

From Peacekeeping to Peace Enforcement: the Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security

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ARTICLES

FROM PEACEKEEPING TO PEACE ENFORCEMENT: THE BLURRING OF THE MANDATE FOR THE USE OF FORCE IN MAINTAINING INTERNATIONAL PEACE AND SECURITY

JON E. FINK*

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I. INTRODUCTION

The 'weapons' used by the peacekeeper in achieving his objectives are those of negotiation, mediation, quiet diplomacy, tact and the patience of Job — not the self-loading rifle.¹

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 since 1945 into a well-developed concept based on certain agreed principles. With the end of the Cold War, the United Nations has willingly taken on a new and more aggressive role as "peace enforcer." Iraq's aggression in Kuwait, for instance, was soundly met by an international coalition of armed forces acting under the authority of the UN. The humanitarian aspects of the Iraqi oppression of the Kurds and the inability to supply food and assistance to starving Somalis have also presented the UN with new challenges to its foundational principles of sovereignty and non-intervention.

As the fighting mounts in the former Yugoslavian republics, the UN appears committed to settling the dispute diplomatically if possible, and by force if necessary. The propensity of the Security Council to authorize humanitarian interventions, however, has led to an anomaly — peacekeepers, generally guided by the principle of neutrality and traditionally limited to self-defense, are finding themselves in the more aggressive role of peace enforcer. The dynamic nature of humanitarian assistance operations has resulted in a gradually expanding mandate for the peacekeepers' authority to use force. As their objectives change and their authority to use force alters, peacekeeping missions are becoming increasingly less impartial and more assertive. The challenge is for the peacekeeping forces to adapt to a more hazardous environment without jeopardizing their safety while accomplishing their mission.

The purpose of this paper is to analyze the full range of the use of force under UN auspices in the context of the UN Charter and international law. Under the Charter, the UN has engaged in peacekeeping and peace enforcement actions which have covered "the spectrum of conflict."² At one end, the spectrum is peacekeeping, with little or no

1. INDAR JIT RIKHYE, *PEACEKEEPING: APPRAISALS & PROPOSALS* 6 (1983).

2. WILLIAM J. DURCH, *THE EVOLUTION OF UN PEACEKEEPING* 4 (William J. Durch ed., St. Martin's Press 1993).

force beyond self-defense authorized and the full consent of the host government. At the other end is a peace enforcement action such as the Persian Gulf war, characterized by the use of "all necessary" force and a total lack of consent by the local government to peacekeeping and peace enforcement actions. This paper addresses the more obscure circumstances where an ostensibly neutral peacekeeping force finds itself gradually engaged in the contentious role of peace enforcer as it progressively moves along the sliding scale of the spectrum.

After an initial introduction to the background of the UN, the Charter and its principal norms, this paper will survey UN actions, from serving as observers and armed peacekeepers to employing enforcement actions and humanitarian interventions, taking a historical and political perspective. The paper will then examine the legal bases and foundations for these operations, focusing on the legal norms directly from the Charter and "guiding principles" from the Charter in practice, which have directed past operations. Because of the Security Council's recent willingness to authorize humanitarian interventions, the paper will also examine the legal development of these missions in some detail, concentrating on the Council's expanded interpretation of the Charter's Article 39 requirement of a "threat to the peace."

Using the present conflict in the former Yugoslav republics as a model, the paper then will analyze the enforcement action in Bosnia-Herzegovina and examine the status of the Charter's norms and other principles which have traditionally guided peacekeeping operations. Lastly, the paper will discuss the peculiar situation which occurs when the authorized use of force in a peacekeeping operation escalates beyond the traditional norm of self-defense and examines the UN's ongoing efforts to address this problem.

II. GENERAL BACKGROUND OF THE UN CHARTER

For the purposes of this paper, it is useful to look at the twentieth century efforts to establish 1) international organizations, 2) conventions, and 3) military arrangements designed to create norms by which force would be restricted.

A. Historical and Political Perspective

The belief that there was a need for a world organization to control the use of force originated from the destruction left in the wake of World War I. Prior to 1919, the justifications for war had evolved from

moral to legal bases.³ The emergence of the state as a political structure helped to create the idea that states had a sovereign right to go to war lawfully.⁴ The havoc wrought by the First World War convinced the Great Powers of the time that an international structure was needed to prevent similar crises in the future.

The League of Nations sought to protect the "territorial integrity and existing political independence of" member states from "external aggression" by developing detailed rules to define the circumstances under which states could use force.⁵ The League devised procedures of arbitration, judicial settlement and inquiry by the League Council to reconcile disputes or "rupture(s)" between member states. Although states could follow the decision of the Council, non-compliance by a state with that decision allowed the affected state to resort to war after a three-month waiting period. Likewise, the Council's failure to make a decision would create no restrictions on a state's ability to resort to war.⁶

The League Covenant did not explicitly outlaw the total use of force. A subsequent attempt to limit the right of states to go to war was the Kellogg-Briand Pact. The Kellogg-Briand Pact, ratified in 1929, renounced war "as an instrument of national policy" and "condemn[ed] recourse to war for the solution of . . . international policies."⁷ Although the Pact did not address the issue of the use of force short of war, it did recognize that aggression was distinct from self-defense. Generally, the parties to the Pact accepted that the use of force was allowable in cases of self-defense.⁸ It will later be seen that the Kellogg-Briand Pact was the precursor to Article 2(4) of the UN Charter.

Although the Kellogg-Briand Pact did not prevent the Second World War, the Allied nations quickly realized that an international political infrastructure was necessary to govern international conflicts. In San Francisco in April of 1945, the victorious Allied powers met along with the delegates of 45 states to formulate the UN Charter.

The UN Charter was intended to provide rules which managed the

3. For a detailed discussion on the early history of the use of force and the moral and legal reasons used to justify war, see A. C. AREND & R. J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE, BEYOND THE UN CHARTER PARADIGM* 11-19 (Rutledge 1993) [hereinafter AREND].

4. *Id.* at 16-17.

5. Covenant of the League of Nations, art. 10.

6. AREND, *supra* note 3, at 19-20.

7. Kellogg-Briand Pact, Aug. 26, 1928, art. I, 94 L.N.T.S. 57.

8. AREND, *supra* note 3, at 23.

behavior of states towards each other. The primary purpose of the Charter was to maintain international peace and security. Several Charter provisions, discussed below, directly address conditions under which the use of force is appropriate.

B. Legal Bases and Norms

We now turn to a discussion of the law as it relates to the full spectrum of the use of force under the auspices of the UN. It first is helpful to discuss the legal norms of international law which have served as general principles which indicate how nations have treated each other over the past fifty years. Due to the dynamic nature of this subject, it is essential to look at the UN Charter, which has been described as the "authoritative statement on the use of force," in light of the subsequent practice of the member states in accordance with Article 31 of the Vienna Convention on the Law of Treaties.⁹

As noted above, the UN Charter has set forth the norms upon which laws governing the use of force are based. Professor David Scheffer has listed the principal norms of international law as state sovereignty, the non-use of force, and non-intervention in internal affairs.¹⁰ Professor Scheffer notes that these norms are "evolving"¹¹ and reflect the view that the Charter is a "flexible document."¹²

The norm of the "non-use of force," and to a lesser extent state sovereignty,¹³ is established in the UN Charter. Article 2(4) contains a

9. See Louis Henkin, *The Use of Force: Law and U.S. Policy*, in RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 38 (Council on Foreign Relations Press, 1991) [hereinafter Henkin]. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 8 I.L.M. 679. See also Vienna Convention on Treaties Between States and International Organizations, Mar. 21, 1986, art. 31, 25 I.L.M. 543 (not in force).

10. David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 259-64 (1992) [hereinafter Scheffer].

11. *Id.* at 259.

12. David J. Scheffer, *Commentary on Collective Security*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 103 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991) [hereinafter Scheffer II]. Professor Scheffer notes that the actions of the international community during the Iraq-Kuwait crisis were proof that a "[n]arrow, rigid interpretation of the Charter . . . may have the unintended result of creating unnecessary obstacles to the effective implementation of critical Charter provisions." *Id.* at 103-4.

13. Sovereignty, according to Professor Scheffer, is the "central pillar of international law," and thus legitimized the nation-state as entitled to the protection of international law. The character of sovereignty, he asserts, is evolving as the state takes on numerous obligations through international treaties and conventions, and is challenged by international organizations and domestic ethnic groups. Scheffer, *supra* note 10, at

prohibition on "the use of force against the territorial integrity or political independence of any state,"¹⁴ providing: "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."

The Article is broader than the Kellogg-Briand Pact in that it prohibits the use and the threat of use of force rather than just recourse to war. 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 — both explicit and implicit — were subsequently used to justify unilateral interventions.¹⁵ 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-defense if an armed attack occurs against a Member. . ." and the enforcement actions authorized by the Security Council under Chapter VII.¹⁶ Implicit exceptions to Article 2(4) have been derived from the Article. For instance, an argument can be made 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.¹⁷

The condemnation by governments of almost every use of force which has occurred since the signing of the UN Charter could lead to the conclusion that Article 2(4) is restrictively interpreted. In fact, the prohibition on the use of force would appear to have been enlarged by

259-60.

14. See also UN Charter, art. 2(3) ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.").

15. Henkin, *supra* note 9, at 39.

16. One commentator has noted that the general prohibition of Article 2(4) on the use of force is limited by three factors: (1) the reservation in Article 51 with respect to self-defense; (2) expressed provisions of the Charter pertaining to collective measures of force by member-states; and (3) the limitation of the word "force" in Article 2(4) covering only armed or physical force. R. AMER, *THE UNITED NATIONS AND FOREIGN MILITARY INTERVENTIONS*, 23 (Department of Peace and Conflict Research Uppsala University 1992).

Other exceptions in the Charter to Article 2(4) include Article 106's collective use of force before the Security Council is functional and the Articles 107 and 53 use of force against "enemy" states. AREND, *supra* note 3, at 31-32.

17. See Henkin, *supra* note 9, at 39-40. Professor Henkin points out that questions such as this could be effectively answered by the development of international law by a court with "comprehensive jurisdiction and recognized authority." *Id.* at 40.

the General Assembly's adoption of instruments designed to limit aggression and armed intervention.¹⁸ States, however, have claimed that use of force and intervention have been justified by numerous exceptions to Article 2(4). Some of the noted exceptions to the prohibition of the use of force have included interventions to support self-determination, socialism (Brezhnev Doctrine), democracy (Reagan Doctrine)¹⁹ and humanitarian interventions.²⁰

As noted above, a primary exception in the Charter to the prohibition of the use of force is the enforcement action procedures contained in Chapter VII. Article 42 expressly authorizes the Security Council to take "action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." There are three prerequisites which must exist before an Article 42 procedure can be authorized. First, the Security Council must determine that a threat to peace, breach of peace or act of aggression exists in accordance with Article 39. Article 39, though originally read rather narrowly, has taken new meaning in the post-Cold War period. Before, the Security Council only considered that Article 39 had been triggered by the actual use of international military force with two exceptions.²¹ Recently, however, the Council has determined that a threat to international peace and security existed in the repression of Kurds in Iraq, the rampant starvation in war-torn Somalia and the secession of the former republics of Yugoslavia.²² This broader interpretation of Article 39 by the Security Council has led to more liberal determinations of when a humanitarian violation constitutes a threat to international peace and security.

The second prerequisite is that the Council should call on the parties concerned to comply with provisional measures as the Council

18. For discussion of the General Assembly's adoption of The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970), and the Definition of Aggression (1974) (both adopted by consensus). See Henkin, *supra* note 9, at 41.

19. See *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), *Merits*, 1986 IJC 14 (Judgment of June 27) (ruling for the first time since the *Corfu Channel* case on limits of the right of self-defense, the determination of what constitutes an "armed attack" and the principle of non-intervention).

