

## **POST-COLD WAR UN PEACEKEEPING: A REVIEW OF LEGAL ASPECTS**

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### **1. Introduction**

UN Peacekeeping has become an increasingly prominent tool used by the international community to promote conflict management and resolution.<sup>1</sup> Its importance and relevance as a pragmatic tool to deal with conflicts worldwide cannot be over-emphasized as the United Nations is under constant pressure to respond to conflicts across the globe. Changing responses of the United Nations to address these constant pressures are, day by day, adding new dimensions to the concept of peacekeeping. In many cases, particularly after the end of Cold War, two fundamentally different concepts - peacekeeping and peace enforcing - are being blended in field operations. Consequently, many legal issues are entering the forefront of public debate.

In the context of such background, the overall objective of the present paper is to identify the legal aspects concerning UN peacekeeping, to assess the prevailing interpretations and doctrines supporting or rebutting the hypotheses associated with these legal aspects, and to look at the post-Cold War developments of peacekeeping and also to examine the legal issues arising out of such developments.

### **2. The Term ‘Peacekeeping’ in the UN Context: Misnomer or Open to Frequent Re-definition?**

“Peacekeeping” is a broad, generic, and often imprecise term to describe many activities that the United Nations and other international organizations

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<sup>1</sup> Greig, J. M. and Diehl, P. F. “The Peacekeeping - Peacemaking Dilemma” *International Studies Quarterly*, Vol. 49, No. 4, 2005, p. 621.

undertake to promote, maintain, enforce, or enhance the possibilities for peace. The word 'peacekeeping' is neither defined in the 111-article-long Charter of the United Nations,<sup>2</sup> nor in any other international legal instrument. The existing literature also does not agree on a standard definition. Consequently, the concept of peacekeeping is open to a variety of definitions, and it has been used in several ways by scholars writing on the subject.<sup>3</sup> The reason for this conceptual uncertainty is also due to the fact that this single concept is used to describe an evolving phenomenon with changing variables, actors and objectives.<sup>4</sup>

Former Secretary-General of the United Nations Dag Hammarskjold, who is also known as the father of UN peacekeeping, referred to peacekeeping as "Chapter 6 and a half" operations, meaning "more than 'good offices' but less than 'enforcement'".<sup>5</sup> Doyle elaborates on Hammarskjold's meaning best when he defines a peacekeeping operation as

military and civilian deployments for the sake of establishing a 'United Nations presence in the field, hitherto with the consent of all parties concerned,' as a confidence-building measure to monitor a truce between the parties while diplomats strive to negotiate a comprehensive peace or officials attempt to implement an agreed peace.<sup>6</sup>

However, this definition is not a workable solution because peacekeeping today includes not only keeping peace.<sup>7</sup> This covers a diverse range of interventions: from traditional peacekeeping, to peace enforcement,

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2 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force on Oct. 24, 1945.

3 Higgins, R. *United Nations Peacekeeping: Documents and Commentary*, Vol. IV, Oxford: Oxford University Press, 1981, p. viii.

4 See, Durch, W. J. and Berkman, T. C. "Restoring and Maintaining Peace: What We Know So Far", in Durch, W. (ed.), *Twenty-First-Century Peace Operations*, Washington: United States Institute of Peace, 2006, p. 5.

5 Mockaitis, T. R. *Peace Operations and Intrastate Conflict: The Sword or the Olive Branch?*, Westport: Praeger Publishers, 1999, p. 3.

6 Doyle, M. W. "Introduction: Discovering the Limits and Potential of Peacekeeping", in Otunnu, O. A. and Doyle, M. W. (eds.), *Peacemaking and Peacekeeping for the New Century*, New York: Rowman & Littlefield Publishers, 1998, p. 3.

7 Mohamed, S. "From Keeping Peace to Building Peace: A Proposal for A Revitalized United Nations Trusteeship Council", *Columbia Law Review*, Vol. 105, No. 3. 2005, p.810.

peacemaking, peace-building, conflict prevention, humanitarian operations, etc.<sup>8</sup> As such, the real difficulty in providing a comprehensive functional definition of peacekeeping is that, as peacekeeping takes on more and more functions, the definitions get longer, more general and less precise.<sup>9</sup> Resultantly, at no time since its inception has the nature or the concept of peacekeeping been as open to redefinition as it is at this juncture.<sup>10</sup> The only way, then, to define peacekeeping as it has been practiced is to take a cross-section of characteristics of the operations pursued to date. From this perspective, peacekeeping appears as the use of multinational military personnel, armed or unarmed, under international command and with the consent of the parties, to help control and resolve conflict between hostile states and between hostile communities within a state.<sup>11</sup>

In this context, the United Nations view also deserves consideration. According to the United Nations, peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace and requires the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well.<sup>12</sup> According to the *General Guidelines for Peacekeeping Operations* issued by the UN Department of Peacekeeping Operations (DPKO), peacekeeping refers to

United Nations presence in the field (normally involving military and civilian personnel), with the consent of the conflicting parties, to implement or monitor

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8 Flint, E. "Civil Affairs: Soldiers Building Bridges", in Gordon, D. S. and Toase, F. H. (eds.), *Aspects of Peacekeeping*, London: Frank Cass Publishers., 2001, p. 231.

9 Fetherston, A.B., *Towards a Theory of United Nations Peacekeeping*, Hampshire: Macmillan Press Ltd., 1994, p.128.

10 Annan, K. A., "UN Peacekeeping Operations and Cooperation with NATO", *NATO Review* (Web Edition), Vol. 47., No. 5, 1993, p. 3-7, available at: <http://www.nato.int/docu/review/1993/9305-1.htm> (last accessed on October 3, 2008).

11 *Id.*

12 United Nations, "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992", No. A/47/277-S/24111, 1992, para. 20, available at: <http://www.un.org/Docs/SG/agpeace.html> (last accessed on October 27, 2008).

the implementation of arrangements relating to the control of conflicts (cease-fires, separation of forces, etc.) and their resolution (partial or comprehensive settlements) or to ensure the safe delivery of humanitarian relief.<sup>13</sup>

Thus it appears that the word ‘peacekeeping’ as it is used these days by the United Nations is terminologically a misnomer since peacekeepers might be asked to operate in situations where there is no peace to keep.<sup>14</sup> At the same time, even if terminological aspect is left aside giving primacy to the practical meaning, the problem of definition remains complex due to frequent change of the fundamental nature, extent and characteristics of so-called peacekeeping operations.<sup>15</sup> However, this does not adversely affect the present study. For the purpose of this study, the definition offered by the UN Department of Peacekeeping Operations (DPKO) as mentioned above will serve as the working definition.

### 3. Legal Basis of UN Peacekeeping

The innovation of peacekeeping is not necessarily a recent phenomenon. Although peacekeeping has become widely known as one of the most significant contributions of the United Nations aimed at maintenance of international peace and security, the UN Charter does not mention it, nor did the United Nations founders anticipate it,<sup>16</sup> and, as a matter of fact, its origins lay in a much longer tradition, nurtured over time by many imaginative policy makers, scholars and peace movement organizations,

with roots in the experiments with multinational auspices for international forces during the League of Nations.<sup>17</sup>

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13 United Nations Department of Peacekeeping Operations, *General Guidelines for Peacekeeping Operations*, New York: United Nations, 1995, pp. 5-6.

14 Slim, H., “Military Humanitarianism and the New Peacekeeping: An Agenda for Peace?”, *Journal of Humanitarian Assistance*, 1995, available at: <http://jha.ac/1995/09/22/military-humanitarianism-and-the-new-peacekeeping-agenda-for-peace/> (last accessed on August 22, 2008).

15 For a brief account of such changes, see, section 6.

16 Johansen, R. C., “Enhancing United Nations Peace-keeping”, in Alger, C. F. (ed.), *The Future of the United Nations System: Potential for the Twenty-first Century*, New York: United Nations University Press, 1998, pp. 90-91.

