

**PEOPLE FIRST, NATIONS SECOND
A NEW ROLE FOR THE UNITED NATIONS**

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...we have probably reached a stage in the ethical and psychological evolution of Western civilization in which the massive and deliberate violation of human rights will no longer be tolerated.

Perez de Cuellar (1991)

INTRODUCTION

The tragedy of East Timor coming so soon after that of Kosovo has focused attention again on the weaknesses of previous United Nations missions that have been *ad hoc*, reactive, and narrowly focused on solving the international emergency of the moment. The United Nations and its Members must focus on the need for timely intervention to save civilian populations from mass slaughter. It must adopt a new role as the assertive custodian of human rights because the use of its enforcement powers in the domestic affairs of rogue States may have a deterrent effect. Therefore, it should lead the way in defining its interventionist role in the emerging international norm of humanitarian intervention.

THE UNITED NATIONS' ROLE

The conduct of national elections has become one of the most visible and concrete aspects of United Nations involvement in the domestic affairs of States today.¹ However, its participation in the domestic affairs of States has been overly cautious and mainly through the supervision and/or monitoring of elections at the invitation of the host State. This recognises that the principles of national sovereignty and non-interference in domestic affairs are fundamental principles and key pillars of the United Nations Charter. In practice, this usually means a request by States for campaign and poll monitoring or for technical, financial and security assistance from the organisation. Since 1990 the United Nations has been involved in the elections in many States undergoing political transformation including

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¹ See United Nations Centre for Human Rights, United Nations, Human Rights and Elections: Handbook on the Legal, Technical and Human Rights Aspects of Elections, United Nations Doc HR/p/ot/2 (1994).

Albania, Angola, Cambodia, Haiti, Lesotho, Malawi, Mozambique, Nicaragua and South Africa.

The form and extent of United Nations intervention are set to change if the historic addresses of Secretary-General Kofi Annan and President Bill Clinton at the 54th Annual Session of the General Assembly on 20 and 21 September 1999 respectively are anything to go by.² Both leaders alluded to the fact that rogue states should not expect their borders to protect them in the face of massive, organised and systematic violations of human rights. Further, Kofi Annan pointed out that there was nothing in the Charter to preclude the recognition that there were rights beyond borders.

These pronouncements have come in the wake of heinous atrocities committed by States, including deliberate, massive and systematic tortures and executions by both State and non-State actors in various corners of the world.³ They have happened at a time when State actions have been under more international scrutiny and many of them are under the control of oppressive national regimes whose political architecture began during the post-World War II era.⁴ When democratic changes swept through Eastern Europe, Asia and Africa in the 1990s and the citizenry clamoured for democracy, transparency and accountability in government, the regimes were vicious in the face of these challenges to their political authority and civil governance styles.⁵ They used the doctrine of sovereignty and the principle of self-determination as mantles to defend against outside interference and sought to address their abuse and misconduct in domestic affairs by the abridgment of fundamental human rights.⁶

²The text of the speeches can be accessed at the following URL <<http://unbisnet.un.org/webpac-bic/wgbroker>>.

³ Examples are the 1992 ethnic cleansing frenzy by the Serbs during the break-up of Yugoslavia, the 1994 genocide in Rwanda, the brutal struggle in Liberia, and the bloodbath in East Timor.

⁴ For example see Chirot D, *Modern Tyrants: the Power and Prevalence of Evil in our Age* (1994, Free Press, New York); Davidson B, *The Black Man's Burden and the Curse of the Nation State* (1992, James Currey, London).

⁵ Examples are: (1) the brutal repression of opposition meetings in Kenya in 1992 following calls for multi-partyism in a de jure one party state; (2) the crackdown on political activists and arbitrary detentions in Nigeria in 1995 after the annulment of civilian elections by the military regime; (3) the high-handed handling by Indonesia following the 1998 Jakarta riots that toppled Suharto from power; and (4) the political repression in Burma that was targeted at pro-democracy activists.

⁶ "Nigeria accuses West of smears", *New York Times*, 18 November 1995 at A4.

During the 1960s and 1970s socialist and third world States dominated the General Assembly.⁷ They construed the self-determination principle in several key international instruments of that period narrowly and excluded the international scrutiny of cases where political rights were denied to their citizens.⁸ It was ironic that the worst human rights offenders were often the most vocal advocates of the principle of self-determination. Against this background, it is suggested that it would be more pragmatic in a changed world order for the United Nations to develop and advance human rights and become its custodian. If accepted, the organisation should be able to use it as justification for its interventionist role, including the use of military force where appropriate.⁹

Principles on self-determination, State sovereignty and involvement in the domestic affairs of States should not hinder such express responsibility supporting human rights.¹⁰ The human rights responsibilities of the global community should not be driven by or seen as a mere public relations exercise. There are international instruments on human rights including the Charter, the 1948 Universal Declaration of Human Rights,¹¹ the 1967 International Covenant on Civil and Political Rights (“ICCPR”),¹² the 1966 International Covenant on Economic, Social and Cultural Rights (“ICESCR”)¹³ and the Optional Protocol to the ICCPR. Professor Louis Henkin has referred to them as a collective International Bill of Rights¹⁴ representing a global consensus that an international responsibility for human rights exists. In reality, the position is complex because the United Nations is an organisation of States that are represented by governments,

⁷ They included the USSR, Peoples Republic of China, Iraq, Syria, Mexico and virtually all the new independent African States.

⁸ Cassese, “The General Assembly in historical perspective 1945-1989” in Alston P (editor), *The United Nations and Human Rights* (1992, Clarendon Press, Oxford) 40-46.

⁹ The intervention in East Timor by a United Nations authorised international force mandated to bring law and order to a territory, to which an independent nation-state lays claim, is counter to the traditional United Nations policy of intervention in a situation with a supposedly “well-defined international dimension.”

¹⁰ Crosette, “China and others reject pleas that the United Nations halt civil wars”, *New York Times*, 23 September 1999 at <<http://www.nytimes.com/library/wo...1/092399nations-intervention.html>>; Leopold, “China castigates west on humanitarian intervention”, *Reuters News Agency*, 25 September 1999 at <<http://biz.yahoo.com/rf/990922/bcr.html>>.

¹¹ General Assembly Resolution 217a, United Nations Doc A/810 (1948).

¹² 999 United Nations Treaty Series 171.

¹³ 993 United Nations Treaty Series 3.

¹⁴ See Henkin L, *The Age of Rights* (1990, Columbia University Press, New York).

some of which are major violators of human rights.¹⁵

Following the end of the Cold War, the United Nations developed new roles concerning its peacekeeping efforts. For example, military-style humanitarian intervention and enforcement actions have occurred in places like Somalia, Iraq and more recently in Bosnia and East Timor. However, such action has not always been implemented. Owing to superpower hostility to anything substantial in peacekeeping, former United Nations Secretary-General Dag Hammarskjöld devised the Concept and Guiding Principles for the United Nations Emergency Forces.¹⁶ This was a compromise solution that used lightly armed units of military personnel who acted more like policemen than soldiers do. To meet today's needs, the Security Council should lower the criteria when considering the appropriate conditions for peacekeeping and devise formal rules of engagement for peacekeepers that are sufficient to meet the needs of the conflict, taking into consideration the area to which the forces are sent. This would change peacekeeping into peacemaking.

Sovereignty, territorial integrity and political independence as norms have weakened over time. The growing body of human rights law and the developing practice of the Security Council under Article 39 of the Charter in Iraq, Somalia, Bosnia and East Timor all point to an emerging customary norm of United Nations humanitarian intervention. These have occurred where humanitarian violations had been severe or had the slightest trans-boundary effect. It may be argued that this norm was crystallised when the organisation authorised intervention in East Timor. As the Security Council liberalises the meaning of "threat to the peace" to include non-military threats, the likelihood of future humanitarian intervention will rise. As it increasingly encounters threats to the safety of its peacekeepers, it should be prepared to exercise a level of force that goes beyond mere self-defence.