20. Henkin, *supra* note 9, at 41-44. Nothing in the Charter expressly prohibits civil wars or internal revolutions. *Id.* at 42.

21. See Jost Delbruck, *A More Effective International Law or a New "World Law"?: Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 707 (1993) [hereinafter Delbruck]. The Security Council had found that a "threat to the peace" had been met by apartheid in South Africa and by racism in Rhodesia. *Id.* at 708 n.14.

22. *Id.* at 707-10.

deems necessary. Provisional measures usually include a cease-fire or withdrawal. In accordance with Article 42, the Council must consider that measures not involving the use of force in Article 41 "would be inadequate or have proved to be inadequate" to satisfy the third condition. The Article 41 measures include economic embargoes, disruption of communications and severance of diplomatic relations.²³

In addition, Article 43 was included to provide for "special agreements" by which nations would contribute armed forces to the Security Council for the maintenance of international peace and security, and Article 47 provided for a Military Staff Committee (MSC) to "advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security."²⁴

It should be noted that the Charter in Chapter VIII recognizes that regional organizations such as the North Atlantic Treaty Organization (NATO) or the Organization of American States (OAS) can potentially perform a role in regional or international conflict management as regulated by the Security Council. Article 52 empowers regional organizations to deal with "matters relating to the maintenance of international peace and security . . . provided that such . . . activities are consistent with the Purposes and Principles of the United Nations." Members are compelled to "make every effort to achieve pacific settlement of local disputes." Article 53 requires that "no enforcement action shall be taken under regional arrangements . . . without the authorization of the Security Council." While scholars agree that regional organizations can use force in self-defense and pursuant to an enforcement action authorized by the Security Council, others claim that uses of force have proven more controversial.²⁵

The principle of state sovereignty, long protected by the concept of non-intervention into the domestic affairs of states, is both recognized

23. See Oscar Schachter, *Authorized Uses of Forces by the United Nations and Regional Organizations*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 67 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991) [hereinafter Schachter].

24. See J. M. LEE, R. VON PAGENHARDT & T. W. STANLEY, *TO UNITE OUR STRENGTH, ENHANCING THE UNITED NATIONS PEACE AND SECURITY SYSTEM* 49-50 (University Press of America 1992) [hereinafter LEE].

25. AREND, *supra* note 3, at 61-62. When the OAS recommended action against Cuba during the 1962 missile crisis, it was considered *not* to be a permissible enforcement action because the Security Council had not authorized the action. *Id.* at 63. In addition, the claim that regional organizations may intervene in civil wars to promote self-determination has been hotly debated. *Id.* at 63-65. Cf. JOHN NORTON MOORE, *LAW AND THE GRENADA MISSION* (1984).

as customary international law and codified in the UN Charter.²⁶ Article 2(7) acknowledges that "[n]othing contained in the present Charter shall authorize 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.²⁷ However, the principle of non-intervention has been eroded by the numerous intrusive treaty obligations to which states have committed themselves.²⁸ 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 recognized 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, which in turn has occasionally led to complex operations that include elements of both peacekeeping and peace enforcement.

III. THE UN CHARTER AND PEACEKEEPING

The grand designs of the UN in the aftermath of World War II were diminished by the emergence of the Cold War. The drafters of the UN Charter expected that the UN would be summoned to confront forces on the size and scale of the Second World War. The previously mentioned articles were created to form a pre-arranged UN force that would be available when needed by the Security Council. With the onset of the Cold War, this expectation quickly became unrealistic.²⁹

Soviet fear of a U.S.-dominated Security Council led to the failure of the five permanent members to agree on a collective security regime. The MSC's incapacity to develop a military force "on call" for Security Council action had two primary effects. The first was the advent of numerous regional defense pacts such as the North Atlantic Treaty Organization (NATO) and the Warsaw Pact. The second result was the

26. AREND, *supra* note 3, at 715.

27. See Vladimir Kartashkin, *Human Rights and Humanitarian Intervention, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 206 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991) [hereinafter Kartashkin].

28. Scheffer, *supra* note 10, at 262.

29. Richard Connaughton, *Military Intervention and UN Peacekeeping, in TO LOOSE THE BANDS OF WICKEDNESS* 171 (Nigel Rodley, ed., Brassey's (UK) 1992) [hereinafter Connaughton].

emergence of peacekeeping as a method of maintaining international peace and security.³⁰

A. History and Background

Generally, peacekeeping can be separated into two categories: observer missions and actual peacekeeping forces.³¹ One of the first peacekeeping operations established by the Security Council was the United Nations Truce Supervision Organization (UNTSO), which still operates today. UNTSO was created to supervise the truce and Armistice Agreements between the newly formed state of Israel and four of her Arab neighbors in 1948-9. The observers were (and remain) unarmed. Significantly, the observers operate only with the consent of the parties. The observers' mission does not include enforcement of Agreements or prevention of any violations of the truce. When complaints arise, observers either settle the dispute on their own or report the complaint through their chain of command to the Mediator, the senior member of UNTSO. The Mediator could then report the complaint, at his discretion, to the Secretary General and the Security Council. In certain cases, the observers would initiate investigations as needed.³²

One of the more recent peacekeeping operations similar to UNTSO is the United Nations Iraq-Kuwait Observation Mission, known as UNIKOM. UNIKOM, set up in the aftermath of the 1991 Persian Gulf War, was authorized by Security Council Resolution 689 to assist allied coalition forces in the demilitarized zone (DMZ) in withdrawing from Iraq.³³ In accordance with the request of the Secretary General's Report, UNIKOM's duties included the deterrence of "violations of the boundary through its presence in and surveillance of the demilitarized zone; and to observe any hostile or potentially hostile action mounted from the territory of one State to the other."³⁴ UNIKOM, distinct from the Special Commissions that were created to dismantle Iraq's nuclear, chemical and biological warfare capacity and

30. LEE, *supra* note 24, at 46-47.

31. *Id.* at 72.

32. UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, THE BLUE HELMETS, A REVIEW OF UNITED NATIONS PEACE-KEEPING 18 U.N. DOC. DPI/1065, Sales No. E.90.I.18 (1990) [hereinafter *The Blue Helmets*].

33. William J. Durch, *The Iraq-Kuwait Observation Mission*, in THE EVOLUTION OF UN PEACEKEEPING 261 (William J. Durch ed., St. Martin's Press 1993) [hereinafter *Durch*].

34. United Nations, *Report of the Secretary-General on the Implementation of Paragraph 5 of Security Council Resolution 687 (1991)*, Security Council Document S/22454, April 5, 1991, 1.

the forces over-flying northern and southern Iraq to protect the Kurds and Shiites, was an unarmed peacekeeping force. The Mission's operations have been limited to observing activity and reporting violations in the DMZ.³⁵

The Suez conflict in 1956 provided the UN with its first opportunity to deploy an armed peacekeeping force. The first United Nations Emergency Force (UNEF I) set the precedent for funding, logistics and command structures for future peacekeeping forces. UNEF's primary mandates under General Assembly Resolution 1000 were to secure a cease-fire between British, French, Israeli and Egyptian forces in the Sinai Peninsula; to direct the withdrawal of the non-Egyptian forces from Egyptian territory; and to patrol the border areas. In addition, the Emergency Force was responsible for trying to achieve the aims of the Egypt-Israeli Armistice Agreement.³⁶ The Secretary General, Dag Hammarskjöld, 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."³⁷ UNEF troops, while more than just observers, were clearly intended to be deployed for peaceful purposes alone.

An essential — and at the time, unique — feature of UNEF I was the broad political support which it received from all parties to the conflict, including the superpowers. The Secretary General was able to secure "good faith" agreements from President Nasser of Egypt regarding the activities of UNEF and thus, Nasser's consent to allowing the force to operate in Egyptian territory while recognizing Egypt's national sovereignty. The United States and Soviet Union, seeking to avoid a direct confrontation in the conflict, were eager to arrange a cease fire and establish the Emergency Force.³⁸ The British and French, widely condemned for the attack and wishing to clear the Suez Canal in order to import oil, agreed to remove their forces and to recognize the UNEF's mandate. The Israelis, while not allowing UN troops on Israeli soil, also reluctantly observed the Resolutions.³⁹

UNEF deployed to the area as the British and French troops withdrew from the Suez Canal territory. The Emergency Force oversaw the withdrawal of Israeli forces, which was delayed until March 1957.

35. Durch, *supra* note 33, at 267.

36. Mona Ghali, *United Nations Emergency Force I*, in *THE EVOLUTION OF UN PEACEKEEPING* 112-13 (William J. Durch, ed., 1993) [hereinafter Ghali].

37. The Blue Helmets, *supra* note 32, at 48.

38. Ghali, *supra* note 36, at 110-11. The Soviets were preoccupied with violent anti-communist student demonstrations in Hungary at the time. *Id.* at 111.

39. *Id.* at 112.

UNEF continued to patrol the border frontier until Egypt rescinded its consent to the Force's presence in May 1967.⁴⁰

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 decolonized Congo. Belgium, the former colonial power, was required to remove her troops from the Congo under the UN's mandate. The complex political situation in the area resulted in the granting of vague responsibilities to the peacekeeping force. There was no authorized use of force, except in self-defense.⁴¹ 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 authorized 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."⁴² ONUC's mandate was again expanded in November 1961 when the Security Council authorized ONUC troops to use force to remove foreign mercenaries who were fighting alongside Congolese forces.⁴³ In addition, the ONUC troops were authorized to have free movement throughout the Congo.⁴⁴ By January 1963, ONUC troops numbered nearly 20,000, including fighter jets from Sweden, Iran, and Italy.⁴⁵ The UN troops, under the rationale of securing their freedom of movement, had advanced to Elizabethville in Katanga and successfully prevented a Katangan secession.⁴⁶

B. Law and Practice

As explained above, peacekeeping is a United Nations non-enforcement action which is not expressly delineated by the UN Charter. Since the signing of the Charter in 1945, there have been twenty-six distinct UN peacekeeping operations — thirteen during the Cold War

40. *Id.* at 119. The UNEF troops withdrew at the request of the Egyptian government in accordance with a good faith agreement. Withdrawal of the forces was a precursor, though not a cause, of the Six Day War. *Id.* at 127.

41. The Blue Helmets, *supra* note 32, at 220.

42. G.A. Res. 161, U.N. SCOR, (1961).

43. G.A. Res. 169, U.N. SCOR, (1961).

44. See The Blue Helmets, *supra* note 32, at 250.

45. William J. Durch, *The UN Operation in the Congo*, in THE EVOLUTION OF UN PEACEKEEPING 336 (William J. Durch, ed., 1993) [hereinafter Durch II].

46. *Id.* at 344.

(1945-1985) and thirteen operations afterward (1985-present).⁴⁷ Although peacekeeping operations have been functionally used for many different purposes,⁴⁸ the legal basis for the concept was a matter of debate from the beginning.

A basic argument first arose out of a strict reading of the Charter. Some argued that the only authorized use of military force under the Charter was in Article 42 and Chapter VII. An ancillary claim was that the Charter in Article 43 provided the only basis for establishing these military forces. However, those in favor of initiating peacekeeping missions contended that this proposed use of military units was not for enforcement purposes. The proposed use, thus, fell outside the scope of Chapter VII. Originally, the UN Secretary General proposed that a UN guard be set up to protect UN missions around the globe.⁴⁹ The Secretary General justified this proposition under Articles 97, 98 and 100 of the Charter, which all refer to the organization of the UN Secretariat and the Secretary General's powers to develop a staff. The resulting resolution from the General Assembly created the UN Field Service, a precursor to later peacekeeping proposals, which assisted field missions and provided a certain amount of security.⁵⁰

The early peacekeeping missions, which involved unarmed observers, were impliedly authorized 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*,⁵¹ the ICJ ruled that Article 14 empowered both the Security Council *and* the General Assembly to

47. DURCH, *supra* note 2, at 7-11. For a comprehensive list of the operations and more in-depth study of peacekeeping history, operations, politics and funding, see *id.*; and The Blue Helmets, *supra* note 32.

