the role of sovereign needs to be addressed as if the UN does assume sovereignty then its powers would derive from its position as sovereign rather than from the Charter and international human rights law.

The UN is not a State or a territory. It is not populated nor does it have any citizens. It is simply a politico-bureaucratic organisation created by a number of States and showered with the gifts deemed necessary to conduct the business that the most powerful States in the post WWII world determined it should do. It is in some respects a club with hereditary seats in the inner sanctum for the States that were victorious in WWII. The inner core of power, the Security Council, is fixed in a time warp. The fluctuating fortunes of States are not reflected in terms of membership of the Security Council. Although the General Assembly works on broadly democratic grounds the Security Council is not truly democratic as between States due to the veto. The distribution of power between the Security Council and General Assembly is unequal. Despite all these apparent injustices and contradictions of the 'one member one vote' ideal it is arguably indispensable to the global intercourse of States. It has become a unique entity that has in many regards the character of a State with none of its attributes. The UN Secretary-General for example, receives a significant amount of attention from the world media and is treated in much the same way as a head of State. How is it then that States which so jealously guard their rights,

privileges and territories from one another raise not the slightest concern when the UN appears to act like a sovereign State? It is suggested that the answer to this, as with many things, lies in the history of the UN.

The League of Nations

The ill fated forerunner of the UN was the League of Nations. It was set up in response to the horrors and carnage of WWI while a commitment never to repeat such diabolical folly was fresh and sincere. With the continental shifts caused by crumbling empires the drafters of the League had to deal in some way with the political vacuums left behind and provide some form of interim government for the former subjects of the empires.

The Covenant of the League of Nations did not expressly refer to the self-determination of peoples, nor was it a central issue as it is to the UN Charter. However, the League's concern for the territories left ungoverned post World War I by the fall of Germany and Turkey was expressed in terms that can be seen as the forerunner of the principles of self-determination. The Covenant of the League stated that peoples of some of the former imperial territories were not yet able to stand by themselves. Therefore Mandated Territories should be set up to tutor such peoples until they would be ready to govern themselves¹¹². Different categories of Mandate were established dependant on the needs of the territory¹¹³.

¹¹² Article 22 Covenant of the League of Nations: Fry, C.B *Key-book of the League of Nations*. (1923) at 165-7.

¹¹³ Harris, in Harris, D.J. *Cases and Materials on International Law*. (5th ed. 1998) at 131.

The Mandatory State was to provide administration to the territory on behalf of the League and render an annual report on its activities to a permanent Commission, which was in turn to report to the Council of the League. Pursuant to the founding Article 22, the Mandatory State was to be selected in accordance with the wishes of the communities that were at a state close to self-sufficiency. Other Mandatories were to be provided on the basis of geographical propinquity and the voluntary assumption of the role by the Mandatory.

In terms of administration of the territories, Article 22 directed the Mandatory to create conditions guaranteeing “freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.” Circumstances were also identified where the Mandatory could extend its own laws and treat the territory as if it were part of the Mandatory’s territory, subject to provisions relating to just treatment. Although all the trappings may have been present, the Mandatory was not granted sovereignty over the territory¹¹⁴.

The United Nations

Following the end of the World War II and the founding of the UN, the League’s Mandates system was replaced by the UN trusteeship system. The provisions of the

¹¹⁴ See for example the *Status of South West Africa Case* ICJ Rep (1950) at 132 where the ICJ held that the conferment of a mandate did not involve cessation or transfer of territory.

trustee system were broadly similar to the League with the promotion of self-government and the interests of the inhabitants within the system of international peace and security being fully articulated. The territories, which still required trusteeship, were transferred to the UN system with the Mandatory becoming the trustee. There are now no trustee territories remaining with all such territories having achieved Statehood.

Under the UN Charter, States are very broadly analogous to the individual in domestic law. The State is the unit that interacts with the UN and other State actors engaging in debate and agree or otherwise to be bound by treaties. States are created equal under the Charter regardless of political power realities¹¹⁵. The territorial integrity and political independence of the State is guaranteed under the Charter by the principles of non-intervention and prohibition on the use of force. The sacrosanct sovereignty of the State, regardless of political and power realities, is at the very core of the UN system, and despite the fictional foundation of equality upon which the UN is built both the UN and the theory of sovereign equality has remained intact. Unlike a natural person it is recognised that the State is made up of parts, the people of the State. There is no specific recognition of the individual as such in the Charter but there is express recognition of the right of the people as a collective to choose government and in this way the people constitute the State¹¹⁶. The UN stance on sovereignty as creating an absolute right and the questionable efficiency of the

¹¹⁵ Walker, R.B.J. "Peace in the Wake of Sovereign Subjectivities" in Hindess, B and Jolly, M (eds) *Thinking Peace Making Peace*. Occasional Paper Series (1/2001) at 28.

