

**FROM CONGO TO EAST TIMOR IN 40 YEARS:THE UN FINALLY CROSSING THE RUBICON
BETWEEN PEACE-KEEPING AND PEACE-MAKING?**

Jackson Nyamuya Maogoto*

ABSTRACT

[People first, nations second. That's the new global creed that is beginning to jell at the United Nations . At the 54th Annual UN General Assembly Session in September 1999, both President Clinton and UN Secretary-General Kofi Annan made historic claims that any country's sovereignty could be violated by other nations under certain conditions occasioned by 'deliberate, massive, organised and systematic violations of human rights'. This is in a world stage where the East Timor Crisis and the accompanying humanitarian intervention forms a vivid backdrop to the past failures of the UN in creating a nexus between international aspirations and pragmatic realities in the protection of fundamental human rights. Could the notion that sovereignty does not entitle a government to slaughter its own people and that outsiders have a duty to take action finally herald the UN's crossing of the rubicon between peace-keeping and peace-making?]

I. INTRODUCTION

Peacekeeping and peace enforcement are concepts which have their origins in the United Nations (UN) Charter. Among other things, the UN Charter is based on principles of sovereignty, non-intervention and the peaceful settlement of international disputes. Although peacekeeping was not explicitly provided for in the Charter, it has evolved over the past half century into a well developed concept governed by a distinct set of principles.

With the end of the Cold War, the United Nations has taken on a new , aggressive role in the use of military force as a peace-maker. Iraq's aggression in Kuwait, for instance, was met by a UN authorised international coalition of armed forces. The humanitarian crisis precipitated

* LL.B(Hons), Moi University, Kenya, 1999: LL.M candidate, University Of Melbourne, majoring in international criminal and humanitarian law. Author wishes to acknowledge the enlightening comments and remarks of Professor Timothy McCormack, University Of Melbourne. Author retains full responsibility for any errors.

by the Iraqi oppression of the Kurds and the inability to supply food and assistance in a war ravaged Somalia to the civilian population have presented the UN with new challenges with regard to political perspectives on matters of an internal nature and the issue of force in its military perspectives. But it is the recent humanitarian intervention in East Timor by an international force expressly authorised to use force to bring law and order to the territory and protect fundamental human rights that has shaken the UN's classical interpretation of its foundational principles of sovereignty and non-intervention.

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

Force and the UN: A Historical Perspective

The norm of the 'non-use of force', and state sovereignty,¹ is established in the UN Charter. Article 2(4) contains a prohibition on 'the use of force against the territorial integrity or political independence of any state',² providing ' [a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.'

¹ Sovereignty, according to Professor Scheffer, is the 'central pillar of international law' and thus legitimised the nation-state as entitled to the protection of international law. For further details see his article 'Toward a Modern Doctrine of Humanitarian Intervention' (1992) 23 *U.To L. Rev.*

² See also the UN Charter, Article 2(3).

The Article is broader than the Kellogg-Briand Pact (which renounced war as an instrument of national policy) in that it prohibits the use and the threat of use of force rather than just recourse to war in recognition by the international community after the aftermath of the World War II that war is not a national right but an international crime. Although Article 2(4) was first thought to outlaw the use of force of any sort by one state against another, exceptions to the Article were subsequently used to justify unilateral interventions.³ One exception expressly built into the Charter was Article 51's recognition that ' [n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member. .' and the enforcement actions authorised by the Security Council under Chapter VII. Implicit exceptions to Article 2(4) have been derived from the Article based on the argument that Article 2(4) prohibits only the use of force against the 'territorial integrity' or 'political independence; of another state, and would not apply to an intervention which is not intended to withhold or even temporarily occupy the state's territory or to interfere with the state's political autonomy or sovereignty.⁴ But even this argument is now under siege after the UN Secretary-General Kofi Annan and the US President Bill Clinton pointed out recently that rogue states should not expect their borders to protect them arguing that international concern for human rights takes precedence over claims of non-interference in internal matters.⁵

The doctrine of state sovereignty, long protected by the principles of non- intervention and self-determination in the domestic affairs of states, is both recognised as customary international law and enshrined in the UN Charter. Article 2(7) acknowledges that '[n]othing

³ Louis Henkin, *The Use of Force: Law and US Policy in Right v Might: International Law and Use of Force* (Council on Foreign Relations Press 1991) 39.

⁴ See Henkin, above n 3, at 39-40.

contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.’ The article, however, is limited by an exception which allows the ‘application of enforcement measures under Chapter VII.’

Article 2(7) is a prohibition against the United Nations, not states, from intervening in the internal affairs of member- states.⁶ However, the principle of non-intervention has been eroded by the numerous intrusive treaty obligations to which states have committed themselves.⁷ The large body of human rights law that has developed in conventional and customary law has also contributed to the development of Article 2(7), which indicates that violations of internationally recognised standards are not always matters completely within the internal jurisdiction of a member-state. This erosion of the principle of non-intervention set forth by Article 2(7) has contributed, in part, to the increase in UN interventions in the post-Cold War world,⁸ which in turn has occasionally led to complex operations that include elements of both peacekeeping and peace enforcement.