48. Some commentators have simply separated the operations into two categories — observer groups and military contingents. See AREND, *supra* note 3, at 66. *But see* Schachter, *supra* note 23, at 80 (classifying peacekeeping operations into eight groupings).

49. This proposal was made shortly after the assassination of Count Bernadotte, the UN Mediator in Palestine. Schachter, *supra* note 23, at 81.

50. *Id.*

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

authorize peacekeeping operations.⁵² Significantly, the ICJ 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 authorization.⁵³ The Court noted that the Security Council commenced missions "at the request, or with the consent, of the States concerned."⁵⁴ Based on the ICJ's opinion, commentators have generally agreed that authority for peacekeeping operations is contained in both Chapter VI and Chapter VII, or as Dag Hammarskjöld quipped, "Chapter VI and a half."⁵⁵

The early peacekeeping campaigns had several elements or "guiding principles" in common which led to their operational success.⁵⁶ First, the UN operations had the political support, or at least acquiescence, of the five permanent members of the Security Council, particularly the United States, which was the principal financier of the operations.⁵⁷ Second, the consent and cooperation of the local parties to the dispute was seen as essential to the deployment of the UN peacekeepers.⁵⁸ For example, the mandate of ONUC was seriously frustrated after the Congolese government collapsed in September 1960. As such, peacekeepers were considered distinct from troops in an

52. UN Charter art. 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." The ICJ's holding in *Certain Expenses of the United Nations* was significant in that the Security Council, hampered by French and British vetoes in the Suez situation and paralyzed by a Soviet veto in the Congo crisis, was unable to take action. The General Assembly eventually debated both issues and recommended, rather than demanded, that states take action. AREND, *supra* note 3, at 67.

53. *Id.*

54. *Certain Expenses* at 164. See Schachter, *supra* note 23, at 82.

55. Connaughton, *supra* note 29, at 174. See also Schachter, *supra* note 23, at 82. The author would distinguish the Congo operation as Chapter VII-authorized even though not an enforcement action per se.

56. The term "guiding principles" is borrowed from the "Concept and Guiding Principles" devised by Secretary General Dag Hammarskjöld for the UNEF I forces. See *The Blue Helmets*, *supra* note 32, at 47-48. The principles in this paper were not initially penned by the Secretary General, but reflect precepts which have developed through subsequent peacekeeping operations.

57. See Connaughton, *supra* note 29, at 171. The author suggests that a "basic understanding" has also been that the peacekeeping troops are not drawn from the permanent members of the Security Council. See also Nikolai Krylov, *International Peacekeeping and Enforcement Actions After the Cold War*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 97 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991) [hereinafter Krylov].

58. Schachter, *supra* note 23, at 84.

enforcement action and were limited to "proportionate and necessary" self-defense.⁵⁹ Third, the neutrality or independence of the UN was a primary factor in an effective peacekeeping operation.⁶⁰ Again, when ONUC began to take an enforcement role in place of the central government, attacks on the UN force occurred and the UN's mandate appeared blurred at best and biased at worst. These "guiding principles" have come to distinguish peacekeeping operations in the "spectrum of conflict" from more aggressive enforcement actions.

Likewise, the use of force in peacekeeping operations has always officially been limited to self-defense. Professor Oscar Schachter, however, has pointed out that self-defense has been interpreted broadly in order to suit the circumstances of the particular operation. For instance, although the ONUC forces were originally authorized to use force only if attacked, the Congo mandate included the maintenance of law and order.⁶¹ In addition, as Professor Schachter has noted, ONUC's free movement throughout the Congo enabled the UN force to control strategic parts of the Congo and, ultimately to prevent the secession of Katanga.⁶² The concept of self-defense, as well as the principles of non-intervention and sovereignty, were loosely defined and greatly modified in the Congo operation.

While peacekeepers today continue to heed to the principle of self-defense, the size and complex mandate of operations such as those in northern Iraq and former Yugoslavia have again blurred the strict "neutrality and impartiality" of these operations.

IV. THE UN CHARTER AND PEACE ENFORCEMENT

A. *History and Background*

Unlike peacekeeping, the concept of peace enforcement had its ex-

59. Schachter, *supra* note 23, at 84-86. The concepts of "necessity and proportionality" are borrowed from the *Caroline* case, which recognized that the "necessity of self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation." AREND, *supra* note 3, at 18. See also Connaughton, *supra* note 29, at 172-73.

60. Lee, *supra* note 24, at 78.

61. See also The Blue Helmets, *supra* note 32, at 267. The United Nations Security Force was set up primarily as an "internal law and security force" to monitor the transition of the administration of West New Guinea (West Irian) from the Netherlands to Indonesia. The United Nations Temporary Executive Authority (UNTEA) was also created in West New Guinea with a broad mandate that included appointing government officials, legislating for the territory and guaranteeing civil liberties and property rights. *Id.* at 270.

62. Schachter, *supra* note 23, at 84-85.

licit origins in the UN Charter under Chapter VII, as noted above. Security Council authority to use force under the Charter has been primarily limited to two different types of collective uses of force: enforcement actions and humanitarian interventions.

1. Enforcement Actions

The first occasion on which the UN Security Council authorized 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.⁶³ 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."⁶⁴ Unable to utilize the MSC 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 President.⁶⁵

Although the Korean enforcement action was the first time that the UN authorized Chapter VII use of force, it must be noted that these resolutions mention neither Chapter VII nor Article 42. The resolutions also were not binding decisions, but rather were recommendations.⁶⁶ Lastly, 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.⁶⁷

The end of the Cold War provided the Security Council with the means to authorize 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.⁶⁸ On August 6, the Council imposed economic sanctions on Iraq, "[a]cting under

63. United Nations Security Council Resolution 82 (June 25, 1950).

64. United Nations Security Council Resolution 83 (June 27, 1950).

65. United Nations Security Council Resolution 84 (July 7, 1950). *See* Schachter, *supra* note 23, at 72.

66. AREND, *supra* note 3, at 53.

67. *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. *Id.* at 52.

68. United Nations Security Council Resolution 660 (Aug. 2, 1990).

Chapter VII of the Charter.”⁶⁹ In response to Iraq’s subsequent claim that it had annexed Kuwait, the Security Council, on August 25, authorized the deployment of naval forces to enforce the sanctions of Resolution 661 by using “such measures commensurate to the specific circumstances as may be necessary . . . to halt all inward and outward maritime shipping. . . .”⁷⁰

The United States during this time argued that the interdiction efforts were justified as an act of collective self-defense of Kuwait, and that Security Council authority was not necessary.⁷¹ In either case, the Security Council took action to authorize the maritime interdiction operations as well as to authorize, as of November 1990, member states “to use all necessary means to uphold and implement resolution 660 . . . and to restore international peace and security in the area.”⁷² The allied coalition forces which liberated Kuwait acted pursuant to the Chapter VII authorization of Resolution 678. Unlike the Korean action, there was no formal UN command. The coalition of independent allied forces operated under the leadership of an American commander with Saudi Arabia serving as the host country.⁷³

The liberation of Kuwait was the first time that all five permanent members of the Security Council authorized the collective use of force to repel an act of aggression. One commentator has noted that Resolution 678 was an authorization pursuant to Article 42, not a command. In addition, the language of the resolution which was addressed to “Member States co-operating with the government of Kuwait” seems to follow the United States’ view that the forces were acting under Article 51 in collective defense of Kuwait.⁷⁴

With increasing political cooperation between all of the permanent members of the Security Council, the UN is, more than ever in its brief history, now in a position to address political situations which threaten international peace and security. From a study of the actions in Korea and the Persian Gulf, it would appear that the UN is most likely to take action where there is large scale aggression by one state against another state and where the vital interests of at least some of the per-

69. United Nations Security Council Resolution 661 (Aug. 6, 1990).

70. United Nations Security Council Resolution 665 (Aug. 25, 1990).

71. See AREND, *supra* note 3, at 54.

72. United Nations Security Council Resolution 678 (Nov. 29, 1990).

73. LEE, *supra* note 24, at 80.

74. Abram Chayes, *The Use of Force in the Persian Gulf*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 10 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) [hereinafter Chayes].

manent members of the Security Council are at stake.⁷⁶ Departures from this view have recently been seen in cases where states under the authority of the UN have justified their use of force on the basis of humanitarian violations.

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.⁷⁶ 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. . . ."⁷⁷ Although the UN Charter never explicitly mentions the use of force for humanitarian purposes, recent relief operations in northern Iraq and Somalia have been authorized by the UN to protect fundamental human rights.

After the defeat of Iraq's army by the coalition forces in February of 1991, 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 Kurds of northern Iraq had been seeking autonomy in the region for decades. As recently as 1988, the Kurds had been attacked with chemical weapons by Saddam's regime.⁷⁸ The memory of the prior attack and the severity of the present onslaught led nearly two million Kurds to leave the region, fleeing into Turkey and Iran. When the Kurds were denied entrance into Turkey, many remained in the inhabitable mountains of northern Iraq. There were reports of nearly 1000 deaths each day.⁷⁹

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 . . . im-

75. See Paul Fifoot, *Functions and Powers, and Inventions: UN Action in Respect of Human Rights and Humanitarian Intervention*, in *TO LOOSE THE BANDS OF WICKEDNESS* 149 (Nigel S. Rodley ed., 1992) [hereinafter Fifoot], where the author distinguishes Chapter VII actions in which the Security Council has authorized the use of force from those in which it has not, as in the Falklands.

76. For an elaborate discussion of the academic definitions of the term "intervention," see AMER, *supra* note 16, at 9-20.

77. AREND, *supra* note 3, at 113.

78. Lawrence Freedman & David Boren, *'Safe Havens' for Kurds in Post-War Iraq*, in *TO LOOSE THE BANDS OF WICKEDNESS: INTERNATIONAL INTERVENTION IN DEFENCE OF HUMAN RIGHTS* 44-45 (Nigel S. Rodley, ed., 1992) [hereinafter Freedman]; See Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 INT'L. J. REF. L. 4, 4-8 (1992) [hereinafter Adelman] for a brief history of the Kurdish struggle in the region, particularly with the Iraqi regime.

79. Freedman, *supra* note 78, at 48.

mediately end this repression. . . ."⁸⁰ The portion of the Resolution which has been described as "interventionist" is contained in the third paragraph where the Security Council *"insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations."⁸¹ What became known as the "Safe Havens" operation began with the deployment of unarmed guards on May 19, 1991 and the deployment of lightly armed guards on May 20, 1991. Allied troops began to build camps for the Kurds so that they would return from the mountains of northern Iraq. By May 23, Iraq had formally agreed to the operation.⁸² At the height of the operation, over 21,000 American, British and French troops were deployed to the region.⁸³

The debate in the Security Council over Resolution 688 indicated that the Resolution was controversial. Both Yemen and China argued that the intervention based on humanitarian grounds contravened the principle laid out in Article 2(7) and would lead to a "dangerous precedent."⁸⁴ Supporters of the resolution pointed to the threat to international peace and security which emanated from the "transboundary impact" of a mass exodus of refugees into other states. Supporters also emphasized the humanitarian nature of the operation.⁸⁵ Although there is no mention of Chapter VII in the resolution, one commentator has noted that the use of the word "demand" in reference to terminating repression indicates that the Security Council was acting pursuant to its decision-making authority under that chapter.⁸⁶ In any event, 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.