In East Timor, InterFET was replaced by the United Nations Assistance

¹⁵ See Goodrich LM, *The United Nations in a Changing World* (1974, Columbia University Press, New York) 2.

¹⁶ United Nations Department of Public Information, *The Blue Helmets: A review of United Nations Peace-keeping*, 18 UN DOC. DP1/1065, Sales No. E.90.I.18 (1990) 47-48. These principles were devised by Hammarskjöld for the UNEF I forces. The principles in this paper were not initially penned by the Secretary General, but reflect precepts which have developed through subsequent peacekeeping operations.

Mission in East Timor (“UNAMET”).¹⁷ The change in the peace-making mandate of the original international force for East Timor with a traditional peacekeeping mandate clearly indicates that the United Nations is reviewing the military dimensions of its forces. This addresses the question raised by the United Nations Protection Force in Bosnia-Herzegovina (“UNPROFOR”), namely, what is an acceptable level of force consistent with “all necessary measures” that United Nations authorised missions may use to deliver aid to those in need? Are United Nations troops allowed to use force in “anticipatory” self-defence?

As original peace-making missions mandated to use force such as InterFET are launched the rules of engagement and the authority for the use of force should be modified and enunciated articulately. However, the stakes are high. The safety of peacemakers, the continued viability of the collective security structure of the United Nations and the maintenance of international peace and security in future operations are all dependent on the ability of the organisation to respond to this challenge.¹⁸

USE OF FORCE – HISTORICAL PERSPECTIVE

Peacekeeping and peace enforcement originate in Chapter VII of the Charter. *Inter alia*, the Charter is based on principles of sovereignty, non-intervention and the peaceful settlement of international disputes. Although peacekeeping is not explicit in the Charter, it has evolved over the past 50 years into a well developed concept governed by a distinct set of principles.

When the Cold War ended, the United Nations took on a new and aggressive role as a peacemaker that used military force. Iraq’s aggression in Kuwait was met by an international coalition of armed forces authorised by the organisation. The humanitarian crisis precipitated by the Iraqi oppression of the Kurds and the inability to supply food and assistance to the civilian population in war-ravaged Somalia presented the organisation with new challenges. The issues had political, military, international and domestic implications. But it was the recent humanitarian intervention in

¹⁷ Security Council Resolution 1264 of 1999.

¹⁸ The Clinton administration introduced very stringent guidelines for future participation in international peacekeeping operations. The United States would only participate if there have been grave threats to international peace and security, major disasters which require relief, or “gross violations of human rights”: “US eyes new criteria for peacekeeping missions”, *Chicago Sun Times*, 30 January 1994 at 36.

East Timor by an international force expressly authorised to use force to bring about law and order in the territory and to protect fundamental human rights that shook the United Nation's key pillars, the principles of sovereignty and non-intervention.

Peacekeeping has seen a number of evolutionary stages. It began with the use of force in self-defence only. From there it moved on to a goodwill presence that was authorised by a host government. The next step was active military action by international forces authorised by the United Nations against aggressive governments and more recently the world witnessed the humanitarian peacemaking efforts of the international force in East Timor. The main aim of the efforts was to halt human rights violations and restore law and order in a territory to which a sovereign State had earlier laid claim. Such efforts had been characterised by the use of all necessary force in the peacekeeping and peace enforcement action and a simultaneous lack of goodwill by the host government.

Article 2 of the Charter provides the twin norms of State sovereignty and the non-use of force. The prohibition extends to the use of force against the territorial integrity or political independence of any State within the terms of Article 2(3) of the Charter:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations.

Article 2(3) is broader than Articles I-II of the 1928 General Treaty for the Renunciation of War,¹⁹ commonly known as "the Briand/Kellog Pact" or Pact of Paris and for all intents and purposes has superseded the Briand-Kellog Pact.²⁰ Generally speaking, the Briand/Kellog Pact renounces war as an instrument of national policy. It prohibits the use and threat of use of force and war ceased to be a national right. It provides:

Article I

The High Contracting Parties solemnly declare in the names of their

¹⁹ 94 League of Nations Treaty Series 57.

²⁰ In spite of this, this treaty has never been terminated. For more discussion refer to Harris DJ, *Cases and Materials on International Law* (1998, Sweet & Maxwell, London) 861-862.

respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Following the aftermath of World War II, war was cast as an international crime. The 1919 League of Nations Covenant²¹ in Articles 15 and 16 sought to limit resort to war and, as seen above, the Briand/Kellog Pact did likewise.

Although Article 2(4) was first thought to outlaw any use of force by a State against another State, exceptions to this provision were subsequently used to justify unilateral interventions.²² The following provision in Article 51 was an exception expressly built into the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member.

This provision permits enforcement actions that the Security Council authorises. However, there are implicit exceptions to Article 2(4) that are derived from the provision itself based on the argument that it prohibits the use of force against the territorial integrity or political independence of another State. However, it does not apply to an intervention that is not intended to even temporarily occupy the State's territory or interfere with its political autonomy or sovereignty.²³ Nonetheless, this argument is now under siege because both Secretary-General Kofi Annan and President Bill Clinton pointed out during the 54th Annual Session of the General Assembly that rogue states should not expect their borders to protect them.²⁴ They argued that international concern for human rights took

²¹ 16 United Kingdom Treaty Series 4.

²² Henkin L, *The Use of Force: Law and US Policy in Right v Might: International Law and Use of Force* (1989, Council on Foreign Relations Press, New York) 38.

²³ *Ibid* 39-40.

²⁴ See discussion above.

precedence over claims of non-interference in domestic matters.²⁵

The doctrine of state sovereignty, long protected by the principles of non-intervention and self-determination in the domestic affairs of States, is recognised as customary international law and enshrined in the Charter. Further, Article 2(7) acknowledges the following:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.

However, the provision is limited by an exception that allows the “application of enforcement measures under Chapter VII”. Article 2(7) prohibits the United Nations, not States, from intervening in the domestic affairs of Member States.²⁶ However, in practice, the principle of non-intervention is eroded whenever States commit themselves to intervene when called upon by the United Nations for the greater good of the international community.²⁷ The large body of human rights law that has developed in conventional and customary law has also contributed to this and the development of Article 2(7), which indicates that violations of internationally recognised standards are not always matters that fall completely within a State’s domestic jurisdiction. This erosion of Article 2(7) has contributed in part to the increase in United Nations interventions in the post Cold War era,²⁸ which in turn has sometimes led to complex operations that have elements of peacekeeping and peace enforcement.

The trend mirrors the effects of globalisation and the numerous treaties and conventions that States enter into. It has reduced the world into a global village where actions, whether military, political or economic, by one State may adversely affect a neighbouring State or States.²⁹ Thus, sovereignty

²⁵ See Chirot D, *Modern Tyrants: the Power and Prevalence of evil in our Age* (1994, Free Press, New York) 3.

²⁶ See Kartashkin, “Human rights and humanitarian intervention” in Damrosch LF and anor (editors), *Law and Force in the New International Order* (1991, Westview Press, Oxford).

²⁷ Scheffer, “Toward a modern doctrine of humanitarian intervention”, (1992) 22 *University of Toledo Law Review* 253, 262.

²⁸ Half of the 26 United Nations authorised missions have been after the Cold War ended.