17 For discussion on pre-UN efforts to plan and deploy international military forces for monitoring purposes, see, James, A., *Peacekeeping in International Politics*, New York: St. Martin’s Press, 1990; Walters, F. P. *A History of the League of Nations*, Vol. II, London: Oxford University Press, 1952, pp. 538-540.

Although the UN Charter does not explicitly authorize peacekeeping, the United Nations has grounded its peacekeeping missions in chapters VI and VII — and in the space in between the provisions of these chapters.<sup>18</sup> Since it emerged within the framework of chapter VI of the UN Charter dealing with pacific settlement and chapter VII dealing with enforcement, the legal foundation of UN peacekeeping is often justified by claiming that it is within the purview of chapter six and a half.<sup>19</sup>

Article 24(1) of the UN Charter provides that in order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security. However, the responsibility conferred herein on the Security Council is “primary”, not exclusive.<sup>20</sup> The General Assembly is also authorized to be concerned with international peace and security.<sup>21</sup> This is because Article 14 of the UN Charter empowers the General Assembly to recommend “measures for the peaceful adjustment of any situation”.<sup>22</sup>

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18 Mohamed, *supra* note 7, p.820.

19 For an elaborate discussion of the legal foundations of UN peacekeeping, see, Chopra, J., “The Space of Peace-Maintenance”, *Political Geography*, Vol. 15, No. 3-4, 1996, pp.335-341; Doyle, M. W., “War Making and Peace Making: The United Nations’ Post-Cold War Record”, in Crocker, C. A., Hampson, F. O., and Alall, P. (eds.), *Turbulent Peace: The Challenges of Managing International Conflict*, Washington: United States Institute of Peace Press, 2001, p. 555; Stopford, M., “Peace-Keeping or Peace- Enforcement: Stark Choices for Grey Areas”, *University of Detroit Mercy Law Review*, Vol. 73, No. 3, 1996, pp. 499-502; Wedgwood, R., “United Nations Peacekeeping Operations and the Use of Force”, *Washington University Journal of Law and Policy*, Vol. 5, 2001, pp. 69-70.

20 International Court of Justice, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports, 1962, p.163.

21 *Id.*

22 Article 14 of the UN Charter reads: “Subject to the provisions of Article 12, 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, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.”

Herein the word “measures” implies some kind of actions.<sup>23</sup> The only limitation in this regard is that the General Assembly should avoid such recommendations while the Security Council is dealing with the same matter unless the Council requests to do so.<sup>24</sup>

Chapter VI of the UN Charter provides the procedure for peaceful settlement of disputes. In case of any dispute or any situation which is likely to endanger the maintenance of international peace and security,<sup>25</sup> the Security Council is authorized to recommend appropriate procedures or methods for adjustment of the dispute or situation.<sup>26</sup> However, the measures under Chapter VI are non-military. Such measures may include the establishment of a peacekeeping force having no mandate to use military force except with a situation of self-defence. Moreover, consent of the host state is a precondition for establishing a peacekeeping force under this chapter.

On the other hand, Chapter VII empowers the Security Council to initiate a collective military action in an appropriate case. In Article 39 of the UN Charter, the Security Council has been given the power to make determination of the existence of the threat to peace, breach of peace or act of aggression.<sup>27</sup> In fact, the Charter has centralized and institutionalized the process of determination of the crisis and for launching of the collective action.<sup>28</sup> It has thus improved upon the Covenant of the League of Nations under which the League was not competent to decide whether or not a state had resorted to war in violation of the Covenant, but was left on each

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23 International Court of Justice, *supra note 20*, p.163.

24 See, Article 12(1) of the UN Charter that reads: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”.

25 See, the UN Charter, Articles 33 and 34.

26 See, the UN Charter, Articles 36 and 37.

27 Article 39 of the UN Charter reads: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security”.

28 Khare, S. C., *Use of Force Under United Nations Charter*, New Delhi: Metropolitan Book Co. (Pvt.) Ltd., 1985, p.140.

member itself to decide.<sup>29</sup> The most coercive action specified in this chapter is enshrined in Article 42 of the Charter. This Article authorizes the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”. The Security Council is yet to resort to these coercive measures, i.e., actions by military forces foreseen in Article 42.<sup>30</sup> In the situation between Iraq and Kuwait, the Council chose to authorize member states to take measures on its behalf.

#### 4. Basic Principles of UN Peacekeeping

Ever since the United Nations effectively invented armed peacekeeping in 1956, blue helmets have relied on a trinity of principles as their conceptual body armour. The consent of the parties, the neutrality/impartiality of the peacekeepers, and the minimum or non-use of force were meant to keep them above the conflicts that they were despatched to ameliorate or end.<sup>31</sup> It is sometimes asserted that UN peacekeeping survived and developed because it adhered to these three basic principles with extra-ordinary flexibility.<sup>32</sup> However, these principles are interrelated and mutually reinforcing.<sup>33</sup>

Traditional peacekeeping forces have been described as “consent forces”,<sup>34</sup> i.e., the consent of the parties to the deployment of the force and to the

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29 Stone, J. *Legal Control of International Conflict: A Treatise on the Dynamics of Disputes and War-Law*, New York: Rinehart and Company Inc. Publishers, 1954, p. 179.

30 United Nations, *supra note 12*.

31 Donald, D., “Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century”, *International Peacekeeping*, Vol. 9, No. 4, 2002, p. 21.

32 Higgins, R. “A General Assessment of United Nations Peace-keeping”, in Cassese A. (ed.), *United Nations Peace-keeping: Legal Essays*, Alphen aan den Rijn : Sijthoff & Noordhoff, 1978, p. 1.

33 Department of Peacekeeping Operations and Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines*, New York: United Nations, 2008, p. 31.

34 Siekmann, R., *National Contingents in United Nations Peace-keeping Forces*, Dordrecht: M. Nijhoff, 1991, p. 6.

renewal of its mandate has been considered essential for their operation.<sup>35</sup> In fact, consent of the host state has been the heart of the peacekeeping capacity that has devolved on the General Assembly acting through its “Uniting for Peace” procedure and it has been a primary element in the legal and political foundation of peacekeeping forces authorized on the basis of Security Council resolutions.<sup>36</sup> Although a textual reading of the Charter leads to the view that the consent of the “host state” is not necessarily needed if there is a threat to the peace, breach of the peace, or act of aggression, practice has led towards the other direction.<sup>37</sup> In the resolution establishing the United Nations Force in Cyprus (UNFICYP), it was expressly provided that the host state was to have a voice in the composition of the Force.<sup>38</sup> When the host state withdrew its consent to UN Emergency Force (UNEF), the UN Secretary General U. Thant observed:

. . . it . . . has seemed fully clear to me that since United Arab Republic consent was withdrawn, it was incumbent on the Secretary General to give orders for the withdrawal of the Force. The consent of the host country is a basic principle which has applied to all United Nations peace-keeping operations.<sup>39</sup>

However, no consent would be necessary if the Security Council should order a peacekeeping force established by the Council itself or by the General Assembly to enter the territory of a particular state in order to maintain or restore peace. Nevertheless, after the Congo operation of the early 1960s, it was concluded in the UN Secretariat that the organization is structurally ill-suited for forcible peacekeeping.<sup>40</sup>

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35 Talmon, S., “Impediments to Peacekeeping: The Case of Cyprus”, Langholtz, H., Kondoch, B., Wells, A. (eds.), *International Peacekeeping: The Yearbook of International Peace Operations*, Vol. 8, Leiden: Martinus Nijhoff Publishers, 2004, p. 37.

36 Garvey, J. I., “United Nations Peacekeeping and Host State Consent”, *The American Journal of International Law*, Vol. 64, No. 2, 1970, p.241.

37 Higgins, *supra note 32*, p.5.

38 *Id.*

39 United Nations Emergency Force, *Special Report by the Secretary General*, U. N. Doc. A/6669, May 18, 1967, p. 9.

40 See, Bowman, E. H. and Fanning, J. E., “The Logistic Problems of a UN Military Force”, *International Organization*, Vol. 17, No. 2, 1963, pp.355-376.