The overthrow of President Said Barre in January of 1991 by combatting rival factions, and the resulting lack of an effective government in Somalia, set the stage for a UN-authorized humanitarian relief

80. United Nations Security Council Resolution 688 (Apr. 5, 1991).

81. *Id.* See Nigel S. Rodley, *Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework*, in *TO LOOSE THE BANDS OF WICKEDNESS* 31 (Nigel S. Rodley ed., 1992) [hereinafter Rodley].

82. Rodley, *supra* note 81, at 33.

83. Freedman, *supra* note 78, at 63.

84. Rodley, *supra* note 81, at 29. Yemen voted against the resolution while China abstained, expressing concern about "taking action on questions concerning the internal affairs of any State." *Id.*

85. *Id.* at 30. The French coined the onslaught and subsequent refugee situation as a "crime against humanity." *Id.*

86. *Id.* at 31.

effort in that country. Civil war in Somalia prevented the transport of food and humanitarian aid to millions of starving Somalis. By January of 1992, the situation had deteriorated to such a degree that the Security Council unanimously enacted a weapons embargo on the country.⁸⁷ 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 UNOSOM.⁸⁸ The situation, however, continued to worsen.

By the summer of 1992, invoking Chapter VII of the UN Charter, the Security Council increased the troop levels of the UNOSOM peacekeepers and approved the transport of humanitarian aid through airlifts.⁸⁹ Citing violence against relief workers, the Secretary General, Boutros Boutros-Ghali, called upon the Security Council to take action under Article 42 of the Charter. In November 1992, after the United States offered to lead a military operation in order to deliver humanitarian aid to the Somalis, the Security Council unanimously adopted Resolution 794. The resolution "authoriz[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."⁹⁰ 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.⁹¹ In addition, Somalia was without a competent government to consent to the UN sponsored intervention because the country was ravaged by rival war factions.

B. Law and Practice

Enforcement actions under Chapter VII, such as those in Korea and Iraq, are clearly permissible under the Charter when authorized by the Security Council. Although legal concerns within Chapter VII

87. United Nations Security Council Resolution 733 (Jan. 23, 1992).

88. Mark R. Hutchinson, Note, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L. L.J. 624, 627 (1993) [hereinafter Hutchinson].

89. United Nations Security Council Resolution 775 (Aug. 28, 1992).

90. United Nations Security Council Resolution 794 (Dec. 3, 1992).

91. See AREND, *supra* note 3, at 55-56; Hutchinson, *supra* note 88, at 632.

abound, such as the authority of states to go beyond the mandate of a particular Security Council resolution, precisely stated objectives would remedy these problems.⁹²

However, a succinct legal issue with regard to enforcement actions and, particularly humanitarian interventions, is whether the Article 39 finding of a "threat to the peace" has been made. One author has noted that, based on UN practice, any legitimate intervention for the purpose of protecting human rights must have transboundary effects and the violation must be "grave and systematic."⁹³ This distinction between "external" international threats and "internal" domestic humanitarian violations has become the subject of scholarly debate, with regard to the legal threshold of Article 39 determinations.

The transboundary impact of a humanitarian violation is easier to gauge than the measurement of a violation's severity. The refugee problem which was created in Iraq by the exodus of the Kurds gave the Security Council some leeway in determining that a threat to international peace and security existed.⁹⁴ Professor Scheffer points out that, throughout history, internal conflicts and disasters have typically had external regional or international impacts. He lists the results of these "events" as including mass migrations of refugees, expanding armed conflicts when a domestic struggle "spills" across the border and problems with the availability and distribution of resources.⁹⁵ It is also believed that the greater emphasis that is now placed on human rights will give constructive "transboundary effect" to certain gross violations.⁹⁶ The Security Council's expanded interpretation of what constitutes a threat to the peace now includes severe humanitarian viola-

92. See Schachter, *supra* note 23, at 73-74. Professor Schachter discusses the academic debate which occurred during the Iraqi invasion. The debate focused on whether coalition states could exceed the bounds of the Security Council's resolution and attempt to remove Iraqi leadership. This was a fundamental issue in the Korean war when General MacArthur planned to chase North Korean troops into Communist China. The debate in the Korean War centered on whether the aims of UN forces were to restore the status quo (remove North Korean troops from South Korea) or to force Korea to unify. The adversaries eventually agreed on the former. *Id.*

93. Rodley, *supra* note 81, at 34.

94. *Id.*

95. Scheffer, *supra* note 10, at 287. Professor Scheffer lists the examples of these recent tragedies in notes 139-41. He also mentions the increased transboundary tensions created by the re-emergence of claims of ethnic minority rights in Eastern Europe after the Cold War.

96. Rodley, *supra* note 81, at 35. Professor Rodley quotes the April 1991 speech of then Secretary General Perez de Cuellar: "[W]e 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." *Id.*

tions.⁹⁷ As the peacekeeping/ peace enforcement operations blend together in humanitarian interventions, it is important to see how these interventions have evolved.

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.⁹⁸ 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,⁹⁹ others have been intended to protect against specific abuses including genocide,¹⁰⁰ war crimes and crimes against humanity,¹⁰¹ slavery,¹⁰² traffic in persons,¹⁰³ forced labor,¹⁰⁴ and torture.¹⁰⁵ These are generally human rights crimes which, if violated, would potentially threaten international peace and security.¹⁰⁶ In addition, apartheid is a human

97. AREND, *supra* note 3, at 133-34. *See also* Scheffer, *supra* note 10, at 254-58 for a comprehensive history of humanitarian interventions from the early nineteenth century to the present.

98. AREND, *supra* note 3, at 132.

99. These conventions include the 1948 Universal Declaration on 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 have been grouped together and labelled the international bill of rights. CLAUDE AND WESTON, HUMAN RIGHTS IN THE WORLD COMMUNITY (Richard P. Claude & Burns H. Weston eds., 2d ed. 1992); *See* Adelman, *supra* note 78, at 13. *See also* Delbruck, *supra* note 21, at 714.

100. International conventions that recognize genocide as an international crime include The 1948 Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278. Kartashkin, *supra* note 27, at 207.

101. The war crimes tribunals which followed the Second World War identified certain fundamental obligations, the violations of which were termed "crimes against humanity." *See* The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.

102. *See* Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253; Protocol of Amendment to the Slavery Convention, Dec. 7, 1953, 212 U.N.T.S. 18; and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 4.

103. *See* Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, March 21, 1950, 96 U.N.T.S. 272.

104. *See* ILO Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; and ILO Convention (No. 105) Concerning the Abolition of Forced Labor, June 25, 1957, 320 U.N.T.S. 291.

105. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, U.N.G.A. Res. 39/46, 38 U.N. GAOR Supp (No. 51) 197, U.N. Doc. A/39/51 (1984).

106. Kartashkin, *supra* note 27, at 207. *See also* Delbruck, *supra* note 21, at 713-14.

rights violation which has triggered Article 39 Security Council action.¹⁰⁷

In practice, the principle of non-intervention as articulated in Article 2(7) has been applied less restrictively as the Charter has evolved. For instance, in the early days of the UN, long before the interventions in Somalia and northern Iraq, the General Assembly passed judgments on matters relating to human rights with respect to the apartheid policies in South Africa¹⁰⁸ and human rights in Eastern European states.¹⁰⁹ The General Assembly tended to view isolated violations of human rights as within the domestic jurisdiction of the member state while regarding the denial of human rights to an entire population as within the Assembly's purview.¹¹⁰ This policy continued even as numerous decolonized states entered the UN, the Cold War struggle lingered on, and human rights conventions came into effect. While the principle of non-intervention certainly exists today, it has been weakened by the norms and conventions cited as well as the growing idea that through collective UN authorization, governments have the right to "intervene" when a human rights violation might threaten international peace.¹¹¹ 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.¹¹² The forcible interventions into Somalia and northern Iraq support this idea.

Consequently, international law relating to the use of force under authority of the United Nations has evolved with the practice of the Security Council during interventions in Iraq and Somalia, and more recently, former Yugoslavia. The crises reflect ongoing tensions between the UN Charter norms of territorial integrity and non-interven-

107. Kartashkin, *supra* note 27, at 207. See also The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

108. See GAOR Res. 44 (I) (1946).

109. See GAOR Res. 272 (III) (1949) and GAOR Res. 385 (V) (1950).

110. A. Cassesse, *The General Assembly: Historical Perspective 1945-1989*, in *THE UNITED NATIONS AND HUMAN RIGHTS* 33-34 (Philip Alston, ed., 1992)[hereinafter Cassesse].

111. B. G. Ramcharan, *Strategies for the International Protection of Human Rights in the 1990s*, in *HUMAN RIGHTS IN THE WORLD COMMUNITY, ISSUES AND ACTION* 275 (Richard P. Claude & Burns H. Weston, eds., 1992)[hereinafter Ramcharan].

112. *Id.* See Scheffer, *supra* note 10, at 275-81. Scheffer contends that the global geo-political changes following the end of the Cold War, in addition to organizational developments in the Conference on Security and Cooperation in Europe, the Organization of American States and the European Community, have all brought about a marked change in the attitudes of governments to humanitarian interventions. *Id.*

tion and the growing development of humanitarian intervention.¹¹³ Humanitarian interventions have thus 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. As will be examined in the next section, the Security Council's authorization to use force, in part to combat the "widespread and flagrant" violations of international humanitarian law, has resulted in the gradual obfuscation of peacekeeping and peace enforcement missions.¹¹⁴ Peacekeepers, generally trained in the ways of self-defense and non-violent reaction, are increasingly confronted with hostile local parties as their missions come to resemble enforcement actions.

Some clarification on the use of force under UN auspices was provided with the June 1992 publication of the Secretary General's *An Agenda for Peace*.¹¹⁵ The publication was intended to be "an analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peace-keeping."¹¹⁶ The Secretary General ultimately reaffirmed the viability of Article 2(7) and cited the principle that "humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality; that the sovereignty, territorial integrity and national unity of states must be fully respected . . . and should be provided with the consent of the affected country."¹¹⁷ In addition,

113. See PETER MALANCZUK, *HUMANITARIAN INTERVENTION AND THE LEGITIMACY OF THE USE OF FORCE* 12 (Het Spinhuis 1993).

114. The operation in Somalia was an indication of what can happen when the peacekeeper/peacemaker mandate and authority are blurred. Originally sent into Somalia in December of 1992 as a traditional peacekeeping mission to "establish a secure environment for humanitarian relief operations" under the authority of Chapter VII, the UNOSOM force's mission was expanded to a "peace enforcement" role within months. By October 1993, 17 Americans had been killed and the Clinton administration eventually announced the intention to withdraw Americans participating in UNOSOM by March 31, 1994. John R. Bolton, *Wrong Turn in Somalia*, *FOREIGN AFFAIRS*, Jan./Feb. 1994 at 65.

115. *An Agenda for Peace: Preventive diplomacy, peacemaking and peacekeeping: Report of the Secretary-General*, UN Doc. A/47/277, 17 June 1992 reprinted in 31 I.L.M. 956 [hereinafter *Agenda for Peace*].

116. *Id.* at para. 1.

117. *Id.* at para. 30, citing General Assembly Resolution 46/182 of 19 December 1991. See T. G. Weiss, *Intervention, Whither the United Nations?*, in *THE WASHINGTON QUARTERLY*, Jan., 1994 at 106, [hereinafter Weiss], where the author argues that Boutros-Ghali, while affirming "conventional notions" about state sovereignty, presents all of the reasons for eroding the concept, ultimately missing the opportunity to advance the idea of humanitarian intervention as a "routine part" of UN operations. *Id.*

the Secretary General suggested that the time was ripe "to make armed forces, assistance and facilities available to the Security Council" in suggesting the creation of "peace-enforcement units."¹¹⁸

The Secretary General recognized the need to adhere to the Charter's norms and the "guiding principles" in peacekeeping operations, as well as the interplay of peacekeeping and peace enforcement. He failed, however, to devise specific plans or to implement particular solutions for a situation where the authorized use of force for peacekeepers suddenly extends beyond the conventional meaning of self-defense and the forces slide futilely along the "spectrum of conflict."