²⁹ Examples are the mass trans-boundary movement of refugees and regional tension created by arms testing.

has undergone the metamorphosis from individual supremacy, which accompanies the birth of the sovereign State, to collective responsibility that is consonant with globalisation and the contemporary cohesiveness of the international community. The notions that sovereignty does not entitle a government to kill its own people and that outsiders have a duty to take action if it occurs are captured by Kofi Annan who surmised that nothing in the Charter precluded a recognition that there were rights beyond borders.

PEACEKEEPING

Generally, there are two categories of peacekeeping, observer missions and peacekeeping forces. The United Nations Truce Supervision Organisation (“UNTSO”) was one of the first peacekeeping operations established by the Security Council. It was created with the consent of States to supervise the truce and Armistice Agreements between the newly formed State of Israel and four of its Arab neighbours in 1948-1949. Such observers were not armed. When Dag Hammarskjold was Secretary-General, he made UNTSO a traditional model for United Nations peacekeeping.

The 1956 Suez conflict provided the United Nations with its first opportunity to deploy an armed peacekeeping force, the United Nations Emergency Force (“UNEF”). UNEF’s primary mandates under General Assembly Resolution 1000 were to secure a ceasefire between British, French, Israeli and Egyptian forces in the Sinai Peninsula, direct the withdrawal of the non-Egyptian forces from Egyptian territory and patrol the border areas. Also, UNEF was responsible for achieving the aims of the Egypt-Israeli Armistice Agreement. Dag Hammarskjold indicated that although it was not a military force controlling temporarily the territory in which it was stationed, UNEF was more than just an observer because its troops were clearly intended to be deployed for peaceful purposes.³⁰

A larger and potentially more dangerous deployment of peacekeepers occurred when the United Nations established the Operation in the Congo (ONUC) from 1960-1964. Originally, ONUC was set up to defuse the separatist civil war taking place in the recently decolonised Congo. Belgium, the former colonial power, was required to remove its troops from the Congo under the United Nations’ mandate. Although not

³⁰ United Nations Department of Public Information, *The Blue Helmets: A Review of United Nations Peace-keeping* 18 UN Doc DPI/1065 (1990) at 48.

deployed for the purpose of initiating any use of force, ONUC's mandate included assisting the Congolese government with the restoration of law and order. After the government disintegrated and attacks on United Nations personnel took place in February 1961, the Security Council authorised ONUC to "take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including...the use of force, if necessary, in the last resort."³¹

The mandate was expanded in November 1961. By January 1963 ONUC numbered some 20,000 fully armed troops including tanks, heavy artillery and fighter jets.³² This operation reflected the traditional model that Dag Hammarskjöld established in 1949 because it was not confrontational in character nor subject to a strict military discipline. When ONUC's mandate was expanded in 1961 to remove foreign mercenaries, it broke new ground. The troops were authorised to move freely within the Congo and their military intervention successfully prevented the secession of Katanga.³³ However, this model was abandoned by subsequent mandates but was resurrected three decades later with the end of the Cold War.

CLASSICAL PEACEKEEPING PARADIGMS

The United Nations Charter does not expressly make peacekeeping a non-enforcement action. Since the Charter was signed in 1945, there have been 26 United Nations peacekeeping operations. Articles 24 and 36 on the Security Council procedures for the settlement of disputes impliedly provided for the early peacekeeping missions that involved unarmed observers and that were authorised by the Security Council. However, this legal authority for UNEF and ONUC operations was subject to controversy. When the Soviet Union and France refused to pay their apportioned dues for those missions, the International Court of Justice was given an opportunity in an advisory opinion to pronounce on the legality of withholding funds including the lawfulness of peacekeeping operations. This was the *Certain Expenses Case*.³⁴

³¹ General Assembly Resolution 161 of 1961.

³² Durch WJ, "The UN operation in Congo" in Durch WJ (ed), *The Evolution of UN Peacekeeping: Case Study and Comparative Analysis* (1993, New York, St Martin's Press).

³³ United Nations Department of Public Information, *The Blue Helmets: A Review of United Nations Peace-keeping* 18 UN Doc DP1/1065 (1990) at 250.

³⁴ [1962] International Court of Justice Reports 151.

In the above case, the International Court of Justice held that Article 14 of the United Nations Charter empowered both the Security Council and the General Assembly to authorise peacekeeping operations.³⁵ The Court rejected the view that Article 43 agreements were required to establish peacekeeping forces and instead held that the operations were not coercive nor enforcement actions that required such authorisation. Thus, this case may be used as authority for the proposition that both Chapters VI and VII of the Charter have provisions that authorise the establishment of United Nations peacekeeping operations.

The early peacekeeping campaigns of the United Nations had three common elements or guiding principles. First, the operations should have the political support or at least the acquiescence of the five permanent members of the Security Council. Secondly, the consent and cooperation of the local parties to the dispute should be seen as essential for the deployment of United Nations peacekeepers. And thirdly, the neutrality or independence of the United Nations should be a primary ingredient for an effective peacekeeping operation. These guiding principles have come to distinguish peacekeeping operations in conflict situations from the more aggressive peace-making actions.³⁶

The concept of self-defence and the principles of non-intervention and sovereignty were blurred and modified during the Congo operation. While peacekeepers today continue to heed the principle of self-defence, the political and mandate complexities of operations such as those in Iraq and the former Yugoslavia have blurred the strict neutrality and impartiality of these operations. Recently, the United Nations authorised its Members to undertake enforcement action aimed at more specific goals that required the use of troops in areas of conflict.³⁷

³⁵ Article 14 provides that “the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations.”

³⁶ Fink, *From peacekeeping to peace enforcement: the blurring of the mandate for the use of force in maintaining international peace and security*, (1995) 19 *Maryland Journal of International Trade and Law* 1, 14, 15.

³⁷ Refer Security Council Resolution 82 of 1950 on Korea, Security Council Resolutions 660 and 678 of 1990 on Iraq, Security Council Resolution 794 of 1992 on Somalia, Security Council Resolution 929 of 1994 on Rwanda, Security Council Resolution 940 of 1994 on Haiti, Security Council Resolutions 770,781,787, 816 of 1992-1994 on Bosnia, and Security Council Resolution 1299 of 1999 on East Timor.

RISE OF PEACEMAKING

The traditional peacekeeping status and role of the United Nations have been changed from non-confrontational, with the consent and goodwill of the host State, to an aggressive presence lacking the goodwill of the host State. In practice, it may be observed that usually the host State had either been “bent” by the international community or the change in mandate had been necessitated by conditions that jeopardise the lives of United Nations troops in the arena of conflict.

Enforcement Action

In June 1950 the Security Council authorised the use of force in a military enforcement action for the first time after North Korean troops crossed the 38th parallel into South Korea. The Security Council met on 25 June and noted that the armed attack on South Korea by forces from the North constituted a breach of the peace under Article 39 of the Charter.³⁸ Two days later the Security Council in Resolution 83 recommended that United Nations Members furnish such assistance to South Korea as was necessary to repel the armed attack and restore international peace and security to the region.³⁹ When the Security Council could not use the Military Staff Committee that was established under Article 47 of the Charter to direct the military action, it established a unified military command with an American commander who reported to the President and Joint Chiefs of Staff of the United States.⁴⁰

Although this enforcement action was the first time that the United Nations authorised the use of force under Chapter VII of the Charter, curiously none of the resolutions mentioned either Chapter VII or Article 42. A reason could have been the nature and military scope of the operation that seemed to involve the United Nations “sub-contracting” its peace enforcement powers to the United States. Further, this had taken place during a period of complex politics and international and military relations involving the superpowers that effectively frustrated any definitive or decisive action by the Security Council.⁴¹

³⁸ Security Council Resolution 82 of 1950.

³⁹ Security Council Resolution 83 of 1950.

⁴⁰ Security Council Resolution 84 of 1950.