This trend mirrors the effects of globalisation especially accelerated with the end of the Cold War in which states have taken on numerous obligations through international treaties and conventions , a trend that has reduced the world into a global village where actions(whether military, political or economic) by one sovereign nation may adversely affect neighbouring sovereign(ities).⁹ Sovereignty has thus undergone the metamorphosis from individual supremacy which accompanied the birth of the national state to collective responsibility

⁵ Opening address of the UN Secretary-General, Kofi Annan to the General Assembly on its 54th Annual Session on 27 September 1999 and the address of the US president during the Session.

⁶ See Vladimir Kartashkin, ‘Human Rights and Humanitarian Intervention’, in Lori Fisler Damrosch & David J. Scheffer (eds) *Law and Force in The New International Order* (1991) 206.

⁷ Scheffer, above n 1, at 262.

⁸ Of the 26 UN authorised missions since its creation, half of them have been in the post-Cold War era.

which is consonant with globalisation and contemporary cohesiveness of the international community of nations. The notion that sovereignty does not entitle a government to slaughter its own people and that outsiders have a duty to take action is captured in the recent words of the UN Secretary-General Kofi Annan that ‘nothing in the [U.N.] Charter precludes a recognition that there are rights beyond borders.’¹⁰

II. PEACE-KEEPING WITHIN THE FRAMEWORK OF THE COMMUNITY OF NATIONS

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

The 1956 Suez conflict provided the UN with its first opportunity to deploy an armed peacekeeping force, the United Nations Emergency Force (UNEF I). UNEF's primary mandates under General Assembly Resolution 1000 were to secure a cease-fire between British, French, Israeli and Egyptian forces in the Sinai Peninsula; to direct the withdrawal of the non-Egyptian forces from Egyptian territory; and to patrol the border areas. In addition,

⁹ This is for instance through a mass transboundary movement of refugees or regional tension created by arms testing.

the Emergency Force was responsible for trying to achieve the aims of the Egypt-Israeli Armistice Agreement.¹¹ The Secretary General, Dag Hammarskjold, indicated that he wanted to ensure that the Emergency Force ‘was in no way a military force temporarily controlling the territory in which it was stationed.’ UNEF troops, while more than just observers, were clearly intended to be deployed for peaceful purposes alone.

A larger and potentially more dangerous deployment of UN peacekeepers occurred when the UN established the Operation in the Congo (ONUC) from 1960 to 1964. 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 her troops from the Congo under the UN's mandate. Although not deployed for the purpose of initiating any use of force, ONUC's mandate included assisting the Congolese government with the restoration of law and order. After the central government disintegrated and attacks on UN personnel took place in February 1961, the Security Council authorised ONUC to ‘take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including . . . the use of force, if necessary, in the last resort.’¹²

The mandate was expanded in November 1961 and by January 1963, ONUC numbered some 20,000 fully armed troops including tanks, heavy artillery and fighter jets. This operation was shorn off the UN tradition model set in 1949 by Dag Hammarskjold of non-confrontation and anti-Rambo form of military discipline. It broke new frontiers when its mandate was expanded in 1961 to remove foreign mercenaries. The troops were authorised to have free movement throughout Congo. The UN troops’ military intervention successfully prevented

¹⁰ Annan, above n 5.

¹¹ Mona Ghali, ‘United Nations Emergency Force I’ in William J. Durch (ed.) *The Evolution of UN Peacekeeping* (1993) 112-113.

¹² GA Res. 161, UN SCOR, (1961).

the secession of Katanga. However this model of peacekeeping through peace-making was quashed by subsequent mandates and only resurrected three decades later with the end of the Cold war during the Gulf War.

Classical Peace-keeping Paradigms

Peacekeeping is a United Nations non-enforcement action which is not expressly provided for by the UN Charter. Since the signing of the Charter in 1945, there have been twenty-six distinct UN peacekeeping operations. The early peacekeeping missions, which involved unarmed observers, were impliedly authorised by the Security Council under Articles 24 and 36. These articles provide for procedures of the Security Council on ‘the settlement of dispute [s].’ The legal authority for the UNEF and ONUC operations, however, was a subject of great controversy. When the Soviet Union and France refused to pay their apportioned dues for those missions, the International Court of Justice (ICJ) had an opportunity to issue an advisory opinion on the legality of withholding the funds, as well as on the overall lawfulness of peacekeeping operations. In the *Certain Expenses Case*,¹³ the ICJ ruled that Article 14 empowered both the Security Council and the General Assembly to authorise peacekeeping operations¹⁴ and rejected the view that Article 43 agreements were required to establish the peacekeeping forces and found that the operations were not ‘coercive or enforcement action [s]’ which would require Security Council authorisation.¹⁵ Based on the ICJ's opinion, evidently the authority for peacekeeping operations is contained in both Chapter VI and Chapter VII.