V. ANALYSIS — THE BOSNIA MODEL

The present situation in the former Yugoslavian republics presents the UN with a challenge which will test both the organization's ability to flexibly respond to a rapidly growing conflict and the efficacy of non-traditional peacekeeping operations. The crisis, which has progressively escalated since 1991, is an example of the inherent dangers that the UN will face in a dynamic "spectrum of conflict" where peacekeeping gradually merges into peace enforcement. To fully analyze these issues, it is necessary to first look at the history of the current dispute.

A. History and Background

The recent conflict in former Yugoslavia was aggravated in December 1990 when Slovenians voted for independence by referendum. The day before, the Croatian Parliament had declared that its law was supreme over federal law. The resulting negotiations for a looser federation of states failed when the Serbian party, representing the dominant Yugoslav republic, walked out of the talks. Despite threats from the Serbs, Croatia and Slovenia declared independence on June 25, 1991. Within days, the central republic's military (JNA) attacked the Slovenian provisional militia. By August, the conflict had spilled over into widespread fighting in Croatia.

The UN Security Council convened in September at the request of several states, including Yugoslavia (consisting of the former republics of Serbia and Montenegro).¹¹⁹ It is interesting to note that due to the

118. *Agenda for Peace*, *supra* note 115, at para. 44.

119. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L. L. 569, 577-79. The Security Council debate was heavily influenced by the fact that Yugoslavia had requested the Council's involvement, thus avoiding claims by Council members that Article 2(7) was being contravened. *Id.*

internal nature of the conflict, there was no suggestion that a violation of Article 2(4) or any "international act of aggression" had occurred.¹²⁰ Security Council Resolution 713 was unanimously adopted on September 25, 1991. Expressing "deep concern" about the fighting in the region, the Security Council found that the continuation of the situation was a threat to international peace and security, and thus invoked the provisions under Chapter VII. The Security Council urged the parties involved to abide by the terms of the cease-fire agreements¹²¹ and called for "a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia."¹²²

By the fall of 1991, all parties were violating the cease-fire agreements. In November, the Security Council expressed hope that the Secretary General would endeavor to maintain contacts with the Yugoslav parties and possibly recommend the establishment of a peacekeeping force in the republics.¹²³ After two resolutions pronouncing that the situation in the region was not proper for a peacekeeping operation, the Council authorized a peacekeeping force (UN Protection Force or UNPROFOR) of 13,870 personnel per its authority under Article 25 in Resolution 743 on February 21, 1992.¹²⁴

In the meantime, an Arbitration Commission was set up by the EC in November 1991 to settle territorial issues in addition to other questions about trade, customs and foreign policy. The Commission made recommendations to the Community regarding the recognition of the former Yugoslavian states and found that the new republics should be given the security of the protections of the UN Charter with respect to external borders, territorial integrity and political independence.¹²⁵

120. *Id.* at 577.

121. A cease-fire had been negotiated through the auspices of the European Community (EC) and the Council for Security and Cooperation in Europe. *Id.* at 579.

122. *Id.* at 579-80.

123. United Nations Security Council Resolution 721 (Nov. 27, 1991).

124. In United Nations Security Council Resolution 724 (Dec. 15, 1991) and United Nations Security Council Resolution 727 (Jan. 8, 1992), the Council determined that, due to the cease-fire violations, the circumstances did not exist for deployment of a peacekeeping force. Resolution 727 sent fifty military liaison officers to the region to help support maintenance of the cease-fire. *See Weller, supra* note 119, at 584.

125. *Id.* at 589. The EC recognition was based on certain criteria, the most significant being the renunciation of territorial claims by the new states. After a referendum in March 1992, where 63% of the population voted for independence, Bosnia-Herzegovina was recognized by the EC on April 6, 1992. Croatia, pursuant to the recommendation of the Arbitration Council, was recognized on January 15, 1992. *Id.* at 593. Macedonia applied for recognition on December 20, 1991. Out of deference to member-state Greece's objection to the name of "Macedonia" (also an area in Greece),

In April 1992, Serbia and Montenegro declared that the republics constituted the successor state to the Socialist Federal Republic of Yugoslavia.¹²⁶

In March 1992, the three main ethnic groups in Bosnia and Hercegovina (hereinafter referred to as Bosnia) released a Statement of Principles for New Constitutional Arrangements which declared that the new state would maintain its existing boundaries and would recognize the rights of all of the Muslim, Croat and Serb citizens. Shortly thereafter, however, the Serb leadership in Bosnia disavowed the Statement.¹²⁷ Hostilities soon swept throughout Bosnia. After several cease-fires were broken, the UN Security Council called an emergency meeting. The Council released a statement denouncing the use of force and demanding that outside parties refrain from interfering in the affairs of Bosnia.¹²⁸

The refugee situation in Croatia, however, propelled the Security Council into action. By April 1991, over 600,000 refugees, more than half from Bosnia, had fled into Croatia. After urgings from Croatia and the other new republics, the Security Council adopted Resolution 752 calling on all parties concerned to assist in the "effective and unhindered" delivery of humanitarian assistance to airfields in Bosnia and demanding that the parties cease their fighting.¹²⁹ The Security Council acted explicitly under Chapter VII in August 1992 when it called upon states to take "all measures necessary to facilitate" the delivery of humanitarian assistance to Bosnia and Hercegovina.¹³⁰

the EC informally recognized the new republic in a declaration of May 1, 1992, despite Macedonia's repeated renunciation of territorial claims. *Id.* at 594. Macedonia was formally recognized by the EC on December 15, 1992. Slovenia requested and received EC recognition on December 19, 1991. *Id.* at 594. For an in-depth legal analysis of secession in former Yugoslavia, see Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L. L. 299 (Spring, 1993)[hereinafter Eastwood].

126. Weller, *supra* note 119, at 595. The intended succession was challenged by the United States, Japan and almost all of the EC states, as, initially, was the attempt by the newly proclaimed Federal Republic of Yugoslavia to occupy the former Yugoslavia's seat at the UN. *Id.* at 595-96.

127. *Id.* at 597.

128. *Id.* at 600. The fact that the Council only authorized a statement from the President and not a resolution has led some to conclude that Council was unwilling to obligate itself to more severe enforcement actions. *Id.* at 601.

129. *Id.* at 601-2. United Nations Security Council Resolution 752 (May 15, 1992). In response to the failure of the Serb authorities to comply with Resolution 752, the Council adopted economic sanctions in United Nations Security Council Resolution 757 (May 30, 1992).

130. United Nations Security Council Resolution 770 (Aug. 13, 1992).

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. In addition, the Assembly demanded the withdrawal of JNA and Croatian forces from Bosnia.¹³¹ Although the JNA totally withdrew from Bosnia, Bosnia Serb forces, armed with JNA weaponry and equipment left behind, have come to be known as the Army of the "Serb Republic." Croatian Army personnel also remained engaged in the fighting in Bosnia.¹³²

General Assembly Resolution 46/242 focused on the human rights violations taking place in Bosnia.¹³³ 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.¹³⁴ 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.¹³⁵ 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

131. General Assembly Resolution 46/242 (Aug. 25, 1992).

132. *Report of the Secretary General*, UN Doc. A/47/747 (Dec. 3, 1992) [hereinafter A/47/747]. The Assembly's resolution followed Security Council Resolution 771 which reaffirmed that "all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions" United Nations Security Council Resolution 771 (Aug. 13, 1992).

133. By November 1992, the UN High Commissioner for Refugees estimated that there were over 3 million refugees, displaced persons and other victims in former Yugoslavia who required some form of assistance. A/47/747, *supra* note 132, at 9.

134. *See id.* at 6. Shortly thereafter, 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 former Yugoslavia. *Id.* at 7. In United Nations Security Council Resolution 798 (Dec. 18, 1992), the Council noted "the massive, organized and systematic detention and rape of women . . . in Bosnia and Herzegovina." In light of the reports of the rapes, "mass killings, . . . [and] 'ethnic cleansing' " in Bosnia, the Council decided to "establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law . . . in former Yugoslavia." United Nations Security Council Resolution 827 (May 25, 1993).

135. *See A/47/747, supra* note 132, at 6.

outside parties. In addition, the Council, acting under Chapters VI and VII, called upon states to "halt all inward and outward maritime shipping" for inspections and verification of cargo and took steps to restrict the diversion of embargoed commodities to Serbia and Montenegro.¹³⁶

The Security Council soon began to take measures in order to ensure that the humanitarian assistance was delivered to those in need. In Resolution 781, the Council "established a ban on military flights in the airspace of Bosnia," excepting, of course, UN flights in support of the humanitarian assistance operations. In response, the United States, France and the Netherlands deployed aircraft in October 1992 to ensure that the ban was observed.¹³⁷ Due to the numerous violations of the ban,¹³⁸ the Security Council acting under Chapter VII of the Charter extended the ban to "all fixed-wing and rotary-wing aircraft in the airspace" of Bosnia.¹³⁹ In addition, paragraph 4 of Resolution 816 "[a]uthorize[d] Member States . . . acting nationally or through regional organizations or arrangements, to take . . . all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations, to ensure compliance with the ban on flights."¹⁴⁰

An additional undertaking to facilitate the delivery of humanitarian assistance was the development of "safe areas." Faced with havoc in the face of widespread fighting in Srebrenica,¹⁴¹ the Council in Resolution 819 demanded that "all parties . . . concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act."¹⁴² The Council again demanded the unimpeded delivery of humanitarian assistance to Bosnia and demanded that the Federal Republic of Yugoslavia "immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units" in Bosnia.¹⁴³ In May 1992, Resolution 824

136. United Nations Security Council Resolution 787 (Nov. 16, 1992).

137. 30 UN CHRONICLE, Sept. 1993 at 16 [hereinafter UN CHRONICLE].

138. 125 flights in violation of the ban were reported from April 1 to June 30, 1992, bringing the total at the time to 624 violations. *Id.*

139. United Nations Security Council Resolution 816 (Mar. 31, 1993).

140. *Id.*

141. The Special Rapporteur of the Commission on Human Rights reported "massive and repeated" violations of the 1949 Geneva Conventions in former Yugoslavia. The violations included attacks on civilians, refusal to allow humanitarian aid to the needy and denial of evacuation of any wounded persons. S/258792 of 10 May 1993.

142. United Nations Security Council Resolution 819 (Apr. 16, 1993).

143. The next day the Security Council strengthened the sanctions against Yugoslavia (Serbia and Montenegro) in order to deter the diversion of sanctioned goods. On

added five additional localities to the list of "safe areas."¹⁴⁴ The Council also declared that it would "consider immediately the adoption of any additional measures necessary" if parties failed to comply with the "safe areas" designation.¹⁴⁵

Reinforcement of the mandate of the UNPROFOR peacekeeping force was also a method of strengthening the UN's hand in delivery of aid. UNPROFOR was given the authority, via Resolution 836, to use force in order to create and maintain safe areas in designated towns.¹⁴⁶ Resolution 836 authorized the peacekeepers to use force to contravene attacks against the "safe areas" or the "deliberate obstruction" of humanitarian convoys. Member states, acting individually or through regional organizations (such as NATO), were given authority by the Council to use "all necessary measures," including the use of air power, to support UNPROFOR. The purpose of the new rules of engagement was to allow UNPROFOR to prevent attacks in the safe area, monitor the cease-fire, assist in the withdrawal of non-Bosnian military units and, overall, to facilitate the delivery of humanitarian aid.¹⁴⁷ Important to the peacekeepers' free movement in the republic was the fact that the mandate allowed them to occupy strategic positions in the area.