⁴¹ For a more detailed analysis see Arend AC and anor, *International Law and the Use of*

The United Nations was able to act in this situation in the middle of the Cold War due to the absence of the Soviet Union from the Security Council when the crucial vote was taken.⁴² However, the text of the resolution mirrored caution and provided for a formal United Nations command. By providing for General Assembly involvement in the operation in this manner it aimed at preventing a political backlash from the Soviet Union. However, in reality, the operation was essentially a United States operation and this is an important fact because subsequent United Nations military actions in the post Cold War era involving the aggressive use of force have had no formal United Nations command.⁴³

The end of the Cold War allowed the Security Council to authorise the use of force in a large-scale enforcement action for the second time. After Iraq invaded Kuwait on 2 August 1990 the Security Council very quickly condemned the action and demanded the immediate and unconditional withdrawal of Iraq's forces.⁴⁴ In response to Iraq's subsequent claim that it had annexed Kuwait, the Security Council in Resolution 665 on 25 August authorised the deployment of naval forces to enforce the sanctions provided in Resolution 661. In addition, the Security Council acted in Resolution 678 on 29 November by authorising its Members to use all necessary means to uphold and implement Resolution 660 and restore international peace and security to the area. These actions helped to prevent the fragmentation of world opinion on the United States' claim that such United Nations authority was unnecessary.

Using the actions in the Korean peninsula and the Persian Gulf as examples, for a time it appeared that the United Nations would most likely take action only when there was large-scale aggression by one State against another State. Furthermore, it appeared that it would do so only where the vital interests of at least some of the permanent members of the Security

Force beyond the United Nations Charter Paradigm (1993, Routledge, New York) 11-19.

⁴² The Soviet delegation was absent from the meetings of the Security Council in protest against Taiwan representing "China" in the Security Council (instead of the People's Republic of China).

⁴³ For example, Operation Desert Storm during the Gulf War, the military intervention in Haiti, and the Somalia humanitarian intervention were all under a United States command. On the other hand, the recent humanitarian intervention in East Timor was under an Australian command.

⁴⁴ United Nations Security Council resolution 660 of 1990.

Council were at stake.⁴⁵ There have been departures from this view recently as seen in Somalia and East Timor where the use of force was justified on humanitarian grounds and political or economic considerations.

Intervention in Domestic Affairs

The principle of non-intervention in the domestic affairs of a State is grounded in Article 2(7) of the Charter. Usually, humanitarian intervention is defined within the context of a State or States using armed force to protect a population from large-scale human rights violations. Although the Charter does not explicitly mention the use of force for humanitarian purposes, the United Nations authorised relief operations in northern Iraq and Somalia to protect human rights. Recently, this was the basis for intervention by InterFET in East Timor.

(i) **Kuwait**

In response to renewed uprisings after his defeat in the Gulf War, Saddam Hussein's military began to attack the populations in northern and southern Iraq to quell the uprisings. The renewed post Gulf War onslaught caused two million Kurds to leave the region and flee into Turkey and Iran. Since they have been denied entry into Turkey they remain in the inhabitable mountains of northern Iraq with reports of hundreds of deaths each day.⁴⁶

At the behest of Turkey and France, the Security Council adopted Resolution 688 on 5 April 1991 that condemned the repression of the Iraqi civilian population and demanded that Iraq end the repression immediately. The section of the Resolution on intervention is contained in the third paragraph where the Security Council insisted that Iraq should allow immediate access by international humanitarian organisations to all those in need of assistance and make available all necessary facilities for their operations in Iraq.⁴⁷ The acrimonious debate in the Security Council over

⁴⁵ See Fifoot, "Functions and powers, and interventions: United Nations action in respect of human rights and humanitarian intervention" in Rodley NS (editor), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (1992, Brassey's, London) 48.

⁴⁶ For a detailed exposition see Freedman and anor, "'Safe Havens' for Kurds in post war Iraq" in Rodley NS (editor), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (1992, Brassey's, London) 44-45.

⁴⁷ At the height of the Safe Havens Operation over 21,000 American, British and French troops were deployed in the region: *ibid.*

Resolution 688 indicated that the Resolution had been a controversy. Yemen and China argued that the intervention based on humanitarian grounds contravened the principle in Article 2(7) and would lead to a dangerous precedent.⁴⁸ Resolution 688 dictated that Iraq would forgo its right to territorial integrity and allow the Allies to go into a host State to establish a relief operation without that State's consent.

(ii) Somalia

In January 1991 President Said Barre's dictatorial regime in Somalia was overthrown by combating rival factions resulting in the end of an effective government. The disjointed civil war that fragmented Somalia into fiefdoms under various warlords who presided over clan alliances prevented the transport of food and humanitarian aid to millions of starving Somalis. In January 1992 the situation deteriorated to such a degree that the Security Council unanimously enacted a weapons embargo on Somalia.⁴⁹ During 1992 the Security Council sent a team to observe the administration of humanitarian aid there and deployed 50 United Nations observers by creating the United Nations Operation in Somalia ("UNOSOM").⁵⁰

The escalating chaos and civil anarchy required the Security Council to invoke Chapter VII of the Charter and increase the troop levels of UNOSOM peacekeepers. In November 1992 the United States offered to lead a military operation in order to deliver humanitarian aid to the Somalis following calls by the then Secretary-General, Boutros Boutros-Ghali. As a result, the Security Council adopted Resolution 794 unanimously. The resolution authorised the Secretary-General and United Nations Members to cooperate to use all necessary means to establish a secure environment for humanitarian relief operations in Somalia as soon as possible.⁵¹ Based on this resolution, the United States sent a large armed contingent into

⁴⁸ Rodley, "Collective intervention to protect human rights and civilian populations: the intervention in Defence of Human Rights (1992, Brassey's, London) 31. Yemen voted against the resolution while China abstained on the basis that this was an internal affair meriting no intrusion. China still holds this position as evidenced by the strongly worded speech of its Foreign Minister Tang Jiaxuan to the General Assembly during its 54th Annual Session that lambasted "a new form of gunboat diplomacy."

⁴⁹ Security Council Resolution 733 of 1992.

⁵⁰ Hutchinson, "Restoring hope: United Nations Security Council Resolutions for Somalia and an expanded doctrine for humanitarian intervention", (1993) 34 *Harvard International Law Journal* 624, 627.

⁵¹ Security Council Resolution 794 of 1992.

Somalia. The Security Council's mandate to use force was unique because the operation was not in response to an act of aggression. The catalyst for this explicit humanitarian action under Chapter VII was Article 39, which determined that the continuing civil war in Somalia was a threat to international peace and security.⁵²

(iii) **East Timor**

The changing status of the United Nations mandate is exemplified by Security Council Resolution 1264 that authorised the creation of InterFET. After the 30 August referendum in East Timor that was sponsored by the United Nations and following growing evidence of political cleansing, systematic torture, execution and large-scale organised detention and translocation of pro-independence East Timorese, InterFET was mandated to undertake a full military operation. In fact, the first and second drafts of Security Council Resolution 1264⁵³ had referred to the Indonesian army's involvement in the violence in East Timor. However, this reference was omitted from the final draft to facilitate the unconditional withdrawal of Indonesian troops from the area and placate Indonesian outrage at the United Nations operation.⁵⁴

Shortly after the United Nations authorised the troop deployment in East Timor there were reports of the militia moving into West Timor who set up training camps and military bases there.⁵⁵ In hindsight, this justified to a greater extent the establishment of InterFET by the Security Council.

Basis for Enforcement Action

Enforcement actions under Chapter VII, such as those in Korea and Iraq, are clearly permissible under the Charter when authorised by the Security Council. The trans-boundary impact of a humanitarian violation is easier to

⁵² See Arend AC and anor, *International Law and the Use of Force beyond the United Nations Charter Paradigm* (1993, Routledge, New York) 55-56.