¹³ *Certain Expenses of the United Nations*, 1962 IJCL 151 (advisory opinion of 20 July 1962).

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

¹⁵ *Id.*

The early peacekeeping campaigns had several elements or guiding principles in common; the UN operations had the political support, or at least acquiescence, of the five permanent members of the Security Council, second, the consent and cooperation of the local parties to the dispute was seen as essential to the deployment of the UN peacekeepers. and third, the neutrality or independence of the UN was a primary factor in an effective peacekeeping operation. These guiding principles have come to distinguish peacekeeping operations in the arena of conflict from more aggressive peace making actions.¹⁶

The concept of self-defence, as well as the principles of non-intervention and sovereignty, were blurred and modified in the Congo operation. While peacekeepers today continue to heed to the principle of self-defence, the political and mandate complexities of operations such as those in Iraq and former Yugoslavia have blurred the strict ‘neutrality and impartiality’ of these operations. The UN has chosen the avenue of active military involvement in situations characterised by some sort of inadequate presence or absence of UN forces. Thus in the recent past, the UN has authorised member states to undertake enforcement action aimed at more specific goals whose achievement necessitates the use of troops in arenas of conflict.¹⁷

II. THE UN CHARTER AND THE RISE OF PEACE-MAKING

The reconfiguration of the traditional peacekeeping status of the UN from a non-confrontational role with the consent and goodwill of the host state to an ‘aggressive’ presence lacking in goodwill by the host party whose will has either been bent by the

¹⁶ John E Fink, “From Peacekeeping to Peace Enforcement: The blurring of the Mandate for the Use of Force in maintaining International Peace and Security’ (1995)19 *Md. Int’l L. & Trade*.

¹⁷ Korea-1950 by SC Res. 82,Iraq-1990 by SC Res. 660 & 678, Somalia-1992 by SC Res. 794,Rwanda -1994 by SC Res.929,Haiti-1994 by SC Res.940,Bosnia-1992-1994 by SC Res. 770,781,787 & 816 and recently East Timor-1999 by SC Res. 1299.

international community or a change in mandate necessitated by conditions in an arena of conflict that puts the lives of UN troops in jeopardy has been through two primary avenues.

1. Enforcement Actions

The first occasion on which the UN Security Council authorised the use of force in a military enforcement action was in June 1950 after North Korean troops crossed the 38th parallel into South Korea. The Security Council met on June 25 to note that ‘the armed attack on the Republic of Korea by the forces from North Korea . . . constitutes a breach of the peace’ in accordance with Article 39 of the Charter.¹⁸ Two days later, the Security Council in Resolution 83 ‘[r]ecommend [ed] that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.’¹⁹ Unable to utilize the Military Staff Committee(MSC-established under article 47 of the Charter)to direct the military action, the Council established a unified military command with an American commander who reported to the United States Joint Chiefs of Staff and the US President.²⁰

Although the Korean enforcement action was the first time that the UN authorised Chapter VII use of force, curiously, none of the resolutions mentioned either Chapter VII or Article 42. This evidently had to do with the nature and military scope of the expected operation in which the UN’s action amounted to a sub-contraction of peace enforcement ostensibly to the USA in the face of underlying political complexities in view of the interplay of reciprocating power relations involving the superpowers in the two states, which effectively frustrated any

¹⁸ UNSC Res. 82 (June 25,1950).

¹⁹ UNSC Res. 83 (June 27,1950).

²⁰ UNSC Res. 84 (July 7,1950).

more definitive or decisive action by the Security Council, arguably dominated by the political and military might of the two.²¹

The UN was able to act in this situation, in the middle of the Cold War, due to the chance absence of the Soviet Union from the Security Council during the time-frame of these resolutions but the text of the resolution mirrored caution and provided for a formal UN command to prevent a political backlash from the Soviet Union by providing a General Assembly (and in effect an international) alibi to the operation. This was a mere realpolitik facade as the Korean military operation was under the US president and the US joint command was essentially in charge of the operation.²² It is important considering that subsequent UN authorised military actions in the post Cold War era involving aggressive use of force have had no formal UN command.²³

The end of the Cold War provided the Security Council with the means to authorise the use of force in a large scale enforcement action for the second time. After Iraq invaded Kuwait on August 2, 1990, the Security Council quickly condemned the action and demanded the immediate and unconditional withdrawal of Iraq's forces. In response to Iraq's subsequent claim that it had annexed Kuwait, the Security Council, on August 25, authorised the deployment of naval forces to enforce the sanctions of Resolution 661.²⁴

The Security Council took action to authorise the maritime interdiction operations as well as to authorise, as of November 1990, member states 'to use all necessary means to uphold and

²¹ For a more detailed analysis, see A C Arend and R J Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge 1993).