In response to the Security Council's request for reinforcements of the peacekeeping force, the Council authorized the expansion of UNPROFOR personnel.¹⁴⁸ 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. At present, UNPROFOR is primarily deployed in Croatia, Bosnia and Macedonia

April 29, 1993, the Assembly decided that the Federal Republic of Yugoslavia should not work on the Economic and Social Council. *See* UN CHRONICLE, *supra* note 137, at 12.

144. Sarajevo, Tuzla, Zepa, Gorazde and Bihac were declared "safe areas" by the resolution. *See* UN CHRONICLE, *supra* note 137, at 12.

145. On May 25, 1993, the Security Council established an International Tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law." The Tribunal will examine "crimes against humanity" and war crimes. United Nations Security Council Resolution 827 (May 25, 1993).

146. *See* UN CHRONICLE, *supra* note 137, at 14.

147. *Id.*

148. United Nations Security Council Resolution 844 (June 18, 1993). Earlier, the Council had requested that the Secretary General deploy international observers to the border in order to monitor the implementation of sanctions. The Secretary General, however, reported that limited UN peacekeeping resources made full border control "unrealistic." UN CHRONICLE, *supra* note 137, at 18. In addition, the Security Council approved the offer of the United States to send peacekeepers to Macedonia in support of UNPROFOR in United Nations Security Council Resolution 842 (June 18, 1993).

with a current strength of over 24,000 personnel.¹⁴⁹

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."¹⁵⁰ UNPROFOR's mandate to use force was again expanded in October 1993 in Security Council Resolution 871 when the peacekeeping force was authorized to use "self-defense, to take necessary measures, including the use of force, to ensure its security and its freedom of movement."¹⁵¹ As will be seen in the foregoing analysis, the peacekeepers in Bosnia have a mandate resembling the ONUC peacekeepers in the Congo operation. This authority and recent events have resulted in a blurring of peacekeeping "guiding principles" and peace enforcement standards for use of force, which jeopardizes the safety of the peacekeepers and hampers the effectiveness of their mission.

B. Legal Analysis

The conflict in the former republics of Yugoslavia seems to touch 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 has been shaped by the experience of its predecessors, especially ONUC. Likewise, the performance of UNPROFOR in former Yugoslavia will doubtlessly form a prototype for successor peacekeeping forces assigned with a mission that involves the use of force beyond self-defense.

UNPROFOR was originally a peacekeeping operation authorized by the Security Council to facilitate contacts with the warring parties in former Yugoslavia and to observe and monitor the cease-fire agreements that were being mediated by the UN and EC negotiators. The Security Council brought Chapter VII claims against the parties after making a preliminary determination that the situation was a threat to international peace and security.¹⁵² It is interesting to note that nearly

149. UN CHRONICLE, *supra* note 137, at 15-16. See United Nations Security Council Resolution 847 (June 30, 1993).

150. United Nations Security Council Resolution 859 (Aug. 24, 1993).

151. United Nations Security Council Resolution 871 (Oct. 4, 1993).

152. See AREND, *supra* note 3, at 37 where the author characterizes the nature of international conflict. The situation in Bosnia would initially appear to be a "civil" conflict in which a state (here former Yugoslavia) is having domestic unrest. A mixed conflict, however, exists "when there is an outside state . . . providing some form of

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 1992.¹⁵³ Although the Assembly did not authorize or attempt to authorize 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. The analysis here is broken up into three sections. The first section scans the development of the legal norms and "principles," not yet norms, associated with the use of force and peacekeeping in particular, which have evolved in the "spectrum of conflict" in former Yugoslavia. The evolving nature of these norms and the lack of adherence to traditional "guiding principles" in UNPROFOR's operations has led to a gradual blending of peacekeeping and peace enforcement actions. The analysis, therefore, turns to an examination of how the mandate for the use of force has developed in the Yugoslavian theater, resulting in an eventual combining of the peacekeeping operation with an enforcement action. 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. The last section of the analysis will, therefore, examine the legal authority of the UN to empower peacekeepers to become peace enforcers during violations of humanitarian law and consider proposals to enhance the safety of the UN troops and mission accomplishment in the face of these continually changing operations.

1. The Dynamic Nature of UN Norms and "Guiding Principles"

The time of absolute and exclusive sovereignty . . . has passed; its theory was never matched by reality The sovereignty, territorial integrity and independence of States within the established international system . . . must not be permitted to work against each other in the period ahead Our constant duty should be to maintain the integrity of each while finding a balanced design for all.¹⁵⁴

assistance . . . to either the government or the rebels in an existing civil conflict." The conflict in the former Yugoslavia is both a civil and international conflict. *Id.* The conflict in Bosnia, in light of the secession and eventual recognition of the former republics of Yugoslavia, resembles a *mixed* conflict, allowing the Security Council greater breadth to declare this an *international* threat to peace and security.

153. See G.A. Res. 46/242, *supra* note 131.

154. *Agenda for Peace*, *supra* note 115, at 953.

The mandate of UNPROFOR has expanded with the need of the Council to enforce its sanctions and weapons embargo. As noted above, the Council did not originally suggest that Article 2(4) of the Charter had been invoked by the earlier conflict in Croatia in September 1991. By August 1992, however, the "need to respect the . . . territorial integrity and political independence" of Bosnia had become the basis for demanding access to the camps and detention centers for the purpose of delivering humanitarian aid.¹⁵⁵ The Security Council has seemingly justified its increasing actions in Bosnia based upon its broader responsibilities under the Charter for protecting the territorial integrity of the state.

An analysis of a humanitarian intervention, such as in Bosnia, as it relates to peacekeeping and peace enforcement operations, must first begin with an examination of how the operation has affected the UN Charter's Article 2(7) prohibition against the United Nations' intervening "in matters which are essentially within the domestic jurisdiction of any state." As noted above, Article 2(7) expressly does not prejudice enforcement measures under Chapter VII. Indeed, the development of human rights law and state practice has helped to significantly transform the original meaning attached to Article 2(7).¹⁵⁶

In some ways, the Council has rationalized its substantial involvement in Bosnia by turning the sovereignty argument around. In many cases, intrusive Security Council action might be countered by arguments that such action impinges upon a state's domestic jurisdiction or sovereignty. In Council resolutions regarding former Yugoslavia, though, several preambles note the reaffirmation of the "sovereignty" of Bosnia as a reason for Chapter VII action.¹⁵⁷ In other words, rather than seeing its deeds as an intervention into the affairs of Bosnia or Yugoslavia, the Council characterizes its action as necessary to protect the Bosnian state's sovereignty from interference of third parties.

While the norm of non-intervention under Article 2(7) has been diminished by the interventions in Somalia and Iraq, the crisis in Bosnia has actually done little to clarify the status of state sovereignty in situations involving grave violations of humanitarian law. It is important to note that the Security Council, frequently reaffirming the "sovereignty" of the Republic of Bosnia, sees itself as responsible for protecting that state's territorial integrity and political independence, rather than as intervening in the domestic affairs of a member state. In

155. See United Nations Security Council Resolution 770 (Aug. 13, 1992).

156. See Scheffer, *supra* note 10, at 262.

157. See *eg.*, United Nations Security Council Resolution 815 (Mar. 30, 1993) and United Nations Security Council Resolution 819 (Apr. 16, 1993).

essence, although some states initially saw the UN's involvement in former Yugoslavia as unwarranted intervention,¹⁵⁸ the issue of Article 2(7) non-intervention was ultimately rendered moot by the request for Security Council action by the Yugoslav government itself in September 1991.

Successful peacekeeping operations have almost always required the consent of all local parties involved in the conflict. For example, UNEF I necessitated the consent and cooperation of all parties — Egypt, France, Israel and the United Kingdom — to ensure that the peacekeepers were able to accomplish their goal of securing a cease-fire and facilitating the withdrawal of foreign troops in the Sinai Peninsula. Similarly, the Congolese central government's lack of consent, due to an internal mutiny, had rendered the Security Council unable to agree on a course of action.¹⁵⁹ In the present conflict in Bosnia, it is impossible to characterize all of the parties as consenting to all of the Council's resolutions, including those which call on the parties to cooperate with UNPROFOR to promote the delivery of humanitarian aid. The Serbs, in what remains as Yugoslavia, have been accused of arming the Bosnian Serbs and interfering with the territorial integrity of Bosnia, as well as violating the human rights of the Muslims and Croats in the region.¹⁶⁰ The lack of consent and cooperation on the part of the Serbs and the Bosnian Serbs to the overall mission of the peacekeepers is of course one of the main reasons for UNPROFOR's deployment in the first place. The consent and cooperation of all local parties involved in a conflict is one of the main factors which normally characterizes a peacekeeping operation. This lack of agreement and cooperation in Bosnia distinguishes the UNPROFOR mission from traditional peacekeeping duties and serves to redefine the operation as an enforcement action.¹⁶¹

158. See Weller, *supra* note 119, at 578-79. China, India, and Cuba all expressed reservations about discussing action in what was seen as an "internal matter." *Id.*

159. See AREND, *supra* note 3, at 96-97. The General Assembly eventually requested the Secretary General to continue "to take vigorous action" in accordance with earlier Security Council resolutions. The Blue Helmets, *supra* note 32, at 229.

160. Weller, *supra* note 119, at 598.

161. The recent strategic planning between the UN Secretary General and NATO forces regarding the use of air power in Bosnia, to achieve the replacement of Canadian peacekeepers with Dutch troops in the face of Bosnian Serb dissent, has led to the drafting of three possible scenarios. The options all revolve around the "consent of the parties." For instance, the first option envisages the "achievement" of the troop replacement with the consent of the Bosnian Serbs and, thus, no need for air power. The other two scenarios assume lack of consent. See *S-G Presents Options for Use of Air Power in Bosnia, Delegates Authority to Akashi*, INT'L DOCUMENTS REV., Jan. 31,

A closely related ingredient for successful peacekeeping is the maintenance of impartiality or neutrality by the United Nations. Again, the UN's neutral role in the UNEF I operation allowed the peacekeepers to work effectively with both the Egyptians and Israelis in an extremely delicate situation. When the ONUC peacekeepers took on a generally partial position by assuming law enforcement duties in the Congo on behalf of the central government, the result was attacks on the force by tribesmen or separatist groups, which could have seriously jeopardized the future of the operation. In former Yugoslavia, the Security Council has particularly condemned the Bosnian Serb paramilitary forces for failing to comply with Council resolutions.¹⁶² In addition, the Council and Assembly have both repeatedly demanded that the JNA be withdrawn from Bosnia.¹⁶³ Recently, the Security Council sought to show the Bosnian Serbs that UN member states were fully determined to use force in the nature of air strikes if the Serbs did not remove their heavy artillery from the area surrounding Sarajevo.¹⁶⁴

In fact, events in the conflict have led to a tilt by the Council towards the protection of the Croatian and Muslim populations in Bosnia. Although there were no reported purposeful attacks on the UNPROFOR forces by the Serb forces until recently, there were peacekeepers killed by the indiscriminate shelling in Bosnia.¹⁶⁵ The recent bombings of Serb positions by NATO aircraft heightens the potential for attacks on the UNPROFOR forces if the Serbs feel that they are being singled out as the aggressors in the conflict.¹⁶⁶ The polit-

1994 at 6.

162. See United Nations Security Council Resolution 787 (Nov. 16, 1992).

163. See U.N. Doc. A/47/747, *supra* note 132.

164. Paul Lewis "West, at U.N., Warns Serbs of Its Resolve to Use Force," N. Y. TIMES, Feb. 15, 1994, at A12.

165. Accusing the UN of favoring the Muslim-led government in Bosnia, the Bosnian Serb forces recently took nearly 150 peacekeepers as hostages. Alison Smale, *Serbs Shown Triumphant Over UN*, Associated Press/AP Online, Apr. 19, 1994.