UN peacekeeping is also based on the principle that an impartial presence on the ground can ease tensions between hostile parties and create space for political negotiations.<sup>41</sup> This impartiality, however, should not be confused with neutrality or inactivity. In fact, UN peacekeepers should be impartial in dealings with the parties to the conflict, but not neutral in the execution of their mandate.<sup>42</sup>

Another traditional but basic principle of peacekeeping is the minimum or non-use of force. However, former UN Secretary General Kofi Annan recommends that the United Nations should abandon outdated concepts of neutral peacekeeping and replace them with a more muscular form of peace operation if it is to avoid the kind of fiascos in previous missions.<sup>43</sup> Mandates of peacekeeping operations are now usually broad enough to allow troops to physically protect civilians under imminent threat of violence.<sup>44</sup> This use of force under imminent threat of violence may be a viable option only if supported by the other two basic principles.

## **5. Peacekeeping During the Cold War: A Historical Background from Legal Viewpoints**

During the early years of Cold War, veto power was a matter of regular recourse by the permanent members of the Security Council. Consequently, with the failure of the Security Council to act, the General Assembly, the second most important organ of the United Nations, came into prominence

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41 Department of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations*, New York: United Nations, 2003, p. 1.

42 Department of Peacekeeping Operations and Department of Field Support, *supra note* 33, p.33.

43 Ramo, J. C., "The Five Virtues of Kofi Annan", *Time Magazine*, September 4, 2000, p. 50.

44 See, The mandates of the United Nations Mission in Sierra Leone (UNAMSIL) (SC Res.1270 (1999)), the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) (SC Res. 1417 (2002)), the United Nations Mission in Liberia (UNMIL) (SC Res. 1509 (2003)), the United Nations Operation in Côte d'Ivoire (UNOCI) (SC Res. 1528 (2004)) and the United Nations Operation in Burundi (ONUB) (SC Res. 1545 (2004)) in the 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict', 28 May 2004, UN doc. S/2002/431, p. 8.

for the maintenance of international peace and security.<sup>45</sup> This development was gradual and reached its climax with the adoption of the 'Uniting for Peace' resolution of November 3, 1950.<sup>46</sup> This resulted into establishment of UN Truce Supervision Organisation (UNTSO) authorized to oversee the armistice between Israel and the Arab States. This can be considered the starting point for UN peacekeeping.<sup>47</sup> The plan of this resolution was first outlined by the US Secretary of State, Dean Acheson, before the General Assembly on September 20, 1950 for strengthening the collective security system to enable the United Nations to maintain international peace and security.<sup>48</sup> This development in the organizational field of United Nations made by this resolution was appreciated by a number of jurists and large majority of states.<sup>49</sup> However, a number of other jurists regarded it as a design to meet the breakdown of the collective security system of Chapter VII under strain of hostile alignments within the United Nations.<sup>50</sup> The

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45 Khare, *supra note* 28, pp. 181-182.

46 U.N. General Assembly Resolution No. 377 (V) A (1950), UN Doc. A/1775.

47 However, the first full-fledged peacekeeping force to be actually deployed under the UN flag was the UN Emergency Force (UNEF I), was established in 1956 with contributions from ten nations to supervise the retreat of foreign troops from the Suez Canal area.

48 See, Franck, T. M., "Who Killed Art. 2(4)? or: Changing Norms Governing the Use of Force by States?", *The American Journal of International Law*, Vol. 64, No. 4, 1970, pp. 809-837.

49 See generally, Cohen, B. V., *The United Nations: Constitutional Development, Growth and Possibilities*, Cambridge: Harvard University Press, 1961, p. 18 (Cohen regards it as a great constitutional landmark in the development of the Charter); Eichelberger, C. M., *UN: The First Ten Years*, New York: Harper and Brothers, 1955, p. 2 (Eichelberger considers it as an adjustment in the organization to the new power situation by shifting the centre of gravity from Security Council to the General Assembly where veto power does not prevail); Goodrich, L. M. and Simons, A. P., *The United Nations and the Maintenance of International Peace and Security*, Washington: Brookings Institution, 1955, p. 345 (the authors view it as an attempt by the General Assembly to exercise its residuary responsibility).

50 See, Stone, *supra note* 29, pp.271-276; Eagleton, C., "The United Nations: Aims and Structure", *The Yale Law Journal*, Vol. 55, No. 5, 1946, p. 974; Wright, Q., "Accomplishments and Expectations of the World Organization", *The Yale Law Journal*, Vol. 55, No. 5, 1946, p. 870; Kirk, G., "The Enforcement of Security", *The Yale Law Journal*, Vol. 55, No. 5., 1946, p. 1081; Borchard, E. "The Impracticability of 'Enforcing' Peace", *The Yale Law Journal*, Vol. 55, No. 5., 1946, p. 966.

legality of “Uniting for Peace” resolution remains challenged by strict Charter constructionists even to this day.<sup>51</sup>

The practice of peacekeeping evolved dramatically since 1956 when, during the Suez Crisis, Canada’s Foreign Minister Lester B. Pearson proposed that third-party UN peacekeeping troops be used to allow France and Britain to resolve the crisis through negotiations rather than through a military confrontation.<sup>52</sup> Although originally a Canadian idea, the UN’s Swedish Secretary-General, Dag Hammarskjöld, began the process of institutionalizing peacekeeping as an extension of UN diplomacy.<sup>53</sup>

During the first 40 years of the United Nations, *ad hoc* and informal arrangements were sufficient to manage the peacekeeping operations, which were generally limited in scope.<sup>54</sup> Therefore, traditional peacekeeping, which constituted the majority of UN operations during the Cold War,<sup>55</sup> entails the deployment of peacekeepers and observers assigned with responsibilities such as supervising buffer zones, monitoring ceasefires and supporting disarmament plans.<sup>56</sup> Missions were limited to interdiction between conflict parties and did not generally allow for assertive missions.<sup>57</sup>

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51 Smith, E. M., “Collective Security, Peacekeeping and Ad Hoc Multilateralism”, in Ku, C. and Jacobson, H. K. (eds.), *Democratic Accountability and the Use of Force in International Law*, Cambridge: Cambridge University Press, 2003, p. 89.

52 Schnabel, A., “A Future for Peacekeeping?”, *Peace Review*, Vol. 9, No. 4, 1997, p. 563.

53 Pugh, M., “Peacekeeping and Critical Theory”, *International Peacekeeping*, Vol. 11, No. 1, 2004, p. 42.

54 New Zealand Ministry of Foreign Affairs and Trade, *United Nations Handbook*, Wellington: Ministry of Foreign Affairs and Trade, 1995, p. 26.

55 The UN mission in the Congo from 1960 to 1964 is the exception. See for details, Mortimer, E., “Under What Circumstances Should the UN Intervene Militarily in a ‘Domestic’ Crisis?”, in Otunnu, O. A., & Doyle, M. W., (ed.), *Peacemaking and Peacekeeping for the New Century*, 1998, Lanham: Rowman & Littlefield, pp. 127-128.

56 See, Doyle, *supra note* 19, pp. 532-533; Goulding, M., “The Evolution of United Nations Peacekeeping”, *International Affairs*, Vol. 69, No. 3, 1993, p. 457; Doyle, M. W. & Sambanis, N., “International Peacebuilding: A Theoretical and Quantitative Analysis”, *American Political Science Review*, Vol. 94, No. 4, 2000, p. 781.

