LAW AND PEACE: A LEGAL FRAMEWORK FOR
UNITED NATIONS PEACEKEEPING

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PhD Thesis
2006

University of Sydney
SUMMARY

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

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

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

Chapters three and four analyse peacekeeping as practiced by the UN in operations conducted under Chapters VI and VII of the UN Charter. This analysis leads to the conclusion that as a matter of practice the UN and the State parties that have provided the troops to perform peacekeeping under UN control have acted in accordance with international human rights law and that as a result there is evidence of State practice to support an argument that as a matter of customary international law international human rights law applies as the framework for peacekeeping in collapsed States.
With a clear grounding in the practice and theory of peacekeeping the work then examines the competing claims of international humanitarian law and international human rights law as the legal framework for peacekeeping operations. Suggestions are made with regard to the triggers for international humanitarian law to apply and the conclusion is drawn that the vast majority of UN operations between 1949 and 2003 were conducted beneath the threshold for the application of international humanitarian law.

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

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

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

**Member -- (Date of Admission)**

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

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

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

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

The Republic of Bosnia and Herzegovina was

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\(^1\) UN Press Release ORG/1360/Rev.1 (10 February 2004)

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

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

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

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

Czechoslovakia was an original Member of the United Nations from 24 October 1945. In a letter dated 10 December 1992, its Permanent Representative informed the Secretary-General that the Czech and Slovak Federal Republic would cease to exist on 31 December 1992 and that the Czech Republic and the
Slovak Republic, as successor States, would apply for membership in the United Nations. Following the receipt of its application, the Security Council, on 8 January 1993, recommended to the General Assembly that the Czech Republic be admitted to United Nations membership. The Czech Republic was thus admitted on 19 January of that year as a Member State.

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

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

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

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

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

The Federal Republic of Germany and the German Democratic Republic were admitted to membership in the United Nations on 18 September 1973. Through the accession of the German Democratic Republic to
the Federal Republic of Germany, effective from 3 October 1990, the two German States have united to form one sovereign State.

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

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

Iran (Islamic Republic of) -- (24 Oct. 1945)
Iraq -- (21 Dec. 1945)
Ireland -- (14 Dec. 1955)
Israel -- (11 May 1949)
Italy -- (14 Dec. 1955)
Jamaica -- (18 Sep. 1962)
Japan -- (18 Dec. 1956)
Jordan -- (14 Dec. 1955)
Kazakhstan -- (2 Mar. 1992)
Kenya -- (16 Dec. 1963)
Kiribati -- (14 Sept. 1999)
Kuwait -- (14 May 1963)
Kyrgyzstan -- (2 Mar. 1992)
Lao People's Democratic Republic -- (14 Dec. 1955)
Latvia -- (17 Sep. 1991)
Lebanon -- (24 Oct. 1945)
Lesotho -- (17 Oct. 1966)
Liberia -- (2 Nov. 1945)
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Malawi -- (1 Dec. 1964)
Malaysia-- (17 Sep. 1957)

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

Maldives-- (21 Sep. 1965)
Mali -- (28 Sep. 1960)
Malta -- (1 Dec. 1964)
Marshall Islands -- (17 Sep. 1991)
Mauritania -- (27 Oct. 1961)
Mauritius -- (24 Apr. 1968)
Mexico -- (7 Nov. 1945)
Micronesia (Federated States of) -- (17 Sep. 1991)
Monaco -- (28 May 1993)
Mongolia -- (27 Oct. 1961)
Morocco -- (12 Nov. 1956)
Mozambique -- (16 Sep. 1975)
Myanmar -- (19 Apr. 1948)
Namibia -- (23 Apr. 1990)
Nauru -- (14 Sept. 1999)
Nepal -- (14 Dec. 1955)
Netherlands -- (10 Dec. 1945)
New Zealand -- (24 Oct. 1945)
Nicaragua -- (24 Oct. 1945)
Niger -- (20 Sep. 1960)
Nigeria -- (7 Oct. 1960)
Norway -- (27 Nov. 1945)
Oman -- (7 Oct. 1971)
Pakistan -- (30 Sep. 1947)
Palau -- (15 Dec. 1994)
Panama -- (13 Nov. 1945)
Papua New Guinea -- (10 Oct. 1975)
Paraguay -- (24 Oct. 1945)
Peru -- (31 Oct. 1945)
Philippines -- (24 Oct. 1945)
Poland -- (24 Oct. 1945)
Portugal -- (14 Dec. 1955)
Qatar -- (21 Sep. 1971)
Republic of Korea -- (17 Sep. 1991)
Republic of Moldova -- (2 Mar. 1992)
Romania -- (14 Dec. 1955)
Russian Federation -- (24 Oct. 1945)
The Union of Soviet Socialist Republics was an original Member of the United Nations from 24 October 1945. In a letter dated 24 December 1991, Boris Yeltsin, the President of the Russian Federation, informed the Secretary-General that the membership of the Soviet Union in the Security Council and all other United Nations organs was being continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States.