166. Carol J. Williams, *Defiant Serbs Harden Stance*, LOS ANGELES TIMES, Apr. 13, 1994, at AA1. [hereinafter Williams], where it is reported that the Bosnian Serbs have announced that they are "laying mines to trap U.N. peacekeepers" and have kidnapped a Dutch observer. The Bosnian Serbs, after the NATO bombing "warned that the U.N. Protection Force is now considered an enemy." *Id.*

In addition, Turkey recently announced that it would be sending 2,700 troops to Bosnia as part of UNPROFOR. *2,700 Turkish Troops for Bosnia*, AGENCE FRANCE PRESSE, Mar. 24, 1994. Almost immediately, Bosnian Serb leaders complained that the Turkish troops in Bosnia would lead to "dangerous consequences" due to Turkey "not maintain[ing] a neutral position toward the civil war in Bosnia." Momcilo Krajisnik, *quoted in Serbs Warn of "Danger" of Turkish Presence, UN Troops Attacked*, AGENCE FRANCE PRESSE, Mar. 26, 1994.

ically sensitive consequences in the participating member states resulting from increased casualties among the peacekeepers would certainly imperil the future of the operation. Again, the perception that the UN might be biased in Bosnia toward one side or the other counters the traditional "guiding principles" for peacekeeping missions and is further evidence that the conflict has blurred into a peace enforcement action.

A third important component for a successful peacekeeping operation is broad political support, especially among the permanent members of the Security Council.¹⁶⁷ UNEF I again presents a model for a successful peacekeeping mission that endured due to superpower consensus that a larger conflict involving the US and Soviet Union must be avoided. Although the end of the Cold War has signalled greater cooperation among the permanent members of the Council, especially with the Russians, domestic political agendas may once again control events. The Russians, traditional allies of the Serbs, have reacted to increasing Russian nationalism by warning the Security Council not to take action without their being consulted first.¹⁶⁸ The recent NATO airstrike renewed Russian objections and led to claims by Russian officials that the action has "imperil[ed] Russia's prospective links with the Western allies."¹⁶⁹ The potential lack of political cooperation by the Russians, permanent members of the Security Council with a veto and strategic participants in the peacekeeping force, could doom the UN's future collective efforts to maintain peace and security in the region.

As UN peacekeepers are sent into missions like former Yugoslavia, where they take on more partisan and aggressive roles, it is foreseeable that they will encounter greater adversity and perform non-traditional peacekeeping duties. The gradual weakening of customary UN Charter norms and the abandonment of traditional "guiding principles" in UN peacekeeping operations does not, of course, signal the end of effective UN collective security action. The trends, however, have led to a blurring of the distinction between the functions of

167. See Lori Fisler Damrosch, *The Role of the Great Powers in United Nations Peace-Keeping*, 18 YALE J. OF INT'L. L. 429 (1993).

168. Russia, for example, "is categorically opposed to the use of air power to change the strategic position of the parties to the conflict in Bosnia-Herzegovina." *NATO Threat of Air Strikes Seeks to Force Sarajevo Heavy Weapons Under UN Control*, INTERNATIONAL DOCUMENTS REVIEW, Feb. 14, 1994 at 1. An example of potential decreased political support outside of the Security Council is the Greek reaction to the deployment of Turkish troops to Bosnia. See e.g., *Greece Upset at Turkey Involvement in UNPROFOR*, The Xinhua General Overseas News Service, Mar. 24, 1994.

169. Williams, *supra* note 166, at p. 1.

peacekeepers and peace enforcers, and raises the issue of where, if at all, the line should be drawn between the two.

2. The Blurring Mandate for the Use of Force

Depending upon the nature of the situation, different configurations and compositions of security deployments will need to be considered. As the variety and scale of the threat widens, innovative measures will be required to deal with the dangers facing United Nations personnel.¹⁷⁰

The authority of the peacekeepers in former Yugoslavia to use force has altered as the mission and the mandate of UNPROFOR has changed. The initial deployment of the UNPROFOR forces impliedly carried with it the authority to use force in self-defense for the safety of the troops.¹⁷¹ The safety of UNPROFOR troops later became a specific concern of the Security Council, which began to demand "that the safety and operational effectiveness of UNPROFOR . . . personnel . . . be fully respected by all parties at all times."¹⁷² As noted above, the Council in Resolution 871 explicitly authorized 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" is closely related to their ability to ensure compliance with resolutions demanding "the unhindered flow of humanitarian assistance" and strengthen their self-defense mandate. Reminiscent of the dilemma of the Congo operation, the peacekeeper's mandate to use force for self-defense in Bosnia is greatly expanded by their authority to secure "free movement," thereby facilitating the delivery of humanitarian aid.¹⁷³ The enlarged role which self-defense now plays in peacekeeping operations appears to have been endorsed by the Secretary General in his *Agenda for Peace*, where he speaks of the need for "innovative measures . . . required to deal with the dangers facing United Nations

170. *Agenda for Peace*, *supra* note 115, at para. 66.

171. *See* Schachter, *supra* note 23, at 84.

172. *See* United Nations Security Council Resolution 859 (Aug. 24, 1993).

173. The "freedom of movement" mandate expressed in United Nations Security Council Resolution 836 (June 4, 1993), was presumably to ensure the safety of the UNPROFOR troops and to enhance their self-defense capabilities. Heightened concern for the safety of the peacekeepers has been generated by confusion over command and control and rule of engagement issues. *See* Jeane Kirkpatrick, *Peacekeeper's Lives in Danger*, THE WASHINGTON POST, Mar. 21, 1994 at A19.

personnel.”¹⁷⁴

Another parallel with the Congo peacekeeping operation is the potential for the use of force to expel outside troops. Resolution 787 expresses the Council’s frustration with these forces, where the Council demands “that all forms of interference from outside the Republic of Bosnia and Herzegovina, including infiltration into the country of irregular units and personnel, cease immediately.” The Council “reaffirm[ed] its determination to *take measures* against all parties and others concerned which fail to fulfill the requirements of Resolution 752 . . . including the requirement that all forces . . . be withdrawn.”¹⁷⁵ Although the Council has not authorized the use of force to expel outside troops, presumably that is one of the options that is contemplated by the use of the term “take measures.”

The most visible examples of UNPROFOR’s enforcement authority are contained in three Security Council resolutions: Resolution 770 and subsequent resolutions, providing that “all necessary measures” be used to deliver humanitarian assistance to Sarajevo and other areas as needed; Resolution 816, creating a no-fly zone and the authority to enforce the ban;¹⁷⁶ and Resolution 836, mandating the protection of “safe areas” through the use of air power if necessary. Some commentators note that these resolutions would not require any further authorization in order to use force.¹⁷⁷

The authority in these resolutions to use force ostensibly outside of the realm of self-defense has not been without controversy or debate.¹⁷⁸ 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.¹⁷⁹ In a letter to the Security Council, the Secretary General stated that “[t]he idea of using air power to support a

174. *Agenda for Peace*, *supra* note 115, at para. 66.

175. United Nations Security Council Resolution 787 (Nov. 16, 1992).

176. On February 28, 1994, NATO warplanes in support of Security Council Resolution 816, shot down four Bosnian Serb bombers that were violating the no-fly zone. Abner Katzman, *Serbia Asks World Court to Rule NATO Threat of Force Illegal*, Associated Press, AP Worldstream, Mar. 23, 1994.

177. See Kirkpatrick, *supra* note 173.

178. See, e.g., *Serbia Asks World Court to Rule NATO Threat of Force Illegal*, Associated Press, AP Worldstream, Mar. 23, 1994 *supra* note 176. Serbia, in response to threats of air strikes from NATO, has asked the International Court of Justice to rule that such threat of force is illegal and contrary to the UN Charter. Serbia contends that NATO’s ultimatum is “inconsistent” with UN purposes. *Id.*

179. See *Bosnia Air Strikes Would Entail More Military Assets on the Ground*, *S-G Tells Council*, INTERNATIONAL DOCUMENTS REVIEW, Jan. 24, 1994 at 7.

military operation . . . gives rise to issues which do not arise in the context of air support for the defence of UN personnel.”¹⁸⁰ In other words, the Secretary General was pointing out the distinction between “launch[ing] offensive action against Bosnian Serb elements which obstructed — or threatened to obstruct — UNPROFOR’s military operations” and the defensive operations normally associated with such peacekeeping operations.¹⁸¹ Responding to concerns from the Russians, Boutros-Ghali later clarified the distinction between close air support for self-defense and the use of air power for preemptive or punitive purposes.¹⁸²

With respect to political support from member nations, issues have arisen as to who has authority to order air strikes. When Secretary General Boutros-Ghali delegated the authority to approve requests for close air support to the UNPROFOR commander for self-defense purposes, it became necessary for him to note that “aggressive air strikes” could only be initiated by NATO and the North Atlantic Council.¹⁸³ The UN Charter and the Security Council, of course, do not provide for the Secretary General’s approval or authority in military enforcement actions. This blurring of the rules of engagement in Bosnia has coincided with the expansion of the peacekeeper’s mission. A former U.S. ambassador to the UN argues that the UNPROFOR forces have been put into jeopardy by the redefinition of peacekeeping, which sends the troops into dangerous combat zones without sufficient armament.¹⁸⁴ The ability of peacekeepers to fulfill their mission and, as noted above, the continued political support of participating nations, 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.

180. Letter from Boutros Boutros-Ghali, Secretary General of the United Nations, to Karel Kovanda, President of the Security Council. (Jan. 18, 1994), *reprinted in part in* INTERNATIONAL DOCUMENTS REVIEW, *supra* note 161.

181. *Id.* The Secretary General noted that air power, potentially helpful in a military operation to open the airfield at Tuzla, would not alone be able to “achieve the desired objectives.” More military assets in Srebrenica and Tuzla would be required. *Id.*

182. Letter from Boutros Boutros-Ghali, Secretary General of the United Nations, to Karel Kovanda, President of the Security Council. (Jan. 28, 1994), *reprinted in part in* INTERNATIONAL DOCUMENTS REVIEW, Jan. 31, 1994 at 6.

183. *See* INTERNATIONAL DOCUMENTS REVIEW, Feb. 14, 1994, at 2.

184. *See* Kirkpatrick, *supra* note 173.

3. Humanitarian Diplomacy — The Future of Peacekeeping and Peacemaking Operations

Providing succour to the victims of conflict through the effective relief programmes can positively assist peacemaking efforts . . . I see a dynamic link between peacemaking, peace-keeping and humanitarian assistance, constituting the essence of humanitarian diplomacy.¹⁸⁵

Enforcement actions under Chapter VII are clearly legal and the use of force authorized by the Security Council for such purposes is lawful. All of the use of force measures authorized in the conflict in Bosnia noted above are explicit Chapter VII actions. As such, the measures fall into the exception of the last sentence of Article 2(7) relating to Chapter VII enforcement actions.

Due to the increasing frequency with which the Security Council has initiated Chapter VII action on the basis of humanitarian violations, it is worthwhile examining the status of interventions for humanitarian purposes in light of the UN action in Bosnia. It has been argued that "genuine instances of humanitarian intervention have been rare, if they have occurred at all."¹⁸⁶ 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.¹⁸⁷ While this theory appears to be challenged particularly by the intervention in Somalia, the crisis in Bosnia and the UN's reaction there cannot be described as solely a humanitarian crisis. The general interest in protecting that state's territorial integrity and the political fear that the conflict might spill over into Greece and Turkey have

185. Boutros Boutros-Ghali, *Report on the Work of the Organization from the Forty-Sixth to the Forty-Seventh Session of the General Assembly* 62 (1992). Boutros-Ghali defined peacemaking as "action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations." *Agenda for Peace*, *supra* note 115, at para. 20. "Peace enforcement," envisioned as a sub-division of peacemaking under Chapter VII, is where the "United Nations has sometimes been called upon to send forces to restore and maintain the cease-fire" and to "enforce the agreed-on mandate." *Id.* at para. 44. See James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in *ENFORCING RESTRAINT* 27, 63 (Lori Fisler Damrosch, ed., 1993)[hereinafter Steinberg].