²² Id. The Soviet Delegation was absent from Security Council meetings in protest of the seating of Taiwan at the Security Council in the place of the People's Republic of China.

²³ Gulf War under US command, military intervention in Haiti under US command, Somalia humanitarian intervention under US command and recently humanitarian intervention in East Timor under Australian command.

implement resolution 660 . . . and to restore international peace and security in the area.’²⁵ This Security Council interdiction helped prevent fragmentation of opinion by the world political caucus against the assertion of the US that such UN authority was not necessary. A feeling that the Security Council was being replaced by a world sheriff with a posse (the US president and army) would have politically muddied the issue of the world’s reaction and would be further proof of the Security Council’s over-politicisation, action or inaction based on the interests of its powerful stakeholders and the unwelcome emergence of the USA as ‘globocop’ with the end of the Cold War.

The allied coalition forces which liberated Kuwait acted pursuant to the Chapter VII authorisation of Resolution 678. Unlike the Korean action, there was no formal UN command, rather the of allied forces operated under the leadership of an American commander

From the pattern of the actions in Korea and the Persian Gulf, for a time it appeared that the UN was most likely to take action only where there is large scale aggression by one state against another state and where the vital interests of at least some of the permanent members of the Security Council are at stake.²⁶ Departures from this view have recently been seen in cases where states under the authority of the UN have justified their use of force in Somalia and recently in East Timor on the basis of humanitarian violations with no visible or invisible underlying political or economic considerations.

²⁴ UNSC Res. 665 (August 25,1990).

²⁵ UNSC Res. 678 (November 29,1990).

²⁶ See Paul Fifoot, ‘Functions and Powers, and Interventions: UN Action in respect of Human Rights and Humanitarian Intervention’ in Nigel S Rodley (ed) *To Loose the Bands of Wickedness* (1992) 48.

2. Humanitarian Interventions

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

In response to renewed uprisings after defeat in the Gulf War, Saddam Hussein's military began to stage attacks on the populations in northern and southern Iraq in order to quell uprisings against his regime. The renewed post Gulf War onslaught led nearly two million Kurds to leave the region, fleeing into Turkey and Iran. Kurds were denied entrance into Turkey, and remained in the inhabitable mountains of northern Iraq. There were reports of hundreds of deaths each day.²⁷

On April 5, 1991, at the behest of Turkey and France, the Security Council adopted Resolution 688 which ‘condemn [ed] the repression of the Iraqi civilian population’ and ‘[d]emand [ed] that Iraq . . . immediately end this repression. . . .’²⁸ The ‘interventionist’ portion of the Resolution is contained in the third paragraph where the Security Council ‘[i]nsists that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for

²⁷For a detailed exposition, see, Lawrence Freedman & David Boren, ‘“Safe Havens” for Kurds in Post War Iraq in Nigel S Rodley (ed) *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (1992)

²⁸ UNSC Res. 688 (April 5, 1991).

their operations.’²⁹ At the height of the Safe Havens Operation, over 21,000 American, British and French troops were deployed to the region.³⁰

The acrimonious debate in the Security Council over Resolution 688 indicated that the Resolution was controversial. Both Yemen and China argued that the intervention based on humanitarian grounds contravened the principle laid out in Article 2(7) and would lead to a dangerous precedent³¹ as Resolution 688 dictated that Iraq forgo its right to territorial integrity and allow the allies to go into the country to set up the relief operation without the consent of the host state.

In January of 1991, President Said Barre’s dictatorial regime was overthrown by combating rival factions resulting in lack of an effective government in Somalia. The disjointed civil war in Somalia that fragmented the country into fiefdoms under various warlords presiding over clan alliances prevented the transport of food and humanitarian aid to millions of starving Somalis. In January of 1992, the situation had deteriorated to such a degree that the Security Council unanimously enacted a weapons embargo on the country.³² As the year progressed, the Security Council sent a team to observe the administration of humanitarian aid and deployed fifty UN observers through the creation of the United Nations Operation in Somalia or UNOSOM³³ necessitating the Security Council to invoke Chapter VII of the UN Charter and increase the troop levels of the UNOSOM peacekeepers. In November 1992, following calls by the Secretary-General, Boutros Boutros-Ghali the United States offered to lead a

²⁹ Id.

³⁰ Freedman, above n 24 at 63.

³¹ Rodley, above n 27, at 29. 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 UN General Assembly during its 54th Annual Session which lambasted ‘a new form of gunboat diplomacy.’

³² UNSC Res. 733 (January 23, 1992).