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

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

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

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

Czechoslovakia was an original Member of the United Nations from 24 October 1945. In a letter dated 10 December 1992, its Permanent Representative
informed the Secretary-General that the Czech and Slovak Federal Republic would cease to exist on 31 December 1992 and that the Czech Republic and the Slovak Republic, as successor States, would apply for membership in the United Nations. Following the receipt of its application, the Security Council, on 8 January 1993, recommended to the General Assembly that the Slovak Republic be admitted to United Nations membership. The Slovak Republic was thus admitted on 19 January of that year as a Member State.

Slovenia -- (22 May 1992)

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

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

Solomon Islands -- (19 Sep. 1978)
Somalia -- (20 Sep. 1960)
South Africa -- (7 Nov. 1945)
Spain -- (14 Dec. 1955)
Sri Lanka -- (14 Dec. 1955)
Sudan -- (12 Nov. 1956)
Suriname -- (4 Dec. 1975)
Swaziland -- (24 Sep. 1968)
Sweden -- (19 Nov. 1946)
Switzerland -- (10 Sep. 2002)
Syrian Arab Republic -- (24 Oct. 1945)

Egypt and Syria were original Members of the United Nations from 24 October 1945. Following a plebiscite on 21 February 1958, the United Arab Republic was established by a union of Egypt and Syria and continued as a single Member. On 13 October 1961, Syria, having resumed its status as an independent State, resumed its separate membership in the United Nations.
The Socialist Federal Republic of Yugoslavia was an original Member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission as new members of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia, The former Yugoslav Republic of Macedonia, and the Federal Republic of Yugoslavia.

By resolution A/RES/47/225 of 8 April 1993, the General Assembly decided to admit as a Member of the United Nations the State being provisionally referred to for all purposes within the United Nations as "The former Yugoslav Republic of Macedonia" pending settlement of the difference that had arisen over its name.
Viet Nam -- (20 Sep. 1977)
Yemen -- (30 Sep. 1947)

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

Zambia -- (1 Dec. 1964)
Zimbabwe -- (25 Aug. 1980)
Introduction

In 1994 the torture and death of a Somali youth by Canadian peacekeepers tarnished the reputation of United Nations (UN) peacekeeping and resulted in the disbandment of a Canadian airborne unit. The subsequent inquiry by the Canadian government\(^1\) found that one of the causes of the incident was the frustration felt by the soldiers at having no means of dealing with criminal activity by the local population. Although the Canadian example was by far the worst it was:

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

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


\(^3\) For example Roberts A. “What is Military Occupation” 55 *British Yearbook of International Law* 257 (1984) who stated at 250 “One might hazard as a fair rule of thumb that every time the forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions on the law of occupation are applicable.” This point was also taken by Eyal
humanitarian law and in particular the law of occupation to provide the legal framework. When he returned from Somalia he augmented the literature by publishing *Restoring and Maintaining Order in Complex Peace Operations.*

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

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

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

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

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

4 Above n 2.

5 Id at 172-178.
host government has failed or the State has collapsed so that a UN force or administration is in de facto control. This is not due to any inability of the UN to be a party to the Conventions as suggested by some commentators,⁶ indeed in this work it is argued that as a subject of international law the UN is subject to customary international law and that the Conventions form part of this body of law. Rather it is the position of this work that international humanitarian law does not apply until and unless the threshold into armed conflict has been crossed and that this threshold is armed conflict or in the event of an occupation by a hostile force.