¹¹⁶ *Id* at 27.

Security Council have been cited as causes for the increasing incidence of peacekeeping and peace building operations coming under fire.¹¹⁷

The UN has from time to time taken on the administration of States and territories. This is a different situation and quite separate as a matter of law from the trusteeship arrangements, as discussed in chapter four of this work. Apart from the Kosovo and East Timor case studies in chapter four other examples of UN administrations can be found in the United Nations Transitional Assistance Group in Namibia (UNTAG, 1989-90), the United Nations Operation in Mozambique (ONUMOZ, 1992-4), the United Nations Transitional Authority in Cambodia (UNTAC, 1992-3), and the United Nations Transitional Administration in Eastern Slavonia (UNTAES, 1996-8).

The ICJ has examined the powers that flow to the UN from the Charter with regard to administration. In the *Namibia Case* the ICJ stated that:

Article 24 of the Charter vests in the Security Council the necessary authority to take such action as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General's Statement, presented to the Security Council on 10 January 1947, to the effect that 'the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII... [T]he Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The

¹¹⁷ Fleshman, M. "Sierra Leone: Peacekeeping Under Fire" *Africa Recovery*, Vol.14 No.2 (July 2000),

only limitations are the fundamental principles and purposes found in Chapter I of the Charter.¹¹⁸

It appears then that the UN is able, at the very least as a matter of practice, to administer a State or territory with the requirement for sovereign power. If the Security Council has the power flowing from the Charter to create an administration then it can surely create a mandate that is strong enough to provide the lawful basis for basic legislation or ordinances for the enforcement of law and order in a peacekeeping operation. After all it is only in States where the peacekeeping operation is being conducted at the extreme of the peacekeeping continuum, where local infrastructure is in a state of collapse, that peacekeepers would need the UN to exercise legislative power. The power to legislate was expressly granted to Mandatories under the League and to trustees under the UN scheme. The implied extension of power to peacekeeping operations relying on a Trusteeship model where the UN administers the State or territory on behalf of the people in whom sovereignty is vested¹¹⁹ is entirely logical.

Conclusion

As the situations into which peacekeepers are placed become more complex the strategies for effecting successful outcomes must be correspondingly inventive. The

at 8

¹¹⁸ *Namibia Case* 276 ICJ Rep. (1971) at 52.

¹¹⁹ In *Porter v United States* (1974) ILR, 61 at 102 it was stated that “sovereignty resided in the people of the territory and was held in trust for them by the administering authority: *Aradanas v Hogan* ILR, 24 (1957) at 57 concerned trust territory and described it as being under UN sovereignty and jurisdiction.

rule of law has been identified as a key ingredient for success in peacekeeping operations. Without the firm foundation of the rule of law peacekeeping operations are likely to fail or have only a transitory effect. The more complex the situation is found to be, the more vital that the justice system is firmly established and that it has credibility and integrity. In situations where the justice system has collapsed peacekeepers must quickly fill the void. The UN has exercised the power to legislate and set up judicial systems in past operations without international protest. The most successful operations have used a legal framework that has been a blend of the pre-collapse domestic legislation and human rights law. The UN has the legal authority to subject the occupants of a collapsed State to the rule of law under the doctrine of implied powers and where to do so is consistent with the objects of the Charter.

Recent experiences in East Timor and the former Yugoslavia have underlined the difficulties in providing instant credible justice solutions from local resources.

Justice systems developed from nothing require time. Operations cannot be postponed for the justice system to develop: justice must be available instantly to underpin the operation. The only instantly available and deployable justice system is the military justice system. The mandate combined with extant international human rights conventions and customary laws provide the framework for jurisdiction, rights and obligations. Donor States can make systems that are human rights compliant available in the same way that they currently provide equipment and personnel.

Military justice systems can be selected that match the type of legal system previously operating in the area and may well improve on it. By deploying a military justice system, legally qualified prosecutors, defenders and magistrates are made instantly

available. The justice system is well understood by those that operate it so that no time is lost in retraining or familiarisation.

Deployment of a military justice system does not interfere with the development of a permanent local solution; indeed it supports local development by relieving the pressure for that system to qualify judges and legal professionals instantly. The time that is necessary to produce a credible local system is available while the military justice system is in operation. The military system can also be used as a model for the local system allowing local court officials to train by witnessing practices and procedures first hand.