57 See, Goulding, *Ibid*, pp.451-464.

Administrative functions were generally limited to management of the mission itself, rather than management of the territory.<sup>58</sup> Quite simply, traditional peacekeeping consisted of keeping the peace. Consent of the parties, neutrality of the peacekeepers and minimal use of force only for purposes of self-defense were adhered to as the key principles of this type of intervention.<sup>59</sup> The UN missions in Cyprus, the Golan Heights and Kashmir are representative of traditional peacekeeping operations undertaken by the United Nations.<sup>60</sup> Peacekeeping in this sense was seen as a deterrent, applied to “placate and refrigerate the conflict environment to allow formal negotiations to take place”.<sup>61</sup>

In short, it can be concluded that during the Cold War, most peacekeeping operations involved a simple interposition of soldiers between the armed forces of warring states, to monitor the observance of a ceasefire, pending the negotiation of a peace agreement. In many cases, this had the unintended effect of reducing pressure on the parties to make the necessary compromises, with the result that the peacekeepers were left in place much longer than originally envisaged.<sup>62</sup> Moreover, during this period, peacekeeping was largely confined to the Middle East and regional conflicts associated with de-colonization. It is only by 1960, that with the establishment by the Security Council of the United Nations Operation in the Congo (ONUC), another dimension - going beyond serving as a neutral buffer between states and becoming involved in intra-state conflicts - was added to UN operations.<sup>63</sup>

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58 See, Chopra, J., “UN Civil Governance-in-Trust”, in Weiss, T. G. (ed.), *The United Nations and Civil Wars*, Boulder: Lynne Rienner Publishers, 1995, p. 79.

59 Goulding, *supra note 56*, pp.453-455.

60 For history and analysis of UN peacekeeping during the Cold War, see, Goulding, *supra note 56*, pp.452-453.

61 Richmond, O. P., *Maintaining Order, Making Peace*, Hampshire: Palgrave, 2002, p. 44.

62 The exceptions that prove this rule were the highly complex operation in the Congo in the early 1960s and, to a lesser extent, the deployment in southern Lebanon from 1978 onwards.

63 Smith, *supra note 51*, p. 89.

## 6. Legal Aspects of Post-Cold War UN Peacekeeping Operations

Today the international security environment is far more complex than it was in the Cold War era of bipolarity. The diminished threat of a world war has been replaced by the reality of intra-state conflicts that undermine stability and security at the domestic and regional level.<sup>64</sup> While addressing this changed scenario, peacekeeping activities of the United Nations are demonstrating new dimensions. In fact, the recent UN “peacekeeping” operations differ in matters of environment, principle and practice from their Cold War predecessors.<sup>65</sup> Especially, in the early 1990s, with the end of the Cold War, the UN agenda for peace and security rapidly expanded.<sup>66</sup> Consequently, the extent to which the Security Council adopted decisions under Chapter VII since 1990 has been wholly unprecedented.<sup>67</sup> Indeed, the phrase “threats to peace” came to mean severe domestic violations of human rights, civil wars, humanitarian emergencies, and almost whatever a Security Council majority (absent a Permanent Member veto) said it was.<sup>68</sup> Therefore, whereas between 1947 and 1987, a span of 40 years, the United Nations undertook thirteen ‘peacekeeping’ missions of varying scope, duration, and degree of success,<sup>69</sup> between 1988 and 2007, a span of only

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64 Islam, S. M. T., “Role of United Nations Peacekeeping in International Security: A Critical Analysis”, *Asian Affairs*, Vol. 26, No. 3, 2004, p. 29.

65 Slim, *supra note* 14.

66 Doyle, M. W., “The New Interventionism”, *Metaphilosophy*, Vol. 32, No. 1/2, 2001, p. 221.

67 Malone, D. M., “The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter”, *New York University Journal of International Law and Politics*, Vol. 35, No. 2, 2003, p. 492.

68 For a discussion of the traditional Cold War interpretations of the phrase, see, Goodrich, L. M., Hambro, E., and Simons, A. P., *Charter of the United Nations: Commentary and Documents*, New York: Columbia University Press, 1969, pp. 293-300.

69 The thirteen missions between 1947 and 1990 include (in chronological order): United Nations Truce Supervision Organization (UNTSO), 1948-present; United Nations Military Observer Group in India and Pakistan (UNMOGIP), 1949-present; First United Nations Emergency Force (UNEF I), 1956-1967; United Nations Observation Group in Lebanon (UNOGIL), 1958-1958; United Nations Operation in the Congo (ONUC), 1960-1964; United Nations Security Force in West New Guinea (UNSF), 1962-1963; United Nations Yemen Observation Mission (UNYOM), 1963-1964;

nineteen years, the United Nations undertook fifty missions with increasingly ambitious mandates.<sup>70</sup> At first, this activism was greeted with

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United Nations Peacekeeping Force in Cyprus (UNFICYP), 1964-present; Mission of the Representative of the SG in the Dominican Republic (DOMREP), 1965-1966; United Nations India-Pakistan Observation Mission (UNIPOM), 1965-1966; Second United Nations Emergency Force (UNEF II), 1973-1979; United Nations Disengagement Force (UNDOF), 1974-present; United Nations Interim Force in Lebanon (UNIFIL), 1978-present. See, [www.un.org/Depts/dpko/list/list.pdf](http://www.un.org/Depts/dpko/list/list.pdf) (last accessed on October 25, 2008).

- 70 The fifty missions between 1990 and 2007 include (in chronological order): United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP), 1988-1990; United Nations Iran-Iraq Military Observer Group (UNIIMOG), 1988-1991; United Nations Angola Verification Mission (UNAVEM), 1989-1991; United Nations Transition Assistance Group (UNTAG), 1989-1990; United Nations Observer Group in Central America (ONUCA), 1989-1992; United Nations Iraq-Kuwait Observation Mission (UNIKOM), 1991-2003; United Nations Mission for the Referendum in Western Sahara (MINURSO), 1991-present; United Nations Angola Verification Mission II (UNAVEM II), 1991-1995; United Nations Observer Mission in El Salvador (ONUSAL), 1991-1995; United Nations Advance Mission in Cambodia (UNAMIC), 1991-1992; United Nations Protection Force (UNPROFOR), 1992-1995; United Nations Transitional Authority in Cambodia (UNTAC), 1992-1993; United Nations Operation in Somalia I (UNOSOM I), 1992-1993; United Nations Operation in Mozambique (ONUMOZ), 1992-1994; United Nations Operation in Somalia II (UNOSOM II), 1993-1995; United Nations Observer Mission Uganda-Rwanda (UNOMUR), 1993-1994; United Nations Observer Mission in Georgia (UNOMIG), 1993-present; United Nations Observer Mission in Liberia (UNOMIL), 1993-1997; United Nations Mission in Haiti September (UNMIH), 1993-1996; United Nations Assistance Mission for Rwanda (UNAMIR), 1993-1996; United Nations Aouzou Strip Observer Group (UNASOG), 1994-1994; United Nations Mission of Observers in Tajikistan (UNMOT), 1994-2000; United Nations Angola Verification Mission III (UNAVEM III), 1995-1997; United Nations Confidence Restoration Operation in Croatia (UNCRO), 1995-1996; United Nations Preventive Deployment Force (UNPREDEP), 1995-1999; United Nations Mission in Bosnia and Herzegovina (UNMIBH), 1995-2002; United Nations transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES), 1996-1998; United Nations Mission of Observers in Prevlaka (UNMOP), 1996-2002; United Nations Support Mission in Haiti (UNSMIH), 1996-1997; United Nations Verification Mission in Guatemala (MINUGUA), 1997-1997; United Nations Observer Mission in Angola (MONUA), 1997-1999; United Nations Transition Mission in Haiti (UNTMIH), 1997-1997; UN Civilian Police Mission in Haiti (MINOPUH), 1997-2000; UN Civilian Police Support Group (UNCPSG), 1998-1998; United Nations Mission in the Central

great enthusiasm - the United Nations could finally perform its mission as the guardian of peace throughout the world. Very soon, however, objections were raised, especially by the "third world," against the perceived excess in the use of power and authority. Another important legal issue arising out of post-Cold War UN peacekeeping developments is the legitimacy of subcontracting, i.e., delegating UN peacekeeping mandates to single states, group of states and regional and sub-regional organizations. Moreover, since UN peacekeeping forces these days have extended mandate that authorize them to use military force not only for the purpose of self defence but also for the defence of their mandate,<sup>71</sup> the aspect of mandate-execution calls for examination of other legal issues such as applicability of international humanitarian law (IHL) to UN peacekeeping forces and the legal status of such forces in terms of their immunities and privileges. In what follows, an attempt is made to appraise, under different heads, all these legal aspects concerning post-Cold War UN peacekeeping operations.