⁵³ *Ibid.*

⁵⁴ Some commentators believe that the silent hand of the Indonesian army played a role by providing financial, military and logistic support to the pro-Jakarta militia: Porteus, "Ambush anger: Howard appeals to the UN", *The Herald Sun*, 12 October 1999 at 14; McPhedran, "Border war threat: Indons fired first", *The Herald Sun*, 12 October 1999 at 15.

⁵⁵ Editorial, 'Indonesia safety Claim Rejected', *The Courier Mail*, 19 October 1999 at 20; McPhedran, *ibid.*

gauge than the measurement of a violation's severity, which acts as the trigger for Security Council action within the terms of Article 39 and its reference to "threat to peace". The trans-boundary effect of the refugee problem that was created in Iraq by the exodus of the Kurds gave the Security Council some leverage when determining that a threat to international peace and security existed in Iraq. With greater emphasis now on human rights as seen by the establishment of InterFET to halt the bloodbath in East Timor it appears that the Security Council's expanded interpretation of what constitutes a threat to the peace includes severe humanitarian violations now.⁵⁶

As peace-keeping and peace-making operations blend with humanitarian interventions, proponents of humanitarian intervention point to Articles 1, 55-56 of the Charter to demonstrate the Charter's emphasis on the protection of human rights and the maintenance of international peace and security.⁵⁷ Several norms in international human rights law have emerged since the signing of the Charter. While efforts have been aimed at general human rights at a universal level, including the Universal Declaration, the ICCPR and the ICESCR, other instruments protect against specific abuses such as genocide,⁵⁸ war crimes and crimes against humanity,⁵⁹ slavery⁶⁰ and torture.⁶¹

⁵⁶ For a comprehensive history of humanitarian interventions from the early nineteenth century to the present, see Scheffer, "Toward a modern doctrine of humanitarian intervention", (1992) 22 *University of Toledo Law Review* 59.

⁵⁷ Arendt AC and another, *International Law and the Use of Force beyond the United Nations Charter Paradigm* (1993, Routledge, New York) 132.

⁵⁸ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 *United Nations Treaty Series* 277.

⁵⁹ The war crimes tribunals at the end of the World War II termed the violation of certain fundamental obligations as "crimes against humanity". The International Law Commission has done further work on the codification of international crimes: see 1954 Draft Code of Offenses and the 1974 Draft Code of Crimes Against the Peace and Security of Mankind. The body of crimes so created now seems part of international customary law after its incorporation into Article 7 Statute of the International Criminal Court. 120 States adopted the Statute in Rome on 17 July 1998.

⁶⁰ See 1926 Slavery Convention, 25 September 1926, *League of Nations Treaty Series* 253; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 1956, 266 *United Nations Treaty Series* 4.

⁶¹ The 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment adopted on 19 December 1984, 1465 *United Nations Treaty Series* 85.

Although the doctrine of sovereignty continues to play a pivotal role in international relations today, it has been weakened by the growing idea that through collective United Nations authorisation, its Members have the right to intervene when a human rights violation threatens international peace.⁶²

A norm has also developed that they have the responsibility to ensure that any human rights violations anywhere are addressed.⁶³ The forcible interventions in Somalia and northern Iraq support this proposition and in East Timor the international community bent the will of the Indonesian government in spite of the latter calling the intervention an unacceptable violation of its territorial integrity and an abuse of its political independence.

Thus, humanitarian intervention is a new consideration for the international and collective use of force as the body of human rights law grows. When the Security Council had authorised the use force to combat the widespread and flagrant violations of international humanitarian law, its peace enforcement measures had gradually overtaken peacekeeping missions. This was evidenced when the mandates of UNOSOM and UNPROFOR were subsequently expanded. They showed that when peacekeepers, who are generally trained in non-violent reaction and self-defence, are confronted by hostility they have to adopt an aggressive dimension and the missions come to resemble enforcement actions ultimately.

The situation in the former Balkan republics presented the United Nations with a challenge that tested both the organisation's ability to respond to a rapidly growing conflict situation and the efficacy of non-traditional peacekeeping operations. This crisis, which had progressively escalated since 1991, is an example of the inherent dangers that the organisation may face in a dynamic arena of potential as well as real conflict.

The negative publicity and criticism of UNPROFOR are not so much a reflection of the military calibre of the peacekeepers but rather the over-

⁶² Ramcharan, "Strategies for the international protection of human rights in the 1990s" in Richard RP and anor (editors), *Human Rights in the World Community: Issues and Action* (1992, University of Pennsylvania Press, Philadelphia) 275.

⁶³ See Scheffer, "Toward a modern doctrine of humanitarian intervention", (1992) 22 *University of Toledo Law Review* 253, 275-81 which contends that the global geopolitical changes following the end of the Cold War and regional organisational developments have brought a marked change in the attitudes of governments to humanitarian interventions.

politicising of peacekeeping issues in the United Nations. The mandate of such forces as an issue dogged discussions in the General Assembly and Security Council during the Cold War era when such forces had virtually no military capability. When the Cold War ended, it was expected that the United Nations could quickly revise its guiding principles on the mandate of peacekeeping forces including their status as reactive rather than proactive. However, this was railroaded in 1993 by squabbling between the United States, Canada and Europe⁶⁴ on the command of a possible permanent peacekeeping force. Consequently, the issue of the mandate of United Nations forces continues to be controversial but it is heartening to know that the organisation is open to new political perspectives and military dimensions when it engages in peacekeeping efforts.

The possible military conflict in East Timor led to two phases in the United Nations' military intervention there. First, an Australian-led international force had to wrestle control of East Timor from the pro-Indonesia militia. Secondly, pursuant to Security Council Resolution 1299 of 25 October 1999 this was followed by the deployment of a traditional peacekeeping force. It seems that UNPROFOR's impotence in Srebrenica and the lessons learnt in the former Yugoslavia drove the Security Council to give its force in East Timor a wider berth in its military operations. The idea was not consent and goodwill but military expedience in establishing a robust and internationally supported socio-political infrastructure in East Timor to curb human rights atrocities and protect fundamental human rights.

CHAPTER VII ACTION

Enforcement actions under Chapter VII of the Charter are legal and the use of force is lawful if authorised by the Security Council for such purposes. For example, the measures authorised in Bosnia are explicit Chapter VII actions. As such, the measures fall within the exception of the last sentence of Article 2(7) relating to Chapter VII enforcement actions. Due to the increasing frequency with which the Security Council has initiated Chapter VII actions on the basis of humanitarian violations, it is worthwhile examining the status of interventions for humanitarian purposes in the light of its action in East Timor. It has been argued that "genuine instances of

⁶⁴ See generally Powers, "The case for a permanent United Nations peacekeeping force", *Daily Nation*, 13 April 1993, Special Reports Column.

humanitarian intervention have been rare, if they have occurred at all.”⁶⁵ Commentators point to the non-humanitarian interest or motives of the intervener, the political or economic considerations and the fact that no intervening State has used the pure rationale of humanitarian intervention to justify its use of force.⁶⁶

The intervention in the Balkans was contentious since it was a “mixed conflict”.⁶⁷ Nevertheless, it may be characterised as a predominantly humanitarian disaster that required Chapter VII action by the United Nations. However, the intervention in Somalia and East Timor is a strong challenge to the assertion that humanitarian interventions usually have underlying political and economic considerations. The locations of the territories and the absence of any visible or invisible overarching socio-political or economic interests by the intervening powers point to purely humanitarian considerations aimed at fulfilling the lofty humanitarian ideals of the international community

Even in the former Yugoslavia, several Security Council resolutions have defined the humanitarian bases of intervention: the trans-boundary effects of the refugee situation in Bosnia,⁶⁸ the inability to deliver humanitarian aid due to the civil war,⁶⁹ and ethnic cleansing and other violations of humanitarian law.⁷⁰ The findings that these circumstances were the bases for a threat to international peace and security are grounded in the recognition that the external refugee problem and the grave and systematic domestic humanitarian violations both warranted Chapter VII action.