³³ Mark R. Hutchinson, ‘Restoring Hope: UN Security Council Resolutions For Somalia and an expanded Doctrine for Humanitarian Intervention’, (1993) 34 *Harv. Int’l. L.J.* 624, 627.

military operation in order to deliver humanitarian aid to the Somalis, the Security Council unanimously adopted Resolution 794. The resolution ‘authorise [ed] the Secretary-General and Member States cooperating to . . . use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.’³⁴

Based on this resolution, the United States sent a large armed force contingent into Somalia. The Security Council's mandate to use force was unique as the operation was not in response to an act of aggression. The catalyst for the explicit action under Chapter VII was an Article 39 determination that the humanitarian situation in Somalia and the continuing civil war constituted a threat to international peace and security.³⁵

The changing status in the mandate of UN authorised action is exemplified by Security Council Resolution 1264³⁶ which authorised an Australian led international force for East Timor following international outrage and international calls for an end to the blood letting in the territory by pro-Jakarta militia after the August 30 UN sponsored referendum following growing evidence of ‘political cleansing’, ‘systematic torture and execution’, and ‘massive, organised detention and translocation’ of pro-independence Timorese. This force is mandated to undertake a full military operation with ‘no-holds-barred’. Considering that the Indonesian army(TNI) is involved a fact initially reflected in the first and second drafts of the Security Council Resolution but later toned down in the hope of securing unconditional Indonesian troop withdrawals and less national outrage at the operation, the silent hand of the Indonesian army is at play through financial, military and logistic support for the pro-Jarkarta militia.³⁷ It will be interesting to watch this politico-military drama unfold with the UN on stage as the

³⁴ UNSC Res. 794 (December 3,1992).

³⁵ See Arend, above n 18 at 55-56.

³⁶ S/RES/1264, 15 September 1999.

leading actor³⁸. Recent reports of the movement of the militia to West Timor and the setting up of training camps and military bases justify more than ever the blank cheque handed to the international force(InterFET) by the Security Council.

3. Basis of Enforcement Action in International Law

Enforcement actions under Chapter VII, such as those in Korea and Iraq, are clearly permissible under the Charter when authorised by the Security Council.

The transboundary impact of a humanitarian violation is easier to gauge than the measurement of a violation's severity and thus a trigger to Security Council action within the framework of article 39's clause of 'threat to peace'. The transboundary effect of the refugee problem which was created in Iraq by the exodus of the Kurds gave the Security Council leeway in determining that a threat to international peace and security existed. With the greater emphasis that is now placed on human rights and the recent UN authorised multinational force(InterFET) in East Timor to halt the blood bath orchestrated by pro-Jakarta militia and ensure the protection of fundamental human rights, it would appear that the Security Council's expanded interpretation of what constitutes a threat to the peace now includes severe humanitarian violations.³⁹

³⁷ See e.g. Clinton Porteus, 'Ambush Anger: Howard Appeals to the UN' *Herald Sun*, 12 October 1999 at 14; Ian McPhedran, Border War Threat: Indons Fired First, *Herald Sun*, 12 October 1999 at 15.

³⁸ On 25 October 1999, the Security Council adopted a resolution establishing the United Nations Transitional Administration for East Timor(UNTAET) which will have three components: governance and public administration, humanitarian assistance and emergency rehabilitation and military component. See, e.g., 'Briefing by Under-Secretary for Peace-Keeping Operations' UN News, 25 October 1999; 'Daily Press Briefing of office of Spokesman for the Secretary-General' UN News, 25 October 1999.

³⁹For a comprehensive history of humanitarian interventions from the early nineteenth century to the present, see Scheffer, above at n 1.

As peace-keeping and peace-making operations blend together in humanitarian interventions, proponents of humanitarian intervention point to UN Articles 1, 55 and 56 to demonstrate the Charter's emphasis on the protection of human rights as well as the maintenance of international peace and security.⁴⁰ Several norms in international human rights law have emerged since the signing of the UN Charter. While certain efforts have been aimed towards general human rights at a universal level,⁴¹ others have been intended to protect against specific abuses including genocide,⁴² war crimes and crimes against humanity,⁴³ slavery,⁴⁴ and torture.⁴⁵

While the doctrine of sovereignty continues to play a pivotal role in international relations today, it has been weakened by the norms and conventions as well as the growing idea that through collective UN authorisation, governments have the right to 'intervene' when a human rights violation might threaten international peace.⁴⁶ In addition, there has developed a norm that member states of the UN have the responsibility to ensure that human rights violations in other states are addressed.⁴⁷ The forcible interventions into Somalia and northern Iraq support this idea as well as the international force in East Timor sent after the international

⁴⁰ Arend, above n 18 at 132.

⁴¹ These conventions include the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the 1966 Covenant on Economic and Social Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights, which are collectively known as the international bill of rights.

⁴² 1948 Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 UNT.S. p.278.

⁴³ The war crimes tribunals at the end of the Second World War termed the violation of certain fundamental obligations as 'crimes against humanity'. Further work was done on the codification of these crimes as international crimes has been undertaken by the ILC in the 1954 Draft Code of Offences and the 1974 Draft Code of Crimes Against Peace and Security of Mankind. This body of crimes could now seem to constitute part of international customary law after their incorporation into the Statute of the International Criminal Court (Article 7) adopted by a staggering 120 countries (including 3 of the Big Five) in Rome, Italy on 17 July 1998.