### 6.1 Extended Mandate

In the recent years, the concept of peacekeeping has been stretched beyond recognition.<sup>72</sup> Interventions during the Cold War period are now described

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African Republic (MINURCA), 1998-2000; United Nations Observer Mission in Sierra Leone (UNOMSIL), 1998-1999; UN Interim Administration Mission in Kosovo (UNMIK), 1999-present; United Nations Mission in Sierra Leone (UNAMSIL), 1999-2005; United Nations Transitional Administration in East Timor (UNTAET), 1999-2002; UN Organization Mission in the Democratic Republic of the Congo (MONUC), 1999-present; United Nations Mission in Ethiopia and Eritrea (UNMEE), 2000-2008; United Nations Mission of Support in East Timor (UNMISSET), 2002-2005; United Nations Mission in Liberia (UNMIL), 2003-present; United Nations Operation in Côte d'Ivoire (UNOCI), 2004-present; United Nations Stabilization Mission in Haiti (MINUSTAH), 2004-present; United Nations Operation in Burundi (ONUB), 2004-2006; United Nations Mission in the Sudan (UNMIS), 2005-present; United Nations Integrated Mission in Timor-Leste (UNMIT), 2006-present; African Union/United Nations Hybrid operation in Darfur (UNAMID), 2007-present; United Nations Mission in the Central African Republic and Chad (MINURCAT), 2007-present. See, [www.un.org/Depts/dpko/list/list.pdf](http://www.un.org/Depts/dpko/list/list.pdf) (last accessed on October 25, 2008).

71 See for details, Cox, K. E., "Beyond Self-Defence: United Nations Peacekeeping Operations & the Use of Force", *Denver Journal of International Law and Policy*, Vol. 27, 1998-1999, pp.239-273.

72 Schnabel, *supra note* 52, p. 569.

retrospectively, somewhat romantically perhaps, as ‘traditional’, ‘classic’, ‘relatively straightforward’ or ‘generally benign’.<sup>73</sup> In fact, mandates of Cold War peacekeeping and post-Cold War peacekeeping, if compared against each other, demonstrate striking differences. Although the United Nations had confronted the challenge of a failed state in the Congo operation of the early 1960s,<sup>74</sup> intra-state conflicts did not emerge as the primary focus of the Security Council until the late 1980s.<sup>75</sup> Within these complex environments the emphasis shifted from a monitoring or observation role to attempts to actively resolve and settle conflicts.<sup>76</sup> As a result of this shift, the Security Council expanded the concept of peacekeeping from its classical origins into a new framework of complex operations. Prior to 1990, the United Nations had authorized two enforcement missions, one against North Korea in 1950 and the other against Congo in 1960 (ONUC).<sup>77</sup> But, after 1990, it has approved a number of major operations with similar characteristics, in Kuwait, Somalia, the former Yugoslavia, Kosovo, East Timor, Albania,<sup>78</sup> the Central African Republic and Sierra Leone. However, some of these are UN

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73 Wilkinson, P., “Sharpening the Weapons of Peace: Peace Support Operations and Complex Emergencies”, in Woodhouse, T. and Ramsbotham, O. (eds.), *Peacekeeping and Conflict Resolution*, London: Frank Cass Publishers, 2000, pp. 63 – 64.

74 See, Chopra, *supra note 58*, pp. 77–78.

75 See, “Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations”, U.N. Doc. No. A/50/60–S/1995/1, 1995, p. 11 (providing statistics on peacekeeping operations), available at: <http://www.un.org/Docs/SG/agsupp.html> (last accessed on November 11, 2009).

76 Williams, M. C., *Civil-Military Relations and Peacekeeping*, Oxford: Oxford University Press, 1998, p. 1.

77 ONUC amounted to at least *de facto* enforcement action. See, White, N. D., “The UN Charter and Peacekeeping Forces: Constitutional Issues”, in Pugh, M., (ed.), *The UN, Peace and Force*, London: Frank Cass Publishers, 1997, p. 53.

78 In case of Albania, traditional peacekeeping and peace enforcement were combined in one mandate. See Kritsiotis, D., “Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania”, *Leiden Journal of International Law*, Vol. 12, No. 3, 1999, pp. 511-47.



mandated forces, while others are merely authorized “coalitions of the willing”.<sup>79</sup>

To portray the evolution of UN peacekeeping in terms of its mandate, contemporary literatures frequently resort to the concept of “generations of UN peacekeeping operations”,<sup>80</sup> wherein most of the post-Cold War operations fall under the category of “new generation peacekeeping”.<sup>81</sup> The most striking features of these “new generation” peacekeeping operations are not so much the large numbers of military personnel involved - several earlier peacekeeping operations, for example, in Sinai, the Congo, and Cyprus had featured large deployments of Blue Helmets - as the important role and substantive diversity of their civilian and police components.<sup>82</sup> Civilian functions discharged by peacekeeping operations or otherwise mandated by the Council included civil administration (most notably in Namibia, Cambodia, the former Yugoslavia, East Timor, and Kosovo); humanitarian assistance (a major feature of the current UN mission in Afghanistan deployed alongside a coalition peacekeeping operation, the International Security Assistance Force (ISAF)); human rights monitoring and training; police and judicial support, training, and reform; and even a degree of leadership on economic revival and development.<sup>83</sup> While military personnel remain vital to most operations, civilians have taken on a growing number of responsibilities, which include: (a) helping former opponents

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79 See generally, Simma, B., “NATO, the UN and the Use of Force: Legal Aspects”, *European Journal of International Law*, Vol. 10, No. 1, 1999, pp. 1-22; Cassesse, A., “Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, *European Journal of International Law*, Vol. 10, No. 1, 1999, pp. 23-30; and also, Guicherd, C., “International Law and the War in Kosovo”, *Survival*, Vol. 41, No. 2, 1999, pp. 19-34.

80 See generally, Otunnu, O. A. and Doyle, M. W. (eds.), *Peacemaking and Peacekeeping for the New Century*, Maryland: Rowman & Littlefield, 1998; Goulding, *supra note 56*, pp.451-464.

81 However, this conceptualization is overlapping and no distinct timeframes can be given for it. It is based on the analysis of how UN peacekeeping responded to emerging conflicts and the roles and responsibilities that ensued.

82 See, Williams, *supra note 76*.

83 See generally, Ratner, S. R., *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War*, New York: Palgrave MacMillan, 1995.

implement complex peace agreements by liaising with a range of political and civil society actors; (b) supporting the delivery of humanitarian assistance; (c) assisting with the disarmament, demobilization and reintegration (DDR) of former combatants; (d) supervising and conducting elections; (e) strengthening the rule of law, including assistance with judicial reform and training of civilian police; (f) promoting respect for human rights and investigating alleged violations; (g) assisting with post-conflict recovery and rehabilitation; and (h) setting up a transitional administration of a territory as it moves towards independence.<sup>84</sup> Depending on their mandate, such multidimensional peacekeeping operations (also referred to as peace operations) may be required to: (a) assist in implementing a comprehensive peace agreement; (b) monitor a ceasefire or cessation of hostilities to allow space for political negotiations and a peaceful settlement of disputes; (c) provide a secure environment encouraging a return to normal civilian life; (d) prevent the outbreak or spillover of conflict across borders; (e) lead states or territories through a transition to stable government based on democratic principles, good governance and economic development; and (f) administer a territory for a transitional period, thereby carrying out all the functions that are normally the responsibility of a government.<sup>85</sup>

It is sometimes argued that there are now more intra-state than inter-state conflicts, justifying peacekeeping with extended mandate. As former UN Secretary General Boutros Boutros Ghali observes, peacekeeping is “the invention of the United Nations” and accordingly, the UN has transformed its ‘invention’ over time to suit the exigencies of the crisis at hand.<sup>86</sup> However, both the assumption as to the exigencies of the crisis and the transformed prescription thereto are questionable. There are some jurists who regard the peacekeeping missions’ extended mandate as contrary to the spirit and mandate of the UN Charter. One argument is that interpretation of what developments may constitute “threats to the peace”, interpretation of the terms of Chapter VII of the Charter and also practice under that chapter,

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84 Department of Peacekeeping Operations, *supra note* 41, p. 2.