Planners for peacekeeping operations need to be aware of the international human rights law requirements and ensure that only systems that meet the international human rights law requirements are deployed. The implementation of this solution would significantly enhance the effectiveness of operations. It would also ensure that the human rights imperatives that flow directly from the UN Charter are complied with on peacekeeping operations.

CONCLUSION

The hypothesis of this work is that international human rights law and not international humanitarian law provides the legal framework for UN peacekeeping in collapsed States. This hypothesis has been confirmed through an analysis of the purpose and function of these two areas of international law. It has been shown that international human rights law has evolved from aspirational statements of the international community into a body of law with the practical power to improve and bring certainty to the conduct of UN peacekeeping by providing a framework around which to reconstruct law and order, the foundation of civil society.

The way that international human rights law can be used to practical effect has been set out in chapter seven of this work. Use of the International Covenant on Civil and Political Rights as the foundation for ordinances has been put forward as a workable solution to fill the vacuum created by the collapse of domestic State infrastructure. Use of military justice systems has also been recommended as a rapid response measure to support peace building and the reconstruction of a viable State.

The conclusion reached is that there is a seamless continuum of law between international humanitarian law and human rights law. International human rights law applies at all times. Even where the threshold has been crossed into international humanitarian law as a result of an armed conflict or belligerent occupation, as determined by the UN Human Rights Committee and the International Court of

Justice,¹ international human rights law continues and works in a mutually supportive way with international humanitarian law.

As set out in chapter one, there are many forms and definitions of peacekeeping. These range from the traditional form, where peacekeepers typically observe border regions and troop demobilisations or elections, to peace enforcement where peacekeepers may be actively engaged in armed conflict. There is no dispute in this work that the laws of armed conflict apply to situations in which peacekeepers are engaged in armed conflict as occurred in Korea in the 1950s and the Congo in the 1960s. There is also no dispute raised in this work that where peace enforcement action puts the force into a situation of belligerent occupation that the Fourth Geneva Convention and the law of occupation apply. Although the second Gulf War in 2003 was not sanctioned by the UN, it was adopted as a UN authorised peacekeeping operation on 22 May 2003 by UN Security Council Resolution 1483. It was recognised as an occupation and the laws were applied accordingly. The acceptance by the UN that the force was in occupation can be seen in Resolution 1546,² which endorsed the end of the occupation and transition to a new phase of the operation on 8 June 2004.

In chapter two of this work the approach of the UN was examined through reports of Secretaries-General and other reports prepared for or on behalf of the UN. The conclusion reached as a result of this analysis was that, from a UN perspective, peacekeeping is a tool to maintain the peace and security for the world community and to be used to rebuild peace and ensure human security. Actions taken by the UN

¹ Human Rights Committee *General Comment No.31* (CCPR/C/21/Rev.1/Add.13, (26 May 2004). The *Wall Advisory Opinion* [2004] ICJ (9 July 2004).

² United Nations S/RES/1546 (8 June 2004).

to ensure human security are consistent with sovereignty that is vested in the people and therefore unless State forces engage peacekeepers in armed conflict the UN force cannot be seen as an occupying force violating that sovereignty. In any event it may be argued that a Member State may be presumed to have consented to the actions of the UN by its participation in the Charter and therefore the position of a UN force is the same as a peace time visiting force; a very different legal condition to belligerent occupation.³

This position is consistent with the practice of peacekeeping as demonstrated in chapters three and four of this work. Other than the Australians in Somalia, UN forces have not considered themselves in occupation of a State. The troop contributing nations have not acted in a manner consistent with occupation. There has been application of international humanitarian law only in circumstances where a state of armed conflict has arisen. As a result it is argued that State practice points clearly to the legal position being that where UN forces are not in belligerent occupation⁴ or involved in armed conflict, that international humanitarian law and in particular the laws of occupation do not apply.

The conclusion drawn with regard to the lack of application of international humanitarian law to UN operations in collapsed States is wholly consistent with the purposes of international humanitarian law. Analysis of this body of law and its application to peacekeeping in chapter five makes it clear that the purpose of international humanitarian law is to regulate the conduct of hostilities that amount to armed conflict or have the potential for the lawful application of force against an

³ Jennings, R and Watts, A (eds) *Oppenheim's International Law* (ninth ed, 1996) at 1155 n. 4.