⁴⁴ See 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

⁴⁵ The 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

⁴⁶ B G Ramcharan, 'Strategies for the International Protection of Human Rights in the 1990s' in (Richard P. Claude & Burns H. Weston (eds) *Human Rights in the World Community, Issues and Action* (1992) 275.

community bent the will of the Indonesian government which had originally termed such a force as an unacceptable violation of its territorial integrity and an abuse of its political independence.

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

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

The much publicised and criticised bungles of the UNPROFOR are not so much reflections of the military calibre of the peacekeepers but rather the over politicisation of peacekeeping issues within the UN and thus an emasculation of the force in its crisis management ability.

⁴⁷ See Scheffer, above n 1 at 275-81 where he contends that the global geo-political changes following the end of the Cold War and regional organisational developments have brought a marked change in the attitudes of

The issue of mandate of peacekeeping forces has dogged all discussions in the UN General Assembly and Security Council in the Cold War era and such forces have had virtually no military capability. With the end of the Cold War ,it was expected that the UN could quickly revise its guiding principles on the mandate of peacekeeping forces as well as their status as a reactive rather than as a proactive measure but this was stymied in 1993 by squabbling between the Americans, Canadians and Europeans over the issue of command of a possible permanent peacekeeping force. Further in a world where so many are weak and so few mighty, the issue of mandate of UN authorised forces will continue to be a thorny matter for the UN caucus but it is heartening that the UN is refreshing its political perspectives and military dimensions in its peacekeeping efforts.

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

4. Bosnia: The Heralding Of A New Role for The UN In Peace-Making

On August 25, 1992, the UN General Assembly demanded an end to the fighting in Bosnia, while condemning the massive violations of human rights and humanitarian law. General Assembly Resolution 46/242 focused on the human rights violations taking place in Bosnia. The Assembly condemned the practice of ‘ethnic cleansing’ and demanded that it be stopped. In addition, the Assembly demanded that the enormous, forcible displacement of the population around Bosnia be ended.⁴⁸ In recognition of these humanitarian problems, the General Assembly demanded that the International Committee of the Red Cross (ICRC) be ‘granted immediate, unimpeded and continued access to all camps, prisons and other places of detention’ in former Yugoslavia as well as ensuring that the ICRC be allowed free movement throughout that territory in order to gain access to those facilities. Security Council Resolution 787 of November 16, 1992 attempted to address these concerns. Resolution 787 called for all parties ‘to cooperate fully with the humanitarian agencies and with the United Nations Protection Force to ensure the safe delivery of humanitarian assistance’ in former Yugoslavia. The Council demanded an end to all interference in Bosnia from outside parties. In addition, the Council, acting under Chapters VI and VII, imposed an embargo on commodities to Serbia and Montenegro.

In response to the Secretary-General’s request for reinforcements of the peacekeeping force, the Council authorised the expansion of UNPROFOR personnel. In addition, the mandate of UNPROFOR was extended and the Council subsequently approved the Secretary-General's request for funds to enhance the peacekeeping force.

⁴⁸Pursuant to this, the Security Council in Resolution 780 requested that the Secretary-General establish an impartial Commission of Experts to make findings with respect to violations of international humanitarian law and breaches of the Geneva Convention in the former Yugoslavia. In United Nations Security Council Resolution 798 (December 18, 1992), the Council noted the human rights atrocities in Bosnia and Herzegovina. In May 25, 1993 by United Nations Security Council Resolution 827, an international criminal tribunal was established ‘for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law...in former Yugoslavia’.

The Security Council in August 1993 reaffirmed its demand for the unimpeded delivery of humanitarian aid and continued ‘safety and operational effectiveness of UNPROFOR and UNHCR personnel’ in Bosnia. In Resolution 859, the Council once again called for an ‘immediate cease-fire and cessation of hostilities.’⁴⁹ UNPROFOR's mandate to use force was again expanded in October 1993 in Security Council Resolution 871 when the peacekeeping force was authorised to use ‘self-defence, to take necessary measures, including the use of force, to ensure its security and its freedom of movement.’⁵⁰ The peacekeepers in Bosnia had a mandate resembling the ONUC peacekeepers in the Congo operation . The authority to use force was aimed at enabling the troops to carry out their role effectively in an environment where the hostility of the local parties threatened their safety and hampered their effectiveness.

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

⁴⁹ UNSC Res. 859 (August 24 1993).

⁵⁰ UNSC Res. 871 (October 4,1993).

It is imperative to note that nearly a year of inaction by the Security Council led to the General Assembly's strong condemnation of the human rights violations taking place in Bosnia in August 1992.⁵¹ Although the Assembly did not authorise or attempt to authorise the peacekeeping operation in Bosnia, the Council was prompted into action by the Assembly's resolution and ultimately strengthened UNPROFOR's mandate partly on that basis. Such strong condemnation of human rights atrocities in East Timor and the persistent calls for the UN to act on the bloodletting in the territory triggered the deployment of InterFET to safeguard fundamental human right by restoring law and order.