85 *Ibid*, pp.1-2.

86 See, United Nations, *supra note* 12.

all have evolved significantly in the post-Cold War era without Charter amendment or a clear break with earlier interpretations.<sup>87</sup> Besides, according to the view of Fleitz, traditional peacekeeping is the only legitimate form of peacekeeping and various 'improved' models of traditional peacekeeping such as multidimensional, second generation, aggravated and muscular peacekeeping, are nonviable experiments without any clear doctrinal or theoretical foundation.<sup>88</sup> There is also an ongoing debate as to whether humanitarian intervention is an essential element of peacekeeping process. Many scholars regard humanitarian efforts of peacekeeping missions as free-standing initiatives, structurally independent of peacekeeping activities.<sup>89</sup> This is because to equate humanitarian situations with threats to international peace and security is a dubious proposition. The experience of Somalia was not very happy either for the people of that country or for the UN and as such the doctrine of humanitarian intervention needs to be treated with caution. There are other scholars, however, who consider humanitarian intervention as an essential element of peacekeeping process.<sup>90</sup> A third approach, reflecting doubts about the desirability of integration and the possibility of insulation, holds that humanitarian action in complex emergencies should be institutionally independent of the United Nations altogether. A host of humanitarian organizations — first and foremost the International Committee of the Red Cross (ICRC) but also some non-governmental organizations — emphasize their structural independence.<sup>91</sup>

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87 Malone, *supra note 67*, p. 487.

88 See, Fleitz, F. H., *Peacekeeping Fiascoes of the 1990s: Causes, Solutions and U.S. Interests*, Westport: Praeger Publishers, 2002, pp. 3-5.

89 See, Minear, L. and Weiss, T.G., *Humanitarian Politics*, New York: Foreign Policy Association, 1995; Minear, L., "The Evolving Humanitarian Enterprise," in Weiss, T.G. (ed.), *The United Nations and Civil Wars*, Boulder: Lynne Rienner, 1995, pp. 89-106.

90 See, Ajello, A. R., "The Coordination of Humanitarian Assistance in Mozambique in the Context of ONUMOZ," in Whitman, J. and Pocock, D. (eds.), *After Rwanda: The Coordination of United Nations Humanitarian Assistance*, London: MacMillan Press, 1996, pp.199-200.

91 Minear, L. "Humanitarian Action and Peacekeeping Operations", *Journal of Humanitarian Assistance*, 1997, available at: <http://jha.ac/1997/02/26/humanitarian-action-and-peacekeeping-operations/> (last accessed on October 23, 2008).

## 6.2 Subcontracting

After the end of the Cold War as the United Nations was placed center stage in efforts to resolve outstanding conflicts, the fading of ideological divisions and superpower spheres of influence enabled the members of the Security Council to act collectively and disinterestedly on many issues.<sup>92</sup> But the multiplication of peacekeeping missions resulting from such activism was not always accompanied by coherent policy or integrated military and political responses.<sup>93</sup> Consequently, a good number of missions encountered problems and received serious criticisms from the observers. Ultimately, the institution of UN peacekeeping started to face a new challenge - the “crisis of expectations” in the Cold War era aggravated to a “crisis of confidence-cum-credibility” and member states began to limit their military, political and financial exposure.<sup>94</sup> Especially, in the aftermath of the operations in Somalia,<sup>95</sup> it was generally acknowledged that United Nations did not itself have the institutional or logistic capacity to conduct peace enforcement operations.<sup>96</sup> The solution to this problem, in the eyes of many, was that such operations should be subcontracted.<sup>97</sup> However, there are several examples prior to Somalia missions that are equivalent to subcontracting. In 1990, the Security Council authorised a multinational coalition to use all necessary means to enforce peace in the Gulf region.<sup>98</sup> The UN peacekeeping mission in Liberia (UNOMIL) set up in 1993 is also sometimes regarded as a form of subcontracting as it worked in coalition

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92 Griffin, M., “Blue Helmet Blues: Assessing the Trend Towards ‘Subcontracting’ UN Peace Operations”, *Security Dialogue*, Vol. 30, No. 1, 1999, pp. 43-44.

93 Schnabel, A. and Thakur, R., “Cascading Generations of Peacekeeping: Across the Mogadishu Line to Kosovo and Timor”, in Schnabel, A. and Thakur, R. (eds.), *United Nations Peacekeeping Operation: Ad Hoc Missions, Permanent Engagement*, New York: United Nations University Press, 2001, p. 3.

94 *Ibid*, pp. 3-4.

95 United Nations Operation in Somalia I (UNOSOM I), 1992-1993 and United Nations Operation in Somalia II (UNOSOM II), 1993-1995.

96 Griffin, *supra note* 92, p. 45.

97 *Id.*

98 Chawla, S., “Trends in United Nations Peacekeeping”, *Strategic Analysis*, Vol. 24, No. 10, 2001, p. 1902.

with Economic Community of West African States (ECOWAS), a sub-regional organization. After the Somalia missions, modifying the Gulf War precedent somewhat, UN-authorized military action by the USA in Haiti, France in Rwanda, Russia in Georgia and NATO in Bosnia.<sup>99</sup> Thus, this practice of devolving control to other actors began to gain currency.<sup>100</sup>

Experts are not unanimous on the legal justification of such subcontracting of peacekeeping. Some jurists view this practice of delegating enforcement operations to groups of member states is a recipe for marginalization of the United Nations.<sup>101</sup> The marginalists believe that delegation will result in the neglect of Third World conflicts, great power abuse and a return to a world divided by spheres of influence, all of which will undermine United Nations legitimacy.<sup>102</sup> From marginalists perspective, NATO's decision to use force in the Kosovo conflict without a UN mandate is the final nail in the United Nations' coffin, representing the culmination of a trend, that has been visible for a while.<sup>103</sup> They also argue that subcontracting raises concerns about bias and selectivity.<sup>104</sup> Since the major powers are interested to take military actions only when and where their national interests are involved,<sup>105</sup> delegation of UN authority to them or to any so-called 'coalition of the willing' dominated by them, as has happened so far and most likely to happen in the days to come, belittles the fact that the United Nations is the political embodiment of the international community and the custodian of the international interest. Moreover, the United Nations has not adequate legal

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99 Schnabel and Thakur, *supra note* 93, p. 13.

100 Griffin, *supra note* 92, p. 46.

101 Jacobsen, P. V., "Overload, Not Marginalization, Threatens UN Peacekeeping", *Security Dialogue*, Vol. 31, No. 2, 2000, pp. 168. Also see, Schachter, O., "United Nations Law in the Gulf Conflict", *American Journal of International Law*, Vol. 85, No. 3, 1991, pp. 452-473.

102 *Id.*

103 *Id.*

104 Karns, M. P. and Mingst, K. A., "Peacekeeping and the Changing Role of the United Nations: Four Dilemmas", in Schnabel, A. and Thakur, R. (eds.), *United Nations Peacekeeping Operation: Ad Hoc Missions, Permanent Engagement*, New York: United Nations University Press, 2001, p. 216.

105 Schnabel and Thakur, *supra note* 93, p. 13.

framework to ensure that subcontracted operations are conducted with appropriate accountability or oversight and has, so far, shown little inclination to meet this challenge.<sup>106</sup> This also goes against the legitimacy of unguided subcontracting.