186. AREND, *supra* note 3, at 135.

187. *Id.* quoting Verwey, *Humanitarian Intervention*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* (A. Cassese, ed., 1986).

also been rationales for intervening in Bosnia.¹⁸⁸ Nevertheless, the plight in Bosnia and the other former Yugoslav republics can be characterized as a predominately humanitarian disaster which has required Chapter VII action by the UN.

The determination that the crisis in the former Yugoslav republics was in fact more than an "internal affair" allowed the Security Council in Resolution 713 to declare that the "continuation of this situation constitutes a threat to international peace and security." This precursory decision would, of course, be necessary in order to evoke Article 39 and Chapter VII enforcement actions.¹⁸⁹ The Council, in several resolutions, defined the bases for such a threat: the transboundary effects of the refugee situation in Bosnia,¹⁹⁰ the inability to deliver humanitarian aid due to the civil war,¹⁹¹ "ethnic cleansing" and other violations of humanitarian law.¹⁹² 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 question then becomes whether the internal human rights situation in Bosnia would by itself trigger Article 39.¹⁹³ At this stage, due to the multi-faceted threats to international peace resulting from this "mixed conflict,"¹⁹⁴ one can only speculate as to how the Security Council would have reacted in Bosnia had the crisis been purely internal.¹⁹⁵ The reports of "ethnic cleansing" and "massive, organized and

188. See MALANCZUK, *supra* note 113, at 22.

189. Curiously, the Council, without expressly determining that a threat to international peace and security existed, employed Chapter VII to implement a weapons embargo in Yugoslavia. See Security Council Resolution 713 (Sept. 25, 1993). The Council made an express determination in Resolution 757 that the international peace and security were threatened.

190. See United Nations Security Council Resolution 757 (May 30, 1992).

191. See United Nations Security Council Resolution 770 (Aug. 13, 1992).

192. See United Nations Security Council Resolution 771 (Aug. 13, 1992).

193. See MALANCZUK, *supra* note 113, at 23-24, where the author concludes that the threat to peace in Yugoslavia is not primarily based on the internal human rights situation but on "the consequences of the conflict for neighboring states." But see Jost Delbruck, *A Fresh Look at Humanitarian Intervention under the Authority of the United Nations*, 67 IND. L. J. 887 (1992) [hereinafter Delbruck II], where the author argues that a threat to the peace under Article 39 should include purely internal situations.

194. See *supra* note 152.

195. The primary ground in the humanitarian intervention in Iraq to protect the Kurds was the "threat to regional stability caused by cross-border refugee flows." Michael Stopford, *Humanitarian Assistance in the Wake of the Persian Gulf War*, 33

systematic detention and rape of women"¹⁹⁶ certainly makes 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 recognized 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 peace enforcement operations which are originally established as intended peacekeeping efforts. It is entirely foreseeable that peacekeepers in the future will find their safety threatened as their mission evolves into an enforcement action requiring more complex and refined rules of engagement. The fading distinction between the level of force used by peacekeepers and peace enforcers is potentially disastrous when considered in light of their separate training and equipment needs, as well as their distinct operational and logistical planning structure. This anomaly, however, is curable through better organizational structuring at the UN and the creation of a better-trained, highly professional peacekeeping corps that is flexible enough to respond to the many diverse situations in which peacekeepers find themselves today.

Ironically, Secretary General Boutros-Ghali seemed to recognize this dilemma in *Agenda For Peace* when he wrote about the need for the Security Council to consider "advance collective measures," particularly when the "purposes of the United Nations operation [are] systematically . . . frustrated and hostilities occur."¹⁹⁷ Along these lines, efforts to reform the structure of the UN peacekeeping bureaucracy began in 1992.

Traditionally, peacekeeping operations were managed by the Office of Special Political Affairs. The organization 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

VA. J. INT'L L. 491, 492 (1993) (citation omitted). *But see* Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, in ENFORCING RESTRAINT 77, 87 (Lori Fisler Damrosch, ed., 1993), where the author notes that Britain and France argued that Iraq's violation of its own populations human rights was a basis for supporting the resolution authorizing humanitarian assistance.

196. United Nations Security Council Resolution 798 (Dec. 18, 1992).

197. *Agenda For Peace*, *supra* note 115, at para. 68.

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 organization. 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.¹⁹⁸

The staff of the Office of Special Political Affairs which oversaw Peacekeeping Operations, adequate before the end of the Cold War, soon found itself stretched beyond its capacity. A comprehensive UN restructuring in 1992 included the creation of an Office of Peacekeeping Operations as one of four designated departments which would report directly to the Secretary General. While the revised structure streamlined the peacekeeping administration, there was still no formal relationship between peacekeepers and peacemakers.¹⁹⁹ For example, planners of operations were still separated from, and had no duty to consult with, logisticians. A standing committee, Senior Planning and Monitoring Group, was also established to improve communication and coordination between the "negotiators and [the] operators." This restructuring, however, has not linked "the people who understand the needs and priorities of the contending parties, and the people who understand the needs, costs, and limits of a field mission."²⁰⁰ Greater integration of the UN's peacekeeping and peace enforcement resources must be pursued in order to improve the training and supply of appropriate intervenors, as well as their operational efficiency in an ever-changing environment.

Along these lines, Secretary General Boutros-Ghali's suggestion of a formation of "peace enforcement units," peacekeepers and peace enforcers who are properly trained and equipped to respond to crises on short notice, is a step in the right direction. The Secretary General visualized an intermediate force which would "bridge the gap between lightly armed UN peacekeeping forces and full scale UN fighting

198. William J. Durch, *Running the Show: Planning and Implementation, in THE EVOLUTION OF UN PEACEKEEPING* 59, 73-74 (William J. Durch ed., 1993).

199. *Id.* at 62.

200. *Id.* See Indarjit Rikhye, *Strengthening UN Peacekeeping: New Challenges and Proposals*, UNITED STATES INSTITUTE OF PEACE 38. Major General Rikhye argues that the Office of the Secretary General would be best strengthened by streamlining existing structures so that the Secretary General is better advised. He contends that the three separate functions (political, military and administrative) should be restructured from within. For instance, the military adviser's office should be further divided into planning, operations and training. *Id.*

forces that have never been deployed."²⁰¹

With "extensive preparatory training within their national forces,"²⁰² the force should be adaptable enough to quickly deploy under a variety of circumstances, with a "variable use of force" mandate. In effect, the "peace-enforcement units" would be a professional quick-response force which could respond to operations along the full "spectrum of conflict."

In addition, experts have also called for greater cooperation between the UN and regional organizations in order to improve organizational support, equipment, logistics, technical support services and financing of operations.²⁰³ However, additional restructuring of the UN bureaucracy and efforts to create a professional and adaptable peacekeeping force must continue. 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 must all be improved to reflect the changing nature of peacekeeping.²⁰⁴

VI. CONCLUSION

Following the end of the Cold War, the UN developed new roles concerning its peacekeeping efforts. Unfortunately, the UN Secretary General and the Security Council are not adhering to the "guiding principles" which had been essential for success in previous peacekeeping operations. Military-style enforcement actions such as the humanitarian interventions in Somalia and Iraq, and situations like Bosnia, where a traditional peacekeeping mission involves an escalating use of force, must be anticipated. Ironically, the dilemma with which UN peacekeeping is faced is actually a by-product of the Cold War and the historical anomaly which created peacekeeping in the first place — the failure to create "special agreements" and a collective security regime

201. Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L.J. 773, 790 (1993).

202. *Agenda for Peace*, *supra* note 115, at para. 44.

203. Rikhye, *supra* note 200, at 34-35.

204. See Brian Urquhart, *the UN and International Security After the Cold War*, in UNITED NATIONS, DIVIDED WORLD 81 (Adam Roberts & Benedict Kingsbury, eds., 2nd ed. 1993), where the former Under-Secretary-General for Special Political Affairs points out the dilemma of the UN peacekeeper's success — the limited capacity of the UN to undertake an increasing number of operations with its present limited resources. The author proposes "new criterion for intervention and rules of engagement" and more highly developed staff, training, planning and command structures, primarily through the execution of Article 43 agreements. *Id.* at 92-96.

in the early days of the UN. In the end, the Security Council must either raise the threshold for considering whether appropriate conditions for peacekeeping exist,²⁰⁵ or devise formal rules of engagement for peacekeepers which are sufficiently tailored to the dynamic "spectrum of conflict" to which the forces are sent.

In former Yugoslavia, the Security Council has repeatedly justified Chapter VII action through the reaffirmation of the "sovereignty, territorial integrity and political independence" of Bosnia. In reality, however, these norms 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 and Bosnia 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. As the Security Council liberalizes the finding of "threat to the peace" to include non-military threats, the likelihood of future humanitarian interventions will also increase. The Council must thus either maintain a neutral role with consent of parties to the conflict in future peacekeeping operations, or 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-defense.

In the final analysis, peacekeeping and peace enforcement are legal UN actions carried out only with the political support of the great powers who sit as permanent members on the Security Council. To maintain peacekeeping as a viable, effective tool, it will be necessary for the UN, through the Security Council and the Secretary General, to adhere to the traditional "guiding principles" which were successfully used by the initial peacekeeping forces in the 1950's. However, events such as the recent bombing of Serb positions by NATO aircraft — with the Russians complaining about the proper authority for the airstrike and the Bosnian Serbs criticizing the UN for being biased — reinforce the conclusion that the humanitarian assistance operations can quickly become peace enforcement actions requiring new rules of engagement.²⁰⁶

With respect to the peacekeepers in Bosnia and their predecessors

205. See United Nations Security Council Resolutions 724 and 727, *supra* note 124, where the Council agreed with the Secretary General that conditions, particularly the failure of the parties to adhere to a cease-fire, did not exist to establish a peacekeeping force in Yugoslavia.

206. See *Yugoslav Government Statement: UN Has Become Directly Involved in the War*, BBC Summary of World Broadcasts, Apr. 13, 1994, Pt. 2 (Central Europe and the Balkans).

in the Congo, difficult issues arise because such missions are poorly defined and there is unclear authority for the use of force.²⁰⁷ What is an acceptable level of force consistent with "all necessary measures" that UNPROFOR can use to deliver the aid to those in need? Can the peacekeepers use force in "anticipatory" self-defense when bombardments of "safe areas" or humanitarian convoys en route to a "safe area" are foreseeable? At what stage does a UNPROFOR request for air strikes transcend the fine line between close air support for self-defense and offensive strategic operations? As peacekeeping operations, such as the one in former Yugoslavia, gradually and progressively evolve into peace enforcement operations, the rules of engagement and the authority for the use of force must also be modified and articulately enunciated. The UN and its Secretary-General have seemingly recognized the dilemma. Current efforts to revise the structure of UN peacekeeping and peace enforcement organizations and to develop "peace-enforcement units" are a good start. The stakes, however, are high. The safety of the peacekeepers, 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.

207. The Clinton administration has recently 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. In addition, once the US has decided to take action, it will then determine whether to send troops or to merely assist in paying for the operation. See *U.S. Eyes New Criteria for Peacekeeping Missions*, CHICAGO SUN-TIMES, Jan. 30, 94 at 35. The Administration will also decide whether to participate based on the willingness of other nations to join the operation. US troops would most likely be under US command in most cases as well. *Id.*