The lesson learnt from UNPROFOR's chequered operation in the former Yugoslavia (Bosnia, Croatia and Macedonia) is that it is foolhardy for the international community to expect a UN peacekeeping force operating within the 'strait-jacket' of traditional mandates to make any meaningful contribution within the arena of military conflict and/or active hostility by the local parties. The humiliation of some of the world's best trained professional soldiers by the Serbs showed the world that an 'aggressive' UN force will deliver more in an arena of military conflict and that constraints in traditional mandates render UN troops helpless and put their lives in jeopardy. This lesson is reflected in the broad mandate to the international force for East Timor(InterFET).⁵²

Due to the permissive interpretation of Article 39 by the Security Council, it is likely that humanitarian interventions under the auspices of the UN will occur more frequently. While the norm of non-intervention under Article 2(7) has been diminished by the interventions in Somalia, Iraq and Bosnia, the East Timor crisis and criticisms of the UN's response to the impending genocide in Rwanda have shown that the status of state sovereignty in situations

⁵¹ GA Res.46/242.

⁵² UNSC Res. 1299.

involving grave violations of humanitarian law is undergoing an evolution from the classical ,strict conservative view to a liberal, wider construction. This reflects the fact that states are taking on numerous obligations through international treaties and conventions and opening up to international scrutiny in issues previously jealously guarded by the cloak of ‘domestic matters of an internal nature’.

III. THE CHANGING FACES OF UN PEACEKEEPING OPERATIONS

1. Big Brother Aggression or Peace-Making?

The authority of the peacekeepers in former Yugoslavia to use force altered as the mission and the mandate of UNPROFOR changed. The initial deployment of the UNPROFOR forces impliedly carried with it the authority to use force in self- defence for the safety of the troops. The safety of UNPROFOR troops later became a specific concern of the Security Council, which in Resolution 871 explicitly authorised the use of force by the peacekeepers in order to guarantee their ‘security and freedom of movement.’ The importance of UNPROFOR's ‘freedom of movement’ was closely related to their ability to ensure compliance with resolutions demanding ‘the unhindered flow of humanitarian assistance’ and strengthen their self-defence mandate. Reminiscent of the Congo operation, the peacekeeper's mandate to use force for self-defence in Bosnia was greatly expanded by their authority to secure ‘free movement’, thereby facilitating the delivery of humanitarian aid.⁵³

Another parallel with the Congo peacekeeping operation was the potential for the use of force to expel outside troops. Resolution 787 expresses the Council's frustration with these forces, where the Council demands ‘that all forms of interference from outside the Republic of Bosnia and Herzcegovina, including infiltration into the country of irregular units and

⁵³ For an exposition on the ‘freedom of movement’ mandate and rule of engagement issues, see Jeane Kirkpatrick, ‘Peacekeeper’s Lives in Danger’, *The Washington Post*(USA), March 21,1994 at p.19.

personnel, cease immediately.’ The Council ‘reaffirm [ed] its determination to take measures against all parties and others concerned which fail to fulfill the requirements of Resolution 752 . . . including the requirement that all forces . . . be withdrawn.’⁵⁴

The most visible examples of UNPROFOR's enforcement authority are contained in three Security Council resolutions: Resolutions 770, 771, 816, and 836. In January 1994, when Sarajevo and other ‘safe areas’ in Bosnia were severely threatened, Secretary General Boutros Boutros-Ghali reaffirmed the "readiness" of the UN to carry out airstrikes to support the operation in Bosnia.⁵⁵ The authority in these resolutions to use force ostensibly outside of the realm of self-defence was not been without controversy or debate.⁵⁶

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

2. Peace-Making: Assertive UN Human Rights Custodianship in the Making?

Enforcement actions under Chapter VII are clearly legal and the use of force authorised by the Security Council for such purposes is lawful. All of the use of force measures authorised in

⁵⁴ UNSC Res. 787(November 16,1992).

⁵⁵ See ‘Bosnia Air Strikes Would entail More Military Assets on the Ground S-G Tells Council’ International Documents Review, January 24,1994 at 7.

the conflict in Bosnia noted above are explicit Chapter VII actions. As such, the measures fall into the exception of the last sentence of Article 2(7) relating to Chapter VII enforcement actions.

Due to the increasing frequency with which the Security Council has initiated Chapter VII action on the basis of humanitarian violations, it is worthwhile examining the status of interventions for humanitarian purposes in light of the UN action in East Timor.