On the other hand, subcontracting has been heralded in some quarters as a necessary and innovative solution to the operational crisis of the United Nations.<sup>107</sup> They argue that although collective action would usually take the form of global action authorized under Article 42 of the UN Charter, it could also be implemented by regional arrangements and agencies authorized under Article 53.<sup>108</sup> Subcontracting is also thought to represent a promising trend insofar as it might help relieve some of the financial burden of the United Nations and promote wider participation in the maintenance of international peace and security.<sup>109</sup> There is also a growing feeling that regional and sub-regional organizations should play a lead role in peacemaking, peacekeeping and peace-building in their own areas since they know their region better than the United Nations.<sup>110</sup>

### 6.3 Relevance of IHL in UN Peacekeeping

One of the main aims of UN peacekeeping is to ensure respect for IHL.<sup>111</sup> But, are the peacekeepers bound by the standards of humanitarian laws? In

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106 Griffin, *supra note* 92, p. 48.

107 *Ibid*, p. 47.

108 Franck, T. M. and Patel, F., "Agora: The Gulf Crisis In International and Foreign Relations Law: UN Police Action in Lieu of War: the Old Order Changeth", *American Journal of International Law*, vol. 85, 1991, p.63. Article 53 states: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state".

109 Griffin, *supra note* 92, p. 47.

110 *Id.*

111 International humanitarian law denotes the whole body of law applicable during armed conflict, often referred to as the law of armed conflict (*jus in bello*). See,

the early days of UN peacekeeping operations, there was some doubt about the applicability of IHL to UN forces.<sup>112</sup> Even if force is used as part of a peacekeeping force's mandate, IHL – as a law whose “thrust is at regulating the warrior, not the peacekeepers”<sup>113</sup> – was always a slightly odd way of dealing with peace operations.<sup>114</sup> This was due to various factors. Notwithstanding its international legal personality,<sup>115</sup> the UN is not in itself a state and thus, it does not possess the juridical or administrative powers to discharge many of the obligations laid down in the Conventions.<sup>116</sup> It also lacks the legal and other structures for dealing with violations of IHL. Nor does it possess the competence to recognize that an armed conflict invoking

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Greenwood, C., “Historical Development and Legal Basis”, in Fleck, D. (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press, 1995, pp. 8-12.

- 112 In a report entitled “Should the Laws of War Apply to United Nations Enforcement Action?” presented to the American Society of International Law in 1952 by the Committee on the Study of the Legal Problems of the United Nations, its Chairman (Clyde Eagleton), stated that: “[a] war is fought by a State for its own national interest; United Nations enforcement action is on behalf of order and peace among nations . . . War as between States of equal legal status has in the past been regarded as honourable; the use of force against the United Nations is now to be regarded as an offence against all Members.” The Eagleton committee concluded in its report that due to the different nature of the use of force by the United Nations to restrain aggression from war-making by a State, the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes. See for details, Eagleton, C. *et al.*, “Should the Laws of War Apply to United Nations Enforcement Action”, *American Society of International Law: Proceedings of the Annual Meeting*, 1952, p. 220.
- 113 Weiner R. O. and Aolain, F. N., “Beyond the Laws of War: Peacekeeping in Search of a Legal Framework”, *Columbia Human Rights Law Review*, Vol. 27, No. 2, 1996, p. 307.
- 114 Megret, F. and Hoffmann, F., “The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities”, *Human Rights Quarterly*, Vol. 25, No. 2, 2003, p. 331.
- 115 See, International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Report*, 1949, pp.174-220.
- 116 Murphy, R., “International Humanitarian Law and Peace Support Operations: Bridging the Gap”, *The Journal of Conflict Studies*, Vol. 23, No. 1, 2003, p. 13.

the application of the Geneva Conventions exists.<sup>117</sup> Moreover, one of the difficulties of applying the laws of armed conflict in peacekeeping operations is that many peacekeeping situations are below the necessary threshold level of violence.

However, since after the UN peacekeeping mission's engagement in Congo, many international organizations and jurists have been offering interpretations in support of applicability of IHL to the peacekeeping operations.<sup>118</sup> There is an argument to the effect that there are situations where the United Nations would be responsible under customary international law for acts of persons or armed forces acting under its control.<sup>119</sup> In the *WHO Agreement Case*, the International Court of Justice specifically referred to the existence of obligations at customary international law for international organizations.<sup>120</sup> As such, it is now generally accepted that IHL binds United Nations forces, whether performing duties of a peacekeeping or peace-enforcement nature,<sup>121</sup> and the conduct of hostilities by UN forces cannot be free from humanitarian

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117 Turley, S. L., "Keeping the Peace: Do the Laws of War Apply?", *Texas Law Review*, Vol. 73, No. 1, 1994, p. 158.

118 See generally, Tittmore, B. D., "Belligerents in Blue Helmets: Applying International Humanitarian Law to the United Nations Peace Operations", *Stanford Journal of International Law*, Vol. 33, No. 1, 1997, pp. 61-118; Murphy, *supra* note 116, pp.12-59; Shraga, D., "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations Related Damage", *The American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 406-412; Weiner and Aolain, *supra* note 113, pp. 312-320; Kelly, M. J., *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework*, Hague: Kluwer Law International, 1999; Megret, and Hoffmann, *supra* note 114, pp.314-342.

119 See, Amerasinghe, C. F., *Principles of the Institutional Law of International Organization*, Cambridge: Cambridge University Press, 1996, pp. 240-241.

120 See, International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, *ICJ Reports*, 1980, p. 73.

121 Greenwood, C., "Scope of Application of Humanitarian Law", in Fleck, D. (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press, 1995, p. 46.



constraint or application of humanitarian law considerations.<sup>122</sup> On the same reasoning, IHL is of direct relevance to states contributing contingents to peace support operations even if they are not formally parties to the corresponding international treaties.<sup>123</sup> However, UN Model Agreement with troop contributing states now includes an express provision to the effect that the peacekeepers shall be bound by IHL.<sup>124</sup>

Nevertheless, the attitude of various national courts accelerated concerns among international lawyers. The Canadian Courts Martial Appeals Court held in *R. v Brocklebank*<sup>125</sup> that Private Brocklebank, who was arrested for aiding and abetting the torture of a Somali teenager, had no legal obligation to ensure the safety of a prisoner – because neither the Geneva Conventions<sup>126</sup> nor the Additional Protocols<sup>127</sup> applied to peacekeeping

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122 It is widely accepted that the laws of war remain directly relevant to such forces. See, Roberts, A., and Guelff, R. (eds.), *Documents on the Laws of War*, Oxford: Oxford University Press, 2000, p. 721.

123 See, Murphy, R., “International Humanitarian Law Training for Multinational Peace Support Operations: Lessons from Experience”, *International Review of the Red Cross*, No.840, 2000, pp. 953-968.

124 The relevant clause reads: “[The UN peacekeeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving . . . be fully acquainted with the principles and spirit of the conventions”.

125 *R. v Brocklebank* CMAC-383, 2 April 1996.

126 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 3; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilians in Time of War, 75 UNTS 287 (all adopted 12 August 1949, entered into force 21 October 1950).

127 Protocol I Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 1949, and Relating to the

operations. Hence IHL did not apply to Canadian Forces in Somalia. A Belgian Military Court investigating violations of IHL also came to a similar conclusion.<sup>128</sup>

In an attempt to clarify the doubt, the UN Secretariat, in 1999, in collaboration with the International Committee of the Red Cross (ICRC), finalized principles and rules on the observance of IHL by peacekeepers. Accordingly, on 6 August 1999, a bulletin<sup>129</sup> was promulgated by the Secretary General of the United Nations.<sup>130</sup> In particular, the IHL obligations outlined in this bulletin include the standards on protection of civilian population,<sup>131</sup> means and methods of combat,<sup>132</sup> treatment of civilians and persons *hors de combat*,<sup>133</sup> treatment of detained persons,<sup>134</sup> and protection of the wounded, the sick, and medical and relief personnel.<sup>135</sup> However, this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of

Protection of Victims of Non-International Armed Conflict(Protocol II), 1977, 1125 UNTS 609.