⁴ It is not disputed that the UN is capable of being in belligerent occupation; merely that it is not so simply because it has jurisdiction over territory as a result of operations in a collapsed State.

occupying force.⁵ Where a force has occupied territory in violation of sovereignty and there has been no resistance there is still the potential for the invaded State to respond and use armed force to eject the invader from its territory. As a result there is application of all the laws of armed conflict in belligerent occupation situations.⁶

Belligerent occupation is wholly distinguishable from the situation that UN forces found themselves in deployments such as those to East Timor, Kosovo, Cambodia and so on. In these deployments a system of law was required that would support the reconstruction of the State. This is not the function of the Fourth Geneva Convention, which tends to preserve the status quo of the occupied State's domestic law while making allowances for the preservation of the occupying force's security.⁷

While it is accepted that a UN authorised force can be in occupation in certain circumstances, it is not accepted that where a peacekeeping operation is conducted in a collapsed State and the UN takes effective control, that it is as a result in occupation and that the international humanitarian law of occupation applies, as contended by Michael Kelly.⁸

The basis for contending that Kelly is incorrect is found in an analysis of his argument and a demonstration that it is founded on an incorrect interpretation of occupation as it appears in Article 2 common to the Geneva Conventions, the approach taken by the UN to its peacekeeping activities, the conduct of peacekeeping operations, and the purpose of international humanitarian law.

⁵ Actions of the French resistance against the German occupation for example.

⁶ Article 2 is common to all the Geneva Conventions of 1949 and therefore brings them all into play in a belligerent occupation.

⁷ See for example Article 64-77 Fourth Geneva Convention of 1949.

⁸ Kelly M. *Restoring and Maintaining Order in Complex Peace Operations*. (1999).

In chapter six of this work it was concluded that not only were the laws of armed conflict not applicable to peacekeeping operations in collapsed States simply by virtue of the peacekeepers administering the State but also that an attempt to extend the laws of armed conflict to cover such situations may effectively defeat the operation.

In chapter seven an alternative solution to that found by Michael Kelly was put forward as the law applicable to collapsed State peacekeeping. International human rights law, it is argued, is the law applicable to such situations. The chapter demonstrates how international human rights law instruments such as the International Covenant on Civil and Political Rights can be used as the framework for a system of law that is capable of providing the basis for reconstruction of a State. A constitution founded on international human rights law has an excellent chance of providing the necessary structure around which a peaceful civil society can be recreated. The authority for the UN force to do this is based on the mandate and the obligations of the States contributing troops to the UN peacekeeping force to comply with their international human rights obligations.

Chapter seven also argued for the need for a rapid reaction to State collapse by the reestablishment of the rule of law and order. Without the rapid return of law and order there can be no reconstruction and the longer the State is in turmoil the harder it is for the operation to succeed.⁹ The solution put forward is for the UN to select the military justice systems from Member States that best suit the domestic State's legal

⁹ Strohmeyer, H. "Making Multinational Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor." *Fletcher Forum of World Affairs*. Vol.25 No.2 (Summer 2001) at 107.

regime¹⁰ and that complies with the international human rights requirements for trials. Jurisdiction over certain crimes could be given to the military tribunal of the mandated States. With this in place the domestic justice system could be grown without the pressure to act instantly while poorly trained and prepared. The result would be the immediate establishment of law and order, so vital to peace building and the construction of a robust domestic justice system capable of taking its place as a corner stone of civil reconstruction.

Whereas international humanitarian traditions reach back into the early times, followed by its development into international law in the 19th Century, international human rights law is a much younger branch of international law that has grown and developed only in the last fifty or so years. Although international human rights law does not have the historical traditions of international humanitarian law it has become increasingly powerful and has proved a robust ally to peacekeeping operations designed to reconstruct civil societies. It is flexible enough to form a framework that can be used where there is little other social structure as well as providing for the protection of a broad spectrum of rights in complex western democracies. Indeed the UN has been effectively using it as a framework without articulating it as demonstrated in chapters three and four of this work.

By providing peacekeepers with a clear and practical understanding of the laws that apply to peacekeeping in collapsed States and by the rapid establishment of a credible and legitimate justice system founded on the robust legal framework that international human rights law provides the tragedy that accompanied the failed operation in

¹⁰ Common law, civil law, religious law with adversarial or inquisitorial process etc.

Somalia¹¹ can be avoided and a significant step made in the evolution of peacekeeping.

¹¹ Canadian Government. *Report of the Somali Commission of Inquiry*. (2 July 1997) at <http://www.dnd.ca/somalia/somaliae.htm>. (5 Oct 2005).

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