It has been argued that 'genuine instances of humanitarian intervention have been rare, if they have occurred at all.'⁵⁷ Commentators point to the intervenor's non-humanitarian interest or motives, or other political or economic considerations involved, in addition to the fact that no intervening state has used the pure rationale of humanitarian intervention to justify its use of force.⁵⁸

The intervention in Bosnia and the other former Yugoslav republics was contentious since it was a 'mixed conflict' nevertheless, it can be characterised as a predominately humanitarian disaster which required Chapter VII action by the UN. The interventions in Somalia and recently in East Timor strongly challenge the assertion above that humanitarian interventions usually have underlying political and economic considerations. The locations of the territories and the absence of any visible or invisible overarching socio-political or economic interests by the intervening powers point to purely humanitarian considerations aimed at fulfilling the lofty humanitarian ideals of the international community on the protection of fundamental human rights as enshrined in the 'international bill of rights' and other related international instruments.

⁵⁶ See 'Serbia Asks World Court to Rule NATO Threat of Force Illegal', Associated Press, AP Worldstream, March 23, 1994.

⁵⁷ Arend, above n 18 at 135.

Even in the former Yugoslavia, the Council, in several resolutions, defined the humanitarian bases of intervention: the transboundary effects of the refugee situation in Bosnia,⁵⁹ the inability to deliver humanitarian aid due to the civil war,⁶⁰ 'ethnic cleansing' and other violations of humanitarian law.⁶¹ The findings that these circumstances were the bases for a threat to international peace and security are grounded in the recognition that the external refugee problem and the internal 'grave and systematic' humanitarian violations both warranted Chapter VII action.

The internal human rights situation in East Timor by itself triggered Article 39 in a crisis that was purely internal. The reports of 'political cleansing', 'massive, organized, detention and translocation' and 'systematic torture and murder' of pro-independence East Timorese certainly made a compelling case for UN action. In any event, although the principle of humanitarian intervention for the purpose of preventing these violations is not yet recognised as a formal legal exception to the Article 2(4) prohibition against the use of force, the practice of the UN in triggering Chapter VII action is clearly legal and presents strong evidence of emerging customary law.

The increased prospect of UN humanitarian diplomacy of this type will potentially increase the number of original peace enforcement operations. This is due to foreseeability that peacekeepers in the future will find their safety threatened as their mission involves enforcement action requiring more complex and refined rules of engagement in hostile environments.

⁵⁸ Id. quoting Verwey, 'Humanitarian Intervention in The Current Legal Regulation of the Use of Force' (A S Cassesse, ed., 1986).

⁵⁹ UNSC Res. 757 (May 30, 1992).

⁶⁰ UNSC Res. 770 (August 13, 1992).

The comprehensive UN restructuring of its peacekeeping operations in 1992 would seem to herald the genesis of a new role for the UN in peacekeeping and peacemaking. Traditionally, peacekeeping operations were managed by the Office of Special Political Affairs. The organisation was administered by two Under-Secretaries General (USG), who both reported to the Secretary General. One USG managed field operations and mediation efforts associated with peace enforcement, while the other was a political troubleshooter for the Secretary General. Eventually, the peacemaking functions were transferred to the Secretary General's Executive Office, resulting in a complete separation of planning from political issues. This structure reflected the clear distinction between peacekeepers and peace enforcers in the UN organisation. This arose from the traditional UN view that peace enforcers, who receive military training, and peacekeepers, who are trained for non-violent responses to provocation, should be kept separate.⁶²

The 1992 restructuring included the creation of an Office of Peacekeeping Operations as one of four designated departments which would report directly to the Secretary General. The revised structure streamlines the peacekeeping administration. A formal relationship between peacekeepers and peacemakers ought to be put in place. As the missions become blurred and conventional peacekeeping forces gradually become engaged in more aggressive Chapter VII actions, training, equipment needs, command structures and rules of engagement on the use of force will have to be reviewed to reflect the changing nature of peacekeeping.⁶³

⁶¹ UNSC Res .771 (August 13,1992).

⁶² William J Durch 'Running the Show: Planning and Implementation' in William J Durch (ed) *The Evolution of UN Peacekeeping* (1993) 73-74.

⁶³ See Brian Urquart, 'The UN and International Security After the Cold War', in Adam Roberts & Benedict Kingsbury (eds) *United Nations ,Divided World* (2nd ed.1993) 81.

V. CONCLUSION

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

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

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

As original peace-making missions such as InterFET mandated to use force are launched , the rules of engagement and the authority for the use of force must also be modified and articulately enunciated. The stakes, however, are high. The safety of the peacemakers, the continued viability of the United Nations collective security structure and the maintenance of international peace and security in future operations will all depend upon the ability of the UN to respond to this challenge.⁶⁴

⁶⁴ The Clinton administration introduced very stringent guidelines for future participation in international peacekeeping operations. The United States will only participate when there have been grave threats to international peace and security, major disasters which require relief, or ‘gross violations of human rights’. See ‘U.S. Eyes New Criteria for Peacekeeping Missions’, *Chicago Sun Times*(USA),January 30,94 at p.36.