- 128 See, Judgment of the Belgian Military Court regarding violations of IHL committed in Somalia and Rwanda, No. 54 A. R. 1997, 20 November 1997; Comment by M. Cogen in 'Correspondents' Reports: A Guide to State Practice Concerning International Humanitarian Law', *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 415-416.
- 129 Secretariat of the United Nations, "Observance by United Nations Forces of International Humanitarian Law", *International Review of the Red Cross*, No.836, 1999, pp. 812-817.
- 130 For more details, see, Zwanenburg, M., "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations", *International Peacekeeping*, Vol. 5, No. 4-5, 1999, pp. 133-39.
- 131 See, section 5.
- 132 See, section 6.
- 133 See, section 7.
- 134 See, section 8.
- 135 See, section 9.

armed conflict.<sup>136</sup> This bulletin probably settled most immediate worries,<sup>137</sup> but it does not cover all situations.<sup>138</sup> For example, where national contingents come together to form “coalitions of the willing”, but do not become organs of the UN, or fall under its command and control, then the UN cannot be held responsible for their acts.<sup>139</sup> In such cases, the acts of military forces remain the responsibility of the states concerned.<sup>140</sup>

Thus it appears that the issue of applicability of IHL to UN peacekeeping forces, that remained a grey area in the Cold War era, has gained some sort of legal clarification in the recent years. However, limited attention has been paid to develop mechanism to oversee adherence of IHL norms by the members of subcontracted peacekeeping forces.<sup>141</sup>

#### 6.4 Legal Status of UN Peacekeepers

Under existing law, a UN peacekeeping operation is considered a subsidiary organ of the United Nations, established pursuant to a resolution of the Security Council or General Assembly.<sup>142</sup> As such, it enjoys the status, privileges, and immunities of the Organization provided for in Article 105 of the UN Charter,<sup>143</sup> and the UN Convention on the Privileges and Immunities

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136 See, section 1.2.

137 Shraga, *supra note* 118, p.406.

138 See, Wills, S., “Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations”, *Journal of Conflict & Security Law*, Vol. 9, No. 3, 2004, p. 402.

139 See, Seyersted, S., “United Nations Forces: Some Legal Problems”, *British Yearbook of International Law*, Vol. 37, 1961, pp. 362 and 421.

140 Murphy, *supra note* 116, p.20.

141 Zwanenburg, M., “Double Standards in Peacekeeping? Subcontracting Peacekeeping and International Humanitarian Law”, *Leiden Journal of International Law*, Vol. 12, No. 4, 1999, p. 753.

142 Murphy, *supra note* 116, p.15.

143 Article 105 of the UN Charter provides: “(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. (2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. (3) The General Assembly may make

of the UN of 13 February 1946.<sup>144</sup> Other than these, the legal framework for UN forces is usually made up, *inter alia*, of: (a) the resolution of the Security Council or the General Assembly establishing and mandating the forces, (b) the Convention on the Safety of United Nations and Associated Personnel 1994,<sup>145</sup> (c) the Status of Force Agreement (SOFA) or the Status of Mission Agreement (SOMA) concluded between the UN and the host state,<sup>146</sup> (d) the agreement by exchange of letters between each of the participating states and the UN, (e) the regulations for the force issued by the Secretary-General. As mentioned above, the promulgation of the bulletin in 1999 by the Secretary-General outlining the IHL obligations of the UN

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recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose”.

- 144 Adopted by the General Assembly on 13 February 1946, entered into force on 17 September 1946, See for text, United Nations, *Treaty Series*, Vol. 1, p. 15 and Vol. 90, p. 327.
- 145 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49 (1994), entered into force on 15 January 1999. In essence, it covers two types of personnel who carry out activities in support of the fulfillment of the mandate of a UN operation. In the first category are those directly engaged as part of a UN mandated operation whether in a military, police, or civilian capacity. The second category covers “associated personnel,” i.e., persons assigned by the Secretary-General or an intergovernmental organization with the agreement of a competent organ of the UN. For example, NATO forces asked to assist UNPROFOR in Bosnia-Herzegovina, and US assistance under UNITAF in Somalia would fall within this element of the definition. For more details see, Bloom, E. T., “Protecting Peacekeepers: The Convention on the Safety of UN and Associated Personnel,” *The American Journal of International Law*, Vol. 89, No. 3, 1995, pp. 623-624; C. Greenwood, “Protection of Peacekeepers: The Legal Regime”, *Duke Journal of Comparative and International Law*, Vol. 7, No. 1, 1996, pp. 185-208; Bourloyannis-Vrailas, M. C., “The Convention on the Safety of UN and Associated Personnel”, *International Comparative Law Quarterly*, Vol. 44, No. 3, 1995, pp. 560-90; Kirsch, P., “The Convention on the Safety of UN and Associated Personnel”, *International Peacekeeping*, Vol. 2, No. 5, 1995, pp. 102-106.
- 146 In practice, however, it is not always easy for the UN to conclude SOFA or SOMA, e.g., none was concluded in Somalia, and it took nearly 20 years to conclude a SOFA in respect of UNIFIL. See generally, Fleck, D., and Saalfeld, M., “Combining Efforts to Improve the Legal Status of UN Peacekeeping Forces and Their Effective Protection”, *International Peacekeeping*, Vol. 1, No. 3, 1994, pp. 82-84.

peacekeeping forces<sup>147</sup> does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel.<sup>148</sup> Moreover, the Rome Statute<sup>149</sup> gives the International Criminal Court (ICC) jurisdiction over serious violations of the laws and customs applicable in international armed conflict included under Article 8(b) (iii), namely, ‘intentionally directing attacks against personnel, installations, materials, units or vehicles involved in humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations’, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.<sup>150</sup> In case of violations of IHL, members of the military personnel of a UN force are subject to prosecution in their national courts.<sup>151</sup> These provisions of the Rome Statute have significantly strengthened as well as clarified the position of international law regarding the legal status of UN peacekeepers.

## 7. Conclusion

The foregoing discussions reveal that after the Cold War, international law has developed to a positive direction in clarifying two important issues – applicability of IHL to UN peacekeeping forces and legal status thereof. But, the legitimacy of extended mandate and subcontracting is yet to be satisfactorily established. Those advocating for legitimacy basically point to the notion of changed circumstances as the basis of justification. But, the existence of such circumstances that necessitated the merger of peacekeeping and peace enforcement, two radically different and apparently incompatible propositions, remains difficult to identify. Here lies the crux of the problem of extended mandate. If the international community could maintain the wall between peacekeeping and peace enforcement

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147 Secretariat of the United Nations, *supra note* 129, pp. 812-817.

148 See section 6.3 above.

149 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.

150 See for details, Robinson, D. and Hebel, H. V., “War Crimes in Internal Conflicts: Article 8 of the ICC Statute”, *Yearbook of International Humanitarian Law*, Vol. 2, Dordrecht, Kluwer Publication, 1999, pp. 193-209.

151 See, Secretariat of the United Nations, *supra note* 129, section 4.

abandoning the idea of so-called generations of peacekeeping – the United Nations could more legitimately respond to any given situation using either of these two instruments, who are different in their approaches and mandates. On the other hand, subcontracting cannot be defended only by resorting to Article 53 of the UN Charter or to some questionable UN precedents, because the real concern is not as much on the authority of UN to subcontract as on the modalities of subcontracting. The United Nations is yet to develop any standards on “when to subcontract?”, “who can be subcontracted?” and “how to ensure accountability of subcontracted forces?”. It is, therefore, high time to develop these standards so that the substantial stakeholders feel confident that subcontracting is no more open to manipulation or reflective of the national interests of powerful states.

In fact, peacekeeping is a 50-year-old enterprise that has evolved rapidly in the past decade.<sup>152</sup> Especially, after the end of Cold War, acceleration of change is remarkable. Therefore, the world community has valid reasons to be concerned about the different aspects of peacekeeping, particularly, the legal one. Keeping the apparent positive achievement of UN peacekeeping in mind, any redefinition or creative interpretation of existing laws and standards must be viewed with utmost caution.

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152 United Nations, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects and Report of the Panel on United Nations Peace Operations*, (popularly known as “Brahimi Report”, named after the Chairman of the Committee which produced the report), UN Doc. A/55/305-S/2000/809, 21 August 2000, para. 12.