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

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

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

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

7 Above n 2 at 54-61.
8 Even Kelly concedes that this is a difficulty with his approach; above n 2 at 179-181.
The advantage the application of the Fourth Geneva Convention would have is that it gives the occupying authority the power to re-establish, at least to some extent, security, law and order and the judicial processes of the State. It is axiomatic that these are essential ingredients for peace so that understanding which legal framework applies goes to the very heart of peacekeeping in situations where the domestic State is unable to carry out functions that are at the core of civil society. If Kelly is wrong, and that is the position of this work, then what legal framework does apply to UN peacekeeping in collapsed States? The answer provided by this work is that international human rights law provides the framework.

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

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

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obligations is to re-establish law and order and provide security for the operation to achieve its mission. There are also international law obligations placed on the contributing States. As there are no Article 43 agreements set up under the UN Charter the troops remain liable to discharge the obligations of the contributing State. International human rights law forms part of the obligation either as a result of treaty law or customary international law. In this work particular emphasis is placed on the obligations imposed by the International Covenant on Civil and Political Rights\textsuperscript{12} (ICCPR). It is the synthesis of the obligation under the mandate and obligations under international human rights law that provides the framework for collapsed State peacekeeping. This synthesis is a powerful tool to re-establish the rule of law.

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

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

\textsuperscript{13} Ibid.
\textsuperscript{14} The doctrine of implied powers flows from the \textit{Certain Expenses of the United Nations (Advisory Opinion)} [1962] ICJ Rep 149.
It is argued in this work that it may also flow as an implied power from the obligation to apply the human rights covenants such as the ICCPR. The articles of the ICCPR provide the framework for the reconstruction of law and order and provide the basis for peace building and the recreation of the State. Contained within the ICCPR are provisions that are capable of forming the foundations of laws dealing with arrest, detention and the treatment of detained persons. The provisions put in place on the basis of the ICCPR can then be adopted or adapted as the State is reconstructed and can form the basis of constitutional government.

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

Chapter one of this work is the foundation chapter and looks generally at the practice of peacekeeping, its legal foundation and the terms used to define it. The chapter asks what is peacekeeping? In answering this question the chapter uses as its start point the legal basis for peacekeeping found in the powers implied from Chapter VI of the UN Charter. It outlines the growth of peacekeeping out of Chapter VI and the incremental development of peacekeeping. Also examined in this chapter is the Uniting for Peace Resolution of the General Assembly that aimed to fill any void created by the Cold War deadlock in the Security Council. This important Resolution demonstrated the central role that peacekeeping had come to play in the activities of the UN.
Chapter one goes on to examine the legal basis of peacekeeping under Chapter VII of the UN Charter. This Chapter of the Charter is more explicit in the ability of the Security Council to use military force and it is on the basis of Chapter VII that peacekeepers have found themselves in the position of a force authorised to use the force of arms to achieve its mission.

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

The chapter concludes by noting the evolution of peacekeeping from a relatively simple, low key placement of a lightly armed force on the ground to observe a process or the relations between States across a border to a highly complex operation capable of supporting a State. In performing these complex operations the UN needs to ensure that peacekeeping operations do not lose legitimacy by stepping outside the boundaries of the law. The purpose of this work is to contribute to the legal legitimacy of UN peacekeeping by providing legal certainty to peacekeeping operations in collapsed States.
Chapter two focuses on what the UN sees as the theory of peacekeeping through its own reports and significant reports presented to it. This is important as it leads to an insight into the UN’s understanding of what peacekeeping is about and how it fits within the Charter, from where peacekeeping mandates obtain their legal authority and legitimacy. The start point for this is the first report of the UN in 1992 that directly addressed the issue of peacekeeping, *An Agenda for Peace* by Secretary-General Boutros-Boutros Ghali.