The human rights situation in East Timor, a purely internal crisis, triggered the application of Article 39. The reports on political cleansing, massive and organised detention, translocation of the population, and systematic torture and murder of pro-independence East Timorese certainly made a compelling case for United Nations action. In any event, although the use

⁶⁵ Arend AC and anor, *International Law and the Use of Force beyond the United Nations Charter Paradigm* (1993, Routledge, New York) 135.

⁶⁶ See Verwey, “Humanitarian intervention in the current legal regulation of the use of force” in Cassese AS (editor), *The Current Legal Regulation of the Use of Force* (1986, Martinus Nijhoff, Boston).

⁶⁷ It had both domestic and international dimensions as it involved intra-State as well as inter-State military conflicts.

⁶⁸ Security Council Resolution 757 of 1992.

⁶⁹ Security Council Resolution 770 of 1992.

⁷⁰ Security Council Resolution 771 of 1992.

of humanitarian intervention to prevent these violations has not yet been accepted as an exception to Article 2(4) on the prohibition against the use of force, the use of Chapter VII is legal and presents strong evidence of emerging customary law. The prospect of this type of humanitarian diplomacy will increase potentially the number of original peace enforcement operations. It is foreseeable that in future peacekeepers will find their safety compromised as their missions involve enforcement action requiring more complex and refined rules of engagement in hostile environments.

The comprehensive restructure of peacekeeping operations in 1992 by the United Nations seems to herald the genesis of a new role for peacekeeping and peacemaking. Traditionally, the Office of Special Political Affairs managed peacekeeping operations. The Office was administered by two Under-Secretaries-General (“USG”) who reported to the Secretary-General. One USG managed field operations and mediation efforts associated with peace enforcement while the other was a political troubleshooter for the Secretary-General. Now, the peacemaking functions have been transferred to the Secretary-General’s Executive Office resulting in a complete separation of planning from political issues. This structure reflects the traditional view in the United Nations that there is a clear distinction between peacekeepers and peace enforcers and that the two should be kept apart. Peace enforcers receive military training while peacekeepers are trained in non-violent responses to provocation.⁷¹

The 1992 restructure included the creation of an Office of Peacekeeping Operations as one of four designated departments that reported to the Secretary-General directly. The restructure streamlined the peacekeeping administration and put in place a formal relationship between peacekeepers and peacemakers. However, as the missions become blurred and conventional peacekeeping forces become gradually engaged in more aggressive Chapter VII actions, training, equipment needs, command structures and the rules of engagement on the use of force will have to be reviewed to reflect the changing nature of peacekeeping.⁷²

⁷¹ Durch, “Running the show: planning and implementation” in Durch WJ, *The Evolution of United Nations Peacekeeping* (1993, St Martin’s Press, New York) 73-74.

⁷² See Urquart, “The United Nations and international security after the Cold War” in Robers A and anor (editors), *United Nations, Divided World* (1993, 2nd edition, Clarendon Press, Oxford) 81.

THE HUMANITARIAN CUSTODIANSHIP

Humanitarian intervention by the United Nations in non-State entities follows a history of participation in their elections when they are transitioning from colonial rule to independence.⁷³ In contrast to its role in supervising and monitoring elections within the decolonisation context and sometimes for the purge of unpopular leftist regimes, the United Nations has now begrudgingly accepted the responsibility of intervention in the socio-political processes of States that violate fundamental human rights. Initially, when confronted by appeals for intervention of this nature the organisation had been unwilling and unprepared to respond.⁷⁴ This reluctance was largely due to two reasons. First, there were the shackles that States had placed on the United Nations through a broad interpretation of the doctrine of sovereignty as enshrined in the Charter. Secondly, the United Nations preferred not to adopt a position or policy that could rock the global political boat.⁷⁵

Slowly, however, the United Nations has begun to develop a tenuous international consensus on its new role in human rights matters.⁷⁶

⁷³ United Nations Centre for Human Rights, United Nations, Human Rights and Elections: Handbook on the Legal, Technical and Human Rights Aspects of Elections, United Nations Doc HR/p/ot/2 (1994) at 2.

⁷⁴ The ethnic cleansing frenzy that gripped a crumbling Yugoslavia was initially only addressed by General Assembly Resolution 46/242 of 25 August 1992 that condemned the practice of ethnic cleansing and other massive violations of human rights. It was not until four months later on 18 December 1992 that Security Council Resolution 798 was passed. This resolution noted the human rights atrocities in Bosnia and Herzegovina and authorised a peacekeeping mission there, namely, UNPROFOR. The case was similar regarding Rwanda. Before genocide began in April 1994, reports had been sent to the United Nations headquarters in New York by the United Nations Assistance Mission for Rwanda ("UNAMIR") requesting for additional troop deployments, including warnings by non-governmental organisations of an imminent bloodbath. For general comments on the United Nations' inaction in Rwanda and the terrible consequences that followed see Annan, "Two concepts of sovereignty", *The Economist*, 18 September 1999 at 80.

⁷⁵ See Crossette, "China and others reject plea that the United Nations halt civil wars", *New York Times*, 23 September 1999 at <<http://www.nytimes.com/library/wo...1/092399/nations-intervention.html>>, especially the warning by Tang Jiaxuan (China's Foreign Minister) on the effect of any deviation to the doctrine of sovereignty and the caution by Jaswant Singh (India's Foreign Minister).

⁷⁶ Global geo-political changes after the Cold War and regional organisation development have brought about a marked change in the attitudes of governments to humanitarian interventions: Scheffer, "Toward a modern doctrine of humanitarian intervention", (1992) 22 *University of Toledo Law Review* 253, 259-64.

Reflecting deep dogmatic reluctance among its Members and within its bureaucracy to expand its role in promoting the protection of fundamental human rights, the organisation has limited its intervention to more well-defined circumstances, primarily in cases with a clear international dimension. However, the circumstances surrounding the recent intervention in East Timor have forced its hand and it must now address and develop the international norms for intervention to protect civilian populations from mass slaughter.⁷⁷

The United Nations should expand and deepen its commitment to human rights values by abandoning the requirement of an international dimension and moving the substance of its involvement beyond the inter-State spectrum to the intra-state arena.⁷⁸ It should transform its policy of limited involvement in the political affairs of States into a broader policy that creates a human rights custodianship. This new role was what the Kurds, the East Timorese and other oppressed populations around the world had been expecting and demanding of the organisation. In the past, it had linked some of its limited humanitarian intervention to efforts to promote human rights within the domestic arena. However, any link between human intervention and human rights obligations had been secondary to the goals found in its Charter, including the primary responsibility of the Security Council on the maintenance of international peace and security, which had been the primary motivation for its missions thus far.

If the importance of human rights in United Nations missions⁷⁹ is down played, the missions may become disconnected from the goal of enduring peace. They should be used to promote substantive changes in adversely affected societies and in the global community as a whole. More importantly, the changes should preserve the worth and dignity of world citizens, existing and future. So far, the missions have been *ad hoc*, reactive and narrowly focused on solving specific international emergencies.⁸⁰ This is a fundamentally flawed approach that teaches States nothing on the disapproval of the international community to human rights

⁷⁷ See Annan, "Two concepts of sovereignty", *The Economist*, 18 September 1999 at 80.