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

The Australian response to *An Agenda for Peace* was set out in *Cooperating for Peace*. It developed many of the concepts that were introduced in outline form by *An Agenda for Peace* and put forward a response to the introduction of many of the measures advocated. These are set out and analysed in chapter two of this work. Its contribution to the debate helped to strengthen the vision set out by the Secretary-General towards a well planned and legitimate form of robust peacekeeping, equipped with the mandate and arms to complete its mission.
In 1995 the Secretary-General issued another report on peacekeeping titled *Supplement to An Agenda for Peace*. This report was not as positive as the first report and highlighted the failures of the Security Council to implement the recommendations put forward in *An Agenda for Peace*. The possibilities for peacekeeping are more limited in the Supplement and the express criticisms of the Security Council set out in the report may well have been a factor in the failure of the Security Council to re-elect Boutros Ghali to a second term of office.\(^\text{15}\)

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

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

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

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

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

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

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

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

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

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

Chapter three of this work examines the Chapter VI operations and analyses the operations that have been conducted in terms of the legal framework applied by the peacekeepers in each case. This analysis links in with the evolution of peacekeeping
set out in chapter one as over time the operations can be seen to become more complex in form while retaining essential characteristics required for Chapter VI operations. From this analysis principles of Chapter VI peacekeeping are identified and set out as consent of the parties, impartiality as between the parties and the use of force strictly limited to self defence.

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

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

As a result of its anomalous position in the peacekeeping continuum, chapter four analyses the UN operation in the Congo between 1960 and 1964. This operation is set apart from all other UN peacekeeping as the UN became engaged as combatants with
rebel separatists and as a result applied the laws of armed conflict to at least part of the operation.

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

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

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

As identified above, the competing views set out in this work are whether international humanitarian law or international human rights law provides the legal framework for UN peacekeeping in collapsed States. In chapter five of the work international humanitarian law is examined in order to establish exactly what it is. The chapter examines the genesis and growth of international humanitarian law, highlighting the global nature of its development, in order to provide an
understanding of its purpose and limits. The sources of international humanitarian law, the basic principles underpinning it and the specific conventions that form its substance are analysed for suitability in peacekeeping.

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

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

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

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

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

The next section of the chapter sets out how the Secretary-General’s Bulletin on Observance by United Nations forces of International Humanitarian Law 18 and the argument put forward by Michael Kelly have muddied the waters with regard to the accurate determination of which law to apply in collapsed State peacekeeping. The section argues that the Bulletin was intended to act only as a guideline in situations of self defence by UN troops that fell short of actual armed conflict and not as an

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

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

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

The concluding chapter in this work is chapter seven. Having established in chapter six that the argument that international humanitarian law provides the legal framework in collapsed State peacekeeping is flawed, this chapter sets out the argument for the application of international human rights law. The chapter charts the development of international human rights from the UN Charter itself through the International Bill of Human Rights and the conventions, covenants and UN Resolutions flowing from it. Chapter seven then examines customary international human rights law and establishes that there are fundamental human rights that peacekeepers are obliged to protect regardless of whether their sending State has become a party to specific international human rights treaties.
Chapter seven then explores the extent that implied powers are available to peacekeepers to assist in fulfilling the obligations created under international human rights law. The issue of the enforcement of international human rights law is examined in this context. Having established the obligation owed by peacekeepers to international human rights law the chapter then proposes a solution to the problem of enforcing international human rights law. This is through the use of a military justice system. The advantage of this system is that it can be placed on the ground immediately. It can be used to train individuals who will form part of the domestic legal system where such systems have collapsed beyond repair. The point is made in this part that only those military systems that comply with international human rights requirements can be deployed by the UN to fulfil these roles. Although many States may offer their justice systems for deployment the UN will be required to ensure that only those systems that fully comply with human rights norms are deployed. If this is not done then the system will lose legitimacy and defeat the object of its deployment.

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

This work concludes by arguing that peacekeeping in collapsed States is as a matter of fact a very different situation from an occupation in violation of the sovereign State. Where the force is not involved in armed conflict international humanitarian law does
not apply. State practice as well as a proper construction of international law supports this argument. International human rights law has developed so as to negate the requirement to stretch international humanitarian law beyond its proper boundaries; by utilizing the military justice system a rapidly deployable justice system can ensure that Member States meet their international human rights obligations when deployed as part of a UN peacekeeping force in a collapsed State.