⁷⁸ *Ibid.*

⁷⁹ In this context, the term "mission" is applied to any level of United Nations military involvement or interference in the relationship between a State and its citizens, with or without the approval of that State's government.

⁸⁰ For example see Haiti and Security Council Resolution 940 of 1994; Bosnia and Security Council Resolutions 770, 781, 787 and 816 in 1991-1994.

abuses and the inter-relation of national and international standards in the entire human rights spectrum.⁸¹ Until this lesson is brought home to States, human rights abuses will continue with impunity and go unabated and unchecked.

There is an emerging international consensus that humanitarian intervention is justified if human rights atrocities take place. This is consistent with the original idea behind the establishment of the United Nations before the organisation succumbed to the tensions and divisions that developed during the Cold War.⁸² Nonetheless, the promotion of human rights and their protection by States are important values. The need to adhere to a comprehensive body of fundamental human rights provides a compelling justification for United Nations involvement in the political affairs of rogue States and it also provides a worthy rationale for the organisation's continued existence. This rationale should be sufficient to justify the United Nations' involvement in a State's political affairs if the State deliberately and arbitrarily alters the nature and content of its citizens' rights. Moreover, it should be the case even where its obligation to maintain international peace and security is not a direct issue.

The selfish interests of States should not be permitted to derail the human rights process. They should not be permitted to use the concept of sovereignty to avoid the issues that clearly transcend national boundaries within this context. China's Foreign Minister used arguments such as "the history of China and other developing countries shows [that] the sovereignty of a country is the prerequisite for the basis of the human rights that the people of that country can enjoy".⁸³ However, they are simply an apologia by States with poor human rights records and a history of brutal political repression.

The development of a new United Nations policy to generate, safeguard

⁸¹ For example refer to Saddam Hussein's renewed onslaught against the Kurds in the post-Gulf War period. For more details see generally Freedman and anor, "'Safe Havens' for Kurds in post war Iraq" in Rodley NS (editor), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (1992, Brassey's, London) 44.

⁸² Goodrich LM, *The United Nations in a Changing World* (1974, Columbia University Press, New York) 11-14.

⁸³ Crosette, "China and others reject pleas that the United Nations halt civil wars", *New York Times*, 23 September 1999 at <<http://www.nytimes.com/library/wo...1/092399nations-intervention.html>>.

and deepen the entitlement of individual citizens to their fundamental rights should proceed and be prevented from derailment. United Nations Resolution 48/141 of 20 December 1993, which establishes the position of United Nations High Commissioner for Human Rights, provides that “all human rights – civil, cultural, economic, political and social are universal, indivisible, interdependent and interrelated”. The Resolution recognises that States have a duty to promote and protect human rights. Founded upon this obligation a human rights custodianship policy will represent a significantly expanded role for the organisation and the most favourable form of governance in ensuring that States promote and protect human rights. This policy would help expand and deepen global understanding and the reception of human rights in general, including their indivisibility in particular.⁸⁴

United Nations electoral missions have clarified important elements of the right to political participation, thus weakening the barriers to the advancement of international human rights. The policy of custodianship would go beyond the current emphasis on the technical validity of State actions based on sovereignty⁸⁵ and take advantage of current opportunities to secure gains in human rights that have followed the end of the Cold War. Perhaps, more importantly, in responding to global dissatisfaction with the current *ad hoc*, reactive, and constricted approach to human rights violations,⁸⁶ a new custodianship policy would focus international attention on actions deemed domestic or “private” by States and forces that perpetuate human rights abuses and inequality around the world.⁸⁷

Since its founding in 1945 the United Nations has promulgated instruments that are collectively equivalent to an International Rights⁸⁸ and helped

⁸⁴ Goodrich LM, *The United Nations in a Changing World* (1974, Columbia University Press, New York) 11-14.

⁸⁵ The embodiment of human rights in bills of rights in constitutions of states is not of itself protection. The yardstick should be to what extent the citizenry have access to the enjoyment of rights. For example compare the human rights records of Australia-without a bill of rights under its constitution and Kenya with a comprehensive bill of rights under Chapter V of its constitution.

⁸⁶ See generally Human Rights Watch, *The Lost Agenda: Human Rights and United Nations Field Operations* (1993, United Nations, New York).

⁸⁷ In this context, some see globalisation today as a central political phenomenon that lowers wages and environmental and human rights standards: “Incorporating the world” in *The Nation*, 15-22 July 1996 at 3.

⁸⁸ See discussion above.

gather international consensus for the idea that the populations of States have rights under international law. This extends to the protection of the rights, even against the government. Beginning with the Charter and the Universal Declaration, the United Nations has constructed a normative framework for the realisation of rights for the people.⁸⁹ The framework has been sustained over time by the actions of States in signing and ratifying various international human rights and related instruments, some of which are now part of customary international law. The international collaborative efforts involving United Nations organs, human rights workers and others have helped publicise the plight of the oppressed millions who yearn for more personal liberties and freedom from arbitrary detention, execution and political purges.

Unfortunately, in interpreting its responsibilities to promote friendly relations among states, the United Nations has failed to give peoples, and thus human rights, the necessary priority. Instead, it has limited the scope of its responsibilities by adopting a shallow conception of its human rights obligations. This attitude does not permit a full response when States deny fundamental human rights.⁹⁰ Further, those who assume that its highly publicised intervention missions are driven primarily by human rights concerns may misunderstand its role in the domestic affairs of States.⁹¹ The fact is that the United Nations intervenes only in few cases and when it does so the scope of its involvement is limited and often dependent on the commitment of States to act for and on its behalf.⁹²

Generally, the United Nations has limited its mandate to promote human rights in States to those instances with a clear international dimension only⁹³ and where the trans-boundary effect of national excesses has been

⁸⁹ See United Nations Centre for Human Rights, *United Nations, Human Rights and Elections: Handbook on the Legal, Technical and Human Rights Aspects of Elections*, United Nations Doc HR/p/ot/2 (1994).

⁹⁰ As noted by Human Rights Watch, human rights have been treated as a dispensable luxury, not as a central element in the success of United Nations peacekeeping and humanitarian operations: refer Human Rights Watch, *The Lost Agenda: Human Rights and United Field Operations* (1993, United Nations, New York) 1.

⁹¹ *Ibid.*

⁹² For example, pursuant to United Nations authorisation, the United States led the multinational force in the 1990 Gulf War and intervened in Haiti in 1994. More recently, Australia led the United Nations force in East Timor.

⁹³ In 1992 the need to respect the territorial integrity and political independence of Bosnia, found in United Nations Security Council Resolution 775 of 1992, was made the basis for

profound. It has received a significant number of appeals from States for more substantial involvement and a clear description of its role as the human rights custodian. This follows its inflexibility and failure to provide guiding principles for humanitarian interventions as shown by its insistence on using the ill-defined, unclear sobriquet “international dimension”. This reflects the “Age of Rights”, an expression that Louis Henkin coined and used for his book’s title,⁹⁴ which champions the organisation’s broad human rights responsibility and provides for humanitarian intervention.

The current United Nations policy of pegging interventions to the trans-boundary effects of human rights abuses and international outrage suffers from two significant weaknesses. First, in the 1990s it intervened twice only, Bosnia in 1992 and East Timor in 1999, both in the face of massive internal human rights atrocities. Secondly, after World War II it promoted a false meaning of sovereignty and non-interference in domestic affairs, thus limiting the scope of its human rights contributions. As a result, the weaknesses have maintained a United Nations focus on the interests of States and governments, not the people. They also reflect the traditional perspective that the organisation’s overriding purpose is to regulate the conduct of States *vis-à-vis* each other under Article 1(1) of the Charter rather than promote the interests or concerns of the people within the State.

INTERNATIONAL PEACE AND SECURITY

International peace and security are of paramount importance to the United Nations. Article 39 of the Charter gives the Security Council broad powers to determine when peace is threatened or breached. Yet, this limits the ambit of Security Council concern and provides an excuse for non-action when human rights violations occur. This restriction is not necessarily co-extensive with the organisation’s simultaneous implied responsibility to promote human rights. The attempt to combine the responsibility for human rights with the international peace and security responsibility, rather than a stand alone human rights responsibility, has led to complex efforts at inventing persuasive excuses for legitimising missions authorised by the

the Security Council’s demand for access to the camps and detention centres for the purposes of delivering humanitarian aid. The Security Council rationalised its substantial involvement in Bosnia by turning the sovereignty argument around. For further details, see Fink, “From peacekeeping to peace enforcement: the blurring of the mandate for the use of force”, (1995) 19 *Maryland Journal of International Trade and Law* 1, 33-35.

⁹⁴ 1990, Columbia University Press, New York.

United Nations. However, many conflicts implicating serious human rights concerns are reasonably contained within domestic borders and their direct impact on international peace and security are often not articulated.⁹⁵

The United Nations finds itself in juxtaposition. On the one hand, the concept of a threat to or a breach of international peace and security would lose international legitimacy if it were relied upon to justify every instance where it acts in support of oppressed people. On the other hand, if it adopts a technically justifiable or a broader interpretation of the concept, it risks losing credibility in the eyes of States that are ever wary of gunboat diplomacy.⁹⁶ The key effect of linking human rights to international peace and security has been to constrain, rather than enhance, the organisation's role in developing and defining human rights standards. Yet, at times the organisation should be permitted to act in support of human rights where no reasonable threat to or breach of international peace and security is obvious. Seemingly, the Charter anticipated this situation by not constraining the use of coercive measures when promoting human rights norms.⁹⁷

The Charter, the Universal Declaration, the ICCPR and the ICESCR provide the foundation for United Nations involvement in domestic political affairs in the name of human rights and embody an assertive vision of its human rights custodianship role. This should be independent of the specific acquiescence of States to human rights fact-finding missions or findings of international dimensions in a bid to nurture and advance fundamental human rights universally. The Charter begins with a strong commitment to human rights promotion, featured prominently alongside the post World War II goal of preventing future international conflicts and conditions that foster such conflicts.⁹⁸ The Charter's origin is found in the preoccupation of allied war time leaders with the saving of "succeeding

⁹⁵ Examples are the genocide that occurred in Rwanda in 1994, the civil conflict, famine and starvation in Somalia in 1990-92 and the brutal struggle in Liberia in the early 1990s.

⁹⁶ Crosette, "China and others reject pleas that the United Nations halt civil wars", *New York Times*, 23 September 1999 at <<http://www.nytimes.com/library/wo...1/092399nations-intervention.html>>.

⁹⁷ See the contrast shown by the United Nations Charter in Chapter VII on coercion in international security and Chapters IX-X on human rights and humanitarian matters.

⁹⁸ It appears that the traditional interpretations of United Nations, purposes found in the Preamble to the Charter, have adopted a distinct hierarchy that insubordinates human rights to sovereignty and the maintenance of international peace and security: Farer, "Human rights in Law's empire: the jurisprudence war", (1991) 85 *American Journal of International Law* 117-118.

generations from the scourge of war”.⁹⁹ An overriding concern of the Charter’s drafters was to eliminate or reduce the causes and consequences of international conflict and immediately following this goal was an explicit commitment in the Preamble to the Charter to:

reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the 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...

Scholars trace the origins of modern international human rights law to the horrors of the holocaust and other Nazi atrocities during World War II.¹⁰⁰ The Charter was the first step in the “codification of international standards to protect human rights.”¹⁰¹ It laid the foundation for what has been dubbed the International Bill of Rights. The Universal Declaration may be viewed as an elaboration of the human rights commitment that is only briefly articulated in the Charter. In many respects the ICCPR (including its Optional Protocol) and the ICESCR elaborate on the commitment expressed in the Charter and the Universal Declaration.

Although the Charter does not contain an explicit right of humanitarian intervention or a role for the United Nations in the socio-political processes of Member States¹⁰² its human rights provisions lay the foundation for this. The maintenance of international peace and security and the principle of self-determination have motivated past and current United Nations missions. However, the recognition of a global responsibility for human rights that is rooted in the Charter should provide a better legal and political justification for the United Nations promoting human rights through various means including a deepened involvement in State affairs.

⁹⁹ See Preamble to the United Nations Charter; Russell RB, *A History of the United Nations Charter: the Role of the United States* (1958, Brookings Institution, Washington DC) 50-56.

¹⁰⁰ See Newman F and anor, *International Human Rights* (1990, Anderson Publishing Co, Cincinnati) 1-3.

¹⁰¹ *Ibid* 564.

¹⁰² The human rights obligations set forth in the United Nations Charter particularly in Articles 55 and 56 are generally worded provisions not particularly helpful in redressing specific human rights problems in a specific state.

This interpretation of the Charter places human rights at the centre of the debate without denigrating the pivotal role of the organisation concerning international peace and security.

CONCLUSION

Getting the United Nations to act assertively on human rights will neither be easy or popular. There has been a strong tendency within the organisation to treat itself as essentially an association for States mainly concerned with international conflict management. The interests of “the Peoples of the United Nations”¹⁰³ were long ago subsumed by the needs of its Member States¹⁰⁴ when they acted in the name of their citizens. It occurred as well when they resisted a meaningful role for the organisation or the global community in human rights including accountability for the abuses of the same citizens. Yet at the same time, they have bound themselves to international instruments that guarantee fundamental rights.¹⁰⁵ South Africa during the apartheid era is a classic example. For decades, it objected to United Nations involvement and condemnation regarding its treatment of non-white citizens during this period. However, other States, including those that rejected South Africa’s position and supported United Nations intervention in South Africa, had also similarly rejected the organisation’s scrutiny of their own human rights practices.¹⁰⁶ Like South Africa, they did so in the name of domestic sovereignty.

The United Nations should free itself from the shackles of the classical interpretation of the doctrine of sovereignty¹⁰⁷ and the principle of self-determination when it considers engaging in pro-rights efforts in domestic affairs. A clear-cut human rights justification should unapologetically be

¹⁰³ See Preamble to the United Nations Charter.

¹⁰⁴ The final version of the Preamble was modified to reflect the fact that although the agreement was between States it purported to represent the desires of the peoples of the world: Goodrich LM, *The United Nations in a Changing World* (1974, Columbia University Press, New York) 2.

¹⁰⁵ For example the ICCPR had 135 State parties as of November 1996.

¹⁰⁶ Friedman uses the example of China and Nigeria, two formerly staunch foes over apartheid, which objected in principle to United Nations intervention in domestic affairs: “United Nations human rights resolution, *New York Times*, 27 December 1995 at A15.

¹⁰⁷ See the redefinition of the doctrine of sovereignty by the forces of globalisation and international cooperation: Annan, “Two concepts of sovereignty”, *The Economist*, 18 September 1999 at 80.

advanced to support its interventionist missions.¹⁰⁸ For constitutional and political support, it should draw on its human rights responsibilities rooted in the Charter and supporting instruments, including the incessant demands of various populations for its involvement. The fact remains that a broader and more assertive involvement by the United Nations in the domestic affairs of States may cast it as a “globocop” and lead it into a dark and ugly political storm. Whether it is able to weather the storm as the international human rights custodian remains to be seen.

¹⁰⁸ See Henkin’s argument on the scope of United Nations obligations in human rights issues: Henkin L, *The Use of Force: Law and US Policy in Right v Might: International Law and Use of Force* (1991, Council on Foreign Relations Press, New York) 62-65.